



S.A.No.1119 of 2011

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

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Kondachinna Boyan

...Appellant

Vs.

1.Chinnasamy

2.Sarasal

...Respondents

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and decree dated 29.04.2011 made in A.S.No.2 of 2011 on the file of the Sub Court, Sathyamangalam confirming the judgment and decree dated 19.04.2010 made in O.S.No.53 of 2005 on the file of the District Munsif Court, Sathyamangalam.

For Appellant : Mr.N.Manokaran

For Respondents : No appearance



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J U D G M E N T

The defendant in O.S.No.53 of 2005 on the file of the District Munsif Court, Sathyamangalam who failed before the Sub-Court, Sathyamangalam in A.S.No.2 of 2011 has filed the present appeal.

2. The appeal arises from a suit for agreement of sale dated 11.08.2004. The value of the agreement is Rs.25,000/-. The agreement reads that Rs.23,000/- was paid on the date of agreement itself. Since the time for execution of the sale deed was 6 months, notices were exchanged between the parties on 05.02.2005 and 11.02.2005. Immediately on receipt of the reply notice, the present suit was filed on 16.02.2005.

3. The defence taken by the appellant was that it was a loan transaction for Rs.15,000/- alone, which he stated, he would re-pay together with 9% per annum. In other words, it was not an agreement of sale, but, a loan transaction. As already pointed out, the trial Court decreed the suit and the lower appellate Court confirmed the same.



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4. Mr.N.Manokaran, learned counsel appearing for the appellant would vehemently argue that the judgment and decree of the Courts below have to be set aside on the following grounds:

1)The Court does not have jurisdiction to compare the thumb impressions;

2)It has not given cogent reasons for comparison of the thumb impressions and

3)The evidence of PW2 and PW3 to the effect that there is a difference in the thumb impressions was ignored and finally

4)The comparison was with respect of post suit documents and not with documents of the admitted thumb impressions which had come into being before the presentation of the plaint.

5. He would then argue that in the reply notice as well as in additional written statement filed on 21.06.2007, he had specifically stated that on 11.08.2004 two persons viz., Velusamy and Natarajan were present as witnesses and the plaintiffs have not examined both of them. He would then argue that a specific issue whether the plaintiff was ready and willing to execute the contract was not raised by the Courts below and on that short point, the appeal has to be allowed.



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6. He would then argue that there is a contradiction in the evidence regarding payment of amount and that is fatal to the plaintiff's case. Finally he would state that the property was worth Rs.3,00,000/- on the date of agreement and that is sought to be knocked off at Rs.25,000/- and that the agreement having been entered into in 2004, if the appeal is dismissed in 2023, due to the increase in price, it would be inequitable.

7. I have carefully considered the submission of Mr.N.Manokaran, learned counsel for the appellant. The respondents, though have been served, have not entered appearance.

8. This Court had not admitted the appeal but ordered notice of motion on 30.08.2011. The following substantial questions of law were suggested for admission of the appeal:

a) Whether the Courts below were justified in comparing the disputed thumb impression with admitted thumb impression and recording a finding about the authenticity of the thumb impression without the benefit of any opinion of an Expert?



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b) Whether the Courts below have committed an error in not considering the issue relating to time prescribed for taking steps or for completion of the transaction while exercising the discretion in a suit for specific performance, particularly no explanation has been given for fixing six months time to pay a meagre amount of Rs.2,000/-?

c) Whether the Courts below have applied greater scrutiny and strictness when considering whether the purchaser was always ready and willing to perform his part of the contract?

d) Whether the Courts below have committed an error in decreeing the suit for specific performance which is purely based on equity and discretionary relief especially when the plaintiffs took advantage over the defendant unmindful of relative hardship?

9. On the first submission that the Court should not have examined the thumb impression, the learned counsel would rely upon the judgment of the Supreme Court in ***Thiruvengadam Pillai Vs. Navaneethammal and another*** reported in (2008) 4 SCC 530. According



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to the learned counsel, this judgment concludes the position of law that the Courts should not venture into comparison of thumb impression and even if it does so, it should give reasons for the same.

10. A careful perusal of the judgment especially paragraph Nos.15 to 17 would show that the Supreme Court had not held that there is a total bar for comparing handwriting or thumb impression by Judicial Officers while trying a suit or criminal proceeding, The Supreme Court has held that while doing so, the Courts have to give their impression on the comparisons. It is here that the facts of this case looms large. In the reply notice dated 11.02.2005, the defendant had not taken a plea of forgery. In the written statement filed before the Court, he had not taken a plea of forgery. Nearly 2 years after the presentation of the plaint, by way of an additional written statement, the defendant took a plea of forgery. In fact, in this case, an application has been taken out under Section 45 of the Indian Evidence Act to send the documents for comparison by an Expert. The said application had been dismissed. Aggrieved by the same, the defendant preferred a revision before this Court. The revision also met with an order



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of dismissal. Thus, those orders closed the door of the defendant to have the documents examined through an Expert evidence by the process of Court. Yet, nothing prevented the defendant from summoning an Expert as evidence on his side, especially when there are several private Experts who are always available.

11. Further, the plea of forgery seems to be an after thought especially when in paragraph No.5 of his original written statement, the plaintiff had admitted to the execution of the documents. He had taken a plea that his thumb impressions were taken same was on a blank sheet of paper. The factum that he has accepted that he had affixed his thumb impression on blank sheet of paper goes against him. This is so because he admits to his thumb impression, but, would take a plea that the same has been affixed on a blank sheet of paper. It is one thing to say that the LTI had been affixed on the blank sheet of paper and totally another to say that the agreement itself was a forged one. To clarify, forgery implies that the persons whose signature/ LTI that the document ostensibly contains is not that of the said person. In case of signing or affixing of LTI on blank sheet



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of paper, the party and in this case, the defendant, admits to the documents but would plead that it was a blank one. In the case of the former, the affixture is not admitted but in the case of the latter the signature/ thumb impression is admitted but the contents are denied. No evidence has been let in by the defendant in order to substantiate this plea.

12. The argument that the Court should have given distinctive discussion on the various similarities it found in the documents or dissimilarities in the thumb impressions is not a straight jacket formula. The Courts below have concurrently compared the thumb impression and come to the conclusion that the same had been executed by the defendant. This read in the light of the stand taken in the original written statement convinces me that the plea of forgery of thumb impression is after thought and does not deserve acceptance.

13. Mr.N.Manokaran would forcibly argue that the evidence of PW2 and PW3 should have been considered for the purpose of rejecting the documents on the genuinity of the thumb impression. PW2 and PW3 are



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not Experts in the field of thumb impression and therefore, the Courts below have rightly not placed any weightage on their evidence.

14. As regards the argument that the Courts should not have compared the thumb impression of post suit documents and that it should have used only the pre-suit documents, I find this argument has been raised only for the purpose of its rejection. It is too well settled that the thumb impression does not change with age, whereas handwriting do. The judgment of the Courts saying post suit documents must not be referred applies to situations of handwriting which changes with age, temperament or medical condition of the person. Unfortunately for the appellant, the thumb impression stays the same from the time, it is formed clearly and distinctly on the thumb till the time is no more with the concerned party. It is too much for the appellant to argue that the thumb impression changes with age. I am not willing to go down that garden path.

15. As regards the next argument that the alleged witnesses Natarajan and Velusamy were not examined turns the concept of burden of



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proof on its head. It is not the plaintiffs case that Velusamy and Natarajan were witnesses to the documents dated 11.08.2004. It was the stand taken by the appellant in his additional written statement. Therefore, the burden falls on him to either bring those witnesses to the Court or to summon them in order to substantiate his case. Merely because he has taken this position in the written statement, it does not convince me that the burden is on the plaintiff to prove the agreement by summoning the concerned persons. The defendant having taken the plea that on 11.08.2004, the aforesaid persons were present, it was on him to do all necessary acts to prove the same. He has failed to discharge the same. Hence, this argument fails.

16. The next point is on readiness and willingness. This argument too is yet another smoke screen. A bare look at the dates involved in the suit is sufficient for the purpose of being convinced that the plaintiff was always ready and willing to execute the contract. The agreement was entered into on 11.08.2004. Out of Rs.25,000/-, Rs.23,000/- has been paid. The balance was a mere Rs.2,000/-. The suit notice was issued on 05.02.2005 [within a period of six months stipulated in the agreement], reply notice was issued



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on 11.02.2005 and within 5 days, the suit was presented on 16.02.2005. A perusal of the dates and payment of Rs.23,000/- out of Rs.25,000/- fixed under the agreement shows that the plaintiff was ready and willing and in fact had performed more than what was called upon by law to perform.

17. The contradiction in the evidence regarding payment, as to whether it was paid in the presence of the attestor or whether it was paid in the presence of the third parties does not make a difference, since the payment has admitted. The defendants have taken a stand that only Rs.15,000/- was paid and not Rs.23,000/-. This shows that the payment had been made, but, there is a variation in the amount. When the defendant pleads variation, it is up to him to prove that the amount specified in the agreement was not paid at all. The hurdle that the defendant unfortunately cannot cross is in the form of Section 91 and 92 of the Evidence Act. Having signed the agreement, stating Rs.23,000/- have been paid under the same, it is not open to him to let in oral evidence for the purpose of contradicting the said written evidence.



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18. The futility of the argument continued in the submission that the suit had been filed in the year 2005 and the present appeal is been heard in 2023 and therefore there is escalation in price and consequently an appeal should be accepted. No one can be blamed for the pendency of the legal proceeding between 2005 and 2023. The blame for pendency of appeal lies elsewhere and not on the plaintiff.

19. Be that as it may, no proof has been tendered before the Court to show that there has been a drastic increase in the price of the property concerned. Apart from that, the defendants though had taken a faint plea that on the date of the agreement the value of the property was Rs.300,000/- and not Rs.25,000/-, he had failed to file even easily accessible guideline value of the property before the Court.

20. Now going to the authorities cited by the learned counsel for the appellant, he would rely upon the judgment in *Shenbagam and others Vs. KK Rathinavel reported in 2022 SCC OnLine SC 71*, in particular paragraph Nos.28 and 29. I have already concluded that hardly within six



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months from the date of agreement, the suit has been presented and majority of the amount liable to be paid, had been paid. In the facts before the Supreme Court, the Court had specifically found that there was a conspicuous absence with respect to the evidence let in by the plaintiff to indicate his readiness and willingness. That is not the situation here. Enough and more evidence is available in the form of the agreement, the suit notice, the reply date, presentation of the plaint and deposit of balance amount by the plaintiff.

21. The learned counsel would then invite my attention to the recent judgment of this Court in *Surendran Vs. G. Selladurai and others* reported in *MANU/TN/7900/2022* to argue that readiness and willingness had not been shown by the party. In paragraph 30 of the said judgment, the Division Bench had held that the issue of readiness and willingness and the finding of the issue is more a matter of content and it is not necessary to use the exact terminology in the judgment. Over all reading of the judgment of the trial Court and the lower Appellate Court shows that both the Courts below have given such a finding. Apart from that, the judgment in that



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particular case turned on the facts that the plaintiff had not proved the genuineness of the agreement of sale. The finding given in the judgment must be looked into at that angle and the same cannot be read as a straight jacket formula.

22. It is necessary to point out the view of the Punjab and Haryana High Court in *Lal Chand Vs. Tek Chand* in *RSA 1989 of 2012 (O&M) dated 10.05.2012*, following the previous judgment of that Court in *Santa Singh Vs. Binder Singh & Others* reported in *2006(4) CCC 608 (P&H)*. The High Court was pleased to hold that in case the defendant has denied execution of the agreement, the statement of the plaintiff is sufficient to infer that he was ready and willing to perform his part of the contract.

23. In this case, the plaintiff has not only mentioned regarding his readiness and willingness in the plaint, but, he had proved the same by examining himself and has stated in unambiguous terms that he was ready and willing to perform his part of the contract. Similar view has been taken by this Court in *2005 (1) LW 472, 2012 (5) SCC 712 and 2019 SCC Online*



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Punjab and Haryana 709. Therefore, I am afraid, I am not able to accept the arguments of the learned counsel for the appellant.

24. The question of law suggested by him does not arise for consideration. Therefore, the judgment and decree in A.S.No.2 of 2011 dated 29.04.2011 in confirming the judgment and decree in O.S.No.53 of 2005 dated 19.04.2010 stands confirmed. The Second Appeal is **dismissed**. Since the respondents were not called upon to answer the appeal, there shall be no costs in the appeal.

13.04.2023

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Index : Yes/No

Internet : Yes/No

Nuetral Citation : Yes/No

Speaking order / Non-speaking order

To:-

1. The Sub-Judge, Sathyamangalam.
2. The District Munsif, Sathyamangalam.

V.LAKSHMINARAYANAN, J.

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