BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.201 of 2022
and C.M.P.(MD)No.8865 of 2022

K.Subbiah ... Appellant / Defendant

Vs.

Pon Gangadharan ... Respondent / plaintiff

PRAYER: This Appeal Suit is filed under Section 96 of C.P.C. against the judgment and decree passed in O.S.No.47 of 2012, dated 12.01.2022 on the file of the III Additional District Court, Tirunelveli.

For Appellant : Mr.H.Arumugam

For Respondent : Mr.K.Sankararaman

JUDGMENT

Aggrieved over the judgment and decree passed in O.S.No.47 of 2012, dated 12.01.2022, on the file of the III Additional District Court, Tirunelveli, the present Appeal Suit has been filed by the appellant.

2. For the sake of convenience, the parties are referred to herein, as per their own ranking before the Trial Court.

3. The brief facts of the plaintiff's case are as follows:-

3.1. The plaintiff and the defendant are neighbors. The defendant is the owner of the suit property. The defendant borrowed some amount from the third parties and also from the Union Bank of India. In order to clear all the loans borrowed by him, he decided to sell the suit property and it was orally agreed between the parties on 16.02.2011, to sell the property for a total sale consideration of Rs.20 lakhs. As per the request of the defendant, the plaintiff had paid a sum of Rs.8,03,850/- to the Union Bank of India to clear the mortgage loan. Again, he has paid a sum of Rs.97,000/- and Rs.1 lakh to the defendant's account in Kanara Bank, Perumalpuram Branch, towards the sale consideration. That apart, he paid another sum of Rs.3 lakhs to the defendant from June to August 2011. Thereafter, the plaintiff has also cleared the loan of the defendant to the tune of Rs.4,70,000/- payable to one Sathyavanimuthu. According to the plaintiff, he has paid a sum of Rs.17,70,000/- towards sale consideration. Thereafter, a registered sale agreement was executed between the plaintiff and the defendant on 15.12.2011 to sell the suit schedule property for a sum of Rs.20,00,000/- with a condition to pay the balance amount of Rs.2,30,000/- within six months by the plaintiff. The plaintiff was ready to pay the balance amount. Since the defendant agreed to register the suit property, the plaintiff purchased the stamp papers on 23.07.2012 for a sum of Rs.50,000/- and also drawn Demand Draft for the remaining sale consideration. However, the defendant did not come to the Register Office on that day. Therefore, the plaintiff issued a legal notice on 30.04.2012. Hence, the suit.

4. The defendant has filed a written statement admitting that he has borrowed loans from the bank and third parties. It was denied by the defendant that there was oral agreement to sell the property for a sum of Rs.20 lakhs and according to the defendant, an agreement came to be executed on 15.12.2011 under the premise that it is only a mortgage agreement towards the money paid by the plaintiff. He never intended to sell the property. It was also denied by the defendant that he had received a sum of Rs.3 lakhs from the plaintiff between June to August 2011. The defendant has executed a contract under the belief that it is only a mortgage deed and all the original deeds have been handed over to the plaintiff. Hence, opposed the suit.

5. Based on the above pleadings, the trial Court has framed the following issues:

> *"1.Whether the plaintiff is entitled to get a decree for specific performance of sale?*
>
> *2.Whether the agreement is got executed stating that it is mortgage deed?*
>
> *3.To what relief?"*

6. On 26.07.2021, the trial Court has framed the following additional issue:

> *"Whether the defendant did not agree and intended to execute sale deed on 23.07.2012?"*

7. On the side of the plaintiff, three witnesses were examined as P.W.1 to P.W.3 and 25 documents were marked as Ex.A1 to Ex.A25. On the side of the defendant, two witnesses were examined as D.W.1 to D.W. 2 and two documents were marked as Ex.B1 and Ex.B2.

8. The trial Court after analysing the entire evidence and materials, decreed the suit for specific performance in favour of the plaintiff. Challenging the same, the present appeal suit came to be filed.

9. The main contention of the learned counsel appearing for the defendant / appellant before this Court is that the suit agreement viz., Ex.A1 was never intended to sell the suit property. In fact, it was executed only as a mortgage deed. Further, it is the contention of the learned counsel appearing for the defendant / appellant that the oral sale agreement dated 16.02.2011, has not been established. The very conduct of the plaintiff, paying the amount in part by part to clear the debts to the bank and various third parties, clearly shows that it is only a loan transactions and the plaintiff and the defendant are being the neighbors, such arrangement came into existence. Therefore, the contention that the sale agreement Ex.A1 came into existence on 15.12.2011 is highly improbable. The same was executed only for the loan transactions. Further, the amount of Rs.3 lakhs paid in cash from June to August 2011 has not been established and therefore, the specific performance cannot be granted. It is the further contention of the learned counsel appearing for the defendant / appellant that the suit property is a residential house and the defendant has leased out the property. Hence, in the event of granting specific performance, great hardship would be caused to the defendant. Hence, prays for allowing of this Appeal Suit.

10. The learned counsel appearing for the plaintiff / respondent submitted that the defendant himself has admitted in evidence that various amounts have been received to clear the loan to the bank and also to the third parties. The very sale agreement itself was executed only to clear the debts. Both of them are neighbors that was the reason which, the plaintiff has advanced that amount, even before the written contract. That itself clearly shows that the defendant was intended to sell the property. After receiving the benefits from the plaintiff, the defendant has now taken a u-turn contending that it is only a loan transaction. D.W.2 is the wife of the plaintiff, who is also witness to Ex.A1 contract. Therefore, the contention that the documents was never intended for sale and it is only executed as a mortgage deed, has no basis. The trial Court has analysed the entire evidence and granted the relief of specific performance. That apart, plaintiff was always ready and willing to perform his part of contract. He paid the substantial sale consideration on the date of agreement itself. Besides, he has also purchased the stamp papers and prepared the draft sale deed and waited in the register office on 23.07.2012 and he has also drawn the Demand Draft for the remaining sale consideration. These facts clearly show that the plaintiff was always ready and willing to perform his part of contract. The legal notice was issued on 30.04.2012, within a period of 6 months as agreed in the agreement. Hence, the plaintiff is entitled to specific performance.

11. In the light of the above submissions, now the points arise for consideration in this Appeal Suit are as follows:

1. Whether Ex.A1 agreement dated 15.12.2011 has not intended to sale of suit property or as a result of loan transaction?

2. Whether the plaintiff was always ready and willing to perform his part of contract?

3. In the event of granting specific performance, whether any hardship would be caused to the defendant?

4. To what other relief, the plaintiff is entitled?

Point No:1

12. It is the case of the plaintiff that the plaintiff and the defendant are neighbors and the plaintiff was residing in Chennai. The defendant has borrowed loans from the bank and the third parties. In order to clear the loans to the bank and third parties, he decided to sell the property for a total sale consideration of Rs.20 lakhs. Accordingly, an oral agreement agreed between the parties on 16.02.2011. From that day onwards, the plaintiff has paid several amounts not only to the bank but also to the third parties. In the plaint, he has clearly pleaded the nature of the payment made to the Bank i.e., Union of India to the tune of Rs.8,03,850/- and also paid another sum of Rs.97,000/- and Rs.1 lakh to the account of the defendant. These amounts have not been disputed by the defendant. It is also the contention of the plaintiff that he has also paid another sum of Rs.3 lakhs from June to August 2011. That apart, another sum of Rs. 4,70,000/- has also been paid by the plaintiff to one Sathyavanimuthu. All other payments have not been denied by the defendant. Whereas the plaintiff in his evidence has clearly spoken that apart from the said amount, a sum of Rs.3 lakhs has also been paid in cash.

13. It is relevant to note that agreement came to be executed on 15.12.2011, prior to that substantial payment has already been paid. The evidence of D.W.1 clearly indicates that he was neighbor of the plaintiff and in fact some time he was also residing as a tenant under the plaintiff. At that time, he has also indebted to several third parties. The relationship between the parties clearly shows that the parties, in fact, has agreed to enter into an agreement to clear the debts by selling the property. D.W.2 is none-other than the wife of D.W.1. She has also admitted that Ex.A1 came to be executed on 15.12.2011 for sale of property for a total sale consideration of Rs.20 lakhs and it is agreed between the parties to complete the sale within a period of 6 months to pay the remaining sale consideration of Rs.2,30,000/-. Ex.A1 is the registered sale agreement typed in Tamil. Therefore, the contention of the defendant that he has executed the document only as a mortgage deed cannot be countenanced. The persons is capable of understanding nature of thing handed over all the original documents and cleared the loans by the amount received from the plaintiff, now cannot go against the contents of the document and terms of the contract.

14. Ex.A2 to Ex.A17 are the documents which clinchingly establish the fact that plaintiff has paid the amount to the debtors of the defendant. All those documents are admitted by the defendant. Ex.A15 to E.17 are the receipt of the payment made to one Sathyavanimuthu, which was also admitted by the defendant. The defendant has also availed the mortgage loan by depositing the title deeds with the bank. After payment made by the plaintiff, the mortgage has redeemed and original title deeds have been taken together from the bank and all the original documents have been handed over to the plaintiff. When the defendant has able to know the nature of the transactions and difference between the deposit of title deeds and sale agreement, it is highly improbable to contend that he has executed Ex.A1, only under the pretext of mortgage deed. Such plea is totally against the normal human conduct. Therefore, this Court is unable to accept the contention of the defendant.

15. P.W.2 and P.W.3 also examined to prove Ex.A1. When the attesting witness and documentary writer also have been given evidence for proving the execution of the documents, the contention of the defendant that it is only a loan transaction and he executed the document as mortgage deed, cannot be countenanced. The evidence of D.W.1 also clearly shows that he has vacated the house property and residing in the plaintiff's house as a tenant for some time. His evidence also clearly shows that he does not even aware of the amount actually received from the plaintiff and he has also admitted that he has not even averred in the written statement as to the nature of the amount borrowed from the plaintiff. These facts clearly indicate that the payment made by the plaintiff has not been denied specifically, except showing some ignorance. Therefore, the contention of the defendant that Ex.A1 is not intended for sale cannot be countenanced. Having admitted the payments to the bank and other debtors and receipt of the amount, now defendant cannot take a contrary stand. Such view of the matter, this Court is of the view that, Ex.A1 is an agreement for sale executed by the defendant. Accordingly, this point is answered.

Point No.2

16. The evidence adduced from the side of the plaintiff, it is seen that substantial payment of Rs.17,70,000/- have been paid on the date of agreement i.e., on 15.12.2011 and the remaining amount of Rs.2,30,000/- to be paid. The time agreed between the parties as per Ex.A1 is six months. It is the specific case of the plaintiff that he was always ready and willing to perform his part of the contract, which has not been seriously denied in the written statement. The specific contention of the plaintiff that he has requested the defendant to receive the balance sale consideration and come to the Register Office, he has also purchased the stamp papers on 23.07.2012 and drawn the Demand Draft for the remaining sale consideration. These documents have been marked as Ex.A20 to Ex.A22. These facts clearly show that plaintiff was always ready and willing to perform his part of the contract. As the defendant did not come to the Register Office, on the particular day, immediately, the plaintiff issued the legal notice on 30.04.2012. D.W.1 in his evidence also admitted that he has received the legal notice. However, he has not sent any reply, as the defendant did not come to execute the sale deed. The plaintiff has also given a police complaint, which was also admitted by the defendant. Thereafter, the suit has also been filed on 16.08.2012. These facts clearly indicate that the plaintiff was always ready and willing to perform his part of the contract. Accordingly, this point is answered.

Point No:3

17. D.W.2 is the wife of D.W.1. She has also admitted that she has signed as witness in Ex.A1. It is the case of the defendant that he has let out the property to M/s.Tower Vision India Private Limited, New Delhi, for a period of fifteen years from 15th October 2008 on monthly rental basis. It is not the case of the defendant in the written statement that the suit property is only the dwelling house where the defendant is residing. The admission made by the defendant in the cross examination clearly shows that he was residing as a tenant under the plaintiff's house, which is adjacent to the suit property. When the hardship is not pleaded in the written statement now merely on the basis of submission of the learned counsel appearing for the defendant / appellant, this Court cannot come to the conclusion that there will be hardship to the defendant. The question of performance of the contract would involve hardship on the defendant has to be determined with reference to the circumstances existing at the time of contract. The defendant taking advantage of the money borrowed from the plaintiff on various dates cleared all his debts and he has not even resided in the house and in fact he has shifted to the neighboring house as tenant as per his evidence. Therefore, merely because the suit property said to be a house property, the hardship cannot be inferred on the submission of the learned counsel for the defendant / appellant. Such view of the matter this Court is of the view that the plaintiff is certainly entitled to specific performance. Accordingly, this point is ordered.

18. In view of the above discussion, I do not find any merit in this Appeal suit. In the result, this Appeal Suit is dismissed, confirming the judgment and decree passed in O.S.No.47 of 2012, dated 12.01.2022 on the file of the III Additional District Court, Tirunelveli. No costs. Consequently, connected miscellaneous petition is closed.

10.04.2023

NCC : Yes

Index : Yes/No

vsm

To

1.The III Additional District Court, Tirunelveli.

2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

N.SATHISH KUMAR, J.

vsm

A.S.(MD)No.201 of 2022

10.04.2023