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A.S.No.274 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.12.2023

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

A.S.No.274 of 2012

C.Madanraj

... Appellants

-Vs-

1. Babu alias R.Srinivasan

2. K.Suresh

3. R.Usha Rani

... Respondents

PRAYER: Appeal Suit filed under Section 96 of C.P.C., to set aside the judgment and decree passed in O.S.No.3 of 2006 by the learned Additional District Judge, (FTC) Tiruppattur, Vellore District, dated 23.11.2011, thereby decreeing the suit in O.S.No.3 of 2006 as prayed for, by allowing the appeal.

For Appellants : Mr.R.Shanmugam
For M/s.Shanmuga Association

For Respondents
For R1 : No appearance
For R2 & R3 : Mr.V.Raghavachari,
Senior Counsel
For Mrs.V.Srimathi



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JUDGMENT

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This appeal suit has been filed as against the judgment and decree passed in O.S.No.3 of 2006 on the file of the learned Additional District Judge, Fast Tract Court, Tiruppattur, Vellore District, dated 23.11.2011, thereby dismissing the suit filed by the appellant for specific performance.

2. The appellants is the plaintiff and the respondents are the defendants. For the sake of convenience the parties are referred as per their ranking in the trial Court.

3. The plaintiff filed suit for specific performance. The case of the plaintiff is that the first defendant owned suit schedule property. He agreed to sell the same and had executed an agreement for sale on 23.04.2001 in favour of the plaintiff. The total sale consideration was fixed at Rs.14,51,000/- and on the same date of agreement for sale, the first defendant received a sum of Rs.3,51,000/- as advance. The first defendant also handed over his title deed in respect of the suit property. Though the time was not mutually intended as essence of contract of



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sale, the plaintiff always ready and willing to perform his part of contract from the date of the sale agreement.

3.1. On 26.04.2001, the first defendant executed a general power of attorney in favour of the plaintiff in respect of the suit property. On 15.06.2002, the first defendant also received balance sale consideration of Rs.11,00,000/- from the plaintiff and the same was also duly endorsed by the first defendant on 15.06.2002 in the agreement for sale. On 15.06.2002, the first defendant also delivered possession of the suit schedule property to the plaintiff as part performance of the agreement for sale. However, the first defendant failed to register any sale deed as agreed by him.

3.2. Therefore, the plaintiff caused notice to the first defendant on 11.10.2002. The first defendant issued reply to that notice and on receipt of the same, the plaintiff came to understand that the power of attorney executed in favour of the plaintiff was cancelled and alleged that the first respondent issued several cheques to the plaintiff. Therefore, the plaintiff caused legal notice on 20.10.2002, thereby called upon the first



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defendant to be present at Sub Registrar Office, Jolarpet, on 25.10.2002 to perform his part of contract. Even after receipt of the said notice, the first defendant failed to turn up the registrar office in order to perform his part of contract. With false allegation, the first defendant sent reply notice dated 28.10.2002. Hence, the suit for specific performance.

4. Resisting the same, the first defendant filed written statement stating that he never agreed to sell the suit property for the total sale consideration of Rs.14,51,000/- and he never executed the agreement for sale. On 23.04.2001, he did not receive any advance amount from the plaintiff. No amount was received subsequently on 15.06.2002 from the plaintiff. Further the suit property was never handed over to the plaintiff. The power of attorney was executed in favour of the plaintiff only for the purpose of developing the suit property, since the plaintiff is a real estate person and both are close friends.

4.1. In fact, the power of attorney was cancelled on 08.10.2002 by the cancellation deed and the same was registered before the Sub Registrar, Ambur. Thereafter, on 11.10.2002, the first respondent caused



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notice to the plaintiff thereby called upon him to return the original documents handed over to him to develop the property. Further, after receipt of the said notice, no reply was sent by the plaintiff. On 20.10.2002, the plaintiff caused legal notice to the first defendant as if he entered into an agreement for sale and called upon the first defendant to perform his part of contract.

5. The second and third defendants filed written statement stating that after purchase of the suit property they are in possession and enjoyment of the suit property and also adopted the written statement filed by the first respondent.

6. After completion of pleading, the trial Court framed the following issues :-

(i) 23.04.2001 தேதியிட்ட தாவா கிரைய உடன்படிக்கை உண்மையான ஒன்றா?

(ii) 15.06.2002 அன்று வாதியானவர் ரூ.11,00,000/-னை 1ம் பிரதிவாதியிடம் கொடுத்தார் என்று கூறுவது சரியா?

(iii) வாதி தாவா சொத்தின் சுவாதீனத்தில் வைக்கப்பட்டார் என்பது சரியா?



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(iv) ஏற்றதை ஆற்றல் பரிகாரம் பெற
வாதிக்கு அருகதை உள்ளதா?

(v)வாதி கோரும் மாற்று பரிகாரம் பெற
அவருக்கு கிடைக்கத்தக்கதா?

(vi)வேறு என்ன பரிகாரம்?

கூடுதல் எழுவினா :-

(i) 2, 3 பிரதிவாதிகள் தாவா சொத்தை
பொறுத்தவரை நல்லெண்ண கிரையதாரர்கள் என்று
கூறுவது சரியா?

7. On the side of the plaintiff, he examined P.W.1 & P.W.2 and marked documents in Ex.P.1 to Ex.P.21. On the side of the defendants, they had examined D.W.1 & D.W.2 and marked documents in Ex.D.1 to Ex.D.6. After considering the oral and documentary evidences, the trial Court dismissed the suit. Aggrieved by the same, the plaintiff filed the appeal suit.

8. The learned counsel appearing for the plaintiff/appellant submitted that though the trial Court concluded that the agreement for sale and subsequent endorsement which were marked as Ex.A.1 & Ex.A2 are genuine one, even then it had taken contrary view. In order to rebut the evidence of P.W.1 & P.W.2, the first defendant failed to get into the



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box. Though the first defendant denied the signature found in the Ex.A.1, the trial Court ought not to have shift the burden on the plaintiff to prove the signature of the first defendant found in Ex.A.1 and Ex.A.2. The plaintiff had paid entire sale consideration to the first defendant towards sale consideration in respect of the suit property. Even then, the first defendant failed to perform him part of contract. When the first defendant admitted the said fact the plaintiff need not to prove the same.

8.1. Further, the trial Court concluded that the plaintiff failed to show his source of income to pay such a huge amount as sale consideration, in respect of the suit property. Even according to the first defendant, symbolic possession was handed over to the plaintiff. But the trial Court concluded that the plaintiff failed to establish his case that he took possession of the suit property by producing the revenue records. In support of his contention he relied upon the following judgments :-

- (i) 2009 (1) MLJ 69 – Prabhakaran & ors Vs. Ranganathan & ors**
- (ii) 2007 (1) CTC 449 – Jayalakshmi Ammal & 8 ors Vs. Chinnasamy Gounder & anr**
- (iii) (2002) 3 MLJ 814 – Balammal and ors Vs. Velayutham & ors**
- (iv) AIR 1999 SC 1441 – Vidhyadhar Vs. Manikikrao & anr**
- (v) 2019 AIR (SC) 4780 0 – Mahinder Kaur Vs. Sant Paul Sing**



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9. The learned Senior Counsel appearing for the respondents 2&3 submitted that the plaintiff was examined as P.W.1 and he categorically deposed that on the date of agreement viz., 23.04.2001, the power of attorney was executed in favour of the plaintiff and the power of attorney was a registered one. When the power of attorney registered, if at all any agreement for sale on the same day, definitely the plaintiff insisted the first respondent to register the agreement for sale also. Ex.A.1 and Ex.A2 are concocted one.

9.1. He further submitted that the plaintiff failed to make his claim within a period of contract and the time is essence of contract. As per the alleged agreement for sale dated 23.04.2001, the time fixed to perform their part of contract was six months. However, the plaintiff cause notice only on 20.10.2002, viz., one year after expiry of the contract period. The plaintiff failed to make any payment within the contract period and the suit itself barred by limitation. Further the relief of specific performance is being discretionary in nature, the plaintiff is not entitled for any relief of specific performance.



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9.2. He also pointed out that the contradiction between P.W.1 and P.W.2. P.W.2 is the scribe of the agreement for sale and he deposed that Ex.A.2, the endorsement was made within a period of two months from the date of agreement viz., 23.04.2001. Whereas, Ex.A.2 is dated 15.06.2002 and the same was made after the period of one year two months. He also pointed out that even assuming that Ex.A.2 is genuine, it is compulsory for registration after amendment under Section 17(1)(A) of the Registration Act. The said amendment came into force with effect from 24.09.2001. Therefore, the trial Court rightly dismissed the suit and prayed for dismissal of the appeal.

10. Heard the learned counsel appearing on either side and perused the material placed before this Court.

11. Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal :-



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(i) Whether the non examination of D.W.1 is fatal to the case of the defendants?

(ii) Whether the power of attorney can depose on behalf of the principal and it is valid or not?

(iii) Whether Ex.A.2 is compulsory registered or not?

12. The suit property originally belonged to the first respondent and he executed power of attorney in respect of the suit property on 23.04.2001, in favour of the plaintiff to deal with the property. Both the plaintiff and the first defendant are close friends. The plaintiff is also doing real estate business and therefore, in order to develop the suit property, the first defendant executed power of attorney in favour of the plaintiff on 23.04.2001 and the same was also registered before the Sub Registrar, Ambur.

13. According to the plaintiff, the first defendant agreed to sell the property for the total sale consideration of Rs.14,51,000/- and entered into agreement for sale on 23.04.2001. On the same day, he paid a sum of Rs.3,51,000/- to the first defendant as part of sale consideration.



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Thereafter, on 15.06.2002, the remaining balance sale consideration of Rs.11,00,000/- was also duly paid and the same was received by the first defendant. However, the first defendant completely denied the very execution of agreement for sale and also the receipt of entire sale consideration. Even then, the plaintiff did not take any steps to prove his case by getting any expert opinion on the signature found in the Ex.A.1 & Ex.A.2.

14. In support of his claim, the plaintiff had examined P.W.2, who is scribe of the Ex.A.1 and Ex.A.2. He deposed that he only prepared the Ex.A.1 and Ex.A.2. After execution of Ex.A.1, within a period of two month, the balance entire sale consideration was paid by the plaintiff to the first defendant. However, Ex.A.2, the endorsement was made on 15.06.2002 viz., after the period of one year two months. Therefore, P.W.2 failed to support the case of the plaintiff.

15. Further on perusal of Ex.A.1, the period of contract is fixed as six months. Even assuming that Ex.A.1 is genuine one, the plaintiff ought to have made payment within a period of contract. The agreement



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for sale was entered on 23.04.2001. Whereas, the plaintiff caused notice only on 20.10.2002, that too after receipt of the notice issued by the first defendant. After cancellation of power of attorney by the first defendant, he had caused notice on 11.10.2002, thereby called upon the plaintiff to hand over all the original documents in respect of the suit property. It was handed over to the plaintiff at the time of execution of power of attorney. The power of attorney was cancelled on 08.10.2002. Therefore, the plaintiff failed to make any payment as per the agreement for sale. It is settled law that the payment should be made within the period of contract.

16. That apart, the plaintiff deposed that on the date of execution of alleged agreement for sale, the power of attorney was executed by the first respondent in favour of the plaintiff. The power of attorney was marked as Ex.A.7 and it was executed on 26.04.2001. Whereas the alleged agreement for sale was executed on 23.04.2001. As rightly pointed out by the learned Senior Counsel appearing for the first defendant, when the first defendant had executed power of attorney and the same was registered before the Registrar office on 26.04.2001, the



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plaintiff should have insisted the first defendant to register the agreement for sale also on 23.04.2001. Except the agreement for sale viz., Ex.A.1 & Ex.A2, no other documents were produced by the plaintiff to prove that the first defendant had received the entire sale consideration in respect of the suit property.

17. The learned counsel appearing for the plaintiff/appellant vehemently contended that D.W.1 was failed to get into the witness box to deny the agreement for sale on his behalf and the power holder only examined as D.W.1. In support of his contention, he relied upon the judgment reported in **2009 (1) MLJ 69** in the case of **Prabhakaran & ors Vs. Ranganathan & ors.**, and this held that when a party shuns the witness box even though he or she was expected to figure as witness, then adverse inference could be drawn.

18. He also relied upon another judgment of this Court reported in **(2002) 3 MLJ 814** in the case of **Balammal and ors Vs. Velayutham & ors** in which the Hon'ble Division Bench of this Court held that where a party to the suit does not appear into the witness box and states her own



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case on oath and does not offer herself to be cross-examined by the other side, a presumption would arise that the case pleaded by her or on behalf of her is not correct and the Court can draw a presumption under Section 114 of the Evidence Act, against the party who did not enter into the witness box.

19. He also relied upon the judgment reported in **2019 AIR (SC) 4780** in the case of ***Mahinder Kaur Vs. Sant Paul Sing.***, in which the Hon'ble Supreme Court of India held as follows :-

“6. In Janki Vashdeo Bhojwani & ors Vs. Indusind Bank Ltd., and ors [2005 (2) SCC 217], it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be crossexamined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows :



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“15. Apart from what has been stated, this Court in the case of Vidhyadhar v. Manikrao observed at SCC pp. 583-84, para 17 that:

“17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be crossexamined by the other side, a presumption would arise that the case set up by him is not correct....”

Whereas in the case on hand, D.W.1 is the power holder of the first defendant to deal with the property. In fact, the power holder only executed the sale deed in favour of the defendants 2 & 3. Therefore, he had knowledge about the property and other transactions.

20. That apart, when the agreement for sale and other transactions, which were marked as Ex.A.1 and Ex.A2, were completely denied by the first defendant, the power holder could not have any knowledge about the alleged transactions between the first defendant and the plaintiff. In fact, D.W.1 had executed sale deed in favour of the defendants 2 & 3 on 17.03.2005, in respect of the suit property. Therefore, he had acquittance with the suit property. Further, D.W.1 was very much available for cross examination, he was not fully cross



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examined by the plaintiff. Therefore, the above judgments are not helpful to the case of the plaintiff.

21. Further the relief under specific performance is a discretionary relief and even if a doubt arises about the genuineness of the agreement of sale between the parties, the relief could be refused to be granted. The relief of specific performance could be granted only if it is a clear case of agreement of sale between the parties, which is pleaded and established by some acceptable evidence. Therefore, the non examination of first defendant cannot be termed as fatal. As stated supra the case of the plaintiff raised doubt whether the first defendant executed agreement for sale in favour of the plaintiff out of will. While so granting a relief under the Specific Relief Act, under a cloud is totally erroneous.

22. In the suit for specific performance, whether the plaintiff is set to have paid a huge amount as advance and also subsequently paid the entire sale consideration, the plaintiff has to adduce convincing evidence as to his source of money and payment of huge amount as sale consideration. Further when the plaintiff paid the entire sale



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consideration, he would have insisted the first defendant to execute the sale deed in his favour. The initial payment was paid by the plaintiff on 23.04.2001 and subsequent payment was made on 15.06.2002 viz., after the period of six months from the date of contract. Therefore, the subsequent endorsement made in order to save the limitation to file the present suit. Therefore, all the points are answered as against the appellant/plaintiff and this Court finds no infirmity or illegality in the judgment and decree passed by the trial Court.

23. Accordingly, the Appeal Suit stands dismissed. There shall be no order as to costs.

13.12.2023

Index : Yes / No
Internet : Yes / No
Speaking order /Non-speaking order

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G.K.ILANTHIRAIYAN, J.

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To

1. The Additional District Judge,
(FTC) Tiruppattur,
Vellore District.

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