



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: **18.12.2019**
CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A. (MD) .No.195 of 2015
and
C.M.P (MD) No.1450 of 2016

Petchiammal ... Appellant/ Appellant/Plaintiff
Vs.
1.R.Perumal
2.Rajam ... Respondents/Respondents/Defendants

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree, dated 30.08.2013 made in A.S.No.10 of 2013 passed by the III Additional District & Sessions Judge, Tirunelveli confirming the Judgment and decree, dated 20.12.2012 made in O.S.No.293 of 2011, on the file of the Principal Sub-Court, Tirunelveli.

For Appellant : Mr.J.Barathan
For Respondents : Mr.D.Nallathambi

JUDGMENT

The plaintiff, in O.S.No.293 of 2011, on the file of the Sub-Court, Tirunelveli, whose suit for specific performance, was dismissed by the trial Court, upon confirmation of the said judgment and decree by the lower appellate Court in A.S.No.10 of 2010, has come up with this second appeal.

2.The suit was laid by the plaintiff seeking specific performance of agreement of sale, dated 25.10.2002 said to have been entered into between the plaintiff and the defendants. According to the plaintiff, the defendants have agreed to sell the suit property for sale consideration of Rs.5,50,000/-. The entire sale consideration was paid on the date of execution of agreement i.e., on 25.10.2002. On the same day, the defendants also executed a registered general power of attorney in favour of the plaintiff's husband authorizing him to sell the property either as a whole or in portions. The agreement does not provide for any period for performance of the contract by either side. While things stood thus, on 14.09.2009, the plaintiff's husband in his capacity as general power of attorney of defendants, had sold an extent of 10 cents out of 32 cents, in the suit properties, in favour of one Sanguthurai. After the said sale, on 18.04.2011, the defendants



cancelled the power of attorney. Immediately, thereafter, the plaintiff has come up with the suit seeking Specific Performance.

3. The suit was resisted by the defendants contending that the suit transaction was not intended to be a sale agreement. According to the defendants, they have borrowed a sum of Rs.2,50,000/- from the plaintiff for the daughter's marriage which took place on 04.05.2003. The plaintiff and her husband insisted that the defendants should execute the sale agreement and general power of attorney as a security for loan transaction. Therefore, according to the defendants, the plaintiff cannot seek specific performance of the agreement of sale. It is the further contention of the defendants that the plaintiff was never ready and willing to perform her part of the contract, even assuming that the sale agreement is true.

4. At trial, the plaintiff's husband was examined as P.W.1 and three other witnesses were examined as P.Ws.2 to 4. P.Ws.2 and 3 are the attesting witnesses to the agreement of sale and P.W.4 is the purchaser from the plaintiff's husband. On the side of the defendants, first defendant was examined as D.W.1 and one Thiru.Manickam was examined as D.W.2. Ex.A1 to Ex.A9 were marked on the said of the plaintiff. Ex.B1 to Ex.B7 were marked on the side of the defendants. The learned Subordinate Judge, who tried the suit, on a consideration of the evidence on record found that the plaintiff is not entitled to specific performance because she was not ready and willing to perform her part of contract. The learned trial Judge also found that the plaintiff has not explained her complete inaction between 25.10.2002, namely the date of the agreement, till 07.12.2011 the date of suit. The trial Court further found that very fact that the power of attorney was also taken on the date of agreement of sale itself and the plaintiff's husband had sold a portion of the property covered by the agreement, which is a strong pointer towards the conclusion that the sale agreement was not intended to be acted upon and as such and it was executed as a security for the loan transaction. On the above findings, the learned Subordinate Judge dismissed the suit. Aggrieved, the plaintiff preferred an appeal in A.S.No.10 of 2010. The lower appellate Court, upon a reconsideration of the evidence on record, agreed with the trial Court on both the grounds and dismissed the appeal. Aggrieved, the plaintiff has come up with this Second Appeal.

5. The following questions of law are framed at the time of admission:-

"a) Whether the Judgment and Decree of the Courts below in dismissing the suit are sustainable in law when the plaintiffs have clearly proved their case in accordance to Sections 101 to 103 of the Indian Evidence Act?

<https://hcservices.ecourts.gov.in/hcsewib> Whether the Courts below are justified in law in



dismissing the suit for specific performance when the defendants had admitted execution of Ex.A1-Sale Agreement?

c) Whether the Courts below are justified in accepting the evidence of defendants side in contrary to the recitals of Ex.A1 in contravention to Section 92 of Indian Evidence Act?

d) Whether the Judgment and decree of the Courts below are justified in law in dismissing the suit on the ground that the plaintiff has failed to prove the negative quotient?

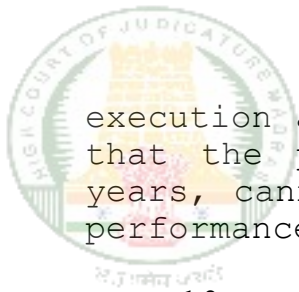
e) Whether the plaintiff is entitled for the suit for specific performance in view of the recitals of Ex.A1 and A2 and admission of the execution of the same by the defendants in accordance with Sections 16 and 20 of the Specific relief Act?"

6. I have heard Mr.J.Bharathan, learned counsel appearing for the appellant and Mr.D.Nallathambi, learned counsel appearing for the respondents.

7. Mr.J.Bharathan, learned counsel appearing for the appellant would vehemently contend that the Courts below were not right in concluding that the plaintiff was not ready and willing to perform the contract. According to the learned counsel for the appellant, readiness and willingness always involved the financial aspect and once the entire sale consideration was paid on the date of the agreement and the defendants having admitted the execution of the agreement, are precluded from leading evidence contending that the agreement was not intended to be acted upon.

8. He would also further submit that the defendants cannot at least contend that they borrowed only a sum of Rs.2,50,000/- on the date of the agreement. Arguing further, he would contend that the Courts below were not right in disbelieving the evidence of P.Ws.2,3 & 4 and concluding that the agreement was only executed as a security for the loan transaction.

9. Contending contra, Mr.D.Nallathambi, learned counsel for the respondents/defendants would submit that the very fact that the agreement of sale was coupled with the power of attorney in favour of the husband of the plaintiff would show that the transaction was essentially a loan transaction. It is his further contention that concept of readiness and willingness not restricted to financial capacity alone, it involves the state of mind to perform the remaining part of the contract. Drawing my attention to the pleadings wherein the plaintiff has stated that the sale deed could not be registered immediately because guideline value of the property was high. Mr.D.Nallathambi, learned counsel for the respondents would submit that this itself would show the plaintiff ready and willing to perform her part of contract, namely,

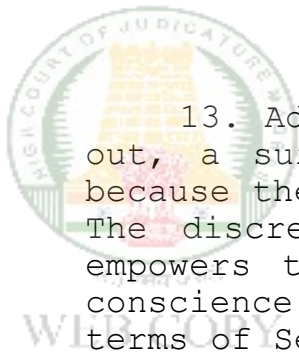


execution and registration of the sale deed. He would also contend that the plaintiff, who had slept over his rights for nearly 9 years, cannot be favoured with the discretionary relief of specific performance.

10. I have considered the rival submissions.

11. The execution of the agreement is admitted. But the defendants would contend that they received only a sum of Rs.2,50,000/- as a loan for the purpose of marriage of the daughter, which was held on 04.05.2003. The agreement as well as the power of attorney document were executed only with a view to secure the borrowing. The fact that the plaintiff has sought for specific performance after nearly 9 years, would by itself, in my considered view, probalise the defence of the defendants. I am unable to agree with the learned counsel for the appellant that readiness and willingness would involve financial implication alone. This Court and the Hon'ble Supreme Court, had on several occasions, pointed out that mere financial capacity or payment of entire sale consideration would not constitute readiness and willingness on the part of the plaintiff. There is nothing in the evidence to show that the plaintiff at least has made a demand for execution of sale deed between 25.10.2002 namely, the date of the agreement till 07.12.2011 namely the date of suit, for over a period of 9 years. Assuming that, the cancellation of the power of attorney, which compelled the plaintiff to file the suit gave him the cause of action the same was on 18.04.2011 and the plaintiff sought for specific performance at least 8 months thereafter. Of course, the agreement does not prescribe any time limit and the suit cannot be said to be strictly barred by limitation. However, specific performance being a discretionary relief, it need not be granted merely because the execution of agreement is admitted or it is legal to do so.

12. The sale agreement covers an area of nearly 1 acre 30 cents out of which, 10 cents have been sold by the plaintiff's husband under power of attorney on 14.09.2009 for a sum of Rs.3,30,000/-. Mr.D.Nallathambi, learned counsel would invite my attention to the recitals found in Ex.A7 sale deed, dated 14.09.2009, which shows that the guideline value of the 10 cents sold was roughly about Rs.10,87,693/-, if the same guideline value is to be applied to the entire extent of 32 cents in Survey No.1027, remaining 22 cents would be of a value of Rs.41,52,924/-. This value reflects only the value of the 6th item in the suit property. No doubt, the Courts cannot refuse the Specific performance on the ground of a lower price being agreed between the parties. But in the case on hand, where the defendants have raised a plea that the agreement was executed as a security for the loan transaction, this huge difference in the sale price must definitely lead to the inference that the suit transaction was a loan transaction. It shocks the conscience of the Court. Therefore, the findings of the Courts to be confirmed and are accordingly, confirmed.



13. Adverting to the questions of law framed as already pointed out, a suit for specific performance need not be decreed merely because the execution of agreement admitted or it is legal to do so. The discretionary element introduced by the Specific Relief Act empowers the Court to reject the relief, if it is shocks to the conscience of the Court. Therefore, mere proof of agreement in terms of Section 101 to 103 of the Evidence Act would not oblige the Court to grant Specific Performance, hence the first question of law is answered against the appellant.

14. On the second question, here again it should be pointed out that existence of an agreement itself would not be the basis for a decree for specific performance. As already pointed out the plaintiff having miserably failed to prove that she was always ready and willing to perform her part of the contract and getting the sale deed executed for over a period of 9 years is not entitled to specific performance merely because Ex.A1 is admitted. Hence, the Second question is also answered against the appellant.

15. On the third question, it is settled law that the defendants in the suit for specific performance can always raise a plea that the agreement is so executed as security for the loan transaction. A Division Bench of this Court in **Kamireddi Sattiaraju v. Kandamuri Boolaeswari** reported in (2007) 3 Law Weekly 580(Mad.), has held that it is open to the defendants to plead that the agreement was entered into by way of security and such a plea is not barred under Section 92 of the Indian Evidence Act, since it is a invalidating circumstances, which is allowed under the first proviso of Section 92 of the Indian Evidence Act. Hence, the third question is answered against the appellant.

16. The Courts below have not dismissed the suit on the ground that the plaintiff has failed to prove the agreement. The Courts below have believed the evidence of defendants, in the absence of any evidence on the part of the plaintiff to prove the readiness and willingness. Hence, the fourth question in my considered opinion does not arise.

17. The fifth question is also on the admission of the execution, which has been answered already. Hence, the second appeal fails and dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar(CS)



1.The III Additional District & Sessions Judge,
Tirunelveli.

2.The Principal Sub-Court,
Tirunelveli.

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The Section Officer,
V.R.Section, Madurai Bench of Madras High Court,
Madurai.(2 copies)

+1 CC to Mr.D.NALLATHAMBI, Advocate (SR-105827[F] dated
19/12/2019)

+1 CC to Mr.T.R.JEYAPALAM, Advocate (SR-105852[F] dated
19/12/2019)

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