

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.08.2019

PRONOUNCED ON : 13.09.2019

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A. No.172 of 2016
and
C.M.P. No.3505 of 2016

V.Annamalai ... Appellant/Plaintiff

Vs.

J.Balasundaram ... Respondent/Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.07.2014, passed by the Principal District Judge at Puducherry in A.S.No.2/2014 reversing the judgment and decree dated 03.12.2013, passed by the Principal Sub Judge, Puducherry in O.S.No.57/2008.

For Appellant : Mr.A.Tamilvanan

For Respondent : Mr.S.Giridharan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 31.07.2014, passed in A.S.No.2/2014, on the file of the Principal District Court, Puducherry reversing the judgment and decree dated 03.12.2013, passed in O.S.No.57/2008, on the file of the Principal Subordinate Court, Puducherry.

2. Suit for specific performance.

3. Briefly stated, according to the plaintiff, the defendant, in order to sell the suit property to the plaintiff, entered into a sale agreement in connection with the same on 07.03.2005 and the sale price was fixed at Rs.1,08,100/- and the defendant received a sum of Rs.40,000/- from the plaintiff as advance on the date of the sale agreement and agreed to receive the balance sum of Rs.68,100/- at the time of the execution of

the sale deed and further, agreed to execute the sale deed in favour of the plaintiff by producing all the original documents related to the suit property within 3 months. The defendant received a sum of Rs.2,000/- on 23.05.2005 and Rs.50,000 on 14.07.2005 and made an endorsement on the back side of the sale agreement. Thereafter, the plaintiff approached the defendant on many occasions and requested to execute the sale deed after receiving the balance sale consideration of Rs.16,100. But the defendant had been dragging on the matter endlessly and therefore, the plaintiff issued a legal notice on 06.02.2008 and to the same, the defendant sent a reply containing false allegations. Hence, the suit for appropriate reliefs.

4. The defendant resisted the plaintiff's suit contending that the sale agreement dated 07.03.2005 projected by the plaintiff is a fabricated record with a view to grab the property belonging to the defendant. The defendant received a sum of Rs.40,000/- as loan only from the plaintiff on 07.03.2005 by executing a promissory note and the defendant received a sum of Rs.2,000/- from the plaintiff by depositing his property document and by executing a promissory note as security on the plaintiff's demand on 23.05.2005 and the defendant so far had paid a sum of Rs.3,500/- as interest to the principal amount of Rs.42,000/- on 14.07.2005 to the plaintiff. The plaintiff approached the defendant on 20.01.2008 for repaying the loan amount of Rs.42,000/- with exorbitant interest, but the defendant refused to pay the interest claimed by the plaintiff and hence, the plaintiff had filed the suit falsely using the promissory note signed by the defendant by filling up the same. On verification of the case records, the defendant came to understand that the plaintiff had used his signature signed on the non judicial papers obtained at the time of the availment of loan from the plaintiff and hence, the sale agreement is a fabricated record and the defendant never executed any such agreement of sale in favour of the plaintiff to sell the suit property and never made any endorsement on the reverse side of the sale agreement and not received a sum of Rs.92,000/- from the plaintiff as alleged in the plaint and he had availed only a loan of Rs.42,000/- from the plaintiff by executing promissory notes and depositing the property document and furthermore, the defendant is not the owner of the second item of the property mentioned in the C schedule and therefore, the suit is liable to be dismissed.

5. In support of the plaintiff's case, PWs 1 to 3 were examined, Exs.A1 to A4 were marked. On the side of the defendant, DWs1 to 4 were examined, no document has been marked.

6. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to decree the suit in favour of the

plaintiff as prayed for. The first appellate Court, on an appreciation of the materials placed on record and the submissions made, was pleased to set aside the judgment and decree of the trial Court and by way of allowing the appeal preferred by the defendant, dismissed the suit laid by the plaintiff. Impugning the same, the present second appeal has been preferred.

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

a) Whether the Courts below have committed an error of law in wrongly throwing the burden of proving the due execution of the suit promissory note on the plaintiff when the defendant has specifically admitted to the execution of the suit sale agreement Ex.A1?

b) Whether the lower Appellate Court is right in law in decreeing the suit by holding that the plaintiff is not ready and willing to perform his part of contract when it is his case that the entire sale consideration was paid within six months from the date of the agreement itself, as could be seen from the endorsement made in Ex.A1 agreement and therefore that the findings rendered by the lower Court is perverse on the question of readiness and willingness?

8. The suit has come to be laid by the plaintiff seeking the relief of specific performance based on the sale agreement dated 07.03.2005, marked as Ex.A1. According to the plaintiff, the defendant had agreed to sell the suit property for a sum of Rs.1,08,100/- in his favour and received a sum of Rs.40,000/- as advance on the date of the sale agreement and furthermore, received a sum of Rs.2,000/- on 23.05.2005 and a sum of Rs.50,000/- on 14.07.2005 and thereafter, though the plaintiff had approached the defendant to receive the balance sale amount of Rs.16,100/- and execute the sale deed, the defendant had been dragging on the matter endlessly and hence, after the issuance of the legal notice on 06.02.2008, as the defendant sent a reply containing false allegations, according to the plaintiff, he had laid the suit for the relief of specific performance.

9. The defendant repudiated the plaintiff's case contending that he had only received a total sum of Rs.42,000/- from the plaintiff by way of loan by executing the promissory

notes and handing over his property document and not executed any sale agreement intending to convey the suit property to the plaintiff as put forth by the plaintiff and according to the defendant, the plaintiff had made use of the signature obtained in the blank non judicial paper obtained at the time of the availment of the loan from the plaintiff and hence, according to the defendant, the sale agreement projected by the plaintiff is a fabricated record and the plaintiff is not entitled to claim any relief based on the same and disputed the case of the plaintiff that he had in toto received a sum of Rs.92,000/- from the plaintiff towards the alleged sale price and made endorsement on the reverse side of the sale agreement and therefore, according to the defendant, the suit laid by the plaintiff is liable to be dismissed.

10. As rightly determined by the first appellate Court, at the foremost, considering the evidence of the defendant examined as DW1 and the defendant's witnesses examined as DWs 2 to 4, it is found that the plaintiff is a moneylender and used to lend loans to various persons. In this connection, according to the defendant, he had only received a sum of Rs.42,000/- from the plaintiff as loan by executing promissory notes, according to the defendant, the plaintiff had misused his signature obtained in blank non judicial papers obtained at the time of the availment of the loan and created the sale agreement. In the light of the abovesaid defence projected by the defendant, at the foremost, the plaintiff should establish that the defendant had agreed to sell the suit property to him for a sum of Rs.1,08,100/- and executed the sale agreement on 07.03.2005 as put forth by him. In this connection, to sustain his case, the plaintiff has examined one of the attestors to the sale agreement namely, Gopalakrishnan as PW2. According to the plaintiff, PW2 had attested the sale agreement Ex.A1. However, on a perusal of Ex.A1 sale agreement, in the column witness, the signature of one Muthukrishnan is found as the first witness and no signature is found in serial No.2 under the column witnesses. On the other hand, PW2 Gopalakrishnan is found to have signed in Ex.A1 sale agreement as if he is also one of the executants of the same and strangely, it is found that even before the plaintiff and the defendant had signed the same, it is only PW2 who had signed the sale agreement firstly in page numbers 2 and 3 of the sale agreement and in page number 1, PW2's signature is found between the signatures of the defendant and the plaintiff. Therefore, on a perusal of Ex.A1 sale agreement, PW2 is found to be a signatory of the document and not signed as a witness to the same. In this connection, PW2 would admit during the course of his evidence that he is the brother of the plaintiff's wife and does not remember the date and time during which he had put his signature in the sale agreement and would state that he had only signed in the first page of the sale agreement and does not know any transactions entered into between the parties as

regards the passing of consideration and according to him, he had only signed the same and does not know who all had signed the same and further, admitted that he had signed in all pages of the sale agreement. When according to the plaintiff, PW2 is the witness of the sale agreement, it has not been explained by the plaintiff as to how come PW2 has signed as the executant of the sale agreement along with the plaintiff and the defendant and not signed in the column witnesses. Furthermore, when PW2 would admit that other than signing the document, he does not know anything about the same, particularly not aware of the exchange of money under the same between the parties concerned. In such view of the matter, particularly, when PW2 is found to be the brother of the plaintiff's wife, no safe reliance could be attached to the evidence of PW2 for sustaining the truth and validity of Ex.A1 sale agreement.

11. The scribe of the sale agreement has been examined as PW3 on behalf of the plaintiff. On a perusal of Ex.A1 sale agreement, it is seen that the same had been prepared and typed by one B.Govindasamy and the said B.Govindasamy has been examined as PW3. PW3 would admit during the course of his cross examination that he does not know to type and had not obtained any certificate with reference to the same and would state that only his assistant had prepared the sale agreement and furthermore, according to him, the witnesses would affix their signature only at the bottom of the sale agreement in the last page and would further state that the witness Muthukrishnan had not signed in his presence and further also admitted that the witness Gopalakrishnan PW2 had not signed in his presence and furthermore, clearly admitted that the witnesses of the sale agreement has not signed in his presence. The evidence of PW3 being as above, in such view of the matter, it is found that, as also determined by the first appellate Court, no safe reliance could be attached to his evidence for upholding the truth and validity of the sale agreement projected by the plaintiff.

12. The attesor Muthukrishnan who is said to have attested the Ex.A1 sale agreement has been examined as DW2 on behalf of the defendant and he would state that his signatures is not found in Ex.A1 sale agreement and according to him, his signature was sought in a promissory note and accordingly, he had put his signature and that there is no agreement between the plaintiff and the defendant with reference to the sale of the suit property. Despite cross examination, nothing has been culled out from DW2 to disbelieve his version.

13. Considering the evidence adduced on the side of the plaintiff, as above pointed out, it is found that the execution of the sale agreement on the part of the defendant, as put forth by the defendant, being shrouded in suspicious circumstances, it is highly doubtful that Ex.A1 sale agreement had been executed

by the defendant in favour of the plaintiff for selling the suit property. Accordingly, it is seen that the evidence of PWs 2 and 3 as well as DW2 had not supported the plaintiff's case that they had signed the sale agreement said to have been executed by the defendant with an intention to sell the suit property in favour of the plaintiff and considering the evidence of PWs 2 and 3 and DW2 in toto, as above discussed, the sale agreement Ex.A1 cannot be held to have been validly executed by the defendant in favour of the plaintiff.

14. According to the plaintiff, apart from the advance sum of Rs.40,000/- on the date of the sale agreement, the defendant had received a sum of Rs.2,000/- on 23.05.2005 and Rs.50,000 on 14.07.2005 towards the sale consideration and made an endorsement on the reverse side of the sale agreement. Strangely, with reference to the abovesaid endorsement said to have been made by the defendant on the reverse side of the sale agreement, no attester had attested the same and the plaintiff, during the course of cross examination, has admitted that for the payment of Rs.50,000/- and Rs.2,000/- there is no witness. The defendant had disputed the abovesaid alleged endorsement made by him for the receipt of Rs.2,000/- on 23.05.2005 and Rs.50,000 on 14.07.2005 towards the sale consideration.

15. According to the defendant, he had received a sum of Rs.40,000/- from the plaintiff on 07.03.2005 and Rs.2,000/- on 23.05.2005 by way of promissory notes and other than the abovesaid amounts, he had not received any other sum from the plaintiff and not made any endorsement in the sale agreement. In the light of the above factors, as rightly determined by the first appellate Court, when the plaintiff is found to be a moneylender and when the plaintiff has failed to establish the truth and validity of the sale agreement, particularly, that the same had been attested by the witnesses and by the scribe as put forth by him, in such view of the matter, when according to the defendant, the plaintiff has made use of his signature obtained in blank non judicial stamp paper at the time of lending of the loan amount and created a sale agreement and when the defendant, during the course of his evidence, has in particular disputed his signature in Ex.A1 sale agreement and would also contend that he would accept the plaintiff's case, if his signatures in Ex.A1 are found to be established through acceptable evidence. Despite the above position, as held by the first appellate Court, the plaintiff should have endeavoured to secure the assistance of an expert for comparing the admitted signature of the defendant with the disputed signature available in Ex.A1 sale agreement and on the other hand, the plaintiff for the reasons best known to him had not resorted to such a course. The abovesaid factors raise suspicion against the plaintiff's case, particularly, when the plaintiff has failed to establish the truth and validity of the execution of the Ex.A1 sale

agreement as above pointed out.

16. The plaintiff having come with the suit for the relief of specific performance based on Ex.A1 sale agreement, it is for the plaintiff to establish his readiness and willingness for securing the said relief. Even for the sake of arguments that the case of the plaintiff that the defendant had received, in all, a sum of Rs.92,000/- from him towards the sale price and the balance amount of Rs.16,100/- alone remains to be paid is true and when according to the plaintiff, the payment of Rs.50,000/- was received by the defendant on 14.07.2005 and if the plaintiff had really endeavoured to enforce the sale agreement and exhibited his readiness and willingness to pay the balance sum of Rs.16,100/- and obtain the sale deed, nothing prevented the plaintiff from tendering the abovesaid sum to the defendant immediately and requesting him to execute the sale deed in respect of the suit property. In this connection, the plaintiff has very vaguely pleaded that he had approached the defendant many times and requested to execute the sale deed after receiving the balance sum of Rs.16,100/- and in such circumstances, if really he had approached the defendant for paying the balance sum of Rs.16,100/- and on some reasons, the defendant had refused to accede to his request. With reference to the abovesaid factors, there are no clear pleas put forth in the plaint. If according to the plaintiff, the defendant had been evading to receive the abovesaid sum and execute the sale deed, on noticing the said attitude of the defendant, as a prudent person immediately the plaintiff should have issued a legal notice to the defendant calling upon him to receive the balance sum and execute the sale deed in his favour. On the other hand, the conduct of the plaintiff in issuing the legal notice only on 16.02.2008 i.e. nearly three years after the receipt of the last payment made on 14.07.2005 for a sum of Rs.50,000/- as above stated, the above conduct of the plaintiff would not only show that there has been complete absence of readiness and willingness on the part of the plaintiff in going ahead with the enforcement of the sale agreement but also it is found that the plaintiff has been not showing any anxiety and readiness and willingness to proceed further by way of the sale agreement and complete the sale transaction and on the other hand, he had taken his own time in issuing the legal notice and thereafter, after receiving the reply from the defendant, had chosen to institute the suit against the defendant on 04.04.2008. As above pointed out, there is no proof on the part of the plaintiff that he had paid a sum of Rs.50,000/- to the defendant on 14.07.2005. The defendant had not admitted his signature qua the alleged endorsement found in the reverse side of the sale agreement. Even according to the plaintiff, there is no witness to the same. The plaintiff has not subjected the questioned signatures of the defendant in Ex.A1 sale agreement by way of an expert scrutiny. With reference to the same, no

valid reason has been projected on the part of the plaintiff. The agreement of sale, on the face of it, does not buttress the plaintiff's case. As above pointed out, the scribe has also not supported the plaintiff's case in any manner and the plaintiff has failed to establish his readiness and willingness to complete the sale transaction and there is complete absence of readiness and willingness on the part of the plaintiff from 14.07.2005 to 16.02.2008. All these factors taken as a whole would only lead to the conclusion that considering the conduct of the plaintiff on the whole and furthermore, when as per Ex.A1 sale agreement, the parties had fixed a time limit of three months for completing the sale transaction and when by way of the alleged endorsement said to have been obtained from the defendant on the reverse side of the sale agreement no time limit had been contemplated by the parties in any manner and though time may not be the essence of the contract in respect of the immovable property, however, the parties have determined the outer time limit for completing the sale transactions and the same cannot be ignored in toto. In such view of the matter, considering the matter wholly and lack of readiness and willingness on the part of the plaintiff, even assuming that the defendant had been evading to complete the sale transaction as sought to be projected by the plaintiff, on the other hand, when he is found to have chosen to issue the legal notice nearly three years after the execution of the sale agreement, in all, it is found that as determined by the first appellate Court, there is total inaction and absence of readiness and willingness on the part of the plaintiff in performing his part of the contract. Further, the plaintiff has failed to prove that Ex.A1 sale agreement is a true one. In such view of the matter, the first appellate Court is found to be wholly justified in declining the relief of specific performance as prayed for by the plaintiff.

17. The reasonings and conclusions of the first appellate Court for declining the relief of specific performance in favour of the plaintiff being founded on the proper appreciation of the materials available on record and centering on factual matrix and also based on the proper application of the principles of law governing the issues involved between the parties and not suffering from any infirmity or perversity, it is found that the same do not warrant any interference.

18. The plaintiff's counsel, in support of his contentions, placed reliance upon the decision reported in (2015) 6 MLJ 132 George Kavalam Vs. P.Vijayalakshmi. The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the case at hand.

19. In my considered opinion, no substantial question of law is found to be involved in the second appeal. Be that as it

may, the substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant. Resultantly, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (ADI-MDU)

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Sub Assistant Registrar

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