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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2021

PRONOUNCED ON : 30.07.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1049 of 2009

S.P.S.Anandan ... Appellant/Respondent/Plaintiff

Vs.

1. Karuthammal
2. Chinnasamy
3. Vellaiyan
4. Murugan

... Respondents/Appellants /defendants

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 08.07.2008 passed in A.S.No.7 of 2008 on the file of the Principal Subordinate Court, Salem, reversing the judgment and decree dated 21.08.2007 passed in O.S.No.857 of 2006 on the file of the Principal District Munsif Court, Salem.

For Appellant : Mrs. Sathya Satheesh
for Mrs.Zeenath Begum

For Respondents: Mr.V.R.Rajasekaran (for R1 to R4)

J U D G M E N T

The present second appeal is directed against the judgment and decree dated 08.07.2008 passed in A.S.No.7 of 2008 on the file of learned Principal Subordinate Judge, Salem, reversing the judgment and decree dated 21.08.2007 passed in O.S.No.857 of 2006 on the file of the learned Principal District Munsif, Salem.

2. The appellant/plaintiff has filed a suit before the learned Principal District Munsif, Salem, in O.S.No.857 of 2006, seeking the relief of specific performance, directing the defendants to receive the balance amount of Rs.10,000/- in respect to the suit scheduled property and execute the sale deed in his favour.

3. The learned Principal District Munsif, Salem, by judgment and decree dated 21.08.2007 allowed the suit and directed the defendants to execute a sale deed after receipt of Rs.10,000/- towards the balance consideration.



4. Aggrieved over the said findings, the defendants 1 to 4 preferred an appeal in A.S.No.7 of 2008 on the file of the learned Principal Subordinate Judge, Salem, praying to set aside the judgment and decree dated 21.08.2007, passed by the learned Principal District Munsif, Salem, in O.S.No.857 of 2006.

5. By judgment and decree dated 08.07.2008, the learned Principal Subordinate Judge, Salem, allowed the appeal and dismissed the suit filed by the plaintiff. Feeling aggrieved over the same, the plaintiff is before this Court with the present second appeal.

6. For the sake of convenience, the parties are referred to as prescribed before the trial Court.

7. The averments made in the plaint, in brief are as follows:

In the year of 1983 and in 1997, the Defendants 1 to 4, have purchased the suit schedule property. In respect to the said property, on 27.09.2002, the defendants entered into a sale agreement with the plaintiff and the plaintiff, also agreeing to purchase the same for a sum of Rs.50,000/-, have paid Rs.40,000/- as advance on the same day itself and agreed to pay the balance amount within 11 months. The defendants also agreed to execute the sale deed on receiving the balance consideration within the period as stipulated in the agreement dated 27.09.2002. After executing the sale agreement, inspite of several requests made by the plaintiff, the defendants evaded to perform their part of contract. The plaintiff issued a legal notice to execute the sale deed as per the sale agreement. Even after the same, the defendants have not come forward to perform their part of contract. Hence, the suit.

8. The case of the defendants, is as follows:

(i) The defendants contended that they never agreed to sell their properties to the plaintiff for a sum of Rs.50,000/- through the alleged sale agreement dated 27.09.2002. They also denied that they have received Rs.40,000/- as sale advance. They never agreed to execute the sale deed in favour of the plaintiff within 11 months from the date of sale agreement.

(ii) The defendants further submit that the plaintiff's father was running a Finance Company viz., M/s.Sukumaran Finance in which the 3rd defendant borrowed a sum of Rs.40,000/- to purchase Omni Van on 27.09.2002 and while such time, as a security for the said transaction, all the defendants signed the document in favour of the plaintiff. The defendants also repaid the same in instalments and there is a balance of Rs.30,000/- to be paid. Since the van met with an accident, the defendants were unable to repay the entire loan amount, as agreed. Further, the plaintiff's father ceased the Maruthi Omni Van from the defendants' custody and also in



order to realise the loan amount, the plaintiff has mischievously filed the suit, by misusing the sale agreement in order to grab the entire suit properties. Hence, the suit filed by the plaintiff is liable to be dismissed.

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9. Before the trial Court, during the time of trial, on the side of the plaintiff, the plaintiff examined himself as PW1 and marked four documents as Ex.A1 to A4. On the side of the defendants, the 3rd defendant Vellayan, examined himself as DW1 and marked 7 documents as Ex.B1 to B7.

10. Having considered all the materials placed before him, the learned Principal District Munsif, Salem, concluded that the plaintiff is entitled to the relief of specific performance, as prayed for. In the appeal filed by the defendants, the findings arrived at by the trial Court was reversed and held that the plaintiff has not proved his case and accordingly, the suit was dismissed.

11. Aggrieved over the said findings of the Court below, the plaintiff is before this Court with the present Second Appeal. When the Second Appeal came up for admission, this Court formulated the following substantial questions of law.

- (i) Whether the defence taken by the defendants that the suit agreement was intended as security for a loan transaction can be upheld, particularly when the loan transaction and the suit agreement have been entered into with totally different persons?
- (ii) Whether the defence taken by the defendants, that, the suit agreement is intended as a security for a loan transaction is barred under Sec.92 of the Indian Evidence Act, particularly when they have taken contradictory stands that they have signed blank stamp papers, whereas the suit agreement is a registered one?

Substantial Questions of Law (i) and (ii):

12. The learned counsel appearing for the appellant/plaintiff would contend that the suit sale agreement is a registered one. Since the defendants have refused to perform their obligation, the plaintiff issued a legal notice on 16.07.2006, requesting the defendants to execute the sale deed after the receipt of balance consideration. The first appellate Court, while at the time of deciding the appeal had erroneously held that the suit transaction is a loan transaction entered into between the defendants and M/s.Sukumaran Finance and therefore, the relief prayed by the plaintiff cannot be entertained. In fact, in respect to the relationship between the plaintiff and M/s.Sukumaran Finance, the defendants have not produced the substantial documents. Therefore, in the absence of any substantial evidence, we



cannot come to the conclusion that the transaction between the plaintiff and the defendants are the loan transaction. According to him, since the plea of loan transaction was taken by the defendants, they alone have to prove their case.

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13. Per contra, the learned counsel appearing for the respondents/defendants would contend that the learned Principal Subordinate Judge, Salem, while at the time of disposing the appeal has correctly held that the suit agreement is a fabricated one. Further by relying on the date found in Ex.B1, the receipt issued by the M/s.Sukumaran Finance, came to the conclusion that the sale agreement was executed by the defendants with a view to avail the loan from M/s.Sukumaran Finance. Therefore, there is no substantial question of law arisen in this appeal.

14. Considering the above submissions, it is an admitted fact that the sale agreement dated 27.09.2002, was a registered one. Further, the defendants did not deny their signature found in the sale agreement. In the said situation, it is necessary to find out whether the defendants are having the right to take a plea, as the suit transaction is a loan transaction. Now, on going through Section 92 of Indian Evidence Act, it reads as follows:

92. Exclusion of evidence of oral agreement.—
When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, [want or failure] of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct



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subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts. Illustrations

15. The said section enacts that when the terms of all contracts, or grant or other disposition of property, are reduced to writing, whether or not such contract or grant is compulsorily required to be reduced to writing and registered, no oral evidence shall be admitted to contradict, vary, add to or subtract, from its terms.

16. Therefore, the said section has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract. But the same section fully allows offers to be varied at the time of acceptance and being turned into regular contracts. Where a complainant seeks to prove the varying of the terms of offer at the time of concluding the contract, such evidence is not prohibited under Section 92 and hence cannot be excluded.

17. More than that, in general, any fact which would invalidate any document or entitle any person to any decree or order relating thereto may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

18. Here it is a case, the stand taken by the defendants is that sale agreement pertains to the suit is obtained by the plaintiff by fraud and misrepresentation. Therefore, it cannot be said that adducing oral evidence by the defendants in respect to the defence now taken by the defendants, is barred under Section 92 of the Indian Evidence Act. It is their case, before the trial Court, that PW1 had given evidence as he did not know the description of the property with correct details. After admitting that there was a terraced house found in the suit scheduled property, not mentioning of the door number in the suit sale agreement, create a primary doubt over the genuineness of the suit sale agreement.



defendants, seven documents were marked as defendants' side exhibits, in which, the first document is the receipt dated 06.11.2002 issued by M/s.Sukumaran Finance. Now, on going through the contents of the said document, it seems that the said finance company issued a receipt for the collection of interest. Further, it was mentioned that the amount of Rs.4,885/- was paid towards the first instalment due for payment on 28.10.2002. In the said circumstances it is to be borne in mind that the suit sale agreement was executed on 27.09.2002. Therefore, the contents of the said document coupled with the evidence given by DW1 would prima facie make out a case that the defendants had paid the interest immediately, after one month from the date of sale agreement.

20. Even assuming that the sale agreement, is a genuine one, since the suit has been filed for the relief of specific performance, it is necessary for the plaintiff to prove his readiness and willingness. As already observed in the suit sale agreement, time for paying the sale consideration was fixed as 11 months. In this regard, nothing was shown on the side of the plaintiff that before 11 months, he attempted to pay the balance sale consideration.

21. Though, it was stated on the side of the plaintiff that he orally reminded the defendants to execute the sale deed, since the same was denied by the defendants, it is for the plaintiff to prove that he orally reminded the defendants for executing the sale deed. But in order to prove the same, nothing was shown on the side of the plaintiff. Ex.A2- Advocate notice dated 16.07.2006 shows that the plaintiff has issued the legal notice demanding to fulfill their obligations only on 16.07.2006 that too, after three years from the date of sale agreement. In this regard, for the said delay, nothing was averred in the plaint. At this juncture, it is relevant and useful to see the judgment in Jagjit Singh (dead) through Legal Representatives, Vs. Amarjit Singh, reported in 2018 (9) SCC 805, wherein our Hon'ble Apex Court has held as follows:

"4. It is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract. Section 16(c) of the Specific Relief Act mandates that the plaintiff should plead and prove his readiness and willingness as a condition precedent for obtaining relief of grant of specific performance. As far back as in 1967, this Court in Gomathinayagam Pillai and Ors. v. Pallaniswami Nadar ((1967) 1 SCR 227) held that in a suit for specific performance the plaintiff must plead and prove that he was ready and willing to perform his part of the contract right from the date of the contract up to the date of the filing of the suit.

This law continues to hold the field and has been



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reiterated in the case of J.P. Builders and Anr. v. A. Ramadas Rao and Anr. ((2011) 1 SCC 429) and P. Meenakshisundaram v. P. Vijayakumar & Ors.(2018(5) SCALE 229). It is the duty of the plaintiff to plead and then lead evidence to show that the plaintiff from the date he entered into an agreement till the stage of filing of the suit always had the capacity and willingness to perform the contract.

22. Now, applying the ratio laid down in the above referred judgment to the case in our hand, the plaintiff has not proved his readiness and willingness from the date on which the sale agreement was executed, by producing the relevant documents.

23. Therefore, the relief of specific performance, being a discretionary relief, for availing the same, the plaintiff must show the genuineness of his case. But, as per the discussion supra, this Court has a doubt whether the plaintiff has approached this Court with clean hands. Accordingly, this Court do not find any merit in the present appeal.

24. Therefore, in the light of the above discussions, the substantial questions of law raised in this appeal are all answered, as above and the Judgment and decree dated 08.07.2008 passed in A.S.No.7 of 2008 on the file of the Principal Subordinate Court, Salem reversing the judgment and decree dated 21.08.2007 passed in O.S.No.857 of 2006 on the file of the Principal District Munsif Court, Salem, is hereby confirmed. The Second Appeal is dismissed. No Costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

Ars

To

1.The Principal Subordinate Judge, Salem

2.The Principal District Munsif, Salem.

+1cc to Mr.Zeenath Begum, Advocate, S.R.No. 37221

S.A.No.1049 of 2009

PMK (CO)
GN(28/09/2021)