



S.A.No.635 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 15.11.2024

Pronounced on: 03.01.2025

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.635 of 2019

and

CMP. No.11213 of 2019

1.P.V.Devan

2.Uma

...Appellants

Vs.

1.K.Purushothaman

2.P.Kavitha

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the decree and judgment dated 29.11.2018 in A.S. No.9 of 2014, Subordinate Judge Court, Vaniyambadi, reversing the Judgment and Decree dated 31.07.2013 in O.S. No.40 of 2005, Principal District Munsif cum Judicial Magistrate, Vaniyambadi.

For Appellants : Mr.R.Subramanian

For Respondents

For R1 : Mr.R.Sankarasubbu

For R2 : Not ready



S.A.No.635 of 2019

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JUDGMENT

The unsuccessful defendants in a suit for specific performance are the appellants herein.

2. The brief and material facts that are required for adjudicating the Second Appeal are as hereunder.

3. The plaintiffs being tenants in the suit property, claiming that they had entered into a sale agreement on 22.10.2001 with the 1st defendant to purchase the suit property for a total sale consideration of Rs.95,000/- out of which they had already paid Rs.80,000/- and that they were ready and willing to pay the balance sale consideration of Rs.15,000/- and that the 1st defendant was evading the execution of sale deed which necessitated the plaintiffs to issue a notice on 21.10.2004 claiming specific performance of the said agreement, filed the suit for specific performance.

4. The said claim was resisted by the defendants stating that the 1st defendant never entered into an agreement with the plaintiff, much less on



S.A.No.635 of 2019

WEB COPY

22.10.2001, when the plaintiffs were tenants against whom the 1st defendant had already initiated eviction proceedings in R.C.O.P.No.91 of 1995 and that the suit was not maintainable and liable to be dismissed.

5. The third defendant filed a separate statement stating that the suit property was settled by the 2nd defendant upon the 3rd defendant on 02.02.2005 and reiterated the defence put forth by the 2nd defendant resisting and denying the several allegations made in the plaint.

6. Before the Trial Court, the plaintiff examined himself as P.W.1 and one Mr.Ayub Khan as P.W.2 and marked Exs.A1 to A3. On the side of the defendants, the 2nd defendant examined himself as D.W.1 and Govindasamy and Rajendran as D.W.2 and D.W.3. On the side of the defendants, Ex.B1 and B2 were marked. Court exhibit X1, being copy of thumb impression register was marked as Ex.X1. The Trial Court found that the sale agreement was not genuine and further the plaintiffs have not established their readiness and willingness by adducing any reliable evidence or material before the Court and dismissed the suit. Aggrieved by



S.A.No.635 of 2019

WEB COPY

the dismissal of the suit, the plaintiffs preferred A.S.No.9 of 2014. The First Appellate Court allowed the appeal holding that in terms of Sec.68 of Indian Evidence Act, Ex.A1 sale agreement had been proved and that the defendant was liable to refund the advance of Rs.80,000/- together with damages of Rs.15,000/- totalling in all, Rs.95,000/-, together with interest at 6 % per annum. It is aggrieved by the said decree directing the refund of Rs.95,000/- with interest of 6% per annum, the present Second Appeal has been preferred by the defendants.

7. On 03.06.2019, while admitting this Second Appeal, the following substantial questions of law have been framed:

“ a) Whether in law has not the Lower Appellate Court erred in holding that the plaintiff has proved the execution of the sale agreement without considering the material facts and evidence?

b) Is not the Lower Appellate Court wrong in overlooking that the plaintiff has created the agreement of sale to cover up the default in payment of rent and escape from the eviction proceedings?

c) Has not the Lower Appellate Court misconstrued Sec. 68 of the Evidence Act which is applicable only in the case of documents which require attestation?



S.A.No.635 of 2019

WEB COPY

d) After holding that the plaintiff is not entitled to the relief of Specific performance, is the lower appellate court right in granting return of advance in spite of the fact that there is no evidence for payment of Rs.80,000/-? ”

8.I have heard Mr.R.Subramanian, learned counsel for the appellants/defendants 2 and 3 and Mr.R.Sankarasubbu, learned counsel for the 1st respondent/plaintiff.

9.The learned counsel for the appellants Mr.R.Subramanian would contend that the First Appellate Court had committed a grave error in placing reliance on Sec.68 of the Indian Evidence Act which is not applicable to an agreement of sale and had failed to advert to the crucial evidence available before the Courts with regard to the impossibility of execution of a sale agreement on 22.10.2001 and contended that the First Appellate Court had erroneously reversed the well considered findings of the Trial Court. He would therefore pray for the Second Appeal being allowed.



S.A.No.635 of 2019

WEB COPY

10.Per contra, Mr.Sankarasubbu, learned counsel for the respondents would contend that the plaintiffs have examined the attesting witness to speak about the due execution of the agreement of sale. He would further contend that the appellants/defendants did not enter the witness box to rebut the evidence of the attesting witness and in such circumstances, the First Appellate Court had rightly ordered refund of the advance amount of Rs.80,000/- and the same did not call for interference in the Second Appeal.

11.The learned counsel for the 1st respondent would also place reliance on the following decisions:

i) Seth Beni Chand (Since Dead) by L.R's Vs. Smt.Kamla Kunwar and Others ((1976) 4 SCC 554).

ii) Om Prakash (Dead) through his Legal Representatives Vs. Shanti Devi and Others ((2015) 4 SCC 601).

The above decisions have been relied on by the learned counsel for the 1st respondent, Mr.R.Sankarasubbu to fortify his contentions regarding the examination of one of the witnesses to the agreement of sale.



S.A.No.635 of 2019

WEB COPY

12.I have carefully considered the submissions advanced by the learned counsel on either side. I have also gone through the decisions on which reliance is placed on by the learned counsel for the first respondent. I have also gone through the judgments of the Courts below.

13.The plaintiff/1st respondent herein was admittedly a tenant in the suit property. Eviction proceedings had been initiated against the plaintiff even prior to the alleged agreement of sale dated 22.10.2001. It is relevant to note that the plaintiff had not even chosen to whisper about the said agreement of sale in the pending eviction proceedings before the Rent Control Court. Further, the plaintiff himself in his evidence has admitted that he never met the 1st defendant after October 2001. This admission raises serious suspicion with regard to the genuineness of the alleged agreement of sale in Ex.A1. In any event, the relief of specific performance has been negatived by the Courts below. The Second Appeal has been preferred only as against the decree directing refund of the advance of Rs.80,000/- allegedly paid on various dates. The payment of said advance of Rs.80,000/- has been referred in the alleged agreement of sale. However, it is the



S.A.No.635 of 2019

specific contention of the 1st defendant that the agreement is not a true and genuine document and therefore, the burden is entirely on the plaintiff to establish that he had paid a sum of Rs.80,000/- as advance on various dates, before becoming entitled to refund of the said amounts.

14.In this regard, I have scrutinized the evidence of P.W.1 as well as P.W.2. The evidence of P.W.1 does not help the case of the 1st respondent since he has not spoken about any payments made by the plaintiff to the 1st respondent. However, P.W.2, whose evidence is strongly relied on by the learned counsel for the 1st respondent, was one of the witnesses to the alleged agreement of sale. He has stated that the plaintiffs paid the entire sum of Rs.80,000/- to the 1st defendant as one payment. Unfortunately, the evidence of P.W.2 has contradicted the very case of the plaintiffs who came to Court contending that the said sum of Rs.80,000/- was paid on various dates. Therefore, the evidence of P.W.2 is not trustworthy and believable. Moreover, as rightly contended by the learned counsel for the appellants, the appellants had already initiated Rent Control proceedings for eviction of the 1st respondent on the ground of willful default in payment of rents, that



S.A.No.635 of 2019

WEB COPY

too, particularly a sum of Rs.400/- per month. It is absolutely not believable that the plaintiff would have been in a position to pay Rs.80,000/- as advance for purchase of the tenanted property itself. Moreover, if really the agreement of sale had been entered pending eviction proceedings, the parties would have definitely caused a reference to the eviction proceedings and the future/fate of the said litigation. I have already found that the evidence of P.W.2 also does not inspire confidence.

15.The decisions relied on by Mr.R.Sankarasubbu, learned counsel for the 1st respondent are cases that arose under testamentary proceedings and in *Seth Beni Chand's* case, the Hon'ble Supreme Court held that examination of one of the attesting witnesses would be sufficient to prove due execution of the Will. In *Om Prakash's* case, the Hon'ble Supreme Court dealing with the proof of documents which was thirty years old and more, under Section 90 of the Indian Evidence Act, and in such circumstances, decided the effect of such a document. Both these decisions will not apply to the facts of the present case.



S.A.No.635 of 2019

WEB COPY

16.The proof of payment of Rs.80,000/- has been stoutly denied by the appellants as defendants in the suit and therefore, it was only incumbent on the 1st respondent to establish and prove such payment. The evidence of P.W.1 as well as P.W.2 are far from establishing such payment and therefore, without going into these aspects, the First Appellate Court has merely relied on the evidence of P.W.2 to hold that the appellants are liable to refund of Rs.95,000/-, together with interest at 6% per annum. Section 68 of the Indian Evidence Act does not in any manner come to the aid of the plaintiffs in establishing the truth and genuineness of the alleged agreement of sale, except when the agreement of sale is proved to be true and genuine by adducing satisfactory evidence to such effect. I have already discussed the evidence of P.W.1 and P.W.2 and found that the evidence available on record falls far short of proof of payment of advance of Rs.80,000/- under the alleged agreement of sale. Therefore, the finding of the First Appellate Court is clearly perverse and unsustainable in law.

17.For all the above reasons, the questions of law are answered in favour of the appellants.



S.A.No.635 of 2019

WEB COPY

18.In fine, the Second Appeal is allowed and the judgment and decree passed in A.S. No.9 of 2014, dated 29.11.2018 by the learned Subordinate Judge Court, Vaniyambadi, is set aside and the Judgment and decree dated 31.07.2013 in O.S. No.40 of 2005 passed by the Principal District Munsif cum Judicial Magistrate, Vaniyambadi is restored. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

03.01.2025
(2/2)

Index : Yes/No
Internet : Yes/No
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To

1. The Subordinate Judge, Vaniyambadi.
2. The Principal District Munsif cum
Judicial Magistrate, Vaniyambadi



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S.A.No.635 of 2019

P.B.BALAJI, J,

ata

Pre-delivery Judgment in

S.A.No.635 of 2019
and CMP. No.11213 of 2019

03.01.2025
(2/2)