

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-02-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.16 of 2016

S.Rajeshwari

.. Appellant/2nd Defendant

vs.

1. A.Ramasamy

.. 1st Respondent/Plaintiff

2. R.Palanisamy

.. 2nd Respondent/1st Defendant

Appeal under Section 96 of the Code of Civil Procedure, 1908, read with Order 41, Rule 1 of the Code of Civil Procedure, 1908 against the judgment and decree made in O.S.No.40 of 2013 on the file of the Principal District Court, Tiruppur, dated 05.12.2015.

For Appellant : Mr.M.Guruprasad

For Respondents: Mr.S.K.Rakhunathan (for R1)

No Appearance (for R2)

J U D G M E N T

The second defendant in the suit is the appellant of the appeal suit and the respondent in the appeal suit instituted a suit for specific performance, to enforce the registered sale agreement entered into between the plaintiff and the first defendant, who is the power holder of the second defendant in agreement dated 27.04.2012.

2. The suit for specific performance was instituted mainly on the ground that the first sale agreement entered into between the plaintiff and the first defendant on 13.04.2010, which is also a registered document in document No.3649/2010. The sale consideration of Rs.3,00,000/- was fixed. Subsequently, the said sale agreement was cancelled by mutual agreement and the second sale agreement was registered on 27.04.2012 in vide document No.4598/2012. Subsequently, the appellant/second defendant cancelled the power of attorney granted in favour of the first defendant on 31.01.2013 in vide document No.1674/2016.

The first defendant and the plaintiff are the business partners and under those circumstances, the property belongs to the second defendant are attempted to be taken away by virtue of these sale agreements, which is otherwise not in commensuration with the market value of the property which is sought to be executed by way of sale.

3. The facts in nutshell as narrated in the plaint are as follows:-

a) The suit property belonged to the 2nd defendant as per registered sale deed dated 28.5.1997. The 2nd defendant appointed the 1st defendant as her power of attorney as per the registered Power of Attorney dated 29.03.2010 to negotiate sale of her properties by executing sale agreements, receive advance amount, to execute sale deeds and receive sale consideration and register the documents etc., The 1st defendant as the Power of Attorney of the second defendant agreed to sell and the plaintiff agreed to purchase the same, for a sale consideration of Rs.3 lakhs and the 1st defendant received an advance of RsT 0,000/- on 13.4.2010 and the sale agreement was reduced into writing.

b) As per the terms of the agreement the plaintiff has to pay the balance sale price of Rs.2,90,000/- within 15 months from the date of agreement and get the sale deed registered. The plaintiff was throughout ready and willing to pay the balance of sale price and get the sale deed registered. The defendants 1 and 2 have colluded together and demanded the plaintiff to pay a higher sale price. Hence, after prolonged negotiations, the sale price was finalized at Rs. 10.00 lakhs. Hence the sale agreement dated 13.4.2010 was cancelled and a fresh sale agreement dated 27.4.2012 was entered between the plaintiff and the 1st defendant fixing the sale price at Rs. 10.00 lakhs.

c) The sale agreement was reduced into writing and the same was registered. On 27.4.2012 the 1st defendant received an advance of Rs.5,00,000/- and the same is mentioned in the agreement itself. As per the terms of the agreement, the plaintiff has to pay the balance sale price of Rs.5.00 lakhs within 18 months, from the date of the agreement and get the sale deed registered. The plaintiff wanted to get the sale deed in the month of Thai 2013. Hence the plaintiff informed the 1st defendant to produced the original title deeds at the time of the registration of the sale deed in favour of the plaintiff. The first defendant agreed to do so and requested time till the end of Thai 2013.

d) The plaintiff met the 1st defendant on 10.2.2013 and

informed him that he is ready to pay the balance sale price on 11.2.2013 and get the sale deed - registered. The 1st defendant informed the plaintiff that the 2nd defendant has cancelled the Power of Attorney dated 29.3.2010 in his favour and he expressed his inability to do so and ask him to get the sale deed through the 2nd defendant.

e) The defendants, who have negotiated for higher sale price and succeed in it previously appear to have colluded together to demand further amount have created a deed of cancellation of power of- attorney with an illegal intention to bargain with the plaintiff to make unlawful, enrichment. The cancellation of the Power of Attorney is nothing but a collusive act between the defendants.

f) The sale agreement dated 27.4.2012 was executed by the 1st defendant when the Power of Attorney executed by the 2nd.defendant was in force. The 2nd defendant as the owner of the property is liable to execute the sale deed in favour of the plaintiff, in pursuance of the sale agreement executed by the 1st defendant as the Power of Attorney of the 2nd defendant. The plaintiff made repeated personal demands to the defendants to receive the balance sale price and execute and register the sale deed. But, the defendants were postponing the execution of the sale deed on some pretext or other.

g) While so, the plaintiff came to know that the defendants were making attempts to encumber and alienate the properties, suppressing the sale agreement in favour of the plaintiff. Hence the plaintiff issued a legal notice 11.2.2013 calling upon the defendants, to receive the balance sale price and to execute and register the sale deed. The defendants have received the notice on 15.2.2013 and they have not complied with the demand of the plaintiff. The 2nd defendant alone has given a reply dated 15.2.2013 making false and untenable allegations. The allegations made in the reply notice that she borrowed Rs.5,00,000/- from the 1st defendant and for that purpose she executed the power of attorney dated 29.3.2010 and she repaid the alleged loan amount are not admitted. The further allegations that the property is worth about Rs.50 lakhs is also false.

h) It is again false to say that the plaintiff and the 1st defendant colluded together and created document is false. The defendants have failed to perform their part of the contract. In spite of the legal notice, they are reluctant to comply with the demand of the plaintiff. Since the defendants are making attempts to encumber the properties and in spite of

the legal notice the defendants have failed to come forward for the execution of the sale deed in favour of the plaintiff, the plaintiff is obliged to file the suit for Specific performance now itself.

i) The plaintiff is entitled to the main relief of Specific Performance based on the agreement of sale executed by the defendants. If, this Court comes to a conclusion that the plaintiff is not entitled to the relief of Specific Performance, the plaintiff seeks an alternative relief of refund of the advance of Rs.5,00,000/- with interest at the rate of 18% p.a. The plaintiff is also entitled to have a charge over the suit properties for the realization of the said amount.

4. The second defendant who is the owner of the suit mentioned property filed a written statement denying the allegations and disputing the averments as follows:-

a) The suit is false, not valid under law and on facts. The plaintiff has to prove the allegations which are not specifically admitted by this defendant as true. Otherwise, the suit will be dismissed with the cost of this defendant.

b) The second defendant has executed the Power of Attorney in favour of the 1st defendant for the loan received by him. It is not executed to sell the property to the second defendant. The allegations found in the plaint are denied vehemently.

c) It is false to say that the 1st defendant has agreed to sell the suit property to the plaintiff for Rs.3,00,000/- and has entered into a sale agreement on 13.4.2010, that he has received an advance amount of Rs.10,000/- and also agreed to pay the balance sale consideration of Rs.2,90,000/- within 15 months.

d) It is false that the defendants 1 and 2 came by demanding higher price for the suit property. It is also false to state that the defendants demanded to raise the price of suit property from Rs.3,00,000/- to Rs. 10,00,000/-.

e) It is false to state that the sale agreement dated 13.4.2010 has been cancelled, that the plaintiff has agreed to purchase the suit property for Rs. 10,00,000/-, that on 27.4.2012, the plaintiff has paid an advance amount of Rs.5,00,000/- to the 1st defendant and that entered into a sale agreement.

f) It is surprise to see that why the plaintiff has not taken any steps to get the sale deed executed within 15 months

time. It is also a surprise that the plaintiff who has not taken any steps to get the sale by giving the balance sale consideration of Rs.2,90,000/-, after the expiry of the first sale agreement, on 27.4.2012 has paid an advance amount of Rs.5,00,00.0/- and has entered into a sale agreement.

g) It is false that the previous sale agreement was cancelled and the time limit for the new sale agreement is 18 months. The plaintiff and the 1st defendant colluded together and have created the above documents fraudulently.

h) It is false to say that the plaintiff is ready to get the sale on 11.2.2013. This defendant has cancelled the Power of Attorney executed by him to the 1st defendant since the plaintiff and the 1st defendant have colluded together and tried to grab the properties from the 2nd defendant. This defendant has never thought to sell the property. The agreement dated 27.4.2012 is not binding upon this defendant. This defendant has issued a reply to the notice sent by the plaintiff on 11.02.2013. The 1st defendant has not given any reply since he colluded with the plaintiff.

i) The suit property would fetch a value more than Rs.50,00,000/-. Further, this defendant did not know that the plaintiff and the 1st defendant has entered into a sale agreement. The plaintiff has filed this suit for Specific Performance against this defendant is not acceptable since this defendant did not know about the fact that the plaintiff and the 1st defendant entered into a sale agreement. The sale agreement is not binding upon this defendant. So that, there is no necessity for this defendant to sell the property to the plaintiff. As the 1st defendant has received the entire loan amount, he is liable to return the original documents to this defendant.

j) On 29.03.2010 when this defendant has borrowed a loan amount of Rs.5,00,000/- and has executed a power of attorney in favour of the 1st defendant for security purpose. After that he has paid Rs.1,50,000/- in February, 2012, Rs.2,00,000/- in November, 2012 and Rs. 1,50,000/- on 10.1.2013 and thus he has paid the entire loan amount, to the 1st defendant. This defendant has cancelled the power of attorney on 4.2.2013 since he has paid the entire loan amount. He has also given notice to the 1st defendant and the Sub-registrar about the cancellation of power of attorney.

k) The plaintiff and the 1st defendant are doing money lending business on interest basis. So they make it as their

custom to create power of attorney and sale agreements in the name of plaintiff as well as the 1st defendant. At the time of cancelling the sale deed dated 13.4.2010 on 27.4.2012, it is stated that the plaintiff has no sufficient means to get the sale deed. But on the same date by creating a new sale agreement, by raising the sale consideration from 3,00,000/- to Rs. 10,00,000/- and by telling that the plaintiff has paid an advance amount of Rs.5,00,000/- are nothing but fraud played by the plaintiff and the 1st defendant to cheat this defendant. So, the sale agreement has been fraudulently created by the plaintiff and the 1st defendant in order to grab the property from this defendant. Hence, the sale agreement is not valid under Law and the suit on the basis of it, is also not valid. There is no cause of action for the suit.

1) The plaintiff did not come to the Court with clean hands. The Court fee paid by the plaintiff for the relief sought by him is calculated incorrectly. Further, the plaintiff is not entitled to get the relief of Specific Performance. Hence the suit has to be dismissed with the cost of this defendant.

5. The Trial Court framed the issues as to Whether the plaintiff is entitled to get the relief of Specific Performance as per the sale agreement dated 27.4.2012. Whether the plaintiff is entitled to get the alternative relief of getting an advance amount of Rs.5,00,000/- with interest at 18% per annum. Whether the plaintiff is entitled to get the relief of permanent injunction and to what relief, the parties are entitled.

6. The plaintiff examined himself as PW1 and PW2 have been examined and Exs.A1 to A10 have been marked. On the side of the second defendant, DW1 has been examined and no documents had been marked. Relying on the registered sale agreement dated 27.04.2012, Ex.A5, and considering the fact that the earlier sale agreement dated 13.04.2010 was also cancelled on 27.04.2012, the date on which the second sale agreement was entered into, the Trial Court decreed the suit and granted the relief of specific performance in favour of the plaintiff.

7. The findings of the Trial Court reveals that the second defendant has deposed as per her written statement. However, the second defendant has not marked any document on her side. She has not marked the cancellation of power deed dated 04.02.2013 as stated by her. The second defendant had not filed any document to prove that she had settled the loan amount and further the power of attorney deed is a registered document and accordingly, the second defendant had given power to the first defendant to deal with the suit mentioned property. Thus, the said registered power deed is binding on the second defendant.

Based on the power of attorney deed, Ex.A1 sale agreement and Ex.A5 suit sale agreements had been executed by the first defendant. The suit sale agreement is a registered sale agreement dated 27.04.2012. On the very same day, the earlier sale deed executed on 13.04.2010 was cancelled by way of cancellation deed dated 27.04.2012. Therefore, the Trial Court arrived a conclusion that Ex.A5 suit sale agreement is binding on the defendants both D1 and D2. When Ex.A1 and A5 are registered sale agreements and when a registered power of attorney deed has been executed by the second defendant, then it is to be construed that all the transaction for sale is valid in the eye of law and accordingly, the plaintiff is entitled for the suit for specific performance.

8. The learned counsel appearing on behalf of the appellant mainly contended that the appellant is the absolute owner of the suit mentioned property. The first respondent/plaintiff undoubtedly signed the suit sale agreement with the second respondent/first defendant, who is the power of attorney holder of the appellant/second defendant. The learned counsel for the appellant reiterated that there was a business transaction between the first defendant and the plaintiff and the second defendant borrowed a loan from the plaintiff and by way of security she had executed a power of attorney and the first defendant by using the said power of attorney deed, which is registered deed, had executed two sale agreements, one on 13.04.2010 for sale consideration of Rs.3 lakhs in respect of the suit mentioned property and second sale agreement dated 27.04.2012, for a total sale consideration of Rs.10 lakhs, and Rs.5 lakhs by way of advance on receipt.

9. The learned counsel for the appellant further stated that the first sale agreement dated 13.04.2010 was cancelled in vide document No.4597/2012 on 27.04.2012 and on the very same day, another sale agreement was registered on 27.04.2012, fixing the sale consideration as Rs.10 lakhs. In order to distinguish these two sale agreements, the learned counsel for the appellant solicited the attention of this Court regarding the manner in which these two sale agreements were registered and cancellation deed was registered. In the first sale consideration, the total sale consideration is Rs.3 lakhs and in the second sale consideration, the total sale consideration is Rs.10 lakhs. In fact, the first sale agreement is dated 13.04.2010 and the second sale agreement was registered after a lapse of two years on 27.04.2012 and on that day itself, the first sale agreement dated 13.04.2010 was cancelled and the cancellation deed was also registered.

10. Relying on the nature of the transaction took place, the learned counsel for the appellant is of an opinion

that the registration of two sale deeds as well as the cancellation deed executed are for the purpose of recovery of loan amount from the second defendant and at no point of time, the second defendant intended to sell her property in favour of any person. The power of attorney was registered by way of security and not for sale of suit property.

11. The Trial Court has not considered the nature of the transaction as well as the circumstances arouse for registration of such sale agreement by the first defendant in favour of the plaintiff. The Trial Court has further not considered that the different sale considerations fixed in two different sale deeds are a leading factor to ascertain that it is a loan transaction and not a sale process.

12. Per Contra, the learned counsel appearing on behalf of the first respondent disputed the contentions strenuously by stating that the Trial Court has rightly proceeded with the grounds raised by the parties to the lis and in fact, the second defendant has not proved before the Trial Court that she borrowed a loan or repaid any amount towards any such loan amount. In the absence of any document in this regard, the Trial Court believed the registered sale deed and granted the relief of specific performance. In other words, it is contended on behalf of the first respondent that the suit sale agreement is a registered document and further the receipt of advance is not disputed by the second defendant and under those circumstances, based on the registered documents, the Trial Court ordered for specific performance and thus, there is no infirmity or perversity as such and therefore, no interference is required and the appeal suit is liable to be dismissed.

13. Considering the arguments, this Court is of the considered opinion that grant of relief of specific performance is a discretionary one and the Courts are bound to consider all the factual circumstances as well as the conduct of the parties so as to ensure that the plaintiff is entitled for the relief of specific performance. The relief being discretionary, the Courts are bound to ascertain, whether the parties have intended to proceed with the sale or not.

14. It is not sufficient for the plaintiff to prove that the sale agreement is the registered document and the contract is not voidable. Even in such circumstances, the relief of specific performance can be declined by the Courts if any inequality or prejudice is likely to be caused, then the Courts are empowered to decline the relief of specific performance. Thus, it is not sufficient for the plaintiff to establish that the contract is not voidable, but it is to be established that the intention and conduct of the parties and related factors

with reference to their transaction as well as they have intended to execute the sale. If there is some doubt with reference to the transaction and the manner in which the documents are registered as well as the manner in which the sale consideration is fixed, then the Courts are well within its powers to decline the relief of specific performance.

15. In the present case, the facts established are that, two different sale agreements were registered and the first sale agreement was registered on 13.04.2010, wherein, the total sale consideration is fixed as Rs.3 lakhs for the suit mentioned property. Thereafter, on 27.04.2012, the said sale agreement dated 13.04.2010 was cancelled in vide document No.4597/2012 and on the very same day, a fresh sale agreement was registered on 27.04.2012 itself. In the said sale deed, the total sale consideration is fixed as Rs.10 lakhs, out of which an advance amount of Rs.5 lakhs was paid. Both the sale agreements were executed by the first defendant who is the power of attorney holder of the second defendant.

16. Looking into the nature of transaction as well as the conduct of the parties and the defense taken by the second defendant who is the owner of the suit mentioned property, this Court is of the considered opinion that the Trial Court has committed an error in granting the relief of specific performance as the parties had not intended to proceed with the sale. This apart, it is brought to the notice of this Court that the property situates in Tiruppur Town and is a house property and the land measuring 2400 sq.ft. The sale consideration fixed in the second sale agreement dated 27.04.2012 is Rs.10 lakhs and undoubtedly, not in commensuration with the actual market value of the said property. This being the factum, the Trial Court had committed an infirmity in granting relief of specific performance and the appellant/second defendant would not have intended to proceed with the sale, as the sale consideration itself is not in consonance with the market value prevailing in Tiruppur Town, as of now and even at the time of execution of the sale agreement in the year 2012.

17. Even recently, the Hon'ble Supreme Court of India, in the case of Surinder Kaur Vs. Bahadur Singh, reported in (2019) 8 SCC 575, wherein the Hon'ble Supreme Court held that, "a perusal of Section 20 of the Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely because the plaintiff is legally right, the court is not bound to grant him the relief. True it is that the court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub-clause (c) of sub-

section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the court can refuse to grant such discretionary relief. Explanation (2) to the section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff."

18. With reference to the alternate relief regarding refund of advance amount, it is contended that the suit sale agreement was executed by the first defendant who is the power of attorney holder of the second defendant / owner. The learned counsel appearing on behalf of the appellant reiterated that the plaintiff had not established that he paid the advance to the second defendant nor the said advance amount was handed over by the power of attorney holder to the original owner / second defendant. In the absence of any such proof, the plaintiff is not entitled for the alternate relief.

19. This Court is of the considered opinion that the second defendant herself raised the ground that the plaintiff as well as the first defendant are the business partners and under these circumstances, this Court is not inclined to consider the alternate relief of refund of advance amount. If at all the plaintiff has paid the advance amount to the first defendant, who is the business partner as well as the power holder of the second defendant, it is left open to the plaintiff to recover the same from the first defendant in the manner known to law.

20. In respect of the lis on hand, if a prime property in Tiruppur Town, more specifically, a house property is allowed to be sold for a sale consideration of Rs.10 lakhs, undoubtedly the same would create an inequitable circumstances as far as the property owner is concerned and therefore, this Court is not inclined to confirm the judgment and decree passed by the Trial Court. Consequently, the judgment and decree dated 05.12.2015, passed in O.S.No.40 of 2013 is set aside and Appeal Suit in A.S.No.16 of 2016 stands allowed. No Costs.

Sd/-

Assistant Registrar

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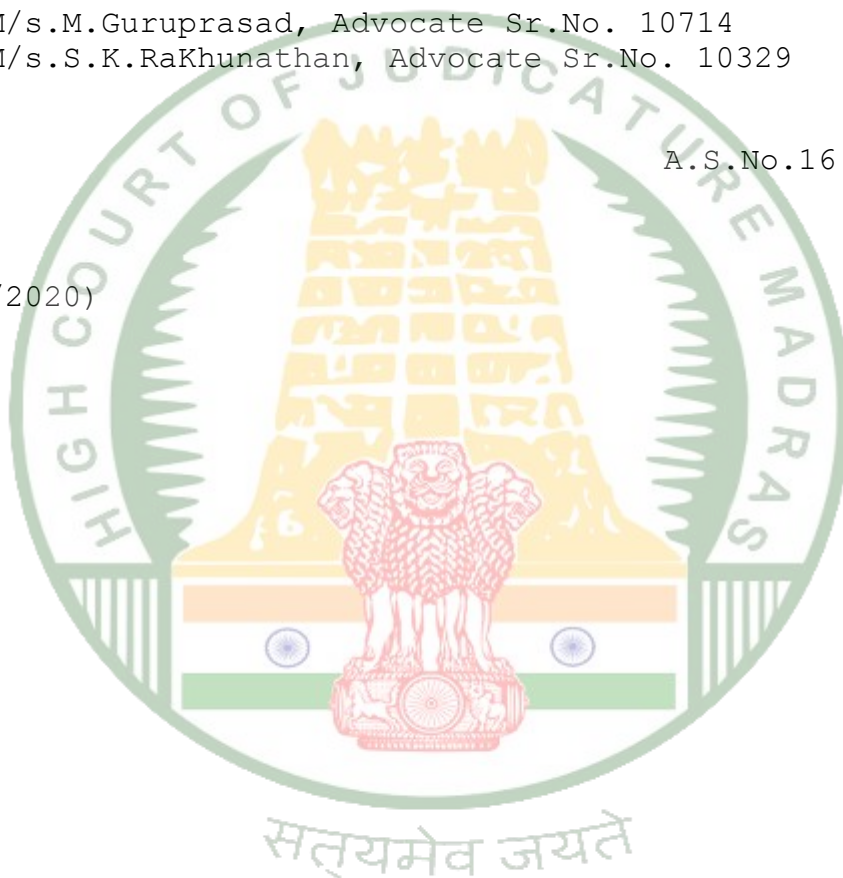
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