

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.02.2018

CORAM :

THE HONOURABLE MR.JUSTICE D. KRISHNAKUMAR

Second Appeal Nos. 465 & 466 of 2015
and
M.P. Nos. 1 & 1 of 2015

Vasanthi .. Sole Appellant
in S.A.NO.465/2015&Plaintiff in O.S. No.60/2012.
.. 3rd Appellant
in S.A.NO.466/2015 /3rd Defendant in O.S.No.73/2010.

1. Saraswathy .. 1st and 2nd Appellants
2. Dharmalingam in S.A. No. 466/2015/Defendants 1
& 2 in O.S.No.73 of 2010.

vs.

Annamalai .. Respondent in
both S.As/Defendant in
O.S.No.60/2012 & Plaintiff in O.S.No.73/2010.

PRAYER in both SAs: These Second Appeals are filed under Section 100 C.P.C., against the common Judgment and decree passed in A.S.Nos. 9 & 10 of 2013 dated 14.11.2014 on the file of Additional District Judge, Dharmapuri, reversing the common Judgment and Decree passed in O.S.No. 73 of 2010 & 60 of 2012 dated 15.02.2013 on the file of Subordinate Judge, Harur.

For Appellants Mr. V. Nicholas in both SAs
For Respondent Mr. S.C.Vishwanth in both SAs

C O M M O N J U D G M E N T

These Second Appeals arise out of the common Judgment and decree passed in A.S.Nos. 9 & 10 of 2013 dated 14.11.2014 on the file of Additional District Judge, Dharmapuri, reversing the common Judgment and Decree passed in O.S.No. 73 of 2010 & 60 of 2012 dated 15.02.2013 on the file of Subordinate Judge, Harur.

2. Brief facts of the cases are as follows :-

The respondent Annamalai and appellant Vasanthi have filed the suits in O.S. Nos.73/2010 and 60/2012. The appellant Vasanthi has filed the suit in O.S. NO.60 of 2012 for

declaration and permanent injunction, in respect of items A and B schedule properties. The case of the appellant in O.S. No. 60 of 2012 is that the A-schedule property belongs to one Ponnusamy and on the basis of Power of Attorney dated 17.07.2009 in the name of one Saraswathi, she sold the suit A-schedule property to the plaintiff under a registered sale deed dated 13.09.2010. The B-schedule property originally belonged to one Kariyamalai, w/o. Ponnusamy. After her death, her husband and daughter Selvi, executed a Power of Attorney dated 13.10.2004 in the name of one Saraswathi. The said Saraswathi sold the B-schedule property to the plaintiff. Therefore, she is in possession and enjoyment of the suit properties, as she is the owner thereof. The other suit in O.S. No.73 of 2010 has been filed by the respondent Annamalai, for specific performance of an agreement dated 08.01.2010 and the endorsement therein dated 09.06.2010, declaring that the sale deed dated 17.08.2010 between the appellants and the respondent as not valid and not binding on him and for permanent injunction in respect of items A and B properties.

3. For the sake of convenience the ranking is followed as in O.S. No.73 of 2010. The defendants have filed written statement, denying the contention of the respondent/plaintiff, stating that the defendants 1 and 2 have entered into an agreement dated 08.01.2010 with the plaintiff, for a sum of Rs.4,80,000/- and received a sum of Rs.4,70,000/- as advance and agreed to execute the sale deed within six months on receipt of the balance of Rs.10,000/-. Subsequently, defendants 1 and 2 approached him on 09.06.2010 and demanded an additional amount of Rs.2,00,000/- towards the sale agreement. The plaintiff agreed to pay an additional amount of Rs.1,95,000/-. Accordingly, the defendants 1 and 2 received the said amount and made an endorsement in the suit agreement. They agreed to execute the sale deed on receipt of Rs.10,000/-. But, the defendants 1 and 2 sent a detailed notice on 20.08.2010 cancelling the agreement entered between them and the plaintiff. Pursuant to the said notice, the appellants have created the sale deed dated 17.08.2010. The other contention of the defendants is that the plaintiff has not paid the balance amount of Rs.10,000/- within the six months period. This itself shows that the sale agreement is not genuine and it is a security for the loan amount borrowed by the defendants 1 and 2.

4. Both the suits, O.S.No. 73/2010 and 60/2012 were tried together. The trial Court framed necessary issues based on the pleadings. During the course of trial, the plaintiff in O.S. No.73/2010 examined himself as P.W.1, along with two other witnesses and marked Exs.A1 to A16. On the side of the defendants, the 2nd defendant in O.S No.73/2010 examined himself as D.W.2 along with two other witness and marked documents as Exh.B1 to B9. After adducing oral and documentary evidences of

both sides, the trial court dismissed the suit in O.S. No.73/2010 and decreed the suit in O.S. No. 60/2012 by declaring that the plaintiff is entitled to the suit property and granting permanent injunction in favour of the plaintiffs. The trial court held that the respondent therein had no intention to purchase the suit property within the period of six months and also the endorsement in Ex.A2 is not genuine and the same is created only for the purpose of the suit. Challenging the judgment and decree, the plaintiff/ respondent filed appeals in A.S. No. 9 and 10 of 2013 before the Additional District Judge, Dharmapuri.

5. The lower Appellate Court after formulating necessary points for determination and on the basis of the depositions and evidences, accepted the claim of the appellant and reversed the judgement and decree passed by the trial court. The appeals suits were allowed holding that since the suit agreement entered between the parties is genuine, the endorsement under Ex.A2 executed by the defendants is to be considered. Further, it is held that the document under Ex.A3 sale deed dated 17.08.2010, has been executed by the defendants 1 and 2 in favour of the 3rd defendant, who is the daughter of the 1st and 2nd defendants. Challenging the said judgment and decree, the plaintiff in O.S. No.60/2012 and the defendants in O.S. No.73 of 2010 have preferred the Second Appeals before this Court.

6. The following substantial questions of law have been framed before this Court in S.A. No. 465 of 2015 :-

- a) When the vendors of the plaintiff had right, title and interest in the suit property and as such the sale deed executed by them in her favour is valid in law whether the lower appellate court is correct in declining to grant the relief to her ?
- b) When the findings of the lower appellate court are contrary to the evidence and as such perverse whether the judgment and decree of the lower appellate court reversing the well reason and sound judgment of the trial court is sustainable in law ?

The following substantial questions of law have been framed before this Court in S.A. No. 466 of 2015 :-

- a) When the plaintiff has not come to court with clean hands by falsely claiming that possession of the suit property has been handed over to him which is contrary to the recitals in the suit agreement whether the lower appellate court is correct in granting the discretionary relief of specific performance to him ?

- b) When the plaintiff failed to discharge his burden to prove that the agreement was executed only to purchase the suit property and that an additional consideration was paid subsequently whether the lower appellate court is correct in upholding the claim of the plaintiff ?
- c) When the findings of the lower appellate court are contrary to the evidence and as such perverse whether the decree for specific performance in favour of the plaintiff is sustainable in law ?

7. The learned counsel for the appellants would submit that when the appellants/ defendants have denied the receipt of the additional amount of Rs.1,95,000/- and the endorsement made under Ex.A2, the burden is on the respondent/ plaintiff to establish the payment of the additional amount and the execution of Ex.A2. But the respondent/ plaintiff has miserably failed to prove the said aspect which goes without saying that Ex.A2 is a created one. Therefore, it is seen that the respondent/ plaintiff has played fraud and he is not entitled for the relief of specific performance. Further, it is the case of the appellants/ defendants that in the sale agreement there is no recital that the possession has been handed over to the respondent, at the time of sale agreement. Therefore, in the absence of proof that the respondent is in possession of the property, claiming for equitable right of specific performance shows that the respondent/ plaintiff has approached the Court with unclean hands. Further it is submitted that the respondent herein has no proof to show that he is ready and willing to perform his part of contract within the time stipulated under Ex.A1. From the above said contentions, the questions of law have been framed by this Court.

8. Further, the learned counsel for the appellants, in support of his contentions relied upon the decision in the case of Lourdu Mari David & Ors. vs. Louis Chinnaya Arogiaswamy & Ors., reported in AIR 1996 SC 2814 (1), wherein the Hon'ble Supreme Court has held that, when the plaintiff approaches the Court with unclean hands or with false case, he is not entitled for the discretionary relief of specific performance. The other decision in the case of G. Anbazhagan & anr. vs. G. Manoharan (deceased) & Ors., reported in 2013 (6) CTC 624, confirms the same. Also, in the case of Thiruvengadam Pillai vs. Navaneethammal & anr., reported in 2008 (4) SCC 530, in paragraph 19, the Hon'ble Supreme Court has observed that, where the authenticity of sale deed is disputed, the burden of proof is on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative.

9. In reply to the contention of the appellants, the learned counsel for the respondent would submit that the appellants had admitted that the sale agreement was executed by the appellants in favour of the respondent herein and has marked as Ex.A1 and has also received the major sale consideration. The other question of law raised by the appellants in the Second Appeal is that, time is the essence of contract and no equitable relief should be granted. Admittedly, six months time has been fixed to execute the sale deed and the respondent herein had also given major sale consideration. Therefore, time is not the essence of the contract on the facts of this case is concerned. With regard to the possession of the respondent in the suit property is concerned, the respondent relies upon Ex.A16, which is a report of the Tahsildar dated 18.12.2012 for the application claiming patta by the 3rd appellant. The relevant portion of the report reads as follows :-

“ ” ஒப்பந்த பத்திரம் செய்த பிறகு திருமதி சரஸ்வதி என்பவர் பாலாஜி மனைவி வசந்திக்கு புல எண் 24/4பி பரப்பு, 0.52.5 ஹெக்டேர் நிலத்தை ஆவண எண் 3587/2010 நாள் 13.09.2010-ன் படியும் ப ,ல எண் 74/6 பரப்பு, 0.680 ஹெக்டேர் நிலத்தை ஆவண எண் 3221/2010 நாள் 17.08.2010-ன் படி கிரயம் கொடுத்துள்ளார். மேற்படி நிலங்கள் தணிக்கையின் போது அண்ணாமலை அனுபவத்தில் உள்ளது. இந்நிலப் பிரச்சனை தொடர்பாக அருர் சார்ப, நீதிமன்றத்தில் ஒ.எஸ். எண். 73/2010 வழக்கு நலுவலையில் உள்ளது. நீதிமன்ற தீர்ப்பின் படி நடவடிக்கை மேற்கொள்ளப்படும் என மனுதாரருக்கு தெரிவிக்கப்படுகிறது. ”

Based on the above report, it is evident that the respondent is in possession of the suit property.

10. The learned counsel for the respondent relies upon the decision of the Hon'ble Supreme Court in the case of Nagindas Ramdas vs. Dalpatram Locharam, reported in 1974 (1) SCC 242, with regard to the admission in pleadings. An other decision relied by the respondent is, the case of Chand Rani vs. Kamal Rani reported in AIR 1993 SC 1742. Therefore, the learned counsel for the respondent submitted that in the light of the facts and circumstances of the case and the decisions relied upon, the judgement and decree passed by the court below is perfectly valid in law.

11. From the above said facts, it is found that the appellants admit that the sale agreement, Ex.A1 was executed between the appellants 1 & 2 herein and the respondent herein; an advance amount of Rs.4,70,000/- was paid and the balance amount of Rs.10,000/- has to be paid within a period of six months from the date of agreement dated 08.01.2010. However, the additional sale consideration received and endorsement made in the sale agreement under Ex.A2 dated 09.06.2010 is disputed. The said endorsement made in Ex.A2 with an intention was a

created one by the respondent. Subsequent to the legal notice, Ex.A4 was issued by the appellants, cancelling the sale agreement. On receipt of the legal notice, reply notice was sent by the respondent. Therefore, the trial court has dismissed the suit by holding that the respondent herein has not expressed his intention to pay the balance amount of Rs.10,000/- within the six months time, nor communicated his intention to execute the sale deed within the time fixed in the sale agreement. After the notice issued by the appellants, reply notice has been sent to the appellants by the respondent. Therefore, the respondent has not shown any bonafide to execute the sale deed within the six months time, as fixed in the sale agreement entered between the parties. As per the Specific Relief Act, when the respondent/ plaintiff has filed a specific performance suit, he should show his bonafide that the balance consideration amount is ready and that he is willing to perform his part of contract. The appellants have denied the signature under Ex.A2. Hence, the burden of proof is on the respondent/ plaintiff to prove that Ex.A2 is genuine. The respondent herein has specifically contended that as per Ex.A16, Tahsildar report, the respondent is in possession of the property. But, the respondent has not proved the possession in the recital of the sale agreement or any other material before the court below. There is no oral or documentary evidence to show that the respondent is in possession of the suit property pursuant to Ex.A1. Therefore, it is clear from the facts that the respondent has not come forward to perform contract within the six months time and also there is no bonafide to prove that Ex.A2 is genuine.

12. Further, the above cited decision in AIR 1996 SC 2814, is relied by the appellants regarding the relief of specific performance observing that if the plaintiff approaches the Court with unclean hands or with false case, he is not entitled for the discretionary relief of specific performance. As per the decision in the case of Thiruvengadam Pillai vs. Navaneethammal & anr., reported in 2008 (4) SCC 530 (above cited), in paragraph 19, the Hon'ble Supreme Court has observed as follows :-

"17. The trial court had analyzed the evidence properly and had dismissed the suit by giving cogent reasons. The first appellate court reversed it by wrongly placing onus on the defendants. Its observation that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, it was for the defendants to establish that the document was forged or concocted, is not sound proposition. The first appellate court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the

defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate court lost sight of the fact that the party who propounds the document will have to prove it. In this case plaintiffs came to court alleging that the first defendant had executed an agreement of sale in favour. The first defendant having denied it, the burden was on the plaintiff to prove that the first defendant had executed the agreement and not on the first defendant to prove the negative. The issues also placed the burden on the plaintiff to prove the document to be true. No doubt, the plaintiff attempted to discharge his burden by examining himself as also scribe and one of the attesting witnesses. But the various circumstances enumerated by the trial court and High Court referred to earlier, when taken together, rightly create a doubt about the genuineness of the agreement and dislodge the effect of the evidence of PW 1 to 3. We are therefore of the view that the decision of the High Court, reversing the decision of the first appellate court, does not call for interference."

13. In the decision relied on by the respondent, towards the principle of 'admission in pleadings', the Division Bench has held as follows in the case of Nagindas Ramdas vs. Dalpatram Locharam, reported in 1974 (1) SCC 242:-

" Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.... "

An other decision relied by the respondent is, the case of Chand Rani vs. Kamal Rani reported in AIR 1993 SC 1742, wherein paragraph 24, it is held as follows :-

" 24. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a

reasonable time if the conditions are:

1. from the express terms of the contract;
2. from the nature of the property; and
3. from the surrounding circumstances, for example:

the object of making the contract. "

14. It is the contention of the respondent that in view of the aforesaid decisions, since the major portion of the amount has been paid and time is not an essence of contract to perform the contract. However, the genuineness of Ex.A2 has not been proved by the respondent herein and no materials have been placed to prove the possession of the suit property by the respondent. Further the respondent has not proved his bonafide to perform the contract, by showing his right and willingness to perform the contract. The appellants 1 and 2 have admitted that the sale agreement (Ex.A1) has been executed in favour of the respondent for a sum of Rs.4,80,000/- and that they have already received a sum of Rs.4,70,000/-.

15. It is useful to extract the decision of the Hon'ble Supreme Court in the case of M.Gouriammal Vs. Soundaraj, Minor Anith Raj and another reported in 2012 (2) CTCOL 581, wherein it has been held as follows:

"36. It would be appropriate to direct the respondents / defendants to repay the amount of advance paid by the plaintiff / appellant with interest at the rate of 9% p.a. from the date of plaint till this date and thereafter with interest at the rate of 6% p.a. till the date of realisation."

The Division Bench of this Court also considered the similar issue in the case of N.Sekaran & another Vs. C.Rajendran reported in 2017-5-LW-46, for granting of refund of the advance amount and hence, the appellants are entitled to refund of the amount.

16. Considering the facts of the case and in the light of the decisions cited supra, this Court has no hesitation to set aside the judgment and decree, passed in A.S.Nos. 9 & 10 of 2013 dated 14.11.2014 on the file of Additional District Judge, Dharmapuri, reversing the common Judgment and Decree passed in O.S.No. 73 of 2010 & 60 of 2012 dated 15.02.2013 on the file of Subordinate Judge, Harur. However, the appellants are directed to refund the advance amount along with an interest at the rate

of 9% p.a. from the date of plaint till this date and thereafter with interest at the rate of 6% p.a. till the date of realisation.

17. In fine, the questions of law is answered in favour of the appellants. Both the Second Appeals are allowed, with the above direction. Consequently, the connected Miscellaneous petitions are closed. No costs.

s/d-
Assistant Registrar(CS-V)

True Copy

Sub-Assistant Registrar

avr

To

1. The Additional District Judge,
Dharmapuri.

2. The Subordinate Judge,
Harur.

+2 Ccs to Mr.V. Nicholas, Advocate sr 8275, 8276.

+2 Ccs to Mr.S.C. Viswanath, Advocate sr 8169 & 8170.

Second Appeal Nos. 465 & 466 of 2015
and

M.P. Nos. 1 & 1 of 2015

TM(CO)
SP(27/03/2018)

सत्यमेव जयते

WEB COPY