

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 14.12.2016

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.57 of 2010

G.Venkatarama Reddy

...Defendant/Appellant

..Vs..

S.A.Philip

...Plaintiff/Respondent

Prayer: Appeal filed Under Order 41 Rule 1 r/w under Section 96 CPC, against the judgment and decree dated 22.12.2009 made in O.S.No.41 of 2007 on the file of the Court of the Additional District Judge, Krishnagiri.

For Defendant/Appellant : Mr.S.V.Jayaraman, Senior Counsel
for Mr.C.Prabakaran

For Plaintiff/Respondent : Mr.V.Nicholas

JUDGMENT

The defendant in O.S.No.41 of 2007 who suffered decree for specific performance is the appellant. The plaintiff had claimed that the defendant had entered an agreement of Sale on 29.09.2006, agreeing to sell an extent of Ac.0.09 cents of land for a total consideration of Rs.9,00,000/-. According to the plaintiff, he has paid a sum of Rs.8,75,000/- as an

advance on the date of the agreement itself and a period of three months was fixed for payment of the balance sale consideration and for execution of the sale deed. Since the defendant did not execute the sale deed, he caused a legal notice on 12.03.2007, demanding execution of sale deed. The defendant sent a reply notice on 05.04.2007. In the said reply notice, the defendant has falsely stated that he never agreed the sale property in question and the agreement has been created by the palintiff. He also claimed that there was an earlier agreement between the parties on 06.07.2006 and the same came to be cancelled subsequently. On the said allegations, the plaintiff would seek decree for specific performance directing the defendant to execute a sale deed after receiving the balance consideration of Rs.25,000/-.

2. The suit was resisted by the defendant primarily contending that he never executed an agreement on 25.09.2006. He would claim that the facts stated in the reply dated 05.04.2007 are true and he also claimed that the suit agreement has been created by the plaintiff using the signatures obtained when he borrowed a sum of Rs.10,00,000/- from the plaintiff 04.08.2006. It is also contended by the defendant that he had repaid a sum of Rs.10,00,000/- in two instalments. The first instalment of

Rs.8,00,000/- paid on 14.11.2006 and another sum of Rs.2,10,000/- paid on 24.11.2006. On the above contentions the defendant sought for dismissal for this suit.

3. The learned Additional District Judge, Krishnagiri, framed the following issues for determination in the suit.

- i) Whether the plaintiff is entitled to decree for specific performance based on the agreement dated 29.09.2006?*
- ii) Whether the plaintiff has been ready and willing to perform his part of the contract as per the agreement dated 29.09.2006?*
- iii) Whether the suit agreement has been created by the plaintiff?*
- iv) To what other relief the plaintiff is entitled to?*

4. The plaintiff examined himself as P.W.1 and examined one A.Chandrasekaran as P.W.2. Exhibits A1 to A9 were marked. The defendant had examined himself as D.W.1 and Exhibit B.1 was marked. On a consideration of the evidence on record, the learned Additional District Judge came to the conclusion, that the suit agreement is true and valid and also found that the case of the defendant that agreement has been created has not been established. On the above said findings the

learned Additional District Judge decreed the suit as prayed for. Aggrieved by the said decree and judgement the defendant has come forward with this Appeal.

5. I have heard Mr.S.V.Jayaraman, Senior Counsel appearing for Mr.C.Prabakaran, learned counsel for the appellant and Mr.V.Nicholas, learned Advocate appearing for the respondent. The following arise for determination in this Appeal.

i) Whether the agreement dated 29.09.2006 is true and valid?

ii) Whether the plaintiff is entitled to discretionary relief of specific performance on the facts pleaded and proved?

iii) To what other relief is the plaintiff entitled to?

6. Mr.S.V.Jayaraman, learned Senior Counsel appearing for the appellant, taking me through contents of Ex.A1, would contend that the fact that the agreement is created is clearly visible from the manner in which the agreement has been typed. He would draw my attention to pages 2 and 3 of the agreement. He would also rely upon the fact that the defendant who is the vendor under the agreement dated 29.09.2006, has also signed as an attesting witnesses to the said document. It was also

brought to my notice that the first attesting witness is the wife of the defendant. The learned Senior Counsel would further contend that the spacing in page no.3 of the agreement itself creates a doubt as to the genuineness of the same.

7. With a view to strengthen this case, the plaintiff had examined one A.Chandrasekaran, an advocate who has drafted the agreement as P.W.2. According Mr.S.V.Jayaraman, learned Senior Counsel appearing for the appellant the evidence of the said witness, particularly in cross examination, weakens the case of the plaintiff. Mr.S.V.Jayaraman, learned Senior Counsel would invite my attention to the cross examination of P.W.2 where he would depose as follows:

“fpuaxg;ge;jj;ij ehd; jahhpj;J bfhLj;njd; mjpy;

ehd; ifbaGj;J nghltpy;iy”/

“vd; Kd;dpiyapy; ahUk; ifbaGj;J nghl;lhy; ird;L

gpnghh; kp vd;W vGjp ifbaGj;jplntd; th/rh/M/1

gj;jpuj;jpy; mt;thW ehd; vGjp ifbaGj;jpltpy;iy. vd;

Kd;dpiyapy; rhl;rpahf xUth; ifbaGj;jpLk;nghJ me;j

Mtzj;jpd; xU jug;gpdiuna mt;thW rhl;rpahf ifbaGj;jpl

ehd; Twkhl;nld;/'

The learned Senior Counsel would also draw my attention to Ex.A6, it is the prior agreement between the same parties with reference to the some other property and it is admitted case of the parties that the said agreement was cancelled and the defendant had issued two cheques one for Rs.10,10,000/- and another for Rs.11,00,000/-. It is also borne out by records that cheque issued by defendant for Rs.11,00,000/- was dishonoured and plaintiff had filed CC.No.67 of 2007 before the Judicial Magistrate, Hosur, under Section 138 of the Negotiable Instruments Act. Though in the evidence it is stated that the said CC.No.67 of 2007 is pending Mr.V.Nicholas, learned counsel appearing for the respondent would submit that the said CC No.67 of 2007 has also been dismissed.

8. Based on the above facts, Mr.S.V.Jayaraman, learned Senior Counsel would contend that there had been prior transactions between the parties and the agreement dated 06.07.2006 had also been cancelled. Basing his submissions on the oral evidence of the P.W.1 and P.W.2, the learned Senior Counsel would contend that it is rather unsafe to grant a

decree for specific performance to the plaintiff in the given circumstances. He would also point out that the plaintiff in the notice dated 23.01.2007 has claimed that the prior agreement was dated 03.08.2006, but in the plaint he would claim that it is dated 06.07.2006. The prior agreement dated 06.07.2006 has been produced as Ex.A6 on the reverse of the first page of the said agreement dated 06.07.2006 there are two endorsements for receipt of money. The first instalment evidences a payment of Rs.15,10,000/- up to 19.07.2006. The second endorsement is actually dated 02.08.2006. But the same has been corrected and an effort has been made to change the date from 02.08.16 to 03.08.2016.

9. According to the learned Senior Counsel these factors should to be borne in mind while exercising the discretion in favour of the plaintiff. Per Contra, Mr.V.Nicholas, learned counsel appearing for the respondent would contend that the sum and substance of the defence is that sale agreement has been created using Stamp papers singed in blank by the defendant when he borrowed money from the plaintiff. Mr.V.Nicholas, learned counsel would point out that the Stamp papers for the agreement dated 29.09.2006 have been purchased only on 28.09.2006. Therefore the claim of the defendant that the agreement has been created using

presigned stamp papers has not been established. He would also point out that the defendant as D.W.1 has admitted his signatures in Ex.A6 agreement dated 06.07.2006.

10. I have examined the rival contentions and I have also gone through the documents as well as the oral evidence. The fact that there has been transactions between the parties apart from the disputed agreement of sale, dated 29.09.2006 is evident. It is also clear that the parties were at logger heads on the question of repayment of the advance received under the agreement dated 06.07.2006. It is also seen from Ex.A9 dated 27.11.2006 that the defendant has agreed to pay back a sum of Rs.7,00,000/- due under the agreement dated 06.07.2006 on or before 05.12.2006. This Ex.A9 is dated 27.11.2006, i.e., after the agreement which is sought to be specifically enforced. There was no reference to the second agreement in the said letter dated 27.11.2006.

11. As rightly contended by Mr.S.V.Jayaraman, learned Senior Counsel appearing for the appellant, looking at page 3 of the suit agreement, dated 29.09.2006, it creates suspicion in the mind of the Court. There is the large gap between the conclusion and the words 'witnesses'.

This strengthens the said suspicion. The fact that the defendant himself has signed as an attesting witness, also appears to be very abnormal. In Ex.A6 which is dated 06.07.2006, three witnesses have signed the document, apart from the executant. Therefore in the absence of convincing explanation from the plaintiff as to how the defendant who executed Ex.A1 agreement, also signed the same as a witness also the cloud cast upon the execution of the agreement cannot be brushed aside. The evidence of PW 2, which has been extracted above, also is fatal to the case of the plaintiff. Even considering that it cannot be firmly said that the agreement has been created, the features that are evident from the very document throw up considerable suspicion on the circumstances under which the said document came to be executed.

12. The learned Additional District Judge has come to the conclusion that the plaintiff is entitled to decree for specific performance solely on the ground that the signatures in Ex.A1 has been admitted by the defendant. In my considered view, learned Additional District Judge has not adverted to the fact that the specific performance being a discretionary relief, the same cannot be granted merely because it is legal to do so. The circumstances under which Ex.A1 agreement came to be executed, do not

indicate that it was a fair and free agreement and there was *consensus ad idem* between the parties when the same came to be executed. A cumulative effect of the inconsistencies in the evidence of P.Ws. 1 and 2 and the intrinsic evidence that is available in Ex.A1 namely the manner in which it is typed, would prevent me from exercising the discretion of granting the relief of specific performance in favour of the plaintiff. The fact that the parties had several other transactions and there was dispute on the advance paid under the earlier agreement dated 06.07.2006, also have a bearing on the exercise of the discretion in favour of the plaintiff. The suit agreement is dated 29.09.2006 and even according to the plaintiff, there was dispute between the parties during November 2006, which has lead to the execution of a letter dated 27.11.2006, marked as Ex.A9. In spite of same the same, the plaintiff waited for two months to send the legal notice on 23.01.2007. It is also borne out by records that the plaintiff has not made a demand for execution of sale deed within a period of three months fixed under the agreement. The period of three months stated in Ex.A1, expired on 29.12.2006 and the suit notice came to be issued only a month thereafter that is on 23.01.2007.

13. In a recent judgment the Hon'ble Supreme Court of India in the

case of ***Padmakumari & Ors. Vs. Dasayyan & Ors.,*** reported in ***(2015) 6 CTC 545***, the Hon'ble Supreme Court had pointed out that the recital in the sale agreement stipulating a period for performance, would make time the essence of the contract. In the present case, even though the delay is only about a month, the other circumstances and the evidence that is available would show that all is not well between the parties, even before November 2006 and this Court is constrained to conclude that the very agreement is doubtful and the plaintiff has not proved that he was ready and willing to perform his part of the contract within the time fixed under the agreement.

14. For the foregoing reasons, I find that the plaintiff is not entitled to the discretionary relief of specific performance and the suit is liable to be dismissed. In fine, the appeal is allowed the judgment and decree of the trial Court are set aside. The suit in OS.No.41 of 2007 will stand dismissed. However, there shall be no order as to costs, either before the trial Court or in the Appeal.

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R. SUBRAMANIAN, J.,
jv

To

The Additional District Judge,
Krishnagiri.

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