

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2020

CORAM

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.S.A.No.196 of 2018

M.Thirunavukarasu (Deceased)

1.T.Sundari

2.T.Selvi

3.T.Amudha

4.T.Saravanan

5.T.Senthil

.. Appellants/Defendants 3 to 7

Vs.

1.P.Usha Rani

2.George Town Co-Operative Bank Ltd.,

No 2/68, Krishnappa Naicken Agraharam Street,
Chennai - 600 079.

.. Respondents/Plaintiff &
2nd Defendant

PRAYER : Appeal filed under Order XXXVI Rule 9 of O.S.Rules r/w
Clause 15 of the Letter Patent against the decree and judgment
passed in C.S.No.611 of 2008 dated 09.02.2018.

CS.No.611 of 2008: Civil Suit filed under Order IV Rule 1 of O.S
Rules read with order VII Rule 1 of the Code of Civil Procedure,
praying that this Hon'ble Court be pleased to pass a decree and
Judgment:

a) directing the 1st defendant to receive the balance sole
consideration after discharge of the mortgage dues payable to
the 2nd defendant and execute the registered sale deed in favour
of the plaintiff in respect of the property morefully described
in the schedule hereunder;

b) directing the defendant to deliver vacant possession of
the schedule mentioned property;

c) or in the alternative to pass a charge decree on the schedule mentioned property in respect of the amounts received by the 1st defendant under the sale agreement dated 03.10.2007 of the sum of Rs.13,00,000/-together with interest at 18% p.a from the date of plaint till the date of realization;

d) for a permanent injunction restraining the first defendant from in any manner alienating or altering the suit property.

For Appellants : Mr.R.Ganesh babu

For Respondents : Mr.P.K.Sivasubramaniam for R1
Mr.Krishna Ravindran for R2

JUDGMENT
(Delivered by M.M.SUNDRESH,J)

The defendants, who suffered the decree for specific performance are the appellants.

2. The deceased first defendant was the owner of the property, which is the house. He also borrowed certain amount from the second defendant, which is the Co-operative Society Bank, by creating mortgage over the suit property. For the purpose of discharging the said mortgage, the deceased first defendant agreed to sell the property to the first respondent/plaintiff for total consideration of Rs.45,00,000/-. Accordingly, a sum of Rs.7,50,000/- has been received as advance and the sale agreement has been executed under Ex.P8. Thereafter, the first respondent/plaintiff paid another sum of Rs.3,50,000/- to the deceased first defendant. The time mentioned under Ex.P8 is three months.

3. As the deceased first defendant was not ready and willing to execute the sale deed, the first respondent/plaintiff issued notice on 24.09.2007 under Ex.P10. As the sale deed could not be executed within the time prescribed, another agreement was entered into between them on 03.10.2007 under Ex.P9. On the same day, the first respondent/plaintiff paid further sum of Rs.2,00,000/- to the tenant, who was living in a portion of the suit property. The receipt of the said amount was acknowledged under Ex.P9. The time prescribed under the said document is three months.

4. The first respondent/plaintiff issued another notice on 27.03.2008 under Ex.P11 asking the deceased first defendant to discharge the mortgage and execute the sale deed after receiving the balance sale consideration. As neither the sale deed executed nor the reply has been given, the present suit has been filed seeking a decree for specific performance to the agreement of sale dated 03.10.2007.

5. The deceased first defendant filed the written statement contending that the agreements have been executed for the purpose of securing loan and, therefore, they cannot be termed as an agreement for sale. Thus, they are nothing but a mere assurance for re-payment of monies received by him.

6. The original first defendant died pending the suit and accordingly, the appellants have been arrayed as legal representatives. The learned Single Judge framed the following issues:-

- "1.Whether the plaintiff is ready and willingness to perform the contract as per the sale agreements 27.06.2007 and 03.10.2007?
- 2.Whether it is true that the first defendant has given sum of Rs.3,50,000/- by cash on 27.06.2007?
- 3.Whether the suit is barred by limitation?
- 4.Whether the plaintiff is entitled for specific performance as prayed for in the plaint?
- 5.To what relief the plaintiff is entitled to?"

7. The issues have been re-framed once again which was reproduced hereunder:-

- "1.Whether the agreements dated 27.06.2007 and 03.10.2007 were not intended to be agreements of sale and were executed only as security for a loan transaction as claimed by defendants 1 and 3 to 7?
- 2.Whether the plaintiff has paid a sum of Rs.3,50,000/- by cash on 27.06.2007?
- 3.Whether the plaintiff was and is ready and willing to perform her part of the contract as per the Sale Agreement dated 03.10.2007?
- 4.To what other reliefs the plaintiff is entitled to?"

8. On behalf of the first respondent/plaintiff, one witness has been examined as P.W.1 and on behalf of the appellants, 7th defendant, who is the son of the deceased examined as D.W.1. The plaintiff marked Exs.P1 to P11 while no document has been marked

on behalf of the defendants.

9. The learned Single Judge decreed the suit after holding that the execution of the documents have been admitted and there is no evidence to substantiate the contentions raised by the appellants that the documents were given by way of a security. Reliance has been made on the evidence of D.W.1 to hold that the defence raised is not correct. P.W.1 has admitted that Exs.P8 and P9 are true and genuine along with the amount received. The documents have been prepared by the lawyer and signed by the deceased first defendant. Though they have not been signed by the first respondent/plaintiff, the same is not mandated by law. The learned Single Judge also finds that the deceased first defendant indeed received the money as mentioned under Exs.P8 and P9. On the plea raised that it is for the plaintiff to discharge the mortgage, once again reliance has been made on the evidence of P.W.1 and the documents executed.

10. The learned Single Judge placing reliance upon Ex.P2 series which are the Income-Tax returns filed by the plaintiff/first respondent for the period from 2004-2012 and the sale deed under Exs.P4 to P6, held that the first respondent/plaintiff has been ready and willing to execute the sale deed.

11. Taking into consideration the length of time, which has been lost in the dispute, the learned Single Judge decreed the suit subject to the condition that the first respondent/plaintiff will have to pay additional sum of Rs.10,00,000/- within a period of six weeks from the date of judgment, discharge the mortgage created over the suit property apart from discharging the decree for which the attachment is pending over the suit property. Challenging the same, the present appeal has been filed.

12. The learned counsel appearing for the appellants submitted that the transactions are merely monetary transactions. The plaintiff/ first respondent has not shown readiness and willingness. The first respondent/plaintiff has not discharged the mortgage and loan as agreed upon. In any case, there is non-compliance of Section 28 of the Specific Relief Act. Therefore, the application filed in C.M.P.No.10711 of 2018 to reverse the decree and dismiss the suit will have to be allowed as the first respondent/plaintiff has not complied with the discharge. Reliance has been made on the documents filed before this Court in support of the aforesaid contentions.

13. The learned counsel appearing for the first respondent/plaintiff submits that the trial Court considered all the materials and decreed the suit. The amount of Rs.10,00,000/- ordered by us was within the time granted. No time limit has been prescribed for the compliance of other two mandates. In any case, the plaintiff is ready and willing to comply with all the conditions now. For the above, the Court will have to grant sufficient time.

14. The learned counsel appearing for the second respondent/second defendant submitted that as and when the mortgage is discharged, the document will have to be handed over in favour of the first respondent/plaintiff. As on today, the mortgage comes to Rs.47,85,395/-.

15. On the issues as framed by the learned Single Judge, we do not find any error warranting interference. D.W.1 has categorically admitted not only the factum of execution of Exs.P8 and P9 but also the amount received and the purpose for which they have executed. Therefore, the evidence of D.W.1 completely non-suited the case of the appellants. Similarly, Exs.P8 and P9 clearly speaks about the onus fixed on the deceased first defendant to discharge the encumbrance. There is a reiteration under Ex.P9. Ex.P9 also shows that Ex.P8 was executed along with the consideration. It further says about the amount received by D.W.1. As these facts are admitted, and the learned Single Judge has considered them correctly, we do not find any error warranting interference. Accordingly, the issues as answered by the learned Single Judge stands confirmed.

16. One of the issues is with respect to the readiness and willingness. The learned Single Judge did consider Ex.P2 and Exs.P4 and P6 while holding that the first respondent/plaintiff was ready and willing throughout. There is nothing to contradict the aforesaid finding given on fact by the learned Single Judge. The appellant did not even dispute seriously the aforesaid documents produced. Ex.P2 is a series of Income-tax returns filed pertaining to the first respondent/plaintiff. Thus, the finding rendered on the aforesaid issue is also confirmed.

17. Section 28 of the Specific Relief Act makes it clear that the onus is on the first respondent/plaintiff to prove the readiness and willingness throughout. There are three compliance sought to be made on the part of the first respondent/plaintiff. Insofar as the first compliance of Rs.10,00,000/- is concerned, we do not find any merit in the contention of the learned counsel appearing for the appellants. The first

respondent/plaintiff sought for the mode of payment and thereafter filed an application and deposited the amount as ordered by the learned Single Judge. Such a request has been made within the time prescribed. However, the defendants took a plea that the remaining compliance will have to be made subsequently. This, we do not agree with. There cannot be any difference between the compliance with respect to Rs.10,00,000/- and discharge which are two in number. Having held so, we are of the view that this is only a misconception on the part of the first respondent/plaintiff. In fact, the learned counsel for the first respondent/plaintiff submitted that the first respondent/plaintiff is ready and willing to discharge the mortgage and the Court decreed within the time prescribed by this Court. The aforesaid submission has been taken on record. In fact, an affidavit has also been filed to that effect. However, we find that there is no only laxity on the part of the first respondent/plaintiff to show some prejudice to the appellants. Compliance is made on all three aspects, the appellants would have got the money earlier. The learned Single Judge did take into consideration the escalation of price. In such view of the matter, we are modifying the judgment and decree of the learned Single Judge with respect to the payment of Rs.10,00,000/- as Rs.20,00,000/-.

18. Accordingly, we are inclined to modify the judgment and decree in the following manner:-

- i) the amount of Rs.10,00,000/- as ordered by the learned Single Judge is increased to Rs.20,00,000/-;
- ii) the said amount will have to be paid within a period of six weeks from the date of receipt of a copy of this judgment;
- iii) initiating action and the action for discharging for mortgage and money payable for which the attachment has been made over the suit property will have to be made within a period of six weeks from the date of receipt of a copy of this judgment;
- iv) at the time of filing the application to raise attachment, the first respondent/plaintiff will have to deposit the amount within the time prescribed as aforesaid;
- v) after the compliance of discharging the mortgage amount, the second respondent/second defendant will have to return the original documents to the first respondent/plaintiff;
- vi) the suit stands decreed in the aforesaid terms;

19. The Original Side Appeal stands disposed of. No Costs. Consequently, connected C.M.P.Nos.3585 of 2020, 9971 and 10711 of 2018 are closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

ssm
To

The Sub Assistant Registrar
Original Side
High Court, Madras.

+1 cc to Mr.R.Ganesh babu Advocate srl7229
+2 ccs to Mr.Krishna Ravindran Advocate srl8193
+2 ccs to Mr.P.K.Sivasubramaniam Advocate srl7673

O.S.A.No.196 of 2018

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