



A.S.No.282 of 2015

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE MUMMINENI SUDHEER KUMAR

A.S.No.282 of 2015

1.Alain Aroquia Gilbert

2.Aroquia Lourdenadin (Insane)

Rep. by his brother/ Guardian 1st appellant.

...Appellants

Vs.

Oudearadjou

...Respondent

Prayer: Appeal filed under Order 41 Rule 1 and Section 96 of the Code of Civil Procedure praying to set aside the judgment and decree passed in O.S.No.49 of 2011 dated 15.12.2014 on the file of the III Additional District Judge, Puducherry by allowing this appeal.

For Appellants : Mr.R.Veeramani

For Respondent : Mr.S.Paneer Selvam
for M/s.K.Shyam Sunder



A.S.No.282 of 2015

J U D G M E N T

WEB COPY (*Judgment of the Court was delivered by **R.SUBRAMANIAN, J.***)

The parties will be referred to as per their rank in the trial Court for the purpose of convenience.

2. The appeal is by the defendants in O.S.No.49 of 2011 on the file of the Additional District Court, Puducherry, aggrieved by the decree for specific performance granted in favour of the plaintiff in the said suit.

3. The plaintiff sued for specific performance of an agreement of sale dated 12.01.2007, in and by which, according to the plaintiff, the defendants agreed to convey the suit property which is a residential house for a total consideration of Rs.40,00,000/-. The said agreement is registered with the office of the Sub-Registrar, Puducherry. According to the plaintiff, as per the agreement, the defendants agreed to execute a sale deed upon receipt of the balance consideration within a period of eleven (11) months from the date of the agreement. A sum of Rs.15,00,000/- was paid as advance on the date of agreement.



A.S.No.282 of 2015

WEB COPY

4. The 2nd defendant in the suit is a mentally ill person and the 1st defendant was shown as guardian. Reliance was placed on an order passed by the Principal District Judge, Puducherry in M.I.P.O.P.No.32 of 2002 dated 17.03.2003, appointing the 1st defendant as the guardian of the person of the 2nd defendant.

5. The plaintiff also averred that a further sum of Rs.15,00,000/- was paid on 09.03.2007 and an endorsement was made by the 1st defendant on the reverse of the agreement. Subsequent thereto, there were at least four extensions of the time fixed under the agreement on various dates. All the extensions were evidenced by endorsements made by the plaintiff and the 1st defendant, in the presence of witnesses. The plaintiff issued a notice seeking specific performance on 07.09.2009, to which the 1st defendant sent a reply on 23.09.2009 disputing the validity of the agreement. Hence, the suit came to be filed on 26.11.2013.



WEB COPY

6. The defendants resisted the suit contending that though the agreement was entered into, it was not intended to be an agreement of sale.

It was the claim of the 1st defendant that the 1st defendant and the plaintiff were doing real estate business, since the business faced a financial crunch, the plaintiff suggested that they could borrow on the strength of the security of the immovable property of the 1st defendant and therefore in order to facilitate such borrowing, the agreement was entered into. It was claimed that neither the advance amount of Rs.15,00,000/- as evidenced by agreement nor the further payment of Rs.15,00,000/- alleged to have been made on 09.03.2007 as evidenced by the endorsement were paid to the defendants. The sum and substance of the written statement was that though an agreement was entered into, it was not intended to be acted upon and no money was received under the agreement.

7. On the above pleadings the learned trial Judge framed the following issues:-

- 1. Whether it is true that sale agreement executed between the parties on 12.01.2007?*
- 2. Whether the defendants had received advance*



WEB COPY



A.S.No.282 of 2015

amount of Rs.15,00,000/- on two occasions i.e., on 12.01.2007 and 09.03.2007?

3. Whether the defendants are directed to execute the sale deed in favour of the plaintiff after receiving the balance sale consideration?

4. Whether the plaintiff is entitled for a judgment and decree as prayed for?

5. To what relief the parties are entitled to?

8. At trial, the plaintiff was examined as PW1 and one Murugan, attesting witness to the agreement as well as the endorsements was examined as PW2. Exs.A1 to A9 were marked on the side of the plaintiff. The 1st defendant was examined as DW1 and no documentary evidence was produced on the side of the defendants.

9. On a consideration of the evidence on record, the learned trial Judge found that the agreement is true. The learned trial Judge also found that the monies alleged to have been paid under the agreement were in fact paid on the date mentioned therein. On the said finding, the learned trial Judge held that the suit had been filed within the extended time and hence



A.S.No.282 of 2015

the plaintiff is entitled to a decree for specific performance. Aggrieved the defendants are on appeal.

10. Pending appeal an application has been taken out by the plaintiff seeking to amend the plaint to include the prayer for refund of advance in C.M.P.No.16276 of 2024 seeking to amend the plaint. The said application has been allowed by this Court on 09.09.2024 and the plaint has also been amended incorporating the prayer for refund of advance. Pending appeal the plaintiff also filed an application seeking specific performance in respect of half share of the 1st defendant only and for partition.

11. We have heard Mr.R.Veeramani, learned counsel appearing for the appellants and Mr.S.Paneer Selvam, for M/s.K.Shyam Sunder, learned counsel appearing for the respondent/ plaintiff.

12. Mr.R.Veeramani, learned counsel appearing for the appellants would vehemently contend that the cumulative effect of the oral evidence that has been placed before the Court would show that the monies as



claimed under the agreement were not paid at all. It was also contended that the plaintiff was never ready and willing to perform his part of the contract.

The financial capacity of the plaintiff to pay the sale consideration was also put in issue. The learned counsel would also further contend that the 2nd appellant being a mentally ill person unless a guardian has been appointed for his property and permission of the Court has been obtained for sale of the property, the decree for specific performance cannot be granted.

13. Contending contra Mr.S.Paneerselvam, learned counsel appearing for the respondent/ plaintiff would submit that the 1st defendant has admitted his signature in the agreement. Therefore, it is not open to him to deny the contents of the same, more so, when the agreement is a registered document. He would also rely upon presumption created under Sub-Section 2 of Section 60 of the Registration Act to contend that the 1st defendant has not placed evidence which would have the effect of derailing the statutory presumption created under Section 60(2) of the Registration Act.

14. The learned counsel would also contend that in view of Section 92



of the Evidence Act it is not open to the 1st defendant to let in evidence contrary to the recitals found in the written instrument. The learned counsel for the respondent would also submit that even if the plaintiff is not entitled to the relief of specific performance in view of the statutory lapse in not obtaining permission for sale of the mentally ill person's property, he would be entitled to refund of advance.

15. We have considered the rival submissions.

16. On the submissions of the learned counsel for the parties the following points arise for determination in the appeal:

1) Whether the 1st defendant had the capacity to represent the estate of the 2nd defendant and to enter into an agreement of sale in respect of the share of the 2nd defendant, who is admittedly a mentally ill person?

2) Whether the plaintiff would be entitled to specific performance and partition of half share of the 1st defendant?

3) Whether the plaintiff would be entitled to refund of advance?



A.S.No.282 of 2015

Point No.1:-

WEB COPY

17. Admittedly the 2nd defendant is a mentally ill person and recognizing such illness, the Principal District Court, Puducherry has appointed a guardian for his person in M.I.P.O.P.No.32 of 2002. A copy of the order of the District Court which has been marked as Ex.A3 shows that the 1st defendant is appointed as a guardian of the person of the mentally ill person. Once the person is held to be mentally ill and the guardian has been appointed, such guardian has no power to alienate the property without the permission of the District Court. Admittedly, no such permission has been obtained by the 1st defendant to alienate the share of the 2nd defendant in the property, in terms of Section 59 of the Mental Health Act, 1987. Therefore, the agreement entered into for entirety of the property, including the share of the 2nd defendant cannot be specifically enforced. Therefore, the decree of the trial Court with reference to the half share of the 2nd defendant will have to be necessarily set aside.

Point No.2:-



A.S.No.282 of 2015

18. In C.M.P.No.17313 of 2023 the plaintiff had sought for amendment to include the prayer for sale of undivided half share of the 1st defendant, for partition of the property and for refund of the excess advance amount of Rs.10,00,000/- with interest at 12% per annum. The trial Court has found that the agreement is true and valid. Though an attempt is made by Mr.R.Veeramani, learned counsel appearing for the appellants to demonstrate that the agreement itself was not intended to be acted upon as sale agreement, we are unable to countenance the said submission of the learned counsel for the appellants, inasmuch as the evidence on record militates against such submission.

19. The 1st defendant as DW1 has admitted his signature in the agreement. The agreement is a registered agreement. DW1 though has denied the receipt of consideration, the evidence available on record shows that the consideration has been paid. PW1 and PW2 have specifically deposed about the payments that have been made. Of course, there are certain minor discrepancies with reference to the timing of the payments, particularly, the payment dated 09.03.2007. While PW1 would claim that



the said payment was made in after noon at about 3.00 p.m., PW2 states that it was made at 11.30 a.m. This in our considered opinion is only a minor discrepancy on the timing. Considering the fact that the witnesses are deposing long after the event, such minor discrepancies cannot be considered as a vitiating factor. The fact that DW1 has admitted his signature and has stated that he appeared before the Registrar and admitted his signature would show that the attempt by the 1st defendant to deny receipt of consideration cannot be accepted.

20. However, strictly, if we uphold the findings of the trial Court regarding the validity of the agreement, the plaintiff would be entitled to a decree for specific performance in respect of the share of the 1st defendant only. But, in the case on hand, we find there are several other factors which would require us to desist from granting a decree for specific performance of half share of the 1st defendant only. The other half share belongs to a mentally ill person, except the 1st defendant there is no one else to represent the said mentally ill person. The property also measures 18feet by 90 feet making a fair division impossible. Therefore, if we are to grant a decree for

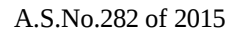


A.S.No.282 of 2015

specific performance regarding the half share of the 1st defendant and for partition, this decree will prejudicially affect the interest of the 2nd defendant, who is a mentally ill person. We are therefore more than satisfied that granting of decree for half share of the 1st defendant only will result in considerable prejudice to the mentally ill person and we therefore do not propose to grant a decree for specific performance in respect of the half share.

Point No.3:-

21. What remains is the question of refund of advance. Again Mr.R.Veeramani, learned counsel appearing for the appellants would draw our attention to the minor variations in the evidence of PW1 and PW2 to claim that the money was not paid at all. As already pointed out, the defendant has admitted his signature as well as the thumb impression in the agreement. He is a literate person having studied upto X standard. He has appeared before the Registrar and admitted execution of the agreement. The Registrar also admitted the document for registration after satisfying himself regarding the execution of agreement under Section 35 of the Registration



22. As regards the second payment of Rs.15,00,000/- on 09.03.2007, the same is evidenced by endorsement on the reverse of the agreement. The defendant would admit the signature in the endorsement and also PW2 and other witnesses had spoken very clearly about the payment. Of course, as already pointed out, there are certain minor discrepancies regarding the date at which the payment was made. Such minor discrepancies, in our opinion, cannot be a ground to conclude that the payment was not made at all. Therefore, we find that the claim of the plaintiff regarding payment of Rs.15,00,000/- as advance on the date of agreement and further payment of Rs.15,00,000/- on 09.03.2007 stands proved. We therefore



A.S.No.282 of 2015

concluded that the plaintiff would be entitled to a decree for refund of advance, as otherwise, it would amount to unjust enrichment on the part of the defendants.

23. As a result of the decisions made in point Nos.1 to 3, the appeal will stand **partly allowed**. The decree for specific performance is set aside; the decree for alternative relief of refund of advance is granted. There will be a direction to the 1st defendant to pay a sum of Rs.30,00,000/- along with interest 6% per annum from the date of the suit till date of payment. The parties will bear their own costs. There will be a charge in respect of the half share of the 1st defendant to the extent of decree for refund of advance.

(R.S.M., J.) (M.S.K., J.)
07.11.2024

dsa
Index : No
Internet : Yes
Neutral Citation : No
Speaking order



A.S.No.282 of 2015

To

The III Additional District Judge,
Puducherry.



WEB COPY



A.S.No.282 of 2015

R.SUBRAMANIAN, J.
and
MUMMINENI SUDHEER KUMAR, J.

dsa

A.S.No.282 of 2015

07.11.2024



A.S.No.282 of 2015

Note:-

The Registry is directed to draft a decree as follows:-

- 1) Appeal is partly allowed;
- 2) The suit in O.S. will stand decreed for refund of advance of Rs.30,00,000/- with 6% interest from the date of the plaint till date of payment;
- 3) The suit in respect of the main relief of specific performance will stand dismissed;
- 4) There will be a charge over the share of the 1st defendant in the property for the decree granted.