

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.01.2020

CORAM:

THE HONOURABLE MS.JUSTICE S.M.SUBRAMANIAM

A.S.No.289 of 2016
CMP.No.5403 of 2016

K.N.Jaganathan

... Appellant/Defendant

Vs.

1. S.M.Devaraj
2. P.M.Ramesh

.. Respondents/Plaintiff

PRAYER: Appeals under Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree made in O.S.No.20 of 2009, on the file of the First Additional District & Sessions Judge, Vellore, dated 25.09.2014.

For Appellants : Mr.J.Ram
For Respondents : Mr.D.Rajagopal

JUDGMENT

The Appeal Suit on hand is directed against the judgment and decree passed in O.S.No.20 of 2009 dated 25.09.2014. The defendant is the appellant before this Court. The respondent plaintiff instituted a suit for specific performance of the agreement of sale dated 22.09.2003, entered into between the plaintiffs and the defendant, in respect of the suit schedule mentioned property.

2. The facts in nutshell as narrated by the plaintiffs are that the suit property belongs to the defendant and he purchased the same through registered sale deed dated 02.04.1969 registered as document No.1164 of 1969. On 22.09.2003, the defendant has executed an agreement for sale in favour of the plaintiffs agreeing to sell the property to the plaintiffs for a total sale consideration of Rs.21,00,000/- and received an advance amount of Rs.1,00,000/- initially and subsequently, received further advance and in total, the defendant had received an advance amount of Rs.4,75,000/-. The time fixed for completion of the terms of agreement was fifteen months, ie., on or before 21.12.2004. The last payment of advance was made on

06.09.2006. Though the period of fifteen months was stipulated in the suit sale agreement, it was agreed between the parties that the time is not the essence of contract as the defendant had received subsequent advance amount from the plaintiffs.

3. The plaintiffs states that on verification, they found that the suit property was subjected to a mortgage and the defendant was taking time after time for discharging the said mortgage and execute the registered sale deed in favour of the plaintiffs. The plaintiffs contends that they were always ready and willing to perform their part of contract and the defendant was evading the performance on his part of contract on account of the fact that the suit property was already under mortgage and the said mortgage was not redeemed for the purpose of execution of sale in favour of the plaintiffs. Thus, the plaintiffs issued lawyer notice on 05.01.2005, to the defendant and the defendant denied the contentions by way of reply notice and thereafter, the plaintiffs were constrained to institute a suit for specific performance.

4. The defendant denied the averments in the plaint by stating that the plaintiffs approached the Trial Court with uncleaned hands with the view to grab the suit property. The defendant is the absolute owner of the suit property. The first plaintiff is the father-in-law of the second plaintiff and both of them do not have sufficient funds to pay and purchase the suit property. Without having funds, the plaintiffs ventured new trade of real estate. By paying a small amount, they used to agree to purchase large extent of land and they will form layout and thereafter, deal the same to the intending purchasers and get advances and pay to their vendors. It is contended that the plaintiffs were being real estate business and they have not intended to purchase the suit property in their name and they have intended to pay a small amount by way of advance and thereafter deal with the property with some third party purchasers. The defendant was in urgent need of funds. He did not agree for fifteen months of first instance and was ready to sell the suit property within a period of three months. However, the plaintiffs insisted for fifteen months time and therefore, the plaintiffs are not entitled for the relief of specific performance.

5. It is contended that the plaintiffs during the relevant point of time was not ready and willing to purchase the suit property and due to their inability to mobilize funds, they cancelled and rescinded the contract on 22.02.2006 to which the defendant also accepted. In view of such cancellation, the plaintiffs are not entitled for any relief in the suit.

6. The Trial Court framed the issues as to whether the plaintiffs have no sufficient funds with them to pay the balance of sale consideration amount and to perform their part of contract as alleged in the written statement, whether the plaintiffs have abandoned the suit agreement, whether the suit agreement was mutually cancelled and rescinded on 22.02.2006, whether the plaintiffs are entitled for specific performance of the suit agreement, whether the plaintiffs are entitled for specific performance of the suit agreement, whether the plaintiffs are entitled for permanent injunction restraining the defendant from alienating the suit property to 3rd party and to what relief the plaintiffs are entitled to.

7. On the side of the plaintiffs, P.W.1 was examined. Ex.A1 to A20 were marked. On the side of the defendant, D.W.1 was examined and no documents were marked. As far as the issue Nos.1 to 3 are concerned, the Trial Court considered the facts, documents as well as the evidences placed before the parties to the suit. The Trial Court arrived a finding that the suit is for specific performance, based on an agreement Ex.A1. The plaintiffs and defendant agree the execution of the agreement Ex.A1, and the receipt of advance of Rs.1,00,000/- and also admit the subsequent payments of Rs.2,00,000/- and Rs.75,000/- and Rs.1,00,000/- for which the endorsements have been marked as Ex.A2 to A4. Thus, the receipt of advance amount is admitted by both the parties.

8. It is further admitted that as per the agreement entered on 22.09.2003, parties have not executed the agreement within fifteen months time as stipulated in the agreement and the plaintiffs had issued notice under Ex.A5, which had been received by the defendant. As per Ex.A6 acknowledgment card and the reply notice Ex.A7 and subsequently, both the plaintiffs and defendant agreed and continued the agreement by endorsement dated 22.02.2006, 10.06.2006 and 06.09.2006, which is after exchanges of notice. In view of the fact that the subsequent endorsement was made by the defendant in the suit sale agreement, the period of limitation was saved and accordingly, the Trial Court arrived a conclusion that the suit is not barred by limitation as raised by the defendant and the suit was filed within a period of limitation.

9. It is further contended that the defendant has declared that the suit property is not under any encumbrances. However, the plaintiffs came to know that the suit property was mortgaged and the mortgage was not redeemed. A copy of the registered mortgage deed dated 08.03.1999 has marked as Ex.A9 and the registration copy of discharge of mortgage dated 04.09.2006 is marked as Ex.A10 and the certified copy of the plaint in O.S.No.508 of 2005 filed in District Munsif Court, Gudiyatham by

one Radhabai, claiming recovery of money is marked as Ex.A11. The certified copy in I.A. 996 of 2005 in O.S.508 of 2005 wherein the suit property has been attached by the Court on 07.06.2006 and the certified copy of the attachment list in the above IA is marked as Ex.A13 and certified copy of the judgment decreed in favour of Tmt.Radhabai is marked as Ex.A14 and the decree copy is marked as Ex.A15. Similarly, another money lender N.A.Sambandan, has filed a suit for recovery of money in O.S.509 of 2005 and the certified plaint copy has been marked as Ex.A16 and the order of attachment of the suit property dated 07.02.2006 in IA.No. 995 of 2006 in O.S 509 of 2005 is marked as Ex.A17 and the copy of attachment list in the above IA is marked as Ex.A18 and certified copy of the judgment in favour in N.A.Sambandan in O.S509 of 2005 is marked as Ex.A19 and the decree copy is marked as Ex.A20. From the above documents, the Trial court found that the property was encumbered even before the date of agreement and even till the date of endorsements Ex.A2 to A4. Even in the reply notice Ex.A7, the defendant has not stated anything about the encumbrance. Unless the defendant releases the encumbrance, he would not be in a position to execute the sale deed. The loan amount outstanding was a sum of Rs. 1,72,000/-. As per the subsequent endorsements, the defendant had received Rs.3,75,000/- with the assurance to settle the loans. But inspite of the excess amount in his hands to settle the loans, the defendant has not done so, and has shown his readiness to receive the balance sale consideration and execute the sale deed.

10. Relying on these facts and circumstances as well as the documents, the Trial Court arrived a conclusion that the plaintiffs was always ready and willing to perform his part of the contract and the defendant expected to clear the encumbrance by releasing the encumbrance, as he received the advance from the plaintiffs. Taking note of these facts, the Trial Court arrived a conclusion that the plaintiffs has established readiness and willingness. This apart, even after knowing about the mortgage of the suit property, the plaintiffs were willing to purchase the same and paid further advance and extended the time for execution of sale deed. Thus, both the parties were aware of the mortgage and these aspects are not considered by the Trial Court, while taking note of the fact regarding the mortgage relating to the suit property.

11. The learned counsel appearing on behalf of the appellant mainly contended that the first plaintiff is the father-in-law of the second plaintiff and they were doing real estate business in that locality. By paying some meager amount of advance, they used to enter into an agreement and thereafter form layout of housing plots and enter into further agreement with the prospective purchasers, receive advance amount and thereafter,

settle the sale consideration to the vendors. This being the nature of business which was being carried out by the plaintiffs, the Trial Court has not considered all these aspects. Even as per the defendant, the suit property was under mortgage and inspite of that, the plaintiffs had paid further advance amount and obtained an endorsement from the defendant in the suit sale agreement only with the view to extend the time for completion of contract and to file suit and grab the property.

12. The learned counsel for the appellant further contended that the plaintiffs were not possessing sufficient funds during the relevant point of time as they had not paid the Court fees at the first instance, more specifically at the time of institution of suit. They have filed the suit and thereafter filed IA.No. 4 of 2008, seeking permission of the Court to extend time for payment of deficit Court fee of Rs.1,50,000/-. The Court fee of Rs.1,50,000/- had not been paid at the time of institution of suit and subsequently an interlocutory application was filed for payment of deficit court fee. The very fact would reveal that the plaintiffs were not possessing required funds for the purpose of completion of sale and therefore, they are not established the readiness and willingness and the Trial Court also erroneously held that the plaintiffs is entitled for the relief of specific performance.

13. The learned counsel for the appellant reiterated that the suit property is situated in the prime location in gudiatham and the present market value of the property is about 2.5 Crores. The sale amount was signed between the parties on 22.09.2003 and the suit itself was instituted in December 2007 and now after a lapse of 17 years from the date of suit sale agreement. If the relief of specific performance is granted, the defendant would be greatly prejudice and the same will result in unjust enrichment for the plaintiffs.

14. The learned counsel appearing on behalf of the respondents/plaintiffs disputed the said contentions by stating that the suit was instituted within a period of limitation and the Trial Court in clear terms held that the time for execution of contract was extended with the consent of the parties. Therefore, the suit was instituted within a period of limitation and the said issue was also decided in favour of the plaintiffs. This apart, the defendant had given a false declaration regarding the encumbrance of the suit property. In fact, even at the time of suit sale agreement dated 22.09.2003, the suit property was under mortgage and those facts were not revealed to the plaintiffs.

15. The learned counsel for the respondents relied on the judgment of the Hon'ble Supreme Court of India in the case of R.Lakshmikantham Vs. Devaraji, reported in (2019) 8 SCC 62, wherein the Apex Court held as under:-

"8. By the impugned judgment [R. Lakshmikantham v. Devaraji, 2017 SCC OnLine SC 1909] , the High Court reversed the concurrent judgments and held, on a construction of the agreement, that since only three months were given to complete the sale transaction, time was of essence. It also went on to hold that the two letters dated 18-12-2002 and 19-12-2002 could not have been said to have been served on the defendant and hence were not proved. The High Court recorded the defendant's advocate's statement that it was not going into other aspects except that the plaintiff was not ready and willing throughout to perform the sale agreement. Despite this, the High Court held that since the suit itself was filed belatedly, it would not be enough for the plaintiff to show that he had the necessary funds. It would also have been necessary for him to show that he was otherwise ready and willing throughout, which cannot be said to be correct considering that there was a long time gap between 22-9-2002 and 7-7-2003 inasmuch as the intermediate letters/notices were not proved. The High Court also further stated that the property value was Rs 10 lakhs on the date of the sale agreement, though this was not proved by the defendant, and then went on to state that since readiness and willingness had to be held against the plaintiff, and since the suit itself was belated, specific performance cannot be granted on the facts of this case and, as stated earlier, reversed the concurrent findings of the courts below.

10. The High Court has, in the second appeal, obviously gone wrong on a number of counts. First, to hold that time was of essence in the agreement, is wholly incorrect. Clause 3 has to be read along with Clauses 5 and 8, which clearly show that in the nature of reciprocal promises, the promise made by the seller in Clause 5 has to be performed first viz. that the title documents have to be obtained from the mortgagee after the mortgage is cleared. It is only then that the consideration above Rs 70,000, being the balance consideration for the sale, has to be paid. Secondly, the High Court is wholly incorrect in stating that the two letters of 18-12-2002 and 19-12-2002 cannot be said to have been proved. Both the letters were registered AD letters sent to the very address of the defendant, which the defendant states is the address

on which it received the legal notice dated 7-7-2003. Further, the moment the registered letter once sent is returned with the remarks mentioned hereinabove, it shall be deemed to have been served on the defendant on the address so stated, unless the contrary is proved. The defendant did not come forward with anything to show that this was not the proper address. In fact, that this is the proper address is shown by the fact that he acknowledged the receipt of the legal notice dated 7-7-2003 on this very address."

16. Relying on the said judgment, the learned counsel reiterated that so long as the suit for specific performance is filed within a period of limitation, delay cannot be put against the plaintiffs. In other words, merely on the ground of delay, the relief of specific performance cannot be denied as the suit was instituted within a period of limitation by the plaintiffs.

17. Considering the arguments, this Court is of an opinion that, the suit sale agreement receipt of the advance amount of Rs.4,75,000/- and the time limitation of fifteen months initially fixed as well as the subsequent endorsements made in the suit sale agreement are admitted by the parties. The Trial Court also held that the suit was instituted within a period of limitation. However, the fact remains that the agreement was signed on 22.09.2003 and the period of fifteen months expired on 21.12.2004. The subsequent payments were made and the last payment of advance was made on 06.09.2006 and the suit was instituted on 20.12.2007 and thereafter an interlocutory application was filed seeking permission of the Trial Court to pay the deficit court fee of Rs.1,50,000/-.

18. In respect of the ground of readiness and willingness, this Court is of the considered opinion that the plaintiffs have pleaded before the Trial Court and he was always ready and willing to perform his part of the contract. Undoubtedly, the subsequent payments were made by the plaintiffs after the expiry of fifteen months. However, at the time of extending the time for sale, the plaintiffs were very much aware of the fact that the property was under mortgage and the defendant had not released the encumbrance. When the plaintiffs were very much aware of the fact that the property was under mortgage and even after receipt of the advance amount, the encumbrance was not released, still they had intended to continue the agreement for the reasons known only to them. In normal conduct of the purchaser would be if they came to understand when the suit sale property was under mortgage, then they can cancel the agreement and get back their advance amount with interest or if any compensation is agreed in the agreement that also can be recovered. Contrarily, the plaintiffs have allowed the agreement

to be extended and paid further advance and obtained the endorsement from the respondent/defendant.

19. The very conduct shows that it is not a normal sales transaction and as contended by the respondents that the plaintiffs are being the real estate business and they paid a meager amount of advance and form a layout and thereafter sell the plots to the prospective purchasers. These aspects were not considered by the Trial Court. The conduct, the intention as well as the genuinity of the parties in respect of the sale are also to be considered by the Courts.

20. The relief of specific performance being a discretionary relief and equitable the Courts are bound to adopt the balancing approach and ensure that no prejudice is caused to either of the parties in the suit. The conduct of the plaintiffs and the subsequent endorsement obtained from the defendant even after knowing the fact that the mortgage was not released, the Trial Court has failed to consider these aspects.

21. Even in case of a lawful agreement, Courts can decline the specific performance if such a relief is inequitable. In this regard, this Court would like to cite the judgment of the Hon'ble Supreme Court 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."

22. In the present case, the fact remains that the defendant had received an advance amount of Rs.4,75,000/- on various dates from the year 2003 to 2006, ie., within a period of three years. The suit was filed in the year 2007. Now the First Appeal is taken up in the year 2020. The learned counsel for the respondent made a submission that the value of the suit property is now about Rs.2.5 Crores. The sale consideration fixed in the year 2003 was Rs.21 lakhs. This apart, the conduct of the plaintiffs establishes that they are not the bonafide purchasers

of the suit property and there was no spontaneous approach in respect of establishing their readiness and willingness. The various circumstances narrated shows that the plaintiffs have moved the documents in such a calculated manner, so as to fix the respondents and respondent who is the agriculturists and residing in Gudiyatham.

23. Under these circumstances, this Court is of the considered opinion that in the event of granting the specific performance, it will be inequitable and result in unjust enrichment on the part of the plaintiffs. Under these circumstances, this court is not inclined to agree with the finding of the Trial Court as the Trial Court has not considered the ground of readiness and willingness in a right perspective and in consonance with the documents and evidences produced by the parties and on the established principles. Thus, the suit is liable to be dismissed with reference to the relief of specif performance.

24. As far as the alternate relief of refund of advance amount is concerned, though the plaintiff has not prayed for any alternate relief, this Court has to consider the same, in view of the fact that the very same unjust enrichment cannot be permitted on the part of the respondent also. In the event of allowing the respondent to retain the advance amount, the same would amount to an unjust enrichment and therefore under those circumstances the Courts are bound to consider the general relief to be granted based on Order VII Rule 7 of the Code of Civil Procedure which enumerates that "every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent a if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement " and the same Rule shall apply to any relief claimed by the defendant in his written statement. The very spirit of Order VII Rule 7 of Code of Civil Procedure is to be considered. Generally, the practice followed in the plaint relief column is that "granting such other relief or relief as the Court may deem fit, proper, just and necessary in the circumstances of the case and render justice". Such a general relief sought for is to be considered, so as to avoid unjust enrichment by either of the parties. Thus the relief is to be moulded under Order VII Rule 7 for the purpose of refund of advance amount as the same is consequential. When the suit for specific performance is denied, then return of advance could be considered as consequential relief and the same cannot be denied to the respondent in the present case. Under these circumstances, the following orders are passed;

1. The judgment and decree dated 25.09.2014 passed in O.S.No.

20 of 2009 is quashed.

2. The respondents are entitled for the alternate relief of refund of the entire advance amount of Rs.4,75,000/- with the interest at the rate of 12% per annum from the date of filing till the date of decree i.e., 25.09.2014 and thereafter 6% per annum till the date of realisation.

25. It is brought to the notice of this Court that the respondents had deposited a sum of Rs.16,25,000/- in the credit of O.S.No.20 of 2009, the respondents are permitted to withdraw the said amount with the accrued interest by filing an appropriate application.

26. The appellant is directed to pay the advance amount of Rs.4,75,000/- along with the interest as stated above within a period of three months from the date of receipt of a copy of this judgment. With these directions, the Appeal Suit allowed in part. No Costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

Pkn.

To

1. First Additional District & Sessions Judge,
Vellore.

2. The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.J.Ram, Advocate sr 7055

+1 CC to Mr.D.Rajagopal, Advocate sr 7565.

A.S.No.289 of 2016

AK(CO)
SP(30/09/2020)

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