THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2023

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS JUSTICE R.KALAIMATHI

A.S.No.77 of 2018
and
C.M.P.No.1689 of 2018

P.Baladhandapani ...Appellant

Vs.

A.P.Maniraj ...Respondent

Prayer: First Appeal filed under Section 96 of C.P.C., r/w. Order 41 Rule 1 of C.P.C., against the judgment and decree dated 03.08.2017 made in O.S.No.576 of 2014 on the file of the I-Additional District Court, Coimbatore.

For Appellant : Mrs.Chitra Sampath for Mr.K.S.Karthik Raja

For Respondents : Mr.M.Aravind Subramaniam,Senior Counsel for Mr.A.Sathasivam

JUDGMENT

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

The plaintiff in O.S.No.576 of 2014 on the file of the I-Additional District Court, Coimbatore is on appeal.

2.The said suit was laid for specific performance of the agreement of sale dated 06.06.2014 and registered on dated 12.06.2014 entered into between the plaintiff and the defendant. According to the plaintiff, the defendant agreed to convey the suit property measuring an extent of about 30 cents in Chinnavendampatti Village of Coimbatore Taluk for a total consideration of Rs.32,70,000/-

3.According to the plaintiff, he had paid an advance of Rs.25,00,000/- on the date of the agreement, of which, a sum of Rs.8,66,900/- and Rs.9,00,000/- were paid through Bank Transfers and the remaining amount of Rs.7,33,100/- was paid in cash at the time of registration of the agreement. The other clauses of the agreement are to the effect, the plaintiff should pay the balance of consideration with in six months and get the sale deed executed. The plaintiff sent a legal notice calling upon the defendant to execute the sale deed on 03.11.2014. The said notice was returned as not claimed. Thereafter, according to the plaintiff, he was waiting in the Sub-Registrar's Office on 12.11.2014 with the balance consideration of Rs.7,70,000/- The defendant did not turn up. The plaintiff laid a suit on 12.12.2014 seeking specific performance.

4.The defendant filed a written statement contending, though he executed the sale agreement and it was registered as averred in the plaint, the same was not intended to be a sale agreement. According to the defendant, he has sought for a loan of Rs.18,00,000/- from the plaintiff and the plaintiff agreed to lend the money, if the defendant would mortage his properties. The defendant agreed for the same and went to the Office of the plaintiff on 06.06.2014. According to the defendant, to his surprise, the plaintiff had prepared a sale agreement and assured the defendant that he would get it cancelled on his repaying the entire money.

5.On the strength of assurance, believing the plaintiff, the defendant had agreed. Since the document could not be registered on the same day, as the Patta for the property was not transferred, execution and registration was postponed and it was actually completed on 12.06.2014 on which date, the plaintiff transferred a sum of Rs.9,00,000/- and Rs.8,66,900/- from his account to two different accounts of the defendant. The defendant would deny having received a sum of Rs.7,33,100/- by cash on 12.06.2014. It is also claimed that the plaintiff managed to get the notice returned by sending it to a wrong address. Therefore, the sum and substance of the case is the agreement was not intended to be acted upon as sale agreement but it is a loan transaction. The defendant would also rely upon the payment of Rs.75,000/- each on 12.06.2014, 15.07.2014 and 28.08.2014 to butress his claim that the suit transaction is a loan transaction and the sum of Rs.75,000/- was paid towards interest.

6.The plaintiff filed a reply statement denying the claim that the suit agreement is a loan transaction and claiming that the two payments for a sum of Rs.75,000/- paid by the defendant on 15.07.2014 and 20.08.2014 represented the commission payable to the Broker and since the Broker did not have a Bank account the money was transferred to plaintiff's account and the same has been paid over the Broker. The claim of the defendant that he has spent a sum of Rs.2,33,100/- at the time of registration of the instrument was also stourtly denied.

7.On the above contentions, the learned Additional District Judge, Coimbatore framed the following issues:-

> *"i) Whether the sale agreement dated 06.06.2014 is true, legally valid and enforceable?*
>
> *Ii) Whether the plaintiff has paid Rs.25,00,000/- as advance as per the agreement dated 06.06.2014 ?*
>
> *iii) Whether the plaintiff is ready and willing to do his part of contract ?*
>
> *iv) Whether the plaintiff is entitled for the relief of specific performance ?*
>
> *v) Whether the plaintiff is entitled for alternative relief as prayed for ?*
>
> *vi)To what other relief?"*

8.At trial, the plaintiff was examined as P.W.1 and one of the attesting witnesses to the document, one D.Subramaniam was examined as P.W.3. Mr.Sankar, Manager of the plaintiff's Bank was examined as P.W.2. Exs. A1 to A16 were marked. On the side of the defendant, the sole defendant was examined as D.W.1 and other attestor to the document namely, one V.R.Jothiram was examined as D.W.2. Exs.B1 to B4 were marked.

9.Upon a consideration of the evidence, the learned Trial Judge accepted the case of the defendant, mainly based on the payment of Rs.75,000/- on three occassions, which according to the Trial Court represented the interest at 36% per annum. The Trial Court found that the agreement was not intended to be a sale agreement but it was only a loan transaction. On the said finding, the learned Trial Judge decreed the suit for the alternative relief, while rejecting the main relief of specific performance. Aggrieved, the plaintiff is on appeal.

10.We have heard Mrs.Chitra Sampath, learned Senior Counsel for the appellant and Mr.M.Aravind Subramaniam, learned Senior Counsel for the respondent.

11.Mrs.Chitra Sampath, learned Senior Counsel for the appellant would contend that the Trial Court misdirected itself in concluding that the agreement was a loan transaction. She would draw our attention to the written statement of the defendant, where the defendant while admitting the agreement, has specifically claimed that he had spent a sum of Rs.2,33,100/- on the date of registration of the instrument namely, 12.06.2014. She would also contend that the notice was sent to the address found in the agreement and the fact that the defendant manipulated to have the notice returned will be borne out from the evidence. He was served suit summons on the same address. She would also point out that the Aadhar Card of the defendant still contains the same address.

12.The learned Senior Counsel would draw our attention to the evidence of the defendant as D.W.1 himself to contend that his evidence is wholly unbelievable. She would point out the fact that the defendant even in his proof affidavit has stated that the plaintiff has paid Rs.5,00,000/- to him on 13.06.2014 and he has adjusted a sum of Rs.2,33,100/- on 12.06.2014. This findings, according to the learned counsel is contrary to the pleading and therefore, the same cannot be accepted.

13.The learned Senior Counsel would also point out the evidence of P.W.2 in cross-examination where he would admit having received a sum of Rs.5,00,000/- on 13.06.2014 from the plaintiff. She would also rely upon the Bank statement of the plaintiff that has been produced as Exs.A7 show that a sum of Rs.8,66,900/- and Rs.9,00,000/- has been transferred to the defendant's account on 12.06.2014. Ex.A12, bank statement would show that these two sums of Rs.75,000/- paid on 15.07.2014 and 20.08.2014 were paid by the defendant into the account of the plaintiff. The Trial Court had taken this as an indicator for the claim of the defendant that the agreement is a loan transaction.

14.According to the learned Senior Counsel for the appellant, the Trial Court greviously erred in not looking into the other sorrounding circumstances, which would go to show that the defendant's case is highly improbable. According to her, the variations between the pleadings and the proof would hit at the bottom of the defence and a person, who pleads that the agreement was not intended to be acted upon as an agreement of sale must come with clean hands and categorical evidence, since he is attempting to demonstrate what is found in the written deed was not the real transaction between the parties but, it was something different.

15.Mrs.Chitra Sampath, learned Senior Counsel would also rely upon the suggestions made in cross-examination of P.W.1 to the effect that he had deducted a sum of Rs.2,33,100/- towards expenses on 13.06.2014 and paid only the balance of Rs.5,00,000/-, which indirectly admits the payment of Rs.5,00,000/- by the plaintiff. Relying upon these discrepancies, which have been overlooked by the Trial Court, the learned Senior Counsel would contend that the Trial Court's findings are vitiated.

16.Contending contra, Mr.M.Aravind Subramanian, learned counsel for the respondent would submit that the very conduct of the parties in the case on hand would show that the transaction between the parties is a loan transaction and not an agreement of sale. He would also draw our attention to the evidence of D.W.2, an attesting witness, who has spoken about the actual transaction. The learned counsel would submit that the very fact that the amounts were paid in fractions and the defendant has paid a sum of Rs.75,000/- on three occassions towards interest and the same having been accepted by the plaintiff would show the true colour of the transaction as a financial transaction. We have considerd the rival submissions.

17.The only question that arises for consideration in the appeal is whether the defendant has established his contention that the agreement was not intended to be acted upon as a sale agreement and it was executed as a security for a financial transaction. We need not go into other questions, since the plaintiff has established his readiness and willingness and he has filed the suit within a very reasonable time and there is no defence that the plaintiff was not ready and willing or that the suit is belated.

18. No doubt, the party to written instrument is not precluded from contending that it was not the real transaction between the parties but what was agreed is different. This position has been recognized by Hon'ble Supreme Court in **Parvinder Singh Vs. Renu Gautam and Others** reported in **2004 (4) SCC 794** wherein, the Hon'ble Supreme Court has observed as follows:-

> *"9.....As enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Mudaliyar V. Vedathanni AIR 1936 PC 70 : 64 IA 126 is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different...."*

19.A Division Bench of this Court in **Kamireddi Sattiaraju and Another Vs. Kandamuri Boolaeswari** reported in **2007 (1) MLJ 499** has also reiterated the same position, after examining, at length, the law on the point as to whether Section 92 would bar such a plea. Therefore, we have to proceed on the premise that the defendant is permitted to raise such a plea. While it is open to the defendant to raise such a plea, a very heavy burden lies on the defendant to establish the plea. The evidence of the plaintiff must be independent and convincing in order to enable the Court to accept such plea, which essentially deviates from the rule of evidence enstrained in Section 92. If we are to examine the facts in the light of the above, we find that the defendant has miserably failed to establish the case pleaded by him.

20.It is the specific case of the defendant in the written statement that he approached the plaintiff for a loan of Rs.18,00,000/- and the plaintiff agreed to advance a sum of Rs.25,00,000/- on the strength of a mortgage. He would also admit having signed the agreement knowing that it is a agreement. He would however, attempt to explain the same saying by, he signed out of belief. The receipt of a sum of Rs.17,66,900/- is accepted. The defendant would also accept receipt of another sum of Rs.5,00,000/- on 13.06.2014 in his evidence.

21.Though he would deny the same in the written statement, the defendant, who had deposed that he had spent a sum of Rs.2,33,100/- in the Registrar Office on 12.06.2014 in his writtenstatement, would in his evidence attempt to project a plea to the effect that the plaintiff has deducted the said sum from the money payable to him and paid the balance of Rs.5,00,000/- on the next day. These conflicting statements of the defendant creates a shadow on his plea that the agreement was not intended to be acted upon. The attesting witness examined by the defendant namely, D.W.2 make things worse for him. He claims to be a Police Officer, who was on medical leave. He says, he knew that the document executed was an agreement of sale but he would also say that he believed the plaintiff and attested the document. A reading of the evidence of D.W.2 in his cross-examination actually shows that he is not speaking the truth. His evidence is highly artificial and unbelievable particularly, when his position as a Police Officer is taken into account.

22.In a suit for specific performance, which is a discretionary relief, the parties are expected to come with clean hands. This rule is applicable not only to the plaintiff, the defendant should also come with clean hands. The evidence available clearly shows that the defendant has not come with clean hands. Of course, that alone would not be the tilting factor. When the execution of the agreement is admitted and the plaintiff has expressed his readiness and willingness within the time stipulated under the agreement he has also sued for specific performance within the time allowed for a suit for specific performance, unless the defendant establishes his plea that the suit agreement was not intended to be acted upon and was executed as security for a loan transaction beyond doubt such plea cannot be accepted. We find that the defendant has miserably failed to prove the case projected by him in his written statement. The learned Trial Judge had taken the payment of Rs.75,000/- on three occassions for which, there is no proof for the first payment said to have been made on 12.06.2014 and has concluded that the agreement is a loan transaction. We are unable to uphold his conclusions for the reasons stated supra.

23.In view of the above, we find that the plaintiff has to succeed and the judgment and decree of the Trial Court has to be reversed. This

Appeal stands allowed, the judgment and decree of the Trial Court are set aside. The suit in O.S.No.576 of 2014 will stand decreed for specific performance. The plaintiff would deposit the balance of sale consideration within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, the connected miscellaneous petition is closed.

(R.S.M.,J.) **(R.K.M.,J.)**
27.07.2023

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Internet:Yes
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Speaking
Nuetral Citation : No

To:-

The I-Additional District Court,
Coimbatore.

R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

KKN

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