

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2020
PRONOUNCED ON: 03.03.2020

CORAM

THE HON'BLE Mr. JUSTICE V.PARTHIBAN

S.A.No.884 of 2013 and
M.P.No.1 of 2013

K.Anandhan .. Appellant/Plaintiff

vs.

1.S.Ashok Kumar
2.Sampath Kumar ... Respondents/Defendants

Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and decree dated 28.03.2013 made in A.S.No.71 of 2012 passed by the learned First Additional District Judge, Coimbatore reversing the decree and Judgment dated 02.01.2012 made in O.S.No.566 of 2007 passed by the II Additional Sub-Judge, Coimbatore.
(Amended vide order dated 25.03.2019 made in C.M.P.No 7381/2019 in S.A.No.884/2013)

For Appellant : Mr.Muruganandam
for Ms.M.Srividya

For Respondents : Mr.Saravanan (R1 and R2)

J U D G M E N T

The Appellant is the Plaintiff. The Respondents are the Defendants in the suit proceedings.

2. The parties are described as per the litigated status and rank in the suit.

3. The Appellant/Plaintiff herein has approached the trial court in O.S.No.566 of 2007 before the Second Additional Sub Court, Coimbatore for passing of decree of specific performance of contract of sale dated 13.06.2005 and directing the Defendants to receive the balance sale consideration of Rs.74,000/- (Rupees Seventy Four Thousand only) and execute a sale deed within a period stipulated by the Court.

4. The case of the Plaintiff was that the Defendants had entered into an agreement of sale on 13.06.2005 to sell the suit schedule property for a total sale consideration of Rs.1,30,000/- (Rupees One Lakh Thirty Thousand Only). The agreement of sale was also a registered instrument. At the

time of execution of the agreement, the initial amount of Rs.30,000/- (Rupees Thirty Thousand only) was paid by the Plaintiff to the Defendants. As per the sale agreement, the sale transaction has to be completed within a period of two years from the date of agreement and free from encumbrance whatsoever. The suit property was infact under a mortgage loan with the Indian Bank, Puliyakulam Branch. After making initial payment of Rs.30,000/-(Rupees Thirty Thousand only), the plaintiff also paid a sum of Rs.6,000/- (Rupees Six Thousand only) and Rs.20,000/- (Rupees Twenty Thousand only) on 04.07.2005 and 12.07.2005 respectively towards the said loan availed by the Defendants and the Defendants have treated these payments as further advances of sale agreement dated 13.06.2005. Totally, the Plaintiff has paid a sum of Rs.56,000/- (Rupees Fifty Six Thousand only) and the balance consideration of Rs.74,000/-(Rupees Seventy Four Thousand only) was to be paid in order to complete the terms of the sale on the side of the Plaintiff.

5. According to the Plaintiff, he was ready and willing to complete the sale transaction, but the Defendants were postponing the same under one pretext or the other. In the said circumstances, the Plaintiff was constrained to send a legal notice to the defendants calling upon them to come to the Sub Registrar's Office concerned on 18.05.2007 at 10.00 A.M. to receive the balance sale consideration after clearing the bank loan, execute and register the sale deed in pursuance of the sale agreement dated 13.06.2005. A legal notice was issued on behalf of the Plaintiff on 07.05.2007. In response to the legal notice, a reply notice was issued on 17.05.2007 on behalf of the Defendants coming up with extraneous allegations, in order to escape from enforcement of the sale agreement. Therefore, the Plaintiff filed a suit for specific performance.

6. The suit claim was resisted by the Defendants by filing a detailed written statement. The substance of the resistance was that not withstanding the sale agreement, the Plaintiff agreed to discharge the loan amount borrowed by the Defendants and only thereafter he was entitled to execution of sale. Since the Plaintiff had not discharged the loan, he was therefore not entitled to enforce the sale agreement dated 13.06.2005.

7. The trial court went into the issues had agreed with the claim of the Plaintiff and decreed the suit on 02.01.2012. The Trial court in extenso found that the defence put up by the defendants that there was a oral agreement between the Plaintiff and them and that the Plaintiff would discharge the bank loan was not proved at all. The trial Court found that no independent evidence was let in in support of such claim. The trial Court also held that burden of proving such oral agreement was on the Defendants and the burden was not discharged at all.

8. Moreover, the trial court has also found that the sale agreement dated 13.06.2005 which was marked as Ex.A1 was a registered agreement, which was admitted and proved and once the document is admitted and proved any amount of evidence contradicting, varying, adding to or subtracting from the terms of the agreement is not permissible under Section 92 of the Indian Evidence Act, 1872. Though proviso (3) to Section 92 of the Indian Evidence Act would provide for approving the existence of any oral agreement constituting to condition precedent, but the defendants have miserably failed to prove such oral agreement either through oral or documentary evidence. Infact, the trial Court found that the so called oral agreement taken by the defendants was a concocted story.

9. Moreover, the trial Court also found that the Exhibits marked on the Defendants' side viz., Ex.B1 which is the statement of accounts of the Defendants with the bank concerned showing only the fact that the loan was availed by the Defendants as a home loan for construction of home in the suit property and yet there was no construction in the suit property as on date and the suit property remained vacant. Ex.B2 was the certificate issued by the bank for closing the home loan by the Defendants on 26.04.2007. Therefore the trial Court found that the loan availed by the Defendants was actually a home loan. By rendering a clear finding, the trial Court has granted the relief as prayed for, to the Plaintiff.

10. As against that, the Defendants filed an Appeal in A.S.No.71 of 2012 before the First Additional District Judge, Coimbatore. The lower appellate court which dealt with the appeal accepted the case of the Defendants in regard to the oral agreement and reversed the finding of the trial court vide its Judgment dated 28.03.2013. The lower appellate court has drawn certain inferences from the circumstances pleaded on behalf of the Defendants. From the reading of the appellate Judgment it looks that Appellate Court has needlessly assumed and presumed many things in favour of the Defendants without any supporting materials. The lower appellate court held that the defence set up by the Defendants was falling within the Proviso 3 to Section 92 of the Indian Evidence Act. The lower appellate Court also reasoned that why would the Defendants pay more money to redeem the property and sell the same for lower price. In such circumstances, the lower appellate court refused to attach any sanctity to the registered sale agreement entered into between the Plaintiff and the Defendants.

11. Having aggrieved by the strange reversal of the decree of the trial Court by the appellate court the present Second Appeal has been filed by the Plaintiff.

12. Mr. Muruganandam, the learned counsel for the Appellant/Plaintiff would reiterate the above facts and he

would infact draw the attention of this Court to the extensive finding rendered by the trial Court in its Judgment. The Judgment rendered by the trial Court appears to be fully self explanatory and does not require appreciation from this Court. The learned counsel would also submit that so called mortgage deed in regard to the suit property as claimed by the defendant was not produced by the Defendants. According to the learned counsel, the lower appellate Court has unfortunately without dealing with any evidence has allowed the Appeal only on the basis of surmises and presumptions and therefore it requires to be interfered with. The learned counsel for the Appellant would also rely on the following decisions of the Hon'ble Supreme Court:

(i) P.S.Ranakrishna Reddy Vs. M.K.Bhagyalakshmi & another reported in (2007) 10 SCC 231. He would draw the attention of this Court to paragraph 13 of the judgment, which is extracted herein;

"13.A document, as is well known, must be read in its entirety. The intention of the parties, it is equally well settled, must be gathered from the document itself. All parts of the deed must be read in their entirety so as to ascertain the nature thereof."

13. According to the learned counsel the intention of the parties has to be gathered from the document itself from its entirety. He would submit that the plea taken on behalf of the defendants that only after discharge of the bank loan, the plaintiff was entitled to specific performance was not found anywhere in the document Ex.A.1- Sale Agreement dated 13.06.2005.

(ii) K.Prakash Vs. B.R.Sampath Kumar reported in (2015) 1 SCC 597. He would draw the attention of this Court to paragraphs 13 and 16 of the judgment, which is extracted herein;

"13.Indisputably, remedy for specific performance is an equitable remedy. The Court while granting relief for specific performance exercises discretionary jurisdiction. Section 20 of the Act specifically provides that the court's jurisdiction to grant decree of specific performance is discretionary but not arbitrary. Discretion must be exercised in accordance with the sound and reasonable judicial principles.

16.The principles which can be enunciated is that where the plaintiff brings a suit for specific performance of contract for sale, the law insists a condition precedent to the grant of decree for specific performance that the plaintiff must show his continued readiness and willingness to perform his part of the contract in accordance with its terms from the date of contract to the date of hearing.

Normally, when the trial court exercises its discretion in one way or other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. The appellate court should also not exercise its discretion against the grant of specific performance on extraneous considerations or sympathetic considerations. It is true, as contemplated under Section 20 of the Specific Relief Act, that a party is not entitled to get a decree for specific performance merely because it is lawful to do so. Nevertheless once an agreement to sell is legal and validly proved and further requirements for getting such a decree is established then the Court has to exercise its discretion in favour of granting relief for specific performance."

14. The learned counsel would submit that the Hon'ble Supreme Court has held in the above decision that once the agreement of sale is found to be validly executed and admitted, the discretion of the Court should be in favour of the plaintiff seeking specific performance.

15. Per contra the learned counsel appearing for the Respondents would submit that the Appellate Court has rightly inferred which was deducible from the circumstances pleaded by the Defendants that why would they sell the property for lesser price than what was actually paid to the bank for redeeming the property. Unfortunately the trial Court has not appreciated this aspect in proper perspective. According to the learned counsel, the trial Court has applied the principles of Evidence Act mechanically without reference to the pleading. He would therefore submit that the Judgment and decree of the appellate court reversing the finding of the trial court was on the basis on the pleading and on sound appreciation in terms of the provisions of the Indian Evidence Act and also in terms of the facts. Therefore, he would submit that the Judgment and decree of the appellate court need not be interfered with.

16. Considered the submissions of the learned counsel for the Appellant/Plaintiff and the Respondents/Defendants, perused the materials and pleadings placed on record.

17. As rightly contended by the learned counsel for the Appellant that the trial court has given an exemplary finding in extenso as to how the Plaintiff was entitled to succeed in the suit and how the Defendants' plea of oral agreement was hollow and unbelievable. Infact the trial Court has correctly held that as per Section 103 of the Indian Evidence Act, when a oral agreement was pleaded the entire burden shifted on the Defendants and no independent evidence was let

in either through documents or through any witness to substantiate the claim of the oral agreement between them and the Plaintiff.

18. When the oral agreement is pleaded, in order to vary the terms of the written agreement namely registered instrument viz., Sale Agreement- Ex.A1 dated 13.06.2005 the burden was so heavy on the Defendants and in the case on hand the Defendants as rightly held by the trial Court had miserably failed to discharge that burden. Therefore, the finding of the Appellate Court in its Judgment that Proviso (3) to Section 92 was attracted was a complete misunderstanding the scope of Proviso (3) to Section 92 of the Indian Evidence Act. Section 92 and Section 103 read as under:

"92. Exclusion of evidence of oral agreement- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1)- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want of failure of consideration, or mistake in fact or law.

Proviso (2)- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso(3)- The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved.

.....

"103.Burden of proof as to particular fact: The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

19. From the above provisions, it has to be seen that whether the Defendants have been able to prove the exception i.e., Proviso (3) to Section 92 at all, the answer is absolutely no. But unfortunately, the Lower Appellate Court has strangely concluded that the Proviso (3) to Section 92 was attracted which conclusion by the Appellate Court is unsupported by any material evidence. Further as per Section 103 which is extracted above, the burden to prove oral agreement pleaded by defendants varying in the terms of registered sale agreement dated 13.06.2005 was not discharged by the defendants.

20. As rightly contended by the learned counsel for the Appellant/Plaintiff that the entire Judgment of the Appellate Court is based on the surmises and presumptions alone and not on the basis of any material evidence. When the findings of the Trial Court and the appellate Courts are viewed along side for appreciation, the finding given by the appellate Court premised on mere presumptions and surmises for reversal of the finding of the trial court appears to be legally unacceptable and unfounded which instantly calls for interference.

21. The second decision cited by the learned counsel for the Appellant/plaintiff (2015) (1) SCC 597 K.Prakash Vs. B.R.Sampath Kumar). would clearly clinch the case in favour of the Appellant as held by the Hon'ble Supreme Court which is binding on this Court that when the legality and validity of the document was admitted and in this case Ex.A1 -Sale Agreement dated 13.06.2005, the discretion of the Court should tilt in favour of the grant of the relief of Specific performance. Taking cue from said observation, this Court has to necessarily tilt its discretion in favour of the Appellant/Plaintiff, and it was what the trial court has done by granting relief to the Plaintiff which was unfortunately reversed by the lower appellate court.

22. In the above circumstances, this Court has no hesitation in allowing the Appeal as the Judgment of the lower appellate court cannot be allowed to stand even for a moment. At the same time, this Court also should look into the aspect of considerable delay in disposal of the lis between the parties and whether the original sale price agreed to Rs.1,30,000/- (Rupees One Lakh Thirty Thousand only) should be consideration as on date. Although, this Court is conscious of the fact that the rise of price due to the efflux of time cannot be the consideration for granting the relief of

specific performance, yet taking into consideration the pragmatic view of the matter the sale price of the suit schedule property is enhanced to Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand only) as nearly fifteen years have gone by from the date of the sale agreement.

23. The Second Appeal is allowed on the following terms;

(i) The Appellant/Plaintiff is entitled to the relief of specific performance in respect of suit schedule property on payment of balance amount on the sale price fixed at Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand), after giving credit to the advance already paid and the deposit made before the trial court, within a period of three months from the date of receipt of copy of this judgment.

(ii) On such payment made, the defendants are directed to execute a sale in favour of plaintiff within two months thereafter.

24. The substantial questions of law framed by this Court at the time of admission of the Second Appeal are answered in favour of the Appellant.

25. In the result, the Second Appeal is allowed on the above terms. No costs. Consequently, connected M.P. is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

To,

1. The First Additional District Judge, Coimbatore.

2. The II Additional Sub-Judge, Coimbatore.

Copy To:

The Section Officer,
V.R.Section, High Court,
Madras.

+1 cc to Mr.S.Saravanan,advocate,sr.19044

+1 cc to Mrs.M.Srividhya, Advocate,sr.19129.

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S.A.No.884 of 2013