

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2019

PRONOUNCED ON : 02.07.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No. 694 of 2019
and
CMP No.13146 of 2019

Desappan ... Appellant

Vs.

1.E.Prasadh

2.P.Shakila

3. R.Amudhadevi ... Respondent

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 12.11.2018 passed in A.S.No.9 of 2018 on the file of IV Additional District Judge, Ponneri confirming the judgment and decree dated 6.9.2013 passed in O.S. No.56 of 2005 on the file of Subordinate Judge, Ponneri.

For Appellant : Mr.K.Gajendran

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 12.11.2018, passed in A.S.No.9 of 2018, on the file of the IV Additional District Court, Ponneri confirming the judgment and decree dated 06.09.2013, passed in O.S.No.56 of 2005, on the file of the Subordinate Court, Ponneri.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. It is found that the plaintiff has laid the suit against the defendants for specific performance and for possession.

4. The suit has come to be laid by the plaintiff for enforcing the sale agreement dated 23.10.2003, which document has come to be marked as Ex.A1 and it is found that the abovesaid sale agreement had been entered into between him and the defendants 1 and 2 qua the suit property for a sum of Rs.3,50,000/- and further, according to the plaintiff, he had paid a sum of Rs.3,40,000/- on the date of the sale agreement as advance and the parties to the agreement had agreed that the balance sum of Rs.10,000/- should be paid within a period of 24 months and complete the sale transaction. Further, according to the plaintiff, he has paid the balance sum of Rs.10,000/- vide cheque dated 03.11.2003, drawn on Indian Overseas Bank, Thiruvottiyur branch and pleaded that the defendants had also endorsed the factum of the receipt of the abovesaid cheque in the sale agreement.

5. According to the contesting defendants 1 and 2, though they have admitted the signature in the sale agreement, would state that the sale agreement had been only executed for the purpose of the loan borrowed from the plaintiff and hence, according to them, the suit sale agreement was not so intended and accordingly, contended that the plaintiff is not entitled to enforce the sale agreement.

6. From the materials placed on record, it is found that the first defendant had sent a letter dated 11.02.2005 to the plaintiff, wherein, he would allege that they had only borrowed a sum of Rs.34,000/- and also would state that the suit property was worth more than Rs.15,00,000/- and by way of the abovesaid letter, it is also seen that the first defendant had cancelled the sale agreement. Immediately, it is seen that the plaintiff had issued a notice dated 16.02.2005, marked as Ex.A7, disputing the averments contained in Ex.A4 notice sent by the first defendant and called upon the defendants to execute the sale deed as per the terms of the sale agreement. The defendants had sent a reply to the same, dated 23.03.2005, which has been marked as Ex.A11, wherein, the defendants would project a different case contending that they had received only a sum of Rs.1,00,000/- from the plaintiff's husband Radhakrishnan and towards the said loan, they had paid a total sum of Rs.8,16,000/- with interest and thereby challenged the sale agreement projected by the plaintiff and contended that the same had been executed only towards the loan transaction.

7. As rightly found by the Courts below, prima facie, when the defendants have admitted the signature in the sale agreement, they would not be entitled to go beyond the recitals contained in the sale agreement. Arguments had been projected by the defendants that the case of the plaintiff that the

parties had agreed a period of 24 months for the payment of Rs.10,000/- for completing the sale transaction is very unnatural and the same would alone go to expose that the sale agreement had only been taken as a security for the loan transaction. As rightly determined by the Courts below, the above point would not merit acceptance. Considering the facts and circumstances of the case, though it is found that the parties had fixed a period of 24 months for the balance payment of Rs.10,000/- for completing sale transaction, the fact remains that the plaintiff had paid the abovesaid sum immediately on 03.11.2003 itself, by way of a cheque, as above adverted to. Therefore, it is found that the plaintiff had, pursuant to the sale agreement, parted with the balance sale consideration at the earliest point of time and been ready to obtain the sale agreement from the defendants 1 and 2 and only on account of the delaying tactics adopted by the defendants, it is found that the plaintiff is unable to go ahead with the enforcement of the sale agreement.

8. As regards the case projected by the defendants that the suit property was worth more than Rs.15,00,000/- as such cannot be countenanced in the absence of any material pointing to the same and when it is found that the mortgage created by the defendants 1 and 2 qua the suit property reveals that the suit property had been valued only at Rs.5,00,000/- and in such view of the matter, the sale consideration fixed in the sale agreement at Rs.3,50,000/-, as rightly determined by the Courts below, appears to be just and reasonable. Therefore, the abovesaid defence version had been rightly rejected by the Courts below.

9. It is found that following the mortgage transaction with the Co-operative Society, the suit property had been brought for sale and it is also seen that the 3rd defendant had purchased the suit property in the auction sale. However, strangely, the 3rd defendant is found to have not contested the plaintiff's suit and remained ex-parte in the trial Court and even in the first appellate Court, he has not chosen to appear and contest the case of the plaintiff by projecting his defence. It is further seen that the 3rd defendant who has come forward with the present second appeal, in the grounds of appeal, has not even averred that he is not served with the summons in the trial Court or the notice in the first appellate Court and therefore, when it is found that the 3rd defendant had been duly served with the summons in the trial Court and the notice in the first appellate Court, despite the same, he has not chosen to contest the plaintiff's case in the Courts below and on the other hand, after the plaintiff's case had been accepted by both the Courts, only thereafter, the 3rd defendant had chosen to come forward with the present second appeal. The defendants 1 and 2 who had

been contesting the plaintiff's case right through, had not chosen to prefer any appeal against the concurrent judgment and decree of the Courts below.

10. Arguments had been projected before the Courts below that inasmuch as the suit property had been subjected to a mortgage transaction, the plaintiff would not be entitled to enforce the sale agreement, however the same had been rightly dispelled by the Courts below. When it is found that the mortgage had been created qua the subject matter, as rightly determined by the Courts below, the agreement holder or the subsequent purchaser would be getting the suit property only subject to the mortgage debt and it is the look out of the plaintiff, the agreement holder, with reference to the clearance of the mortgage debt and therefore, the abovesaid defence projected by the defendants 1 and 2 that the plaintiff would not be entitled to enforce the sale agreement due to the existence of the mortgage transaction had been rightly turned out by the Courts below.

11. It is also seen that the defendants 1 and 2 had also put forth the plea that the 3rd defendant had purchased the suit property in the auction sale bonafidely and his right should not be affected by enforcing the sale agreement. As abovenoted, the 3rd defendant, despite service before the trial Court and as well as the first appellate Court, had not chosen to contest the plaintiff's case. In such view of the matter, the arguments put forth by the defendants 1 and 2 that the 3rd defendant is a bonafide purchaser for value in the auction sale, as such, cannot be accepted, particularly, when no such plea had been raised by the 3rd defendant before the Courts below with necessary pleas and materials. As rightly found by the Courts below, merely because the 3rd defendant happens to be the auction purchaser, it cannot be held that the auction sale taken by him is foolproof, particularly, that the subject matter of the auction sale is free of all encumbrances. As rightly found by the Courts below, there is no warranty of title for a Court auction or any sale in a public auction and the person who takes part in the auction takes the risk while participating in the auction and even as against him, the rule of caveat emptor would apply and therefore, the plea put forth by the defendants 1 and 2 that by enforcing the sale agreement, the interest of the 3rd defendant would be affected cannot be accepted, particularly, when the 3rd defendant did not endeavour to project such a case before the Courts below.

12. The defence projected by the defendants that the sale agreement had been taken only towards the loan transaction is found to be not substantiated with any acceptable and reliable materials and the documents projected by the defendants with

reference to the same, marked as Exs. A1 to A4, as such, would not, in any manner, advance their case. As determined by the Courts below and when according to the defendants, the sale agreement was not so intended to be acted upon, the burden is only heavy upon them to show that under what circumstances the sale agreement had come to be executed. When there is no material worth acceptance on the part of the defendants 1 and 2 pointing to the same and furthermore, when the defendants have also not endeavoured to examine the persons associated with the sale agreement in support of their defence or any other independent witnesses, in such view of the matter, it is found that the case projected by the defendants 1 and 2 that the sale agreement had been taken only towards the loan transaction cannot be countenanced and the same has been rightly rejected by the Courts below.

13. As regards the contentions put forth by the defendants 1 and 2 that the suit laid by the plaintiff is premature, the same had been properly considered by the Courts below, I do not find any valid reasons to interfere with the determination of the Courts below.

14. As abovenoted, the contesting defendants 1 and 2 have not preferred the second appeal. Only the 3rd defendant has come forward with the second appeal and when the 3rd defendant has not projected any cause before the Courts below for challenging the case of the plaintiff in any manner, in such view of the matter, the 3rd defendant cannot be allowed to dispute the plaintiff's case by projecting new materials, as if the defendants 1 and 2 had ceased to be the owners of the property by way of the auction sale. When it is seen, the auction sale conducted with reference to the mortgage had taken place subsequent to the execution of the sale agreement and in such view of the matter, when there is no material to show that the 3rd defendant is unaware of the sale agreement and as abovenoted, the 3rd defendant have also not evinced interest to contest the plaintiff's case before the Courts below and accordingly, when it is seen that the defendants 1 and 2 have executed the sale agreement, a registered instrument, in favour of the plaintiff for the amount received from him, as recited in the same and the plaintiff had also established his readiness and willingness and paid the entire sale consideration pursuant to the sale agreement, in such view of the matter, it is found that the plaintiff is entitled to secure the relief of specific performance as rightly determined by the Courts below.

15. In the light of the abovesaid discussions, when it is found that the Courts below had assessed and analysed the materials placed on record in the right perspective, taking into consideration the factual matrix and the principles of law

governing the same correctly, in such view of the matter, the reasons afforded by the Courts below for accepting the plaintiff's case do not suffer from any perversity and irrationality and in my considered opinion, there is no reason warranting interference to the same. Accordingly, it is found that no substantial question of law is involved in this second appeal. Resultantly, the second appeal is dismissed. Consequently, connected miscellaneous petition, if any, is closed.

s/d-
Assistant Registrar(CS V)

True Copy

Sub-Assistant Registrar

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To

1.The IV Additional District Judge, Ponneri.

2.The Subordinate Judge, Ponneri.

+1 CC to Mr.K.Gajendran, Advocate sr 54668

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EV(CO)
SP(24/01/2020)