

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.11.2017
PRONOUNCED ON : 15.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.1212 of 2001

P.K.Subramanian .. Appellant

Vs

1. Pongiannan (deceased)
2. Palaniammal
3. Rajavelu
4. Raju @ Thangaraj ... Respondents

(RR2 to 4 recorded as Lrs of the deceased R1 vide order of Court dated 18.07.2014 made in memo presented in Court dated 18.07.2014 in S.A. No.1212 of 2001)

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 17.04.2001 made in A.S.No.105 of 1998 on the file of the Subordinate Court, Sankari reversing the Judgment and Decree dated 30.10.1998 made in O.S.No.117 of 1996 on the file of the District Munsif Court, Tiruchengode.

For Appellant : Ms.Mythili Suresh

For Respondent : No appearance
Nos. 2 to 4

JUDGMENT

Challenge in this second appeal is made to the Judgment and Decree dated 17.04.2001 made in A.S.No.105 of 1998 on the file of the Subordinate Court, Sankari reversing the Judgment and Decree dated 30.10.1998 made in O.S.No.117 of 1996 on the file of the District Munsif Court, Tiruchengode.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for specific performance

4. The case of the plaintiff, in brief, is that the first defendant is the brother of the plaintiff, the second defendant is the wife of the first defendant and the third and fourth defendants are the sons of the defendants 1 & 2 and the properties described in the plaint schedule belonged to the defendants and they being their ancestral properties and on 29.12.1991, the defendants entered into a written agreement for sale of the suit properties to the plaintiff agreeing to sell the same for a sum of Rs.30,000/- and on the same date, in evidence of their assurance, the plaintiff paid a sum of Rs.20,000/- to the defendants towards the sale price and the defendants agreed to receive the balance amount of Rs.10,000/- within 18 months from the date of the agreement from the plaintiff and execute a registered sale deed in respect of the suit properties in favour of the plaintiff free from all encumbrances and the other necessary recitals are also contained in the agreement of sale and the plaintiff had gathered the balance sum of Rs.10,000/- in the month of December, 1992 and despite the readiness and willingness on the part of the plaintiff to complete the sale transaction, the defendants evaded to execute the sale deed and hence, the plaintiff issued a notice through his lawyer on 10.02.1993 calling upon the defendants to perform their part of the contract and complete the sale transaction. The defendants had evaded to receive the said notice and the plaintiff being always ready and willing to complete the sale transaction and as the same could not be done, due to the evasive tactics adopted by the defendants, according to the plaintiff, he has been necessitated to lay the suit of appropriate reliefs.

5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. The case of the plaintiff that the defendants agreed to sell the suit properties to him for a price of Rs.30,000/- on 29.12.1991 and in evidence thereof, received a sum of Rs.20,000/- as advance and agreed to receive the balance sale consideration of Rs.10,000/- within 18 months from that date and execute the sale deed in favour of the plaintiff are all false and specifically denied and according to the defendants, the agreement of sale is rank forgery and the further case of the plaintiff that he had been ready to part with the sale consideration of Rs.10,000/- to the defendants several times and only on account of the evasive tactics adopted by the defendants, the sale could not be completed are also false. The issuance of the legal notice claimed in the plaint is not admitted. It is false to state that the defendants had evaded to receive the said notice. The plaintiff is the younger brother of the first defendant and the first defendant borrowed a sum of Rs.20,000/- from the plaintiff and at the time of paying the amount, the plaintiff had taken the signatures of the first defendant, the LTI of the second defendant and the

signatures of the defendants 3 & 4 in blank papers, promissory notes, the blank stamp papers and the defendants also accede to the same on account of the close relationship between the parties and subsequently, dispute arose between the plaintiff and the defendants on paying extra interest for the sum advanced and on account of the said misunderstanding, the plaintiff has fabricated the sale agreement with the help of the defendants' signatures and LTI obtained in the blank papers, blank stamp papers, etc and therefore, there is no obligation on the part of the defendants to execute any sale deed in respect of the suit properties in favour of the plaintiff. The attestors of the sale agreement are close allies of the plaintiff and there is no bona fide in the alleged readiness and willingness on the part of the plaintiff to pay the balance amount and there is absolutely no cause of action for the suit and hence, the suit is liable to be dismissed.

6. In support of the plaintiff's case, PWS1 & 2 were examined and Exs.A1 to 6 were marked. On the side of the defendants, DW1 was examined and Exs.B1 & 2 were marked.

7. The trial Court, on an appreciation of the materials placed and the submissions made, was pleased to decree the suit as prayed for. On appeal, the first appellate Court found that the plaintiff has failed to establish his readiness and willingness to perform his part of the contract and thereby, complete the sale transaction, accordingly, declined the relief of specific performance sought for by the plaintiff, however, chosen to grant the relief of refund of the advance amount of Rs.20,000/- with interest and accordingly, disposed of the appeal preferred by the defendants. Aggrieved over the same, the present second appeal has been preferred.

8. The second appeal has been admitted and at the time of admission, the following substantial questions of law were formulated for consideration in this second appeal:

" (i) Whether the lower Appellate Court is correct in law in refusing the relief of Specific performance to the Appellant after having found that Ex.A1 sale agreement in favour of the appellant is genuine and valid?

(ii) Whether the lower Appellate Court is correct in law in questioning the agreed terms of parties in respect of period fixed for completion of the contract, particularly when the agreement found to be true and binding on both parties?

(iii) Whether the lower Appellate Court

is correct in law in discarding Ex.A2 Notice which would clearly prove the readiness and willingness of the Appellant to perform his part of the contract?

(iv) When the respondents themselves have accepted the financial soundness of the appellant in Para III (5) of the grounds of Appeal filed by them in A.S.No.105/1993 and that the appellant could raise a sum of Rs.10,000/- in no time, whether the lower Appellate Court is correct in law in taking a contrary view that the appellant was not in a position to raise a sum of Rs.10,000/- and that he was not ready and willing to perform his part of the contract?"

9. The relationship between the parties is not in dispute and as such, it is found that the plaintiff is the younger brother of the first defendant, the second defendant is the wife of the first defendant and the defendants 3 & 4 are the sons of the defendants 1 & 2 . It is found that according to the case of the plaintiff, the defendants agreed to sell the suit properties belonging to them in favour of the plaintiff and accordingly, on 29.12.1991, the parties had entered into a sale agreement for the same and in evidence of the above said transaction, the defendants had received a sum of Rs.20,000/- as advance towards part of the sale consideration and agreed to receive the balance sale consideration of Rs.10,000/- within 18 months from the date of the sale agreement and execute the sale deed in favour of the plaintiff and according to the plaintiff, though he had been always ready and willing to perform his part of the contract by tendering the balance sale consideration and complete the sale transaction, according to the plaintiff, the defendants had evaded to perform their part of the contract and hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

10. The defendants have not disputed their signatures and the LTI found in the sale agreement marked as Ex.A1. All that they would say is that the defendants used to borrow loan from the plaintiff and at the time of the borrowal of a sum of Rs.20,000/- from the plaintiff, according to them, the plaintiff obtained their signatures and LTI in blank papers, blank stamp papers, promissory notes, etc and as disputes arose between the parties subsequently, according to the defendants, the plaintiff had made use of their signatures and LTI obtained in the blank papers above stated and fabricated the sale agreement, as if the defendants had agreed to convey their suit properties in favour of the plaintiff for a sum of Rs.30,000/-

and hence, it is contended by the defendants that there is consensus ad idem between the parties for the sale of the suit properties as put forth in the plaint and hence, the plaintiff has no cause of action to institute the suit against the defendants.

11. The defendants have admitted their signatures and LTI in the sale agreement. Hence, as rightly found by the Courts below, it is for the defendants to establish that the said document has come into existence only in view of the loan transaction as put forth by them. No doubt, from Exs.B1 & 2, it could be seen that the defendants had been in the habit of receiving loan from the plaintiff now and then and accordingly, it is seen that for the loan obtained from the plaintiff, the defendants had duly executed the mortgage deeds in favour of the plaintiff, which could be evidenced from Exs.B1 & B2. Therefore, to contend that the plaintiff had also obtained their signatures and LTI in the blank papers, blank stamp papers, promissory notes, etc at the time of lending loan as such cannot be accepted readily. It is the specific case of the plaintiff that, as also spoken to in the course of his evidence, he has not obtained the signatures and LTI of the defendants in the blank papers as pleaded by the defendants. If really, the plaintiff had obtained the signature and LTI of the defendants in blank papers etc., as pleaded by the defendants, as rightly argued, the defendants would have initiated necessary legal action against the plaintiff with reference to the same. Even admitting for the sake of arguments that the above plea of the defendants is true and when according to the defendants, disputes had arisen between the parties subsequent thereto, atleast thereafter, the defendants, as prudent persons, should have resorted to necessary legal action against the plaintiff as regards the obtainment of their signatures and LTI in blank papers, etc as put forth by them. On the other hand, it is found that the defendants have not resorted to any such course and this would only falsify the theory put forth by them that Ex.A1 has been fabricated by the plaintiff taking advantage of their signatures and LTI obtained in the blank papers at the time of loan transaction. In this connection, to establish prima facie that the sale agreement has come into existence between the parties as pleaded in the plaint, the plaintiff has chosen to examine himself as PW1 and clearly deposed about his case in the course of evidence. Despite cross examination, nothing has been elucidated from PW1 to disbelieve his testimony with reference to the case put forth by him. In addition to that, the plaintiff has also chosen to examine the scribe of the sale agreement as PW2 and PW2 has also in his evidence clearly spoken to about the sale agreement entered into between the parties and according to him, he had written the sale agreement marked as Ex.A1 as agreed to between the parties and also spoken about the receipt of Rs.20,000/-

from the plaintiff by the defendants in respect of the same and the undertaking of the defendants to receive the balance sale amount within 18 months and complete the sale transaction. As rightly found by the Courts below, the evidence of PW2 is convincing, trustworthy and reliable. Despite cross examination, nothing has been culled out from him to discredit his testimony as regards the sale agreement put forth in the case. It is further found that, even admitted by DW1, the attestors to the sale agreement are known person of the defendants and in fact, one of the attestors is a relative of the defendants and despite the above position, the defendants have not chosen to examine the attestors to disprove the plaintiff's case, when the burden is heavily upon them to show that their signatures and LTI in Ex.A1 had been obtained only in view of the loan transaction as putforth by them. However, for the reasons best known to them, despite the attestors being closely associated with the defendants, the defendants have not chosen to examine them in support of their defence version.

12. It is found that the plaintiff before laying the suit had also sent a legal notice calling upon the defendants to receive the balance sale consideration and complete the sale transaction. As urged by the plaintiff, it is seen that the legal notice has been sent to the residential address of the defendants and despite the same, the defendants had maneuvered to evade the receipt of the same and accordingly, the notice sent had been returned with an endorsement not claimed. On the other hand, the suit summons sent to the same address had been acknowledged by the defendants. It is thus found that the defendants knowing very well about the implication of the receipt of the notice sent by the plaintiff have cleverly evaded to receive the same and this conduct of the defendants amply establish the case of the plaintiff that the defendants had been avoiding the execution of the sale transaction as put forth by the plaintiff.

13. The contention that the sale agreement had been engrossed in stamp papers brought much earlier to the transaction also cannot be allowed to be entertained to defeat the plaintiff's case and as rightly argued, it is seen from the evidence of the plaintiff that several months before the transaction, the defendants had expressed their desire to sell the suit properties and as the plaintiff had expressed his willingness to purchase the same and as the same had been accede to by the defendants orally, it is found that the plaintiff had purchased the stamp papers with reference to the same and accordingly, on 29.12.1991 when the parties had decided to put their understanding in writing, it is seen that the sale agreement has come to be engrossed on abovesaid stamp papers and

therefore, nothing unnatural could be made out from the said fact alone to disbelieve the plaintiff's case or upholding the defence version.

14. It is not the case of the defendants that the sale price agreed to between the parties for the suit properties is on the low side. It is thus found that the sale price is also found to be reasonable and accordingly, the parties have agreed to the sale consideration as pleaded in the plaint.

15. The Courts below have, on a careful analysis of the materials placed on record, found that the defendants have failed to establish that Ex.A1 document has come to be executed by them in view of the loan transaction as put forth in the written statement. On the other hand, the Courts below have, based on acceptable and convincing evidence of PWS1 & 2 and the other materials, found acceptance and merits in the plaintiff's case and accordingly, held that only pursuant to the understanding entered into between the parties for the sale of the properties by the defendants in favour of the plaintiff, the sale agreement Ex.A1 has come into existence for a sum of Rs.30,000/- and accordingly, pursuant to the same, the defendants have received a sum of Rs.20,000/- as advance from the plaintiff and agreed to receive the balance sale consideration within 18 months thereafter and execute the sale deed in respect of the suit properties in favour of the plaintiff, accordingly, rightly held that Ex.A1 is a true and genuine document.

16. It is the specific case of the plaintiff that he has been always ready and willing to perform his part of the contract i.e. paying the balance sale consideration of Rs.10,000/- right from the inception and accordingly, expressed his readiness and willingness to the defendants frequently and however, the defendants did not come forward to execute the sale deed after receiving the balance sale consideration. In this connection, it is found that necessary recitals are also found in the plaint and it is further found that the plaintiff, before institution of the suit, has also sent a notice to the defendants calling upon them to receive the balance sale consideration and execute the sale deed. It is found that the notice had been sent to the defendants' address and so normally, as rightly found by the Courts below, the defendants would have received the notice. However, the notice has been evaded to received by the defendants and hence, returned back to the plaintiff as not claimed. The notice and the return covers have been marked as Exs.A2 to 6.

17. The defendants would contend that they had no knowledge about the notice. However, as rightly determined by the Courts

below, when the defendants had acknowledged the receipt of the suit summons sent to the same address, their conduct that they had no knowledge about the notice Ex.A2 sent to them to the same address as such cannot be accepted. It is therefore seen that the plaintiff, by way of Ex.A2, had exhibited his readiness and willingness to perform his part of the contract within the time stipulated in the sale agreement. That apart, the materials disclose that the plaintiff has also deposited the balance sale consideration in the Court during the course of trial. This aspect also goes to establish the readiness and willingness on the part of the plaintiff to complete the sale transaction. It is further found that the defendants have not stated in the written statement that the plaintiff is incapable of means and therefore, not ready with the balance sale consideration so as to complete the transaction. On the other hand, the very plea of the defendants in the written statement is that they use secure loan from the plaintiff now and then and that aspect of the matter is also fortified by the documents marked as Ex.B1 & 2. It is thus found that even on the defence version, it could be seen that the plaintiff is capable of raising the balance sale consideration at any point of time. That apart, in the grounds of appeal before the first appellate Court, it has been specifically admitted by the defendants that the plaintiff is rich enough to pay the balance amount in no time and this admission, on the part of the defendants, would go to show that the plaintiff has always been having the cash in hand to complete the sale consideration and only due to the evasive tactics adopted by the defendants, the sale transaction could not be completed and hence, the plaintiff has been forced to lay the suit for specific performance. It is further found that as seen above, 18 months time had been accepted between the parties to complete the sale transaction. The above time limit as agreed to be fixed between the parties cannot be stated to be unnatural, considering the relationship between the parties and also the fact that the defendants had sought time of 18 months to complete the sale transaction and accordingly, it is seen that the above said time had been incorporated in the sale agreement. It is however found that well before the time stipulated, the plaintiff had made demands to the defendants to receive the balance sale consideration and complete the sale transaction. This could be seen from the evidence tendered by the plaintiff as PW1 and also could be visualized from the contents of the legal notice sent by the plaintiff marked as Ex.A2 and also the readiness and willingness of the plaintiff is further strengthened by the conduct of the plaintiff in depositing the balance sale consideration in the trial Court. It is further seen that inasmuch as the plaintiff is always eager and willing to perform his part of the contract and complete the sale transaction, it is found that well within the time stipulated in the sale agreement Ex.A1, the suit has come

to be laid by the plaintiff. It is found that the suit had been laid by the plaintiff on 08.03.1993 well before the time stipulated under the sale agreement for completing the sale transaction and only on account of the delaying tactics adopted by the defendants, the sale transaction could not be completed.

18. However, it is found that the first appellate Court has determined that the plaintiff has not been ready and willing to perform his part of the contract and thereby, declined the relief of specific performance sought for by the plaintiff. In this connection, the first appellate Court has taken into consideration the admission of the plaintiff during the course of cross examination that though he had the capacity to pay the balance sale consideration of Rs.10,000/- within two months after the execution of the sale agreement, he had not asked the defendants to execute the sale deed within the period of said two months and therefore, on that basis and further relying upon the plaintiff's averment that the plaintiff had gathered the balance of Rs.10,000/- and demanded the defendants several times in person in the month of December, 1992 to execute the sale deed as per the agreement and accordingly, viewed the above admission of the plaintiff is not exhibiting the readiness and willingness on his part to complete the sale transaction. However, as rightly put forth by the plaintiff's counsel, the evidence of a party should be read in whole and not in isolation and in such view of the matter, if the evidence of the plaintiff is seen cumulatively tendered both during chief and cross examination plus the averments contained in the plaint, if seen conjointly with the evidence tendered by the plaintiff, it would go to show that the plaintiff had the solvency to mobilize and pay the balance sale consideration immediately after the sale agreement and accordingly, was ready with the balance sale consideration and accordingly, requesting the defendants now and then to receive the same and complete the sale transaction. In such view of the matter, the first appellate Court has erred in holding that the plaintiff has failed to establish his readiness and willingness merely on the above said isolated testimony of the plaintiff made during the course of cross examination and this approach of the first appellate Court cannot be appreciated and encouraged as the same, had resulted in miscarriage of justice. The plaintiff's counsel for the proposition that the evidence of the parties should not be taken in isolation and on the other hand, should read wholly for drawing an inference out of the same and in this connection, relied upon the decisions reported in (2000) 3 M.L.J. 199 (S.C.) (Boramma Vs. Krishna Gowda and others), and the decision of the High Court dated 31.07.2014 passed in OSA No.438 of 2012. A perusal of the above said decisions, would go to show that merely because, a statement had been obtained during the course of cross examination, the same cannot be termed as a clear admission and the evidence of a party should be read conjointly and only thereafter, an

inference should be drawn from the same and in such view of the matter, it is found that the first appellate Court has erred in holding that the plaintiff has not been ready and willing to perform his part of the contract based on the above said isolated testimony of PW1 during the course of cross examination.

19. As regards the readiness and willingness aspects, the principles to be followed by the Court with reference to the same, the counsel for the plaintiff placed reliance upon the decisions reported in 1998 (II) CTC 613 (N.Saraswathi Ammal Vs. Jayaram Rao and 2 others), 1999 (III) CTC 394 (Rathinam Chettiar Vs. Embar Naidu and another), (2012) 3 MLJ 1219 (A.K.Gopal Vs. R.K.Sitrula) and (2016) 10 SCC 353 (Syscon Consultants Private Limited Vs. Primella Sanitary Products Private Limited and another). The principles of law outlined in the above said decision are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

20. Considering the facts and circumstances of the present case, particularly, time not being the essence of the contract as regards the immovable properties and that apart, when as far as this case is concerned, it has been established by the plaintiff by acceptable and convincing evidence that he is always ready and willing to pay the balance sale consideration and complete the sale transaction and further, had also buttress the said fact by depositing the sale transaction in the Court and also issuing the legal notice within the time stipulated and furthermore, instituting the suit also within the time stipulated under the sale agreement would go to show that the plaintiff has been always ready and willing to perform his part of the contract and accordingly, it is seen that the plaintiff is entitled to seek the relief of specific performance based upon the sale agreement marked as Ex.A1. In the light of the above position, the lower appellate Court is wrong in refusing the relief of specific performance to the plaintiff after having found that the sale agreement Ex.A1 is genuine and valid. The lower appellate Court has also erred in doubting and questioning the period agreed to be fixed between the parties in the sale agreement particularly after holding that the sale agreement is a true and genuine document and binding on the parties concerned. The lower appellate Court failed to consider the true import of Ex.A2 notice and had it correctly considered the same in the right perspective, would have clearly held that the plaintiff has proved his readiness and willingness to perform his part of the contract. The lower appellate Court has erred in holding that the plaintiff has no means and capacity to pay the balance sale consideration particularly not considering the admission of the defendants as regards the financial capacity of the plaintiff, as admitted in the grounds of appeal projected

before the first appellate Court and therefore, it is found that the lower appellate Court has consequently erred in holding that the plaintiff is not ready and willing to perform his part of the contract. Accordingly, the substantial questions of law formulated in the second appeal are answered in favour of the plaintiff and against the defendants.

21. In conclusion, the Judgment and Decree dated 17.04.2001 made in A.S.No.105 of 1998 on the file of the Subordinate Court, Sankari are set aside and the Judgment and Decree dated 30.10.1998 made in O.S.No.117 of 1996 on the file of the District Munsif Court, Tiruchengode are confirmed. Accordingly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/--
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

sms

To

1. The Subordinate Court, Sankari.
2. The District Munsif Court, Tiruchengode.

+1cc to M/s.Sarvabhauman Asso. Sr.No.81126

KS (CO)

sm:24.1.2018

judgment made
in S. A.No.1212 of 2001

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