

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.12.2016

PRONOUNCED ON : 19.12.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.405 of 2011

and

M.P.No.1 of 2011

D.Murugesan

...
Vs.

Appellant

Arokia Marie Emathay

...

Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 16.11.2010 and made in A.S.No.4 of 2009 on the file of the Principal District Judge, Puducherry affirming the judgment and decree dated 30.10.2008 and made in O.S.No.216 of 2000 on the file of the Principal Sub Judge, Puducherry.

For Appellant : Mr.G.Ravi Shankar
For Respondent : Mr.H.Suresh Baabu

JUDGMENT

Challenge in this second appeal is made by the plaintiff against the judgment and decree dated 16.11.2010 made in A.S.No.4 of 2009 on the file of the Principal District Court, Puducherry, confirming the judgment and decree dated 30.10.2008 made in O.S.No.216 of 2000 on the file of the Principal Subordinate Court, Puducherry.

2. The suit has been laid by the plaintiff for specific performance.

3. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

" Whether the Courts below erred in shifting burden of proof on the side of plaintiff when the defendant had taken as stand that Exhibits A-1 is a Loan Agreement and whether the courts below failed to see that it is for the defendant to prove that Exhibit A-1 is a Loan Agreement and therefore, the entire findings of the Courts below in respect of Exhibit A-1 is totally erroneous and contrary to the statutory provision of evidence Act?

4. According to the plaintiff, the defendant agreed to convey the suit property to the plaintiff and based upon the above said understanding the plaintiff and the defendant entered into a sale agreement on 1.12.1997 for the sale price of Rs. 4,00,000/- and the plaintiff has advanced a sum of Rs.3,00,000/- to the defendant

through a cheque and thereafter, on 3.10.1998 the defendant again approached the plaintiff and requested a further a sum of Rs.10,000/- for obtaining the documents pertaining to the suit property and accordingly, the plaintiff tendered the said amount and even thereafter, though the plaintiff was ready and willing to pay the balance sale consideration and execute the sale deed, inasmuch as the defendant did not come forward to execute the sale deed, the plaintiff issued the legal notice on 28.10.1999 and inasmuch as the defendant sent a false reply repudiating the case of the plaintiff, according to the plaintiff, he has been necessitated to lay the suit.

5. The defence in short is that the parties have not entered into a sale agreement as pleaded by the plaintiff. On the other hand, the defendant received a sum Rs.3,00,000/- from the plaintiff and executed a simple mortgage deed in respect of the suit property in favour of the plaintiff on 1.12.1997 and subsequently, during the months of Jan,1998 and Feb 1998, the defendant paid a sum of Rs.15,000/- respectively and despite the receipt of the said amount, the plaintiff has failed to issue receipts in favour of the defendant and further, according to the case of the defendant, the suit property is worth about Rs.15,00,000/- as per the government guideline value and hence, the case of the plaintiff that the defendant agreed to

convey the suit property for Rs.4,00,000/- is false and hence, the suit is liable to be dismissed.

6. The sale agreement has been marked as Ex.A1. A perusal of the sale agreement, marked as Ex.A1 would go to show that the recitals found therein could not to be construed as a mortgage deed as put forth by the defendant. On the other hand, the recitals found therein would only go to show that it is only an agreement of sale and accordingly, the defendant had agreed to convey the suit property to the plaintiff for a sum of Rs.4,00,000/- and received Rs.3,00,000/- by way of cheque and the parties have agreed that within one year thereafter, the transaction should be completed i.e. the plaintiff has to pay the balance amount of Rs.1,00,000/- within the time stipulated and pursuant to the same, the defendant should execute the sale deed in favour of the plaintiff in respect of the suit property. Now, according to the plaintiff, on 3.10.1998 for obtaining the deeds pertaining to the suit property, the defendant requested further payment of Rs.10,000/- and accordingly, the plaintiff paid Rs.10,000/- and necessary endorsement has been made in the sale agreement with reference to the same and then for completing the sale agreement, the time was extended by a period of 11 months and even thereafter, despite the willingness and readiness of the plaintiff

to get the sale deed executed, as the defendant did not come forward to complete his part of the transaction, the suit has been laid .

7. As adverted to earlier, the defendant has taken a plea that Ex.A1 is only a mortgage deed and not an agreement of sale. Therefore, it could be seen that indirectly the defendant has admitted that he had executed the document marked as Ex.A1, but has only contended that it is a mortgage deed and not an agreement of sale. In other words, according to the defendant, Ex.A1 has been executed in respect of the loan transaction. Such being the defence put forth by the defendant, as rightly argued by the plaintiff's counsel, the defendant has to establish that Ex.A1 has been executed in respect of the loan transaction as put forth by her. However, it could be seen that the defendant has not discharged the onus fastened on her to establish that Ex.A1 has been executed in respect of the loan transaction. Ex.A1 is a registered document. As adverted to earlier, the recitals found in Ex.A1 do not go to show that it is a mortgage deed. Per contra, the recitals would only go to show that it is an agreement of sale. Further the case of the defendant is that he had paid Rs.15,000/- twice, one during the month of January 1998 and the next during the month of February 1998 in respect of the loan transaction, but the plaintiff has not given credit to the same. If

really Ex.A1 is a loan transaction and if the defendant had advanced Rs.30,000/- as above mentioned, it could be seen that necessary endorsement would have been made in the document marked as Ex.A1. However, no such endorsement has been made in the document. Further, if really, the defendant had paid Rs.30,000/- in respect of the loan transaction as pleaded, he would have taken steps to obtain necessary receipts from the plaintiff with reference to the same. However, the defendant has only pleaded that the plaintiff has not issued receipts for the above said payments. What prevented the defendant from getting the receipts with reference to the same has not been explained by the defendant in any manner. That apart, the defendant has not cared to examine the attestors to the document Ex.A1 to establish her case that it is only a mortgage deed and not an agreement of sale. On the other hand, the plaintiff has examined one of the attestors as PW3 and he has not stated anything in support of the defendant's version. Therefore, it could be seen that the defendant has, without any basis, been contending that Ex.A1 is a mortgage deed and not an agreement of sale. However, despite the above defence, the defendant has not placed any proof to hold that Ex.A1 is only a mortgage deed and not an agreement of sale. Such being the position, it could be seen that the defendant having failed to establish his case, the case of the plaintiff that Ex.A1 is an

agreement of sale has to be accepted. Therefore, the courts below have, as rightly argued by the plaintiff's counsel, erred in holding that Ex.A1 has been executed in respect of the loan transaction as put forth by the defendant and not as an agreement of sale.

8. A perusal of the judgment of the courts below would go to show that they have taken into consideration the value aspect put forth by the defendant and on that basis, proceeded to hold that the defendant would not have agreed to convey the suit property to the plaintiff for a sum of Rs.4,00,000/- under Ex.A1. However, as rightly argued by the plaintiff's counsel, even as per the copy of the sale deed in respect of the suit property in favour of the defendant dated 26.06.1997 marked as Ex.B6 would go to show that the sale price fixed under Ex.A1 is not on the low side. It could also be seen that no safe reliance could be placed on the sale agreements marked as Ex.B1 to 3 to come to the conclusion that the value of the suit property is on the high side as put forth by the defendant. It could be seen that those documents are only self-serving documents and would not be adequate and relevant to support the defendant's case. The document marked as Ex.B6 is a contemporaneous document which is in respect of the suit property. It could thus be safely concluded that the sale price mentioned in Ex.A1 is not on the low

side. Similarly, even in Ex.B4, the valuation certificate dated 22.07.1997, the value has been only mentioned as Rs.4,74,000/-. However, the courts below, have based upon the location of the suit property i.e. it being situated in a prominent locality in the area, has come to the conclusion that the value of the suit property during the year 1997 should be only on the higher side. However, when compared to Ex.B6 which is dated 26.06.1997, it could be seen that the sale price fixed in Ex.A1 cannot be termed to be a low amount and therefore, the courts below have, as rightly argued by the plaintiff's counsel erred in rejecting the plaintiff case basing upon the value of the suit property as contended by the defendant

9. In the light of the above discussions, it could be found that Ex.A1 is only an agreement of sale entered into between the parties for conveying the suit property. The suit has been laid for specific performance. Therefore, it could be seen that for claiming the equitable relief of specific performance, the plaintiff should aver and establish that he has been always ready and willing to perform his part of the contract and the fault was only on the part of the defendant in completing the sale transaction. Ex.A1 sale agreement is dated 1.12.1997. On the date of sale agreement, out of sale price of Rs.4,00,000/-, Rs.3,00,000/- had been advanced and for the

payment of the balance sale consideration of Rs.1,00,000/- the time limit was fixed as one year. Therefore, it could be seen that the plaintiff should prove his readiness and willingness to complete the sale transaction within one year by tendering the sale consideration. However, except the ipse dixit testimony of PW1, there is no material to show that within the time limit fixed under Ex.A1, the plaintiff was ready and willing to pay the balance sale consideration of Rs.1,00,000/- to the defendant and get the sale deed executed from him. On that aspect, there is no acceptable and reliable evidence on the part of the plaintiff. According to the plaintiff, inasmuch as the defendant had not obtained the documents pertaining to the suit property as agreed, the transaction could not be completed. However, as far as the role of the plaintiff is concerned, whether he has been ready and willing to pay the balance sale consideration as stipulated, there is no material forthcoming. It could be seen that the plaintiff has failed to establish that he had the means to pay the balance sale consideration within the stipulated period and that he has been always ready and willing to part with the balance sale consideration to the defendant to complete the sale consideration.

10. However, it is the case of the plaintiff that on 3.10.1998 the

defendant approached the plaintiff and requested further payment of Rs.10,000/- for getting the documents pertaining to the suit property. It is stated that the plaintiff had paid the said amount and necessary endorsement is also found to be made on the agreement of sale. Under the above stated endorsement, a further period of 11 months is stipulated for completing the sale consideration. As regards that extended period, it has to be seen whether the plaintiff had been ready and willing to pay the balance amount as agreed. With reference to the same, it has to be held that the plaintiff has miserably failed to establish that he has been always ready and willing to pay the balance sale consideration within the extended time agreed between the parties.

11. The parties have agreed to extend the time by another 11 months from 3.10.1998 to complete the sale consideration. Therefore, it could be seen that to show his bona fide the plaintiff has to establish that he had means to pay the balance sale amount i.e. Rs.90,000/- in his custody and has been always ready and willing to pay on or before 3.9.1999. However, other than pleading in the plaint, the plaintiff has not placed any material to hold that he had been always ready and willing to pay the balance sale consideration within the extended time.

12. Now, according to the plaintiff, finally, he has been constrained to issue the legal notice dated 28.10.1999 calling upon the defendant to execute the sale deed. The legal notice has been marked as Ex.A2. A perusal of Ex.A2 would go to show that the same is conspicuously absent as regards the readiness and willingness on the part of the plaintiff in paying the balance sale consideration. Nothing has been mentioned in Ex.A2 that the plaintiff has always been ready and willing to pay the balance sale consideration from the inception and that he was in possession of sufficient means to pay the balance sale consideration within the time agreed between the parties. Under Ex.A2, the plaintiff has only averred that he had advised the defendant to receive the balance sale consideration and execute the sale deed. Ex.A2 is dated 28.10.1999. Therefore, it could be seen that Ex.A2 has come to be issued after the expiry of the extended time agreed to between the parties. Even under Ex.A2, the plaintiff has not averred that he has been always ready and willing to pay the balance sale consideration and the fault only lies at the hands of the defendant in completing the sale transaction. Therefore, it could be seen that the plaintiff's readiness and willingness could not be gathered from the recitals found in Ex.A2.

13. Even if the defendant has not made a plea in the written statement about the readiness and willingness on the part of the plaintiff, still, the plaintiff having come forward with the suit claiming the equitable relief of specific performance, should have averred and established that he had been always ready and willing to perform his part of the contract. In this connection, a useful reference may be made to the decision reported in **2011 (1) SCC 429 (J.P.Builders and another V. A.Ramadas Rao and Another)**. However, as seen from the above discussions, the plaintiff has miserably failed to establish that he has been ready and willing to pay the balance sale consideration within the original time stipulated in Ex.A1. Further, he has also failed to establish that he has been ready and willing to pay the balance sale consideration within the extended time agreed to between the parties after the payment of Rs.10,000/- on 3.10.1998. Even in Ex.A2, legal notice the plaintiff has not averred that he has been ready and willing to pay the balance sale consideration as stipulated. Ex.A2 has come to be issued after the period agreed to between the parties. With reference to the capacity of the plaintiff to pay the balance sale consideration no reliable material is forthcoming. Therefore it could be seen that the plaintiff has miserably failed to establish that he has been ready and willing to pay the balance sale consideration agreed to between the parties

right from the inception and in such view of the matter, it could be seen that the plaintiff's claim for the equitable and discretionary relief of specific performance cannot be granted.

14. Specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. In the light of the above discussion, when it is found that the plaintiff has miserably failed to establish his readiness and willingness to pay the balance sale consideration right from the date of the contract through out the period stipulated under the agreement and also the extended time agreed to between the parties thereafter, it could be seen that the readiness and willingness on the part of the plaintiff, being an essential sine-qua-non to enable him to get the relief of specific relief performance and he having failed to establish the same, it has to be held that the plaintiff cannot be granted the relief of specific performance as sought for in the plaint.

15. The plaintiff's counsel in support of his case, has relied upon the following decisions ***AIR 1999 Supreme Court 1823 (Pawan Kumar Gupta V. Rochiram Nagdeo)***, ***AIR 2004 Supreme Court***

436 (Bhagat Ram and another V. Suresh and others), AIR 1986 Supreme Court 1099(1) (M/s.Sodhi Transport Co. and another, etc, etc., V. State of U.P.and another etc., etc.), AIR 2008 SC 1568 (Silvey & ors V.Arun Varghes & Anr.), (1996) 8 Supreme Court Cases 301 (V.G.Kulkarni V. Spl. Land Acquisition Officer) and AIR 2001 Supreme Court 1392 (Tek Chand and others V. Deep Chand and others). The principles of law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

In conclusion, even though it is found that the courts below have erred in shifting the burden of proof on the side of the plaintiff, vis a vis, the defence put forth by the defendant that Ex.A1 is a loan agreement and accordingly, the substantial question of law formulated is answered in favour of the plaintiff. Still inasmuch the plaintiff has failed to establish that he has been ready and willing to perform his part of the contract as agreed to between the parties under the sale agreement and thereafter, pursuant to the endorsement dated 3.10.1998, it has been held that the plaintiff is not entitled to seek the relief of specific performance. Accordingly, for the reasons aforementioned, though this court does not agree with the findings of the courts below for rejecting the case of the plaintiff,

nevertheless, this court finds and hold that the plaintiff is not entitled to obtain the relief of specific performance. Accordingly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

19.12.2016

Index : Yes/No
Internet: Yes/No
sms

To

1. The Principal District Court, Puducherry.
2. The Principal Sub Judge, Puducherry.

T.RAVINDRAN,J.

sms

Pre-delivery order in
S. A.No.405 of 2011
and

M.P.No.1 of 2011

19.12.2016