

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2020

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.NO.613 OF 2014

M.Vijayakumari

...Appellant/Defendants

Vs.

P.Sekar

...Respondent/Plaintiff

Prayer:-

Appeal Suit filed under Section 96 r/w Order 41 Rule 1 of CPC, 1908, to set aside the Decree and Judgement of the learned XVIII Additional Judge, City Civil Court, Chennai passed in O.S.No.11781 of 2010 on 03.02.2014.

For Appellant : K.R.B.Dhaaranee  
for Mr.K.V.Babu

For Respondent : Mr.C.B.Murali Krishnan

JUDGEMENT

The Appeal Suit is directed against the Judgement and Decree dated 03.02.2014 passed in O.S.No.11781 of 2010. The defendant is the appellant in the Appeal Suit and the respondent/plaintiff instituted a suit for specific performance to enforce the suit sale agreement dated 31.08.2006.

2.The suit sale agreement had been entered into between the parties on 31.08.2006 for sale of the suit property for a total sale consideration of Rs.13,00,000/-. Initially, the plaintiff has paid a sum of Rs.25,000/- and agreed to pay the balance sale consideration of Rs.12,75,000/- on the date of execution of the sale deed.

3.It is contended that after execution of the sale agreement, there were changes that took place between the plaintiff and the defendant and the defendant made a proposal to the plaintiff that there is a tenant in the first floor and the said tenant refused to vacate his portion and also stated that the plaintiff has to evict the said tenant by way of making

payment of Rs.50,000/- to him. Accordingly, the plaintiff paid a sum of Rs.50,000/- on 10.09.2006 and the said tenant was evicted. The payment of Rs.50,000/- was also duly acknowledged by the defendant. On receipt of the amount, the defendant handed over the particular portion to the plaintiff immediately. In respect of other tenant, namely Ramesh, the plaintiff further paid a sum of Rs.75,000/- on 16.09.2006 for vacating his portion in the first floor. The said Ramesh vacated his portion on receipt of Rs.75,000/- from the plaintiff and the said portion was handed over to the plaintiff by the defendant.

4.It is contended that the plaintiff has paid a total sum of Rs.1,25,000/- to the defendant's tenants, apart from the initial payment and in total, the plaintiff has further paid Rs.3,75,000/- on 21.09.2006, Rs.20,000/- on 29.09.2006, Rs.55,000/- on 14.12.2006 and a sum of Rs.30,000/- on 19.12.2006 and accordingly, the plaintiff claims that he paid advance amount of Rs.6,30,000/- towards the sale consideration and the balance sale consideration of Rs.6,40,000/- was to be paid during the relevant point of time.

5.The plaintiff has approached the defendant for execution of sale deed by receiving the balance sale consideration. However, the defendant evaded the execution and this apart, it was stated by the defendant that she had already executed an agreement prior to the suit sale agreement in favour of one Mr.Saravanan for the suit property and the defendant failed to execute the sale deed in favour of the said Saravanan also. The said Saravanan filed a suit in O.S.No.6573 of 2006 for the relief of specific performance. Against the said suit, the defendant preferred another appeal in A.S.No.1001 of 2004 before the High Court. A compromise was arrived in the above appeal between the said Saravanan and the defendant and accordingly, the defendant paid a sum of Rs.4,00,000/- to the said Saravanan and the matter was settled out of Court. Under those circumstances, the plaintiff issued a notice to the defendant and subsequently instituted a suit for specific performance.

6.The defendant filed a written statement denying the allegations set out in the plaint. The defendant contended that he is living in the suit premises with his two children. The suit property was purchased in the year 1985 by the husband of the defendant, who died on 29.09.2006, leaving behind the defendant and two children as his legal heirs. Originally, the defendant had entered into an agreement with one Mr.Saravanan. Subsequently, the dispute arose between the said Saravanan and the defendant, and a suit was instituted and when the appeal was pending before this Court, the issues were settled. The defendant accordingly set out her defense in the written statement and prayed for dismissal of the suit.

7.The Trial Court framed the issues as to (1) whether the plaintiff is entitled for the relief of specific performance of the suit sale agreement, (2) whether the agreement of sale was entered by fraud, coercion and undue influence and (3) to what relief the plaintiff is entitled.

8.On the side of the plaintiff, he examined himself as PW1 and one Mr.Gangadharan, who is the father-in-law of the plaintiff, is examined as PW2 and Ex.A1 to Ex.A12 are marked. On the side of the defendant, she examined herself as DW1 and no documents are marked on the side of the defendant.

9.With reference to issues 1 and 2, the learned counsel for the plaintiff reiterated that the defendant was not ready and willing to perform her part of the contract. The sale consideration was fixed as Rs.13,00,000/- and on several occasions, the plaintiff paid different amounts and a total sum of Rs.6,30,000/- was paid towards advance. The plaintiff has stated that he was always ready and willing to perform his part of the contract by paying the balance sale consideration and it was the defendant, who was reluctant in executing the sale deed.

10.The Trial Court considered the documents as well as the evidences. The Trial Court found that the suit sale agreement was entered into between the plaintiff and the defendant and as per the suit sale agreement Ex.A1, the total sale consideration fixed by the authorities is Rs.13,00,000/-. The plaintiff has paid Rs.25,000/- initially and on different dates, the plaintiff paid the total sum of Rs.6,30,000/- by way of advance. The payments were acknowledged and the receipts were also marked as documents before the Trial Court. Thus, the payment of advance amount of Rs.6,30,000/- was unable to be denied by the defendant, as the plaintiff could be able to prove that he paid advance on various dates, in order to evict the tenants, who were in occupation of two portions of the suit mentioned property. All these transactions were established by the plaintiff. The Trial Court, while considering all these grounds raised by the plaintiff, failed to frame the issue whether the plaintiff was ready and willing to pay the balance sale consideration.

11.The learned counsel for the respondent solicited the attention of this Court with reference to the findings of the Trial Court and contended that though there was no specific issue regarding readiness and willingness, the Trial Court has made a finding to that effect. There is no perversity or infirmity as such. The perusal of the findings in paragraph 17 reveals that the plaintiff could be able to establish that he had not played any fraud in respect of the contract entered into between the plaintiff and the defendant. It is relevant to

extract the said portion of the findings, which reads as follows:

17. The signatures of the defendant in Ex.A1 is admitted by her. Counsel for defendant argued that even though the execution of Ex.A1 is denied the attestors are not examined on the side of plaintiff. From the evidence of defendant, it is cleat that the execution is not at all denied by the defendant. But the case of the defendant is, the signatures of the defendant are obtained by coercion and undue influence. Since the execution is not at all denied, the argument of the counsel for defendant that the examination of attesor is a must does not hold goods. The Documentary evidences produced by the plaintiff as part consideration. On the basis of sale agreement, no iota of evidence produced by the defendant to prove that plaintiff played fraud upon the defendant. The plea of coercion and undue influence are also not at all proved by the defendant. At the same time, oral and documentary evidences produced by the plaintiff prove that there is a valid agreement between the parties regarding the suit property. Tje readiness and willingness of the plaintiff is also proved by the evidence of P.W.2 and Ex.A7 to Ex.A11. Plaintiff himself admits in his cross examination that the remaining sale consideration is in his hand and he is not yet deposited the same into the Court. In the light of the foregoing reasons, it is held that the plaintiff is entitled to the relief of specific performance on the basis of the suit sale agreement dated 31.08.2008 by paying the remaining sale consideration and issue No.1 is answered accordingly in favour of the plaintiff. Defendant failed to prove that the suit sale agreement was entered by fraud, coercion and undue influence, hence issue No.2 is answered against the defendant.

12.With reference to the above findings, the Trial Court arrived a conclusion that the plaintiff is entitled for the relief of specific performance and accordingly, directed the defendant to execute a sale deed in favour of the plaintiff regarding the suit mentioned property, on the basis of the suit sale agreement dated 31.08.2006.

13.Undoubtedly, the Trial Court proceeded based on the documents and evidences produced by the respective parties. The Trial Court has not committed any error in respect of considering the documents filed by the parties, the suit sale agreement Ex.A1 and the receipt of payment of advance made by

the plaintiff in favour of the defendant and other documents. Based on these factors, the Trial Court has proceeded and granted the relief of specific performance.

14. The learned counsel appearing on behalf of the appellant though contended that no issue has been framed by the Trial Court with reference to readiness and willingness, this Court could able to find out that the Trial Court considered these factors and arrived a finding. This apart, the transactions between the parties are not seriously disputed and the defendant is unable to rebut the same. The subsequent advance amounts paid to evict the tenants are also not seriously disputed by the defendant. Under these circumstances, the Trial Court had considered the grounds set out in the plaint and granted the relief of specific performance.

15. This Court is of the considered opinion that it is not sufficient that the plaintiff could be able to establish that the suit sale agreement is genuine and true. It is insufficient that the plaintiff has established his readiness and willingness beyond all these factors. The Court has to find out whether any inequality arose on account of the change in circumstances or otherwise, so as to avoid any unjust encroachment to the suit of specific performance. In other words, the contract must be voidable. The contract is established by the plaintiff and he performed his portion of the contract, still the relief of specific performance being a discretionary one, the Court has considered the overall circumstances of the facts and has taken a decision, whether any inequality would arise in the event of granting the relief of specific performance. Courts cannot direct a party to execute a sale deed, if the sale consideration is inequitable or the nature of contract or the circumstances are over mitigating factors. These are the factors to be considered for the grant of relief of specific performance.

16. In respect of the list on hand, though the Trial Court has proceeded with reference to the terms and conditions agreed upon between the parties and granted the relief of specific performance, on a flux and on account of the change in circumstances as well as the market price of properties, this Court has considered the present appeal.

17. It is brought to the notice of this Court, the suit mentioned property may fetch more than Rs.50,00,000/- as of now. The market price in that locality is far higher than the sale consideration fixed between the parties in the year 2006. These factors are not disputed as the suit mentioned property is situated between the suit limits of Chennai and therefore, in the event of confirming the relief of specific performance granted by the Trial Court, undoubtedly, a great prejudice would

be caused to the appellant and there would be unjust enrichment in favour of the respondent/plaintiff. Under these circumstances, the Courts have to consider and grant equity relief in favour of the respondent/plaintiff.

18.It is relevant to cite the Judgement of the Hon'ble Apex Court in the case of Surinder Kaur vs. Bahadur Singh [(2019) 8 SCC 575], wherein the Hon'ble Supreme Court in clear terms 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".

19.In view of the observations of the Hon'ble Apex Court as cited supra, the present appeal is to be considered. Though the contract is not voidable in the present case, the circumstances and the efflux of time make it inequitable to grant the relief of specific performance. This being the principle to be followed, this Court has no hesitation in arriving a conclusion that the Judgement of the Trial Court is to be set aside.

20.With reference to the alternate relief, though there is no alternate relief sought for in the plaint, this Court has to equally consider the point of equity in favour of the respondent/plaintiff. In a suit for specific performance, grant of alternate relief of refund of advance amount is a consequential relief. The principles to be followed in the matter of grant of alternate relief in a suit for specific performance has been considered by this Court in A.S.No.275 of 2013, dated 07.02.2020, wherein it has been held as follows:

16. The alternate relief of return of advance in a suit for specific performance is a consequential relief and therefore, the same need not be construed

as a different relief. Once the relief of specific performance is rejected, then the refund of advance amount shall be consequential as no parties to the suit can be allowed to have an unjust enrichment. In other words, the dismissal of the relief of suit for specific performance, cannot stand in the way of granting the alternate relief to refund the advance amount with reasonable interest. The question arises in the absence of any such relief sought for in the plaint, whether the Court can grant the relief or not. This Court is of the considered opinion that the alternate relief to refund the advance amount is to be construed as a general relief, as such a relief is consequential to the rejection of the relief of specific performance. In the event of not considering the alternate relief under the umbrella of general relief, then one of the party to the civil suit would be prejudiced and the other party will get an unjust enrichment.

17. Keeping in mind the prejudice likely to be caused to one of the parties in the event of not granting the alternate relief of refund of advance amount, this Court has to adopt a pragmatic approach and constructive interpretation with reference to the Code of Civil Procedure.

18. Order VII, Rule 7 of the Code of Civil Procedure 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 as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement".

19. The spirit of Order VII, Rule 7 of the Code of Civil Procedure is to be considered in the general format of the plaint. In the relief column, the plaintiffs used to pray for "grant such other relief or reliefs as the Hon'ble Court may deem fit and proper in the circumstances and thus render justice". Such a relief is to be construed as a general relief sought for in the plaint, the facts and circumstances and the equity to be considered in the interest of justice and the general relief is to be molded, so as to grant the alternate relief of refund of advance amount in the event of rejecting the relief of specific performance by the Courts.

20. Order XLI, Rule 33 of the Code of Civil Procedure enumerates that "the Appellate Court shall have power to pass any decree and make any order which ought to

have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection?. Therefore, the Trial Court granted the general relief by molding the prayer for grant of the relief of refund of advance amount with interest in the event of rejection of the relief of specific performance and the Appellate Court by invoking Order XLI, Rule 33 also grant the similar relief in respect of the appeals preferred against the judgment and decree of the Trial Court. In either of the circumstances, both the Trial Court as well as the Appellate Court are empowered to grant the consequential relief of return of advance amount in the event of rejection of the relief of specific performance on the basis of the principles of equity. Therefore, there is no impediment either for the Trial Court or for the Appellate Court to grant the alternate relief of refund of advance amount to either of the parties to the civil suit or an appeal in the event of rejecting the relief of specific performance in a suit or in an appeal suit.

21. In view of the above principle, the respondent/plaintiff is entitled for the refund of advance amount along with interest, though there is no prayer in the plaint.

22. Accordingly, the following orders are passed:

(1) The Judgement and Decree dated 03.02.2014 passed in O.S.No.11781 of 2010 is set aside.

(2) The appellant/defendant is directed to refund the advance amount of Rs.6,30,000/- along with interest at the rate of 12% p.a. from the date of plaint till the date of decree passed in O.S.No.11781 of 2019 and thereafter, 6% till the date of realisation.

(3) The respondent/plaintiff is directed to withdraw the amount already deposited before the Trial Court in the credit of O.S.No.11781 of 2010, by filing an appropriate application.

(4) The balance amount is directed to be settled by the appellant/defendant in favour of the respondent/plaintiff, within a period of 3 months from the date of receipt of a copy of this Judgement.

23.In the result, the appeal suit in A.S.No.613 of 2014 stands allowed in part. No costs.

Sd/-  
Assistant Registrar(Insp.Cell)

//True Copy//

Sub Assistant Registrar

hvk

To

1. The XVIII Additional Judge,  
City Civil Court,  
Chennai.
2. The Section Officer,  
VR Section, High Court,  
Madras-104.

+1cc to Mr.K.V.Babu, Advocate, S.R.No.13170

+1cc to Mr.C.B.Murali Krishnan, Advocate, S.R.No.13461

A.S.No.613 of 2014

SSD(CO)  
CS/14/12/2020



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