

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 26.11.2019

JUDGMENT PRONOUNCED ON : 05.12.2019

CORAM

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.256 of 2014
and
MP.No.1 of 2014
and
CMP.No.21019 of 2019

1.R.Mohan Kumar
2.M.Geetha

..Appellants/ Defendants1&2

Vs.

1.N.Selvi
2.R.Padmanaban

...1st Respondent/Plaintiff

.2nd Respondents/3rd Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree made in A.S.No.70 of 2012 on the file of V Additional District and Sessions Court, Coimbatore dated 20.09.2013 reversing the judgment and decree made in O.S.No.455 of 2005 on the file of the Principal Sub-Court, Coimbatore dated 12.06.2012.

For Appellants : Mr.A.E.Ravichandran
for Mrs.C.Usha

For Respondents : Mr.P.Valliappan for R1

Mr.Subbiah, Senior Counsel
for Mrs.Elizabeth Ravi for R2

J U D G M E N T

The defendants in O.S.No.455 of 2005 who have suffered a decree for the alternative relief of refund of advance, upon its

reversal by the lower appellate court as one for specific performance of the agreement of sale dated 17.05.2004 have come up with this Second Appeal.

2. According to the plaintiff, the suit properties were allotted to the defendants 1 and 2 under a final decree passed in O.S.No.566 of 1993 on 20.03.2000. The defendants 1 and 2 agreed to sell the property to the plaintiff for a consideration of Rs.3,50,000/- and executed an agreement of sale on 17.05.2004. The plaintiff paid an advance of Rs.2,00,000/- on the same day and the time for performance was fixed as 1 year.

3. According to the plaintiff, though he was ready and willing to perform his part of the contract, by paying the balance of sale consideration of Rs.1,50,000/-, the defendants have not come forward to execute the sale deed. It is also claimed that the defendants sent a registered notice on 29.04.2005 raising false and imaginary contentions. The plaintiff sent a reply on 14.05.2005 requiring the defendants to execute the sale deed. Though the said notice was received by the defendants they did not comply with the demands made in the said notice. Therefore, the plaintiff had come up with the above suit seeking specific performance.

4. The defendants 1 and 2 resisted the suit contending that one N.Subramaniam had forced the defendants to avail a loan, for which 1st defendant had obtained a power of attorney from the 2nd defendant on 27.02.2002. It is also claimed that the said N.Subramaniam had taken the 1st defendant to one Mr.Ravi and another Mr.Subramaniam for the purpose of availing loan and had created the make believe agreement dated 17.05.2004 in favour of the plaintiff. It was also claimed that the 1st defendant was not aware of the suit agreement. On discovering the fact that the suit agreement has been created, the 2nd defendant had cancelled the power executed in favour of the 1st defendant, her husband.

5. According to the defendants, since the agreement was obtained fraudulently, the plaintiff cannot seek specific performance on the basis of the said agreement. It was also claimed that the defendants having terminated the agreement by a notice dated 29.04.2005, the plaintiff is not entitled to specific performance.

6. During the pendency of the suit, the 3rd defendant was impleaded as per order dated 11.03.2008 made in I.A.No.41 of 2008. Upon his impleading, the 3rd defendant filed a separate written statement claiming that he is the owner of the suit property. According to the 3rd defendant, the decree passed in O.S.No.566 of 1993 under which the defendants 1 and 2 claim

title was set aside by a court of competent jurisdiction in O.S.No.1647 of 2005 at his instance.

7. It is also his claim that the 3rd defendant has filed a suit for specific performance in O.S.No.1964 of 1996 based on a prior agreement entered into between him and the original owners of the property and the original owners of the property have executed a sale deed in his favour pursuant to the said decree. Therefore, according to the 3rd defendant, the defendants 1 and 2 have no title to the property and hence, the suit for specific performance cannot be decreed.

8. At trial, the plaintiff was examined as PW1 and one Kalaivani was examined as PW2. Ex.A1 to Ex.A8 were marked. The 2nd defendant was examined as DW1 and the 3rd defendant was examined as DW2. The certified copy of the judgment and decree in O.S.No.1647 of 2005 was marked as Ex.B1.

9. Upon a consideration of the evidence on record, the learned trial Judge found that the agreement dated 17.05.2004 is true and valid. The learned trial Judge however concluded that the plaintiff is not entitled to specific performance. upon such finding, the learned trial Judge granted a decree for refund of advance with interest at 12% p.a. Aggrieved by the said judgment and decree of the trial court, the plaintiff preferred an appeal in A.S.No.70 of 2012.

10. The lower appellate court faulted the trial court for impleading the 3rd defendant who sets up an independent title in a suit for specific performance. The lower appellate court held that the 3rd defendant is not a necessary party relying upon the judgment of the Hon'ble Supreme Court in Kasthuri Vs. Ayyamperumal and others reported in 2005 (4) LW 25, wherein, the Hon'ble Supreme Court has categorically held that a person setting up independent title adverse to that of the agreement vendors is not a necessary party to a suit for specific performance.

11. The lower appellate court however concluded that the plaintiff has established that the agreement dated 17.05.2004 is true and valid and he was also ready and willing to perform his part of the contract throughout. Upon the said finding, the lower appellate court reversed the judgment of the trial court and granted a decree for specific performance as prayed for. Aggrieved the defendants 1 and 2 have come up with this Appeal.

12. The following questions of law were framed in this appeal:

1. When the title of the 2nd appellant over the suit property has been taken away by virtue

of the judgment and decree passed in O.S.No.1647 of 2005 even then can the court in exercise of its discretionary power pass a decree of specific performance against the appellants?

2. Whether the appellate court has properly appreciated the oral and documentary evidence before reversing the well considered judgment and decree of the trial court?

13. Pending appeal, the 3rd defendant who was impleaded as the 2nd respondent in the appeal filed a petition in CMP.No.21020 of 2019 seeking to transpose himself as the appellant in the appeal. The said petition was dismissed by me concluding that he is not a necessary party to the suit and he ought not to have been impleaded, as he is setting up independent title adverse to that of the vendors.

14. The 3rd defendant who figures as 2nd respondent in the suit has also filed a petition for receipt of additional evidence in CMP.No.21019 of 2019. The documents that are sought to be filed are the sale deed dated 02.01.2009 executed by the original owners viz., Palaniammal and Savithri in favour of the petitioner/ 2nd respondent and the judgment and decree in O.S.No.1964 of 1996.

15. The judgment and decree in O.S.No.1964 of 1996 came to be delivered on 23.11.2007, when the suit in O.S.No.455 of 2005 was pending. The sale deed dated 02.01.2009 was executed during the pendency of the appeal before the lower appellate court. The petitioner/ 2nd respondent who was a party to both the proceedings did not choose to produce them before the courts below. The reasons set out for non-production of these documents at the earliest point of time are not convincing. Further I do not think that these documents would in any way be of any assistance to this court in disposing of the Second Appeal.

16. As already stated, the lower appellate court has categorically found that the 2nd respondent/ petitioner in CMP.No.21019 of 2019 is not a necessary or proper party to this proceeding which is one for specific performance. Therefore, I do not find any merits in CMP.No.21019 of 2019 and the same is dismissed.

17. Adverting to the questions of law framed in the appeal. The 1st question of law may not arise strictly in view of the judgment of the Hon'ble Supreme Court that an enquiry into the title of the agreement vendors is foreign to the scope of a suit for specific performance. In Kasthuri Vs. Ayyamperumal and

others reported in 2005 (4) LW 25, the Hon'ble Supreme Court had held that a person who sets up adverse title to that of the agreement vendors is not a necessary party, as the court cannot go into his title or the title of the agreement vendors in a suit for specific performance.

18. The lower appellate court has reversed the findings of the trial court regarding the entitlement to specific performance of the plaintiff on the basis that the 3rd defendant is not a necessary party and therefore the question of title cannot be gone into. Title is set up by the defendants 1 and 2 on the basis of the decree passed in O.S.No.566 of 1993. As could be seen from Ex.B1, the decree in O.S.No.1647 of 2005, a competent civil court had set aside the said decree. Therefore, the defendants 1 and 2 have lost their title after the agreement on 30.01.2008.

19. No doubt, the court cannot investigate on the title of the agreement vendors in a suit for specific performance. But the specific performance being a discretionary relief, it is open to the court to refuse the relief of specific performance if it finds that it would lead to multiplicity of legal proceedings and it cannot be conveniently performed.

20. In the case on hand, the only source of title for the defendants 1 and 2/ appellants is decree in O.S.No.566 of 1993. The said decree has been set aside by a competent court in O.S.No.1647 of 2005. The decree in O.S.No.1647 of 2005 came to be passed after the agreement dated 17.05.2004. Therefore, the defendants 1 and 2 lost their title to the suit property on 30.01.2008. Once it is found that the defendants in a suit for specific performance have no title to the property, I do not think that the court should still persist in granting a futile decree for specific performance. The discretionary power of the court in granting or refusing a specific performance has to be exercised judicially.

21. The lower appellate court has gone ahead to grant a decree for specific performance on the finding that the 3rd defendant who was impleaded is not a necessary party and any document brought in by him cannot be looked into. I do not think that a court cannot have such a rigid approach particularly while considering the discretionary relief of specif performance. I therefore find that the exercise of discretion by the trial court is just and proper and the lower appellate court was not right in reversing the same and granting a futile decree for specific performance knowing fully that the defendants 1 and 2 cannot convey any title to the plaintiff. The decree granted by the lower appellate court would in fact unjustly enrich the defendants 1 and 2 who have already received

a substantial amount by way of advance from the plaintiff. I therefore find that the judgment and decree of the lower appellate court will have to be set aside as being impracticable and that of the trial court should be restored.

22. In fine, the Second Appeal is allowed and the judgment and decree of the lower appellate court are set aside and that of the trial court are restored. The appellants shall bear the costs of the 1st respondent in this Second Appeal. Consequently, the connected miscellaneous petition is also closed.

23. The learned counsel for the appellants would however contend that the trial court had granted an interest at the rate of 12% from 17.05.2004 till date of realisation. He would plead for reduction of the interest. I do not think that this is a fit case for reduction of interest. The trial court had rightly found that there is an unjust enrichment on the part of the defendants 1 and 2. Hence, they are liable to pay interest at 12% from the date of the agreement viz., 17.05.2004 till the date of repayment on the said sum of Rs.2,00,000/-. I do not see any justification in the request of the counsel for reduction of the rate of interest.

24. It is stated that the plaintiff has deposited the balance of sale consideration of Rs.1,50,000/- also to the credit of the suit. In view of the appeal being allowed, the plaintiff would be entitled to refund of the said sum with all accrued interest.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

dsa
To

1. The V Additional District & sessions Judge,
Coimbatore.

2. The Principal Subordinate Judge,
Coimbatore.

3. The Section Officer, V.R. Section,
High Court of Madras, Chennai 600 104.

+1cc to Mr.A.E.Ravichandran, Advocate SR.No. 101824

+1cc to Mr.Elizabeth Rani , Advocate SR.No. 101607

+1cc to Mr.P.Valliappan , Advocate SR.No. 101591

S.A.No.256 of 2014

A.SK(10/03/2020)