IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.11.2024

CORAM

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No. 779 of 2012
and M.P. No. 1 of 2012

1.M.Vasugi(died)
2.V.Mani, S/o.Late Venkatesan
3.M.Sathiamurthy, S/o.V.Mani
4.Sudha, W/o.V.Venkatesan
Appellants 2 to 4 are residing at
Chinnakanginoor Village
Pallikondapet Post
Tiruvannmalai District-606611.
(Appellants 2 to 4 brought on record as legal representatives of the deceased sole appellant viz., M.Vasugi vide Court Order dated 15.11.2021 made in C.M.P. Nos.5688, 5690 & 6188 of 2021 in S.A. No.779/2012)

...Appellants

Vs.

C.Nagamuthu ... Respondent

PRAYER: Second Appeal is filed under section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree dated 25.01.2012 made in A.S. No. 2 of 2011 on the file of the District Court, Tiruvannamalai, confirming the judgment and decree dated 27.09.2010 made in O.S. No. 58 of

2008 on the file of the Principal Subordinate Judge, Tiruvannamalai.

For Appellants : Mr.S.Udayakumar

For Respondent : Mr.T.Dhanasekaran

JUDGMENT

The defendants are the appellants against whom the plaintiff has filed a suit in O.S. No. 58 of 2008 for specific performance. The trial Court has decreed the suit and the first appeal filed by the defendants also got dismissed by confirming the judgment and decree of the trial Court. Aggrieved over the same, the defendants have preferred the second appeal.

2. The brief facts pleaded in the plaint are as follow:-

The defendants had executed a sale agreement dated 14.06.2006 in favour of the plaintiff in respect of the sale of the suit properties for a valuable consideration of Rs.3,00,000/-. On the very same date of the agreement itself, Rs.2,00,000/- had been paid as sale advance and the time for compliance is agreed as two years. The plaintiff was ready and willing to pay the balance sale consideration of Rs.1,00,000/- and to get the sale deed executed from the defendants. The plaintiff has been calling upon the defendants to receive the balance sale consideration and execute the sale deed, but the defendants evaded to receive the balance sale consideration and execute the sale deed. In the sale agreement, a mortgage deed has been mentioned and the defendants assured that while executing the sale deed, he would reduce the mortgage amount of Rs.15,000/- in the sale amount fixed, because the defendants are liable to pay the principal mortgage money of Rs.15,000/- together with interest accrued to Rs.24,900/- to the plaintiff under the aforesaid mortgage deed. The plaintiff had issued a lawyer's notice on 03.03.2008 calling upon the defendants to receive the balance sale consideration and execute the sale deed. The defendants received the notice on 10.03.2008 and issued a reply notice with a false reckless, unfounded and imaginary allegations on 18.03.2008. Hence, the plaintiff has filed the suit.

3. The defendant has filed written-statement with the following averments:-

The defendants never returned back to sell the suit properties and has not intended to execute any sale agreement and did not receive any advance amount as well. It is false to state that the defendants have received Rs.2,00,000/- as sale advance from the plaintiff. The defendants had no intention to alienate the suit property and the plaintiff had no idea to purchase the suit properties.

3.2. The suit properties and other properties was originally belonged to the defendants' father, viz., Munusamy Gounder, who died intestate about 10 years back leaving behind his legal heirs viz., Ranthammal, Vasugi (defendant) Manimegalai, Kalaiyarasi and Selvi. After the demise of Munusamy Gounder, his legal heirs partitioned the properties under a registered partition deed dated 25.03.1998 and in the said partition, the suit properties were allotted to the share of the defendants.

3.3. The defendant's husband has been working as a Secondary Grade Teacher in Srinivasa Higher Secondary

School, Adi Annamalai. The first defendant had two daughters and one son. One of his daughters has died four years back. Another daughter had completed Teacher Training course in the year 2007 and she is unemployed. The first defendant's son had completed Teacher Training Course in the year 2003 and got appointment in the year 2005. In order to meet the family expenses and educational expenses of his children, the first defendant's husband borrowed a loan from the plaintiff and at the insistence of the plaintiff, the first defendant's husband had executed a mortgage deed in favour of the plaintiff. The plaintiff insisted to pay interest at the rate of 36% per annum for the loan amount of Rs.15,000/- borrowed by the first defendant's husband for which the plaintiff obtained the simple mortgage deed dated 06.09.2002 from the first defendant's husband in respect of the suit properties.

3.4. On the same day, without any consideration as a measure of security to the due requirement of the said loan the plaintiff obtained a pronote for Rs.10,000/- from the defendants. The plaintiff had obtained a pronote for a sum of Rs.10,000/- from the defendants. Once again the first defendant's husband borrowed another sum of Rs. 10,000/- from the plaintiff for which the plaintiff obtained a pronote for Rs.10,000/- on 10.05.2005 from the first defendant's husband. The first defendant's husband and her son borrowed a sum of Rs.25,000/- from the plaintiff for which the plaintiff obtained a promissory note for Rs.35,000/- in favour of the plaintiff's son by the first defendant's husband and her son jointly.

3.5. When the first defendant's husband urgently needed money to discharge the debts due by the first defendant's father viz., Munusamy Gounder, he requested the plaintiff to pay a sum of Rs.70,000/-. The plaintiff insisted the first defendant's husband to execute a registered sale agreement. Thereafter, the first defendant's husband had executed an agreement of sale by way of security to the amount already availed from the plaintiff. So the agreement of sale is a measure of security and not executed with an intention to execute the sale. This suit has been filed under the wrong misconception and hence, to be dismissed.

3.6. The defendants had returned all those promissory notes to the defendants on the date when the sale agreement was executed. The defendants did not receive a sum of Rs.2,00,000/- as advance. The agreement of sale has been attested by the first defendant's husband Subramani and Murugan, who is one of the Sammandhis of the plaintiff. Since the first defendant's husband had executed the sale agreement as a security, the plaintiff is not entitled to the relief as prayed for.

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

"(1) Whether the sale agreement is sham and nominal ?

(2) Whether the defendant had executed the sale agreement on 14.06.2006 in favour of the suit property as a collateral security for due repayment of the earlier loans availed by the defendant from the plaintiff? If so, whether the defendant's husband had received only Rs.79,000/- as loan and not Rs.2,00,000/- as advance

amount on 14.06.2006 from the plaintiff?

(3) *Whether the plaintiff had no financial capacity to give Rs.2,00,000/- towards advance amount to the defendant under the sale agreement?*

(4) *Whether the plaintiff is entitled to get a decree for specific performance of contract as prayed for?*

(5) *Alternatively whether the plaintiff is entitled to get a decree for the refund of the advance amount of Rs.2,00,000/- with interest and cost thereof as prayed for?*

(4) *To what other relief, the plaintiff is entitled?"*

5. During the course of trial, on the side of the plaintiff, two witnesses were examined as PW1 and PW2 and Exhibits A1 to A16 were marked and on the side of the defendants, two witnesses were examined as DW1 and DW2 and Exhibits B1 to B4 were marked.

6. At the conclusion of the trial and after considering the materials available on record, the learned Trial Judge has decreed the suit and the First

Appeal preferred by the defendants, the First Appellate Court had dismissed the first appeal by confirming the judgment and decree of the Trial Court.

7. Aggrieved by the same, the defendants have preferred the second appeal by raising the following substantial questions of law, by alleging them to be the substantial questions of law arising in the appeal:-

> *"(a) Whether the Trial Court as well as the Lower Appellate Court are correct in holding Exhibit A-12 as a sale agreement, when the same was executed as security for money transaction which could be established on the fact for fixing the time limit for performance of contract for 2 years?*
>
> *(b) Whether the respondent /plaintiff is entitled to equitable relief of specific performance when the plaintiff has not exercised his option of readiness and willingness to perform his part of contract?"*

8. The learned counsel for the appellants submitted that an extraordinary the duration of two years for completing the sale transaction would show that the sale agreement has been executed for the purpose of security and not with an intention to execute the sale deed. He further submitted that the defendants was in the habit of getting loan from the plaintiff and in fact, for the earlier loans availed by executing the promissory notes, viz., Exhibits B2 and B3 have been returned after repayment and hence, for the loans that have been obtained subsequently, the sale agreement was obtained only as a security. The lower appellate Court has omitted to appreciate the probabilities of the circumstances in order to come to the conclusion that the sale agreement has been executed only with an intention to treat it as a security and not otherwise.

9. The learned counsel for the respondent submitted that the respondent has filed the suit in the year 29.04.2008 even before the expiry of 2 years as agreed. The appellants is estopped from denying his own agreement in view of Section 92 of the Indian Evidence Act. The defendants has not come to the box and subjected himself for the examination and hence, adverse inference has to be taken. The defendants did not deny the execution of the sale agreement and affix the signature on the Exhibit A12 - Sale Agreement.

10. According to the appellants, the sale agreement dated 14.06.2006 is a sham and nominal one and it is meant only as a security for the earlier loans availed by the respondent /plaintiff. No doubt, Exhibit A-12/sale agreement appears on form and content as a sale agreement. The respondent/ plaintiff submitted that the terms of the contract has been reduced into writing and the same is produced and that will satisfy the requirement of Section 91 of the Indian Evidence Act and hence, it is not necessary for the respondent /plaintiff to prove that the contents of the sale agreement by any other mode than producing the sale deed.

11. It is further claimed that the defendants are estopped from stating anything contrary to the contents of Exhibit A12/ sale agreement in view of Section 92 of the Indian Evidence Act. In the instant case, the appellants have taken up the stand that though Exhibit A12 appears to be a sale agreement, the intention of the parties was not to consider it as a sale agreement, but only to take it as a security document for the loan availed by the appellants.

12. The fact that the appellants have received a sum of Rs.2,00,000/- on 14.06.2006, is not denied. The respondent /plaintiff had already issued a pre-suit notice on 03.03.2008, wherein he has stated that the appellants had already availed a loan of Rs.15,000/- and executed a mortgage deed on

06.09.2002 and the said mortgage amount along with interest would accrue to Rs.24,900/- and that the said amount ought to have been deducted from the balance sale consideration, which is supposed to be paid to the appellants. But there is no recitals to that effect is seen to be present in Exhibit A12-Sale Agreement. The primary contention of the appellants is that there is no meeting of minds between the parties about the subject matter of the agreement, the appellants had chosen to prove the contrary by claiming to be falling under Section 92 of the Indian Evidence Act.

13. However, the respondent/ plaintiff submitted that even in that context, the appellants have not proved anything contrary to the terms of agreement. He further submitted that the appellants power of attorney alone was examined as DW1 and the appellants did not come to box; and the non-examination of the appellants also would go adverse to the stand taken by the appellants and hence, in all probabilities, the Exhibit A-12 Sale agreement can be considered a document only for the purpose as found in the same.

14. It is true that examination of the party to the document viz., the defendants is a vital to the defense raised by the appellants. But the rebuttal proof can also be drawn from the infirmities and inprobabilities found in the plaintiff's case as well.

15. One aspect which is very ticklish is the time limit of two years for paying the balance sale consideration of Rs.1,00,000/- and to get the sale deed registered. The plaintiff all along was saying that he has money to pay the balance sale consideration and he has been ready and willing to perform his part of contract. According to the plaintiff, after adjusting the mortgage loan due to be settled by the appellants the balance sale consideration would be only Rs.75,100/-. Under such circumstances, the agreement time for two years time is seen to be unnatural and tainted. In normal course, when parties also reside locally, absolutely there cannot be any reason to agree an exordinary longer period.

16. In fact, the plaintiff who was examined as PW1 did not give any satisfactory explanation as to why a long period has been prescribed and that too, when the plaintiff has given other loans to the appellants /defendants. This will cause a cloud around the plaintiff's case. The respondent /plaintiff who all along been in a better financial position and who have been giving frequent loans to the defendants, would not have found it difficult to pay the balance sale consideration and get the sale deed registered without waiting for two full years.

17. It would have been a different scenario had the sale agreement been prescribed a short time for completing the sale, but due to the subsequent circumstances, it got delayed and the suit had been filed before the expiry of limitation. It is the case where at the first instance itself the time for completing the transaction has been agreed as two years. So the above fact alone is sufficient enough to improbabilize the agreement for a sale transaction.

18. The learned counsel for the respondent/ plaintiff submitted that the plaintiff has filed the case even after the expiry of three years period of limitation. It is not a question whether the plaintiff has filed the suit before the expiry of limitation. But the doubtful circumstance in the too long a period of two years fixed for completing the sale transaction. When the sale amount has been agreed as Rs.3,00,000/- and the substantial portion of sale consideration has already been paid, it appears to be impractical and doubtful to extend the time for completion of the transaction in years than in months.

19. In all probabilities and possibilities, Exhibit A12 /sale agreement appears to be a document executed as a security for the loan availed by the defendants from the plaintiff. But the first appellate Court had failed to appreciate the above vital circumstances and had chosen to decree the suit.

20. As the relief of specific performance, it is an equitable one, I feel in the given circumstances and for the reasons stated above, the respondent /plaintiff can be given with the alternate relief of refund of the advance amount of Rs.2,00,000/- with 9% interest from the date of the suit till the date of repayment.

21. In the result, the second appeal is disposed and the judgment of the first appellate Court is set aside and modified to the effect of decreeing the suit for granting the relief of refund of advance amount of Rs.2,00,000/- along with interest at the rate of 9% from the date of the suit till the date of realization.

Consequently, connected Miscellaneous Petition is closed. No costs.

26.11.2024

Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No

Maya

To

1. The District Court, Tiruvannamalai,

2. The Principal Subordinate Judge, Tiruvannamalai.

3. The Section Officer,
   V.R. Section,
   High Court, Madras.

R.N.MANJULA, J.

Maya

S.A. No. 779 of 2012

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