IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.10.2023

CORAM:

THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

A.S.No. 148 of 2017
and
C.M.P.Nos. 6621 of 2017 & 10321 of 2022

V.Brijesh Kumar,
S/o. T.G.Venkatachalam
rep. by his General Power of Attorney
Agent Mrs.V.Preemalatha ... Appellant

Vs.

S.Sayed Masooth,
S/o. Sayeed Gaffar .. Respondent

PRAYER : Appeal Suit filed under Sec.96 of Civil Procedure Code, praying to set aside the judgment and decree dated 18.01.2017 made in O.S.No.81 of 2015 on the file of learned Principal District Judge, Krishnagiri.

For Appellant : Mr.T.P.Manokaran,
Senior Advocate for
Mr.T.Sathyamoorthy

For Respondents : No appearance

JUDGMENT

The appellant herein is the plaintiff, who has filed a suit in O.S.No.81 of 2015 on the file of learned Principal District Court, Krishnagiri against the respondent/defendant claiming the relief of specific performance directing him to execute the sale deed in respect of suit property along with delivery of possession and another prayer directing the defendant to pay a sum of Rs.9,50,000/- with interest at the rate of 18% and other consequential relief.

2. For the sake of convenience, the parties are referred as per ranking in the suit.

3. The defendant contested the suit stating that he was not intended to sell the property to the plaintiff nor executed a sale agreement to that effect. In fact, he borrowed a loan of Rs.1,50,000/- from the plaintiff and as a security, at the instance of plaintiff, the said agreement was executed. At any point of time, he has not received advance amount of Rs.10,00,000/-, but

the plaintiff manipulated the papers, for which he has obtained signature fraudulently and created the document, thereby he filed the suit, as such is liable to be dismissed.

4. Before the trial court, both parties adduced their evidence. As the plaintiff was in abroad, his mother is the power of attorney holder and his brother, both were examined as P.W.1 and 2 and the documents like sale agreement along with bank statement and payment acknowledgments were marked as Ex.A1 to A12. On the side of defendant, he was examined as D.W.1. Independent witness was examined as D.W.2. Considering both side submissions, the trial court framed issues, more particularly, with regard to the relief of specific performance as well as return of payment of Rs.9,50,000/- together with interest in favour of plaintiff. Considering entire evidence on record, the trial judge held that the evidence adduced by mother as a power of attorney holder on behalf of his son is not acceptable in respect of transaction between plaintiff and the defendant and also held that relying the plaintiff's case, he has marked Ex.A1 to A7, which have not been properly proved and the bank statement also not supported his case, besides

the plaintiff paid the amount to the defendant than the sale consideration, but not claimed to execute the sale deed in time as such, it would probablise that the said agreement was executed only for the purpose of security as a loan transaction not with the intention to sell the property. Accordingly, the suit was dismissed with regard to entire relief. Further he has also held that in respect of payment of additional amount, the plaintiff not adduced proper evidence to prove the same, thereby the entire claim of plaintiff was dismissed. Aggrieved over the findings of the trial judge, the plaintiff preferred this appeal.

5. The learned counsel for plaintiff would submit that the trial judge erroneously concludes that Ex.A2 to A7 receipts are not supported with the payment given to the defendant nor taken steps to disprove the signature, inspite of that, the suit was dismissed holding that plaintiff not proved the additional payment as such is unfair and liable to be set aside. Further, he would submit that mother of plaintiff examined as P.W.1, she was well aware of entire facts and so, she deposed about the transaction between the parties and her evidence also supported by P.W.2, her another son with

regard to the payment of additional amount to the defendant through bank statement. Without appreciating the said oral and documentary evidence, the trial judge erroneously concluded that plaintiff's claim is not supported with proper evidence as such is total misconception of law and facts and the same is liable to be set aside. Further, he would submit that the defendant failed to establish that he repaid the loan amount as he claimed nor produced any document to disprove the plaintiff's claim as well as the agreement, inspite of that, the suit was dismissed by the trial judge as such is unjust and liable to be set aside.

6. By way of reply, the learned counsel for defendant would submit that the plaintiff without filing the suit went abroad and his mother as a power holder filed a suit, who has no knowledge about the real transaction between the parties, thereby, her evidence was rightly disbelieved by the trial judge. Further, he would also content that bank statement relied on by the plaintiff not supported the additional payment as mentioned in Ex.A2 to A7 and the same was rightly compared by the trial judge and disagreed with the plaintiff's claim, which needs no interference. Further, the trial judge

observed that if at all, the plaintiff paid additional sum than the sale consideration, he ought to have taken steps to get the sale deed, but he has not taken any steps, which itself shows that the said agreement was executed as a security for the loan transaction and the same would probabilise the defence taken by the defendant, thereby the trial judge rightly dismissed the suit. Hence, he prayed to dismiss the appeal as no merits.

7. Brief facts of the case :-

The defendant is the owner of property, to whom the plaintiff entered into the sale agreement to purchase the said property for a sum of Rs.15,00,000/- on 27.09.2013, on the date itself, he paid advance of Rs.10,00,000/- to the defendant and for the remaining balance, a sum of Rs.5,00,000/- is to be paid within six months and to get the sale deed. The terms between the parties subject to registered sale agreement, but the time fixed as 16 months is not the essence of contract. After the said agreement, on various dates, in the year of 2014, the defendant received more than the balance sale consideration, but again for his necessity, he received total sum of Rs.9,50,000/- on various occasions in the year of 2015, thereby he received excess payment of Rs.9,50,000/- apart from the sale consideration of Rs.15,00,000/-. Only in order to help the defendant to meet out his financial crisis, the plaintiff paid the said excess amount on good faith, in turn the defendant also promised to repay the same, but when the plaintiff demanded to execute the sale deed and also insisted to repay excess amount with interest, the defendant evaded. Hence, he filed a suit by issuing pre-suit notice. As the job avocation, necessity arose for him, he went abroad and so, he gave power of attorney to his mother and she filed the present suit for the relief of specific performance with other remedies.

8. By way of written statement, the defendant admits the signature in the agreement, but denied that it was intentionally executed by him to purchase his property and also denied that he has not received excess amount of Rs.9,50,000/- than the sale consideration, however, he admits that he borrowed the loan amount of Rs.1,50,000/- from the plaintiff and as a security for the said loan transaction, a registered sale agreement was executed at the compulsion of plaintiff, besides he signed in the blank

promissory note. Accordingly, he gave those documents in order to meet out his financial crisis and he agreed to execute the said agreement, but the plaintiff inserted the amount as Rs.15,00,000/- as if the defendant agreed to sell the property. After the receipt of notice, he came to know about all these facts. At any point of time, there is no necessity arose for him to borrow the said huge amount nor the plaintiff has to pay the same. However on 14.07.2016, he paid the entire loan amount and requested to return the documents, however, though the plaintiff assured to return, but not returned the same. Thereafter, he contacted him through phone, for that he has also agreed to cancel the agreement, but demanded a sum of Rs.5,00,000/-, which was refused by the defendant. So, he gave a notice with false allegation, for that he gave suitable reply, thereby, he totally denied the execution of sale agreement as well as the receipt of excess amount.

9. As the plaintiff approached the court for the relief of specific performance, the initial burden is casted upon the plaintiff to prove the said sale agreement executed by the defendant with the intention to sell his property to the plaintiff for a valid consideration and the plaintiff always

ready to perform his part of agreement within a stipulated period. On the side of plaintiff, the plaintiff's mother was examined as P.W.1. While the agreement was marked as Ex.A1, admittedly, the defendant admits the signature in Ex.A1, but he content that it was executed as security for the loan transaction. But as per the written recitals of document, it clearly denotes that both parties entered into agreement to purchase and sell the property and the sale consideration was also fixed and within 16 months, the plaintiff has to pay the balance amount and to get the sale deed. The said 16 months ends on or before January 2015 and the plaintiff has to get the sale deed by paying the balance amount. At this juncture, the learned counsel for plaintiff drawn attention on the receipts as well as acknowledgments issued by the defendant, which were marked in Ex.A1 to A7, based on that, he content that after the said agreement i.e. from September 2013 till January 2015, on various occasions, the defendant received part of sale consideration from the plaintiff and issued receipts. Accordingly, the plaintiff paid excess amount of Rs.9,00,000/- than the sale consideration as it requested by the defendant for his urgent need. On perusal of the documents, it reveals that as a part of sale consideration based on the said agreement, on various occasions the plaintiff paid the amount to the defendant, in which the defendant signed and two witnesses are also signed in those documents. Accordingly, as per the contention of plaintiff, those amounts were paid to the defendant by utilising the amount from the bank as well as from the hands and to that effect, they produced the bank statement, which was marked as Ex.A12. The evidence of P.W.2, who is brother of plaintiff relied Ex.A12 bank statement stating that on various dates, from the bank account, he drawn the amount and paid the same to the plaintiff. On perusal of bank statement, as analysed by the trial judge in para 15 of the trial court findings, comparing to the dates found in Ex.A2 to A7 receipts correlated with the bank statement more or less the amount in the account and the same was drawn by the account holder P.W.2 but the amount mentioned in those receipts are not fully tallied with the amount mentioned in the bank statement, however, it probablise that there was an amount in the account of P.W.2. He has also deposed before the trial court that apart from the amount from the bank account, they utilised the amount in their hand and by summing up the amount, they have handed over the same to the defendant and to that effect, the defendant executed those receipts, but the trial judge not believed the version of P.W.1 and 2 holding that the bank statement is not sufficient to prove the amount lying in the account of P.W.2, thereby they come forward with Ex.A2 to A7 receipts. So, the excess amount paid by the plaintiff has not been established by the plaintiff, however the learned counsel for plaintiff argues that during the trial, the defendant simply denied the signature found in Ex.A2 to A7, but not taken steps to disprove the same by sending those documents to forensic lab in order to get expert opinion about the signature found in those documents, thereby the silent on his part is amounting to admission. For that, he relied on the following authorities in support of his contentions :-

(i) In the case of ***Man Kaur vs. Hartar Singh Sangha*** reported in ***2010 (10) SCC 512 – Para 18 (G);***

(ii) In the case of ***Rattan Dev vs. Pasam Devi*** reported in ***2002 (7) SCC 441 – Para 5;***

(iii) In the case of ***Fakruddin vs. State of Madhya Pradesh*** reported in ***AIR 1967 SC 1326 – Para 10;***

(iv) In the case of ***Videocon Properties Ltd. vs. Dr.Bhalchandra Laboratories*** reported in ***2004 (3) SCC 711 – Para 13;***

(v) In the case of ***M.Vennkataramana Hebbar vs. M.Rajagopal Hebbar*** reported in ***2007 (6) SCC 401– Para 13;***

(vi) In the case of ***Muddasan Venkata Narasaiah vs. Muddasani Sarojana*** reported in ***2016 (12) SCC 288 – Para 15;***

But, as discussed above, the defendant totally denied that he has not received any such amount from the plaintiff. Therefore, the authorities relied on by the plaintiff are not supporting his contentions. So, the initial burden is casted upon the plaintiff to establish that he has paid excess amount as per Ex.A2 to A7.

10. With regard to the execution of sale agreement, the defendant admits signature in the document, but content that it was executed as security for the loan transaction. Therefore, the burden is casted on him to prove the same. For that, the defendant not adduced any evidence. Moreover, he content that he repaid the loan amount of Rs.1,50,000/-, but there is no proof on his side to prove the said fact. In support of his contentions, he examined independent witness D.W.2, but admittedly, he is

close relative of defendant and his evidence is tainted with interest. Therefore, D.W.2 evidence is not reliable one. Furthermore, the plaintiff has not taken any steps to get the sale deed executed. The defendant also content that without his knowledge, the plaintiff drafted the sale agreement by misrepresentation, but to prove the same, he has not taken any steps to adduce any contra evidence. As per Sec.92 of Indian Evidence Act, oral evidence not to be adduced against written recitals unless contra evidence is proved. The case in hand, the defendant not adduced any contra evidence to disprove the recitals of Ex.A1. Therefore, the sale agreement is forged one. Though Ex.A2 to A7 have not been proved by the plaintiff, but within the stipulated period of agreement, there was a terms between parties and the plaintiff went abroad and his power holder, P.W.1 has proceeded with terms of agreement and filed the suit. P.W.2 also brother of defendant narrated the entire transaction between the parties, which sufficiently concludes that there is an agreement between plaintiff and the defendant, but now considering the property value, it is higher than the price at the time of agreement. Moreover, during the pendency of proceedings, the plaintiff also filed an application for refund of advance amount as an alternative remedy. Considering the same, this court is not inclined to grant the relief of specific performance, but inclined to direct the defendant to refund the advance amount of Rs.10,00,000/- with interest at the rate of 12% from the date of agreement, till the realisation. To that effect, the property subject to the sale agreement also settled by the defendant in favour of his daughter and if the property is encumbered, the plaintiff is not able to realise the suit claim. Therefore, the charge is ordered to be created over the suit property till realisation. With regard to repayment of additional excess amount claimed by the plaintiff, the suit is dismissed. Accordingly, this appeal is partly allowed and the findings of the trial judge in O.S.No. 81 of 2015 is set aside. In respect of specific performance as well as in respect of additional excess amount of Rs.9,00,000/-, the suit is dismissed. In respect of alternative remedy for refund of advance amount, the suit is decreed. Accordingly, the defendant is directed to repay the sum of Rs.10,00,000/- along with interest at the rate of 12% from the date of agreement till the date of realisation within a period of three months from the date of receipt of copy of this order. Until realisation, the charge is ordered to be created over the suit property. No costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

11.10.2023

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

Principal District Judge,
Krishnagiri.

T.V.THAMILSELVI, J.

rpp

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