IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 12.11.2018

Judgment Pronounced on : 21.12.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.473 of 2008
and
M.P.No.1 of 2008

Mani ... Appellant/Defendant

Vs.

Radhakrishnan ... Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in A.S.No.58 of 2006 by the Principal District Judge, Cuddalore dated 25.07.2007 in reversing the Judgment and Decree passed in O.S.No.259 of 2003 by the Principal Sub-Judge, Vriddhachalam, Cuddalore District dated 24.04.2006 to set aside the same.

For Appellant : Mr.P.Palaninathan

For Respondent : Ms.R.Meenal

JUDGMENT

The defendant in a suit for specific performance in O.S.No.259 of 2003, on the file of the Principal Sub-Judge, Vriddhachalam has preferred this appeal. The parties would be referred to by their rank before the trial court.

The Pleadings
2.1 The material facts that forms the foundation for the suit are: The property involved in the suit is a plot measuring 1,065 sq.ft., with a building. This property belongs to the defendant. On 23.10.2000, the plaintiff and the defendant entered into a written agreement of sale under which the plaintiff agreed to buy the said property for a total consideration of Rs.1,10,000/-. He had paid an advance amount of Rs.1,00,000/- leaving a balance of Rs.10,000/-. The time for performing the contract is stipulated as one year. Be that as it may, on 22.07.2002, the plaintiff had issued a suit notice requiring the defendant to perform his part of the contract, and as it could not be served, the plaintiff was constrained to serve another notice for the same purpose on 03.08.2002. This notice though

was received, was not replied to. In these circumstances, left with little option, the plaintiff has laid the suit on 22.07.2003.

2.2 Denying the contentions of the plaintiff, yet admitting the execution of the sale agreement, the defendant in his written statement has pleaded that this defendant was running a financial institution under the name and style M/s. Anantha Jothi Financiers in partnership with plaintiff's wife and others. This firm was formed on 10.02.1994. The plaintiff, who then had a wide network of friends and relations, had helped the firm in building its business. However, the firm ran into financial crisis forcing the partners to repay its creditors and investors. The plaintiff helped the defendant with the financial assistance for which he received interest at exorbitant rates. It is to secure his loan outstanding to the plaintiff, the defendant had executed the alleged sale agreement but essentially as a security for the debt repayable, and there is no intention to convey the property to the plaintiff as per the aforesaid agreement of sale. Further, the defendant has invested considerable sums in developing the property and therefore, it is inferable that in ordinary course of events he never would have agreed to sell the property for the same consideration for which he purchased the property on 13.05.1999.

2.3 There is an additional written statement, in which the defendant would allege that the plaintiff was an employee of Neyveli Lignite Corporation and that he had superannuated, and that towards his terminal benefits he was paid about Rs.25,00,000/- and therefore, paying the balance sale consideration of Rs.10,000/-, was well within his financial capacity even on the date when the sale agreement was entered. Further, the defendant has renovated the suit property where he has housed as many as five financial institutions namely 'M/s Anantha Jothi Finance Corporation', 'Anantha Jothi Chit Funds', 'Anantha Jothi Bankers', 'Anantha Jothi Financiers' and 'Anantha Jothi Benefit Funds Ltd'. This apart, there was yet another institution by name 'Anantha Jothi Motor Finance' that was ready to be commenced at the relevant time. All these institutions were partnership firms in which the plaintiff's wife was a partner. The plaintiff would obtain deposits from third parties and for facilitating the firms with such deposits, he was paid agent's commission. Besides, the plaintiff had made independent deposits in Anantha Jothi Finance Corporation for which he was receiving interest. While so, when the financial institutions referred to above ran into rough weather, the plaintiff to secure the amounts due to him has obtained the aforesaid sale agreement.

2.4 The plaintiff has filed his additional pleadings by way of replication to the written statement, wherein he has stuck to his version in the plaint and denied the allegations made in the written statement.

3.1 Before the trial court, the sale agreement was marked as Ext.A1 and the suit notice dated 22.7.2002 and an earlier suit notice that was returned unserved were respectively marked as Exts.A2 and A3. The defendant has produced as many as 10 documents of which Exts.B-1 to B-3 are the receipts issued towards payment of agent's commission to the plaintiff or his son Saravanan as the case may be. To prove his case, the plaintiff has examined himself as P.W.1 and to prove the genuineness of Ext.A-1 sale agreement, he had examined an independent witness as P.W.2. For the defendant, he examined himself as D.W.1.

3.2. Appreciating the evidences before it, more particularly, the attitude of the plaintiff in relation to the agreement, the trial court has held that Ext.A-1 sale deed was not intended to be acted upon as an agreement of sale and dismissed the suit. Aggrieved by the same, the plaintiff had moved the First Appellate Court in A.S.No.58 of 2006 before the Principal District Court, Cuddalore. In its judgment reversing the decree of the trial court, the first Appellate Court has chiefly relied on Section 92 of the Evidence Act and certain portion of the testimony of D.W.1, to grant a decree in favour of the plaintiff.

4. This decree of the First Appellate Court is now under challenge. At the time of admission, this Appeal was admitted on the following substantial questions of law:

> ''1. Whether the lower appellate court was right in concluding that the plaintiff was ready and willing to perform his part of the contract?
>
> 2. Whether the lower appellate court was right in exercising the discretion under Section 20 of the Specific Relief Act on granting decree on the ground of the specific performance?''

5. The learned counsel for the appellant submitted that:

- While, the defendant does not dispute the factum of execution of Ext.A1 sale agreement, he does challenge the intention behind executing it. In this context, the finding of the First Appellate Court in relying on Section 92 of the Evidence Act, as binding on the defendant may not be an appropriate approach, since it is permissible for a party to a written agreement to plead and prove that the document is not intended to be what it purports to be, and that it bears a character different from what its nomenclature conveys. Developing the arguments further, the learned counsel argued that the plaintiff in his cross-examination, has spoken to his utter lack of knowledge about the property that he was to buy and this is not in consonance with the ordinary course of human conduct, which a reasonable man of law would expect from a purchaser of an immovable property in similar situations.

- Secondly, despite the fact that the defendant has pleaded in the written statement that the plaintiff's wife was a partner with him in running a few financial institutions, the plaintiff was keen to be silent on it in his replication. In this context, the plaintiff also admits that his terms with his wife is cordial and that they live under the same roof peacefully.

- Thirdly, when confronted with Exts.B-1 and B-2, which are the receipts issued for the payment of agent's commission, the plaintiff while admitting the same, still would deny the character of these documents. Having admitted his signature in the printed receipts, the burden shifts to the plaintiff to explain how and in what circumstances he happened to sign those receipts. But, then he responds with a firm silence.

Therefore, there is something which the plaintiff is keen to hide, and in context of a suit for specific performance, this conduct of the plaintiff will tilt the scale against him, and this should necessarily weigh with the Court while exercising its discretion in considering if the Court should decree the suit.

6.1 Countering the arguments of the appellant's counsel, the learned counsel for the respondent relied heavily on the testimony of the defendant. She brought to the notice of the Court a set of statements made by the defendant as D.W.1, which the learned counsel contended, would take the wind out of the contention that the Exhibit A.1, sale agreement was executed only for the purpose as a security for the loan obtained. Here, the following facts, as disclosed in the cross-examination of D.W.1 are critical:

(i) On 12.01.1998, the plaintiff's wife had retired from the Financial Institution, of which, the defendant was the Managing Partner. That, he had settled all the amounts due to the plaintiff's wife and his son Saravanan.

(ii) Ex.A.1 was executed with an intention to sell the property and with this intention, Rs.1.0 lakh was received on the date of the agreement.

(iii) That he had handed over the original title deed pertaining to the property to the plaintiff and that it was so handed over only with the intention that the sale deed had to be executed pursuant to the sale agreement.

(iv) That, pursuant to the complaint given to the police by the plaintiff, he (defendant) had given a statement that he would execute the sale deed in terms of Exhibit A.1. Nowhere, he claims that Ex.A.1 was obtained under duress.

(iv) That, after the closure of the business in 2001, he (defendant) had migrated to Chennai, that he had several creditors to be settled and that he had been selling most of his properties to raise necessary finances for satisfying his creditors. Thus, in these circumstances, on 23.10.2000, Ex.A.1 was executed essentially to raise finances for repayment.

In a suit for specific performance, it is not only the conduct of the plaintiff that matters, but the conduct of the defendant too has to be factored in. Therefore, if the totality of the circumstance is considered, the situation was well set for the defendant to enter into a sale agreement, as he was in difficult times financially, and there was considerable pressure on him to raise finances. In this context, it is immaterial at what the price he had agreed to sell the property, for, there is no case for the defendant/appellant that he was coerced into executing the sale agreement. Ex.A.1 needs to be appreciated in the context of its setting and its enforceability has to be considered in the backdrop of the evidence of the defendant.

6.2 Given the context, the only fact that the appellant was not adequately informed about the property he is buying may not be material, since, even according to the defendant, the plaintiff is one, who is known to the defendant and he concedes in his evidence that he had helped him in his business considerably. Further, the registered sale agreement carries with it a presumption that it is intended for the purpose that it's terms indicate and the burden is well on the defendant to establish the contra. In support of his contention, reliance was placed on a judgment rendered in the case of Vimal Chand Ghevarchand Jain and others Vs. Ramakant Eknath Jadoo, [(2009) 5 SCC 713].

7. In reply, the learned counsel for the appellant would reiterate that the property was purchased by the appellant in the year 1999 for a consideration of Rs.1,10,000/- and it is

unbelievable that he would have agreed to sell the property for the same consideration after a year. He has also made considerable improvements in the property and that the value of the property as on the date of agreement, had not been taken into account. A suit for specific performance is one in equity, and while exercising his discretion in favour of the plaintiff, every fact that affects equity, cannot be ignored. In this case, the appellant, nowhere has proved his readiness and willingness to perform his part of the contract and he has not offered any explanation, whatsoever, as to why he needed one year time to mobilise Rs.10,000/- for obtaining the sale. His testimony in cross-examination runs counter to the one in his chief examination, and these contradictions and inconsistencies are material, which would demonstrate that the conduct of the plaintiff is not that, that can support his prayer for specific performance. In support of his contention, reliance was placed on a judgment rendered by this Court in the case of M.Sankar Nadar Vs. Deva Krishnan [(2017) 1 CTC 561].

8. Both the substantial questions raised chiefly requires an examination if the conclusions arrived at by the first Appellate Court are strongly improbable.

9. Primarily, there are two aspects: First is the intention of the parties in executing the Ext.A-1 sale agreement. Second, the facts that are disassociated with that. After all the defendant's primary defence is that Ext.A-1 was not intended to be acted upon as such, even as he admits that the execution of the said sale agreement. Here, the burden is squarely on the defendant to prove the defense, and in establishing his defense, he has made easy a conclusion to be arrived with his oral evidence. Normally, an intent contrary to what a written sale agreement purports to convey might have to be gathered from the proof of the circumstances attending the execution of the said agreement. One such circumstance which the Court normally looks to is the proportion the balance consideration to be paid bears to the total consideration fixed in the agreement and the advance amount paid, and the time stipulated for performance of the contract. But, these are certain parameters which the Court may employ to ascertain the intent behind an agreement from the circumstances in which it is set. It is exactly here, the defendant has chosen not to trouble the Court when he testified in his cross examination that the sale agreement was executed only with the intention that it was performed as such. And, he has clarified it a few times during his cross-examination. The specifics are already listed in paragraph 6.1 above. Having conceded that which he disputed in pleadings, it is not given to the defendant to contend that the first Appellate Court has blundered itself in appreciating the evidence.

10. The other evidence on which the defendant has placed reliance such as the plaintiff pleading ignorance of the property that he was to buy, his wife being a partner of the firms of which the defendant was a partner, or he denying the receipt of agent's commission are only remotely connected to the core issue involved in the suit, namely to ascertain the intention behind Ext.A-1 sale agreement. So far as the adequacy of the consideration is concerned, it is for the parties to a contract to decide what the consideration should be, and as already stated it may have a bearing, if there is no direct evidence to prove the intention behind a document. And, the facts proved in the case does indicate that the defendant was in deep financial crisis and he was on a selling spree of his properties to settle his creditors. The decision to sell the suit property to the plaintiff might well have been a distress sale, and this cannot be lost sight of.

11. If the less material evidence which pose no threat to the proof of those material facts constituting the cause of action for the suit are kept a constant, it cannot be said that the first Appellate Court has decided to exercise its discretion under Sec.20 of the Specific Relief Act wrongly or inappropriately.

12. In conclusion, the appeal is dismissed and the judgment and decree passed in A.S.No.58 of 2006 by the Principal District Judge, Cuddalore dated 25.07.2007, reversing the judgment and decree passed in O.S.No.259 of 2003 by the Principal Sub-Judge, Vriddhachalam, Cuddalore District dated 24.04.2006, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To:

1.The Principal District Judge
Cuddalore.

2.The Principal Sub Judge
Vridhachalam, Cuddalore District.

3.The Section Officer
VR Section, High Court, Madras.

+1cc to M/S.C.P.Jhonson, Advocate Sr.89661
+1cc to M/S.R.Meenal, Advocate Sr.89967

S.A.No.473 of 2008

cnr[co]
srg 28/03/2019