

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.06.2017

CORAM:

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

Second Appeal No.514 of 2013

V.Sivaraj

... Appellant/Appellant/Defendant

Vs.

S.Rasiya Begam

... Respondent/Respondent/Plaintiff

Second Appeal filed under Section 100 C.P.C. against the judgment and decree dated 17.11.2012 passed in A.S.No.111 of 2010 by the III Additional District Court, Dharapuram, confirming the judgment and decree dated 08.09.2009 passed by the Subordinate Court, Dharapuram in O.S.No.67 of 2007.

For Appellant : Mr.K.Surendranath
for Ms.P.T.Ramadevi

For Respondent : Mr.N.Ponraj

J U D G M E N T

The defendant in the suit is the appellant herein. He has come up with the present Second Appeal challenging the judgment and decree, dated 17.11.2012 passed in A.S.No.111 of 2010 by the III Additional District Court, Dharapuram, confirming the judgment and decree, dated 08.09.2009 passed by the Subordinate Court, Dharapuram in O.S.No.67 of 2007, which was filed by the plaintiff for specific performance.

2. It is the case of the respondent/plaintiff that the suit property belongs to the appellant/defendant vide Sale Deed dated 15.11.1999 and that she entered into an agreement of sale with the appellant/defendant on 14.03.2007 vide Ex.A1, determining the sale consideration as Rs.4,00,000/- and on the same day, the respondent/plaintiff parted a sum of Rs.3,00,000/- to the appellant/defendant. The Agreement stipulates a time limit of three months for the balance sale consideration of Rs.1,00,000/- to be paid, i.e. on or before 14.06.2007. According to the respondent/plaintiff, she was always ready and willing to perform her part of the contract and she also sent a telegram on 13.06.2007 to the appellant/defendant, calling upon him to be present in the Sub-Registrar Office, Dharapuram on

14.06.2007 to execute the Sale Deed. But, there was no response from the appellant/defendant and hence, the respondent/plaintiff filed a suit in O.S.No.67 of 2007 for specific performance.

3. While so, in the Written Statement filed before the Trial Court, the appellant/defendant has stated that he never entered into any agreement for sale with anybody including the plaintiff. According to the appellant/defendant, he was availing loan on promissory note from the year 2000 with interest at 36% per annum. As a matter of fact, the appellant/defendant borrowed a sum of Rs.1,50,000/- from the respondent/plaintiff with interest at 24% per annum only on her compulsion and executed an Agreement for Sale, dated 14.03.2007 only as a security and the value of the suit property is more than Rupees Nine Lakhs. According to him, the said Agreement has been obtained by coercion and undue influence and that the same is not valid and enforceable in law.

4. The Trial Court, on a consideration of the entire oral and documentary evidence, decreed the suit for specific performance in favour of the respondent/plaintiff. Aggrieved by the said finding, the defendant went on appeal in A.S.No.111 of 2010 and the First Appellate Court dismissed the appeal, thereby confirming the judgment and decree of the Trial Court. Challenging the dismissal of the appeal by the First Appellate Court, the defendant has come up with the present appeal.

5. The Second Appeal was taken up for hearing on 22.07.2013 and after hearing both sides, this Court granted an order of interim stay till 23.08.2013. Thereafter, now the Second Appeal is listed for final disposal and the same is being disposed of by this judgment.

6. It is the contention of the learned counsel for the appellant that the appellant/defendant entered into a Sale Agreement with the respondent/plaintiff only for availing loan for running a School and that the said Agreement was entered into only as a security. According to the learned counsel, the totality of the circumstances has got to be taken into account and that the First Appellate Court, being a final Court with regard to finding of facts, has not considered any of the documents marked by the appellant.

7. To substantiate his claim, learned counsel for the appellant has relied on the following decisions:

(i) Parakunnan Veetill Joseph's Son Mathew vs. Nedumbara Kuruvilla's Son and others, 1987 (Supp) SCC 340

"14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as

to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for Sale Ex.A1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance."

(ii) A.C.Arulappan vs. Ahalya Naik, (2001) 6 SCC 600

"7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20 (2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

8. In Damacherla Anjaneyulu vs. Damcherla Venkata Seshaiyah, the High Court declined to grant a decree for specific performance in favour of the plaintiff, even though the defendant was guilty of breach of agreement. That was a case where the defendant had constructed costly

structures and if a decree for specific performance was granted, the defendant would have been put to special hardship. This Court directed the defendant to pay compensation to the plaintiff.

15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court. The trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and, in our view, the appellate court seriously flawed in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract."

(iii) Bal Krishna and another vs. Bhagwan Das (dead) by L.Rs. and others, AIR 2008 SC 1786

"8. Section 16 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act") corresponds with Section 24 of the old Act of 1877 which lays down that the person seeking specific performance of the contract, must file a suit wherein he must allege and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. The specific performance of the contract cannot be enforced in favour of the person who fails to aver and prove his readiness and willingness to perform essential terms of the contract. ... The first requirement is that he must aver in the plaint and thereafter prove those averments made in the plaint. The plaintiffs readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the court. ..."

(iv) K.Jiji Bai @ Pushpammal vs. Sureshkumar Kankariya, (2011 (2) CTC 77)

"9. The duties of the First Appellate Court are found exemplified in the unreported judgment of this Court in Spur Tank Road Filling Station and another vs. F.Jayakumar and another, dated 17.07.2009 passed in S.A.No.888 of 2007, the relevant portion of which would run thus:

"18. The oral evidence and the documentary evidence adduced by both sides have not been discussed, as it ought to have been dealt with by the last Court of fact.

19. It is trite proposition of law that the First Appellate Court, which happened to be the last Court of fact, to analyse both oral and documentary evidence afresh and arrive at an independent conclusion.

20. In this case, the judgment of the First Appellate Court, to say the least, is far from satisfactory, as the learned District Judge has totally ignored his responsibility to analyse the oral evidence and also the documentary evidence and arrived at the conclusion."

(v) Mahant Jawala Singh (dead) through LRs vs. Shiromani Gurdwara Prabhandhak Committee, Amritsar, (2011) 2 SCC 457

"60. In the report of the Tahsildar, Phul it was noted that there is no mention regarding the ownership but inquiry from the Lambardar revealed that the ownership was of Bhai Bir Singh who was shown as Nirmala Sadhu. In the report of the Revenue Superintendent, there is a mention of Dera on the land and as per the instructions given by the Government on 29th Poh, Samvat 1954, the entry in the column of ownership was to be made in the name of Dera Granth Sahib as per the desire of real owners. It was also indicated that the sadhus residing in the Dera shall have no right to sell and mortgage the land. The muafi was granted by Maharaja Bharpur Singh for dharmath, i.e. to meet the expenses of sadhus and poor. The last order passed by the Maharaja shows that entry regarding ownership of the Dera

was to be made as proposed at the time of settlement. Unfortunately, the High Court brushed aside the documentary evidence produced by the appellant by recording a one-line observation that his counsel could not establish its relevance. In our view, while hearing the appeal, it was the duty of the High Court to have adverted to the various documents and then determined their relevance."

(vi) Shamsher Singh and others vs. Rajinder Kumar and others, (2015 (4) CTC 441) (SC)

"11. ... As per Section 20(2)(b) of the Specific Relief Act, 1963 (in short "the Act") the jurisdiction to grant Decree of Specific performance is discretionary and Section 20(2) lists the cases in which the Court may properly exercise discretion not to grant decree of specific performance."

8. On the other hand, learned counsel appearing for the respondent/plaintiff contended that the respondent/plaintiff is always ready and willing to perform her part of the contract and it is only the appellant/defendant, who is evading execution of the Sale Agreement in her favour.

9. In support of his submissions, the learned counsel for the respondent/plaintiff relied upon a decision of this Court in the case of A.N.Arunachalam Vs. T.Sivaprakasam and another, reported in 2011 (1) MWN (Civil) 819, and the relevant portion of the same reads as follows:

"12. ... Therefore, as per Section 92 of the Indian Evidence Act, no one is permitted to let in evidence contra to a registered document. Hence, the parties have to prove that the document in question, is in accordance with law. The burden is upon the respondents/defendants to prove that the document has been executed as "Bokkiam" (usufructuary mortgage)."

10. Heard the learned counsel on either side, gave careful consideration to their submissions and perused the material documents available on record.

11. The readiness and willingness of the respondent/plaintiff to perform her part of the contract, was not resisted or denied by the appellant/defendant in the Written Statement filed by him before the Trial Court. The

appellant/defendant, who was examined as D.W.1, in his cross-examination has admitted the receipt of the telegram from the respondent/plaintiff. Further, he had admitted in his cross-examination that Ex.A1 - Sale Agreement was not obtained by coercion or undue influence. That apart, P.Ws.1 to 3 have spoken about the transaction between the parties to the suit.

12. To strengthen his plea, the appellant/defendant has taken substantial defence by marking Exs.B1 to B3, which are the earlier Agreements of Sale duly executed and registered by the defendant by entering into Agreement with third parties, viz. Yesaiyan, P.Ramasamy and S.Latha. The Encumbrance Certificate showing the liabilities under the Agreements is marked as Ex.B4. It is also seen that on the date of execution of Ex.A1, the liability of the defendant towards the said Latha was discharged and from and out of the advance amount of Rs.3,00,000/-, the defendant discharged the said encumbrance, which is not disputed or impugned by the respondent/plaintiff.

13. Though the appellant/defendant has emphasized in his Written Statement that he received a sum of Rs.1,50,000/- as loan from the respondent/plaintiff with interest at 24% per annum, there is no such recital in the Agreement for Sale in Ex.A1. Further, in the Agreement for Sale, vide Ex.A1, after the recitals by using a Computer, a sentence has been inserted stating that the possession of the property is not handed over to the Agreement Holder and only thereafter, the signatures of the parties have been affixed therein. What has to be taken note of here is that, if the sentence pertaining to the handing over of the property had been incorporated in the Deed, some inference could be drawn that the appellant/defendant had entered into such an Agreement only for the purpose of availing the loan. But, the insertion of the said sentence creates a reasonable suspicion over the bona-fide of Ex.A1. Further, the appellant/defendant has also taken a plea that the suit property is worth about Rs.9,00,000/-, but he has not produced any document before the Trial Court to that effect.

14. It is seen that before the Trial Court, both P.Ws.2 and 3 have let in cogent and corroborative evidence and it is clear that the Agreement for sale was duly executed by the appellant/defendant on receipt of the advance amount of Rs.3,00,000/-. Merely because three Agreements have been entered into by the appellant/defendant earlier with third parties for the purpose of availing loan, it cannot be said that the present Agreement for Sale, vide Ex.A1 is also intended for loan purpose. The same yardstick cannot be applied to the facts of this case also, as the specific period for completing the sale transaction including the registration of the sale Deed, is fixed as three months in Ex.A1.

15. By no stretch of imagination, it can be construed that the Sale Agreement vide Ex.A1 is intended for raising loan. As rightly pointed out by the learned counsel for the respondent/plaintiff, no oral evidence could be let in contradicting the contents of a written document. Here, the suit for specific performance is based on Ex.A1 - Sale Agreement. Normally, if there is any plea that money has been obtained only as loan, the burden is on the person who obtains loan to prove the same. In this case, the appellant/defendant failed to discharge his burden, as the burden lies on him to prove that it was only a loan transaction. But, the respondent/plaintiff has established that it is a case of Sale Agreement and held that she is entitled for specific performance.

16. That apart, the readiness and willingness to perform a contract has to be determined by the conduct of the parties and the Courts below have clearly held that the respondent/plaintiff was always ready and willing to perform her part of the contract and it is the finding of fact, which cannot be interfered with by this Court.

17. In the light of the above factual finding that it is an Agreement for Sale and that the readiness and willingness is not questioned by the defendant at any stage and that the plaintiff has established his readiness and willingness apart from the fact that Ex.A1 is an Agreement for Sale, as per the decision of this Court reported in 2011 (1) MWN Civil 819 (cited supra).

18. Moreover, in the decision of the Apex Court in the case of Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others, reported in (2002) 3 SCC 533, it is held that while relying on a judgment, if it is found that the factual situation totally differs, then there is no compulsion for the subordinate Courts to blindly rely on the same to arrive at a conclusion. Relevant portion of the said decision reads thus:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

19. Therefore, this Court finds that the decisions extracted above and relied on by the learned counsel for the appellant/defendant, are distinguishable on facts.

20. Further, learned counsel for the appellant contended that the oral and documentary evidence adduced by both the parties have not been discussed and that the First Appellate Court, being the last Court of finding of facts, has got to arrive at an independent conclusion and that in this case, the First Appellate Court has rendered a judgment contrary to Order 41 Rule 31 C.P.C. In this regard, it is useful to refer the decision of the Supreme Court reported in K.Jiji Bai @ Pushpammal vs. Sureshkumar Kankariya, (2011 (2) CTC 77), relevant portion of which, reads as under:

"A mere perusal of the aforesaid judgment would clearly display and demonstrate that if an Appellate Court renders the judgment without adhering to Order 41, Rule 31, C.P.C., then it cannot be equated with that of a reasoned judgment and such a judgment has to be set aside."

21. It cannot be contended that Order 41 Rule 31 CPC had not been followed by the First Appellate Court, as the First Appellate Court has framed the points in paragraph 4 of its judgment and dealt with the same in detail. The decision of the First Appellate Court is correctly based on Order 41 Rule 31 C.P.C.

22. In view of the foregoing discussion, this Court is of the view that the respondent/plaintiff is entitled to the relief sought by him, which has been rightly granted by the Trial Court and the same has been upheld by the First Appellate Court and it cannot be interfered with.

23. There is no question of law, much less substantial question of law that arises for consideration in this Second Appeal.

In fine, the Second Appeal stands dismissed. No costs. Consequently, connected M.P.No.1 of 2013 is closed.

Sd/-
Asst.Registrar (CS VI)

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Sub Asst. Registrar

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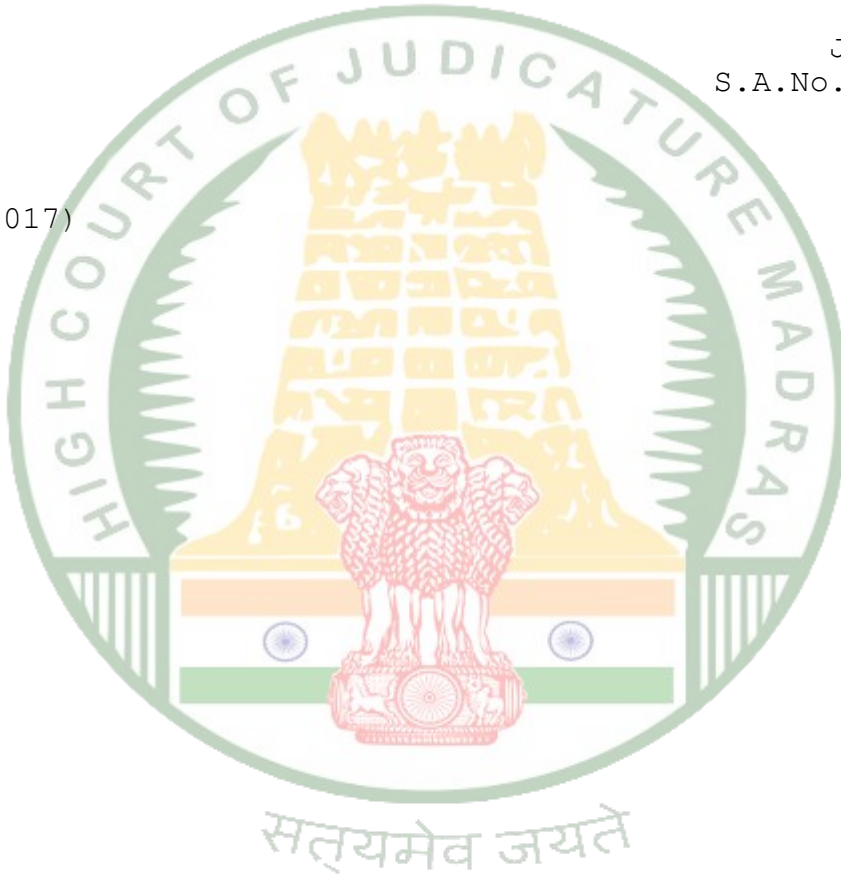
To:

- 1.The III Additional District Judge, Dharapuram.
- 2.The Sub Judge, Dharapuram.

+1cc to Mrs.P.T.Ramadevi, Advocate Sr. 44147
+1cc to Mr.N.Ponraj, Advocate Sr. 44065

Judgment in
S.A.No.514 of 2013

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