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AS.No.704 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.11.2024

CORAM:

THE HONOURABLE Mr.JUSTICE **R.SUBRAMANIAN**
AND
THE HONOURABLE Mr.JUSTICE **C.KUMARAPPAN**

A.S.No.704 of 2017

R.Senthil Kumar

... Appellant

-Vs-

Kumaravel

... Respondent

PRAYER: First Appeal filed under Section 96 R/W Order 41-A of the Code of Civil Procedure against the Judgment and decree of the Additional District Judge, Bhavani dated 31.01.2017 made in O.S.No.94 of 2013 in so far as the decree of the alternative relief of refund of advance amount is concerned.

For Appellant : Mr.T.Gowthaman
Senior Advocate
for Ms.S.Karpagapriya

For Respondent : Mr.K.Baskar



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J U D G M E N T

[Judgment of the Court was delivered by **R.SUBRAMANIAN, J**]

The defendant is on appeal aggrieved by a decree for the alternative relief viz., refund of advance amount granted by the Trial Court in OS.No.94 of 2013 a suit for specific performance.

2. The plaintiff sued for specific performance of an agreement for sale dated 17.11.2008. According to the plaintiff, the defendant agreed to sell the property subject matter of agreement to them for a total consideration of Rs.36,00,000/- [Rupees Thirty Six Lakhs only] and received an advance of Rs.19,00,000/- [Rupees Nineteen Lakhs only] on the date of the agreement. It was also agreed that the plaintiff will pay the remaining amount within two years and take the sale deed. It is the claim of the plaintiff that on 14.12.2009, a sum of Rs.7,00,000/- [Rupees seven lakhs only] was paid and an endorsement to that effect was made in the reverse of the sale agreement dated 17.11.2008. Contending that he has been ready and willing to perform his part of the contract, the plaintiff issued a legal notice on 27.02.2013. The defendant sent a reply disputing the very agreement and the receipt of



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advance. Forcing the plaintiff to sue for specific performance.

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3. The defendant resisted the suit contending that the plaintiff is a stranger to him and he had not executed the agreement as it stands. While admitting his thumb impression and signature in the agreement, the defendant would plead that the agreement had been created by the plaintiff with the help of stamp paper stolen by his sister and mother from his house. The claim that a sum of Rs.26,00,000/- [Rupees Twenty Six Lakhs only] was paid as advance was specifically denied and the financial capacity of the plaintiff was also put in issue. On the above pleadings, the defendant sought for dismissal of the suit.

4. The learned Trial Judge framed the following issues for determination in the suit:-

“(1) Whether the suit agreement is genuine?

(2) Whether the plaintiff is entitled for specific performance of contract as claimed in the suit?

(3) Whether the plaintiff is entitled for any other alternative remedy?

(4) To What other reliefs?”



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5. At trial, the plaintiff apart from examining himself as PW1, examined the attessor to the agreement as PW2 and the scribe of the endorsement dated 14.12.2009 as PW3. Exs.A1 to A25 were marked. The defendant examined himself as DW1 and Exs.B1 to B20 were marked.

6. On the evidence on record, the learned Trial Judge came to the conclusion that the agreement is true and valid. In coming to the said conclusion, the learned Trial Judge took note of the fact that the defendant has not chosen to deny his signature and the thumb impression not only in the agreement, but also in endorsement dated 14.12.2009. On the plea that the plaintiff does not have the means to pay the advance as claimed by him, the Trial Court referred to the evidence of PW2 and PW3 as well as the plea of the defendant that the plaintiff is a total stranger to reject the said plea. The Trial Court, however found that the plaintiff has not proved that he has been ready and willing to perform his part of the contract. On the said findings, the Trial Court while dismissing the claim for specific performance, granted a decree for refund of the advance amount with 12% interest from the date of the suit till the date of decree and 6% thereafter till the date of realization. Aggrieved, the defendant is on appeal.



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7. We have heard Mr.T.Gowthaman, learned Senior Counsel appearing on behalf of the appellant and Mr.K.Baskar, learned counsel for the respondent.

8. Mr.T.Gowthaman, learned Senior Counsel appearing for the appellant would vehemently contend that the evidence of PW1 itself would show that he had no means to pay the advance of Rs.19,00,000/- [Rupees nineteen lakhs only] said to have been paid on the date of the agreement and the additional advance of Rs.7,00,000/- [Rupees Seven lakhs only] said to have been paid on 14.12.2009. Taking us through the cross examination of PW1, the learned Senior Counsel would submit that the plaintiff himself has stated that he had only a sum of Rs.5,72,000/- as on 17.11.2008 and therefore, a claim that he had paid a sum of Rs.19,00,000/- on the said date and further sum of Rs.7,00,000/- [Rupees Seven lakhs only] on 14.12.2009 has not been established. The learned Senior Counsel would further submit that though the plaintiff has admitted that he has got bank account, the plaintiff has not chosen to produce the statement of accounts, inviting us to draw an adverse inference against the plaintiff for non production of the best evidence available. The learned Senior Counsel would further submit that the fact that the plaintiff has



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admitted that one Mr.Ponsugumar, an Advocate purchased the property from him would show that the plaintiff and the counsel named above have conspired together to create this agreement. The fact that Mr.Ponsugumar appeared for the sister of the defendant in other criminal cases between the defendant and his sister would stand testimony to the conspiracy theory floated by the defendant.

9. Contending contra, Mr.K.Baskar, learned counsel appearing for the respondent/plaintiff would submit that having raised a plea that the plaintiff is a stranger and the defendant does not know the plaintiff, it is not open to the defendant to contend that the plaintiff is not a man of means. He would also submit that a wholesome reading of the evidence in the cross examination of the defendant would show that the admission regarding possession of Rs.5.72 lakhs was in answer to a suggestion made by the counsel for the defendant and that by itself did not show that he did not have any other money. He would also submit that the suggestions made to the effect that the plaintiff had been doing Real Estate business and he has been buying and selling the properties to various persons would itself show that the plaintiff had the wherewithal to part with a sum of Rs.19,00,000/- [Rupees Nineteen lakhs only] on the date of



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the agreement. The learned counsel would also submit that Ex.A1 being a document that is required to be in writing, the contents of it has to be accepted upon its proof and any attempt to vary or alter the terms of the contract through oral evidence cannot be allowed in view of the provisions contained in Section 92 of The Indian Evidence Act.

10. On the above rival submissions, the only point for determination that arises in this appeal is:-

Whether the plaintiff had established that he paid a sum of Rs.19,00,000/- [Rupees Nineteen lakhs only] on 17.11.2008 and a sum of Rs.7,00,000/- [Rupees seven lakhs only] on 14.12.2009 as evidenced by Ex.A1-Agreement?.

On the point:-

As already stated, we have been taken through the evidence of PW1, the attempt of the learned Senior Counsel for the appellant is to rely upon certain portions of the cross examination and contend that the plaintiff had with him only a sum of Rs.5.72 lakhs on 17.11.2008. Therefore, we should presume that he did not have a sum of Rs.19,00,000/- on the said date. We are unable



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to read the evidence in the manner suggested by the learned Senior Counsel.

The admission and possession of a sum of Rs.5.72 lakhs on the date of agreement is in answer to a specific suggestion that he had a sum of Rs.5.72 lakhs with him from the sale proceeds of certain plots in Arachalur to Mr.Ponsugumar, Advocate. This by itself cannot lead to the presumption that he did not have any other money. Remaining part of the cross examination would show that the plaintiff had laid out lands in Arachalur and sold them in plots and 5 such plots were sold to Mr.Ponsugumar, who happens to be a lawyer. The claim agreement has been prepared on a pre-signed stamp paper has been disbelieved by the Trial Court and we see no reason to take a different conclusion.

11. We have also perused the original Agreement-Ex.A1. The stamp papers have been purchased on 17.11.2008 from a stamp vendor in Erode and bears the thumb impression as well as the signature of the defendant in every page. We must point out at this juncture that the defendant has admitted his thumb impression and the signature in the said instrument. Apart from the above, there is an endorsement on the reverse of the stamp paper in Ex.A1, which has been marked as Ex.A2. That endorsement is dated 14.12.2009.



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That endorsement also contains the thumb impression as well as the signature of the defendant. The said signature and thumb impression have also been admitted. The scribe-cum-witness to the endorsement Mr.Sasikumar has been examined as PW3 and one of the attesting witnesses to the document Mr.Palanisamy has been examined as PW2. Both of them in their evidence, have spoken about the execution of the agreement as well as the endorsement. PW2 has denied a specific suggestion made in cross examination to the effect that he did not see the plaintiff paying a sum of Rs.19,00,000/- [Rupees Nineteen lakhs only] to the defendant has been specifically denied. Similarly, PW3-Scribe-cum-witness to the endorsement dated 14.12.2009 has deposed that the plaintiff has paid a sum of Rs.7,00,000/- to the defendant on the said date. Nothing has been elicited in his cross examination to make the said evidence unbelievable.

12. As rightly contended by the learned counsel for the respondent, Ex.A1 is a document, which is required to be reduced into writing and the same has been reduced into writing. Section 92 of the Indian Evidence Act bars evidence, which would have effect of varying and contradicting the recitals in the instrument. Once the agreement and endorsement are held to be



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proved, evidence contrary to the recitals therein, particularly to show that a part of the consideration was not paid, cannot be looked into. The Trial Court has also taken note of the fact that the defendant had originally pleaded that he did not even know the plaintiff. Therefore, as rightly contended by the learned counsel for the respondent, the plea regarding the ability of the plaintiff to part with the advance and additional advance as found in Ex.A1-Agreement is not available to the defendant. We therefore, conclude that the plaintiff has established the payment of the advance as well as the additional advance and the Trial Court cannot be faulted for having granted a decree of refund of advance.

13. The appeal therefore fails and accordingly dismissed. No costs.

[R.S.M., J] [C.K., J]
11.11.2024

Index : No

Internet: Yes

Speaking Order

NCC : No

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To

The Additional District Judge,
IV Additional District Court,
Erode District at Bhavani.



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