

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2018

CORAM:

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

A.S. No.371 of 2014

R. Ganesh

.. Appellant/Plaintiff

Vs.

1. R. Kanchana

2. R. Jeevabharathi

... Respondents/Defendants

Prayer : APPEAL is filed under Order XLI-A Rules 1 and 2, read with Section 96 of CPC, against the judgement and decree dated 11.11.2013 made in O.S. No. 135 of 2008 on the V Additional District and Sessions Court, Coimbatore.

For Appellant : Mr. A. Edwin Prabakar

For Respondents : Mr. Thilageswaran

JUDGMENT

The plaintiff in O.S.No.135 of 2008, on the file of District Court, Coimbatore, which he had instituted for specifically enforcing an agreement of sale of the suit property, having lost the suit, has come forward with this appeal. Parties would be referred to by their rank before the trial Court.

2.1. The facts on which the plaintiff rests his cause of action may be stated as below :

- The suit property belongs to the defendant. On 05.06.2005 the plaintiff and the defendant had entered into an oral agreement of sale, whereby the defendant agreed to sell the suit property to the plaintiff for a total consideration of Rs.12.0 lakhs. The plaintiff paid the defendant a sum of Rs.4.0 as advance. Possession of the suit property too was handed over to the plaintiff. Subsequently, on 16.09.2005 this oral agreement was reduced to writing. However, in denoting the advance amount the plaintiff had earlier paid, the same was mentioned as Rs.1,001/- in the said written agreement. The time for performance of the contract was fixed as three months from the date of the agreement. The plaintiff has been ready and willing to perform his part of the contract but the defendant has been evading the same.

Therefore, the plaintiff caused issuance of a legal notice dated 03.01.2006 on the defendant. On 04.01.2006, the plaintiff received a notice dated 31.12.2005 from the defendant. In the said reply the defendant had taken up following two contentions, both of which are untenable:

(a) That only Rs.1,001/- was received as advance.

(b) Since the time for performance of the contract has expired, the contract itself has been terminated.

- Thereafter, on 24.01.2006, the first defendant personally approached the plaintiff and conveyed to him that she was ready to execute the sale deed, provided the plaintiff withdrew his notice dated 03.01.2006. Trusting the defendant, the plaintiff had issued a notice through his counsel on the same day, withdrawing his earlier notice dated 03.01.2006. On the following day, i.e., 25.01.2006, certain Ranganathan, the husband of the defendant visited the plaintiff, put him under threat and in fear of death, and obtained signature on the reverse side of the agreement of sale. He then left the place with the original sale agreement as well as the notice withdrawing the earlier notice dated 03.01.2006. On 07.02.2006, the plaintiff preferred a complaint to the Commissioner of Police against the first defendant and her husband. As the police did not act positively on the complaint, the plaintiff preferred a Criminal O.P. No.10151 of 2007. This came to be allowed on 11.04.2007, whereupon a case was registered in Cr. No. 785 of 2007.
- Since the conduct of the first defendant arose just suspicion, the plaintiff obtained an encumbrance-certificate of the suit property, and it revealed that the first defendant had already executed a sale agreement dated 27.02.2006 in favour of her son, the second defendant Jeeva Bharathi.
- In these circumstances, the plaintiff caused issuance of a second legal notice dated 20.07.2006, requesting the defendants not to interfere with his peaceful possession of the suit property, and required the first defendant to cancel the sale agreement and execute a Sale deed. This was responded to by the defendants Vide reply dated 03.08.2007 where they alleged that the plaintiff was inducted only as a tenant, and that he had defaulted in paying the rent from January, 2007, and sought eviction of the plaintiff from the suit property, both on grounds of willful default in payment of rent, and for demolition and own occupation of the second defendant. This was suitably replied by the plaintiff as per his rejoinder dated 12.08.2006. Thereafter, defendants laid RCOP No.151 of

2006 for eviction on the aforesaid two grounds.

It is on the above facts and circumstances, the plaintiff has laid the suit for specific performance.

2.2 In the written statement of the first defendant (which is adopted by her son, the second defendant), the allegations in the plaint are substantially denied, but not the execution of the agreement of sale on which cause of action for the suit was found. It was further pleaded:

- In October, 2004, the plaintiff was inducted as a tenant by the first defendant under an oral lease agreement, on a monthly rent of Rs.1,500/-; he had paid Rs.15,000/- as rental advance. Both, the payment of deposit amount of Rs.15,000/- as well as the subsequent payment of rent were used to be recorded in a pocket book which the plaintiff maintained.
- Be that as it may, the second defendant proposed to do his higher studies abroad, and the defendants were desperate for finances, for which purpose the defendants' family required about Rs.15.0 lakhs. It is hence they chose to sell the suit property. The plaintiff, on coming to know of the defendants' intention to sell the property conveyed his willingness to buy the same and accordingly an agreement was entered into, on 16.09.2005. The consideration agreed to be paid was Rs.12.0 lakhs, towards which the plaintiff had paid only Rs.1,001/- as advance amount. The plaintiff had agreed to pay the balance consideration within three months from the date of sale. Given the context, the time stipulated for performance of the contract was one of the essential and material terms of the contract. The agreement was prepared in duplicate and one copy was left with the plaintiff's wife and other with the first defendant's husband. The plaintiff was also entrusted with the original agreement, leaving a copy with the defendant.
- Be that as it may, the plaintiff proposed to raise a loan on this property for which purpose the first defendant had delivered a copy of her title deed along with the encumbrance certificate. The loan however, was not sanctioned, and consequently the plaintiff was not in a position to mobilise the requisite funds. As the first defendant's concern to raise requisite funds to finance her son's travel abroad became acute, she sent a SMS message on 23.12.2005 to the plaintiff, and also followed it with a letter dated 31.12.2005. He however, did not reply this notice. In this context, the allegation in the written

sale agreement as referred to above, preceded by the oral agreement is false. So also was the allegation that the plaintiff had paid a sum of Rs.4.0 as advance.

- The plaintiff had been a tenant since June, 2005, and the first defendant had never delivered any possession of the property pursuant to the sale agreement. Even post-sale agreement, the plaintiff continued to be a tenant under the first defendant and paid her the rent payable. It is in these circumstances, following exchange of notices in January, 2006, when the plaintiff was found to be so circumstanced that he could not raise the requisite sale consideration as agreed under the agreement of sale, a peaceful negotiation commenced for an amicable cancellation of the sale agreement. On 24.01.2006, this took place in the presence of certain Selvaraj, Ganesh Kumar and Rathinasamy. In that meeting, both the plaintiff and the first defendant agreed to cancel the agreement of sale. The first defendant also agreed to refund Rs.1,001/-, and on his part the plaintiff too agreed to withdraw the legal notice dated 03.01.2006, and thereafter, the sale agreement was cancelled by the plaintiff making necessary endorsement in the sale agreement, with his wife attesting it, and the same was delivered to this defendant.
- While the first defendant was under the impression that the issue has been settled peacefully, the plaintiff revived the controversy when he lodged a complaint before the police levelling accusation against the defendants that his endorsement cancelling the sale agreement was obtained under duress. As the conduct of the plaintiff did not inspire confidence, the first defendant executed a sale deed in favour of her son.
- In the meantime on 10.03.2006, the first defendant's husband Ranganathan came to know that the plaintiff, when he took some efforts to obtain the loan from the bank, had produced certain sale agreement with the bank where the signatures in different pages did not reconcile with each other. The first defendant's husband thereupon probed into the matter, perused the relevant papers and found that the plaintiff was busy fabricating building plans, forging Corporation seal etc. He also had changed the sale consideration from Rs.12.0 lakhs to Rs.16.0 lakhs, and altered the advance amount from Rs.1,001/- to Rs.4.0 lakhs. The first defendant was therefore, constrained to prefer a police complaint against the plaintiff, and then approached this Court in CrI.O.P. No.13642 of 2006 in which she obtained an order dated 21.03.2007, directing the police to register a case against the plaintiff, which they

eventually did.

- It is true that the defendants had filed RCOP No.151 of 2006 for eviction. However, no possession was granted to the plaintiff under the agreement of sale.
- The plaintiff has never been ready and willing to perform his part of the contract, that his conduct hardly befits the standards that law prescribes and expects a litigant seeking a discretionary relief in equity.

2.3 In the defendant's additional written statement filed, it is essentially contended that the defendants have challenged the FIR laid against them in Crl. O.P. No.4324 of 2008 and the same came to be allowed and the FIR was thereby quashed by an order of this Court dated 01.11.2011.

3.1 On the aforesaid pleadings, the trial court has raised as many as eight issues, of which the second issue pertains to the alleged oral agreement which the plaintiff has asserted and the first defendant has denied. Issues 1 and 3 relate to the genuineness of the endorsement of the cancellation of the sale agreement. The 4th issue was on plaintiff's entitlement to seek specific enforcement, while the 5th issue was on plaintiff's alleged readiness and willingness to perform his part of the contract.

3.2 Before the trial court the plaintiff has examined himself as P.W.1, and he has examined another Selvaraj as P.W.2 to prove the payment of advance amount of Rs.4.0 lakhs as pleaded by the former. He has produced Ex.A-1, a copy of the sale agreement, Ex.A-2 his suit notice, Ex.A-3 notice issued by the defendant to the plaintiff. The defendants, for their part have examined the first defendant as D.W.1 and also her husband. She further examined a certain Selvaraj (who is different from P.W.2), to prove the negotiation for cancellation of the sale agreement, which she has asserted as having taken place on 24.01.2006. Besides, she has also examined certain Raghavan, counsel for Bank of India to speak about the alleged fabrication of documents by the plaintiff.

3.3 The trial court in its judgment has entered a finding disbelieving the oral agreement of sale dated 05.06.2005 as the same was not recited in the subsequent written agreement in Ext. A-1 = Ext. B-1. It also disbelieved the plaintiff's contention that he had paid Rs.4.0 lakhs as advance since the same was not reflected in the written sale agreement. Besides, the trial court has also found that the plaintiff did not prove that the said fund was available with him on the date on which the plaintiff claimed to have given the advance amount. Though a

specific issue if the plaintiff was put in possession pursuant to the sale agreement was not raised, the trial court addressed the issue in its judgement and dismissed this allegation of the plaintiff. So far as the cancellation of sale agreement Vide the endorsements made in Ext.B-1 agreement and separately marked as Ext.B-5 (the endorsement made in the copy of Ext.B-1 agreement is marked Ext.B-6) goes, the trial Court decided against the defendants, for which purpose it found the evidence of D.W.1 more reliable. On the same point, the trial court has also taken into account: (a) that the plaintiff has not chosen to deny his as well as his wife's signatures in the document of cancellation; (b) that plaintiff has preferred the police complaint alleging that the cancellation was procured under duress after an inexplicable delay of 13 days; and (c) that the plaintiff has failed to examine his wife. After relying on the judgment in Saradamani Kandappan vs. Rajalakshmi and Others [2011 (4) CTC 640] and MMS Investment and Others vs. Veerappan and Others [(2007) 3 MLJ 608 SC], it has held that the suit itself is barred by limitation. The trial court found that the plaintiff does not deserve a decree for specific performance and dismissed the suit. This decree is now in challenge.

4. Points for consideration:

1. Was the cancellation of sale agreement evidenced by Exts.B-5 and Ext.B-6 (cancellation endorsement made in the copy of Ext.B-1) genuine?
2. Whether the plaintiff's conduct entail him the right to seek specific enforcement Ext A-1 = B-1 sale agreement?
3. Was the Plaintiff ready and willing to perform his part of the contract?

5. The learned counsel for the appellant argued :

- While the trial court has held that there never was an oral agreement to sell, the same stands disproved when the first defendant has admitted it during her cross examination, when she was examined as P.W.1 in the RCOP No.151 of 2006. He has further argued that as alleged by the plaintiff, there was a meeting on 25.01.2006 which the defendants admit, and it instantly creates a circumstance that the notice issued by the plaintiff withdrawing the suit notice could not have been given on his own volition.
- Secondly, the fact that sale agreement had not been cancelled in the manner the defendants allege if supported by the fact that the plaintiff, behaved the way any reasonable person of ordinary prudence would behave in the ordinary course of human conduct when he preferred a police complaint on 07.02.2006, would mean that the cancellation

of sale agreement. That 13 days intervention in lodging the complaint may be relevant in a criminal prosecution but not so much in a civil litigation where evidence have to be assessed based on rule of probability.

- Thirdly, the fact that the FIR was subsequently quashed does not again mean that the cancellation was not obtained under duress, and as it does not, by itself, make the duress fact improbable.

5.2 The learned counsel further argued that it is now an admitted fact that the first respondent/first defendant has laid RCOP No. 151 of 2006 for eviction, that it came to be ordered on 31.03.2010, against which the plaintiff has unsuccessfully preferred a Rent Control Appeal as well as a further revision before this Court and ultimately lost even before the Supreme Court in SLP No. 13757/2017 on 05.05.2017. As he was distracted entirely in the Rent Control proceedings, he could not properly institute the present suit without loss of time, and this cannot be viewed exclusively against the plaintiff but must be appreciated in combination with other facts on record. If all the attending circumstances that lie outside the sale agreement which distract the appreciation of rights flow from the agreement of sale are eliminated, then it would establish that the plaintiff indeed is entitled to a decree for specific performance. Now it is an admitted fact that the plaintiff was put in possession as a tenant even prior to the sale agreement and when once a sale agreement was entered, it is only natural that the possession under a contract of lease merged with a sale agreement, and it becomes a possession under sale agreement. This was precisely a reason why he did not pay the rent.

6. Per contra, counsel for the respondents/ defendants would argue that :

- Even under Ext.A3 letter dated 31.12.2005, the defendants had indicated to the plaintiff that the sale agreement had been terminated. And, under Ext.B-5 and Ext.B6 dated 24.01.2006, a formal endorsement was made in the sale agreement terminating the contract based on the mutual negotiation. This would imply that latest by 24.01.2006, the sale agreement had been cancelled. Therefore, the plaintiff cannot in a false sense of comfort keep alive the sale agreement to generate a cause of action. Significantly, the plaintiff has not chosen to challenge Ex.B5 and Ex.B6, which according to him have been obtained under duress.
- Secondly, according to him he issued a suit notice on 20.07.2006 , the suit was not laid immediately thereafter but the plaintiff waited almost 1½ years to institute the

suit. Dehors his contention about the genuineness of Ex.B5 and Ex.B6, at no point of time before the Court has he demonstrated his readiness and willingness to perform his part of the contract in the manner law demands.

- So far as possession goes, it is now not in dispute that in the Rent Control proceedings the defendant has suffered successive orders of eviction and the plaintiff also lost his final hope to achieve some success even before the Hon'ble Supreme Court. When the courts have already treated his possession as one pursuant to tenancy agreement, it is impermissible for him to claim right founded on part performance of a sale agreement. Secondly, Ex.A1 = Ex.B1 nowhere refer to handing over the possession under the sale agreement. And, in the Rent Control proceedings, his possession was not considered to be one pursuant to part performance of contract.
- The fact that he has paid an advance amount of Rs.4.0 lakhs is without proof, and his conduct in asserting possession under the sale agreement and his overall conduct during the suit, does not project him as a candidate worthy for court's consideration for grant of a decree under equity jurisdiction.

7. The pleadings in this case provides a gripping storyline. The endeavour is to examine the evidence to ascertain whose evidence preponderates the probability of being the most inspiring storyline as to win the confidence of this Court.

8.1 Primarily this case is not about enforcing a contract of sale (Ext.A-1 = B-1), but is about ascertaining if a contract at all is available in order its specific enforcement can be sought. It is an admitted fact that plaintiff's legal relation to the defendant commences even prior to Ext.A1 agreement when he became her tenant of the suit property. So far as the sale agreement is concerned, the defendants did not dispute its execution. It is in this scenario, the plaintiff admits that on 24.01.2006, the contract came to be terminated under Exts.B-5 and B-6 (all endorsements made on the reverse side of the agreement, or its copy, as the case may be). This document is signed by the plaintiff and his wife. While, the defendants would plead that there was consensus ad idem in plaintiff opting out of the sale agreement and chose to cancel it, the plaintiff would contend that it was obtained by duress. Therefore, unless the plaintiff is able to cross this obstacle on his way to seek remedy, he might not be even able to maintain the suit, since there would not be any agreement for him to rest a cause for the ongoing action. Here this court finds that, since the cancellation of sale agreement replaces the very agreement, the

plaintiff should have had the cancellation document in Ext.B-5 and Ext.B-6 cancelled through court as per Section 31 of the Specific Relief Act, on the ground that the same was vitiated for want of free consent in executing it. This he chose not to do. Hence, Ext. B-5 (and Ext. B-6) survives, and consequently Ext.B-1 = Ext.A-1 agreement is no longer there for the plaintiff to build a cause of action on that.

8.2 Even de hors it, the plaintiff has not even examined his wife, who incidentally had joined the plaintiff in signing both Ext.B-5 and Ext.B-6. Nor did he react in a way a person of ordinary prudence would have reacted if document was obtained under duress. He preferred a police complaint after 13 days of the event, which raises just suspicion about his conduct.

9. This point having clinched the issue, this court need not travel beyond. However, since it is a first appeal, and the facts have not become final, this Court considers it appropriate to it is necessary to deal with some of the other aspects raised.

10. Before delving on them, the foundational principles of law which guides this Court in granting specific performance/enforcement of an agreement of sale (which hardly requires reiteration) may be briefly stated: The soul of equity jurisdiction is that he who seeks equity should do equity. It must not be forgotten that fairness and equity are inseparables, and he who breaches rules of fairness does not qualify for a relief in equity. Here this Court finds the plaintiff positioning himself on the wrong side of fairness:

- First, when Ext.B-1, a written sale agreement on which the cause of action for the suit is found, stipulates that the advance amount paid under the agreement was a bare Rs.1,001/-, he insisted in the suit that Rs.4.0 lakhs had been paid. This is plainly impermissible under Sec.91 of the Evidence Act, which prohibits parole evidence to prove the content of the terms of a contract.
- When plaintiff's contention as to the genuineness of Ext.B-5/B-6 is negatived, his attempt in putting forth the said contention itself would taint his intention with unfairness.
- On his readiness and willingness to perform his part of the contract, the plaintiff had failed to demonstrate it before the Court.

11. To conclude, there is no merit in the appeal, and the same is dismissed with costs, and the judgement and decree of the V Additional District and Sessions Court, Coimbatore, dated 11.11.2013 made in O.S.No.135 of 2008 is hereby confirmed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To:

1. The V Additional District and Sessions Judge,
Coimbatore.

2.The Section Officer, VR Section, High Court, Madras.(2 copies)

+1CC TO MR.THILAGESWARAN, Advocate sr. no.45097

A.S. No.371 of 2014

GN(16.11.2018)



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