IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.01.2020

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.95 of 2013
C.M.P.No.24564 of 2019

S.Umedraj Jain ... Appellant/Plaintiff

-Vs-

Sadasivam
.. Respondent/Defendant

PRAYER: First Appeal filed against the Judgment and decree dated 31.01.2007 passed in O.S.No.90 of 2004 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Poonamallee.

For Appellant : Mr.S.Silambanan
Senior Counsel
for Mr.N.Baskaran

For respondent : Mr.T.Thangamani

J U D G M E N T

The appeal suit on hand is directed against the judgment and decree dated 31.01.2007 passed in O.S.No.90 of 2004 on the file of the Additional District and Sessions Judge, Fast Track Court No.III, Poonamallee.

2. The plaintiff is the appellant in the appeal suit and the defendant is the respondent. The suit was instituted by the appellant/plaintiff for the relief of specific performance based on the agreement executed on 25.03.1997, which is marked as Ex.A1.

3. The contentions of the appellant/plaintiff are that the defendant had executed a Sale Agreement on 25.03.1997 in favour of the plaintiff in respect of the sale of the suit mentioned property towards part performance of the agreement. The defendant had placed the plaintiff into physical possession of the suit mentioned property and accordingly, the plaintiff was in possession and enjoyment of the property sought to be conveyed under the said sale agreement dated 25.03.1997. It is contended by the appellant/plaintiff that he would always ready and willing to pay the balance sale consideration of a sum of Rs.2,60,000/- and even at the time

of filing of the plaint, he has stated that he was ready to pay the balance amount and accordingly, the defendant should execute the sale as per the agreement. The total sale consideration fixed was Rs.7,60,000/- (Rupees Seven lakhs and sixty thousand only), out of which, a sum of Rs.5,00,000/- (Rupees Five lakhs only) was paid as advance. It is contended that the entire documents in respect of the suit mentioned property is in the custody of the plaintiff and under those circumstances, the plaintiff had caused a notice to the respondent/defendant on 09.02.2000 and the notice was refused by the defendant and the cover was returned as undelivered. Hence, the plaintiff was constrained to institute the suit for specific performance to enforce the agreement dated 25.03.1997.

4. The defendant disputed the contentions in his written statement by stating that he had executed the sale agreement document dated 25.03.1997 in favour of the plaintiff, but the said document was not acted upon as an agreement for sale. Though it purports to be an agreement of sale, it was intended to be a document of security for the loan advanced by the plaintiff to the defendant for the purpose of construction of factory sheds and for payment of loan obtained from TIIC. In this regard, the defendant contended that he borrowed loan from TIIC for the purpose of construction of factory sheds and he was unable to repay the loan. In these circumstances, he borrowed loan from the plaintiff for the purpose of settling the loan dues to the TIIC. It is contended that the defendant had repaid a sum of Rs.2.2 lakhs to the plaintiff in liquidation of the loan advanced by the plaintiff. At the out set, it was contended in the written statement that the said sale agreement was not intended for sale of the suit mentioned property and it was executed as a security for the purpose of loan borrowed from the plaintiff by the defendant. The defendant denied that he had settled the total dues pertaining to the suit mentioned property to the plaintiff in pursuance of the contract of sale. It is stated that the plaintiff was directed by the defendant to pay to TIIC, the loan which the defendant had borrowed. The plaintiff was due and liable to pay to the defendant a substantial amount by way of rents as he was in a possession of the suit mentioned property. Out of such dues, the plaintiff paid a sum of Rs.6,00,000/- to TIIC at the instance of the defendant. The defendant has stated that after the discharge of the loan of Rs.6,00,000/- to TIIC, the plaintiff had on 05.08.1999 again taken the building marked as 410-B in the sketch, which the plaintiff had earlier vacated when he moved to adjoining building marked as 410-A. It is contended on behalf of the defendant that the plaintiff owes to the defendant a sum of Rs.15,44,154/- as arrears of rent after adjusting the loan amounts and other amounts received by the defendant. Opposing the plaint, the defendant had set out the above facts.

5. The Trial Court framed the issues as to (i) whether

the plaintiff had paid a sum of Rs.5,00,000/- as advance in respect of the agreed total sale consideration of Rs.7,60,000/- and executed the sale agreement dated 25.03.1997 or not; (ii) whether the plaintiff was in possession of the suit mentioned property after the sale agreement dated 25.03.1997; (iii) whether the defendant has handed over the documents to the plaintiff or not; (iv) whether the defendant had paid the part loan amount to the plaintiff or not; (v) whether the suit sale agreement is a valid one or not; (vi) whether the plaintiff is entitled for the alternate relief?.

6. With reference to issue no.2, the Trial Court considered the documents and made a finding that after the suit sale agreement, the plaintiff was not in complete possession of the suit mentioned property. He was continuing as a tenant in the suit mentioned property and the evidences produced before the Trial Court also revealed that the plaintiff was in possession of the suit mentioned property in his capacity as a tenant and not in lieu of the said sale agreement. He was in continuous possession only as a tenant and based on such finding, the Trial Court arrived at a conclusion that after the execution of the suit sale agreement in Ex.A1, the plaintiff was in possession of the suit mentioned property only as a tenant and accordingly, the issue held in favour of the defendant.

7. With reference to the issue no.3, the Trial Court arrived the findings that the original documents relating to the suit mentioned property was handed over to the plaintiff with the consent of the defendant as the plaintiff had paid the loan dues to TIIC as per the consent extended by the defendant. Accordingly, the issue was decided by the Trial Court.

8. With reference to the issue nos.1, 5 and 6, the Trial Court arrived at a conclusion that during the execution of the suit sale agreement-Ex.A1, the defendant had not received the advance amount of Rs.5,00,000/- from the plaintiff. With reference to these issues, the Trial Court examined the nature of the suit sale agreement entered into between the parties. The suit sale agreement-Ex.A1 dated 25.03.1997 reveals that the amount regarding the total sale consideration is filled in hand and this apart certain conditions are contradictory and reveals that the agreement was not entered into between the parties for the purpose of sale of the suit mentioned property. It is relevant to extract the terms and conditions to ascertain the nature of the agreement and the same are extracted hereunder:-

> "7. The purchaser accepts to receive the sum of Rs.7.6 lakhs from the vendor within 24 months consequently. After paying fully this agreement will stand cancelled.

8. The vendors agrees to comply with the statutory requirements of the Income Tax Act, 1961 and further agrees to obtain and produce necessary Income Tax Clearance Certificate for completion of sale.

9. Both the parties agree not to commit breach of any one of the conditions set out in this agreement for them to perform.

a). In case the vendor commits breach of any or all the terms of this agreement, the purchaser will be entitled for specific performance of the contract or to claim refund of the sale advance together with damages of an equal sum option being that of the purchaser.

b). If the purchaser commits breach he/she will forfeit a sum of Rs.10,000/- (Rupees Ten Thousand only) out of the sale advance and on payment of the remaining amount of advance sale money to the purchaser, this agreement will stand cancelled."

9. On examining clause 7 of the agreement-Ex.A1, it is seen that the purchaser accepts to receive the sum of Rs.7,60,000/- from the vendor within 24 months, consequently, after paying fully, the agreement shall stand cancelled. It is pertinent to note that such a condition is not only unusual, but the same expresses the intention of the parties and the nature of transaction entered into between the parties. The terms and conditions are paramount important in view of the fact that certain condition reveals the minds of the persons, but agreed to comply with the terms and conditions. The acceptance by the purchaser to receive a sum of Rs.7,60,000/- in sale transaction can never be done. On receipt of a sum of Rs.7,60,000/- from the seller, the purchaser accepts for the sale agreement stands cancelled. The question does not arise at all in view of the fact that if the sale is intended to be executed, then there is no possibility for agreeing for such a condition by the purchaser. When the purchaser himself agrees that in the event of receiving a sum of Rs.7,60,000/- from the vendor within 24 months, he is prepare to cancel the sale agreement itself. This Court has no doubt with the conclusion that it is a loan amount, which sought to be repaid by the plaintiff and the plaintiff had never intend to purchase the property belongs to the defendant. When the plaintiff is not intend to purchase the property of the defendant as specifically agreed to cancel the suit sale agreement in the event of receiving a sum of Rs.7,60,000/- from the defendant within 24 months, this Court has no hesitation in coming to the conclusion that the suit sale agreement can never be an agreement for sale and it is the document as a security towards the loan borrowed from the plaintiff by the defendant.

10. As far as clause 9 of the suit sale agreement is concerned, both the parties agreed not to commit any breach in respect of the conditions agreed. Clause 9(a) stipulates that in case, the vendor commits breach of the terms of the agreement, the purchaser will be entitled for specific performance of the contract. Therefore, the defendant agreed that in the event of non payment of a sum of Rs.7,60,000/- to the purchaser within 24 months, then the purchaser would be entitled for the relief of specific performance. As far as clause 9(b) of the agreement is concerned, if the purchaser fails to purchase the property, he will forfeit a sum of Rs.10,000/- out of the sale advance and on payment of the remaining amount of advance sale money to the purchaser, the agreement stand cancelled. Therefore, the said clause is advantage to the plaintiff as he paid the loan amount to the defendant. The amount of Rs.7,60,000/- in all the places in the agreement are written in handwriting type and rest of the conditions are typed in stamp paper. Therefore, doubt arises whether filling up the total sale consideration in hand is nothing but the loan amount along with interest calculated at a later point of time and filled by the plaintiff.

11. The learned senior counsel appearing on behalf of the appellant mainly contended that the plaintiff had established the fact that the agreement was signed by the parties concerned and the signature of the parties is not disputed before the Trial Court. The receipt of advance amount by the defendant has not been disputed. When the terms and conditions are admitted by the parties, the Trial Court ought to have granted the relief of specific performance. When the plaintiff established the readiness and willingness to pay the balance sale consideration and further proved that he is entitled for the relief of Specific Performance based on the suit sale agreement, the Trial Court ought not to have dismissed the suit merely on the ground that it was the loan transaction and the suit sale agreement was not executed for the purpose of sale of the suit property.

12. The learned Senior counsel relying the contentions in the written statement and made a submission refuting the said contention of the plaintiff that he had repaid the loan amount in the absence of any such specific refutal in the written statement. Now the respondent/defendant cannot take a stand that the agreement is not intended for sale and it is only to be construed as a security for the loan borrowed by the defendant from the plaintiff.

13.The learned counsel appearing on behalf of the respondent/defendant disputed the said contention of the learned Senior counsel and stated that the terms and conditions of the suit sale agreement-Ex.A1 itself reveals that the agreement was executed not for the purpose of sale of the suit mentioned property but, as a security towards loan borrowed by the defendant from the plaintiff. Substantiating the said arguments, the learned counsel for the respondent reiterated Clause 7, 9 of the suit sale agreement and emphasised that the appellant/plaintiff himself admitted that he had no intention to purchase the suit property and he was interested in recovering the loan dues from the respondent/defendant and therefore, the Trial Court is right in rejecting the suit for specific performance and granted the alternate relief of refund of advance amount with interest.

14. The Trial Court, in clear terms, held that the suit sale agreement in Ex.A1 is a document executed towards the security of the loan borrowed by the respondent/defendant and the terms and conditions of the agreement reveals that it was not intended for the sale of the suit mentioned property. This being the findings, this Court independently considers the terms and conditions agreed upon between the parties in Ex.A1, there is no ambiguity in respect of the intention expressed by the appellant/plaintiff as that the agreement stands cancelled if the purchaser accepts to receive a sum of Rs.7,60,000/- from the vendor within 24 months. Therefore, it is clear that the appellant/plaintiff agreed to cancel the suit sale agreement in the event of repayment of Rs.7,60,000/- to the appellant within 24 months. Since the defendant failed to repay the said amount within 24 months, the appellant/plaintiff instituted the suit for specific performance as agreed in para 9(a) of the suit sale agreement. Thus, it is clear that the suit sale agreement cannot be construed as a sale agreement and the parties have not intended to sell or purchase the suit mentioned property. This being the factum established and the finding arrived at by the Trial Court, this Court does not find any perversity or infirmity in respect of the findings of the Trial Court and the documents as well as the evidences placed by the parties before the Trial Court were considered in the right perspective. Accordingly, the relief for specific performance was rejected and the repayment of the advance amount with interest was granted. The learned counsel for the respondent/defendant raised objection that in the absence of prayer in the suit, this Court is of the considered opinion that grant of alternate relief falls, which is permissible under the code of Civil Procedure and therefore, in the event of granting alternate relief for refund of advance amount, then it would cause prejudice to the appellant/plaintiff and result unjust to the respondent.

15. Under these circumstances, this Court would like to refer the recent judgment of the Hon'ble Supreme Court of India in the case of Surinder Kaur v. Bahadur Singh, reported in 2019 (8) SCC 575 and the relevant paragraph 14 is extracted hereunder:

> "14. 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."

16. In this case, the receipt of advance amount was admitted by the parties concerned and therefore, the appellant is entitled for the alternate relief of refund of advance amount with interest as ordered by the Trial Court and accordingly, the respondent/defendant is directed to refund the advance amount with interest as ordered by the Trial Court, within a period of three (3) months from the date of receipt of a copy of this judgment.

17. In this view of the above, the judgment and decree passed in O.S.No.90 of 2004 dated 31.01.2007 stands confirmed and consequently, AS.No.95 of 2013 stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

kmi

To

The Additional District and Sessions Judge,
Fast Tract Court No.III,
Poonamallee.

Copy To
The Section Officer,
VR Section, High Court, Madras.-104

+6cc to Mr.T.Thangamani, Advocate SR.No.4114
+1cc to Mr.N.Baskaran, Advocate SR.No.3978

SSD(CO)
GMI(02/03/2020)