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Court : Chennai

Decided On : Mar-14-2014

Judge : G.Chockalingam

Appellant : Vellaichamy

Respondent : Navaneethan

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 14.03.2014 CORAM THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM S.A.(MD)No.104 of 2006 Vellaichamy : Appellant/Defendant versus Navaneethan : Respondent/Plaintiff Prayer This second appeal filed under Section 100 of CPC against the judgment and decree, dated 25.07.2005 of the II Additional Subordinate Judge, Madurai in A.S.No.201 of 2004 reversing the judgment and decree of the District Munsif, Melur, dated 08.01.2004 in O.S.No.13 of 2003.

!For Appellant : Mr.S.Subbiah ^For respondent : Mr.Mr.PT.S.Narendravasan :

JUDGMENT

Challenge in this second appeal is to the judgment and decree, dated 25.07.2005 passed in A.S.No.201 of 2004 by the II Additional Subordinate Judge, Madurai, reversing the judgment and decree passed in O.S.No.13 of 2003 on the file of the District Munsif, Melur, dated 08.01.2004.

2.The respondent herein as plaintiff has instituted Original Suit No.13 of 2003 on the file of the trial Court for specific performance or in the alternative relief of getting Rs.30,000/- with interest at the rate of 18% from the date of the alleged sale agreement, wherein the present appellant has been shown as defendant.

3.It is averred in the plaint that the suit properties originally belonged to the defendant.

The defendant offered the suit properties for sale to the plaintiff and the plaintiff had also agreed to purchase the same.

On 25.07.2001, both the plaintiff and the defendant entered into a registered agreement of sale.

The terms and conditions of the agreement is that the agreed sale price is Rs.30,000/- and the advance amount is Rs.28,000/- and the balance of Rs.2,000/- has to be paid before the Sub Registrar or in person at the time of execution of the sale deed within a period 18 months i.e., on or before 25.01.2003.

The agreement was registered on 27.07.2001 duly attested by two witnesses.

The plaintiff has always been ready and willing to have the sale deed duly executed and also issued a registered notice on 09.01.2013, which was also acknowledged by the defendant on 13.01.2003.

In-spite of that, the defendant has not expressed his willingness to execute the sale deed and to receive the balance amount.

Hence, the present suit has been filed for the relief as stated above.

4.In the written statement filed on the side of the defendant, it is averred as follows:- The suit properties are the joint family properties belonged to the defendant and his son Venkatasamy and his daughters Nachiammal, Muthulakshmi and minor Sudha and they are in joint possession and enjoyment of the same.

The defendant, being the elder son of the family, managed the joint family properties situated in Navinipatti village to an extent of 2 acres of 'Nanja lands' and 70 cents of 'Punja lands' and earned income of Rs.80,000/- per year from the said lands and purchased the suit property and other properties in his name, when the defendant's father was alive.

The defendant's father died 20 years back.

After the death of his father, the defendant and his brothers Periya Karuppan, Subramanian and Vellaisamy orally partitioned the joint family properties.

The defendant's brothers were also allotted some portions in the joint family properties.

It is false to state that on 25.07.2001, an agreement of sale entered into between the plaintiff and the defendant in respect of the suit properties and in fact, the defendant received a sum of Rs.28,000/- towards loan and executed an agreement of sale and that was duly registered.

The defendant had paid Rs.15,000/- towards part loan amount along with interest at Rs.4,480/- for the period from 25.07.2001 to 25.12.2001 on receipt of lawyer's notice on 17.01.2003 and for that, the plaintiff has also given a receipt.

Thereafter, it was agreed by both parties that the defendant has to pay the balance amount within two months.

In the meantime, the plaintiff has filed the vexatious suit containing false allegations set out in the plaint.

Hence, the defendant prayed for the dismissal of the suit.

5. In the reply statement, the plaintiff has stated that the defendant has purchased the suit property from his own earnings through two sales deeds on 12.03.1980.

At the time of the execution of the contract agreement, two sale deeds were entrusted to the plaintiff.

As the defendant has failed to perform his part of the contract, the suit has been filed directing the defendant to perform his part of the contract within the specified time as per the agreement entered into between them or in the alternative directing the defendant to pay Rs.30,000/- with interest at the rate of 18% p.a. The plaintiff has deposited the balance sale consideration of Rs.2,000/- into court and therefore, the defendant is liable to perform his part of the contract.

The plaintiff also denied all the allegation made in the written statement.

6. The trial court, after considering the rival submission made on either side, has held that the plaintiff is not entitled to get the relief of specific performance and the plaintiff is only entitled to Rs.30,000/- with legal interest, deducting Rs.19480/-, which was already paid by the defendant.

Against that, the plaintiff as appellant has preferred the A.S.No.201 of 2004 on the file of the fiRs.appellate court.

The fiRs.appellate court, after hearing both sides and upon reappraising the evidence available on record, has allowed the appeal as prayed for by the plaintiff and thereby set aside the findings of the trial court made in O.S.No.13 of 2003.

Against the judgment and decree passed by the fiRs.appellate court, this second appeal has been preferred at the instance of the defendant as appellant.

7. At the time of admitting the second appeal, the following substantial questions of law have been formulated for consideration:- 1. Whether the Exhibit A1 sale agreement is intended to get the suit property through a sale deed is true?.

2. Whether the exhibit A1 sale agreement is executed only for the security of the loan got by the appellant/defendant from the respondent/plaintiff?.

3. Whether the suit is maintainable when the respondent/plaintiff is praying alternative relief of getting a decree for a sum of Rs.30,000/- (Rupees thirty thousand) with interest at the rate of 18%.?.

4. Whether the receipt exhibit B7 payment made a part of the amount towards the said loan is true and valid?.

5. Whether the respondent/plaintiff had proved the validity of the alleged said agreement exhibit A1 is true?.

6. Whether the respondent/plaintiff is in the habit of giving loans or money lending business by getting sale agreement as security of said loan is true?.

8. Before going into the merits of the case, it is necessary to narrate the admitted facts of this case.

9. It is admitted by both parties that the suit property in question, belonged to the appellant/defendant and the appellant/defendant executed a sale agreement in favour of the respondent/plaintiff.

10. The learned counsel for the appellant/defendant argued that the suit property in question belonged to the appellant/defendant and due to necessity, he borrowed Rs.30,000/- from the respondent/plaintiff and executed a sale agreement in respect of the suit property at the instance of the respondent/plaintiff.

The respondent/plaintiff is the money lender and he is lending loan and for that, his usual practise is to get the sale agreement in favour of him and after repayment of the loan amount, he will discharge the sale agreement.

So, the respondent/plaintiff has got registered sale agreement in his favour from the appellant/defendant and there was no real intention to sell the property by the appellant/defendant to the respondent/plaintiff by following the same procedure contained in the sale agreement (Ex.A1) and it is only a security for the advance received by the appellant/defendant from the respondent/plaintiff, but both the courts below have come to the erroneous conclusion that Ex.A1 is a sale agreement and the appellant/defendant has to perform his part of contract, in default, specific performance relief would be ordered.

11. It is further argued on the side of the appellant/defendant that after receiving Ex.A4 notice, a part of loan amount i.e., Rs.15,000/- has been paid along with of Rs.4,480/- towards interest for 16 months to the respondent/plaintiff and got the receipt in favour of him, which was marked as Ex.B7 and the said receipt is proved by the attesting witnesses, but the fiRs.appellate court has failed to consider the

evidence of the attesting witness to prove Ex.B7 and erroneously rejected Ex.B7 receipt and passed a decree in favour of the respondent/plaintiff, which is liable to be set aside.

12.It is further argued on the side of the appellant/defendant that the usual practice followed by the respondent/plaintiff was proved on the side of the appellant/defendant by producing the documents, which were marked as Exs.B1 to B4 and therefore, the case of the appellant/defendant has proved beyond reasonable doubt and therefore, the respondent/plaintiff's case has to be rejected in view of the above reasons and therefore, the judgment and decree of the fiRs.appellate court is liable to be set aside and the second appeal has to be allowed with costs.

13.Per contra, on the side of the respondent/plaintiff, it is argued that Ex.A1 sale agreement was executed by the appellant/defendant in favour of the respondent/plaintiff with a real intention to sell the suit property and Ex.B4 receipt is not at all a true one and the alleged principal part amount paid by appellant/defendant is not true and the fiRs.appellate court has correctly rejected the evidence of the interested witness and the respondent/plaintiff was always ready and willing to perform his part of contract and the fiRs.appellate court has rightly come to the conclusion that the appellant/defendant is liable to execute the sale agreement and therefore, there is no need to interfere with the judgment and decree of the fiRs.appellate court and hence, the second appeal filed by the appellant/defendant has to be dismissed.

14.In this case, fiRs.of all, we have to decide that whether Ex.A1 sale agreement was executed with an intention to sell the property by the appellant/defendant to the respondent/plaintiff.

15.On the side of the appellant/defendant, Exs.B1 to B3 were marked during the cross examination of PW1 and he has also admitted those documents.

Therefore, we have to refer the deposition of PW1.

16.PW1 in his deposition stated that:- ehd; fpua xg;ge;jk; (jth xg;ge;jj;ij nghy;) jth xg;ge;jj;ija[k; nrh;j;J bkhj;jk; ::K:d;W nghl;L ,Uf;fpnwd;/ re;jpud;.

ghz;o nghd;w eghplk; fpua xg;ge;jk; nghl;L cs;nsd.; ,itfis jtpu ntW fpua xg;ge;jk; ahUIDk; ehd; nghl;IJ ,y;iy/ re;jpuDld; bra;J bfhz;l fpiua xg;ge;jij ehd; uj;J bra;Jtpl;nld;/ re;jpuDld; bra;J bfhz;l fpiua xg;ge;jj;jpy; fz;l brhj;J mtUila jhahUf;F ghj;jpag;gl;IJ vd;gjhy; me;j fpua xg;ge;jj;ij ehd; uj;J bra;J tpl;nld;/ me;j uj;J bra;ag;gl;l gj;jpuKk; gjpt[bra;ag;gl;IJ jhd;/ mjd; efy; xg;ge;jg;gj;jpuk; gp/rh/M/1/ re;jpuDf;Fk; vdf;Fk; ,ilapy; Vw;gl;l fpua xg;ge;jjpd; uj;J gj;jpuk; efy; gp/rh/M/2/ ghz;o vd;ghplk; ehd; bra;J bfhz;l fpua xg;ge;jj;jpd; efy; gp/r/h/M/3/ gp/3 gj;jpuj;ija[k; ehd; uj;J bra;Jtpl;nld;/ ghz;of;F ,uz;L kidtpfs; mtuJ kidtpfspy; xj;jpapd; kfd; btspehl;oy; ,Uf;fpwhh;/ me;j btsp ehl;oy; ,Ug;gtUk; ghz;oapd; ,uz;L kidtpfSk; ehd; ghz;oa[lld; bra;J bfhz;l fpua xg;ge;jjpy; fz;l brhj;J rk;ke;jkhf gpur;rid bra;jhh;fs; gpd;g[Ch; bghpath;fis itj;J ngrpajpy; ,e;j fpua xg;ge;jij uj;J bra;JtpLk;go brhd;dhh;fs; mjdhy; uj;Jbra;J tpl;nld;/ mjd;go gjpt[gj;jpuk; K:yk; uj;J bra;njd;/ uj;J bra;jjw;fhd Mjhuk; efy; gp/rh/M/4 re;jpuDld; bra;J bfhz;l fpua xg;ge;j gj;jpuj;jpy; fz;l bjhif U:gha; 45,000/- k; Mdhy; ehd; re;jpuDf;F bfhl;j bjhif U:/40,000/- mJ me;j gj;jpuj;jpy; fz;Ls;sJ.ghf;fp U:gha; 5000/- j;ij ehd; re;jpuDf;F bfhl;f Koahj fhuz;jpdhy; me;j xg;ge;jjpy; uj;J bra;J tpl;ljh f gp/2 Mtz;j;jpy; fz;Ls;sJ vd;why; rhpjhd;/re;jpuDld; bra;J bfhz;l fpua xg;ge;jjpy; fz;l brhj;J mtuJ jhahUf;F ghj;jpag;gl;IJ vd;gjhy; me;j fpua xg;ge;jj;ij ehd; uj;J bra;Jtpl;nld; vd;w tptuk; gp/2y; brhy;y;gl tpy;iy v;dwhy; rhpjhd;.....

17.So from the evidence of PW1 and documents Exs.B1 to B4, it is made clear that respondent/plaintiff entered into an agreement of sale and paid a considerable portion of amount of Rs.45,000/- as advance and the remaining balance of Rs.5,000/- under Ex.B2 and Ex.3 sale agreement amount is Rs.90,000/- and Rs.60,000/- was paid and subsequently, he received the advance of Rs.60,000/- and cancelled the sale agreement as admitted by the respondent/plaintiff and the reasons alleged for cancellation of the agreement has been stated by the respondent/plaintiff.

But in his deposition, he has stated that after receipt of the advance amount Rs.40,000/-, he cancelled the sale agreement Ex.B1 due to his inability to pay Rs.5000/- to Chandran according to Ex.B.2 and also after the receipt of the advance amount of Rs.60,000/- he cancelled the sale agreement Ex.B.3 due to his

inability to pay Rs.30,000/- to Mr.Pandi.

18.From the above documents and admission of PW1, it is made clear that the respondent/plaintiff has been doing money lending business and his usual practice is to get registered sale agreement executed in his favour and after receiving the loan amount, he cancelled the sale agreement, by registering another document.

In this case also, the registered sale agreement executed for the value of Rs.30,000/- and 28,000/- received as advance by the appellant/defendant in favour of the respondent/plaintiff and for the remaining amount of Rs.2,000/- one and half years time is granted.

The contention of the learned counsel for the appellant/defendant that the respondent/plaintiff is doing money lending business and entered into three sale agreements, but he has not paid Rs.30,000/- to Pandian and Rs.5000/- to Chandran and after the receipt of advance amount, he cancelled the sale agreements is acceptable.

But in Ex.A.1-sale agreement only for paying the balance of Rs.2,000/-, he stipulated the period as one and half years is not a usual one.

19.The learned counsel for the appellant/defendant argued that the sale agreement(Ex.A1) was orally entered into between the parties, but not with an intention to sell the property by the appellant/defendant to the respondent/plaintiff and it was given only as a security to the respondent/plaintiff as per the respondent/plaintiff's usual practice is to get the sale agreement executed in his favour and mentioned the time period as one and half years is acceptable one.

It was also proved from the facts admitted by the respondent/plaintiff, during the cross examination.

Further, P.W.2 in his cross examination has admitted that he only signed in the sale agreement (Ex.A1)and he did not know the conditions stated therein.

Therefore, that evidence of PW2 is not at all useful for the respondent/plaintiff.

20. On the side of the appellant/defendant, one of the attesting witnesses was examined as DW3 and in his deposition, he has stated that the appellant/defendant borrowed a sum of Rs.28,000/- from the respondent/plaintiff and executed a sale agreement (Ex.A1) and at the time of execution of sale agreement, the appellant/defendant brought the Patta Passbook and parent documents and in Ex.A1 sale agreement, it is mentioned as Patta No.658.

So, DW3 has deposed that the appellant/defendant brought the Patta Passbook on the date of execution of the sale agreement is acceptable.

21. From the conjoint reading of the deposition of both parties, it is made clear that the usual practise followed by the respondent/plaintiff has been proved by way of documents Exs.B1 to B4.

22. Further, on perusal of the evidence of both sides, it is made clear that Ex.A1 sale agreement was executed by the appellant/defendant with an intention not to sell the property, but it was executed only as a security for the amount borrowed from the respondent/plaintiff alone is accepted.

23. In this case, even according to the learned counsel for the appellant/defendant, since Ex.A1 is not a sale agreement and one and half years long period is stipulated for payment of Rs.2,000/- to get the sale deed.

But contrary to that, on the side of the respondent/plaintiff, it is argued that the respondent/plaintiff is always ready and willing to execute his part of contract, but the appellant/defendant is not willing to execute his part of contract.

With regard to the above fact, on going through the entire averments in Ex.A1 sale agreement, after the receipt of Rs.2,000/- the appellant/defendant has to execute the sale deed, but there is no condition or stipulation stated to the effect that the defendant has to produce patta book to the suit property.

But contrary to that averment in the plaint that there was a delay in producing the Patta Passbook, the execution of sale deed was delayed and for that reason only, the respondent/plaintiff before filing of the suit, issued notice to the appellant/defendant, that was marked as Ex.A4 and in Ex.A4 notice also the

respondent/plaintiff has not stated any reason for the delay in the execution of sale deed and he is only stated that he is always ready to perform his part of contract on payment of Rs.2,000/-.

But the appellant/defendant has failed to execute the sale deed and Ex.A4 notice was also issued one week before ending of one and half year period.

But, without stating the above fact in his plaint, PW1 further stated in his deposition that the appellant/defendant was not ready to perform his part of contract and he was delaying the execution of the sale deed by saying the reason that he applied for Patta Passbook and hence, the delay.

But, there is no specific condition in the sale agreement that the appellant/defendant has to produce the Patta Passbook before the execution of the sale deed, but patta number is mentioned in Ex.A1 sale agreement itself.

24.Further PW1, in his deposition has stated that:- gl;lh gh!; g[j;jfk; gpujpthjpf;F fpilj;j gpd;g[fpu a gj;jpuk; bra;J bfhs;sntz;oaJ vd;w tpguk; V1 kw;Wk; vd;Dila tHf;fwp".h; mwptpg;gpy; brhy;yg;;gltpy;iy vd;why; rhpjhd;/ ve;j tptuk; tHf;FiuapYk; brhy;ytpy;iy vd;why; rhpjhd; gpujpthjp gl;lh gh!; g[j;jfk; juhjh fhuzj;jpdhy; jhd; fpu a gj;jpuk; gjpt[bra;a ,ayhky; nghdJ vd;W ,g;ng hJ tHf;fpw;fhf bgha;brhy;fpnwd; vd;why; rhpay;y/ gl;lh gh!; g[j;jfk; fpilj;Jtpl;jhf vd;W V1 Mtzk; Vw;gl;l fhyk; Kjy; tHf;fwp".h; mwptpg;g[mDg;g[k; fhyk; tiu cs;s ,ilgl;l fhyj;jpYk; ehd; gy Kiw nfl;Ls;nsd;.

v1y; fz;l 1-1/2 tUl fhy mtfhrk; Kotjw;F Rkhh; 15 ehs;fSf;F Kd;g[jhd; ehd; tHf;fwp".h; mwptpg;g[mDg;gpndd; vd;why; rhpjhd;.....25.In this case, Patta Passbooks issued in favour of the defendant, were marked as Exs.B5 and Ex.B6.

The respondent/plaintiff stated in his cross examination that Patta Passbooks were issued very long before the execution of sale agreement Ex.A1.

Hence the reasons stated by the respondent/plaintiff that Patta Passbooks were not available with the appellant/defendant and the appellant/defendant is not ready with the Patta and hence, the execution of sale deed was delayed, is not at all acceptable.

Hence, as per the above discussions, the respondent/the plaintiff is always ready and willing to perform his part of contract is not at all acceptable.

26.Further, the contention of the respondent/plaintiffs that without Patta Passbook, the defendant cannot execute the sale deed is not at all acceptable one.

Further, the respondent/plaintiff contrary to Ex.A1 agreement of sale, demanded Patta Passbook for the performance of his part of contract.

From the above, it is made clear that respondent/plaintiff is not willing to perform his part of contract.

Therefore, the argument of the learned counsel for the respondent/plaintiff that the respondent/plaintiff is always ready and willing to perform his part of contract is not at all acceptable.

27.Further, on the side of the appellant/defendant, it is contended that the appellant/defendant has paid Rs.15,000/- towards part payment of loan with interest of Rs.4,480/- and got the receipt(Ex.B7) in the presence of the witnesses and except that receipt, there is no document produced on the side of the appellant/defendant for the repayment of loan amount.

As already the respondent/plaintiff issued notice (Ex.A4) for the execution of the sale deed in his favour and hence if the appellant/defendant has paid the part amount to the respondent/plaintiff for the payment of Rs.15,000/- along with interest of Rs.4480/-, he has to get an endorsement in Ex.A1, which is available with the respondent/plaintiff.

But he could not get any endorsement in Ex.A1 sale agreement and for that, no explanation was offered, on the side of the appellant/defendant.

Therefore, the contention of the appellant/defendant that after receiving the notice from the respondent/plaintiff, he has paid Rs.15,000/- towards part payment, without getting proper endorsement in Ex.A1 agreement is not at all acceptable one.

Hence, the appellant/defendant has to pay the entire loan amount borrowed by him with proportionate interest to the respondent/plaintiff.

28.From the above discussions, this court is of the considered view that Ex.A1 sale agreement was not executed with the real intention of selling the property to the respondent/plaintiff by the defendant and it was given only as security for the loan borrowed and it is the usual practice of the respondent/plaintiff, to get the sale agreement registered in his favour and even for the argument sake Ex.A1 sale agreement is a true one, the readiness and willingness on the part of the respondent/plaintiff has not been proved.

Hence, the respondent/plaintiff is not entitled to the relief of specific performance on the basis of Ex.A1 sale agreement and therefore, the judgment and decree of the fiRs.appellate court are liable to be set aside and accordingly, set aside.

29.The Substantial question of law Nos.1 to 6 are answered accordingly.

30.In the result, the second appeal is allowed in part and the specific performance relief sought for by the respondent/plaintiff is dismissed.

The appellant/defendant is directed to pay Rs.28,000/- with interest at 12% p.a from the date of Ex.A1 agreement of sale with pro-costs to the respondent/plaintiff.

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