

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.09.2019

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.248 of 2016  
and  
C.M.P.No.4814 of 2016

1. B.Rajeswari
2. B.Rajesh

...Appellants/Respondents/Defendants

Vs.

1. B.Vinayagam ...Respondent/Appellant/Plaintiff
2. M.Balaraman
3. Kanniappan ...Respondents/Respondents/Defendants

Prayer: The Second Appeal is filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 20.11.2013 made in A.S.No.50 of 2011 on the file of the learned Additional District Judge, Chengalpattu reversing the judgment and decree dated 13.07.2011 made in O.S.No.281 of 2006 on the file of the Principal Subordinate Judge, Chengalpattu.

For Appellants : Mr.G.T.Subramanian

For Respondents : Mr.K.P.Gopalakrishnan - R1  
No appearance- R2 and R3

JUDGMENT

The defendants 1 and 2 in O.S.No.281 of 2006 have filed this second appeal aggrieved by the judgment and decree in A.S.No.50 of 2011, on the file of the learned Additional District Judge, Chengalpattu, in and by which the learned District Judge, reversed the judgment and decree of the trial Court, dated 13.07.2011, in O.S.No.281 of 2006 on the file of the learned Principal Subordinate Court, Chengalpattu.

2. The suit in O.S.No.281 of 2006, was filed by the first respondent herein seeking specific performance of the agreement of sale dated 08.08.2006. According to the plaintiffs/defendants 1 to 4 who were owners of certain

immovable properties at Ponvilainthakalathur Village, had entered into an agreement on 08.08.2006 agreeing to sell the properties for a total consideration of Rs.9,69,000/-. The defendants have received Rs.5,01,000/- towards advance on the date of execution of sale agreement. It was agreed between the parties that balance of sale consideration was to be paid within 15 days from producing the chitta and adangal by the defendants. The defendants 3 and 4, on 01.10.2006, received from the plaintiffs a further payment of Rs.2,16,000/- . The defendants 3 and 4 had made an endorsement acknowledging the payment of Rs.2,16,000/- on the reverse of the agreement. It is also contended that the defendants 3 and 4, had pursuant to the agreement dated 08.08.2006, executed a sale deed in favour of the plaintiff on 04.10.2006. Since the defendants 1 and 2 did not come forward to execute the sale deed, the plaintiff had filed the above suit seeking the relief of specific performance.

3. The defendants 1 and 2 resisted the suit contending that they never entered into an agreement for sale with the plaintiffs. It is further claimed that the suit agreement would have been created by the 3<sup>rd</sup> defendant viz., Balaraman, who had taken the signatures of the defendants 1 and 2 in certain blank papers for the purpose of obtaining loans. The defendants 1 and 2 would also contended that the suit agreement itself is forged document and they are not liable to honour the same. Pending the suit, an application was taken out by defendants 1 and 2 for referring for the suit agreement to the hand writing experts for comparing the second defendant signature found in the sale agreement. The said application was allowed and the document was referred for expert opinion. The admitted signature of the second defendant contained in the Driving License was also forwarded to the expert for comparison. The report of the forensic expert was marked as Ex.B5. The Expert gave an opinion that the disputed signature found in the document does not tally with the admitted signature of the second defendant. The expert was also examined as D.W.3.

4. At trial, the plaintiff examined himself as P.W.1. One Ekambaram, an attester to Ex.A1 agreement was examined as P.W.2 and Balaraman, the third defendant was examined as P.W.3. Ex.A1 to A7 were produced on the side of the petitioner. The second defendant examined one Rajesh as D.W.1 and one Rangan, brother of the third defendant Balaraman was examined as D.W.2. As already stated, the forensic expert was examined as D.W.3. Ex.B5 is the hand writing expert's opinion.

5. On consideration of the evidence on record, the trial Court came to the conclusion that the opinion of the expert

should be accepted as nothing substantial was elicited in the cross examination of the hand writing expert in order to discredit his report or his evidence. Going by the report and also the evidence and the trial Court concluded that the second defendant has not signed in the agreement i.e. Ex.A1. On the said conclusion, the learned Subordinate Judge dismissed the suit, holding that the suit being one for the specific performance and the relief being discretionary, he was not convinced to exercise that discretion in favor of the plaintiff.

6. Aggrieved, the plaintiff filed an appeal in A.S.No.50 of 2011. Pending appeal an application was taken out in I.A.No.417 of 2012 seeking to have the signature of the first defendant found in Ex.A1 agreement compared with the admitted signatures found in the sale deed dated 28.07.2005. The said application was allowed and the Commissioner had taken the document to the hand writing expert. The hand writing expert found that the signature of the first defendant was not found in the sale deed dated 28.07.2005 and returned the papers. Upon such return, the learned counsel for the appellant, not pressed the application in I.A.No.417 of 2012 and the same was dismissed on 17.03.2015. Thereafter, another application was filed by the plaintiff/appellant seeking to compare the signatures of the first defendant found in Ex.A1 with the another sale deed dated 25.07.2005, wherein the first defendant has figured as identifying witness. The lower Court dismissed the said application.

7. On merits, the lower appellate Court found that the defendants have admitted there signatures in Ex.A1 and therefore, no credence could be attached to the report of the expert, wherein it is stated that the signature found in the agreement does not tally with that of the admitted signatures. Upon such finding, the learned Appellate Judge decreed the suit and chose to reverse the judgment of the trial Court and decreed the suit for specific performance.

8. Being aggrieved by the said reversal, the defendants 1 and 2 have come forward with the present second appeal.

9. The following questions of law have been framed by this Court at that time of admission of the second appeal:-

(i) whether the plaintiff is entitled for a decree for specific performance while he had failed to prove the execution of the agreement and payment of money to other party?

(ii) whether the expert opinion and the finding of the trial Court are against the plaintiff can it be ignored by the Appellate

Court without assigning any reason and substantial evidence?

10. I have heard Mr.G.T.Subramanian, learned counsel appearing for the appellant and Mr.K.P.Gopalakrishnan, learned counsel appearing for the respondent and perused the materials available on record before this Court.

11. Mr.G.T.Subramanian, learned counsel appearing for the appellant would vehemently contend that the appellate Court was not right in concluding that the appellants have admitted their signatures in Ex.A1 by drawing my attention to the reply notice in Ex.A4 as well as plea in written statement.

12. Mr.G.T.Subramanian, would contend that all the Exhibits cited in the suit agreement would have been created with the signatures obtained by the 3<sup>rd</sup> defendant Balaraman in the blank stamp papers which he had taken under the guise of obtaining loan. After the inspection of the documents, they found that the signatures are not theirs. Hence, they have filed an application to have the signature of the second defendant compared. Therefore, they got the document referred to the expert and upon reference, the expert has given an opinion that the signature did not tally. According to Mr.G.T.Subramanian, there is no unqualified admission of signatures in Ex.A1 agreement by the defendants 1 & 2. He would point out that it is the specific case of the plaintiff is that the defendants 3 and 4 had executed Ex.A7 sale deed dated 04.10.2006, pursuant to the agreement dated 08.08.2006. He would however, contended that the sale deed dated 04.10.2006, does not refer to the agreement dated 08.08.2006 and the payment of advance made thereunder. He would also draw my attention that P.W.3 Balaraman who is the third defendant in the suit has received the entire advance amount paid on 08.08.2006 and 01.10.2006. Therefore, according to Mr. G.T.Subramanian, the lower appellate Court was not right in reversing the well considered judgment of the trial Court.

13. Contending contra Mr.K.P.Gopalakrishnan, learned counsel appearing for the plaintiff/first respondent would submit that once the signatures are admitted the onus of proof shifts and it is for the defendants to show that the agreement was created by using their signatures. He would also draw the attention of this Court to the evidence of P.W.2 to the effect that he had seen the defendants signing the sale agreement and receiving part of the sale consideration. Therefore the lower Appellate Court was justified in reversing the judgment and granting specific performance.

14. I have heard the rival submissions.

15. It is for the plaintiff, in a suit for the specific performance, to prove the genuineness of the sale agreement beyond all reasonable doubt. If the Court finds that there are certain suspicious circumstances which create a cloud over genuineness of the agreement, it is open to the Court to refuse the relief of specific performance. The lower Appellate Court had gone by what it assumed to be an admission of execution of the agreement by the defendants 1 and 2 in the reply notice and the written statement. In both the reply notice as well as the written statement, the defendants 1 and 2 have stated that there is a possibility of the agreement having been created by using the blank stamp papers obtained by the 3<sup>rd</sup> defendant. In the written statement, the defendants have specifically stated that the agreement is a forged instrument. Not stopping with that the defendants 1 & 2/appellant had taken steps to have the documents sent to an expert and got it compared with admitted signatures. The report of the expert has also been filed as Ex.P5. The Expert has also appeared as D.W.3 and deposed in support of his opinion. Both the Courts below have not found that the evidence of D.W.3 cannot be relied upon or the evidentiary of the value of the report was doubtful. The trial Court has also compared the signature, exercising its power under Section 73 and concluded that the signature of the 2<sup>nd</sup> defendant found in the Driving License(admitted signature) and the signatures found in the suit agreement Ex.A1(disputed signatures) did not tally. The lower Appellate Court has nearly gone by what it assumed to be an unqualified admission of the signature by the defendants in Ex.A1. I am unable to agree with the said conclusion arrived at by the appellate Court. Yet another circumstance, which militates against the claim of the plaintiff is the sale deed Ex.A7, dated 04.10.2006 which is stated to have been executed pursuant to the agreement dated 08.08.2006. No where the sale deed refers to the said agreement. The plaintiff who has paid nearly Rs.7,17,000/- as on the date of Ex.A7, would not have paid a sum of Rs.1,92,500/- on 04.10.2006 without even a reference to the payments under the said agreement. Therefore, in my considered opinion, the lower Appellate Court was not right in believing the case of the plaintiff and going by what it thought to be an unqualified admission in reply notice and written statement. The lower Appellate Court was therefore not right in granting a decree for specific performance. Moreover, the evidence points out that one of the parties, was not signatory to the agreement and the signature was forged. Specific performance being a discretionary relief, cannot be granted for mere asking more so when, it is shown that the plaintiff has not come to Court with clean hands. Therefore,

specific performance has to be necessarily refused.

16. The Question of Law No.1:- Question of law No.1 is answered to the effect that the lower Appellate Court was not right in granting a decree for specific performance in view of the failure on the part of the plaintiff to prove the execution of Ex.A1 agreement and the receipt of the money by both defendants 1 and 2.

17. The Question of Law No.2 The lower Appellate Court has ignored the expert opinion by citing certain judgments wherein it has been held that expert opinion is very weak evidence unless it is proved by examination of the expert. The lower Appellate Court had totally overlooked the fact that the expert has been examined as D.W.3. It has not considered the evidence of the expert and reached a conclusion that the report of the expert is not reliable. No doubt the expert's opinion is not final and it is for the Court to accept or reject the expert opinion. While rejecting the opinion of the expert, that too an expert who has deposed in Court, the Court must give cogent and convincing reasons for such rejection. The lower Appellate Court has not even attempted to examine the evidence of D.W.3 in order to find out whether his report could be relied upon or not. The opinion of the expert was simply brushed aside. I find that the procedure adopted by the lower Appellate Court is totally unconvincing. Hence, Questions of law No.2 is also answered in favor of the appellant to the effect of the lower Appellate Court was not right in ignoring the opinion of the expert.

18. In view of the answers to the Questions of law Nos.1 and 2, as above, the Second Appeal is allowed. The judgment and decree of the lower Appellate Court are set aside. The judgment and decree of the trial Court are restored. The suit in O.S.No.281 of 2006 will stand dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar (CS-VIII)

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Sub Assistant Registrar

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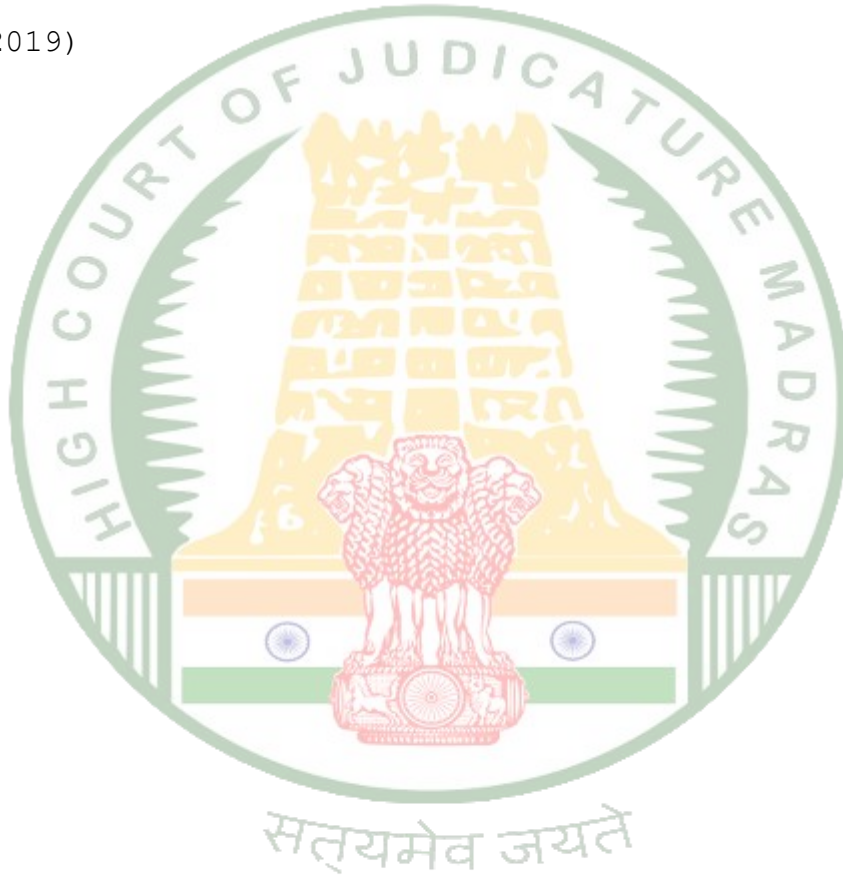
1. The Additional District Judge, Chengalpattu.
2. The Principal Subordinate Court, Chengalpattu.

Copy to: The Section Officer,  
VR Section, High Court, Madras-104

+lcc to Mr.Mahmood Aslam, Advocate SR.83880/19  
+lcc to Mr.K.P.Gopalakrishnan, Advocate SR.77441/19

S.A.No.248 of 2016  
and  
C.M.P.No.4814 of 2016

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CB(12/11/2019)



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