IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.07.2019

PRONOUNCED ON : 28.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.NO.125 OF 2016
AND
C.M.P.NO.2628 OF 2016

Vellaisamy
...Appellant/Appellant/Defendant

Vs.

P.Subramanian
... Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.36 of 2013 dated 20.03.2015 on the file of the Additional District Court No.3, Dharapuram, confirming the judgment and decree passed in O.S. No.280 of 2002 dated 05.07.2013 on the file of the Sub-Court Dharapuram.

For Appellant : Mr.S.Saravanan

For Respondent : Mr.R.Asokan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 20.03.2015, passed in A.S.No.36 of 2013, on the file of the Additional District Court No.3, Dharapuram, confirming the judgment and decree dated 05.07.2013, passed in O.S. No.280 of 2002, on the file of the Subordinate Court, Dharapuram.

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

3. Suit for specific performance or in the alternative, for the refund of advance amount with interest.

4. Briefly stated, according to the plaintiff's case, the defendant entered into an agreement of sale to sell the suit property in his favour for a sum of Rs.1,50,000/- on 15.04.2002 and received a sum of Rs.1,25,000/- on the date of the sale agreement and the parties had agreed to complete the sale transaction within 9 months from the date of the sale agreement and even though the plaintiff has been always ready and willing to perform his part of the contract, however, as the defendants had been avoiding the same on one pretext or the other and had not come forward to execute the same after receiving the balance sale consideration, according to the plaintiff, he had issued a legal notice, calling upon the defendant to receive the balance sale consideration and execute the sale deed on 04.09.2002 and to the same, the defendant sent a reply containing false allegations and hence, the suit.

5. The defendant resisted the plaintiff's suit contending that he had borrowed a sum of Rs.1,05,000/- from the plaintiff's father towards loan and had been paying interest with reference to the same on various dates and according to him, till 14.07.2001, he has been paying interest regularly and according to him, at the time of lending the loan, his signature had been obtained in blank stamp papers as security and according to the defendant, the same had been made use of by the plaintiff in creating the sale agreement and therefore, according to the defendant, he has not entered into any sale agreement with the plaintiff agreeing to sell the suit property for a sum of Rs.1,50,000/- as claimed by the plaintiff and accordingly, prayed for the dismissal of the plaintiff's suit.

6. In support of the plaintiff's case, PWs 1 to 3 were examined, Exs.A1 to A5 were marked. On the side of the defendant, DW1 was examined, Exs.B1 to B23 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to decline the relief of specific performance prayed for by the plaintiff, however, granted the relief of the refund of advance amount paid by the plaintiff and accordingly, disposed of the plaintiff's suit. Impugning the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

> 1. Whether the trial Court is right in decreeing the suit by granting the alternative relief to the plaintiff, by

directing the defendant to pay the advance amount after concluding that the sale agreement is not genuine?

2. Whether the Courts below are right in decreeing the suit in O.S. No.280 of 2002 by granting alternate relief of refund or advance amount without considering the evidence of the PW1, which clearly establishes that there was no money transaction between the appellant/plaintiff and the money advanced by the plaintiff's father has been repaid and hence perverse?

3. Whether the judgments and decrees passed by the Courts below are sustainable in law when the case of the plaintiff is based on falsehood thereby disentitling himself from getting any relief from the Court?

4. Whether the appellate Court is right in dismissing the appeal preferred by the appellant in modyfing the findings of the trial Court on the basis of Ex.B15 when there is no pleading and evidence as to circumstances under which it was executed and father of the plaintiff to whom it was addressed was not examined and hence perverse?

5. Whether the lower appellate Court is right in modyfing the findings of the trial Court without assigning any reasons, as to how the finding of the trial Court is erroneous in the appeal preferred by the appellant/defendant and especially when no appeal has been preferred by the plaintiff/respondent challenging the finding of the trial Court that Ex.A1 is a fraudulent document?

6. Whether the Courts below ought to have drawn an adverse inference for non-examining the father of the plaintiff, who was the attesting witness to Ex.A1?

9. The suit has been laid by the plaintiff for the relief of specific performance based on the sale agreement dated

15.04.2002. The abovesaid sale agreement has been marked as Ex.A1. It is found that only much later, the defendant has claimed the alternative relief of the refund of the advance amount and accordingly, on that basis, the parties had proceeded with the trial.

10. It is the specific case of the defendant that he had borrowed a sum of Rs.1,05,000/- from the plaintiff's father on several occasions and been repaying the same with interest and accordingly, had marked the receipts towards the payment of interest as Exs.B1 to B13. A perusal of Exs.B1 to B13 would go to show that in respect of the loan advanced by the plaintiff's father, the defendant had been paying the interest and accordingly, it is found that the last date of the payment of interest is 14.07.2001, which could be gathered from the receipt marked as Ex.B13. It is found that the plaintiff's father had also issued a notice to the defendant on 20.11.2001, calling upon him to repay the loan amount and the said notice has been marked as Ex.B14 and to the same, the defendant had sent a reply on 04.02.2002 marked as Ex.B15. It is thus found that the defendant already owed amount to the plaintiff's father and it is thus noted that there had been loan transactions between the plaintiff's father and the defendant much prior to 15.07.2000. The receipts towards the payment of interest had been produced by the defendant as Exs.B1 to B13 and the same commence from 15.07.2000. Now, according to the defendant, his signature has been obtained in blank stamp papers at the time of lending the said loan during 2000. Accordingly, we have to see whether the abovesaid defence put forth by the defendant deserves acceptance. Admittedly, there has been loan transaction between the plaintiff's family and the defendant right from 2000 onwards. It is found that the defendant's version is more probabilised, considering the position that the sale agreement put forth by the plaintiff in the present suit, according to the plaintiff, is found to have entered into on 15.04.2002. Therefore, when according to the plaintiff, the defendant had agreed to sell the suit property to him on 15.04.2002, naturally, as determined by the trial Court, the parties would not have endeavoured to engross the agreement on a stamp paper purchased on 14.06.2000. It is noted that the sale agreement dated 15.04.2002 has come to be engrossed on a stamp paper purchased on 14.06.2000. As abovenoted, it is the case of the defendant that he has borrowed loan from the plaintiff's father during the year 2000 and been paying the interest towards the same commencing from 15.07.2000. Therefore, the abovesaid defence version seems to be more probabilised and accordingly, it is found that when he had secured the loan from the plaintiff's father during 2000, it is noted that for security, his signature has been obtained in the blank stamp papers at the

time when the abovesaid loan had been advanced. The plaintiff has offered no plausible explanation as to why the sale agreement dated 15.04.2002 has come to be engrossed on a stamp paper purchased on 14.06.2000.

11. In addition to that, on a perusal of Ex.A1 sale agreement, it is found that the defendant's signature in page 2 is found in continuation of the description of the property and the defendant's signature is particularly noted to be adjoining the description of the suit property. As rightly put forth by the defendant's counsel and as rightly determined by the trial Court, if the sale agreement had been obtained in the normal fashion, the defendant's signature would have been obtained below the description of the suit property and on the other hand, when his signature is found to be in continuation of the description of the suit property, naturally a doubt arises whether at all Ex.A1 agreement would have been obtained from the defendant in the normal course.

12. Furthermore, the defendant's title deed had also come to be obtained at the time of lending the loan. The title deed in the name of the defendant has been marked as Ex.A2. It is found that the defendant had acquired the suit property on 30.06.93 and the value of the suit property has been fixed at Rs.71,300/- in Ex.A2 sale deed. In such view of the matter, to say that the value of the suit property had only doubled even after ten years at the time of the execution of the sale agreement to only Rs.1,50,000/- cannot be believed and the said factors had also been rightly taken into consideration by the trial Court and with reference to the abovesaid position, no acceptable cause has been advanced by the plaintiff.

13. Furthermore, considering the evidence of the scribe examined as PW2 and the attestor examined as PW3, when they are not able to come out with a clear case as to whether the suit property consist of a superstructure or not at the time of the sale agreement and also has not come forward as to how come they had arrived at the value of the suit property and when the scribe, in particular, examined as PW2 has not come forward with any explanation as to why the defendant's signature had been obtained in continuation of the description of the property in the sale agreement and not below the same and when PW3 attestor has admitted that there are other scribes other than PW2 at Dharapuram and also there are various stamp vendors at Dharapuram and also admitted that the defendant's signature has been obtained in continuation of the description of the property, accordingly, based on the abovesaid factors, the trial Court has rightly doubted the reliability and acceptability of the evidence of PWs 2 and 3 for upholding the truth and validity of the sale agreement.

14. Considering the materials available on record, it is found that the defendant is residing in the suit property and the same could be gathered from the tax receipts and other charges paid by the defendant with reference to the same and therefore, when the suit property is found to be consisting of a superstructure and on the other hand, the property described in Ex.A1 sale agreement is only shown as a vacant site and when with reference to the abovesaid position, no plausible explanation has been offered by the plaintiff, the abovesaid factor also throws a serious doubt on the truth and validity of Ex.A1 sale agreement.

15. In addition to that, according to the plaintiff, when the sale price had been fixed at 1,50,000/- and when he has put forth the case that he has paid Rs.1,25,000/- on the date of the sale agreement, if really his endeavour is only to purchase the suit property, there is no need for fixing the outer limit of nine months for paying the balance amount of Rs.25,000/- for completing the sale transaction. The abovesaid feature also throws suspicion as to whether Ex.A1 agreement would have been really entered into between the parties thereto with consensus ad idem to sell the suit property as put forth by the plaintiff for the sale consideration as recited therein.

16. When the evidence of PWs 2 and 3 are found to be unreliable and not convincing, as rightly put forth by the defendant's counsel, the plaintiff's father who is also one of the attestors to the sale agreement and when according to the plaintiff, the sale agreement had been created by making use of the signature obtained in the blank stamp papers at the time of advancing the loan by the plaintiff's father and when the plaintiff's father has also issued notice to the defendant to repay the loan amount, in such view of the matter, to clear all the doubts, the plaintiff should have endeavoured to examine his father in support of his case to refute the defence version. On the other hand, the plaintiff has not chosen to examine his father and with reference to the same, there is no proper explanation offered on the part of the plaintiff.

17. In the light of the abovesaid factors, considering the defence version more probable and accordingly disbelieving the plaintiff's case, the trial Court has proceeded to hold and determine that the sale agreement had not been executed by the defendant in favour of the plaintiff as put forth and on the other hand, the sale agreement had been created by the plaintiff by making use of the signature obtained from the defendant in the blank stamp papers at the time of lending the loan amount and accordingly, the trial Court has held that there has been no consensus ad idem between the parties for entering into the sale

agreement Ex.A1 and however proceeded to hold that the defendant having admitted the borrowal of the loan of Rs.1,50,000/- from the plaintiff's family and accordingly held that he is liable to pay the said amount with interest. On that reasonings the trial Court proceeded to grant the relief of the refund of the advance amount in favour of the plaintiff and accordingly, disposed of the plaintiff's suit.

18. As abovenoted, the trial Court has clearly determined that Ex.A1 sale agreement had been secured/created based on the signature obtained from the defendant in the blank stamp papers at the time of lending the loan amount. In such view of the matter, when according to the trial Court, there has been no consensus ad idem between the parties concerned for entering into the sale agreement projected in the matter, in such view, as rightly put forth by the defendant's counsel, the trial Court has committed a manifest error in granting the relief of the refund of the advance amount with interest in favour of the plaintiff. The abovesaid determination of the trial Court is found to be not in accordance with the principles of law outlined in the decisions reported in CDJ 2015 MHC 8018 (V.P.Murugesan Vs. P.Sheik Mideen) and CDJ 2016 MHC 6522 (T.P.Kandasamy & Others Vs. Vemba Gounder & Others).

19. Despite the abovesaid findings of the trial Court, it is found that the plaintiff has not challenged the judgment and decree of the trial Court. On the other hand, it is only the defendant who has preferred the first appeal challenging the judgment and decree of the trial Court.

20. The first appellate Court, without going into the various reasons given by the trial Court for not believing the sale agreement projected by the plaintiff, on the mere factor that as the defendant, by way of the reply notice Ex.A5, had not put forth any loan transaction between him and the plaintiff directly and on that footing, proceeded to hold that the sale agreement had been particularly executed by the defendant in favour of the plaintiff as put forth by the plaintiff. The abovesaid reasonings of the first appellate Court are patently unacceptable in the eyes of law. When the trial Court has given various reasonings for disbelieving the sale agreement projected by the plaintiff and finally came to the conclusion that the sale agreement had been taken only as a security for the loan transaction, in such view of the matter, the first appellate Court, if it desires to dislodge the abovesaid determination of the trial Court, should explain as to on what reasonings it differed from the abovesaid determination of the trial Court and on the other hand, when the first appellate Court has not even endeavoured to consider the reasonings adduced by the trial

Court in any manner, particularly, the first appellate Court being the final Court of fact, in such view of the matter, it is found that if the first appellate Court proceeded to reverse the finding of fact, it must have gone into close quarters with the reasonings assigned by the trial Court and then assign its own reasonings for arriving at a different finding. The abovesaid position of law could be gathered from the decisions reported in CDJ 2001 MHC 1079 (B.Parvathy Vs.Ramakrishna Mission represented by duly authorised power agent Swami Amirthananatha and others) and CDJ 2003 MHC 1203 (Raju & another Vs. Muthuammal & others).

21. As abovenoted, insofar as this case is concerned, the first appellate Court has not considered the reasonings of the trial Court for determining that the sale agreement has been taken only as a security for the loan transaction and on the other hand, without going into the said aspects of the matter, by taking into consideration only the reply notice marked as Ex.A5, has blindly accepted the plaintiff's case and the abovesaid approach of the first appellate Court is found to be totally unjustifiable and liable to be set aside. As abovenoted, when particularly, the plaintiff has not chosen to challenge the abovesaid determination of the trial Court by filing appeal or cross objection and moreover, when the defendant has also not placed any acceptable explanation for holding that the abovesaid determination of the trial Court is erroneous or unacceptable, in such view of the mater, the first appellate Court is found to be totally unjust in disturbing the abovesaid findings/determination of the trial Court without assigning any reasons whatsoever and also not giving any reasons whatsoever as to how it differed from the reasonings of the trial Court for arriving at its own conclusion. On the above score alone, it is found that the determination of the first appellate Court that the sale agreement had been indeed executed by the defendant in favour of the plaintiff as projected by the plaintiff does not merit acceptance and liable to be set aside.

22. Considering the reasons adduced by the trial Court for disbelieving the plaintiff's case and when the abovesaid reasonings of the trial Court are found to be on the proper appreciation of the materials available on record and the plaintiff having failed to establish that there had been any consensus ad idem between the parties for entering into the sale agreement projected by him and on the other hand, the materials placed on record only probabilise the defence version that the sale agreement had been created/taken as a security for the loan transaction pending between the parties, in such view of the matter, the refund of the advance amount said to have been paid by the plaintiff pursuant to the so called sale agreement cannot at all be granted, particularly, after coming to the

determination that the sale agreement had been created/taken only as a security for the loan transaction and in the light of the above position, both the Courts have erred in granting the relief of the refund of the advance amount in favour of the plaintiff with interest as prayed for by the plaintiff and the abovesaid determination of the Courts below are found to be totally against the principles of law as above pointed out and in such view of the matter, the judgment and decree of the Courts below directing the defendant to refund the advance amount with interest to the plaintiff is liable to be set aside. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendant and against the plaintiff.

23. For the reasons aforestated, the judgment and decree dated 20.03.2015, passed in A.S.No.36 of 2013, on the file of the Additional District Court No.3, Dharapuram, confirming the judgment and decree dated 05.07.2013, passed in O.S. No.280 of 2002, on the file of the Subordinate Court, Dharapuram are set aside and resultantly, the suit laid by the plaintiff in O.S. No.280 of 2002 is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Court No.3,
   Dharapuram.
2. The Subordinate Court,
   Dharapuram.
3. The Section Officer,
   V.R.Section, High Court, Madras.

+1cc to M/s.S.Saravanan, Advocate, S.R.No.73529
+1cc to M/s.R.Asokan, Advocate, S.R.No.73977

S.A.No.125 of 2016
and
C.M.P.No.2628 of 2016

PVS(CO)
RLP(16/06/2022)