



S.A.No.1141 of 2003

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 26.06.2024

CORAM

THE HONOURABLE MR.JUSTICE **S.SOUNTHAR**

S.A.No.1141 of 2002

1.G.Sivasamy (Died)
2.Rajendran
3.Rajalakshmi
4.Vetrivel
5.Sakthivel

...Appellants

-Vs-

K.Dhanalakshmi

... Respondent

(Appellants 2 to 5 were brought on record as legal representatives of the deceased sole appellant vide order of this Court, dated 12.12.2022 made in C.M.P(MD)Nos.11048, 11052 and 11053 of 2022)

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the judgment and decree passed in A.S.No.2 of 2001 on the file of the Additional District Judge, Kumbakonam, dated 28.02.2002 confirming the judgment and decree of Additional Subordinate Judge, Kumbakonam in O.S.No.69 of 1995, dated 16.04.2001.



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For Appellants :Mr.G.Gomathishankar
For Respondent :Mr.R.Devaraj

JUDGMENT

The defendant in a suit for specific performance is the appellant. The respondent filed a suit for specific performance of the agreement, dated 15.12.1994. The suit was decreed by the trial Court and the findings of the trial Court were affirmed by the first appellate Court. Aggrieved by the concurrent findings, the defendant is before this Court.

2.According to the respondent/plaintiff, she entered into a suit sale agreement, dated 15.12.1994, with the appellant/defendant for purchasing the suit property for a sale consideration of Rs.35,000/-. On the date of agreement, an advance amount of Rs.2001/- was paid and the remaining amount was agreed to be paid within four months from the date of agreement. The defendant failed to complete the sale transaction, in spite of several requests made by the plaintiff and hence, a pre-suit notice was issued by the plaintiff on 21.03.1995 under Ex-A2 calling upon the defendant to complete the sale transaction within three days after receiving the balance



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sale consideration. The defendant issued a reply notice on 27.03.1995 under Ex-A3 stating that the suit sale agreement was obtained by the plaintiff, when he was indisposed and the same was not out of his free will. In the very same reply notice, the defendant also cancelled the agreement and returned the advance amount of Rs.2001/- by way of demand draft drawn in favour of the plaintiff. After receipt of the reply notice, the plaintiff issued a rejoinder on 30.03.1995 under Ex-A4 returning the demand draft sent by the defendant and insisted him to complete the sale transaction. As there was no favourable response from the defendant, the plaintiff laid the suit for specific performance of suit sale agreement on 10.04.1995.

3.The appellant/defendant filed a written statement and resisted the suit on the ground that the suit sale agreement was instigated by one Murugesan and the same was not executed by him out of his free will. It was also contended by the defendant that the suit property was the ancestral property and his daughter has got a share in the suit property. It was further averred that after the agreement, there was misunderstanding in his family and therefore, the agreement could not be completed. It was also averred by



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the defendant that the agreement was cancelled and the advance amount was sent back to the plaintiff by way of demand draft. It was also averred that the defendant had no intention to sell the suit property to the plaintiff. On these pleadings, the defendant sought for dismissal of the suit.

4.Before the trial Court, the plaintiff was examined as PW-1. One of the attestors of the suit sale agreement was examined as PW-2 and the scribe was examined as PW-3. On behalf of the plaintiff, four documents were marked as Ex-A1 to Ex-A4. The defendant was examined as DW-1 and the carbon copy of the suit sale agreement was marked as Ex-B4 and the signatures of the attestors found in the carbon copy were marked as Ex-B1 to Ex-B3.

5.The trial Court, on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiff was entitled to a decree for specific performance and decreed the suit. Aggrieved by the same, the defendant filed a first appeal in A.S.No.52 of 2001 on the file of the Additional District Court-cum-Chief Judicial Magistrate, Tanjore at



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Kumbakonam. The first appellate Court affirmed the findings of the trial Court. Aggrieved by the concurrent findings, the defendant has come by way of this Second Appeal.

6.At the time of admission, this Court formulated the following substantial questions of law, by order, dated 22.07.2003:

“1.Whether the facts that the appellant was not in a free state of mind to execute the agreement was not established on reasons of health and the claim made by his daughter to the property and the facts that has immediately sent the amount of advance along with Ex-A3 cancelling the agreement, i.e.Ex-A1?

2.Whether the reasoning and conclusion of the Courts below that the agreement Ex-A1 is valid and enforceable for specific performance is sustainable in law?”

7.Upon hearing the parties, this Court, by order, dated 27.07.2023, formulated the following additional substantial questions of law:

“3.Whether the plaintiff is ready and willing to perform the contract as agreed between the parties?”

8.The learned Counsel for the appellants submitted that the suit sale agreement was not executed by the defendant out of his free will and his



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signature was obtained in the suit sale agreement, when he was suffering from illness. The learned Counsel further submitted that when the agreement is not out of free will of the parties, the same cannot be treated as an enforceable agreement in the Court of law. The learned Counsel further submitted that the site of the suit property belonged to one Annamalai Chettiar and the defendant was an employee of the said Annamalai Chettiar and he gifted the suit site to the defendant for putting up a residential house and thereafter, the defendant had put up a building in the said suit site and has been residing thereon. Therefore, It is the submission of the learned Counsel for the appellant that the suit site does not belong to the defendant and hence, he is not the owner of the entire suit property. Therefore, the suit for specific performance will not lie against him. The learned Counsel further submitted that the total extent of the property as per agreement was 27 kuzhis and the consideration for the suit property was not fixed on kuzhi basis and therefore, the plaintiff is not entitled to seek enforcement of the agreement.

9.The learned Counsel appearing for the respondent by taking this



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Court to the judgments rendered by the Courts below submitted that both the Courts below, on appreciation of oral and documentary evidence available on record, came to a factual conclusion that the suit agreement was validly executed by the defendant and the said finding requires no interference.

10.In order to prove the valid execution of the suit sale agreement, the plaintiff examined one of the attestors to the agreement as PW-2 and the scribe of the agreement was examined as PW-3. Both the Courts below scrutinised the evidence of PW-2 and PW-3 and accepted their versions. Further, the defendant also admitted the execution of the suit sale agreement. However, he pleaded that the agreement was not out of his free will. When the execution of the suit sale agreement is admitted and it was pleaded that consent of the defendant was not out of free will, it is for him to prove that the suit sale agreement was obtained by employing anyone of the vitiating factors recognised under the Indian Contract Act, 1872. In the case on hand, the defendant failed to lead any evidence to show that his consent on agreement was obtained by influencing his will. In support of the plea raised by the defendant regarding absence of free will, except interested testimony



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of the defendant, there is no evidence available on record.

11.The defendant's son-in-law, Rajendran, who had attested the suit sale agreement, as one of the witnesses, has not been examined by the defendant to prove the alleged influence employed by the plaintiff. Therefore, the conclusion reached by the Courts below that the defendant voluntarily executed the suit sale agreement agreeing to its terms, is a factual conclusion based on proper appreciation of evidence of PW-2 and PW-3. The said factual conclusion requires no interference from this Court. Therefore, the questions of law 1 and 2 framed at the time of admission are answered against the appellant and in favour of the respondent.

12.As far as readiness and willingness are concerned, as per the terms of the suit sale agreement, dated 15.12.1994, the plaintiff paid an advance of Rs.2001/- and agreed to pay the balance within four months. The first notice was issued by the plaintiff on 21.03.1995 well within the expiry of four months period expressing his willingness to pay the balance amount. The defendant issued a reply raising a plea that the agreement was not out of his



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free will. Immediately, the suit was filed on 10.04.1995 well before the expiry of four months period mentioned in the agreement. Therefore, the readiness and willingness on the part of the plaintiff is very well established by the pre-suit notice issued by him and filing the suit before the expiry of the time limit. Hence, the third substantial question of law raised in the Second Appeal is answered against the appellant and in favour of the respondent.

13.A reading of Ex-A1 would suggest that the defendant agreed to sell the property with an extent of 27 kuzhis and the sale consideration was fixed as Rs.35,000/-. When the sale consideration for whole of the agreement mentioned property is mentioned, the submission made by the learned Counsel for the appellant that the sale consideration was not fixed on kuzhi based is not acceptable to this Court. As far as the submission of the learned Counsel for the appellant with regard to the defect in the title is concerned, nowhere in the pre-suit note or in the written statement, the defendant contended that the site of the suit property belonged to third party. Only at the time of leading evidence, it was spoken to by DW-1. It is settled law that



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the parties are not entitled to lead any evidence without any foundational plea. Further, it is not a suit concerning title in an immovable property. The suit is for specific performance of an agreement. The defendant by representing himself as owner of the property entered into an agreement and in the pre-suit notice as well as in the pleadings, he has not raised any point regarding the defect in his title. Therefore, the appellant/defendant is not entitled to canvass the point in the Second Appeal stage without foundational plea.

14.In view of the discussion made earlier, all the substantial questions of law are answered against the appellant and the Second Appeal stands dismissed by confirming the judgment and decree passed by the Courts below. No costs.

26.06.2024

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

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To

- 1.The Additional District Judge, Kumbakonam.
- 2.The Additional Subordinate Judge, Kumbakonam.
- 3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

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