

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Reserved on: 06.12.2018
Delivered on: 24.04.2019
CORAM
THE HONOURABLE Ms. JUSTICE P.T. ASHA
A.S.No.1119 of 2015

A.Chandrasekaran

...Appellant/Plaintiff

Vs

T.Venugopal

...Respondent/Defendant

PRAYER: First Appeal is filed under Section 96 read with Order XLI Rule 1 and 2 of the Code of Civil Procedure against the Judgement and Decree in O.S.No.11949 of 2010 passed by the Honourable XVII Additional Judge, City Civil Court, Chennai dated 14.08.2015.

For Appellant : Mr.C.Umashankar

For Respondent : Mr.Muizz Ali
for Mr.K.Thiyagarajan

J U D G E M E N T

The plaintiff in a suit for specific performance of an agreement of sale dated 02.02.1999 is the appellant before this Court. The plaintiff has also sought for an alternative relief of recovery of a sum of Rs.14,34,050/- being the sum of Rs.5,75,000/- given as sale consideration and Rs.8,59,050/- being the interest computed at the rate of 1.80 % per month on the principal sum of Rs.5,75,000/-. The suit schedule property is the 1st floor portion ad measuring 900 Sq.ft. constructed at new Door No.8, I floor, 7th cross Street, Thiruvalluvar Nagar, Thiruvannamipur Extension, Chennai. The parties are referred to in the same litigative status as in the Trial Court.

2.Plaintiff's case:

2.1.It is the case of the plaintiff that he and the defendant were good friends and that the plaintiff was working as a Section Officer in the Secretariat and the defendant was working as Section Superintendent at the Director General of Police office at Santhome. In the late 1980's the defendant had proposed to purchase a property for his family and he had obtained an allotment from the Tamil Housing Board for a

property measuring an extent of 1,200 Sq.ft. together with a small construction of 350 sq.ft. There upon the defendant had requested the plaintiff to extend financial assistance to enable him to put up construction on the said property by demolishing the existing structure and putting up a ground and 1st floor.

2.2.The plaintiff had also extended the said assistance and the agreement was that the 1st floor would be sold to him. On 02.02.1999, an oral agreement was reduced into writing and the defendant also acknowledged the receipt of sum of Rs.5,75,000/-. This amount, according to the plaintiff was paid from out of his own savings and from borrowals from relatives, friends and financiers etc., This constituted the entire consideration according to the plaintiff.

2.3.In February 1997, The plaintiff was put in absolute possession of the 1st floor and he continues in possession of the same in the fond hope that the defendant would execute the sale deed (when the suit was originally instituted the plaintiff had contended that he had been put in possession of the property in Feb 1999).

2.4.It is a further case of the plaintiff that despite several requests to the defendant to execute the sale deed there was no response from the defendant. However on 04.08.2005, the defendant issued a legal notice to the plaintiff informing him that he was in arrears of the rents to the tune of Rs.50,000/- and putting him on notice that in the event of amount not being paid he would be constrained to initiate eviction proceedings.

2.5.A reply dated 08.09.2005 was sent by the plaintiff in which the plaintiff would contend that he had been in possession of the property only as a security for the loan extended by him and the interest payable on the loan was to be adjusted towards the rents. Therefore he had contended that there was no landlord-tenant relationship between the plaintiff and the defendant and he had called upon the defendant to either return the money borrowed or to execute the sale deed in respect of the suit schedule property.

2.6.The defendant had issued a re-joinder stating that the agreement was forged one and the default in the payment of rents started from November 2004 till the date of the notice. Therefore the plaintiff would contend that he had come forward with the present suit.

3.Written Statement:

3.1.The defendant had filed a written statement inter alia denying the various averments contained in the plaint and contending that the Tamil Nadu Housing Board had allotted the property to him in the year 1986 for a sum of Rs.65,000/-. In the year 1994, an additional sum of Rs.67,351/- was demanded and once again on 07.12.2005 a further sum of Rs.2,57,496/- was

demanded. Since the defendant had not paid the entire amount the Housing Board had not executed a sale deed in his favour and therefore he did not have title to sell the property as on 1999.

3.2.The defendant would contend that he had borrowed a sum of Rs.4,00,000/- from the plaintiff and that the entire amount was repaid by him and that there was no subsisting loan. The alternative claim for Rs.14,34,000/- is absurd and baseless and that the suit is barred by limitation.

3.3.He would contend that the agreement dated 02.02.1999 is a forged one and the signature of the defendant has been put by the plaintiff. He would further contend that the suit is nothing but a counter blast to the notice dated 04.08.2005 issued by the defendant to the plaintiff calling upon him to make the payments. The defendant would further contend that the plaintiff did not have the where withal to pay the sum of Rs.5,75,000/- and he would further contend if at all the plaintiff is entitled for a relief it is only for a recovery of sum of Rs.5,75,000/- and not Rs.14,34,000/- as claimed.

3.4.The defendant had filed an additional written statement in which he had questioned the amendment made by the plaintiff to substitute the date of his coming into possession of the property from 1999 to 1997 and the defendant would contend that the amendment made to the dates show the clandestine intent of the plaintiff. He had further pleaded that he had instituted eviction proceedings against the plaintiff in R.C.O.P.No.193 of 2006 and despite several hearings the plaintiff has not come forward to cross examine the defendant and has been deliberately dragging on the matter. He therefore sought for dismissal of the suit.

4.Trial Court:

4.1.The Trial Court had framed ten issues and which are as follows:

- "1.Whether the suit is barred by limitation?
- 2.Whether the defendant has not acquired full title to the suit property from the Tamil Nadu Housing Board concerned?
- 3.Whether the plaintiff is in occupation of the suit property only as a tenant under the defendant?
- 4.Whether the plaintiff had lent Rs.5,75,000/- to the defendant or not?
- 5.Whether the suit agreement to sell purported to have been emerged between the plaintiff and the defendant is a genuine one or fabricated document?
- 6.Whether the suit is barred by limitation with respect to the prayer for specific performance and in the alternative to recover a sum of Rs.14,34,050/-?
- 7.Whether the plaintiff has already been ready and willing to perform his part of the contract and if so,

whether the defendant committed default in performing his part of the contract?

8. Whether the plaintiff is entitled to a decree of specific performance of the suit agreement to sell?

9. Whether the plaintiff is entitled to the alternative prayer for a recovery of a sum of Rs.14,34,050/-?

10. Whether the plaintiff is entitled to 1.80% interest on Rs.5,75,000/- from the date of suit till the date of realisation?"

4.2. The plaintiff had examined himself as P.W.1 and one Subramanian and Sethu as P.W.2 and P.W.3 respectively and had marked Ex.A.1 to Ex.A.10 on his side. The defendant on the other hand had only examined himself as D.W.1 and had not marked any documents.

4.3. The learned Judge had taken up all the issues together and had ultimately returned a finding that the plaintiff had not proved Ex.A.1 as an agreement of sale and had also held that the suit was barred by limitation. The nature of occupation of the plaintiff in the suit schedule property whether as a tenant or as a agreement holder was left open to be decided in R.C.O.P.No.193 of 2006. The learned Judge has also held that the plaintiff had not proved the loan of Rs.5,75,000/- to the defendant and had ultimately proceeded to dismiss the suit.

5. Submissions:

5.1. Mr.C.Umashankar, learned counsel who appeared on behalf of the plaintiff/appellant would contend that the plaintiff was put in possession of the property much before the agreement of sale and the total sale consideration was fixed at a sum of Rs.5,75,000/-. There was no period given for the repayment of the loan but failure to repay the amount would entail the plaintiff to obtain the sale in his favour.

5.2. The counsel would also rely upon the legal notice which has been issued by the defendant and marked as Ex.A.2, wherein the defendant had contended that the plaintiff had been put in possession in August 1999 itself on a monthly rental of Rs.5,000/- and that the default started from November 2004. The counsel would draw my attention to the Ex.A.5 which is a telephone bill which would show that the phone was installed on 12.05.1997, which, according to the learned counsel, would go to show that the plaintiff has been in possession of the suit property since 1997.

5.3. The counsel would further argue that the defendant who has come forward with a case that the entire transaction was only a loan transaction has failed to prove the same and having failed to prove the discharge of the loan the contentions of the defendant is totally false.

5.4.He would further submit that his witnesses P.W.2 and P.W.3 have clearly spoken about the agreement of sale and therefore the defendant cannot be permitted to deviate from the contents of the documents. The signature in Ex.A.1 has been disputed by the defendant on the ground that he has been in the habit of signing in Tamil and in order to substantiate the contention that the defendant was also in habit of signing in English the plaintiff has produced Ex.A.10 obtained under the Right to Information Act, which would show that the defendant has been signing in both English as well as Tamil. Therefore, he would submit that Ex.A.1 stood proved.

5.5.As regards the defense of limitation the counsel for the plaintiff would submit that in the year 2005 the first notice was issued by the defendant and within a year namely by 2006 the suit has been filed and therefore the question of limitation would not come into play at all. That apart, the Tamil Nadu Housing Board has finally executed a sale deed in favour of the respondent in the year 2009 during the pendency of the suit.

5.6.He would draw the attention of the Court to Section 13 (1) (a) of the Specific Relief Act which reads as follows:

"1.Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely:-

(a)if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;"

5.7.He would also draw the attention of this Court to Section 17 of the said Act which deals with contract which cannot be specifically enforced and it is argument that the instant case does not come within the provisions of Section 17 of the Specific Relief Act.

5.8.He would also draw the attention of this Court to the Chief Examination of P.W.2 who is one of the witnesses to the Ex.A.1 agreement who would submit that under the agreement of sale dated 02.02.1999, the sale consideration was fixed at Rs.5,75,000/- and that the entire amount was received by the defendant.

5.9.He would also invite attention to the evidence of the other witness who has been examined as P.W.3 who also deposes about the execution of the Ex.A.1. The learned counsel would rely upon the Judgements:

1.Kollipara Sriramulu Vs. T.Aswatha Narayana reported in AIR 1968 SCC 1028.

2.Deenanath Vs. Chunnilal reported in AIR 1975 (Raj) 69.

in support of his submissions that a suit for specific performance cannot be rejected on the ground of defective title.

5.10. Thereafter with reference to the issue of limitation he has relied upon the following Judgements:

1. Shakuntala Vs. Narayan Gundoji Chavan reported in (1999) 8 SCC 587.

2. Harnam Singh Vs. Mangal Singh reported in AIR 2001 (Punjab) 257.

5.11. With reference to the defense raised by the defendant that the signature of only one party to an agreement would render the agreement invalid. The Judgement reported in Alka Bose Vs. Parmatma Devi and others reported in 2008 (6) CTC 509 has been cited by the counsel.

5.12. Per contra, Mr. Muizz Ali, learned counsel appearing on behalf of the defendant would submit that there is no concluded contract since the contract does not contain any details with reference to the agreement of sale. That apart, he would submit that even prior to the filing of the specific performance suit, the Rent Control Proceedings had been initiated. R.C.O.P.No.940 of 2014 was filed by the defendant for fixing a fair rent and ultimately fair rent of Rs.29,000/- was fixed, which has been taken up on challenge in R.C.A.No.411 of 2017. He would further contend that the suit ought to have been filed on 31.01.2002 since the agreement was entered into on 02.02.1999.

5.13. He would further submit that the contract itself is highly nebulous and the plaintiff has to prove under what capacity he had been inducted into possession, since Ex.A.1 is not an agreement of sale. The counsel would further argue that the entire amount borrowed has been repaid. He would also draw this Court's attention to the cross examination of the P.W.1 wherein he would admit that in Ex.A.1 there is no reference to the persons from whom the plaintiff had collected the sum of Rs.5,75,000/-, which he had given as loan to the defendant. In his chief examination he would submit that he has been put in possession after the signing of the agreement, thereafter the plaintiff has done a volte face and stated that he had been put in possession of the property in 1997 itself which is totally contradictory and an after thought.

5.14. He would also point out the admission of P.W.2 in cross examination that the sum of Rs.5,75,000/- has been paid not at one go but over a period of time. He has also admitted that Ex.A.1 contains a recital that the loan of Rs.5,75,000/- has been paid for which interest at the rate of 1.80% has been levied. P.W.2 admits that in Ex.A.1 there is no reference to possession being handed over to the plaintiff.

5.15. The counsel would also rely upon the evidence of P.W.3 who is the other attesting witness who in his cross examination would submit that the Ex.A.1 has been given only towards security for a loan of Rs.5,75,000/- borrowed by the defendant.

Therefore the counsel would argue that in the light of this categoric admission of P.W.3 that Ex.A.1 was only executed as a security the suit ought to be dismissed.

6.Points for Consideration:

On hearing the submissions of either side and perusing the papers, I am of the view that the following points for consideration arises in the instant first appeal:

- 1)Whether Ex.A.1 can be treated as an agreement of sale or as a loan transaction simplicitor?
- 2)Whether the suit is barred by limitation?
- 3)Whether the defendant had extended a sum of Rs.5,75,000/- towards sale of the property?
- 4)Whether the plaintiff's claim that he has been in possession of the property since 1997 is correct?

7.Discussion:

7.1.The entire fulcrum of the case revolves upon Ex.A.1 which is now termed an agreement of sale and which reads as follows:

“பட்டினப்பாக்கம், ஏடி-14 ல் வசிக்கும் மறைந்த அறம்வளர்த்த நாத பிள்ளை குமாரன் திரு.அசந்திரசேகரன் என்பவரிடம் ரூ.5.75 இலட்சம் (ரூபாய் ஐந்து இலட்சம் எழுபத்தி ஐந்தாயிரம் மட்டும்) எனது வீட்டினைக் கட்டுவதற்காக கடனாகப் பெற்றுள்ளேன். இக்கடனை மாதம் ஒன்றுக்கு 1.80 கதவீத வட்டியுடன் திருப்பச் செலுத்திவிடுவேன் என்றும், மேலும் அதற்கு ஈடாக மேலே குறிப்பிட்ட கதவு, இலக்கத்தில் கட்டுப்பட்டுள்ள வீட்டின் முதல் தளத்தை உங்களுக்கு கிரயம் செய்து கொடுக்கிறேன் இதன் மூலம் சம்மதிக்கிறேன்”

7.2.A reading of Ex.A.1 would show that the said agreement had been executed by the defendant in favour of the plaintiff for the sum of Rs.5,75,000/- borrowed by him from the plaintiff for putting up a construction in the aforesaid property and which was repayable by the defendant to the plaintiff together with an interest at 1.80%.

7.3.The document further states that the same has been executed as a security for the said loan with a condition that in the event of the money is not been repaid the plaintiff would execute a sale in respect of the 1st floor. However the document does not give any details of the property that had to be sold. The address of the plaintiff is shown as A.D.14, Fore Shore Estate. This document shows that a sum of Rs.5,75000/- has been paid as loan by the plaintiff to the defendant. The document does not state that the sum of Rs.5,75,000/- constitutes the sale consideration in the event of the defendant not repaying the money and the plaintiff exercising his right to purchase the property.

7.4.Further the document does not describe the property in question therefore there is an ambiguity with reference to the

agreed sale consideration and the agreed property which is the subject matter for the suit. In the Judgement relied upon by the appellant in Alka Bose Vs. Parmatma Devi and others reported in 2008 (6) CTC 509, the Honourable Supreme Court has stated that the sine qua non for an agreement of sale is the security with reference to the agreement for sale and purchase and the consideration for which the purchase is made has also other terms of agreement as seen from Ex.A.1. The document is not clear as to whether the loan of Rs.5,75,000/- is constituting the entire sale consideration and further the property which is the subject matter of an agreement has also not been described.

7.5. That apart the time for performance has not been stipulated. In these circumstances, Ex.A.1 cannot be termed or considered to be an agreement of sale. In addition to that the agreement of sale would come into existence only when and if the defendant failed to repay the loan amount borrowed by him. There is no pleading or evidence to show that the plaintiff had demanded a repayment of the loan and on the failure on the part of the defendant the 2nd contingency contemplated in Ex.A.1 come into existence. The plaintiff has very clearly understood the scheme of agreement since in Ex.A.3 reply notice dated 08.07.2005 the plaintiff has stated as follows:

"My client also states that for the amount of Rs.5.75 lakhs received by your client, your client had given his first floor portion of property viz., property bearing No.M139, 7th cross street, Thiruvalluvar Nagar, Thiruvannamipur, Chennai - 41 as client where two persons stood as witnesses, with an option left to my client to purchase the same."

Your client had not paid either the principal or the interest portion from the threshold until this day to my client. In fact, your client had agreed therein to part perform by executing the sale deed of the first floor portion favouring my client, however failed to pay either the amount borrowed from my client viz. Rs.5.75 lakhs with interest or to convey the first floor portion of the subject property to my client.

More significantly, my client had also been permitted by your client to occupy the first floor portion of the subject property due to the security created by your client for the loan availed by him from my client. Therefore the contention of landlord-tenant relationship does not hold good and unsustainable in the eye of law. Needless to say that my client need not pay any amount towards rent to your client."

7.6. Therefore the plaintiff had clearly understood that it was only as a security for the loan that the document was executed and only in the event of a failure to repay, the

parties had to enter into the sale deed after agreeing upon the terms thereof. P.W.3 in his cross examination has also admitted that Ex.A.1 was only executed as a security and not as an agreement of sale. In the light of the above the first point is answered against the plaintiff.

7.7.As regards the second point, it is seen that for the first time on 04.08.2005 a legal notice has been issued by the defendant demanding the appellant to issue the arrears of rent failing which the Rent Control Proceedings would be initiated. Immediately the plaintiff had issued a reply and also followed it up with the suit in question. Therefore the suit is not barred by limitation and the 2nd point is answered in favour of the plaintiff.

7.8.As regards the third point for consideration, the plaintiff would submit that the entire sum of Rs.5,75,000/- has not been given from out of his pocket but that he had borrowed from others to pay the defendant. However none of these persons have been examined by the appellant/plaintiff to prove the payment of Rs.5,75,000/- particularly when the defendant had denied the receipt of the said sum. Considering the fact that the suit is one for specific performance with an alternative relief of a recovery of money the onus is upon the plaintiff to prove that he has made the payment to the defendant. This onus has not been discharged by the plaintiff by examining the persons from whom he claims he had borrowed money to extend a loan to the defendant. Therefore this point is answered against the plaintiff.

7.9.As regards the fourth point for consideration it is seen that the plaintiff had originally filed the suit stating that he has put in possession of the property in the year 1999. However this statement was amended later, wherein, he would contend that he was put in possession of the property in the year 1997 and to prove the said factum the plaintiff has marked Ex.A.5, telephone Bill stands in his name in which the date of installation is given as 12.05.1997.

8.This in my considered view would not confirm the plaintiff was in possession of the suit property since 1997 and this view is further verified by the address given by the plaintiff in Ex.A.1 alleged agreement of sale in which the plaintiff address is given as A.D.No.14, Foreshore Estate and this is in the year 1999. Therefore the contention of the plaintiff that he was put in possession of the suit property in the year 1997 has not been proved by him and this point is also answered against the plaintiff.

9.The suit for specific performance being a discretionary relief the plaintiff has not come to the Court with a clear case and with true facts. In the instant case the document which the

plaintiff claims to be an agreement of sale, in view of the above discussion of this Court is not an agreement of sale and no rights flow from the same in favour of the appellant. In the result, point Nos.1, 3 and 4 for consideration are answered against the plaintiff and point No.2 is answered in favour of the plaintiff. I find no infirmity in the Judgement and Decree passed by the Court below.

Consequently, the Appeal Suit stands dismissed confirming the Judgement and Decree in O.S.No.11949 of 2010 on the file of the learned XVII Additional City Civil Judge, Chennai. There shall be no order as to costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To,

The XVII Additional Judge,
City Civil Court, Chennai.

+1cc to Mr.C.Umashankar, Advocate Sr.39266
+2cc to Mr.K.Thyagarajan, Advocate Sr.39192

A.S.No.1119 of 2015

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