

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.31 of 2013

M.Mageswari

... Appellant/Respondent
Plaintiff

Vs

M.Vaiyapuri

... Respondent/Appellant/
Defendant

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree of the II Additional District Judge, Salem dated 30.08.2012 passed in A.S.No.97 of 2011, reversing the Judgement and Decree of the II Additional Sub-ordinate Judge, Salem dated 30.03.2011 made in O.S.No.74 of 2010.

For Appellant : Mr.S.Karthikeyan
For Respondent : Mr.C.A.Diwakar

J U D G E M E N T

The unsuccessful plaintiff in a suit for specific performance is the appellant before this Court. The parties are referred to in the same array as in the suit.

2.Plaintiff's case:

2.1.The plaintiff had come forward with a case that the defendant had approached her with an offer to sell his property and the plaintiff had accepted it. On 15.04.2009, a registered agreement of sale was entered into between the plaintiff and the defendant with the defendant agreeing to sell the suit schedule property for a total sale consideration of Rs.1,10,000/-. An advance of Rs.1,00,000/- was paid on the date of the agreement and the balance sale consideration of Rs.10,000/- was repayable within a time span of 11 months.

2.2.The plaintiff would contend that they have been ready and willing to repay the balance sum but however the defendant had been postponing the execution of the schedule. The plaintiff would further contend that on 01.03.2010 she was

constrained to issue a legal notice, Ex.A.2, informing the defendant that she would be waiting in Sub-Registrar Office at Veerapandi on 08.03.2010 with a balance amount and that the defendant should come for executing the sale deed after receiving the balance sale consideration.

2.3.The plaintiff would further contend that despite receipt of the legal notice there was no response from the defendant and consequently the plaintiff had come forward with a suit O.S.No.74 of 2010 on the file of the Sub-ordinate Judge, Salem for Specific performance of the agreement of sale dated 15.04.2009.

3.Written Statement:

3.1.The defendant had denied the contention of the plaintiff that he had entered into an agreement to sell his property to her. It is his specific case that the defendant had only borrowed a sum of Rs.30,000/- from the plaintiff's husband to meet the expenses incurred by him on account of leg injury that he had suffered on 14.05.2007 for which the plaintiff's husband was demanding meter interest (மீட்டர் வட்டி).

3.2.The defendant would categorically state that interest at the rate of Rs.300/- per day was paid to the plaintiff's husband and in all the plaintiff had paid a sum of Rs.80,000/- and the entire loan had become cleared. The defendant would submit that the plaintiff's husband had created two earlier agreements which were forged ones and which had not been signed by the defendant. The defendant would further contend that there was no agreement between the parties to sell the suit property nor had he receive the sum of Rs.1,00,000/-.

4.Trial Court:

4.1.The II Additional Sub-ordinate Judge, Salem had framed the following issues:

"1.Whether the plaintiff is entitled to Specific Performance as prayed for?

2.Whether the Sale agreement dated 15.04.2009 is forged one?

4.2.The learned II Additional Sub-ordinate Judge, Salem by Judgement and Decree dated 30.03.2011 had answered the issues against the plaintiff by holding that there was no intention on the part of the plaintiff to purchase the property from the defendant and on the other hand the plaintiff was only extending amounts to the defendant as a loan for which the sale agreement had been registered in her name as security.

4.3.The II Additional Sub-ordinate Judge, Salem though had held that the plaintiff was not entitled to the relief of specific performance however directed the defendant to refund the advance amount of Rs.1,00,000/- together with interest at 24% per annum from date of agreement till date of Judgement. In the suit O.S.No.74 of 2010 the plaintiff had only pleaded for specific performance of the agreement of sale deed dated 15.04.2009.

5.Appellate Court:

5.1. In view of the above the defendant had challenged the Judgement and Decree of the II Additional Sub-ordinate Judge, Salem in O.S.No.74 of 2010 by filing A.S.No.97 of 2011 on the file of the II Additional District Judge, Salem. The learned Judge by Judgement and Decree dated 30.08.2012 was pleased to allow the appeal on the ground that the plaintiff has not prayed for refund of the advance amounts therefore the same could not be granted. That apart, the Court has also held that the amounts which have been paid under the various agreement which have been marked as Ex.A1, B1 and B2 were advance amounts and therefore cannot be refunded.

6.Second Appeal:

Challenging the said Judgement and Decree the plaintiff has filed the above Second Appeal. While admitting the same following Substantial Questions of law has been raised:

"1.The Judgement and Decree of the Lower Appellate Court is contrary to law, weight of evidence and probabilities of the case?

2.The Lower Appellate Court failed to see that the relief specific performance is a discretionary one and the Court comes to a conclusion that the appellant herein is not entitled to specific performance of the Exhibit A1 Sale agreement, the Court can very well grant alternative relief of directing the respondent herein to return the advance amount paid by the appellant herein and without considering the same the Lower Appellate Court erroneously dismissed the suit of the appellant herein without granting the alternative relief on the ground that the said relief was not sought for by the appellant?

3.The Lower Appellate Court failed to read the plaint as a whole and came to an erroneous conclusion that alternative relief of refund of advance money was not sought for. In fact, in para 9 of the plaint, the appellant herein unequivocally claimed the refund of advance amount of Rs.1,00,000/- with accrued interest @ 24% per annum and in para 10 of the plaint valued the said relief and even paid the Court fee for the same?

4.The Lower Appellate Court erred in law by not granting alternative relief of refund of money on specious ground that the same was not sought for in the prayer column?"

7.Submissions:

7.1. Mr.S.Karthikeyan, learned counsel appearing on behalf of the appellant would contend that a reading of Ex.A.1 would clearly show that a sum of Rs.1,00,000/- has been paid since the same is a registered document and signed by the defendant. He would also draw the attention of this Court to Ex.B.1 to Ex.B.4 to show that the plaintiff had entered into an agreement earlier with the defendant and had got the same cancelled. In fact after cancelling the agreement of sale (Ex.B.2) dated 20.06.2008 by cancellation deed (Ex.B.4) dated 15.04.2009, Ex.A.1 had been entered into between the defendant and the plaintiff.

7.2. He would also draw the attention of the Court to the evidence of D.W.1, wherein, he has admitted the signatures before the Sub-Registrar Office. He would therefore contend that the plaintiff is entitled to the refund of the advance amount since the defendant had signed Ex.A.1.

7.3. Mr.C.A.Diwakar, learned counsel appearing on behalf of the defendant would contend that in reply to Ex.A2 notice the defendant had sent Ex.B.6 reply in which the defendant had in very clear terms stated that he has not executed an agreement of sale and that he has not received the sum of Rs.1,00,000/-. It is his case that he only borrowed a sum of Rs.30,000/- which sum he had repaid together with interest in all to the tune of Rs.80,000/- and that there was no dues between the plaintiff and the defendant.

8.Discussion:

8.1. Heard the parties and perused the papers. The plaint is absolutely silent about the reply notice that has been issued by the defendant, wherein, the defendant has categorically denied the execution of agreement to sell the suit property to the plaintiff and also the receipt of the sum of Rs.1,00,000/-. Once the defendant has denied the receipt of the money on the ground that there was no agreement of sale and that the plaintiff did not have necessary wherewithal to extend such a huge amount as a loan, the onus is on the plaintiff to prove the contrary. However the plaintiff has failed to discharge this onus.

8.2. That apart, the plaintiff who comes forward with the case that she had only paid Rs.1,00,000/- on the date of agreement of sale i.e., 15.04.2009 however in her cross examination would contend that on the date of agreement of sale

the entire sum of Rs.1,10,000/- has been paid. This would definitely raise a doubt in the mind of this Court since the plaintiff is taking a contradictory stands. That apart, the plaintiff has not sought for the refund of the amount paid and the suit is one for Specific Performance of the agreement alone. The plaintiff has not challenged that portion of the Judgement and Decree in O.S.No.74 of 2010 in and by which the learned II Additional Sub-ordinate Judge, Salem has held that there was no agreement between the parties for the sale of suit property.

8.3. The proviso to Section 22 (2) of the Specific Relief Act would read as follows:

"22. Power to grant relief for possession, partition, refund of earnest money, etc.- (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or 1 [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provident that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief"

9. In view of the above and considering the fact that such a demand for refund has not been made by the plaintiff the Appellate Court was right in allowing the appeal. The Substantial Questions of law are therefore answered against the plaintiff. The Second Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1.The II Additional Sub-ordinate Judge, Salem.

2.The II Additional District Judge, Salem.

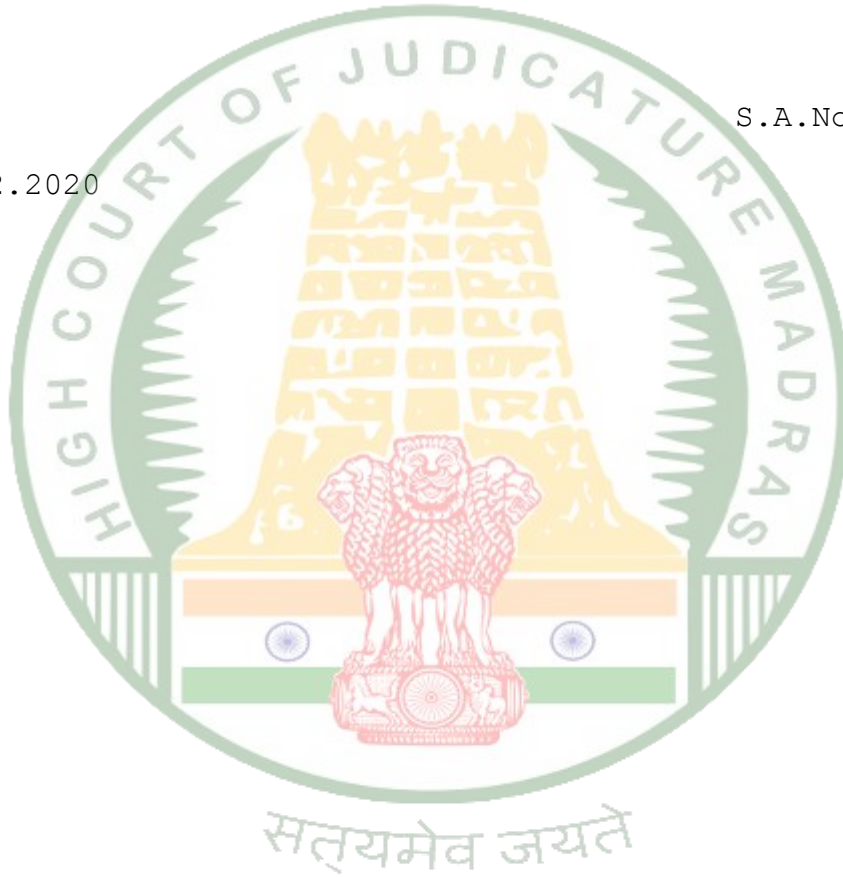
3.The Section Officer, V.R. Section,
High Court, Madras.

+lcc to Mr.C.A.Diwakar, Advocate, SR.No.75787.

+lcc to Mr.A.M.Amutha Ganesh, Advocate, SR.No.75377.

S.A.No.31 of 2013

KK(CO)
CSR: 12.02.2020



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