IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.228 of 2013
and
CROS.OBJ.No.51 of 2014

S.Senthil Kumar ..Appellant/Plaintiff in A.S.No.228 of 2013

K.C.Varadharajan
...Cross objector in Cros.Obj.No.51 of 2014

vs.

K.C.Varadharajan
..Respondent/Defendant in A.S.No.228 of 2013

S.Senthil Kumar ...Respondent in Cros.Obj.No.51 of 2014

Prayer in A.S.No.228 of 2013 : First Appeal filed against the Judgment & Decree dated 19.04.2013 passed in O.S.No.36 of 2012 on the file of the 1st Additional District and Sessions Judge, Vellore.

Prayer in Cros.Obj.No.51 of 2014: Cross objection filed under Order 41 Rule 22 read with Section 151 of the Code of Civil Procedure, to set aside the decree of the learned First Additional District and Sessions Judge, Vellore in O.S.No.36 of 2012 dated 19.04.2013.

For Appellant in A.S.No.228 of 2013 : Mr.D.Rajagopal

For Respondent in A.S.No.228 of 2013 : Mr.V.Raghavachari

For Cross-objector in Cros.Obj.No.51 of 2014 : Mr.V.Raghavachari

For Respondent in Cros.Obj.No.51 of 2014 : Mr.D.Rajagopal

JUDGMENT

The appeal suit is filed against the judgment and decree dated 19.04.2013 passed in O.S.No.36 of 2012 on the file of the 1st Additional District and Sessions Judge, Vellore.

2. The plaintiff is the appellant in the appeal suit. The suit was instituted for specific performance and for permanent injunction with costs.

3. The facts in nutshell narrated in the plaint are that the defendant agreed to sell the suit property to the plaintiff for a sum of Rs.15,00,000/-. The plaintiff was doing business in the suit property for several years as a tenant. On negotiation, the sale consideration was fixed as Rs.10,00,000/- and they have entered into an agreement dated 28.02.2005. The defendant had received a sum of Rs.1,00,000/- as advance and promised to execute the sale on or before 27.02.2008. Even though the plaintiff was ready and willing to purchase the property, the defendant had evaded the execution of sale. Considering the relationship between the plaintiff and the defendant, there was a compromise and both of them had agreed for a sum of Rs.15,00,000/-, by cancelling the previous agreement. They have executed another sale agreement on 15.05.2008 and the said sale agreement was registered under Document No.4848/2008. Initially, the defendant had received a sum of Rs.2,00,000/- as advance and the defendant had promised to perform his part of contract on or before 14.05.2011. The defendant had received further advance amount of Rs.8,65,000/- on 19.05.2008 and Rs.3,35,000/- on 22.05.2008 and endorsed the same on the reverse side of the agreement. The plaintiff states that he is ready and willing to perform his part of the contract by paying the remaining balance consideration of Rs.1,00,000/-. However, the defendant was evading and not willing to perform his part of the contract. Thus, the plaintiff issued a legal notice to the defendant on 09.04.2011. The defendant sent a reply notice dated 25.04.2011 with false averments and made an attempt to alienate the property to some other third party. Thus, the plaintiff was constrained to institute the suit for specific performance.

4. The defendant disputed the allegations and denied

the averments in the plaint, by filing a written statement, for dismissal of the suit filed by the plaintiff. The written statement states that "the plaintiff not approached the court with clean hands. The defendant never agreed to sell the property to the plaintiff at any point of time. As per the final decree passed in O.S.No.114/1999 of Sub-Court Vellore between the defendant and his sons, a huge value of 15 items of properties described in the final decree were allotted to share of this defendant. The properties which were shown as 2nd and 5th items in the final decree are described as suit schedule property. As per the Government guidelines, the value of the suit property on the date of sale agreement is Rs.41,91,000/-. This defendant has no necessity to sell the property to the plaintiff. The plaintiff being the tenant in the suit property, used to involve in money lending transactions with the sons of this defendant. In the said process, the plaintiff is used to give money based on the suit properties by creating agreement of sale and he used to cancel the said agreement after receiving the amount then and there. In such a way on 29.01.2004, the plaintiff entered into a sale agreement with this defendant and the same was cancelled as per the cash receipt dated 22.01.2007. Similarly on 30.04.2007, the plaintiff entered into a sale agreement with the son of this defendant and the same was cancelled as per the sale agreement cancellation deed dated 04.02.2011. This defendant converted one of his property into plots after execution of the sale agreement and in due process this defendant has settled the money by selling the plots and from various sources. On 29.12.2008, the plaintiff visited the house of this defendant and received Rs.2,00,000/- towards sale consideration mentioned in the sale agreement as first installment. In the continuing process, on 28.03.2009, this defendant gave Rs.1,00,000/- and on 02.04.2009, he gave Rs.1,30,000/- to the plaintiff through his son Thiru.K.V.Elangovan. On 15.04.2009, on behalf of plaintiff, his servant by name Thir.Muthukrishnan, visited the house of this defendant and received Rs.5,70,000/-. On 08.09.2009, on behalf of the plaintiff, his close friend namely Thiru.K.Rajendran received Rs.4,00,000/- from KV Elangovan who is the son of this defendant. Finally on 02.01.2010, this defendant gave Rs.1,00,000/- and settled the amount in entirety and also adjusting the rent due by the plaintiff towards interest for the sale consideration. By suppressing all the above facts, the plaintiff with malafide intention filed this suit. The suit is devoid of merit. Hence the suit might be dismissed with compensatory costs of this defendant."

5. The trial Court framed the issues as to whether the sale agreement dated 15.05.2003 is true and valid? whether the plaintiff is entitled for specific performance of contract as prayed for? whether the plaintiff is entitled to permanent injunction as prayed for? to what other relief the plaintiff is entitled?

6. On the side of the plaintiff, P.W.1 and P.W.2 were examined. Exs.A1 to A9 were marked. On the side of the defendant, D.W.1 to D.W.3 were examined.

7. With reference to issue No.1, the Trial Court considered the documents as well as the evidence. Ex.A1, suit sale agreement dated 15.05.2008, is the registered sale agreement entered into between the plaintiff and the defendant. The contents of the agreement reveals that the defendant had agreed for a sum of Rs.15,00,000/- and he had received a sum of Rs.2,00,000/-, at the time of entering into an agreement and thereafter, received further advance and in total, the plaintiff had paid Rs.14,00,000/- by way of advance in favour of the defendant. It is contended by the defendant that the plaintiff is a tenant under him and whenever the defendant is in financial difficulties, he used to get money from the plaintiff and execute sale agreement in favour of the plaintiff for the amount received by him. The defendant's son also used to get loan from the plaintiff. Therefore, sale deed was never intended for the purpose of execution of sale and it was executed as security for the purpose of loan obtained from the plaintiff. This apart, other promissory note executed by the defendant and his sons, were marked as documents. Various documents were filed by the parties to the suit revealed that there was a money transaction between the plaintiff and the defendant, and the plaintiff had been lending the money to the defendant as well as his sons. Therefore, the trial Court believed the contention of the defendant by holding that the suit sale agreement was not intended for the purpose of execution of sale but it is executed as a security in respect of loan borrowed by the defendant and his sons. This being the findings of the Trial Court, this Court also found that various other documents marked, for instance, Ex.B9 and B5 and other connected documents goes to show that there was a loan

transaction between the plaintiff and the defendant as well as defendant's sons. This apart, the reverse side of Ex.A1, Ex.A5 and Ex.A6, also reveals that the defendant has received a sum of Rs.8,65,000/- on 19.05.2008 and Rs.3,35,000/- on 22.05.2008. The plaintiff has given a total sum of Rs.14,00,000/- to the defendant, whereas the total sale consideration is Rs.15,00,000/-. Therefore, Ex.A2 dated 09.04.2011, is the legal notice issued by the plaintiff to the defendant thereby demanding to receive a sum of Rs.1,00,000/- from the plaintiff and execute the sale deed in favour of the plaintiff. Relying on these aspects, the trial Court arrived at a conclusion that Ex.A1, the sale agreement executed between the plaintiff and the defendant is not the sale agreement as contended by the plaintiff. In fact, the said document was executed for the sake of guarantee towards the loan borrowed by the defendant from the plaintiff. The plaintiff right from the year 2004 onwards, is having money transaction with the defendant and his sons. Already prior to Ex.A1, there are two sale agreements in between the plaintiff and the defendant which were not ended in sale. However, the amount was settled and the agreement was thereby canceled. Thereafter, considering all these aspects, the trial Court arrived at a conclusion that the suit sale agreement was executed towards guarantee for the purpose of return of sum advanced by him.

8. With reference to issue No.2, the trial Court found that the entire due amount under Ex.A1 was settled on various occasions. In the absence of receipts that the entire amount was settled to the plaintiff, the Trial Court hold that the entries made in Ex.B10, B11 and B12 does not have any evidentiary value, so as to presume that the defendant has paid the entire amount due under Ex.A1. Thus, the claim made by the defendant that he has paid the entire amount to the plaintiff is unsustainable one. Under these circumstances, the Trial Court found that the plaintiff has not approached the Court with clean hands and therefore, the plaintiff is not entitled for the relief of specific performance. In this case, the trial Court has declined to grant the relief of specific performance. Therefore, even in the absence of any alternative relief, this Court has to consider the grant of refund of advance amount under the general relief clause which is Order 7 Rule 7 read with Order XLI Rule 33 of C.P.C. Under Order 7 Rule 7, the Courts are empowered to consider the grant of general

relief and Order XLI, Rule 33 of the Code of Civil Procedure enumerates that "the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection". Therefore, the Trial Court granted the general relief by molding the prayer for grant of the relief of refund of advance amount with interest in the event of rejection of the relief of specific performance and the Appellate Court by invoking Order XLI, Rule 33 also grant the similar relief in respect of the appeals preferred against the judgment and decree of the Trial Court. In either of the circumstances, both the Trial Court as well as the Appellate Court are empowered to grant the consequential relief of return of advance amount in the event of rejection of the relief of specific performance on the basis of the principles of equity. Therefore, there is no impediment either for the Trial Court or for the Appellate Court to grant the alternate relief of refund of advance amount to either of the parties to the civil suit or an appeal in the event of rejecting the relief of specific performance in a suit or in an appeal suit."

9. Thus, this Court is inclined to consider the issue No.4 in favour of the plaintiff and accordingly, the plaintiff is entitled for the relief of refund of advance, which is to be made by the defendant, along with interest at the rate of 10% per annum from the date of plaint till the date of decree and thereafter, 6% per annum till the date of realisation. Accordingly, the judgment and decree dated 19.04.2013 passed in O.S.No.36 of 2012 is confirmed, with reference to the rejection of relief of specific performance and with reference to the alternative relief, the respondent is directed to refund the advance amount of Rs.14,00,000/- along with interest at the rate of 10% per annum from the date of plaint till the date of decree and thereafter, 6% per annum till the date of realisation and the said amount is directed to be settled in favour of the appellant within a period of four months from the date of receipt of a copy of this Judgment. Accordingly, the appeal suit stands partly allowed. No costs.

10. In view of the orders passed in the first appeal, no further consideration is required and cross-objection stands dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//
Sub Assistant Registrar

ssb

To

The 1st Additional District
and Sessions Judge, Vellore.

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

+1cc to Mr.D.Rajagopal, Advocate, S.R.No.9187
+1cc to Mr.V.Raghavachari, Advocate, S.R.No.9370

A.S.No.228 of 2013
and CROS.OBJ.No.51 of 2014

EV(CO)
CB(28/08/2020)