BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 16.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.161 of 2015

A.Parimala Gowri (Died) ... Appellant/Defendant

2.P.Azagesan

3.Siva Balan Ganesh

4.Sasidharan ... Appellants

(Appellants 2 to 4 are brought on record as legal heirs of the deceased sole appellant vide Court order, dated 07.06.2022 made in C.M.P(MD)Nos. 152, 153 and 155 of 2022 in A.S(MD)No.161 of 2015)

Vs.

K.Devendra Krishnan ... Respondent/Plaintiff

Prayer : This Appeal Suit filed under Section 96 r/w Order 41, Rule 1 of CPC., against the judgment and decree passed in O.S.No.81 of 2011, dated 11.12.2014 on the file of the III Additional District Court, Tirunelveli.

For Appellants : Mr.K.P.Narayana Kumar
for Mr.A.Balakrishnan

For Respondent : Mr.T.Selvan

JUDGMENT

This Appeal Suit has been preferred as against the decree and judgment passed in O.S.No.81 of 2011 on the file of the III Additional District Court, Tirunelveli, wherein the respondent herein has filed a suit as against the first appellant herein for the relief of specific performance and the suit was decreed in favour of the plaintiff. As against the decree and judgment, the present appeal has been filed by the appellant / defendant. During the pendency of the appeal, the first appellant died and her legal heirs were impleaded as appellants 2 to 4.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

3. <u>The brief averments made in the plaint are as follows:</u>

Originally, the suit properties belonged to the defendant through sale deed, dated 24.01.1996. The plaintiff and the defendant entered into an agreement to sell the property, dated 03.08.2011 and the sale consideration was fixed as Rs.20,00,000/- and the time was fixed on

15.09.2011. The said agreement was registered. On the date of agreement itself, the plaintiff paid a sum of Rs.18,00,000/- towards advance of sale consideration. The balance amount of Rs.2,00,000/- to be paid at the time of sale. The plaintiff was always ready and willing to perform his part of contract prior to 15.09.2011 (i.e.,) time for sale. The plaintiff approached the defendant for getting sale deed but the defendant evaded from executing the sale deed. Thereafter, the plaintiff issued notice, dated 10.11.2011 through his Counsel and the same was received by the defendant on 16.11.2011. But the defendant has not issued any reply. Therefore, the suit is filed for the relief of specific performance.

4. **The brief averments made in the written statement are as follows:**

The suit is not maintainable either in law or on facts and the same is liable to be dismissed *in-limine*. It is true that the property belongs to the defendant by way of sale deed, dated 24.01.1996. But it is false to state that the defendant entered into agreement to sell the property for a sum of Rs.20,00,000/-, dated 03.08.2011 and also it is false to state that on the date of agreement itself, the defendant received a sum of Rs.18,00,000/-

and the remaining of Rs.2,00,000/- is to be paid on or before 15.09.2011 and the defendant has to execute the sale deed. It is also false to state that the plaintiff was always ready and willing to perform his part of contract and he was ready on 15.09.2011 with balance of sale consideration. The agreement was not intended to sell the property. In fact it was executed for loan purpose. The defendant has three sons and first son studied up to Engineering. The defendant borrowed loan for the studies of his first son. In the mean time, his second son also studied in B.E. Therefore, the defendant obtained loan from one Muthaiya belongs to Thiyagaraja Nagar. At the time, the said Muthaiya insisted to execute agreement instead of mortgage deed. Since the defendant had financial crises, he executed a registered agreement, dated 28.07.2010 for the loan obtained from Muthaiya for a sum of Rs.7,00,000/-. But in the sale agreement, the value was fixed at Rs.6,50,000/- as if advance paid Rs.2,00,000/-.

5. Apart from that, one pro-note and cheque was also given by the defendant. Further this defendant obtained loan from the LIC of India for a sum of Rs.2,00,000/- and thereafter, mortgaged to the Repco Bank, Palayamkottai and obtained Rs.4,70,000/- and settled the amount to the

LIC. The original sale deed also under the custody of Repco Bank, Palayamkottai. In order to settle the debt to Muthaiya, the defendant approached the plaintiff and obtained loan by executing sale agreement. Therefore, the defendant obtained loan from the plaintiff to settle the debts of Muthaiya and also for the educational expenses of his sons and finally, obtained loan of Rs.11,50,000/-, at the time, the plaintiff demanded to execute sale agreement as if executed in favour of Muthaiya. Therefore, the plaintiff has executed the sale agreement in favour of the defendant but not for sale of the property. Since the sale agreement in favour of Muthaiya was not cancelled prior to the agreement of this plaintiff, he obtained signatures in the empty twenty rupees stamp paper and cheques drawn on State Bank, Vannarapettai on 13.07.2011. In that twenty rupees stamp paper, the plaintiff filled the stamp paper as if on 14.07.2011 and agreement was executed and the plaintiff received Rs.1,00,000/- and thereafter, Rs.4,00,000/- on three times and total amount of Rs.23,00,000/- were mentioned. Thereafter, the defendant paid a sum of Rs.7,00,000/- to Muthaiya and cancelled the said agreement. On the same day itself, the plaintiff obtained the plaint agreement and deducted Rs.50,000/- towards interest and other expenses, as the amount of Rs.7,00,000/- settled to

Muthaiya and the remaining Rs.4,00,000/- already received by the defendant from the plaintiff. Therefore, now the plaintiff filed the suit as if the sale agreement was executed for sale of the property. The defendant already paid interest of 3% for Rs.100/- per month. The plaintiff threatened the defendant to execute sale deed in his favour. Thereby, he already lodged a complaint to the Commissioner of Police and the same was forwarded to Crime Branch and thereafter only the present suit was filed by the plaintiff. Therefore, the suit is liable to be dismissed.

6. Based on the above said pleadings, the Trial Court framed the following issues:

"1) Whether the suit agreement was intended to sell the property? (தாவா கிரைய ஒப்பந்தம் தாவாச்சொத்தை விற்க வேண்டுமென்ற நோக்கத்துடன் ஏற்படுத்தப்பட்டதா?)

2) Whether the plaintiff was always ready and willing to perform his part of contract? (வாதி எப்போதும் கிரைய ஒப்பந்தத்தை நிறைவேற்ற தயாராகவும், விருப்பத்துடனும் இருந்தாரா?)

3) Whether the plaintiff is entitle to decree for specific performance of contract? (பிராதில் கோரியபடி வாதிக்கு ஏற்றதை ஆற்றுக பரிகாரம் கிடைக்கத்தக்கதா?)

4) To what relief the plaintiff is entitled to? (வாதிக்கு கிடைக்கத்தக்க பரிகாரம் என்ன?)"

7. Before the Trial Court, on the side of the plaintiff, he himself examined as P.W.1 and examined other two witnesses P.W.2 and P.W.3 and marked Exhibits A.1 to A.3. On the side of the defendant, she herself examined as D.W.1 and also examined D.W.2 and D.W.3 and marked Exhibits B.1 to B.8.

8. After careful perusal of the documents and hearing both sides, the Trial Court has decreed the suit in favour of the plaintiff by granting decree for specific performance of contract. As against the decree and judgment passed by the Trial Court, the defendant has preferred this appeal on the following grounds:

<u>Grounds of Appeal:</u>

(i) The judgment and decree of the Trial Court is against law, weight of evidence and facts of the case.

(ii) The Court below has erroneously given finding that it is normal practice of paying the amount in the presence of Sub-Registrar without any endorsement as to payment of amount by the Sub-Registrar and the Trial Court failed to consider that the payment of advance amount before the Sub-Registrar is contradicted by the P.W.3.

(iii) The Trial Court failed to appreciate that even before the disputed sale agreement, the property was under subsisting mortgage with Repco Bank and thereby, no possibility of entering into agreement of sale of property and also failed to consider that after receipt of notice, the defendant gave a criminal complaint before the Land Grabbing Cell.

(iv) The Trial Court ought to have consider evidence of D.W.1 to D.W.3 to arrive at a conclusion that the disputed agreement was executed only as security for a loan.

(v) The Trial Court failed to consider Exhibit B.6 sale agreement, dated 14.07.2011 by fixing the sale consideration of Rs.23,00,000/- and the payment of advance as Rs.1,00,000/-, which clearly establish that even prior to the disputed sale agreement, there was a subsisting sale agreement between the parties by mentioning higher price value and the Trial Court failed to consider that in the said agreement, P.W.2 and P.W.3 are the attesting witnesses, who attested in this suit agreement and thereby, the plaintiff suppressed the material facts and came to this Court with unclean hands.

9. The learned Counsel appearing for the appellant / defendant would contend that the respondent / plaintiff herein has filed a suit for specific performance of contract alleging that the appellant / defendant executed sale agreement in favour of the respondent / plaintiff and sale price fixed as Rs.20,00,000/-. On the date of agreement itself, Rs.18,00,000/- was given as advance and the agreement has to be completed after receipt of balance sale consideration of Rs.2,00,000/- on 05.09.2011 and the said agreement was registered. But in fact the said sale deed was not executed with intend to sell the property and the same was entered between the parties as security for the loan obtained by the appellant / defendant. The appellant / defendant had examined D.W.1 to D.W.3 and marked Exhibits B.1 to B.8. The evidences of defendant's side clearly shows that the suit agreement was entered between the parties for loan sanction. Already the property was mortgaged with the Repco Bank and the same also mentioned in the agreement. While so, it shows that the agreement was intended only for loan purpose. Further, already the defendant indebted with one Muthaiya for his sons educational expenses. The appellant / defendant obtained loan from the plaintiff to settle the said amount to Muthaiya and thereby, the agreement was executed only for loan purpose. The interest was fixed at 3% for Rs.100/- per month and the defendant is paying interest to the plaintiff and even now, the appellant / defendant is ready to settle the amount with interest. The Trial Court without considering the evidences adduced on the defendant side, erroneously decreed the suit. Moreover, the plaintiff has failed to prove that the agreement was executed for sale purpose. According to the respondent / plaintiff, he paid the advance amount before the Sub-Registrar but, there is no endorsement in the agreement in respect of receipt of amount. As per Rule 91 of the Registration Rules, once the amount was given in the presence of Sub-Registrar, the Sub-Registrar has to make endorsement by the parties in the presence of Sub-Registrar to that effect. But in this Exhibit A.1 document, there is no such endorsement made by the Sub-Registrar. But the attesting witness P.W.3 stated that, the amount was given before the Sub-Registrar but other witnesses stated that the amount was paid outside of Registrar Office, on the date of agreement. Therefore, there are various contradictions between the evidences of P.W.1

and other plaintiff side witnesses in respect of execution and passing of consideration of the document. Therefore, the judgment and decree passed by the Trial Court are liable to be set aside.

10. The learned Counsel appearing for the respondent / plaintiff would contend that the appellant / defendant agreed to sell her property to the plaintiff for a sum of Rs.20,00,000/- and an agreement was entered into between the parties on 03.08.2011 and on the same date also, the appellant / defendant received a sum of Rs.18,00,000/- towards consideration of sale price and the agreement was registered on the same date and the remaining amount has to be paid on 05.09.2011. Now, due to escalation of price of the property, the appellant / defendant refused to execute sale deed as agreed by him. The respondent / plaintiff has examined as P.W.1 to P.W.3 and marked Exhibits A.1 to A.3 and thereby, clearly proved the execution, attestation of Exhibit A.1 and passing of consideration. Per contra, the appellant / defendant has failed to prove that the agreement was executed for loan purpose. Therefore, the Trial Court after considering all the aspects, correctly decreed the suit. Therefore, the plaintiff is entitle to the decree for specific performance and the present appeal is liable to be dismissed.

11. This Court after hearing both sides and upon perusing the documents including the order of the Tribunal, the points for determination in this appeal are:

"1) Whether the agreement was entered between the parties with intend to sell the property?

2) Whether the consideration of Rs.18,00,000/- was passed through the agreement?

3) Whether the plaintiff was always ready and willing to perform his part of contract?

4) Whether the plaintiff is entitled to decree for specific performance?

5) Whether the appeal has to be allowed or not?

6) To what relief the parties are entitle to?"

12. **<u>Point Nos.1 and 2:</u>**

According to the plaintiff, the defendant intended to sell the property and thereby entered into agreement, dated 03.08.2011 and on the date of agreement itself, a sum of Rs.18,00,000/- was given towards sale consideration and the balance sum of Rs.2,00,000/- has to be paid at the time of sale and the time for sale is fixed on 05.11.2011 and the plaintiff was always ready and willing to perform his part of contract, but the defendant evaded to execute the sale deed. Per contra, the contention of the appellant / defendant is that the property belongs to him and he already entered into agreement with one Muthaiya and obtained loan of Rs. 7,00,000/- and his sons are also studied in Colleges and thereby, he was need of money. In order to settle the debt to Muthaiya and for his sons educational expenses, he obtained loan from the plaintiff for the purpose, the respondent / plaintiff insisted to execute a sale agreement and thereby, he executed the sale agreement. Therefore, the plaintiff was not intended to sell the property and only executed security for the loan purpose.

13. In order to prove the case of the plaintiffs, he examined P.W.1 to P.W.3 and marked Exhibits A.1 to A.3. The plaintiff P.W.1 in his evidence categorically deposed about the agreement between the parties and receipt of advance by the defendant and the plaintiff side witnesses, who are P.W.2 and P.W.3 also deposed about the execution of deed of agreement and passing of consideration. Therefore, the plaintiff side witnesses shows that the agreement was executed and amount was also paid. The defendant also admitted the execution of agreement and receipt of Rs.11,50,000/-. Once the defendant admitted the execution of agreement, he has to prove that the said agreement was not intended to sell the property and the same was executed for the loan amount. In this context, the defendant examined D.W.1 to D.W.3 and marked Exhibits B.1 to B.8. D.W.1 defendant has deposed that he already indebted from one Muthaiya and his sons were also studying and to settle the amount to Muthaiya and for his sons educational expenses, he executed a sale agreement and received Rs.11,05,000/- from the plaintiff and settled Rs.7,00,000/- to Muthaiya and a sum of Rs,50,000/- was deducted by the plaintiff for the expenses and remaining Rs.4,00,000/- was expended to his sons studies. On careful perusal of the documents marked by the defendant shows that, the defendant already executed sale agreement in favour of one Muthaiya and the Exhibit B.8 shows that already the property was mortgaged to the Repco Bank.

14. The plaintiff also admitted the encumbrance in respect of mortgage to the Repco Bank but in spite of that, the plaintiff intended to purchase the property. The plaintiff in the cross-examination admitted that he has not seen the encumbrance over the property prior to the date of sale agreement and also not even seen the original documents of the parental deed and the sale deed of the property and only he had seen the blue print for the building and he had the copy of the blue print for the building but it was not marked before the Court. In this context, P.W.1 in his cross examination is extracted hereunder:

"கிரையம் பேசும்போது சொத்துத் தொடர்பான ஆவணங்களை பார்த்தேனா என்றால் xerox நகல்களை பார்வையிட்டேன் நான் எதுவும் வில்லங்கம் போட்டுப் பார்த்தேனா என்றால் இல்லை.

நான் ஒப்பந்தம் பேசும்போது அசல் பத்திரத்தை பற்றி கேட்டேனா என்றால் கொடுப்பதாக சொன்னார்கள் ஆனால் கொடுக்கவில்லை. கிரைய ஒப்பந்தத்தின்போது அசல் ஆவணங்கள் எதையும் நான் பார்த்தேனா என்றால் கட்டிட தொடர்பான வரைபடத்தை மட்டும் அசலாய் என்னிடம் கொடுத்தார்கள்.

மேற்படி கட்டிட வரைபடத்தை நீதிமன்றத்தில் தாக்கல்

செய்யவில்லை என்றால் சரி ஆனால் கைவசம் உள்ளது."

15. Therefore, from the above said evidence, it is clear that the plaintiff before entering into the agreement not even verified the original document and he only obtained the copy of the blue print for the construction raised in the property. An ordinary prudent man while entering into agreement for sale of the property by investing huge amount of Rs.20,00,000/- without perusing the original documents, cannot enter into sale agreement. But in this case, the plaintiff entered into sale agreement without seeing the original documents in respect of the property. Further, P.W.1 in his evidence stated that he paid a sale advance amount to the defendant in the presence of Sub-Registrar. But there is no endorsement in the agreement in respect of the amount given in the presence of Sub-Registrar as per Section 58 of the Registration Act and Rule 91 of the Registration Rules. If any amount given in the presence of Sub-Registrar, the above said payment of amount has to be endorsed in the presence of Sub-Registrar. In this case, there is no such endorsement. Further P.W.2, who is one of the attesting witnesses stated that the amount was given in the presence of Sub-Registrar but P.W.3 in his cross-examination stated that the amount was given outside the Registrar Office prior one hour to the time of Registration. Further the plaintiff himself admitted that already there is an encumbrance over the property. Further the defendant admitted in the cross-examination that prior to the sale agreement, he has not perused the house tax receipt. According to the defendant, she already entered into unregistered sale agreement with the same plaintiff and the Xerox copy of agreement was also marked as Exhibit B.6.

16. According to the appellant / defendant, he executed an agreement for loan purpose and he only received a sum of Rs.11,05,000/- and out of the above said Rs.11,05,000/-, Rs.50,000/- was deducted by the plaintiff for the expenses and Rs.7,00,000/- was settled to Muthaiya and Rs.4,00,000/- was already received towards his sons educational expenses. But in order to prove the same, he has not examined any witnesses and no sufficient evidence adduced by the defendant, that he only received a sum of Rs.11,50,000/-. But once he admitted the execution of deed and obtained loan, he is bound to pay the amount mentioned in the agreement. Therefore, the defendant failed to prove that he only received a sum of

Rs.11,05,000/- and not paid Rs.18,00,000/- is not acceptable. Per contra, the plaintiff's side evidences proved that the defendant received a sum of Rs.18,00,00/- from the plaintiff. However, the plaintiff admitted that he not even perused the original records prior to the date of agreement and he also admitted that there was an encumbrance over the suit schedule property by mortgaging the same to the Repco Bank. Therefore, the conduct of the plaintiff shows that the agreement was not intended to sell the property. Therefore, the evidences of defendant side probabilized their defence and the agreement was not intended to sell the property. Thus the points Nos.1 and 2 are answered.

17. Point No.3:

According to the plaintiff, the agreement was entered into between the parties for sale of property and he was always ready and willing to perform his part of contract and also issued notice Exhibit A.2 on 10.11.2011 immediately and after the expiry of time for the contract (i.e.,), dated 05.11.2011. Thereby he was always ready and willing to perform his part of contract. This Court in the previous point already decided that the agreement was not intended to sell the property and the same was executed for the loan amount paid by the defendant and thereby, there is no question of readiness and willingness would arise. Thus the point is answered.

18. <u>Point Nos.4, 5 and 6:</u>

The plaintiff sought for the relief of specific performance of contract through the agreement alleging that the said agreement was intended to sell the property. This Court already in the previous point decided that the agreement was not intended to sell the property and the same was for the purpose of loan and thereby, the plaintiff is not entitled to the relief of specific performance of contract but at the same time, the defendant herself admitted that the agreement was executed for loan obtained for the sons' educational purpose and for settling the loan. This Court also in the previous point decided that the consideration of Rs.18,00,000/- was proved by the plaintiff and thereby, the defendant is bound to pay the said amount as mentioned in the agreement. During the course of arguments, the learned Counsel for the appellant / defendant also ready to settle the amount with nominal interest. Therefore, in order to meet the ends of justice, this Court is inclined to pass decree by directing the appellant /

defendant to pay a sum of Rs.18,00,000/- with interest at the rate of 6% from the date of agreement till the date of realisation. Though the plaintiff has not sought for alternative relief of return of advance under the equity and by invoking Order 41, Rule 33 of CPC and considering the admission made by the appellant / defendant, this Court can direct the defendant to pay the advance amount along with interest. Therefore, the defendant is directed to pay the above said amount of Rs.18,00,000/- with interest at the rate of 6% per annum from the date of agreement till the date of realisation. Thus the points are answered.

19. The appellant / defendant has preferred this appeal as against the specific performance granted by the Trial Court in favour of the first respondent / plaintiff. This Court already decided in the previous points that the agreement was not intended to sell the property and the same was entered for loan obtained by the defendant. Thereby, the plaintiff is not entitled to the relief of specific performance. But the Trial Court in its judgment failed to consider the same and only relied upon the evidences adduced on the plaintiff and erroneously hold that the agreement was intended for sale of property and thereby, granted specific performance.

But the Trial Court failed to consider that the plaintiff not even perused the original deed and also failed to consider that the original deed was with the Repco Bank and already there was an encumbrance over the property and the defendant already borrowed loan from one Muthaiah and for settling the loan defendant obtaining money from the plaintiff. Therefore, the circumstances shows that the agreement was not intended for sale of property and the conduct of the plaintiff shows that he also offered loan to the defendant and the above said aspects have not been considered by the Trial Court and thereby, the decree and judgment passed by the Trial Court are un-sustainable in law and facts and the same are liable to be set aside. Accordingly, the judgment and decree of the Trial Court are set aside by allowing this appeal. Thus the points are answered.

20. In the result, this appeal stands allowed and the suit in O.S.No.81 of 2011 on the file of the III Additional District Court, Tirunelveli is dismissed. However, considering the admission made by the appellant / defendant and under the equity, the money decree is passed in favour of the plaintiff by directing the defendant to pay the advance amount of Rs.18,00,000/- with interest at the rate of 6% per annum from the date of agreement till the date of realisation and the time for payment is two months from the date of this judgment. There shall be no order as to costs.

16.02.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The III Additional District Court,
Tirunelveli.

2.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.

P. DHANABAL, J.

BTR

A.S(MD)No.161 of 2015

16.02.2024