

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :28.04.2015

CORAM :

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.356 of 2009

and

M.P.No.1 of 2009

Thirumuruga Ramalingam ... Appellant/Defendant

Vs.

Mohamed Hanifa ...Respondent/Plaintiff

Prayer:- Appeal under Section 100 of the Civil Procedure Code, against the judgment and decree dated 22.08.2008 passed in A.S.No.64 of 2007 on the file of the Principal District Court, Cuddalore in reversing the judgment and decree dated 28.02.2007 passed in O.S.No.171 of 2002 on the file of the 2nd Additional Sub Court, Cuddalore.

For Appellant : Mr.P.Mani

For Respondent : Mrs.R.Meenal

J U D G M E N T

The second appeal is filed by the defendant in a suit for specific performance filed in O.S.No.171 of 2002 on the file of Additional Sub Court, Cuddalore.

2. In the plaint, the respondent / plaintiff alleged that the defendant offered to sell the suit property to him under an agreement of sale dated 16.12.1998 for a sale price of Rs.1,20,000/- and received a consideration of Rs.10,000/- as advance on the same day. The defendant agreed to execute the sale deed by receiving the balance sale consideration within three months. The plaintiff claimed that he was ready and willing to perform his part of contract as per the agreement. However, the defendant was evading the same. Nevertheless on 28.06.1999, the defendant received a sum of Rs.40,000/- towards the part of sale consideration. However, the defendant did not come forward to execute the sale deed. Hence the plaintiff issued a legal notice on 26.06.2002, calling upon the defendant to receive the sale price and execute the sale deed. The said notice was not received by the defendant. Hence, the present suit was filed by the plaintiff for specific performance.

3. The defendant denied the allegations that he had executed a sale agreement dated 16.12.1998 or that he received a further advance of Rs.40,000/-. It was contended by the defendant

that the plaintiff had concocted and forged the document with the help of his henchmen to defraud the defendant. The suit property is worth about more than Rs.5 Lakhs and there was no necessity for the defendant to sell the suit property to the plaintiff. The plaintiff also had no capacity to purchase the suit property. On these grounds, the defendant sought for the dismissal of the suit.

4. Issues on the Judgment:

On the said pleadings, two issues were framed by the Trial Court.

1. Whether the plaintiff is entitled to the relief of specific performance as prayed for?
2. To what relief the plaintiff is entitled to?

5. The plaintiff has examined himself as P.W-1, the attester as P.W.2 and PW-3 was the scribe and marked Exhibits A1 to A6. The agreement of sale executed was marked as Ex.A1 and the further part-payment of endorsement was marked as Ex.A2. The notice issued was marked as Ex.A3. While the defendant examined himself as DW-1, no document was marked. The trial Court after appreciating the evidence, dismissed the suit by decree dated 28.02.2007 mainly on the ground of limitation. On appeal, the first appellate Court allowed the plaintiff's appeal holding that the agreement of sale was proved and decreed the suit on 22.08.2008 granting the relief of specific performance. Being aggrieved, the defendant has filed the second appeal.

6. At the time of admission, the following questions of law were formulated under:

(i) Whether the plaintiff is entitled to the equitable relief of specific performance of Ex.A-1 sale agreement when the plaintiff failed to aver and prove that he has been ready and willing to perform his part as per the sale agreement and when Section 16(c) of the Specific Relief Act specifically bars the said relief?

(ii) Whether the present suit for specific performance as instituted is barred by limitation under Article 54 of the Limitation Act when the same has not been filed within three years from the expiry of three months period fixed under Ex.A-1 sale agreement?

7. Points for consideration:

The judgment of the first Appellate Court is challenged in this second appeal. The appellant contended that having regard to the provisions of the Evidence Act, there is nothing improper in the first Appellate Court comparing the signatures of the first defendant in Exs.A1 and A2 with the admitted signatures in Ex.A5 and A6. The finding of the first appellate Court on such comparison held that there are no marked differences between two signatures. Being a finding of fact, it is not open to interfere in the second appeal. It was contended that the execution of the agreement of sale was duly proved by the evidence of PW-2 and PW-3 who are the attester and scribe respectively. It was also pointed

out that there was no evidence to rebut the evidence of PWs. 1, 2 and 3 regarding the execution as the defendant had not adduced any evidence. Excepting his oral testimony, the defendant also had not sought for reference to a handwriting expert to prove the signatures on the agreement of sale and the endorsement were not that of the defendant.

8. The trial court had doubted the genuineness of the agreement dated 16.12.1998. However on appeal, the same was upheld by the Lower Appellate Court. The learned counsel for the appellant submitted that apart from raising doubt with regard to the authenticity of the agreement, the endorsement made under Ex.A2 was also denied. In this regard, a reference is made under Section 45 of the Evidence Act, which provides inter alia that when the Court has to form an opinion as to identity of handwriting, the opinion upon that point, of persons specially skilled in questions as to identity of handwriting are relevant facts. Section 73 of Evidence Act provides that in order to ascertain whether a signature is that of the person by whom it purports to have been made, any signature admitted to have been made by that person may be compared with the one which is to be proved.

9. These provisions have been subject matter of several decisions of this Court. No doubt, a Court does not exceed its power under section 73, if it compares the disputed signatures with the admitted signature of the party so as to reach its own conclusions. Though there is no legal bar to the Judge using his own eyes, to compare the disputed signatures without the aid of a handwriting expert, the Judge should hesitate to render his findings with regard to the identity of the handwriting. The reason is that such opinion forms the sheet anchor against a person whose signature is compared. Such venture by the first appellate Court to compare the signatures by itself does not mean that the Court had assumed the role of an expert. Section 73 of Evidence Act expressly enables the Court to compare the disputed signature. Such comparison of signature by an expert is not done by the parties, may be for the reason of ignorance or affordability. Then it becomes the duty of the Court to compare the signature and come to a conclusion. Thus the Court cannot avoid its responsibility in the absence of an expert opinion. If the opinion of an expert is available, it would aid the Court in proper adjudication of the matter. When the same is not available, the Court will have to seek guidance from its own experience and knowledge.

10. Therefore, when it is said that there is no bar to the Court to compare the disputed signature, it goes without saying that the Court can record the opinion or finding on such comparison after analysis of the same. Where the Court finds that the disputed signatures and admitted signatures are clear and the Court is in a position to identify the characteristic of the signature, even in the absence of an expert opinion, the Court may record the finding on comparison. In the case on hand, when the signatures are disputed by the defendant, no steps have been taken to send the same to an expert for comparison. On the contrary, the plaintiff

had established the same by producing Ex A5 and A6, which are the salary certificate and Leave Register of the defendant. Admittedly, the defendant works in a school. It is also clarified by the plaintiff that the defendant though has the habit of signing in English, deliberately has signed in Tamil in the deposition. In such circumstances, the first Appellate Court was constrained to take up the comparison by itself and ascertained the characteristics and similarities of the signatures. The Lower Appellate Court, which is also a final Court of fact, had given reasons for the conclusions based on the comparison.

11. PW2, who is an attesting witness and PW3 who is the scribe of the document, have also categorically deposed about the execution of Ex.A1. Though PW2 and PW3 have not attested Ex.A2 endorsement, the conclusion arrived at by the Lower Appellate Court on comparison of the signature found in Ex.A2 with that of admitted one, makes it clear that Ex.A2 is also genuine. In this background, the finding by the first Appellate Court that the signatures of Ex.A1 and A2 are true and genuine, does not warrant any interference and the same is confirmed.

12. So far as the question of readiness and willingness is concerned, the plaintiff has specifically pleaded that he was ready and willing to perform his part of the contract. To show his bona-fides, the plaintiff had also deposited the balance sale consideration before the Trial Court.

13. So far as the question of limitation is concerned, the defendant contended that the suit is barred by limitation as the suit has not been filed within time. The counsel for the respondent contended that time was not the essence of agreement of sale after endorsement made in Ex.A2 by the defendant. It was further contended that the contract becomes voidable by the failure to do such thing at or before the specified time. So far as the suit for specific performance is concerned normally it is presumed that time is not the essence of contract. Even if there is a specific contract to that effect, the said presumption can be rebutted under the law of equity, which governs the relief of specific performance that only the substance of the agreement is the criteria. If time is essence in such agreements, it should only be with reference to the payment of sale price and not with regard to the execution of sale deed. Normally in contract relating to sale of immovable properties, time would not be the essence of contract unless the terms of agreement explicitly indicate such intention of the parties. It is the contention of the plaintiff that the suit is filed within the period of limitation from the date of Ex.A2 endorsement which admittedly does not speak about the extension of time. Besides the cause of action had arisen on the date of denial of the agreement despite the notice issued by the plaintiff. There is no reason as to why the defendant had refused to receive the same. The defendant / appellant has not proved that the plaintiff had not satisfied, the circumstances enlisted under sec.16 of the Specific Relief Act. It is seen that the intention of the plaintiff is to perform his part

of the contract and to show his readiness and willingness, he has also paid a further sum of Rs.40,000/- to the defendant. In such circumstances, there is no reason to deny the equitable relief of specific performance to the plaintiff.

14. In the above factual matrix, when the plaintiff has established the execution of Ex.A1 and in the absence of any contra evidence adduced by the defendant, no interference is warranted in the well considered judgment of the lower Appellate Court which is the final fact finding Court. In such circumstances, the substantial questions of law framed by this Court are answered against the appellants.

15. In the result, the Second Appeal is dismissed and the judgment and decree dated 22.08.2008 passed in A.S.No.64 of 2007 on the file of the Principal District Court, Cuddalore reversing the judgment and decree dated 28.02.2007 passed in O.S.No.171 of 2002 on the file of the 2nd Additional Sub Court, Cuddalore, are confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Deputy Registrar

True Copy

Sub Assistant Registrar

To

1. The Principal District Judge, Cuddalore
2. The II Additional Sub Judge, Cuddalore.
3. The Section Officer,
V.R.Section, High Court, Madras

+1 cc to Mr.P.Mani, Advocate,SR.23285.

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