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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2021

PRONOUNCED ON : 25.11.2021

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A.No.1462 of 2010

&

M.P.No.1 of 2010

R.Krishnamurthy

...Appellant/Defendant

Vs.

A.Elumalai Gounder

...Respondent/Plaintiff

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Code of Civil Procedure, against the Judgment and decree dated 23.08.2010 made in A.S.No.44 of 2010 on the file of the learned Principal District Judge, Villupuram, reversing the judgment and decree dated 20.04.2010 made in O.S.No.63 of 2007 on the file of the learned Additional Subordinate Judge, Tindivanam.

For Appellant : Mr.T.Dhanasekaran

For Respondent : Mrs.P.Kavitha Balakrishnan

J U D G M E N T

The defendant in O.S.No.63 of 2007 on the file of the learned Additional Subordinate Judge, Tindivanam, is the appellant herein. Before the said Court, the respondent herein filed the above referred suit as against the appellant seeking the relief of specific performance, directing the appellant to execute the sale deed in respect of suit schedule property, after the receipt of balance sale consideration of Rs.1,36,700/- and for further reliefs. By judgment and decree dated 20.04.2010, the learned Additional Subordinate Judge, Tindivanam, had dismissed the suit with entirety.

2.Aggrrieved over the said findings, the plaintiff preferred an appeal in A.S.No.44 of 2010 on the file of the learned Principal District Judge, Villupuram. By judgment and decree



dated 23.08.2010, the learned Principal District Judge, Villupuram, had allowed the appeal filed by the plaintiff and granted the decree as prayed for in O.S.No.63 of 2007.

3. Feeling aggrieved over the judgment and decree dated 23.08.2010, the defendant in the suit has preferred the instant second appeal.

4. For the sake of convenience hereinafter the appellant is called as 'defendant' and the respondent is called as 'plaintiff'.

5. The laconic averments made in the plaint, are as follows:

(i) The suit schedule property is the absolute property of the defendant. On 12.01.2007, the defendant agreed to sell the suit schedule property in favour of the plaintiff and entered into a sale agreement wherein the price for sale was fixed as Rs.950/- per Cent. On the date of agreement, the plaintiff paid Rs.40,000/- to the defendant as an advance amount. The time for execution was fixed as three months. After the sale agreement, the plaintiff is always ready and willing to pay the balance sale consideration of Rs.1,36,700/- and for executing the sale deed. The defendant is not willing to perform his part of contract. Hence, on 07.04.2007, the plaintiff sent a notice to the defendant wherein he asked the plaintiff to execute a sale deed immediately on receipt of the balance sale consideration.

(ii) After the receipt of the said notice, on 21.04.2007, the defendant sent a reply notice, wherein he has stated that his family members are not willing to sell the suit schedule property. Further, he has stated that in the suit schedule property, around 32 cents belongs to one Rajakumari and Sumathi. He has further stated in the reply notice that he is always willing to repay the advance amount with interest. Hence, for the reason that the defendant is not willing to perform his part of contract, the present suit has been filed.

6. The case of the defendant, is as follows:

(i) It is not correct to say that the suit schedule property is the absolute property of the defendant. The sale agreement dated 12.01.2007 is not executed by the defendant with free consent. It is not correct to say that the plaintiff approached the defendant through third parties for the execution of the sale deed and even assuming that the sale agreement dated 12.01.2007, is found genuine, the plaintiff has to initially perform his part on or before 11.04.2007, by paying the balance sale consideration, but herein it is a case, the plaintiff has not performed his duty. Hence, the sale agreement dated 12.01.2007 is not valid in law.



(ii) Before fifty years, in the partition effected in the family of the defendant, some meager properties are alone allotted in favour of the defendant. At that time the defendant was working as a Junior Assistant and earned Rs.210/-p.m. In the said circumstances, only from the income derived from the ancestral property, the defendant had purchased the suit schedule properties from his mother. After made purchase, the defendant enjoyed the suit schedule properties along with his son and daughters as a Hindu Joint Family property.

(iii) In S.No.53/1, out of 0.98 cents, 0.32³/₄ cents belongs to one Ramakrishnan and Kuppammal. In respect to the same, a suit has been filed in O.S.No.1199 of 1970 on the file of Villupuram Court, wherein, in the compromise arrived at between the parties, 0.32³/₄ cents were allotted to the said Kuppammal and in turn the said Kuppammal had given the said property to her daughters viz., Rajakumari and Sumathy. The suit schedule property includes the said property also. In the said circumstances, if the decree is passed in favour of the plaintiff, the same cannot be executed. Further, after suppressing the real value, the plaintiff fixed Rs.950/- alone as a price per cent. Apart from that as of now, the son and daughters of the defendant i.e. Mugunthan, Umasankari, and Subashini, have sent an Advocate notice for partitioning the suit schedule property, further, one Rajakumari has filed a civil suit in O.S.No.353 of 2007 against the defendant for declaration and injunction and the said suit was pending. The relief prayed for by the plaintiff cannot be entertained. The alleged sale agreement is a fabricated one. There is no necessity to the defendant for selling the suit schedule property. The plaintiff has not approached the Court with clean hands. Hence, the suit filed by the plaintiff is liable for dismissal.

7. Based on the above pleadings, the learned Additional Subordinate Judge, Tindivanam, framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff examined himself as PW1 and he examined four other witnesses as PW2 to PW5. On his side, five documents were marked as Ex.A1 to Ex.A5. On the other hand, on the side of the defendant, the defendant himself examined as DW1 and one Venkatesan was examined as DW2, further two documents were exhibited as Ex.B1 and B2.

8. Having considered the materials placed before him, the learned Additional Subordinate Judge, Tindivanam, vide judgment and decree dated 20.04.2010 dismissed the suit filed by the plaintiff. Aggrieved over the same, the plaintiff preferred an appeal in A.S.No.44 of 2010 on the file of the learned Principal District Judge, Villupuram. By judgment and decree dated 25.08.2010, the learned Principal District Judge, Villupuram,



reversed the findings arrived at by the trial Court and decreed the suit as prayed for.

9. Feeling aggrieved over the said findings of the first appellate Court, the defendant is before this Court with this present second appeal. When the second appeal is taken up for admission, this Court formulated the following substantial questions of law.

"1. Is the Lower Appellate Court correct in granting the relief of Specific Performance when the vendor is not the owner of the entire suit properties and when properties which do not belong to the vendor have also been wrongly included in the sale agreement?

2. Is the Lower Appellate Court correct and justified in decreeing the suit for specific performance especially when O.323/4 C do not belong to the vendor and when they belong to third parties, who have also obtained decree in O.S.No.353 of 2007 to which the agreement holder is a party and who remained ex parte which facts were admitted by plaintiff?"

10. Heard the respective learned counsel appearing on behalf of the appellant and the defendant and perused the materials available on record.

11. The first and foremost contention raised by the learned counsel for the appellant is that the sale agreement dated 12.01.2007 i.e. Ex.A1 is a fabricated one. According to him, if the sale agreement is properly executed, it should be executed in the stamp paper, which is having the value of Rs.20/- whereas, the present sale agreement is executed in Stamp Paper of Rs.10/-. Further, the words and other things found in the sale agreement are in the form of scribbling. Therefore, the sale agreement [Ex.A1] is not at all to be considered as a true one.

12. Per contra, the learned counsel appearing for the respondent /plaintiff would contend that it is the case of the appellant/defendant that the signature found in the sale agreement belongs to him. Therefore, it is for him to show under what circumstances, the disputed sale agreement has been prepared. But in this regard, he has not adduced any evidence and therefore, it cannot be held that the sale agreement is a fabricated one.

13. Now, by considering the said submissions with the relevant records, before filing the suit, for the notice sent by



the plaintiff, the defendant sent a reply notice dated 21.04.2007. In the reply notice, i.e. Ex.A3, in paragraph No.3, the defendant has stated his case as follows:

"While so, on 12.01.2007, your client approached my client at Cuddalore and got his signature on a stamp paper for selling his lands to him at the rate of Rs.950.00 per cent and paid a sum of Rs.40,000/- as advance thereof. It is not a registered sale agreement, executed by my client."

14.The said averments is sufficient to hold that with an intention to create a sale agreement, after the receipt of Rs.40,000/-, the defendant has put his signature in the sale agreement. Further, in order to prove the genuineness of the said document, on the side of the plaintiff, two witnesses have been examined as PW2 and PW3, who are the witnesses attested in the sale agreement. The evidence given by PW2 and PW3 coupled with the averments found in the reply notice would make out a case as with an intent to execute the sale agreement, the defendant had put his signature and therefore, the submission made by the defendant that the sale agreement is a fabricated document cannot be accepted. It is true, the said sale agreement was executed in 10 Rupees Stamp Paper, but, when at that time the alleged Sale Agreement was executed, there is no rule prohibiting either parties to execute a Sale Agreement in 10 Rupees Stamp Paper.

15.The learned counsel appearing for the appellant/defendant would submit that the relief of specific performance is a discretionary one. It is for the respondent/plaintiff to show his readiness and willingness by producing the relevant documents. Here, it is a case, before the trial Court, the plaintiff has not shown his capacity as he is having sufficient money to complete the sale proceedings. Therefore, in the absence of any evidence in respect to the readiness and willingness, granting the discretionary relief in favour of the plaintiff is erroneous.

16.Now, on considering the same with relevant records, it is the submission of the learned counsel appearing for the respondent/plaintiff that after instituting the suit before the trial Court, in view of the order passed, the balance sale consideration was deposited into the Court account and therefore, the same is evident to show that the plaintiff is having the capacity to pay the balance sale consideration and consequently, the same is sufficient to hold that the plaintiff is having the readiness and willingness to complete his part of contract.

17.In this regard, in the case of Sukhbir Singh & Ors. Vs.



Brij Pal Singh & Ors., decided on 10.05.1996, our Hon'ble Apex Court has held as follows:

"It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree."

18. So, applying the ratio laid down in the above referred judgment, here it is a case, being the reason that the plaintiff deposited the balance sale consideration into the Court account, it was decided that the plaintiff is always ready and willing to perform his part of contract.

19. The next submission of the appellant/defendant would be that, in the suit schedule property, out of the total extent around 0.32³/₄ cents belongs to third party. The plaintiff when at the time of giving evidence as PW1, had also admitted that a portion of the land in the suit schedule property belongs to third party and therefore, if the suit is decreed in favour of the plaintiff, the same could not be executed. It is further submitted that the first appellate Court without considering the said aspect granted the decree, which is liable to be set aside.

20. Per contra, the learned counsel appearing for the respondent/plaintiff would contend that mere admission in respect to the ownership of the suit schedule property made by the plaintiff is not a conclusive proof. It is his submission that the burden of proof is rest with the defendant that the suit schedule property is not his absolute property, further, in order to establish the said fact i.e., the portion of the property belongs to third party, the defendant has not produced the substantial documents to show that an extent of 0.32³/₄ cents belongs to third party and therefore, it is not necessary to modify the findings arrived at by the trial Court.

21. In this regard, the respondent/plaintiff relied on the judgment of our Hon'ble Apex Court in Narayan Govind Gavate etc vs. State of Maharashtra, reported in 1977 AIR 183, wherein our Hon'ble Apex Court has held as follows:

"As applied to judicial proceedings the phrase 'burden of proof' has two distinct and frequently confused meanings:

(1) the burden of proof as a matter of law and pleading-the burden, as it has been called, of establishing a case, whether by preponderance of evidence, or beyond a reasonable doubt; and (2) the burden of proof in the sense of adducing evidence."



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"106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

In judging whether a general or a particular or special onus has been discharged, the Court will not only consider the direct effect of the oral and documentary evidence led but also what-may be indirectly inferred because. certain facts have been proved or not proved though easily capable of proof if they existed at all which raise either a presumption of law or of fact. Section 114 of the Evidence Act covers a wide range of presumptions of fact which can be used by Courts in the course of. administration of justice to remove lacunae in the chain of direct evidence before it. It is, therefore, said that the function of a presumption often is to "fill a gap" in evidence."

22. Further, in Ajodhya Prasad Bhargava Vs. Bhawani Shanker Bhargava and Anr, reported in AIR 1957 All 1, the Allahabad High Court has held as follows:

"The statutory rule should apply because admissions themselves being incompetent cannot really be considered to be proper admissions in law, and the initial onus of proving an admission which rests on the party who sets it up cannot itself be said to be discharged. The equitable rule also should apply because such admissions, even though alleged to be so, have in fact no merit as such. Further, there is a danger that the party against whom they are set up might be taken by surprise and condemned unheard."

23. In Tirumalasetty Santhamma and 5 others vs. Yenuganti Venkaiah, reported 2013 (6) ALT 664, Andhra Pradesh High Court, has held as follows:

"The said decision was rendered by Division Bench of this Court basing on Full Bench decision of the Madras High Court. The principle is that it is not open to the vendor to plead lack of title for himself in a suit for specific performance and that at the same time it is open to the purchaser to plead so."

24. Now, on considering the said submissions with the relevant records during the time of giving evidence as PW1, the plaintiff himself admitted in his cross examination as in the suit schedule property, the property belongs to one Rajakumari and Sumathi, is also wrongly included. He has further stated that in the sale agreement, four boundaries to the suit schedule property have not been mentioned.



25. In this occasion, on going through the averments found in the written statement filed by the defendant, in the initial stage itself, the defendant has averred that the suit schedule property is not his absolute property. Therefore, in the said circumstances, it is for the plaintiff to establish that the suit schedule property is the absolute property of the defendant. After admitting the fact that the suit schedule property is not the absolute property of the defendant, proceeding of the case by the plaintiff as the suit schedule property is the absolute property of the defendant, is found not correct.

26. In respect to the validity of the admission, our Hon'ble Apex Court while at the time of deciding the case of Union of India Vs. Ibrahim Uddin and another, reported in 2012 (8) SCC 148, has held as follows:

"Admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel in certain circumstances. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff."

(para 32 and 29)

27. Here is the case, in respect to the admission that the portion of the suit property belongs to others, the plaintiff has not given any subsequent explanation as the same is wrong. The first appellate Court without considering the said aspect, came to the conclusion that the admission made by the plaintiff is not a conclusive proof. In otherwise, I am of the considered opinion that the said finding, arrived at by the first appellate Court is a perverse one.

28. In fact it is the case of the defendant that in the year of 1970 itself, there was a suit filed in respect to the suit schedule property and thereafter, in the compromise arrived at in the said suit, a portion of the property was allotted to third parties. In the said circumstances, in the absence of any evidence as the entire suit schedule property belongs to



defendant, if the decree is granted in favour of the plaintiff, the same becomes the unexecutable decree.

29. Accordingly, I am of the considered opinion that, as already observed, if the decree is passed in favour of the plaintiff, being the reason that the same is not an executable decree, the decree cannot be granted. However, considering the facts and circumstances, it is appropriate to direct the defendant to refund the advance amount to the plaintiff with interest.

30. In the result, the second appeal is allowed, the judgment and decree made in A.S.No.44 of 2010 dated 23.08.2010 on the file of the learned Principal District Judge, Villupuram, is set aside. The defendant is directed to refund the advance amount of Rs.40,000/- to the plaintiff with interest at the rate of 12% per annum from the date of sale agreement i.e. 12.01.2007, till the date of realisation. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Villupuram
2. The Additional Subordinate Judge,
Tindivanam

Copy To

The Section Officer,
V.R. Section, High Court, Madras - 104.

+1cc to Mr.T.Dhanasekaran, Advocate, S.R.No.61694

+1cc to Mrs.Kavitha Balakrishnan, Advocate, S.R.No.61150

S.A.No.1462 of 2010

SSV(CO)
RGA(28/01/2022)