

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.02.2019

Delivered on: 26.02.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

S.A.No.287 of 2013

and

M.P.No.1 of 2013

Packirisamy

... Appellant/Defendant

Vs.

Pethanachiammal

...Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree of the Sub Court, Mannargudi in A.S.No.22 of 2012, dated 24.11.2012 confirming the judgment and decree of the District Munsif Court, Thiruthuraipoondi in O.S.No.2 of 2011 dated 23.12.2011.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.C.T.Mohan

For Mr.A.Ilango

JUDGMENT

This Second Appeal has been filed by the defendant against the judgment and decree passed by the Sub-Judge, Mannarkudi, in A.S.No.22 of 2012 dated 24.11.2012 confirming the judgment and decree passed by the District Munsif, Thiruthuraipoondi in O.S.No.2 of 2011 dated 23.12.2011.

2. The respondent herein had filed a suit in O.S.No.2 of 2011 on the file of the District Munsif, Thiruthuraipoondi for specific performance of the sale agreement dated 22.05.2009 alternatively to direct the defendant to return the advance amount with interest and to create charge over the suit property. The learned District Munsif, Thiruthuraipoondi by the judgment dated 23.12.2011, had decreed the suit for specific performance and directed the defendant to execute the sale deed within a period of two months from the date of decree. Aggrieved by the same, the defendant had filed an appeal in A.S.No.22 of 2012 on the file of the Sub-Judge, Mannarkudi and by the judgment and decree dated 24.11.2012 the learned Sub-Judge had dismissed the said appeal confirming the judgment and decree passed by the trial Court. Feeling aggrieved, the

defendant has filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3. The averments made in the plaint are in brief as follows:-

On 22.05.2009, the plaintiff and the defendant entered into a sale agreement in respect of the suit property and said agreement has been reduced in to writing. As per the said agreement, the sale consideration was fixed at Rs.74,250/- and the plaintiff had paid a sum of Rs.50,000/- as advance and the plaintiff has to pay the balance amount Rs.24,250/- within a period of three months from the date of sale agreement and get the sale deed executed. The plaintiff is always ready and willing to perform his part of the contract. In spite of repeated oral demands, the defendant did not come forward to execute the sale deed and hence, the plaintiff had issued a lawyer's notice dated 26.06.2010, calling upon the defendant to receive the balance sale consideration and execute the sale deed in respect of the suit property. Though the defendant had received the said notice, he did not come forward to execute the sale deed nor send any reply. On the contrary, he made attempts to alienate the suit property. Hence, the plaintiff was constrained to file the above suit for the aforesaid relief.

4. The averments made in the written statement filed by the defendant are in brief as follows:-

(a) The suit property is situated within the Municipal limit and it would fetch Rs.12,00,000/-. The plaintiff had filed the above suit based on the forged document with a view to grab the defendant's property. The plaintiff's husband Vijayachandran is running a bricks chamber. In the month of March, 2009, the plaintiff's husband approached the defendant and made a request to permit him to have a bricks chamber in his land and at that time, he orally agreed to give a sum of Rs.25,000/- for manufacturing Rs.1,00,000/- bricks. Based on the said promise, the defendant permitted the plaintiff's husband to have a bricks chamber in his land. Subsequently, in the month of May, 2009, the defendant was in need of money on account of his daughter's marriage and told the plaintiff's husband to give Rs.50,000/- and manufactured 2,00,000/- bricks from his land. At that time, the plaintiff's husband got signatures from the sons of the defendant namely, Vedhaiyan and Murugaian in a blank sheet, but no signature was obtained from the defendant. Since the defendant was very close to the plaintiff's husband in connection with the business, the plaintiff's husband might have prepared a false sale agreement by putting the signatures of the

defendant. The plaintiff's husband demanded the defendant to execute the sale deed in respect of the suit property and the same was refused by the defendant. Only thereafter, the plaintiff had issued a lawyer's notice. Further, the plaintiff's husband attempted to remove the bricks from the bricks chamber.

(b) On 24.07.2010, the plaintiff's husband convened a Panchayat and in the said Panchayat he demanded to repay the amount. Since, the defendant has no sufficient funds, the defendant permitted the plaintiff's husband to take the bricks worth about Rs.25,000/- and the said amount should be adjusted with the amount already given to the defendant. It was decided in the Panchayat that the balance amount should be settled with interest. However, with a view to grab the defendant's property, the plaintiff's husband got a document from the defendant stating that the defendant has to pay a sum of Rs.2,00,000/- and thereafter, the plaintiff's husband prepared a forged sale agreement in the name of the plaintiff and issued a lawyer's notice. Further, the plaintiff's husband had obtained kist receipts in the name of the plaintiff. Therefore, the defendant prayed to dismiss the above suit.

5. Based on the aforesaid pleadings, the learned District Munsif, Thiruthuraipoondi had framed necessary issues and tried the suit. During trial, on the side of the plaintiff, the plaintiff examined herself as PW1 and also examined one more witness as PW2. She has marked Exs.A1 to Ex.A6 as exhibits. On the side of the defendant, the defendant examined himself as DW1 and also one more witness as DW2. He has marked Exs.B1 to Ex.B5 as exhibits.

6. The learned District Munsif, Thiruthuraipoondi, after considering the materials placed before him, found that on 22.05.2009, a sale agreement was entered into between the plaintiff and the defendant with regard to the suit property and a sum of Rs.74,250/- was fixed as sale price and in pursuance of the said agreement, the plaintiff had paid a sum of Rs.50,000/- on the same date and it was agreed that the balance sale consideration of Rs.24,250/- to be paid within a period of three months and get the sale deed executed. He also found that in spite of the several requests made by the plaintiff, the defendant did not come forward to complete the sale transaction and accordingly, he decreed the suit for the relief of specific performance. Aggrieved by the same, the defendant had filed an appeal in A.S.No.22 of 2012 on the file of the Sub-Judge, Mannarkudi. The learned Sub-Judge, Mannarkudi by the judgment dated 24.11.2012 had dismissed the said appeal and confirmed the judgment and decree passed by the trial Court. Feeling Aggrieved, the defendant has filed the present second appeal.

7. This Court, initially, without admitting the Second Appeal, had ordered notice to the respondent on 21.06.2013. The respondent, on receipt of the notice, appeared through counsel. After hearing both sides and perusing the appeal Memorandum and the judgments of the Courts below, this Court on 08.02.2018 has admitted the second appeal and has formulated the following substantial questions of law:

"1. Whether the judgments of Courts below are vitiated by misreading of evidence of PW2 is not useful to prove execution?

2. Whether judgments of Courts below are vitiated by non-considering of unexplained delay on the part of the plaintiff in filing specific performance of the suit?

3. Whether a person who failed to prove readiness and willingness from inception is entitled to decree for specific performance?"

8. Heard, Mr.S.Sounthar, the learned counsel for the appellant and Mr.C.T.Mohan for Mr.A.Ilango, the learned counsel for the respondent.

9. Substantial Questions of law 1 to 3:

The learned counsel for the appellant/defendant has submitted that the defendant in his written statement has categorically denied the execution of the sale agreement and in such a case, the burden is upon the plaintiff to prove the execution of the sale agreement. He further submitted that in order to prove the execution of the sale agreement, the plaintiff had examined PW2, who is said to have been one of the attestors of the sale agreement. He further submitted that though PW2, in chief examination supported the case of the plaintiff, during cross examination he gave evidence against the case of the plaintiff and hence, subsequently, he was treated as hostile and therefore, his evidence cannot be looked into. He further submitted that even assuming that the suit sale agreement Ex.A1 is a genuine agreement in the said agreement, it was specifically stated that the plaintiff has to pay the balance sale consideration within a period of three months and get the sale deed executed, but she had issued lawyer's notice calling upon the defendant to come and execute the sale deed only on 26.06.2011 i.e., after two years and the said act would

show that the plaintiff was not ready and willing to perform her part of the contract. He further submitted that since the defendant was in dire need of money for performing his daughter's marriage, he approached the plaintiff's husband to pay a sum of Rs.50,000/- and in lieu of the said amount, the plaintiff's husband can manufacture 2,00,000/- bricks in the defendant's property and subsequently, the plaintiff's husband convened a Panchayat and demanded to repay the said amount and in the Panchayat it was decided that the defendant has to pay a sum of RS.2,00,000/- towards principal and interest and got a document to that effect. He further submitted that since the defendant could not pay the said amount, the plaintiff's husband forged the suit agreement and filed the suit for specific performance. He further submitted that the trial Court failed to take note of all the aforesaid facts, and granted the decree in favour of the plaintiff for specific performance and the first Appellate Court also confirmed the findings of the trial Court mechanically and therefore, he prayed to allow this Second Appeal and set aside the judgments and decrees passed by the Courts below and dismiss the suit.

10. Per contra, the learned counsel for the respondent/plaintiff has submitted that the defendant, in his written statement has not specifically denied the execution of the suit sale agreement. He further submitted that the defendant has not specifically taken a plea in the written statement that the signature found in the suit sale agreement is not his signature. On the contrary, he has pleaded a bald and vague defence, and in such circumstances, it has to be presumed that the defendant had entered into a sale agreement with the plaintiff and signed Ex.A1 sale agreement. He further submitted that it is well settled that the evidence of the witness who turned hostile need not be rejected in toto and therefore, the portion of the evidence which is supporting the case of the plaintiff can be used in favour of the plaintiff. He further submitted that once the execution of the sale agreement is proved, the burden shifts on the defendant to prove that the parties had intended to create some other contract. He further submitted that the defendant failed to prove that in the Panchayat it was decided that the defendant has to pay a sum of Rs.2,00,000/- towards principal and interest to the plaintiff's husband and at that time, a document was obtained by the plaintiff's husband from the defendant and with the help of the said document, the plaintiff's husband had prepared a false document and filed the suit for specific performance.

11. He further submitted that the oral evidence of PW1 would show that before issuing lawyer's notice, the plaintiff made

several requests to the defendant to execute the sale deed and the same has been expressed in the lawyer's notice also and after receipt of the said notice, the defendant failed to send any reply. He further submitted that at the time of filling of the suit, the plaintiff had deposited the balance sale consideration before the trial Court and that itself would show that she is always ready and willing to perform her part of the contract and taking into consideration of the aforesaid facts, the trial Court has rightly decreed the suit for specific performance and the first Appellate Court has concurred with the findings of the trial Court and in the said factual findings, this Court cannot interfere and therefore, he prayed to dismiss the Second Appeal.

12. According to the plaintiff, on 22.05.2009, the plaintiff and the defendant entered into a sale agreement with regard to purchase of the suit property. It is her further case that it was agreed that the defendant has to sell the suit property to the plaintiff for Rs.74,250/- and in pursuance of the said agreement, on the same date, the plaintiff had paid a sum of Rs.50,000/- as advance. It is her further case that it was further agreed that the plaintiff has to pay the balance sale consideration of Rs.24,250/- within a period of three months and get the sale deed executed. It is her further case that inspite of repeated oral demands, the defendant did not come forward to execute the sale deed and hence, she was constrained to send a lawyer's notice on 26.06.2010 calling upon the defendant to receive the balance sale consideration and execute the sale deed. Her further case is that the defendant after receipt of the said notice, neither came forward to execute the sale deed nor sent any reply and hence, after depositing the amount before the trial Court she filed the suit for specific performance.

13. In order to substantiate her case, the plaintiff examined herself as PW1 and also examined one Dhanusamani as PW2. She also produced the said sale agreement and marked the same as Ex.A1.

14. The case of the defendant is that he has not executed the said sale agreement. His further case is that the plaintiff has filed the above suit with forged document with a view to grab his property. It is to be pointed out that in the written statement, the defendant has not specifically pleaded that the signature found in the suit sale agreement is not that of his signature. Further, he has not specifically taken a plea that he has not executed the suit sale agreement. As per Rule 3 Order 8 of CPC, it shall not be sufficient for a defendant in his

written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth. As per Rule 4 Order 8 of CPC, where the defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Further, Rule 5 Order 8 of CPC, shows that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

15. In this case, as already pointed out that in the written statement, the defendant has not specifically denied that the signature found in the sale agreement is not his signature and he has not executed the sale agreement. On the contrary, he has taken only a bald and vague defence in the written statement. In one place, the defendant has stated that in the month of March, 2009, the plaintiff's husband Vijayachandran approached him and made a request to put a bricks chamber in his land accordingly, he permitted him. He further stated that in the month of May, 2009, he was in need of money on account of his daughter's marriage and hence, he made a request to the plaintiff's husband to pay a sum of Rs.50,000/- and manufacture 2,00,000/- bricks from his land and accordingly, the plaintiff's husband paid a sum of Rs.50,000/- and at that time, the plaintiff's husband had got signature in blank sheet from his sons. He further stated that he has not signed in any blank sheet. He further stated that since the habit of the defendant is already known to the plaintiff's husband, he believed that the plaintiff's husband would have put his signature and prepared a false document. But as already pointed out that he has not specifically stated in the written statement that the signature found in the suit sale agreement is not his signature. Therefore, it has to be presumed that the signature found in Ex.A1 sale agreement is the defendant's signature. On 26.09.2011, PW2 has filed a proof affidavit wherein, he has categorically stated that on 22.05.2009 at about 11.00 A.M, the sale agreement was executed in the Office of the document writer. He also stated that at that time, the plaintiff had paid a sum of Rs.50,000/- as advance and the sale agreement was typed and in the said sale agreement, the plaintiff and the defendant have signed and he also signed as one of the witnesses. He reiterated the same, in his chief-examination also, before the Trial Court. But during cross-examination, he deviated from the chief-examination on certain aspects and hence, he was treated as hostile and the plaintiff has cross examined him.

16. It is well settled that the evidence of the hostile

witness need not be rejected in toto. The portion of the evidence which is in support of the plaintiff can be taken in her favour. In the proof affidavit and also before the trial Court during chief examination he has categorically stated that the plaintiff and the defendant have signed in Ex.A1 and he signed as one of the attestors. It is to be pointed that during cross examination of PW1 and PW2, it was not at all suggested that the defendant has not signed in Ex.A1 sale agreement and the signature found in the said agreement is not his signature.

17. It is also to be pointed out that the plaintiff has produced the patta which stands in the name of the defendant and marked as Ex.A2. According to the plaintiff, the defendant has handed over the said patta at the time of entering the agreement itself. The defendant has stated in his written statement that he handed over the patta to the plaintiff's husband only as per the decision of the Panchayat. But the DW2, who is said to be the Panchayatdar, has not stated that the defendant has handed over the patta to the plaintiff's husband. Therefore, the contention of the defendant that he handed over the patta to the plaintiff's husband as per the panchayat decision cannot be accepted.

18. It is also to be pointed out that the plaintiff has stated in her plaint that she made several requests orally to the defendant to come and execute the sale deed but, he has not come forward. In the evidence also, she reiterated the same, but no suggestion was put during cross examination of PW1 denying the aforesaid allegations. Therefore, it has to be presumed that the plaintiff made oral requests to the defendant to execute the sale deed but the defendant did not comply with the said request. It is also to be pointed that even though the defendant has received the pre-suit notice, did not send any reply.

19. The defendant has not produced any evidence to show that he permitted the plaintiff's husband to have a brick chamber in his land by getting Rs.50,000/- and subsequently, in the panchayat it was decided that he has to pay a sum of Rs.2,00,000/- towards principal and interest and at that time, the plaintiff's husband got document from the defendant. If really the plaintiff's husband got any such document, he would have filed the suit based on the said document itself and there is no necessity for him, to fabricate a false sale agreement and file a suit.

20. It is also to be pointed out that since the defendant himself has admitted that the plaintiff's husband had paid a sum of Rs.50,000/- for the purpose of conducting bricks chamber in his land, there will not be any difficulty for the plaintiff to pay the balance amount of Rs.24,250/-. Further, even at the time of filing of the suit, the plaintiff has deposited the balance sale consideration before the Trial Court. Therefore, the contention of the defendant that the plaintiff is not ready and willing to perform her part of contract. Taking into consideration of all the aforesaid facts, the trial Court has rightly decreed the suit for specific performance. The first Appellate Court also has concurred with the views of the trial Court and in the said factual concurrent findings, this Court cannot interfere. Accordingly, the substantial questions of law are answered against the appellant/plaintiff.

21. In the result, the Second Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

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To

1.The Sub-Judge, Mannarkudi.

2.The District Munsif, Thiruthuraipoondi.

3.The Section Officer
VR Section, High Court, Madras

+1 cc to Mr.S.Sounthar Advocate sr17522

+1 cc to Mr.A.Ilango Advocate sr 17481

S.A.No.287 of 2013

and

M.P.No.1 of 2013

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