

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON:24.11.2016
DATE OF DECISION:09.12.2016
CORAM:
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.533 of 2006

T.K.Jhambu

... Appellant/Defendant

Vs

Dhanasekaran

.... Respondent/Plaintiff

This appeal is filed under Order 96 of C.P.C. Against the Judgement and Decree dated 28.10.2005 passed in O.S.No.4 of 2003 on the file of the Additional District and Sessions Judge, Fast Track Court-11, Thindivanam.

For Appellant :Mr.P.B.Balaji
For Respondent : No appearance

J U D G E M E N T

The defendant in O.S.No.4 of 2013, who has suffered by a decree for specific performance, is the appellant.

2. According to the plaintiff, the defendant is sister's son of the plaintiff. The defendant had leased out the properties to the plaintiff during January 1998 for a monthly rent of Rs.300/- after receiving advance amount of Rs.25,000/-. The rent is being paid regularly without any default.

3. From January 2000, the rent was enhanced from Rs.300/- to Rs.500/- and the plaintiff has been paying the revised rent also without any default. The defendant offered to sell the suit properties to enable him to construct a house at Chennai and to meet the educational expenses on his children. This offer was made during January 2001. The plaintiff agreed for the purchase of the suit property and the sale price was fixed at Rs.3,25,000/-.

4. An oral agreement of sale was entered into on 26.01.2002 in the presence of respectable witnesses, including Dhan Natarajan, an Advocate, Tindivanam, who is said to be a close relative of the plaintiff as well as the defendant. The plaintiff would further aver that he has paid an advance amount of Rs.2,00,000/- on 26.1.2002 itself and the plaintiff was put in

possession in part performance of the agreement . The time for performance was fixed as six months and if the plaintiff fails to perform his part of contract he would forfeit the advance amount of Rs.2,00,000/-. In the event of failure on the part of the defendant, it was agreed that the plaintiff would seek performance through court.

5. The plaintiff claimed that he has been continuously ready and willing to perform the contract. The plaintiff did not yield to the demand of the defendant to pay Rs.2,00,000/- as balance sale consideration instead of Rs.1,25,000/-. On 13.04.2002, the defendant chose to issue a legal notice cancelling the agreement and requiring the plaintiff to vacate and delivery possession of the property treating him as a tenant. The plaintiff came to know the institution of eviction proceedings before the Rent Controller, Tindivanam, after service of notice, in the rent control petition namely, RCOP.No.5/2002. The plaintiff chose to issue legal notice on 28.06.2002 demanding specific performance of the agreement dated 26.1.2002. The said legal notice was replied to on 7.7.2002 with false and untenable allegations. Therefore, the plaintiff is constrained to file the above suit for specific performance. Alternative relief of refund of advance amount was also prayed for.

6. The defendant resisted the suit contending that the alleged oral agreement is false. There was no necessity for him to sell the property, since he had already completed construction of a house at Chennai as his children have completed their education and they were employed. The receipt of advance amount of Rs.2,00,000/- was also denied. The defendant claimed that the plaintiff is in possession of the property as tenant and not as an agreement holder in part performance of the contract. The defendant would further claim that the suit is counter blast to the eviction proceedings initiated by him in RCOP.No.5/2002. It was also further contended that the suit property is worth about Rs.8,00,000/-. Therefore he would not have agreed to sell the same for a sum of Rs.3,25,000/- as claimed by the plaintiff.

8. On the above pleadings, learned Additional District and Sessions Judge, Tindivanam framed the following issues:

- 1) Whether the claim of the plaintiff that there was a oral agreement of sale on 26.1.2002 is true?
- 2) Whether the plaintiff had paid a sum of Rs.2,00,000/- to the defendant on the same day?
- 3) Whether is it true that the defendant demanded Rs.2,00,000/- instead of Rs.1,25,000/- from the plaintiff during March, 2002?
- 4) Whether the plaintiff is in possession as a tenant and he is in arrears of rent for the period of nine month form June 2001, amounting to Rs.3600/-?

- 5) Whether the plaintiff is entitled to the relief of specific performance?
- 6) To what other reliefs is plaintiff entitled to?

9. On the side of the plaintiff he examined himself as PW1 and PW2 was also examined. Exs.A1 to A3 were marked. On the side of the defendant, he examined himself as DW1, Exs.B1 to B11 were marked.

10. Upon a consideration of oral and documentary evidence, the learned Additional District Judge, Tindivanam, relying upon the evidence of PW2, who is an advocate practicing at Tindivanam, came to the conclusion that the oral agreement is true and also held that the defendant received a sum of Rs.2,00,000/- from the plaintiff. Upon the said findings, the learned Additional District Judge decreed the suit for specific performance on the basis of the oral agreement.

11. Aggrieved by the said Judgement, the defendant had preferred the above appeal.

12. Mr.T.R.Rajaraman, learned counsel appearing for the respondent/plaintiff in the appeal, had reported no instruction on 14.10.2015. It is also seen from the records that the legal representatives of the respondent had taken out an application in M.P.No.1/2015 seeking to implead them as the legal representatives of the respondent contending that the respondent Dhanasekaran has gone missing from 2010. Therefore, they should be brought on record as the legal heirs. The said application was dismissed by this Court, by order dated 3.9.2015.

13. When the matter listed before me on 4.11.2016, I directed the learned counsel appearing for the appellant to take private notice to the respondent returnable by 21.11.2016. Accordingly, private notice has been taken to the respondent and the same has been returned unserved with an endorsement "No such person". Thus, the attempt to serve the respondent after his counsel reported no instruction, has also proved futile. Therefore, I proceeded to hear the appeal on merits.

14. I have heard Mr.P.B.Balaji, learned counsel appearing for the appellant. The following points arise for determination in the appeal.

- 1) Whether the plaintiff has established the oral agreement said to have been entered into on 26.1.2002 and the payment of advance Rs.2,00,000/- on the said date?
- 2) Whether the plaintiff is entitled to specific performance on the basis of the said oral agreement?
- 3) Whether the suit one for specific performance based on oral agreement of sale is maintainable?

Points 1 to 3: Since all the three points are interlinked, I am dealing with them together.

15. Mr.P.B.Balaji, learned counsel appearing for the appellant, taking me through the evidence of PW1 and PW2 and pointing out inconsistencies in their evidence would submit that the alleged oral agreement cannot be true. He would also rely upon the judgement of the Hon'ble Supreme Court in Ouseph Varghese vs. Joseph Aley and others reported in 1969 (2) SCC 539 and contend that the burden on the plaintiff whose suit for specific performance based on oral agreement is very heavy and unless it is brought about by cogent and substantial evidence that there was an agreement, capable of being specifically enforced, the Courts should be slow in granting the discretionary relief of specific performance on the basis of an oral sale agreement. The plaintiff in his evidence as PW1 has deposed that he had advised the defendant not to sell the property and he could consider borrowing monies according to his necessity. He would further state that the defendant however insisted the sale of the property. He would further claim that he discussed with his family members and decided to purchase the property, since he has been doing business there more than 15 to 20 years. It can be immediately pointed out that the said evidence is not in tune with the plaint allegations.

16. Even according to the plaintiff, he became a tenant under the defendant only in the year 1998, PW1 further deposed that the defendant had requested him to pay the sum of Rs.2,00,000/-, when he visited Tindivanam on 26.1.2002. Therefore, according to the plaintiff on 26.1.2002, an oral agreement was entered into in his residence at Tindivanam and he paid a sum of Rs.2,00,000/- as advance. In his cross-examination, PW1 would admit that the suit itself was filed only after receipt of notice in RCOP.No.5 of 2002 filed by the defendant seeking eviction.

17. The fact that the defendant owns house in Chennai and his children had completed their education has also been admitted by the plaintiff in his cross-examination. He would also admit that Rs.2,00,000/- is a big amount and he did not take receipt for the payment of Rs.2,00,000/- considering the relationship between the parties. Though he would claim that he had met the defendant at Chennai in March, 2002 and demanded performance, he has also admitted that he did not offer to pay the balance sale consideration in his cross-examination. PW2 is a relative of both the parties and he is also stated to be a lawyer at Tindivanam. Even in chief examination PW2 would depose that he advised the parties to reduce the agreement in writing. But the defendant had said that there is no requirement for written agreement.

18. He would also depose in his cross-examination that the sale deed could not be registered, since the defendant's wife, demanded more money. He has admitted that the plaintiff is closely related to him. He would claim that the defendant informed him that he wants to sell the property only on 26.1.2002 and he does not know about the sale transaction prior to that date. In fact PW2 in his cross-examination would admit that except him there was no common person at the time of alleged agreement.

19. It is seen from the cross-examination, after having admitted that there was no other person except him at the time of agreement, PW2 added that the persons mentioned in his chief examination were present. He would also depose that there was no one on behalf of the defendant except himself. During his further cross-examination he would depose that he had no role to play in fixing the sale price. It is now to be considered as to whether on the basis of above evidence, it should be taken that oral agreement has been established and the plaintiff is entitled to a decree for specific performance on the basis of the said oral agreement.

20. Mr.P.B.Balaji, learned counsel appearing for the appellant would invite my attention to the observations of a Division Bench of this Court in the judgement in Mrs. Shoba Viswanathan vs. D.P.Kingsley reported in CDJ 1996 MHC 579 would submit that the conduct of the plaintiff in seeking specific performance after the receipt of summons in the proceedings for eviction in RCOP.No.5 of 2002 should be taken into account. Mr.P.B.Balaji, learned counsel would draw my attention to the following observations made in the Division Bench Judgement in paragraph 14, which reads as follows:

"14. In a suit for specific performance, if the court feels that the suit is filed with an ulterior motive, that conduct also will have to be taken into consideration while exercising the discretion. We must understand that at the time when this suit was filed, the defendant had already filed the suit for eviction and it was after receipt of summons, this suit was filed. That earlier suit filed by the defendant itself was for eviction of the plaintiff on the ground that he had not paid the rent and was, therefore, liable to be evicted. At the time when that suit was filed, the building was exempted from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act. But after the revocation of the exemption, defendant filed R.C.O.P.No.2788 of 1990 for eviction on the ground that from 1.12.1981 the defendant had not paid rent. The defence in that proceeding also was that he was in possession as

owner, the said R.C.O.P. Was allowed against the plaintiff, against which he preferred an appeal before the Appellate Authority as R.C.A.No.893 of 1993. Even in that proceeding, the plaintiff has taken a contention that he is not bound to pay the rent and that whatever he pays after 1.12.1981 is towards sale consideration. That shows conduct of the plaintiff. He wanted the entire rent to be appropriated towards the sale consideration and thus get the property free of price. Such a conduct cannot be accepted by a court of law while exercising equitable and discretionary jurisdiction.

21. Mr.P.B.Balaji, learned counsel appearing for the appellant would also draw my attention to the judgement of the Division Bench in Kumari Anandan versus Dr.T.Balamukunda Rao (died) and 3 others reported in CDJ 2002 MHC 681, wherein it has been held in paragraph 23 as follows:

" 23. However viewed, the evidence offered by the plaintiff in support of his case is not credible and the plaintiff cannot merely on the strength of some contradictions in the defendants' case deprive the defendants of a valuable property in the heart of the city of Madras, which today is worth several millions. So far as the second defendant is concerned it is abundantly clear that he had, at no point of time, authorised his brother to sell his share to the plaintiff who has asserted that the first defendant had such authority has not produced any document to substantiate that assertion."

If we are to examine the case of the plaintiff on the basis of standard of proof that is required as laid down in the above decisions, the necessary conclusion is that the plaintiff has not discharged his burden that lies on him to prove an oral agreement of sale. The evidence of both PW1 and PW2, apart from being interested is not credible and convincing. Though, according to the plaintiff, several other persons were present at the time of contract, PW2 deposed that he alone was present.

22. These apart, the conduct of the plaintiff in having sought for specific performance after initiation of eviction proceedings by the defendant in RCOP.No.5 of 2002 would speak the volumes about his conduct. The suit notice was issued on 28.6.2002, it is also on record that the defendant sent notice to the plaintiff on 13.04.2002 stating that the plaintiff is in arrears of rent and demanding vacant possession from him. The plaintiff did not choose to send reply for over a period of two months, but chose to issue notice setting up a oral agreement and claiming specific performance. This by itself is enough to reject the claim of the plaintiff for specific performance.

23. I am unable to persuade myself to resist the irresistible conclusion that the suit is a counter blast to the eviction proceedings launched by the defendant in RCOP.No.5 of 2002. Therefore, I am of the considered opinion that the Trial Court went wrong in granting decree for specific performance without adverting very essential requirements namely, the conduct of the plaintiff who seeks the discretionary relief of specific performance. So far as the claim of payment of advance also, the oral evidence is totally untrustworthy. Both PW1 and PW2 in their evidence would say that Rs.2,00,000/- is a big amount and it was paid without a receipt. Their evidence does not inspire the confidence of this Court. PW2, who is an advocate has admitted the suggestion that he did not advise the parties to take receipt for payment of Rs.2,00,000/-.

24. Reading of the entire evidence of PW2 would show that he had attempted to create impression that he represents interest of the defendant at the time of the negotiations that took place on 26.01.2002. Unfortunately he has been forced to admit his relationship with the plaintiff and therefore, I am of the considered view that the plaintiff has not established his case that the payment of Rs.2,00,000/- was made on 26.01.2002. Though the learned Trial Judge would cite several judgments as relied on by the counsels, except for a reference of those judgments, the learned Judge has not considered the law laid down in those judgements.

25. It is not enough for the Court just to list the citations of the judgements relied upon by the respective counsels. The Court should apply its mind to the law laid down in the said judgements after referring to them and also state the reasons for either accepting or not accepting the ratio propounded in the precedents.

26. A perusal of the judgement of the learned Additional District and Sessions Judge, Fast Track Court No.2, Tindivanam would show that he was in fact influenced by the fact that PW2 was a lawyer practicing at Tindivanam and therefore, his evidence should be taken as a gospel truth. I am unable to agree with the said conclusion of the learned Additional District and Sessions Judge, Tindivanam. Apart from the relationship, the manner in which PW2 has deposed and the fact that the present suit has been filed after initiation of eviction proceedings and service of summons in the said eviction proceedings, would cause serious dent on the claim of the plaintiff.

27. It is also to be pointed out that the plaintiff has claimed that he was put in possession in part performance of the agreement dated 26.01.2002. In order to claim possession in part performance of the agreement, the fundamental requirement is that the agreement should be in writing. Admittedly, the suit is based

on oral agreement. Therefore, the claim of the plaintiff that he is in possession in part performance of the agreement is legally untenable. Therefore, his possession of the property could be only considered as that of a tenant and not as an agreement vendee.

28. For the foregoing reasons, the points raised in the appeal are against the respondent. Therefore, the appeal is allowed and the judgement and decree of the learned Additional District and Sessions Judge, Fast Track Court-II, Tindivanam are set aside and the suit O.S.No.4 of 2003 stands dismissed with costs. The stay of the eviction proceedings granted in this appeal is vacated and the eviction proceedings in RCOP. 5 of 2002 shall be proceeded in accordance with law. The Rent Controller is directed to dispose of the RCOP.No.5 of 2002 as expeditiously as possible at any rate not later than 30th April, 2017 and such disposal should be reported to this Court. Consequently the connected C.M.P.No.1 of 2006 is closed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

vk

To

Additional District and Sessions Judge,
Fast Track Court-11, Thindivanam.

+1 cc to M/s.P.B.Ramanujam Advocate sr 72460

+1 cc to Mr.M.Anbalagan Advocate sr 72577

सत्यमेव जयते

A.S.No.533 of 2006

ug(co)

aa06/02/2017

WEB COPY