BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 13.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.(MD)No.674 of 2007

and

M.P.(MD)No.2 of 2007

R.Lakshmi ...Appellant / Appellant / Defendant

Vs.

K.Palanichamy ... Respondent / Respondent / Plaintiff

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 29.08.2005 passed in A.S.No.13 of 2005 on the file of the learned Principal District Judge, Dindigul, confirming the judgment and decree dated 31.12.2004 passed in O.S.No.241 of 1998 on the file of the Sub Court, Palani.

For Appellant : Mr.R.Vijaya Kumar

For Respondent : Mr.V.K.Vijayaraghavan for Mr.A.Veerasamy

JUDGMENT

Aggrieved over the concurrent finding of the Courts below, granting specific performance, the present Second Appeal is filed.

2.The parties are referred to as per their rank before the trial Court.

3.The brief fact, leading to file this appeal, reads as follows:-

The defendant is the owner of the suit property and agreed to sell the property for total sale consideration of Rs.3,00,000/- and executed an agreement in favour of the plaintiff on 26.09.1997 and received an advance of Rs.2,60,810/- and remaining balance of sale consideration agreed to be paid within one year. The plaintiff was always ready and willing to perform his part of contract. However, the defendant is avoiding to receive the balance sale of consideration. Therefore, the plaintiff has issued legal notice on 18.03.1998. Hence, the suit is filed for specific performance.

4.It is the contention of the defendant that there is no privity of contract between the plaintiff and herself. She does not even know the plaintiff. According to her, she has borrowed certain amount of Rs.1,00,000/- from one Selvi money lender. Such money lender while agreeing to lend money at the rate of 5% interest, asked the defendant to execute the sale of agreement in favour of the plaintiff. Accordingly, the defendant has executed the agreement. Despite the agreement, she has paid amount with interest properly to the said money lender. Hence, there is no agreement of sale and she never agreed to sell the property and no consideration is paid. Despite the payment of loan, the agreement has not been cancelled by the said Selvi. Hence, it is the contention that the agreement is not intended for sale.

5.Based on the above pleadings, the trial Court has framed four issues. On the side of the plaintiff, P.W.1 was examined and Exs.A.1 to A.3 were marked. On the side of the defendant, D.W.1 was examined and no documents were marked. After perusal of the oral and documentary evidence, the trial Court has decreed the suit. The First Appellate Court has also confirmed the finding of the trial Court. Against which, the present Second Appeal is filed.

6.While admitting the Second Appeal, the following substantial question of law has been framed:-

> *"Whether the Courts below are correct in passing a decree in favour of the plaintiff even though Ex.A.1 has been given as a security in favour of a third party?."*

7.The learned counsel appearing for the appellant submitted that the agreement is not intended for sale. This has been clearly probablised due to inconsistency of amounts in the plaint, legal notice and agreement. Further, it is the contention that the agreement stipulates that the loan amount has to be cleared in the Urban Bank. There is no evidence produced by the plaintiff to show that the amount has been cleared. That itself clearly shows that the agreement is not intended for sale. Further, it is the contention that even assuming that the agreement is true, non-payment of the loan to the Urban Bank within the agreed period clearly shows that the plaintiff is not ready and willing to perform his part of contract. The trial Court has found that the plaintiff has not produced any document to prove the above payment to the Bank, however, granted specific performance. Hence, it is the contention that the readiness and willingness is totally absent. Further, the delay in filing the suit even after the issuance of legal notice has also not been properly explained, hence, prayed for allowing the appeal.

8.The learned counsel appearing for the respondent submitted that the entire defence in the written statement as if the agreement was not intended for sale and agreement is intended only to loan transaction, has not been established, whereas, P.W.1 clearly spoken about the readiness and willingness and payment to the bank, which has not been denied in the cross-examination, hence, prayed for dismissal of the appeal.

9.Heard the learned counsel appearing for the appellant, the learned counsel appearing for the respondent and perused the materials available on record carefully.

10.After hearing both sides, this Court has re-framed the substantial questions of law, which are extracted hereunder:-

> *"1.Whether the Courts below in right in granting specific performance without going to the issue of readiness and willingness on the part of the plaintiffl;*
>
> *2.Whether the defendant has discharged the burden to prove that the assertion that agreement is not intended for sale."*

11.Ex.A.1 is a registered agreement dated 26.09.1999 filed by the plaintiff. A perusal of the above agreement makes it clear that the defendant has agreed to sell the property for Rs.3,00,000/- and a sum of Rs.2,75,800/- said to have been received on the date of agreement and the remaining sale consideration agreed to be paid on or before 25.09.1999 ie., one year. One of the terms of the agreement is that a sum of Rs.15,810/- has to be paid to the Urban Bank by the plaintiff. Whereas, it is the contention of the defendant that the agreement is not intended for sale, which is based on the loan transaction with one Selvi. Both the Courts have disbelieved the defence of the defendant. The suit agreement is registered one. Once the document is registered and the terms are reduced in writing, when the person asserts that such document is not intended for sale or result of different transaction, the entire burden lies on them to establish such assertion. Though the proviso to Section 92 of Indian Evidence Act, enables the party to prove that the written contract is not intended for sale and it is for different transaction, the defendant has not proved the same by adducing proper evidence. Though the defendant have taken such plea that the agreement is not intended for sale, the entire burden lies on her to establish the above fact. Except her statement and no other materials whatsoever brought on record to substantiate her contention.

12.P.W.1 in his evidence has spoken about the circumstances, in which the agreement was executed and the sale consideration of Rs.2,65,810/- paid on the same date and the remaining amount is also agreed to be paid to the Bank. It is the specific case of the plaintiff in her evidence that the loan payable to the bank is also cleared by him. The above evidence was not even denied in the cross-examination, except denying the agreement and contending that the agreement was not intended for sale, no circumstances whatsoever brought on record in cross-examining P.W.1. Ex.A.1 is the registered document. Therefore, in the absence of any materials to show that it is not intended for sale and it was executed only towards security in favour of some third party without any circumstances or probabilities even to infer such defence, this Court is of the view that the defendant has failed in this case. The plaintiff is also ready and willing to perform his part of contract, which is also not denied in the cross-examination and also written statement. That apart the suit notice was issued on 18.03.1998 itself even before the expiry of agreed time to pay remaining sale consideration and the suit has been filed on 09.10.1998. It is the contention of the learned counsel that there are 6 months delay in filing the suit after issuance of legal notice. Such delay cannot be a ground to disbelieve the plaintiff's case, however, he has established other aspects. It is the contention of the learned counsel for the appellant that the plaintiff has not proved the payment to the Bank by producing any document. It is to be noted that if no such payment was made all these days, the Bank would have certainly proceeded against the property, when the plaintiff asserted that the payment has been made, which is not denied in the examination, further no action whatsoever taken by the Bank. Therefore, this Court has to necessarily hold that the plaintiff has paid the amount. Therefore, merely no document filed in this regard, it cannot be said that he is not ready and willing. Therefore, the plaintiff has also explained discrepancies found out in the plaint and agreement. In the legal notice, it is specifically stated that Rs.2,50,000/- paid on the date of agreement and remaining amount to be paid to the Bank by the plaintiff. Such mere description in amounts also cannot be a ground to deny the relief of specific performance. Accordingly, all the substantial questions of law are answered against the appellant.

13.In the result, this Second Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Myr

To

1.The Subordinate Judge, Palani.

2.The Principal District Judge, Dindigul.

COPY TO:

The Section Officer, (2 COPIES)
Vernacular Records,
Madurai Bench of Madras High Court,Madurai.

+1 CC to M/s.A.VEERASAMY, Advocate (SR-6268[F] dated 14/02/2020)

+1 CC to M/s.R.VIJAYAKUMAR, Advocate (SR-6360[F] dated 14/02/2020)

S.A.(MD)No.674 of 2007
13.02.2020

SMA/12/03/2020/4P/7C