



S.A.No.1507 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.02.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1507 of 2007

and

M.P.No.1 of 2007

R.Duraisamy

...Appellant

Vs

1.K.Devaraja

2.C.Manoharan

... Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree passed by the Lower Appellate Court in A.S.No.23 of 2007 on the file of Principal District Court, Erode dated 13.07.2007 reversing the Judgment and Decree of the Trial Court in O.S.No.394 of 2004 on the file of I Additional Sub-Court, Erode dated 20.04.2006 are liable to be set aside.



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For Appellant : Mrs.P.T.Ramadevi

For Respondents : Mr.V.S.Kesavan [R1]

R2 – Served – No Appearance

JUDGMENT

The plaintiff in a suit for specific performance is the appellant before this Court, challenging the judgment and decree in A.S.No.23 of 2007 on the file of Principal District Court, Erode dated 13.07.2007 reversing the Judgment and Decree of the Trial Court in O.S.No.394 of 2004 on the file of I Additional Sub-Court, Erode dated 20.04.2006.

2. In order to appreciate the grievances of the appellant, it is necessary to allude briefly to the facts of the case and while doing so, the parties are referred to in the same ranking as before the trial Court.

3. It is the case of the plaintiff that the suit property was the absolute property of the 1st defendant, he had purchased the same under the sale deed dated 06.09.1995. On 10.02.2001, the 1st defendant had agreed to sell the suit property to the plaintiff and for which purpose, he had entered into an



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agreement of sale in and by which the total sale consideration was fixed at a sum of Rs.1,00,000/-. On the date of the agreement, a sum of Rs.75,000/- was paid as advance and the balance due was only Rs.25,000/- which was payable within a period of one year. On the date of agreement, the plaintiff was in possession and enjoyment of the suit schedule property. It is the case of the plaintiff that he was always ready and willing to perform his part of the contract and it was the 1st defendant who was postponing the same. Thereafter, on 22.11.2002, the 1st defendant demanded from the plaintiff a further sum of Rs.15,000/- from out of the balance amount of Rs.25,000/- for meeting his family expenses. This amount was also paid by the plaintiff to the 1st defendant. An endorsement to this effect was made in the reverse of the 1st page of the sale agreement and the time for execution was extended by further period of one year. Despite several demands, the 1st defendant evaded his obligations under the agreement. The plaintiff finding something amiss therefore applied for an encumbrance certificate where he learnt that the suit property was sold to the 2nd defendant, who is the brother of E.K.Gopal, a close friend of the 1st defendant. It is the contention of the



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plaintiff that the sale deed is a collusive, sham and nominal document and no sale consideration has passed under this document. The plaintiff issued a legal notice, to which, the defendants had issued a reply containing false allegations. Therefore, the plaintiff has come to Court seeking the relief of specific performance.

4. The 1st defendant had filed written statement *inter-alia* denying the sale agreement and contending that he had borrowed a sum of Rs.50,000/- from the plaintiff for which, he had handed over blank promissory note and blank stamp papers signed by him together with xerox copies of the document of title in respect of the suit properties. It is these documents that have been misused to create the suit sale agreement. It is not binding on the 1st defendant. The 1st defendant also stated that he has not received any money from the brother of the said Gopal and the suit property was given towards security before the Judicial Magistrate Court, Gobichettipalayam, for the vehicle of Gopal. The sale deed dated 04.04.2001 is a sham and nominal document and it was executed in favour of the 2nd defendant at the



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instigation of E.K.Gopal. The criminal case was contested by the 1st defendant and the 1st defendant was liable to pay a sum of Rs.65,000/- to the plaintiff with interest. The 1st defendant therefore prayed that the suit to be decreed for the said sum of Rs.65,000/- and regarding other aspects, he prayed for dismissal of the suit for specific performance.

5. The 2nd defendant had filed counter *inter-alia* contending that the 1st defendant had mortgaged the suit property and his share in the family properties for a sum of Rs.3,00,000/- on 24.05.1998 in favour of one Sivasankaran. The 1st defendant sold the property to the 2nd defendant on 04.04.2001 for valuable consideration and possession was also handed over to him as he was unable to repay the loan. It is the case of the 2nd defendant that he is in possession and enjoyment of the property. That apart, the 2nd defendant had discharged the loan due to V.Sivasankaran by paying him a sum of Rs.87,900/- and obtained a receipt for the same on 04.04.2001. It also appears that E.K.Gopal filed creditor insolvency petition in I.P.No.40 of 2002 against the 1st defendant and others, the same is still pending. The 1st



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defendant demanded money from the 2nd defendant for meeting his legal expenses, which was refused. Therefore, the 1st defendant and the plaintiff had colluded together to create this deed.

6. The trial Court on going through the pleadings had framed the following issues:

- 1) Whether the plaintiff is entitled for the relief of specific performance?*
- 2) Whether the plaintiff is entitled for the alternative relief of return of Rs.1,28,500/- with subsequent interest at the rate of 12% on Rs.90,000/- and for costs?*
- 3) Whether the plaintiff is entitled for a charge in respect of the suit property?*
- 4) Whether it is true to say that the 1st defendant executed a sale deed in favour of 2nd defendant for Rs.87,900/- on 4.4.2001?*
- 5) To what relief the plaintiff is entitled to?*



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7. The plaintiff examined PWs 1 and 2 and marked Exs.A1 to A9.

The defendants examined DWs 1 to 4 and marked Exs.B1 to B13.

8. The trial Court on considering the evidence on record granted the relief of specific performance. Aggrieved by which, the 2nd defendant alone has filed an appeal before the appellate Court.

9. The appellate Court on going through the records, came to the conclusion that the plaintiff has not been able to prove his readiness and willingness. The learned Judge, after sifting through the evidence held that from a reading of the oral evidence of the plaintiff, as PW1, his capacity to pay the advance amount itself was questionable. That apart, the plaintiff has not proved the endorsement on the rear of the stamp paper. The learned Judge found discrepancies in the recitals in Ex.A7 and also the signatures found in Ex.A1 agreement of sale. The Appellate Court had also found that the sale in favour of the 2nd defendant was a true and valid one particularly when the 2nd defendant proved the payment of sale consideration and the



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settlement of the amounts due by the 1st defendant to his mortgagor, Sivasankaran. Challenging the same, the plaintiff is before this Court.

10. The second appeal was admitted on the following substantial questions of law:

"1. Has not the Lower Appellate Court committed an error of law to the facts and circumstances of the case in reversing the well merited judgment and decree of the Trial Court without reversing its reasoning and findings?

2. Has not the Lower Appellate Court committed an error of law to the facts and circumstances of the case in holding that non-challenge of Ex.A.2 is fatal to the case, since the same has been obtained by fraud and collusion between the defendants and no such plea or issue has been raised by the defendants and framed by the Trial Court?



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3. Has not the Lower Appellate Court committed an error of law to the facts and circumstances of the case in not holding that Ex.A.2 has been created collusively by the Defendants and the same is norm and shaminal document not supported by consideration?"

11. Heard the learned counsel on either side and perused the materials on record.

12. The plaintiff would state that the sale agreement had been entered into on 10.02.2001 and on that date, the plaintiff after paying an advance of Rs.75,000/- was due to pay the 1st defendant the balance sum of Rs.25,000/- . For the payment of Rs.25,000/- a time period of one year has been given. Thereafter, it is the case of the plaintiff that a further sum of Rs.15,000/- was paid for which an endorsement, Ex.A7 was made on 22.11.2002 leaving a balance of Rs.10,000/-. For this sum of Rs.10,000/-, once again

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time was extended by a further period of one year. This itself would go to show that the plaintiff did not possess the necessary wherewithal. Therefore the plaintiff has failed to prove his readiness and willingness. Further the agreement of sale and the endorsement on the reverse of the agreement of sale has been denied by the 1st defendant and the plaintiff has not been able to satisfactorily prove the same.

13. The 2nd defendant has proved the passing of consideration under Ex.A2 and further, the plaintiff was not able to establish the fact that the said document, namely, the sale deed-Ex.A2 in favour of the 2nd defendant was created by fraud and collusion. Therefore, for the above reasons, the substantial questions of law are answered against the plaintiff.

14. In the result, this Second Appeal is dismissed and Judgement and Decree passed in A.S.No.23 of 2007 on the file of Principal District Court, Erode dated 13.07.2007 reversing the Judgment and Decree in O.S.No.394 of 2004 on the file of I Additional Sub-Court, Erode dated 20.04.2006 are



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confirmed. No costs. Consequently, connected civil miscellaneous petition is closed.

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Index : Yes/No
Speaking order/non-speaking order
ssn

To

1. The Principal District Court,
Erode.
2. The I Additional Sub-Court,
Erode.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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