IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

S.A.No.371 of 2013

Durai .. Appellant

vs.

Mohanraj ..Respondent

Second Appeal filed under Section 100 of CPC against the judgment and decree passed in A.S.No.25 of 2012 dated 02.11.2012 on the file of the Principal District Judge, Cuddalore in confirming the judgment and decree in O.S.No.187 of 2010 dated 20.12.2011 on the file of the Principal Subordinate Judge, Cuddalore.

For Appellant : Mr.C.Prakasam

For Respondent : Mr.T.K.Baskaran

JUDGMENT

This second appeal arises against the judgment and decree dated 02.11.2012 in A.S.No.25 of 2012 on the file of the Principal District Judge at Cuddalore in confirming the judgment and decree of the Court of Principal Subordinate Judge, Cuddalore in O.S.No.187 of 2010 dated 20.12.2011.

2. O.S.No.187 of 2010 is a suit for specific performance of an agreement for sale entered into between the plaintiff and the defendant on 16.05.2010. The plaintiff and the defendant are blood brothers. There is no dispute in relationship between the parties or on the execution of Ex.A1 dated 16.05.2010 and Ex.A2, which is dated on the same day.

3. As per the terms of the agreement, the defendant / appellant before me and the owner of the property agreed to sell the property for a sum of Rs.9,25,000/-. On the date of agreement itself, the defendant had received an amount of Rs.2,00,000/- leaving a balance of Rs.7,25,000/-. As Exs.A1 and A2 have been entered into on the same date, the following conditions were imposed on the plaintiff in order to get the sale deed executed in his favour:

i) that he shall withdraw the suit for partition and separate possession filed by him along with his sister in O.S.No.134 of 2008 on the file of Principal District Munsif, Cuddalore; and

ii) that he shall pay the loan which was taken from ICICI

Bank mortgaging the suit schedule mentioned property.

4. The defendant on the service of summons filed a written statement stating that the plaintiff was living in the same house which had been the subject matter of mortgage and therefore, he should have been aware of the account details. He would state that since the ICICI Bank loan was not repaid and as the suit in O.S.No.134 of 2008 on the file of Principal District Munsif, Cuddalore was not withdrawn, the plaintiff has not complied with the terms of Exs.A1 and A2 and therefore, he is not entitled for a decree of specific performance.

5. Before the trial Court, the following issues were framed:

1. Whether the sale agreement is true and valid?

2. Whether the plaintiff is always ready and willing to perform the contract of sale agreement as alleged?

3. To what other relief the parties are entitled?

6. In order to prove the agreement, on the side of the plaintiff, PW1 to PW4 were examined and Exs.A1 to A8 were marked and on the side of the defendant, the defendant examined himself as DW1 and marked Exs.B1 to B4.

7. The learned trial Judge in and by way of a judgment dated 20.12.2011 decreed the suit as prayed for. Against the said judgment and decree, an appeal was presented as A.S.No.25 of 2012 before the Principal District Judge at Cuddalore.

8. After hearing both the parties, the regular appeal which was presented in the aforesaid number came to be dismissed. Against the concurrent findings of the Courts below, the present second appeal has been presented.

9. This Court did not admit the appeal but had issued notice regarding admission on 23.04.2013. On service of notice, Mr.T.S.Baskaran entered appearance for the contesting respondent/plaintiff.

10. When the matter came up before this Court on 29.09.2021, the parties had agreed that there is a possibility of a settlement. Therefore, the matter was adjourned considering that the appellant and respondent are brothers but on 18.04.2022, the learned counsel for the appellant reported that there is no possibility of settlement. Hence, the appeal was taken up for admission.

11. Heard Mr.C.Prakasam, for the appellant and Mr.T.S.Baskaran, for the respondent. I have gone through the records, in particular Exs.A1

and A2 and the evidence of PW1 and DW1 and have carefully considered the submissions made by either side.

12. Mr.C.Prakasam, would urge that the sale consideration had been mentioned as Rs.9,25,000/- with two additional conditions, namely i) for extinguishing the mortgage loan that had been taken by the defendant with ICICI Bank and ii) for withdrawal of O.S.No.134 of 2008 on the file of Principal District Munsif at Cuddalore. He would state that since the conditions have not been complied with, the plaintiff is not entitled to a decree for specific performance and the judgments of Courts below deserve to be set aside. The learned counsel would urge the following substantial questions of law for the purpose of admitting the second appeal:

> *"1. Whether the Courts below are right in holding that time is not essence of the contract contrary to admitted fact by the plaintiff/respondent?*
>
> *2. Whether the Courts below are right in decreeing the suit where the plaintiff had failed to perform his part of obligation of contract?*
>
> *3. Whether the Courts below are right in holding that doctrine of frustration will not prevent the appellant to perform the contract?"*

13. Mr.T.S.Baskaran would submit that insofar as the agreements under Exs.A1 and A2 are concerned, there is no dispute that they had been entered into between the parties. However, learned counsel would state that the respondent was unable to comply with the condition of extinguishing the loan with the ICICI Bank because the appellant/defendant did not inform him about the amount that has to be paid. He would plead that it is impossible for a non-borrower to approach the Bank to get the details of amount to be paid. He adds that the mere fact that the plaintiff and his father were residing in the same property, which is the subject matter of the suit and mortgage, would not enable him to know the amount outstanding without being informed by the defendant. Insofar as O.S.No.134 of 2008 is concerned, he would bring to the notice of this Court that the said suit had been dismissed for default even before Ex.A2 had been entered into, on 17.11.2009. Therefore, he would state that the suit which had already been dismissed for default could not have been withdrawn as there was no suit which was pending on that date for the purpose of its withdrawal.

14. Insofar as the agreements are concerned, relevant portion is Clause 4 of the said agreement. As per the said agreement, it is the duty of the plaintiff to pay the amount outstanding to the ICICI Bank.

However, as submitted by Mr.T.S.Baskaran, it is impossible for the plaintiff to pay the amount unless and until the outstanding amount is informed by the defendant to the plaintiff. Under Ex.A1, Durai, the appellant should have informed his brother Mohanraj, the respondent, the amounts which he has already paid to ICICI Bank and the outstanding amount. This clause could not have been worked by the plaintiff alone. It is seen from Ex.A5, the suit notice dated 22.06.2010 that the plaintiff had called upon the defendant to inform him about the loan amount and the amount outstanding. Despite the same, only an evasive reply had been given by the defendant on 26.06.2010 and even in the reply notice the amount that has to be paid had not been informed.

15. During the course of examination, DW1 has specifically admitted that time is not essence of the contract. Apart from that he has also admitted that he had chosen not to inform the plaintiff about the amount outstanding and had further added even if the plaintiff is willing to discharge the loan amount, he is not willing to stand by Exs.A1 and A2. In a suit for specific performance, the Court should not only look at the conduct of the plaintiff but also that of the defendant. Having entered into Exs.A1 and A2, it does not lie in the mouth of the defendant

to state that

(i) he will not inform the amount outstanding to the plaintiff so as to enable him to perform his part of the contract and

ii) repudiate the contract by stating even if the plaintiff pays the amount, he will not execute the sale deed.

It is in the aforesaid circumstances that the plaintiff was constrained to present the suit for specific performance.

16. The trial Court had considered these aspects and had passed a decree stating that the defendant shall furnish the loan particulars to the plaintiff within a reasonable time. This had been modified by the lower Appellate Court directing the defendant to furnish the loan particulars to the plaintiff within a period of 15 days from the date of receipt of the judgment and directing the plaintiff to pay the amount which was due to ICICI Bank.

17. In the light of the above discussion I am able to see the following:

i) that the plaintiff was ready and willing to pay the amount of Rs.7,25,000/- which is the outstanding amount to be paid as per agreements under Exs.A1 and A2 dated 16.05.2010;

ii) The suit in O.S.No.134 of 2008 on the file of Principal District Munsif, Cuddalore had already been dismissed on the date on which the agreements had been entered into between the parties. Therefore, there is no question of withdrawal of the same; and

iii) Most crucially, it was the defendant who refused to furnish the particulars to the plaintiff so as to enable the plaintiff to discharge the outstanding mortgage.

iv) The plaintiff had done all that he had to do for the purpose of converting the sale agreement into a sale deed and it was the defendant who for the reasons best known to him refused to divulge the details of loan transaction.

v) Under Section 16(c) of the Specific Relief Act, 1963, I have to see whether the plaintiff has been ready and willing to convert the sale agreement into a sale deed. A close reading of evidence of PW1 and DW1 leads me to the conclusion that plaintiff was ready and willing to get the sale deed executed but it was the defendant who took a stand even if the plaintiff had been willing to pay the amount and get the loan discharged, he would not stand by the agreements under Exs.A1 and A2. Therefore, the plaintiff having done everything that he had to do, the conduct of the defendant and his evidence would show that it was the defendant who was evading his part of the promise.

vi)As submitted by Mr.T.S.Baskaran. the relationship between ICICI Bank and appellant/defendant is that of the debtor and creditor and no creditor would inform a third party even if he is a blood brother about the outstanding amount. It is here that Mr.Prakasam would add that the defendant had repaid the entire amount that was due and payable to the ICICI Bank. In other words, despite the fact that he had repaid the amount, he had not informed the amount which the plaintiff will have to pay him towards conversion of the agreements Exs.A1 and A2 dated 16.05.2010 into a sale deed. The defaulting party being the defendant, the Courts below have rightly appreciated the facts and the evidence in the case and have decreed the suit. The questions of law especially on *doctrine* of frustration that has been suggested by the appellant for consideration by this Court, does not arise even for the moments notice. I do not find any error or irregularity in the judgment of the Courts below and they deserve to be confirmed.

vii) However, taking into consideration the submission made by Mr.Prakasam that he had repaid the loan to ICICI Bank, I modify the decree of the lower Appellate Court directing the defendant to furnish the particulars of the amount that he has paid to ICICI Bank to the plaintiff. This exercise shall be done within a period of one month instead of 15 days granted by the lower Appellate Court. In case the defendant does not inform the plaintiff about the amounts which he has paid to ICICI Bank towards discharge of the loan within the time fixed in this judgment, the respondent/plaintiff will be at liberty to approach the ICICI Bank and the ICICI Bank is directed to inform the amounts that have been paid in discharge of the loan. This task shall be completed within one month thereafter. Within one month from the date of obtaining information from the ICICI Bank, the respondent/plaintiff shall tender the same by way of Demand Draft to the defendant and in case the defendant refuses the same, he shall deposit the same into the Court. I also take note of the fact that the balance sale consideration of Rs.7,25,000/- has already been deposited on 11.01.2012 by the plaintiff to the credit of the suit.

18. In fine, with the above modification, the judgment and decree of the Court of the Principal District Judge, Cuddalore dated 02.11.2012 in A.S.No.25 of 2012 in confirming the judgment and decree of the Court of Principal Subordinate Judge, Cuddalore in O.S.No.187 of 2010 dated 20.12.2011 stands confirmed.

19. Considering the fact that the plaintiff and defendant are brothers, I am not inclined to impose costs.

30.01.2024

Index:Yes/No
Neutral Citation:Yes/No
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Note to office: Registry is directed to carry out the amendment as per the orders made in C.M.P.No.6374 of 2018 dated 12.01.2022.

To

1. The Principal District Judge
   Cuddalore

2. The Principal Subordinate Judge
   Cuddalore

V. LAKSHMINARAYANAN, J.

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