



Second Appeal No.374 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2024

CORAM :

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

Second Appeal No.374 of 2020

S.Shanmuga Sundaram

.... Appellant

-Vs-

1.Thulasiammal

2.R.Sundaram

.... Respondents

Prayer : Second Appeal under Section 100 of C.P.C., against the judgment and decree of the Court of the I Additional District and Sessions Judge at Coimbatore in A.S.No.103 of 2017 dated 05.02.2019 in reversing the judgment and decree of the Court of the Subordinate Judge at Coimbatore in O.S.No.720 of 2010 dated 11.08.2017.

For Appellants

: Mr.T.Mohan, Senior Counsel
for Mr.P.Srinivasan

For Respondents

: Mr.S.Mukunth, Senior Counsel
for M/s.Sarvabhauman Associates
- for R1,
R2 - Served, no appearance

J U D G M E N T

The present Second Appeal arises out of the judgment and decree of the Court of the I Additional District and Sessions Judge at Coimbatore in A.S.No.103



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of 2017 dated 05.02.2019 in reversing the judgment and decree of the Court of the Subordinate Judge at Coimbatore in O.S.No.720 of 2010 dated 11.08.2017.

For the sake of convenience, the parties will be referred to as per their ranking in the suit.

3. O.S.No.720 of 2010 is a suit for specific performance of an agreement of sale. There is no dispute in the relationship between the parties. The plaintiff Shanmuga Sundaram is the son of the second defendant. The first defendant is his paternal aunt ie., wife of Ponnusamy, the brother of the second defendant Sundaram.

4. According to the plaintiff, the first defendant executed a power of attorney in favour of the second defendant on 23.06.2005. The said power of attorney was registered on the file of the Sub Registrar Office at Gandhipuram, Coimbatore in Document No.450 of 2005. Through the said power of attorney, she appointed the second defendant as her agent in respect of the share of properties that she would obtain in a partition suit, in which preliminary decree had been passed, and also to execute a sale deed and do such other incidental acts as are necessary to complete the transaction.



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5. The plaintiff claimed that on the strength of the power of attorney dated 23.06.2005, the second defendant executed an agreement of sale in his favour on the very same date. As per the agreement of sale, the sale consideration was fixed at Rs.4,50,000/-, on which date itself the plaintiff had paid a sum of Rs.1,00,000/- to the first defendant through the power agent, the second defendant. According to him, since the partition suit was still pending for passing of final decree, the property was yet to be divided and demarcated and, the 1/3 share which Ponnusamy was entitled to through whom the first defendant claims, has not yet been allotted to her. So, the plaintiff agreed to purchase the undivided 1/3 share of the first defendant.

6. He would plead that he was ready and willing to have the sale agreement converted into sale deed. He would further plead that the second defendant had agreed for extension of time and had made three endorsements on the agreement viz., 19.06.2008, 18.03.2009 and 17.12.2009 and had assured that the sale deed will be executed on or before 20.09.2010. He further pleaded that he had paid a sum of Rs.3,00,000/- on different dates to the second defendant. Since the second defendant refused to execute the sale deed, the plaintiff suspected a foul play *inter se* the defendants and therefore sent a telegram on 13.09.2010 calling upon the defendants to appear before the Registrar Office on 15.09.2010. He waited in the Registrar Office from 10.00 am



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to 5.00 pm, but it was all in vain. He would plead that he had the balance of Rs.50,000/- in his hand and left with no other option, since the defendants were trying to avoid their responsibility under the agreement, he came forward with the suit for specific performance of contract of sale.

7. On receipt of summons, the defendants entered appearance. The first defendant filed a detailed written statement. She would plead that between herself, the second defendant and one Rathinasamy, a suit for partition was pending. A preliminary decree had been passed in the suit and as against the preliminary decree, a regular appeal had been presented before this Court. She would add that the preliminary decree was confirmed and in those proceedings, it was the second defendant who was assisting her. She would state that she believed the second defendant and his brother Rathinasamy, who had taken signatures in the documents. She would plead that the plaintiff will have to prove the alleged power of attorney executed by her and also the agreement of sale which had been entered into by the second defendant and the plaintiff. She would state that she is an unlettered lady and a widow having no issues to support her and was eking out her living by working as a coolie.

8. She would state that the properties are situated in Kalampalayam village, in which several software companies had put up construction and it was



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an upcoming area in Coimbatore. According to her, the value of the property was not less than Rs.13,500/- per cent and it was shocking that the second defendant should agree to alienate the property in favour of the plaintiff for a paltry sum of Rs.4,50,000/-. She would also state that the plaintiff and the second defendant being father and son, are residing under the same roof and that they had colluded together and had created the endorsements dated 19.06.2008, 18.03.2009 and 17.12.2009. She alleged that the power of attorney and all the endorsements were created by the alleged agreement holder and the alleged agent amongst themselves. She would therefore plead that on this basis the suit for specific performance is not maintainable and would seek for dismissal of the same.

9. The second defendant surprisingly entered appearance. In a case like this, it is normally expected that the power of attorney would remain exparte. In this case, as it would be seen later, it is fortunate to the first defendant, that the second defendant entered appearance and filed a written statement. The second defendant stood by the sale agreement and the power of attorney and pleaded that the Court may decree the suit as prayed for without cost being imposed on the second defendant.



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10. Normally, a suit is preceded by a notice and a reply notice. But, this case is unique since the suit was presented on 17.09.2010. On the very same day, Ex.A3 notice had been issued by the first defendant to the plaintiff. In the said advocate's notice, she had stated that she came to know that the power of attorney had misused his power and therefore she had revoked the same. She would also state that the second defendant does not have any right as the power agent to alienate the property in favour of the plaintiff. Having received a notice, a reply notice was issued under Ex.A4. It is under Ex.A4 the plaintiff informed the first defendant about the presentation of the plaint.

11. On the basis of these pleadings, the learned trial Judge framed the following issues:

1. 23.06.2005 தேதியிட்டு 2ம் பிரதிவாதி வாதிக்கு எழுதிக் கொடுத்த கிரய ஒப்பந்தம் உண்மையானதா ? செல்லத்தக்கதா ?
2. கிரய ஒப்பந்தத்தை நிறைவேற்ற வாதி எப்போதும் தயாராகவும் இசைவுடனும் இருந்தாரா ?
3. வாதிக்கு ஏற்றதை ஆற்றுக பரிகாரம் கிடைக்கத்தக்கதா ?
4. 1ம் பிரதிவாதி 23.06.2005ல் 2ம் பிரதிவாதிக்கு எழுதிக் கொடுத்த பொது அதிகார பத்திரம் உண்மையானதா ?
5. வாதிக்கு கிடைக்கும் இதர பரிகாரம் என்ன ?



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During the course of trial, the following additional issue was framed.

"Whether the 2nd defendant has already paid the amount to the 1st defendant who voluntarily executed power of attorney?"

12. On the side of the plaintiff, he did not examine anyone other than himself as P.W.1 and marked Exs.A1 to A5. On the side of the defendants, the first defendant examined herself as D.W.1 and the second defendant examined himself as D.W.3. The endorsements made on the agreement in Ex.A1 were marked as Exs.B1 to B4. Apart from that, 14 other documents were presented. In all, Exs.B1 to B18 were exhibited on the side of the defendants.

13. On the basis of the oral and documentary evidence let in before the Principal District Judge, he came to a conclusion that,

- (i) the agreement was true and genuine.
- (ii) The plaintiff had shown his readiness and willingness, and
- (iii) the endorsements were true and genuine and therefore the plaintiff's suit ought to be decreed and accordingly he decreed the suit.

14. Aggrieved by the said judgment and decree, a regular appeal was preferred which was received by the learned I Additional District and Sessions Judge in A.S.No.103 of 2017. The learned Judge came to a conclusion that,



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- (i) As the attestors of Exs.B2 to B4 had not been examined by the plaintiff, it is fatal to his case.
- (ii) From the date of the power deed as well as the sale agreement dated 23.06.2005 till the filing of the suit, no steps have been taken by the power agent to demarcate the property.
- (iii) The three endorsements made in Exs.B2 to B4 were made after the expiry of the period given under the sale agreement.
- (iv) The documents showed that the first defendant did not have any notice about the agreement and therefore she had revoked the power of attorney on 09.09.2010 and,
- (v) Finally she came to the conclusion that Ex.A6 sale agreement executed by the second defendant in favour of the plaintiff is not genuine and therefore allowed the appeal and dismissed the suit.

15. Against this reversal, the present Second Appeal arises before this Court. The Second Appeal was admitted on 14.09.2020 on the following substantial questions of law:



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1. *Whether the lower appellate Court is correct in holding that the endorsements as made in Ex.A1 sale agreement is created one especially when the first respondent herein not taken any steps to establish the fact that the said signature as found in the endorsements are not that of the 1st defendant?*
2. *Whether the lower appellate Court is correct in holding that the appellant is not ready and willing to perform his part of contract especially when the appellant herein established that execution of sale agreement and subsequent endorsements for extension of time for perform the part of the contract on the side of the defendants?*
3. *Whether the lower appellate Court is correct in holding that the endorsements as made in Ex.A1 is created especially when the 1st defendant has denied with execution of Ex.A1 later she has admitted the execution of sale agreement Ex.A1 in her cross examination, however not specifically denied with execution of endorsements in Ex.A1 in Ex.A3 and in her cross examination?*

16. Even at the admission stage, M/s.Sarvabhauman Associates had taken notice on behalf of the first respondent / first defendant.

17. I heard Mr.T.Mohan, Senior Counsel for Mr.P.Srinivas for the appellant and Mr.S.Mukunth, Senior Counsel for M/s.Sarvabhauman Associates for the first respondent.



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18. Mr.T.Mohan would submit that under Ex.A3, notice issued by the first defendant to the plaintiff, the power of attorney as well as the agreement of sale had been admitted. He would point out the power of attorney had been cancelled only on 09.09.2010 and therefore this will not affect the acts which had already taken place. He would then point out that the power to extend the time is implied in terms of the power of attorney. He would submit that the power to enter into an agreement presupposes the implied power to extend the time for completion of the contract. He would point out that the power of attorney had examined himself as D.W.3 and had admitted the payment of money by the plaintiff. He would point out from Ex.A2 that the plaintiff had specifically stated all that remained to be paid was only Rs.50,000/- and he was waiting in the Sub Registrar Office for the purpose of registration of the document from 10.00 a.m to 5.00 p.m. Combining the two submissions, he would say that the requirements of Section 16 of the Specific Relief Act had been complied with and therefore he would point out the findings of the Court below regarding Exs.A1 and B1 to B4 are invalid, and hence require interference.

19. Per contra, Mr.S.Mukunth would submit that there is a serious discrepancy in the payment of monies under Exs.B2 to B4. He would state from the cross examination of P.W.1 and D.W.3 that, on one hand the plaintiff had pleaded that he had paid money to the first defendant through the second



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defendant, whereas D.W.3 had stated that the money had been paid directly by the plaintiff to the first defendant. He would then draw my attention to Ex.B14, a document which was registered on the same day for an adjacent property. He would state the executant of the said document is none else than the sister of the first defendant. He would point out that the adjacent property had been sold at Rs.15 lakhs and it is well nigh impossible that a document registered on the same day would fetch the value of the property at Rs.4,50,000/- after giving three years time for the purpose of execution.

20. Expanding on the contradiction in the evidence of the plaintiff and the second defendant, Mr.S.Mukunth would submit that the plaintiff had specifically pleaded in his examination that a receipt was available to prove the amount of Rs.1,00,000/- paid under Ex.A1 had been given by the second defendant to the first defendant, whereas D.W.3 had stated there is no such receipt. He would point out that insofar as the willingness is concerned, there is no proof that the plaintiff was present in the Registrar's office, nor had he let in any evidence to prove with regard to the preparation of the sale deed. He would reiterate the finding of the lower appellate Court that though the plaintiff had alleged the witnesses to the endorsements Exs.B2 to B4 are all the employees of the second defendant, none of them have been examined to substantiate the plea.



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21. Finally he would point out from the evidence of D.W.3 that the alleged employer did not even know about the existence of the witnesses. In fine, his argument is that the sale agreement as well as the endorsements are all the result of collusion between the plaintiff and the second defendant. He would state, being a suit for specific performance, with such kind of contradictions, the suit ought not to have been decreed. Finally, he would submit that assuming the power of attorney to be true and genuine, the power of attorney is not entitled for granting extension of time under an agreement unless and until the said power had been specifically conferred on him. To that effect, he will rely upon the judgment of a Division Bench of this Court in **G.Thomas Noel -vs- Vijayalakshmi Ammal (2018) 1 MLJ 708.**

22. I have carefully considered the arguments of either side and gone through the documents in the suit and the evidence let in by both parties.

23. From the evidence, it is clear that the second defendant, the husband of the first defendant Ponnusamy and another brother Rathinasamy had presented a suit for performance in O.S.No.699 of 1981 before the Court in Coimbatore. This suit came to be decreed in 2005 and the appeal preferred therefrom to this Court also came to be dismissed. Though the parties had succeeded in the suit for partition, no steps had been taken for the purpose of



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getting an executable final decree. The husband of the first defendant being no more, the affairs of the first defendant were being taken care of by the second defendant and his brother Rathinasamy. I am able to perceive that being a widow who is not possession of sufficient funds, she was depending on the second defendant who is her brother-in-law to take care of her litigations on her behalf. Therefore, I am able to perceive an active confidence that the first defendant had over the second defendant.

24. Insofar as the power of attorney is concerned, the first blow that was initiated was by the first defendant herself. She issued a notice under Ex.A3 to the plaintiff and to the second defendant. In the said document, she had specifically pleaded that she had executed a power of attorney for the property in favour of the second respondent. However, she would point out that the sale agreement that had been entered into between the plaintiff and the second defendant is not true and genuine, but sham and nominal. She would state that subsequent to coming to know of the sale agreement, she had also issued a telegraphic notice to the second defendant dated 09.09.2010 and had also registered a cancellation deed in Document No.910 of 2010 dated 09.09.2010.

25. The power of attorney having been admitted, the plaintiff would be



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bound by the authorised acts initiated by the second defendant. It is the plea of the second defendant that he had entered into an agreement of sale under Ex.A1 on the strength of the power of attorney. Under Ex.A1, it is specifically pleaded that the plaintiff who is none else than the son of the second defendant had negotiated and agreed to purchase the suit schedule mentioned property for a sum of Rs.4,50,000/-. In the said agreement itself, he pleads that a sum of Rs.1,00,000/- had been paid as advance amount. The period for completion of the agreement was three years.

26. The first defendant having denied the document under Ex.A1, the burden fell on the plaintiff to prove the said document. The proof required includes the alleged payment of Rs.1,00,000/- that is said to have been paid under the deed. I have to note here that all the payments said to have been made by the plaintiff to the second defendant, as the power of attorney of the first defendant, are in cash. Law does not prevent any cash transactions, but the same should have been reflected in the books of accounts of the plaintiff or in his income tax statements or at least by examination of his auditors. During the course of examination, P.W.1 has specifically stated that he has properties worth Rs.20 Crores and he is generating an income of Rs.60 lakhs per year. This is believable as he is in one of the top most brackets as income tax assessee. In the plaint, he has asserted that he is an agent of Aircel. Therefore, he ought to



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have produced any one of these evidences in order to substantiate that this payment of Rs.1,00,000/- under the agreement and Rs.3,00,000/- through the subsequent endorsements, had been made to the second defendant.

27. It is here, as pointed out by Mr.S.Mukunth, that the suspicion arises. According to the plaintiff, he had paid the sum of Rs.1,00,000/- to the second defendant who had in turn passed on this amount to the first defendant and collected a receipt. This clear and categorical statement is found in his proof affidavit as well as in his plaint. Entering witness box, he stood by the statement. Unfortunately for him, his father the second defendant who was examined as D.W.3 pleaded that the amount said to have been paid on 23.06.2005 was directly paid to the first defendant. This is the first contradiction in the payment of money under the document.

28. The second contradiction that arises is that the plaintiff had pleaded that the amount of Rs.1,00,000/- was paid by him on 23.06.2005. His father, as the power of attorney, had handed over this amount to the original owner viz., the first defendant. He would also state that the payment was made as against which receipt was issued by the first defendant. Curiously enough, even this aspect was given up by his father, the power of attorney of the first defendant in his cross examination. He has stated that no such receipt was ever issued by the



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first defendant for the receipt of the amount. These two contradictions itself establishes the confusion on the basis on which Ex.A1 was formed.

29. For a moment, if I were to keep aside this and assume Rs.1,00,000 has been paid under Ex.A1, there arise some more problems for the plaintiff. He is said to have paid a sum of Rs.1,00,000/- on 19.06.2008, a further sum of Rs.1,00,000/- on 18.03.2009 and finally a further sum of Rs.1,00,000/- on 17.12.2009. As a proof of all the payments, three endorsements have been made on the documents. These are under Exs.B2, B3 and B4. Insofar as these payments too, all are said to be cash payments. Nothing has been produced before the Court in order to show that these amounts were in fact paid by the plaintiff to his father acting as the power of attorney of the first defendant. These three endorsements have two witnesses each. None of the witnesses to the said document have been examined. Apart from the fact that the plaintiff has not produced any records to show that he had made a payment of Rs.1,00,000/- each on these three different dates as accounts etc., as pointed out above, I would have expected the plaintiff to have at least examined the witness to the aforesaid endorsements in order to substantiate this plea of payment.

30. The crucial contradiction which makes me look against the plaintiff



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arises here. According to the plaintiff, the persons who made these endorsements are all employees of his father's farm. The father as D.W.3 has stated in clear and categorical terms that he does not know about the existence of any of these persons. Therefore, the doubt already entertained by this Court on the payment of Rs.1,00,000/- looms large in the light of the suspicious circumstances under Exs.B2 to B4. No law bars an employee from making an endorsements witnessing the payment made to his employer. However, when the said endorsements are denied, it is required that a person who relied upon the endorsements to prove the same at least by examining the witnesses. As pointed out above, the plaintiff's positive assertion was that the witnesses were working in the father's farm. A similar assertion is made by his father, although he is not aware about their existence.

31. I am not going into the aspect of readiness or the strength of the plaintiff because during the course of cross examination of the plaintiff, the first defendant herself has put questions pointing out to his ability. However, I have to turn to the aspect of willingness. These are twin conditions in terms of Section 16(c) of the Specific Relief Act. The proof that Mr.Mohan would rely upon to substantiate his plea of willingness is the fact that he was present before the Sub Registrar's Office at Gandhipuram for the purpose of registration. The telegram had been issued on 13.09.2010 calling upon the defendants to be



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present in the Sub Registrar's Office on 15.09.2010. If the plaintiff pleads that he was ready with the sale deed for the purpose of its registration, it is expected that the plaintiff would have filed the stamp papers that have been purchased by him or a receipt as a proof for the same and a draft sale deed or a pucca sale deed which has been prepared for the purpose of registration on 15.09.2010. He would plead that he was present from morning 10.00 a.m. to 5.00 p.m. Proof of presence in such kind of cases is normally by filing the Encumbrance Certificate or other documents, that have been issued by the Sub Registrar Office on that date. In this case all the aforesaid documents are crucially missing. Apart from the *ipse dixit* of the plaintiff that he was present on 15.09.2010 at Sub Registrar's Office at Gandhipuram, there is no other evidence available. Hence, I am not inclined to accept the plea that the plaintiff was available on 15.09.2010 at the Sub Registrar's Office.

32. The cumulative conclusion of the aforesaid discussion is that the plaintiff has been unable to prove his preparedness and therefore I have to presume that he has come forward with a false plea. Even without this conclusion, under Section 20 of the Specific Relief Act, a suit for specific performance need not be decreed merely for the reason that it is lawful to do so. The high bar that is required in a suit for specific performance to be crossed by the plaintiff in the present case has fallen hopelessly low. Ex.A1 and Exs.B2 to



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B4 not having been proved, I have to necessarily confirm the findings of the lower appellate Court. Though it is a Second Appeal, since the lower appellate court is reversing judgment of the trial Court, I went through the documents as well as the evidence with the assistance of the learned Senior Counsel on both sides and I have to come to a conclusion that the plaintiff has not proved his case.

33. Above all, I am bound by the judgment of this Court in **G.Thomas Noel -vs- Vijayalakshmi Ammal (2018 (1) MLJ 708)**, wherein a Division Bench speaking through Justice Kalaiyaran (as he then was) has specifically held that a general power of attorney is not sufficient for the agent to make an endorsement for extension. The Division Bench has held that the agent must be given a specific authority to extend the time to perform similar task including execution of the sale deed. A perusal of Ex.A1 shows that the second defendant had not been empowered specifically to that effect. A power of attorney being a document of agency, requires strict interpretation.

34. In the light of the above discussion, the Second Appeal fails. The substantial questions of law framed are answered against the appellant and in favour of the respondents. The judgment and decree of the I Additional District and Sessions Judge at Coimbatore in A.S.No.103 of 2017 dated 05.02.2019 in



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reversing the judgment and decree of the Court of the Subordinate Judge at Coimbatore in O.S.No.720 of 2010 dated 11.08.2017 stands confirmed. Costs throughout. Consequently, connected miscellaneous petition is closed.

05.07.2024

Index : Yes/No
Neutral Citation : Yes/No
Speaking Order / Non-speaking order
KST
To

- 1.The I Additional District Judge, Coimbatore.
- 2.The Subordinate Judge, Coimbatore.



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V.LAKSHMINARAYANAN, J.

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