



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

30.04.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.615 of 2011

- 1.V.S. Shanmugam (died)
- 2.Bakkiyalakshmi
- 3.Rajeshwari
- 4.Jayalakshmi

(Appellants 2 to 4 were brought on record
as L.Rs. of the sole appellant—vide order
of the Court dated 9.4.2021 made in CMP.Nos.
12351 to 12353 of 2017.) ...Appellants / Plaintiff

Vs.

- 1.R. Senkoda Chettiar
- 2.S. Mangaiyarkarasi
- 3.M. Palanisamy
- 4.P. Velumani
- 5.Senthil Kumar

...Respondents / Defendants

PRAYER: Second Appeal filed under section 100 of the Civil Procedure Code against the judgement and decree dated 15.07.2010 passed in A.S.No.16 of 2010 on the file of the First Additional District Court, Coimbatore, partly confirming the judgment and decree dated 31.08.2009 made in O.S.No. 396 of 2000 on the file of the Additional Subordinate Judge, Coimbatore.

For Appellant : Mr. N. Manoharan

For Respondents: R1, R3 and R4 -not claimed.
R2 & 5 Served

JUDGEMENT

The unsuccessful plaintiff in a Suit for specific performance before the Courts below is the appellant before this



2. Parties are referred to in the same litigative status as in the Trial Court.

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Plaintiff's Case:

3. The plaintiff would submit that the suit schedule property belongs to defendants 1 and 2 in which they had put up a commercial complex. The suit schedule property, which is a part of the larger extent, is owned by defendants 1 and 2. The defendants had agreed to sell the same to the plaintiff for a total sale consideration of Rs.1 lakh and an agreement of sale came to be executed on 12.11.1997 and on the date of the agreement a sum of Rs.40,000/- was paid as advance.

4. It is the case of the plaintiff that he was always ready and willing to perform his part of the contract. He would also submit that possession of the property was handed over to him on the date of execution of the agreement itself. However, the endorsement regarding the handing over of possession was made on the sale agreement later.

5. On 08.05.1998, the plaintiff had leased out the suit-property to one M/s. Century Agency to carry on business, who after sometime vacated the same in the month of May 1999. The plaintiff would submit that from the date of the tenant handing over possession, he is in possession and enjoyment of the suit property. In the meantime, the plaintiff came to learn that the defendants 1 and 2 were attempting to create documents in favour of defendants 3 and 4 and therefore a legal notice was issued by the plaintiff to all the defendants on 12.12.1998.

6. The defendants 1 and 2 had manoeuvred to have the notice returned with the endorsement "Gone Out" and defendants 3 and 4 alone had given reply dated 27.01.1999 stating that the 4th defendant had purchased the suit-property and was in possession and enjoyment of the same. The third-defendant was the power of attorney agent for defendants 1 and 2. Therefore, the plaintiff had applied for an encumbrance certificate, and in the Encumbrance Certificate he found no entry with reference to sale of the suit-property in favour of defendants 3 and 4. After filing of the suit, the property was sold to the 5th defendant and



therefore the 5th defendant was also impleaded as a party.

7. The plaintiff would submit that the defendants had taken advantage of his absence from the property. He being a permanent resident of Erode, and the tenant M/s. Century Agencies having vacated the same, the property was lying vacant. Taking advantage of this defendants 3 and 4 have trespassed into the suit-property and hence the suit. The plaintiff had sought for the alternative relief of refund of the advance amount together with interest at 24 per cent per annum.

Written Statement of Defendants 3 and 4:

8. The defendants 3 and 4 had denied the sale and the payment of advance and also the fact of possession being handed over to the plaintiff. They would contend that the suit-property in question was purchased by the fourth-defendant and she has been in possession and enjoyment of the same from the date of sale by letting it to tenants for over two years, which would clearly establish that the plaintiff is not in possession and enjoyment of the suit property. That on 19.04.2000 the defendants attempted to trespass into the suit property and that was suitably prevented and a police complaint was lodged is untrue and the present suit is only an abuse of law. An additional written statement was also filed by the 3rd defendant, which was adopted by the 4th defendant, in which once again they had reiterated that they are in possession of the suit-property.

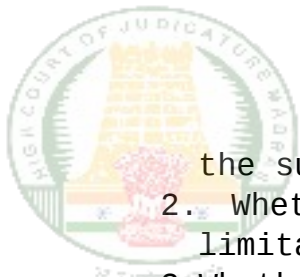
Written statement of the 5th defendant:

9. The 5th defendant would submit that there is no cause of action against him and that the plaintiff had suppressed material facts and had not come to Court with clean hands in order to become entitled to the grant of the discretionary relief of specific performance. The 5th defendant is a bonafide purchaser for value and in his additional written statement the 5th defendant would submit that the suit has been filed in the year 2000 on an agreement of sale entered in the year 1997. Therefore, he would seek for dismissal of the suit.

Trial Court

10. The learned II Additional Subordinate Judge, Coimbatore had framed the following issues:

1. Whether the sale agreement was not entered on 12.11.1997 between the plaintiff and the defendants 1 and 2 with regard to



the suit property?

2. Whether the sale agreement dated 12.11.1997 is barred by limitation?
3. Whether the plaintiff was not in possession of the suit property?
4. Whether the plaintiff is entitled to get the relief of specific performance?
5. Whether the plaintiff is entitled to get the relief of injunction as prayed for?
6. To what other relief the plaintiff is entitled?

11. Additional Issues:

1. Whether the plaintiff had paid the proper court fees?
2. To what other relief the plaintiff is entitled?

12. The learned Subordinate Judge had dismissed the suit on the following grounds.

(a) that the plaintiff had not taken any steps within the period of one year in furtherance of sale agreement. No notice has been issued directing the defendants 1 and 2 to receive the balance sale consideration and execute the sale deed before the expiry of the period fixed in Ex.A1 sale agreement, namely 12.11.1998.

(b) The plaintiff has not proved his readiness and willingness.

(c) The plaintiff had purchased another shop in the very same complex from defendants 1 and 2 for a sum of Rs.75, 000/- and that the advance paid under Ex.A1 had been adjusted towards the purchase amount of the said shop, which clearly shows that the plaintiff had abandoned his right under Ex.A1.

(d) The endorsement dated 22.12.1997 was a fabricated and forged one as the plaintiff had failed to examine the alleged witness of A2 endorsement.

(e) Exs.A3, A4 and A10 are fabricated documents since the third defendant has shown proof that he had been paying the maintenance charges to the Association of the Complex and thereafter the 5th defendant has been paying the same.

(f) Though the plaintiff had asked for refund of the advance amount, the learned Trial Judge had rejected this claim stating that the amount advanced under Ex.A1 had been adjusted towards the sale consideration for the other shop which had been purchased by the plaintiff.



Appellate Court

13. Aggrieved by the same, the plaintiff had filed the Appeal in A.S.No.16 of 2010 on the file of the I Additional District Court, Coimbatore. The learned Appellate Judge upheld the findings of the Trial Judge and in addition observed that Ex.A4, which was the lease revocation deed dated 10.05.1999 by the so-called M/s. Century Agency in favour of the appellant was a fabricated one. The learned Appellate judge noted that though the Surrender Deed is dated 10.05.1999, the stamp paper on which it has been written is dated 19.05.1999. Therefore, the Surrender Deed was disbelieved as a fabricated one. The learned Judge found that the plaintiff was not in possession of the suit property as alleged by him, whereas documents had been created to show possession. The learned Judge has observed that the plaintiff has not proved his possession of the suit-property and further failed to prove that he was ready and willing to perform his part of the contract. The learned Judge had also observed that the plaintiff was all along aware about the sale of the property in favour of the 5th defendant. The defendants 3 and 4 had not mentioned anything about the sale in favour of the 5th defendant. However, the plaintiff was aware about the same.

14. The learned Judge partly allowed the Appeal by granting an alternative relief of refund of the advance amount together with interest at the rate of 6 per cent per annum from the date of agreement till the date of realisation.

15. Aggrieved by the said judgment and decree, the appellant is before this Court. When the matter had come up on 10.11.2011, this Court had ordered notice to the respondents. Though notice was served on the respondents they have not entered appearance through counsel or appeared in person before this Court.

Submissions:

16. Mr. N. Monoharan, learned counsel appearing for the appellant after narrating the facts and the reasoning of the Trial Court as well as the Appellate Court would submit that in the light of the amendment to Section 10 of the Specific Relief Act, discretion is no longer available to the Court in a suit for specific performance and that the Court is bound to enforce the agreement. In respect of the above argument, he would rely on the judgment of the Hon'ble Supreme Court in B. Santhoshamma & Another Vs. D.Sarala & Another reported in 2020 (3) MWN (Civil)



"67. The relief of specific performance of an agreement, was at all material times, equitable, discretionary relief, governed by the provisions of the Specific Relief Act 1963, hereinafter referred to as S.R.A. Even though the power of the Court to direct specific performance of an agreement may have been discretionary, such power could not be arbitrary. The discretion had necessarily to be exercised in accordance with sound and reasonable judicial principles.

"10. Cases in which specific performance of contract enforceable.- Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

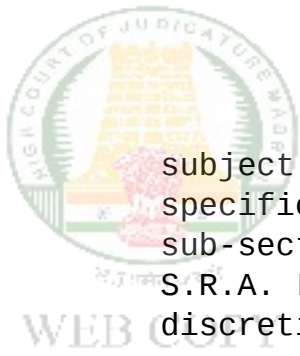
(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

69. After amendment with affect from 1.10.2018, Section 10 of the S.R.A. provides:

10. Specific performance in respect of contracts.- The Specific performance of a contract shall be enforced by the court subject to the provisions contained in sub- section (2) of section 11, section 14 and section 16.

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subject to ...". The Court is, now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, Section 14 and Section 16 of the S.R.A. Relief of specific performance of a contract is no longer discretionary, after the amendment."

17. Heard the counsel and perused the records.

18. Since the argument of the learned counsel primarily rests on the amendment to the provisions of the Specific Relief Act, it is necessary to extract the same.

"Section 10: The specific performance of a contract shall be enforced by the Court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."

19. Section 10 of the Specific Relief Act, as it stood prior to its amendment with effect from 1.10.2018, would read as follows:

"Section 10: Cases in which specific performance of contract enforceable---

Except as otherwise provided in this Chapter the Specific Performance of any Contract may, in the discretion of the Court, be enforced.

(a) when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that Compensation in money for its non-performance would not afford adequate relief;

Explanation: Unless and until the contrary is proved, the Court shall presume--

(i) that the breach of a Contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a Contract to transfer movable property can be so relieved except in the following cases:

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the Plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the Agent or Trustee of the Plaintiff."

20. Therefore, the discretion granted to the Court has been taken away. However, the amendment to Section 10 is subject to



the provisions contained in sub- section (2) of Section 11, Section 14 and Section 16 of the Act. These provisions are extracted hereinbelow:

Section 11(2): A Contract made by a trustee in excess of his powers or in breach of trust, cannot be specifically enforced.

Section 14: Contracts not specifically enforceable: The following contracts cannot be specifically enforced, namely:--

(a) where the party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the Court cannot supervise;

© a contract which is so dependent on the personal qualifications of the parties that the Court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable."

Section 16: Personal bars to relief: Specific performance of a contract cannot be enforced in favour of a person--

(a) who has obtained substituted performance of contract under section 20; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

© who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.-- For the purpose of clause ©,--

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must prove performance of, or readiness and willingness to perform, the contract according to its true construction."

21. Therefore, Section 10 of the Act has to be read with the provisions of sub-section (2) of Section 11, Section 14 and Section 16. Section 16(b) of the Act provides that Specific Performance of a Contract cannot be enforced in favour of a



person who acts in fraud of the contract or willingly acts at variance with, or in subversion of, the relation intended to be established by the contract. These two phrases assumes significance owing to the conduct of the plaintiff in the instant case. The plaintiff has indulged in acts of fabrication. The Appellate Court has disclosed in detail the acts of fabrication indulged by the plaintiff. These acts are as follows:

a) Ex. A2 Endorsement is a fabricated endorsement and the plaintiff has not examined the alleged witness to the said endorsement.

b) The alleged Lease Revocation deed marked as Ex.A4 is a rank forgery since through the date of the agreement would read as 10.05.1999, the Stamp Paper on which the said deed has been typed upon is dated 19.05.1999 that is 9 days after the execution of the deed.

c) the plaintiff in his name purchased another shop in the very same complex thereby abandoning his right to enforce Ex.A1.

I do not find any ground to hold otherwise as these facts are borne out by evidence.

22. The defendants have proved their possession by producing Ex.B4 series which are payments made by them to the apartment owner association from the year 1998. Therefore, the conduct of the plaintiff appears to be fraudulent and deceitful. The argument of the learned counsel that in the light of the amendment to Section 10, the Courts below are bound to enforce the contract cannot be countenanced as this right is subject to the provisions contained in Sections. 11(2), 14 and 16 of the Act.

23. In view of the above, I do not find any substantial question of law warranting this Court's interference in the well considered judgment and decree of the Courts below. Second Appeal is therefore dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

mrn



To,

1.First Additional District Court,
Coimbatore,

2.The Additional Subordinate Judge,
Coimbatore.

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

+1cc to M/s.N.Manokaran, Advocate, S.R.No.26931

S.A.No.615 of 2011

KK(CO)
SB(28/10/2021)