

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.06.2019

Delivered on : 03.07.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.Nos.36 and 37 of 2013
and M.P.Nos.1 + 1 of 2013

G. SubramaniamAppellant in S.A.No.36 of 2013

S. Velusamy ...Appellant in S.A.No.37 of 2013

Vs

V.T. Pattilingam ... Respondent in both appeals

Prayer in S.A.No.36 of 2013: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 21.06.2012 and made in A.S.No.25 of 2010 on the file of the learned V Additional District and Sessions Judge, Coimbatore, (formerly Fast Tract Court No.III), reversing the Judgment and Decree dated 29.09.2009 and made in O.S.No.140 of 2008 on the file of the learned II Additional Subordinate Judge, Coimbatore.

Prayer in S.A.No.37 of 2013: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 21.06.2012 and made in A.S.No.26 of 2010 on the file of the learned V Additional District and Sessions Judge, Coimbatore, (formerly Fast Tract Court No.III), reversing the Judgment and Decree dated 29.09.2009 and made in O.S.No.684 of 2008 on the file of the learned II Additional Subordinate Judge, Coimbatore.

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For Appellants : Mr.Muthumani Doraisami
in both appeals

For Respondent : Mr.P. Valliappan
in both appeals

COMMON JUDGMENT

The plaintiffs in O.S.No.684 of 2005 and O.S.No.140 of 2008 are the appellants in S.A.Nos.37 and 36 of 2013, respectively. Since common issues arise and the Courts below have passed a Common Judgment in the above suits and the appeal suits A.S.No.26 and 25 of 2010, respectively, on the file of the learned V Additional District and Sessions Judge, Coimbatore, this Court is pronouncing the Common Judgment.

2.The parties are referred to in the same litigative status as in the suit.

Plaintiffs' case in O.S.No.684/2005 and O.S.No.140/2008:

3.The facts in brief are as follows:

The suit O.S.No.684 of 2005 from out of which S.A.No.37 of 2013 arises has been filed by the plaintiff therein for a Specific Performance of an Agreement dated 26.09.2002 in and by which the defendant had agreed to sell Plot Nos.3,4 and 5 in the layout promoted by him in his land comprised in S.F.No.191/2C Vilankurichi Village, Coimbatore. It is the case of the plaintiff that the Agreement of Sale was executed for a total sale consideration of Rs.2,75,000/- and that at the time of execution of the agreement of sale, a sum of Rs.50,000/- was paid as advance. The parties had agreed that the Sale Deed would be executed and registered within a period of three months from the date of agreement.

4.The plaintiff would further contend that immediately upon the execution of the Agreement of Sale and on the very same day, the defendant had demanded the balance sale consideration and the plaintiff had also paid the balance sale consideration of Rs.2,25,000/- and the defendant had executed a Varthamana Letter as acknowledgment of the receipt of the balance sale consideration. The plaintiff would submit that despite his request, the defendant did not come forward to execute the Sale Deed as he had to obtain the approval from the Tamil Nadu Housing Board and an NOC from Vilankurichi Panchayat before execution of the Sale Deed. It was also the case of the plaintiff that there was an extension of the Agreement on 19.09.2005 which was executed by the Power Agent and the plaintiff in the connected suit in O.S.No.140 of 2008. Since the defendant was not coming forward to complete the contract the plaintiff had issued a legal notice dated 12.11.2005 to which the defendant had sent a reply containing totally untenable contentions. Therefore, left with no other alternative the plaintiff was constrained to file the above suit.

5.The plaintiff in the suit O.S.No.140 of 2008 also made a similar pleadings, except in his case, the Sale Deed was in respect of Plot No.6 alone. In all other respects, the pleadings in the suit was similar to that in O.S.No.684 of 2005.

Written Statement of the defendant in the two suits:

6.The Written Statement filed by the defendant in both the suits were more or less the same. It is the case of the defendant that he had neither executed any document to sell the property nor had he received the money as pleaded. It was his specific case that he was in need of money and had received only a sum of Rs.75,000/- from the plaintiff in the suit O.S.No.684 of 2005. He had not received a single penny from the other plaintiff. He would submit that towards security for the sum of Rs.75,000/-, the plaintiff in O.S.No.684 of 2005 had got executed two agreement of sale, one in his favour and the other in favour of his friend, the plaintiff in O.S.No.140 of 2008. On the very same day, the Power of Attorney has also been executed. The defendant categorically denied the execution of the Varthamana Letter which was pleaded in both the suits as well as the signature in the extension endorsements. The defendant would plead that he was only liable to refund the sum of Rs.75,000/- which he had borrowed together with interest. He therefore sought for dismissal of the above suit.

Trial Court:

7.The learned II Additional Subordinate Judge, Coimbatore, took up the suit O.S.No.684 of 2005 and O.S.No.140 of 2008 for joint trial and common issues were framed by the learned II Additional Subordinate Judge, Coimbatore. The two agreements were marked as Ex.A.1 and Ex.A.9. The learned II Additional Subordinate Judge, Coimbatore, on perusing the evidence both oral and documentary, came to the conclusion that the Agreement of Sale, Power of Attorney, extension endorsement as well as the Varthamana Letter had all been executed by the defendant and that the defendant had not discharged his burden of proving that the intention of the parties was not to execute an agreement of Sale. The learned Judge has opined that no documents had been let in on the side of the defendant to prove his case. The suits were therefore decreed for specific performance.

Appellate Court:

8.Aggrrieved by the said Judgment and Decree, the defendant had filed an appeal A.S.No.26 of 2010 and A.S.No.25 of 2010 against the Judgment and Decree in O.S.No.684 of 2005 and O.S.No.140 of 2008, respectively. The Appellate Court had reversed the Judgment and Decree on the ground that the execution of Agreement of Sale, the Power of Attorney and the so called Varthamana Letter were on the same date and the documents

did not inspire confidence since there was no necessity for the execution of the Varthamana Letter on the very same day as the Agreement of Sale, more particularly, when the agreement of sale had been registered. Further, the Appellate Court had found fault with the execution of the extension letter by the power of attorney, who are the plaintiffs in the two suits especially, when the defendant was very much available and the Varthamana letter could have been signed by him .

9.The learned Judge has also found that there was an inordinate delay on the part of the plaintiffs, particularly, when they have come forward with the specific case that the entire sale consideration had been paid by them. Further, the defendant continued to be in possession of the suit property. The fact that the plaintiffs in the two suits had got executed a power of attorney on the very same day only implied that the agreement of sale was never intended to be acted upon. Therefore, the Appellate Court has reversed the Judgment and the Decree of the trial Court and granted the alternate relief of the refund of the advance amount. Aggrieved by the said Judgment and Decree, the plaintiffs are now before this Court.

Second Appeal:

10.While admitting the above Second Appeals, the following Substantial Questions of Law were framed:

"1.Whether the Judgment and Decree of the first Appellate Court is sustainable in that the main relief granted by the trial Court was set aside and in its place the alternative relief was granted?

2.Whether the first Appellate Court erred in formulating the point for determination regarding readiness and willingness and rendering a finding when the same was not disputed by the defendant in the written statement as well as in the evidence?

3.Whether acceptance of the oral evidence that the transaction was only loan transaction, which is contrary to the contents of the registered documents is sustainable?

4.Whether the acceptance of oral evidence which is contrary to the registered agreement for sale by the first Appellate Court is in violation of Section 91 of the Evidence Act?"

11.Heard the learned counsel appearing on either side and perused the Judgments cited by the counsel for the defendant.

Discussion:

12.A perusal of the Agreement of Sale would indicate that the sale in favour of the defendant was contemplated only after getting the approval from the Tamil Nadu Housing Board and an

NOC from the Vilankurichi Panchayat. Without obtaining the said Certificate, on the very same day, as the agreement of Sale was executed and registered, the varthamana letter has come into existence. From the perusal of Ex.A.1 and Ex.A.9, it is clearly evident that the registration of documents had taken place only between 04.00 and 05.00 hours. That being the case, there is no explanation as to why the receipt of the entire sale consideration has not been reflected in the agreement of Sale. Further, if really, the plaintiff had paid the entire sale consideration, he would have been put in possession of the property. There is no recital about the possession being handed over to the plaintiff in the respective agreements of sale. It is also seen that the extension of the respective agreements have been signed by the plaintiffs in the suits in the agreement of sale of the other. This extension has been executed as a Power Agent of the defendant. However, from a perusal of Ex.B.1 and Ex.B.2, it would clearly show that the defendant had not given any authority to the power agent to execute the extension agreement. Therefore, the execution of the same is without any authority. That apart, when the defendant was very much available, there was no necessity for the power agent to execute the agreement of sale. It is also questionable as to why the plaintiff chose to have the agreement extended for the second time in 2005, especially, when according to them, the entire sale consideration had been paid on the date of the agreement of sale.

13.Be that as it may, in a suit for specific performance, it is the bounden duty of the plaintiff to prove that he was ready and willing to perform his part of the Contract right through the period of agreement starting from the date of execution of the Agreement of Sale till the date of actual payment.

14.As already submitted, the plaintiff had pleaded that the entire sale consideration had been paid and Varthamana letter obtained the execution of this document, but however, casts a doubt in the mind of this Court. Therefore, this Court holds that the Varthamana Letter is a fabricated document created for the purpose of the suit.

15.In these circumstances, the plaintiffs are bound to prove his readiness and willingness which is a sine qua non for a suit for specific performance. The plaintiffs in the two suits have miserably failed to prove the same and therefore, the Appellate Court was correct in reversing the Judgment and Decree of the trial Court.

16.The plaintiff in the suit in O.S.No.684 of 2005 has filed the suit beyond the period of three years. The agreement is dated 26.09.2002 and the time for performance given is three months. The suit has been filed just at the nick of time in the month of December 2005. This is yet another reason to prove that he is not ready and willing to proceed with the agreement.

17.The suit O.S.No.140 of 2008 has been filed much beyond the period of limitation. The agreement was dated 26.09.2002 and the time for performance was a period of three months from the date of agreement, i.e., 25.12.2002. However, the suit is filed in the year 2005. It is well established that the suit for specific performance being a discretionary suit, the plaintiff has come to Court with clean hands and a clear case. In the case of hand, it is seen that the plaintiff has fabricated documents and has also not evinced any interest to proceed further with the agreement.

18.The Question of Law No.1 is answered in favour of the plaintiff since the defendant had not challenged the Decree granting the alternate relief and considering the fact that the plaintiff is not entitled to the main relief for specific performance and taking into account the fact that the defendant has not filed any appeal, the Question of Law No.1 is answered in favour of the plaintiff.

19.As regards the Question of Law No.2, Section 16(c) of the Specific Relief Act, makes it mandatory that if the plaintiff fails to aver that he is and has always been ready and willing to perform the contract then such a person is not entitled to specific relief Act. In the instant case, the defendant had categorically denied the payment of entire consideration as alleged by the plaintiff and further, he has come forward with the case that he has only executed the agreement of sale as security for the loan. The Varthamana letter having been disbelieved the onus is upon the plaintiffs to prove that they are ready and willing throughout. This has not been pleaded by them. Useful reference may be made to the Judgments reported in 2018 (3) MWN (Civil) 591 [B.V. Subramanian, Proprietor of "Baggya Reka Exports" v. Vasantha] and 2018 (3) CTC 428 [P.Meenakshisundaram v. P. Vijayakumar and another).

20.Be that as it may, considering the provisions of Section 16(c) of the Specific Relief Act, it is imperative the Court raises an issue with reference to readiness and willingness and the Appellate Court has rightly considered it. Therefore, the Question of Law No.2 is answered in favour of the defendant.

21.As regards the Question of Law Nos.3 and 4 with reference to the pleadings contrary to the contents of the documents, it

is submitted that by the attendant documents, namely, the power of attorney, extension endorsement and the Varthamana letter, the plaintiff has been able to establish suspicion around Ex.A.1 and Ex.A.9 and coupled with the fact that the defendant had admitted that the document has been executed as a loan document and the same has not been repaid by him. The Court below has ordered the alternate relief and the same cannot be now called into question. These questions are answered in favour of the defendants.

For the reasons stated above, these Second Appeals are dismissed confirming the Judgment and Decree dated 21.06.2012 in A.S.Nos.26 and 25 of 2010 on the file of the learned V Additional District and Sessions Judge, Coimbatore. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mps
To

1.The V Additional District and Sessions Judge,
Coimbatore.

2.The II Additional Subordinate Judge,
Coimbatore.

+2cc to M/s.P.Valliappan, Advocate Sr.55813,55814
+2cc to M/s.Muthumani Doraisami, Advocate Sr.55626, 55627

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and M.P.Nos.1 + 1 of 2013

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