



WEB COPY

S.A.No.33 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.03.2024

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.33 of 2021

1.D.Ramanathan
2.R.Maruthamuthu

... Appellants

Vs.

A.Shanmugasundaram (died)

1.A.Radhakrishnan

2.A.Venkatraj

3.Gnanamani

4.Premalatha

5.S.Jayakumar

6.S.Rathinasamy

... Respondents

Prayer:- Second Appeal is filed under Section 100 of C.P.C against the judgement and decree dated 19/09/2016 made in AS.No.211/1997 on the file of the Court of the I Additional District Judge, Coimbatore



reversing the judgement and decree dated 29/02/1996 made in O.S.No.344/1991 on the file of the Court of Subordinate Judge, Udumalpet.

For Appellant : M/s.T.M.Naveen

For Respondent : M/s.Nazeer Ahamed [R.3 to R.6]

: Served - No appearance[R.1 and R.2]

JUDGEMENT

The plaintiffs are the appellants before this Court. The suit is one for specific performance. The facts which have culminated in the filing of the above Second Appeal are herein below set out and the parties are referred to in the same ranking as before the Trial Court.

2. Before discussing the facts of the Second Appeal, it is worthwhile to take note of the conduct of the respondents.

3. Earlier the matter had been argued in part and when the matter was posted for further arguments, the respondent's counsel had



reported that they had given a change of vakalat and one M/s.D.Rajalakshmi said that she has entered appearance on behalf of the respondents 3 to 6 and had sought for an adjournment. The matter was thereafter adjourned to 05.03.2024. When the matter was taken up on 06.03.2024, once again time was sought for and it was made clear that the respondents had to finally argue the matter failing which the Court would proceed to pass orders. Today, when the matter is listed finally for arguments, the respondent's counsel is not ready and willing to make his submission.

4. The Substantial Questions of Law that arises for consideration in the above Second Appeal are:-

“1. Whether the Lower Appellate Court is correct in law in fixing the onus of proving the defendant's case upon the plaintiffs”.

2. Whether the plaintiffs have proved the execution of the agreement and the passing of



WEB COPY

S.A.No.33 of 2



consideration?"

5. It is the contention of the plaintiffs that they had entered into an agreement of sale dated 22.03.1990 with the defendants. As per the terms of the agreement, the total sale consideration was fixed at a sum of Rs.1,50,000/- and a sum of Rs.1,00,000/- was paid as an advance. The period for concluding the contract was fixed at one and a half years from the date of agreement.

6. The plaintiffs would submit that they have been ready and willing to perform their part of the contract by paying the remaining balance sale consideration. However, on 12.07.1991, the defendants had issued a legal notice to the plaintiffs alleging that the sale agreement was issued as a security for a loan for a sum of Rs.1,00,000/-. The plaintiffs had refuted the claim and sent a reply notice on 05.08.1991 once again reiterating the fact that they are ready



and willing to perform their part of the contract. After receipt of this reply notice, there has been no re-joinder from the defendants and therefore, the plaintiffs had come forward with the suit for specific performance and have also sought for the alternate relief of refund of the advance amount.

7. The defendants had filed a written statement denying the contentions in the plaint. They would submit that the sale agreement was executed when the defendants were in urgent need of funds to meet their expenses and commitments. At that time, one Nachimuthu son of Nanjappa Gounder came to their rescue and undertook to advance money as a loan. However, he had laid certain conditions for giving the loan. The sale agreement was executed in favour of the plaintiffs only on the basis of these conditions. The plaintiffs and the said Nachimuthu are close associates. The said Nachimuthu is a financier and also doing real estate business. Apart from this sale agreement, the said Nachimuthu had also got 3 promissory notes for a



sum of Rs.35,000/- each from defendants 2 to 4 and also 3 blank promissory notes signed by the very same defendants. Further, the said Nachimuthu had also obtained signatures of defendants 2 to 4 on blank stamp papers. The said Nachimuthu had already received a monthly interest of Rs.3.000/- from the defendants for one year.

8. The defendants would also take a stand that the 1st defendant only had a life interest in the property and the absolute right devolved on defendants 2 to 4 as per the Will of the 1st defendant's husband dated 06.11.1987. Therefore, the 1st defendant had no right to enter into the agreement of sale. The defendants would submit that they had issued a notice dated 12.07.1991 narrating the above facts. They had also contended that the plaintiffs had no source of income and they were not ready and willing to perform their part of the contract. It is for this reason that they have sought for the alternate relief. Therefore, the defendants sought for dismissal of the suit.



9. The Trial Court had framed the following issues:-

1. Whether the sale agreement was executed by defendants in favour of the plaintiffs?

2. Whether the suit sale agreement is non est in law?

3. Whether the plaintiffs have means to pay the amount mentioned in the sale agreement?

4. Whether the defendants are liable to execute sale deed in favour of plaintiffs.

5. Whether the plaintiffs are entitled for possession and compensation?

10. The 1st plaintiff had examined himself as P.W.1 and marked Ex.A.1 to A.20. The 2nd defendant had examined himself as D.W.1 and marked Ex.B.1 to B.4.

11. On considering the evidence on record, the Trial Court had



proceeded to decree the suit for specific performance. Aggrieved by this judgement and decree the defendants had filed A.S.No.211 of 1997 on the file of the I Additional District and Sessions Court, Coimbatore. The learned Lower Appellate Judge had reversed the judgement and decree of the Trial Court and decreed that the plaintiffs are entitled for alternative relief of refund of advance amount of Rs.1,00,000/- with simple interest at the rate of 6% per annum.

12. Challenging the same, the plaintiffs have preferred the above Second Appeal. Initially, when the Second Appeal had come up for admission, this Court had directed notice and thereafter respondents had entered appearance through counsel. What transpires thereafter has been set out in the forgoing paragraph no.3.

13. M/s.T.M.Naveen learned counsel appearing on behalf of the appellants/plaintiffs would submit that the agreement in question was



an agreement of sale entered into between the parties for the purchase of the suit schedule property. He would submit that the period of one and a half years that has been provided in the agreement of sale was only on account of the fact that the defendants had sought time to vacate the premises. He would submit that the plaintiffs had paid a huge sum of Rs.1,00,000/- as an advance and what remained was a payment of Rs.50,000/-. Before the end of one and a half years and without vacating the premises, the defendants had issued a legal notice on 12.07.1991 under Ex.A.2.

14. He would submit that the defendants who have claimed that the transaction was a loan transaction had not taken any steps to prove the same. The learned counsel would submit that Thirumalaisamy, one of the attestors of Ex.A.1, introduced the financier, Nachimuthu, to the defendants, after which they borrowed money from Nachimuthu. However, the said Thirumalaisamy had not been examined on the side of the defendants. Therefore adverse inference



has to be drawn against the defendants in this regard. In fact, during his cross examination, D.W.1 had clearly deposed that he is not going to examine Thirumalaisamy. Therefore, the learned counsel for the plaintiffs would submit that the onus of proving that the document in question was executed as a security for a loan has not been discharged by the defendants.

15. The learned counsel would also submit that the contentions of the defendants 2 to 4 that the 1st defendant was not competent to execute the agreement of sale as she was only a life estate holder pales into insignificance since all the parties have together executed the agreement of sale. He would submit that the Lower Appellate Court has totally misdirected itself in holding that it is for the plaintiffs to prove that it was not a loan agreement. He would therefore pray that the appeal be allowed and the judgement and decree of the Trial Court be confirmed.



16. Heard the counsel for the appellants. As already submitted, the respondents are not willing to make their submissions.

17. The case of the plaintiffs is that on 22.03.1990, he had entered into an agreement of sale with the defendants and the sale agreement has been marked as Ex.A.1. The said agreement of sale is a registered one. As per the terms of the agreement, the total sale consideration fixed was a sum of Rs.1,50,000/- and on the date of the agreement a sum of Rs.1,00,000/- was paid as an advance. The agreement further reads that the transactions should be concluded within a period of one and a half years. This period comes to an end in the month of September 1991. However, on 12.07.1991 a legal notice was issued by the defendants to the plaintiffs as well as one Nachimuthu. In the said legal notice they had further contended that they have been paying the monthly interest of Rs.3,000/- to Nachimuthu for the loan of Rs.1,00,000/- advance by him. They had also contended that the sale agreement was only issued as a security



for the loan. Since the transaction was a loan transaction and the defendants had also repaid interest for one year, they had warned the plaintiffs against filing a suit for specific performance stating that if such a suit is filed it would be adequately contested.

18. The said Nachimuthu had issued a reply Ex.B.1 in response to the notice under Ex.A.2 in which he has categorically denied the contention that he has given a loan to the defendants. He has also submitted that he has nothing to do with the agreement of sale said to have been entered into between the defendants and the plaintiffs. He has also denied the factum of receiving blank promissory notes from the defendants. The said Nachimuthu would go on to state that on 16.01.1991 he had extended a loan of Rs.40,000/- for which the defendants are paying the interest.

19. Further, a perusal of Ex.A.1 would show that the agreement of sale has been executed by all the defendants. The life estate holder



as well as the vested remainder have all signed the agreement of sale.

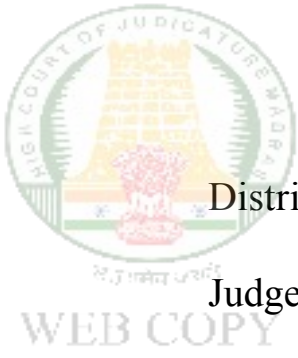
Therefore, the argument of the defendants that the documents has been executed by persons who are not competent to enter into such an agreement has to necessarily fail. The Lower Appellate Court has therefore erred in holding that the agreement of sale Ex.A.1, is unenforceable.

20. Coming to the next argument that the agreement of sale was executed as a security for the loan agreement, the defendants would contend that they had borrowed money from Nachimuthu and Nachimuthu had directed them to execute this agreement of sale in favour of the plaintiffs. However, the defendants have not chosen to cross-examine Tirumalaisamy who they say was the person instrumental for obtaining the loan from Nachimuthu. This Thirumalaisamy is also an attesting witness in the agreement of sale. The defendants have kept away the best evidence from the Court. Therefore, adverse inference has to necessary be drawn against the



defendants. The plaintiffs have proved not only the execution of the agreement of sale but also the passing of consideration which has been admitted. The defendants would submit that they have received the money from Nachimuthu. The said Nachimuthu had issued a reply notice under Ex.B.1 wherein he has clearly and categorically denied the contention of the defendants that he had given them a loan of Rs.1,00,000/-. He has also denied knowledge about the agreement of sale. The reply notice has been marked on the side of the defendants themselves. This factum has not been taken note of by the Lower Appellate Court. The Lower Appellate Court has failed to appreciate that the onus is on the person pleading against the recitals contained under the document to prove his case. This onus has not been discharged by the defendants. Therefore, the order of the Lower Appellate Court has to necessarily be set aside.

21. In fine, the Second Appeal is allowed, the Judgement and Decree of the Lower Appellate Court, namely, the I Additional



District Judge, Coimbatore in A.S.No.211 of 1997 is set aside and the Judgement and Decree of the Trial Court, namely, the Subordinate Judge, Udumalpet in O.S.No. 344 of 1991 is confirmed. No costs.

19.03.2024

Index: Yes/No
Speaking order/non-speaking order
Neutral Citation: Yes/No
shr

To

1. The I Additional District Judge, Coimbatore.
2. The Subordinate Judge, Udumalpet.
3. The Section Officer,
V.R.Section,
High Court, Madras.



WEB COPY



S.A.No.33 of 2

P.T.ASHA, J.,

shr



WEB COPY



S.A.No.33 of 2

S.A.No.33 of 2021

19.03.2024