IN THE HIGH COURT OF JUDICATURE OF MADRAS

Reserved on: 13.01.2020

Delivered on: 22.01.2020

Coram:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

S.A.No.1172 of 2007

1.S.Vijaya
2.Siyamala Devi
3.P.S.Ravindra Babu ... Appellants/ Respondents/Plaintiff

vs.

A.Subramani .. Respondent/ Appellant/ Defendant

Second Appeal is filed against the judgement and decree dated 15.12.2005 passed by the Additional Subordinate Judge, Salem, A.S.No.72 of 2005 reversing the judgement and decree dated 02.08.2004 passed by the Principal District Munsif, Salem, in O.S.No.386 of 2004.

For Appellants :: Mr.V.R.Rajasekaran

For Respondent :: No appearance

JUDGEMENT

This second appeal is filed by the plaintiffs in the suit as against the judgement and decree, dated 15.12.2005, passed by the Additional Subordinate Judge, Salem, in A.S.No.72 of 2005, reversing the judgement and decree, dated 02.08.2004, passed by the Principal District Munsif, Salem, in O.S.No.386 of 2004, which was one for return of money.

2.The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3.The Appellants herein are the plaintiffs in the suit and the respondent is the defendant. The first plaintiff had entered

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into a sale agreement (Ex.A1) with the respondent/defendant for sale of the suit schedule property, on 16.06.1999, by fixing the sale consideration at Rs.2,25,000/- and also paid a sum of Rs.75,000/- as advance to the defendant on the date of agreement. The time for execution of the sale was fixed as six months from the date of agreement-Ex.A1. According to the plaintiffs, though they were willing to perform their part of the contract and was ready to execute the sale deed, there was no response from the defendant in complying with the sale agreement. In the said circumstances, the plaintiffs issued a legal notice-Ex.A2, on 22.11.1999, calling upon the defendant to receive the balance sale consideration and execute the sale deed. The defendant failed to comply with the demand made in the legal notice Ex.A2 nor had chosen to give any reply to the notice, despite the receipt of the same. Acknowledgement card is also marked as Ex.A3, in the suit proceedings.

4.In the above circumstances, the plaintiffs approached the trial Court by laying a suit in O.S.No.386 of 2004, on 10.01.2000, seeking a decree for return of the advance amount of Rs.75,000/- with interest at 12%, put together Rs.80,075/-, till the date of filing of the suit i.e. 09.01.2000 and to pay future interest at the rate of 12% per annum from the date of suit till the realisation and also to create a charge over the suit schedule property, for realisation of the said consideration.

5.The suit was resisted by the defendant completely denying the factum of execution of the sale agreement (EX.A1). In the written statement, the defendant also pleaded that the description of property and the property Tax Assessment mentioned in the suit schedule property did not tally and was incorrect and therefore, prays for dismissal of the suit.

6.The trial Court, after framing the issues, has proceeded to examine the evidence let in on behalf of the plaintiffs. On behalf of the plaintiffs, two witnesses, viz., P.W.1 and P.W.2 were examined and three documents were marked as Exs.A1 to A3. P.W.1 is the wife of the first plaintiff. The first plaintiff died during the time of trial. P.W.2, a business man dealing with silver ornaments, was an independent witness, who vouched the fact of payment of Rs.75,000/- towards advance by the first plaintiff to the defendant. Ex.A1 is the sale agreement dated 16.06.1999, Ex.A2, dated 22.11.1999, is an Advocate notice issued on behalf of the plaintiffs, and Ex.A3, dated 26.11.1999, is an acknowledgement card signed by the defendant for having received the legal notice dated 22.11.1999.

7.After appreciating the oral and documentary evidence, the trial Court had come to a definite conclusion that the plaintiffs had made out a case for grant of relief and

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accordingly decreed the suit in favour of the plaintiffs by directing the defendant to pay a sum of Rs.80,078/- with interest at the rate of 12% per annum from the date of sale agreement till the date of decree and thereafter at the rate of 9% per annum till the date of realisation of the amount. However, the trial Court did not grant any relief in respect of the prayer for creating a charge over the suit schedule property for realising the amount.

8.The trial Court, while granting the decree in favour of the plaintiffs, has compared the signature of the defendant in Ex.A3, viz., the Acknowledgement card, dated 26.11.1999 and also in Ex.A1-sale agreement, dated 16.6.1999, and found that the signatures in both the documents tallied with each other and therefore, discountenanced the plea of the defendant. In respect of the denial of the defendant with regard to the execution of the sale agreement-Ex.A1, the trial Court found that the independent witness P.W.2 has spoken about the payment of advance amount of Rs.75,000/- to the defendant under the sale agreement-Ex.A1. In fact, the defendant, at the time of trial, raised a plea of registered mortgage of the suit schedule property, dated 01.03.1999, which was marked as Ex.B1, in favour of the Urban Co-operative Bank and pleaded that there was no necessity for entering into a sale agreement with the first plaintiff. The trial Court held that mortgaging the suit schedule property in favour of the Urban Co-operative Bank had nothing to do with the sale agreement entered into by the defendant with the first plaintiff and in respect of the discrepancies in the description of property, viz., wrong door number and house tax assessment, it was held that they were too minor discrepancies, which could be ignored. There was also a plea taken on behalf of the defendant that the defendant was only a co-sharer of the property along with his wife. In any event, the plaintiffs have filed the suit only for recovery of the money paid as advance under Ex.A1-the sale agreement and not for specific performance.

9.As against the judgement and decree of the trial Court, dated 02.08.2004, the defendant filed an appeal before the Additional Subordinate Judge, Salem, in A.S.No.72 of 2005. Before the lower Appellate Court, the defendant filed two I.As, viz., I.A.Nos.84 and 88 of 2005 with the prayer to produce additional documents and additional evidence. Along with I.A.No.88 of 2005, the defendant had also filed additional written statement, giving the details of the silver business transaction between him and the first plaintiff during the year 1997 and the running account was being maintained by the fourth plaintiff in connection with the said transaction. However, the lower appellate Court, by order dated 21.11.2005, dismissed both the I.As.

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10.The lower appellate Court, after hearing the parties, has decreed the appeal and set aside the judgement and decree of the trial Court. According to the lower appellate Court, the first plaintiff, while entering into a sale agreement, had not verified the encumbrance certificate as a bona fide purchaser. The trial Court, which decreed the suit in favour of the plaintiffs, had not taken into consideration the execution of mortgage deed Ex.B1, dated 01.03.1999. The appellate Court also found that the trial Court had not taken into consideration in proper perspective about the discrepancies in the description of the suit schedule property. The lower appellate Court had also held that there was a long time gap between the date of purchase of stamp paper (19.9.1997) and the date of execution of the sale agreement dated 16.09.1999. The lower appellate Court has also observed that P.W.1, who was the wife of the first plaintiff, had deposed that advance amount of Rs.25,000/- was paid under the sale agreement-Ex.A1, whereas, the claim of the plaintiffs was Rs.75,000/-. The appellate Court also held that while entering into the sale agreement-Ex.A1, the defendant was owning only half share in the property and the other co-sharer, viz., the wife of the defendant, was not a party to the agreement.

11.In consideration of the above factors, the lower appellate Court reversed the judgement and decree of the trial Court and decreed the appeal in favour of the defendant in the suit. As against the judgement and decree of the lower appellate Court, the present Second Appeal has been filed by the plaintiffs.

12.The Second Appeal was admitted by this Court on the following Substantial Questions of Law:

> "(i)Whether the lower appellate Court is justified in taking a different view as to Ex.A1 and thereby reversing the findings rendered by the trial Court as to the genuineness of Ex.A1 by comparing the disputed signature of the respondent herein with admitted one available on record?
>
> (ii)Whether the approach of the lower appellate Court in taking certain circumstances as relevant factors to decide the genuineness of Ex.A1 is correct and sustainable in law when the trial Court ventured to compare the disputed signature and rested its findings on such basis in the light of the law laid down by the Supreme Court in (1999) 6 SCC 104 (K.S.Satyanarayana vs. V.R.Narayana Rao?)

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(iii)Whether the judgement and decree of the lower appellate Court are liable to be aside for the reason of misappreciation of oral and documentary evidence available on record?

(iv)Whether the judgement and decree of the lower appellate Court are not perverse as the same has taken into consideration several factors which are not relevant to prove the genuineness of Ex.A1?"

13.Mr.T.R.Rajasekaran, learned counsel appearing for the appellants/plaintiffs would submit that the lower appellate Court has completely erred in taking into consideration extraneous factors while reversing the judgement and decree of the trial Court. According to the learned counsel, the lower appellate Court had failed to appreciate that the defendant had taken a contrary stand in the additional written statement to the effect that at particular point of time he had ongoing business transaction i.e. Silver business, with the first plaintiff and an account was being maintained; whereas, in the original written statement, he had completely denied the execution of sale agreement (Ex.A1) . The learned counsel would submit that the lower appellate Court had extensively relied on mortgage deed dated 01.03.1999 executed by the defendant in favour of the Urban Co-operative Bank, without appreciating the fact that the property mortgaged can be subjected to agreement of sale and there was no bar for that.

14.As regards the evidence of P.W.1 is concerned, the learned counsel would submit that the trial Court has correctly held that P.W.1 is the wife of the first plaintiff, who was no more at the time of trial and therefore, P.W.1's deposition about the amount advanced need not be given undue importance, particularly, in the teeth of the fact that independent witness P.W.2 had deposed clearly that Rs.75,000/- was paid by the first plaintiff at the time of execution of Ex.A1-the sale agreement. The other factors relied on by the lower appellate Court regarding the plaintiffs had not perused the original title deed and verified the encumbrance certificate are concerned, according to the learned counsel, it is not incumbent upon the plaintiffs to verify the title while entering into a sale agreement and the absence of the scribe name in the agreement was not fatal to the relief being claimed by the plaintiffs. The time gap, as mentioned by the lower appellate Court, was not also fatal to the relief being claimed by the plaintiffs. Therefore, the learned counsel would submit that the lower Appellate Court has miserably failed to appreciate that the transaction was not successfully rebutted by the defendant and the defendant's stand on the other hand was inconsistent both

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before the trial Court as well as the lower appellate Court. The learned counsel for the appellants/plaintiffs would therefore submit that the judgement and decree of the trial Court are to be upheld and the judgement and decree of the appellate Court are liable to be set aside.

15.Despite notice having been served on the respondent/defendant and his name also appeared in the cause list, after service of notice, today, when the matter is taken up for final disposal, no one appeared on behalf of the respondent.

16.Considered the arguments of Mr.T.R.Rajasekaran, learned counsel appearing for the appellants/plaintiffs and also considered the materials and pleadings of the parties.

17.The trial Court, while decreeing the suit in favour of the plaintiffs, has verified the signature of the defendant in the acknowledgement card Ex.A3, dated 26.11.1999 and the signature affixed in Ex.A1-sale agreement, dated 16.6.1999, and had come to the clear conclusion that the signatures tallied with each other. Therefore, the trial Court disbelieved the version of the defendant that there was no execution of Ex.A1-the sale agreement, dated 16.06.1999 at all. Moreover, the trial Court was right in coming to the conclusion in favour of the plaintiffs that when legal notice-Ex.A2, dated 22.11.1999, was issued, on behalf of the defendant no reply was sent, although receipt of legal notice was acknowledged on 26.11.1999 (Ex.A3).

18.The trial Court also was right in relying on the evidence of P.W.2, who was an independent witness, to the effect that Rs.75,000/- was paid at the time of execution of Ex.A1. The trial Court has rightly ignored the deposition of P.W.1, wife of the first plaintiff, in regard to her statement about the payment of Rs.25,000/-. The trial Court reasoned that she being the wife of the first plaintiff, could not be aware of the exact amount paid.

19.The trial Court has also held that the discrepancy as found in the suit schedule property was very minor in nature, which would not upset the claim of the plaintiffs. The trial Court has also correctly held that the plea of mortgage claimed by the defendant was not a proper rebuttal to the plea of the plaintiffs, as the sale agreement would always co-exist along with the mortgage. The trial Court is entirely right in appreciating the various facts and the rival pleas raised by the parties.

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20.On the other hand, this Court finds that the factors relied on by the lower appellate Court were completely misconceived and cannot be sustained either in law or on facts. It is not necessary for the plaintiffs to peruse the original title deed in order to enter into a sale agreement. In fact, the plea of the plaintiffs was that they believed that at the time of execution of the sale deed, the defendant would bring his wife. It is always possible for the party to bona fide believe such assurance and enter into sale agreement. Moreover, as rightly held by the trial Court, the existence of the mortgage with the Urban Co-operative Bank of the suit schedule property, by the defendant, dated 01.03.1999, cannot be a bar to enter into a sale agreement by the defendant with the plaintiffs. The lower appellate Court has also miserably failed to see that the mis-description of the suit property was too minor, which would not be a fatal for accepting the case of the plaintiffs as against the defendant. Once the signature of the defendant in the document Ex.A1-sale agreement was established in the trial Court, unless there was a strong rebuttal by the defendant with clear evidence, the lower appellate Court was not right in reversing the judgement and decree of the trial Court. In fact, on behalf of the defendant, there was no proper rebuttal at all. On the other hand, completely different and contradictory stands taken in the two written statements filed by the defendant itself would prove that the defendant was a party to the document Ex.A1-the sale agreement. But, unfortunately, the lower appellate Court has failed to appreciate those crucial factors. As rightly contended by the learned counsel for the appellants/plaintiffs, the lower appellate Court has unnecessarily relied on extraneous factors for reversing the judgement and decree of the trial Court. The factors like long gap between the purchase of stamp paper and the execution of sale agreement-Ex.A1 and the non-mentioning of the scribe name in Ex.A1, to say the least, are extraneous consideration, which shows the non-application of mind on the part of the lower appellate Court. Therefore, the ultimate decision by the lower appellate Court on those factors would have to be held unsustainable.

21.Taking into account all the above aspects, this Court finds that the trial Court was right in decreeing the suit in favour of the plaintiffs; whereas the lower appellate Court has miserably failed to appreciate the relevant materials and the factors and has wrongly reversed the findings of the trial Court and set aside the well considered judgement and decree of the trial Court.

22.In the above circumstances, this Court is of the considered view that the judgement and decree of the lower appellate Court, passed in A.S.No.72 of 2005, dated 15.12.2005,

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are liable to be set aside and the same are set aside. The judgement and decree of the trial Court, passed in O.S.No.386 of 2004, dated 02.08.2004, are upheld. The Substantial Questions of Law framed by this Court, at the time of admission of the Second Appeal, are answered in favour of the appellants herein. No costs.

Msk

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Subordinate Judge, Salem.
2.The Principal District Munsif, Salem.

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

+1cc to Mr.V.R.Rajasekaran , Advocate SR.No. 4052

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A.SK(22/09/2020)

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