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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.35 of 2015
and M.P.No.1 of 2015

1. M.Subramaniam (Died)
2. E.Kasthuri
3. S.Mahendiran
4. M.Ravi
5. S.Selvakumar
6. S.Baskaran .. Appellants/Defendant
Appellants 2 to 6 brought on record as LR's of the
deceased sole appellant vide Court order dated 10.03.2017
in CMP Nos.19936 to 19938 of 2016 in S.A.No.35 of 2015

Vs.

T.Abaranji Ammal .. Respondent/Plaintiff

* * *

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 26.11.2014 made in A.S.No.32 of 2013 on the file of the Principal District Court, Vellore, confirming the judgement and decree dated 23.08.2011 made in O.S.No.96 of 2011 on the file of the Subordinate Court, Vellore.

* * *

For Appellants : Mr.S.V.Jayaraman, Senior Counsel
for Mr.K.M.Ramesh

For Respondent : Mr.V.Ramesh
for M/s.Sampathkumar Associates

J U D G E M E N T

This Second Appeal is filed by the defendant challenging the judgement and decree dated 26.11.2014 made in A.S.No.32 of 2014 on the file of the Principal District Court, Vellore, confirming the judgement and decree dated 23.08.2011 made in O.S.No.96 of 2011 on the file of the Subordinate Court, Vellore.



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2. The case of the plaintiff is that the defendant agreeing to sell the suit property entered into an agreement dated 24.11.2004 for a sum of Rs.5,25,000/- with her and received an advance of Rs.5,00,000/-. The defendant undertook to execute and register the sale deed at the time of receiving the balance of the sale consideration. It was agreed between the parties that time for performing their respective obligation under the contract was three years. Though the plaintiff was ready and willing to perform her part of the obligation by paying the entire sale consideration and get the document executed and registered at the time of entering into the agreement itself, the defendant wanted to have three years time. Since the defendant is not forthcoming to execute the sale deed, the plaintiff issued a notice on 19.09.2005 calling upon him to perform his part of the obligation, which was responded to by the defendant via reply notice dated 30.09.2005, wherein, the defendant stated that since his son incurred loss in the business, he executed the agreement to sell for a loan of Rs.5,00,000/- as security, and it was not intended to be acted upon. Hence, the plaintiff filed the suit for specific performance.

3. Resisting the suit, the defendant filed the written statement denying all the averments in the plaint. The defendant had also stated that he was a Electricity Board employee and he never intended to sell the suit property to the plaintiff. It is stated by him that his son one Ravi incurred loss in business and his partner one Shankar took the defendant and his son Ravi to the plaintiff for getting a loan and for the said loan transaction, as a security, he entered into the subject agreement with the plaintiff, who was a Financier, and it was not intended to be acted upon. It is also stated in the written statement that he was regularly paying the monthly interest to the plaintiff, which he continued, even after filing the suit and mediation was conducted on November, 2006 for settlement, which did not materialise. Hence, he sought for dismissal of the suit.

4. Before the trial court, the plaintiff examined herself as P.W.1 and examined P.Ws.2 and 3, and also marked Exs.A.1 to A.3. On the side of the defendant, the defendant examined himself as D.W.1 and he has not chosen to mark any document.

5. The trial court, upon considering the materials on record, decreed the suit, which was confirmed by the lower appellate court. Hence, the present Second Appeal is filed.

6. At the time of admitting the appeal, the following substantial questions of law were formulated for consideration by this Court :



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"(i) Whether the respondent after paying the loan amount of Rs.5,00,000/- to the appellant and get a sale agreement for Rs.5,25,000/- is fair under Specific Relief act. The balance sale consideration amount of Rs.25,000/- would be paid on or before three years is fair or not ?

(ii) Whether the suit transaction is an unconstitutional (sic - unconscionable) bargain and whether the suit can be decreed based on the same ?

(iii) Whether the sale agreement is true one or not and it is executable one or not ?"

7. Heard both sides and perused the materials on record.

8. The subject matter of the suit for specific performance is a property in S.Nos.508 and 509, Housing Board Phase II, Sathuvachari Village, Vellore. An agreement to sell was entered into between the appellant/defendant and the respondent/plaintiff on 24.11.2004. The consideration agreed upon was Rs.5,25,000/- and an amount of Rs.5,00,000/- was received as advance. The balance was to be paid when the sale deed was executed. Time for completion of the transaction was three years. A legal notice was issued under Ex.A.2, dated 19.09.2005. In response, a reply was sent on 30.09.2005. In the reply notice, the appellant/defendant has stated that the agreement was intended to be a security for the loan borrowed.

9. In the view of the trial court, there was nothing in the agreement to indicate that it was executed merely by way of security and accordingly, decreed the suit. A finding of fact was arrived at to the effect that the respondent/plaintiff was ready and willing to perform the agreement. The lower appellate court also confirmed the decree.

10. To show the readiness and willingness the respondent/plaintiff had deposited the balance of sale consideration before the trial court. It is argued on behalf of the appellant/defendant that the defendant's son ended up in loss in his business and that he was in need of money. Hence, as requested by his son Ravi and one Shankar, Ex.A.1 was executed and the same was registered. As Ex.A.1 was executed not intending to sell the suit property, the appellant/defendant prayed for dismissal of the suit.



11. Admittedly, the suit property belonged to the defendant. He admitted the execution of Ex.A.1 and handing over of the original documents to the respondent/plaintiff. When it is alleged that Ex.A.1 was executed only for the purpose of security for a loan transaction, the burden is on the appellant/defendant to prove the same. In the reply notice Ex.A.3, the appellant/defendant has stated that his son S.Ravi incurred a heavy loss in the business and had to settle the debts. Therefore, he approached one Shankar, his partner, who in turn, took him to the respondent/plaintiff and the respondent/plaintiff readily agreed to pay the amount and got Ex.A.1 executed only as a security. The son of the appellant/defendant Ravi or his partner Shankar were not examined in this regard. In the written statement, the appellant/defendant had stated that it was only a loan transaction and that he had been paying interest regularly for the loan amount. A perusal of Ex.A.3 reply notice, written statement and the evidence of D.W.1 would go to show that the appellant/defendant was not consistent in his stand. Originally, he had stated that he borrowed Rs.5,00,000/- and executed an agreement to sell, instead of mortgage deed. Later, he had stated that he had paid interest regularly for the amount borrowed and in the written statement, it is stated that the execution of Ex.A.3 is only sham and nominal. The appellant/defendant, as D.W.1., had deposed that he had never paid interest for the amount borrowed. Thus, the incoherent evidence of D.W.1 had operated against him in the suit being decreed.

12. Mr.S.V.Jayaraman, learned Senior Counsel for the appellant/defendant argued that when it is only a loan transaction, the suit ought not to have been decreed. However, this Court is of the view that the plea of the appellant/defendant is inconsistent in this regard, as in the reply, he had stated that his son suffered loss in the business, hence, he had to borrow money from the plaintiff and that he had been regularly paying interest. However, it is to be noted that neither the son of the defendant nor his partner was examined to prove the case of the appellant/defendant. There is also no scrap of paper filed to prove the payment of interest as alleged by him.

13. The learned Senior Counsel for the appellant/defendant submitted that the specific performance of agreement need not necessarily be decreed merely because it is lawful to do so, as it is always the discretion of the Court. He further submitted that the property is worth more than Rs.15,00,000/- and the



price agreed is also very low. Assailing the submission, the learned counsel for the respondent/plaintiff urged that escalation of prices alone could not be a justification to refuse specific performance.

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14. The jurisdiction of the Court to decree specific performance is discretionary. Yet the discretion of the court is not arbitrary, but is on "sound and reasonable" to be guided by judicial principles. Sub-section (2) of Section 20 contains a stipulation of those cases, where the court may exercise its discretion not to grant specific performance. It is relevant to refer to Section 20(2) of the Specific Relief Act, which reads as follows :

"20. Discretion as to decreeing specific performance -

(1) XXXX

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:-

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.-Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).



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Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract."

15. Performance of contract involving some hardship on the defendant, which he did not foresee, while non-performance involving no such hardship on the plaintiff is one of the circumstances, in which, the Court may properly exercise discretion not to decree specific performance suit arbitrarily. Ordinarily, the respondent/plaintiff is not to be denied the relief of specific performance on account of phenomenal increase in price during the pendency of litigation. As a general rule, only the respondent/plaintiff alone cannot be allowed to have the entire benefit of the increase in value of the property pending lis. The test is to see who is the defaulting party. Only the totality of the circumstances have to be seen. Inadequacy of consideration or the fact that the contract is onerous to the defendant is not sufficient to deny the relief of specific performance.

16. In the instant case, execution of the agreement to sell is not disputed. The consistent case of the appellant/defendant is that it was only a loan transaction. However, there is no evidence to substantiate his case. The defendant had not even examined his son or his partner to speak about the same. There is no piece of paper produced evidencing payment of interest, though pleaded inconsistently. Even so far as escalation is concerned, there is no pleading or relevant material produced before the Court to take judicial note of the fact before exercising discretion. The trial Court as well as the appellate court had comprehensively analysed the pleading and evidence of the parties and held that the respondent was ready and willing to pay balance price. There is a distinction between readiness to perform and willingness to perform the contract. While readiness may mean the capacity of the plaintiff, including financial position, willingness would refer to the conduct of the parties. In the present case, the appellant neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather the plea taken that it was intended to be a mortgage deed and that it was never intended to be acted upon is found to be wholly untenable.



17. For the above reasons, the questions of law are answered against the appellant/defendant *and the Second Appeal is dismissed. The judgment and decree of the Courts below for specific performance shall stand confirmed. No costs. Consequently, pending application is closed.

Sd/-

Assistant Registrar (CS-VI)

Dated:19/04/2018

*Corrected as per order
of this Court for Being
mentioned dated 03/08/2018 and
made in S.A.No.35/15

Sd/-

Assistant Registrar (CS-VI)

Dated:14/08/2018

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge, Vellore.
2. The Subordinate Judge, Vellore.

To be substituted
in the place of
order already
despatched on
08/05/2018

Copy to:

1 The Section Officer, V.R. Section,
High Court, Madras. (2 copies)

+1cc to Mr.SAMPATHKUMAR & ASSO. Advocate, S.R.No.24836

+1cc to Mr.K.M.RAMESH, Advocate, S.R.No. 24757

S.A.No.35 of 2015

SY(CO)

TR(25/04/2018)

SRG 14/08/2018