



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.11.2024

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

S.A.No.1369 of 2011 and
M.P.No.1 of 2011

V.S.Kandaswamy

... Appellant / Defendant

Vs.

G.Venugopal

... Respondent / Plaintiff

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree made in A.S.No.12 of 2010 dated 11.07.2011 on the file of the First Additional District Judge, Coimbatore, confirming the judgment and decree made in O.S.No.553 of 2006 dated 27.10.2009 on the file of the II Additional Sub-Court, Coimbatore.

For Appellant : Ms.C.Usha

For Respondent : Mr.S.Mukunth, Senior Counsel for
Mrs.Gayathri

JUDGMENT

This Second Appeal has been filed to set aside the judgment and decree made in A.S.No.12 of 2010 dated 11.07.2011 on the file of the First Additional District Judge, Coimbatore, confirming the judgment and decree



made in O.S.No.553 of 2006 dated 27.10.2009 on the file of the II
Additional Sub-Court, Coimbatore.

2. Heard Ms.C.Usha, learned counsel for the appellant and Mr.S.Mukunth, learned Senior Counsel for the respondent and perused the materials available on record.

3. The defendant is the appellant against whom the plaintiff has filed the suit for specific performance and got the suit decreed by the Trial Court, and the First Appellate Court has also confirmed the judgment of the Trial Court in an appeal preferred by the defendant by dismissing the First Appeal. Now, the defendant has preferred this Second Appeal.

4. The short facts pleaded in the plaint are as follows:

The defendant is the absolute owner of the suit property described in the schedule. He derived the suit property by virtue of a registered Will dated 10.10.1985, which was executed by his mother Palaniammal. After the demise of his mother, the Will came into force and the defendant became entitled to the possession and enjoyment of the suit property. On 13.07.2005, the defendant entered into an agreement of sale in respect of the



suit property with the plaintiff for a sum of Rs. 25,000/- per cent. As per the sale agreement, the defendant agreed to sell the suit property for a sum of Rs. 25000/- per cent. The defendant has received a sum of Rs.20,000/- from the plaintiff towards advance for the sale agreement. The time fixed for completing the sale is six months. At the time of executing the sale agreement itself, the defendant had handed over the Xerox copy of the Will and Encumbrance Certificate pertaining to the property. The plaintiff was always ready and willing to pay the balance sale price and get the sale deed registered. He approached the defendant to execute the sale deed in his favour. On 23.12.2005 the defendant approached the plaintiff and sought an extension of time. So, the time was extended by five months and an endorsement was also made to that effect in the original sale agreement.

4.1. On 23.12.2005 the defendant received an another sum of Rs.20,000/- from the plaintiff. On 23.12.2005 five months time was extended, and thus the time was extended till 22.05.2006. On the date of endorsement, the defendant received a total sum of Rs.40,000/- towards total sale consideration from the plaintiff. On 13.07.2005 onwards, the plaintiff is always ready and willing to perform his part of the contract. During the first



week of May 2005, the plaintiff called upon the defendant to come and execute the sale deed by getting the balance sale consideration. The defendant wantonly did not come forward to execute the sale deed. Hence, the plaintiff has filed a suit for specific performance.

5. The brief facts pleaded in the written statement filed by the defendant are as follows:

The plaintiff was not ready and willing to perform his part of contract. The alleged agreement dated 13.07.2005 would contain a recital that the plaintiff get the sale deed executed by the defendant by paying the balance sale consideration within six months. The plaintiff had failed to perform his part of the contract within a period of six months. The advance amount of Rs.20,000/- received by the defendant was also forfeited. The defendant did not receive a further sum of Rs.20,000/- from the plaintiff. The witnesses who have signed on 23.12.2005 did not know the contents of the alleged sale agreement dated 13.07.2005. Hence the suit should be dismissed.

6. On the basis of the above pleadings, the Trial Court has framed the following issues:



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"1. Whether the suit sale agreement is true, valid binding upon the defendant?

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

3. Whether the Endorsement regarding the extension of time of sale agreement and receipt of part sale consideration are true and valid?

4. Whether the Plaintiff is entitled for the relief of specific Performance of the sale agreement as prayed for with cost?

5. To what other relief the plaintiff is entitled?"

7. During the course of the trial, on the side of the plaintiff, two witnesses have been examined as PW.1 and PW.2 and Exs.A1 to A7 were marked. On the side of the defendant, one witness has been examined as D.W.1 and no document was marked.

8. After conclusion of the trial and on considering the evidence available on record, the trial court has allowed the suit by granting the relief as prayed and on the appeal preferred by the defendant, the said appeal was dismissed by confirming the judgement of the Trial Court. Hence, the



defendant has filed this Second Appeal by raising the following substantial questions of law:

"1. Whether in law the First Appellate Court is right in dismissing the First Appeal by ignoring the fact that the plaintiff has failed to prove Ex.A1 in terms of Section 72 of the Indian Evidence Act?

2. Whether in law the First Appellate Court is right in dismissing the Appeal by ignoring the fact that the disputed signature in Ex.A4 endorsement has not been proved that it was affixed by the plaintiff?

3. Whether in law the First Appellate Court is right in dismissing the Appeal by ignoring the fact that the time is an essence of contract and that the plaintiff has not come forward to perform his part of contract before the expiry of time?"

9. The learned counsel for the appellant submitted that the First Appellate Court and the Trial Court have ignored the fact that the time is the essence of contract and the plaintiff did not come forward to get the sale deed executed before the expiry of six months time agreed in the sale agreement. He further submitted that the Courts below have ignored to take note of the fact that Ex.A4 endorsement has not been executed by the



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defendant. So far as the proof in terms of the sale agreement is concerned, the same has been marked as Ex.A1. The sale price was agreed at Rs.25,000/- per cent and an advance amount of Rs.20,000/- has been paid. The time for contract has been agreed at six months. It is claimed by the learned counsel for the appellant that Ex.A1 would fall under Section 72 of the Indian Evidence Act. Section 72 of the Indian Evidence Act would read as under:

"72. Proof of document not required by law to be attested -- An attested document not required by law to be attested may be proved as if it was unattested."

10. It is not the contention of the defendant that he did not execute the sale agreement. In fact, the defendant is a party to the sale agreement and the terms of agreement to sell the property has been reduced into writing. The plaintiff has discharged his liability by producing the document in compliance of Section 91 of the Indian Evidence Act. Question of proving the document would arise only when the defendant himself has chosen to admit the fact that he had executed Ex.A1. In fact, the defendant resisted the suit by stating that the endorsement Ex.A4 for paying the another part payment of Rs.20,000/- towards the sale consideration is a forged one and



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that the time is the essence of contract. Having made a point that time is the essence of contract, the defendant cannot take a fancy submission that he did not execute Ex.A1 sale agreement. So far as the execution of Ex.A1 sale agreement is concerned, it has to be taken that the defendant has agreed the same and only because of that, he raised a point that Ex.A4 endorsement is a forged one and that the time is the essence of contract.

11. The question regarding Section 72 of the Indian Evidence Act is concerned, it is about proving Ex.A1 in terms of Section 72 of the Act. Ex.A1 is a document which does not mandatorily require attestation. So it is sufficient for the plaintiff to prove the document in terms of Section 67 of the Indian Evidence Act. In the reply notice sent by the defendant, he did not deny execution of the sale agreement and hence, it is unnecessary to expect the plaintiff to prove Ex.A1 and his burden of proving the existence of the sale agreement gets completed on the very production of the sale agreement and by marking it as Ex.A1. Hence, the question of law in respect of Section 72 of the Indian Evidence Act does not assume any relevance. Thus, the first question of law is answered.



12. Now coming to the point that the time is the essence of contract, the time limit as agreed is five months. The defendant did not choose to send any legal notice after the expiry of five months by stating that the agreement has got terminated in view of the expiry of time limit.

13. The learned counsel for the appellant submitted that time cannot be the essence of contract just because it is mentioned in the agreement in an usual manner and it should state that the agreement has been entered into for specific performance and hence, time is the essence of contract and failure to fulfil the terms within the time limit would frustrate the whole object. In the instance case, there is no reason stated as to why and for what purpose time limit of six months has been fixed. If it is fixed as a term in the contract, the expiry of time limit frustrates the whole object of the sale agreement. Hence, the third substantial question of law does not arise.

14. Apart from that, the most relevant proof is about the denial of Ex.A4 endorsement. The plaintiff has relied on Ex.A4 endorsement that the time has been extended for a further five months as the defendant has stated to receive a further sale consideration of Rs.20,000/- and had made an



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endorsement by extending the time limit for further five months. The defendant had stoutly denied the very endorsement and stated that it has been executed just for the purpose of saving the time and not otherwise. Even if it is presumed that the endorsement is not made by the defendant, it still remains that the suit has been filed within the period of limitation. The Ex.A4 endorsement did not play any vital role in gaining statutory time for filing the suit.

15. The alleged signature of the defendant in both Exs.A1 and A4, even on a bare eyes examination do not tally and hence, it cannot be strictly presumed that the signature in Ex.A4 endorsement is made by the defendant. The drastic difference could be found between the disputed signature in Ex.A4 and the other signatures in Ex.A1 of the defendant on the bare eye examination. It would have been better had the Courts below done the bare eye examination. The Courts proceeded to rely on the evidence of the attesting witnesses and had chosen to arrive at a finding that the signature in Ex.A4 was made by the defendant. Even in the absence of endorsement, the plaintiff could have still got the period of limitation to file the suit and claim the relief of specific performance.



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16. The fact that the advance amount of Rs.20,000/- was received at a time when the sale agreement was executed cannot be disputed by the defendant. So far as the other payment of Rs.20,000/- and Ex.A4 endorsement is concerned, the plaintiff did not prove that the signature is that of the defendant. In fact, the defendant made a specific contention that he did not make any signature on 23.12.2005. Even if the attesting witness had deposed evidence supporting the plaintiff, the gross difference found in the signatures cannot be ignored. So in the fitness of things, I feel the plaintiff does not deserve to get the relief of specific performance on equitable grounds. In such circumstances, I feel it would be appropriate to give an alternate relief of refund of the advance amount. Even though the plaintiff has claimed that he is entitled to the refund of Rs.40,000/-, the materials available on record would only prove the payment of Rs.20,000/- only.

17. In the result, this Second Appeal is partly allowed and the judgment and decree made in A.S.No.12 of 2010 dated 11.07.2011 by the First Additional District Judge, Coimbatore is modified to the extent of



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decreeing the suit by granting the alternate relief of refund of the advance amount of Rs.20,000/- along with interest at the rate of 9% from the date of filing of the agreement till the date of realization. In all other aspects, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Speaking order / Non-speaking order

26.11.2024

Index : Yes / No

Neutral Citation : Yes / No

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To

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1. The First Additional District Judge,
Coimbatore.
2. II Additional Sub-Court, Coimbatore.



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R.N.MANJULA, J.

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