



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.04.2021

WEB COPY

CORAM:

THE HONOURABLE MR. JUSTICE M.SUNDAR

S.A.No.345 of 2021
and
C.M.P.No.6576 of 2021

Murugan .. Appellant / Plaintiff
Vs.
Punithavathi .. Respondent / Sole Defendant

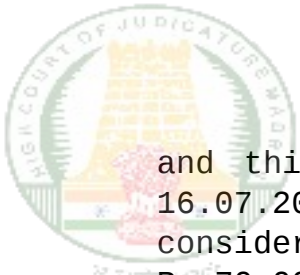
Second Appeal under Section 100 of CPC to set aside the judgement and decree dated 30.11.2020 in A.S.No.18 of 2017 on the file of the learned Subordinate Judge, Panruti partly allowing and modifying the judgment and decree dated 17.04.2017 in O.S.No.155 of 2013 on the file of the learned District Munsif, Panruti.

For Appellants : Mr. B.Prashanth Nadaraj

J U D G M E N T

In less than three months from now this litigation would turn 8 or in other words, in less than three months from now this litigation will become an eight year old litigation as it commenced when a plaint was presented on 03.07.2013 in the 'District Munsift Court, Panruti' (hereinafter 'trial Court' for the sake of brevity) by one Murugan, son of Rathinasamy, who is the appellant before this Court. This plaint presented on 03.07.2013 was taken on file by the trial Court as O.S.No.155 of 2013.

2. The suit property is 51 cents of agricultural property described as two items of agricultural lands comprised in various survey numbers in Silambinathanpettai village situate within the Kullanchavadi sub-registration district and Cuddalore Registration District. This 51 cents of agricultural property shall from hereon be referred to as 'suit property' for the sake of convenience and clarity. O.S.No.155 of 2013 was laid with a prayer for specific performance qua conveyance of suit property



and this prayer was predicated on an agreement to sell dated 16.07.2012 (Ex.P1) before the trial Court. Total sale consideration is Rs.1,00,000/-. 70% of the same, namely Rs.70,000/- had been paid as advance and the balance Rs.30,000/- was to be paid within one month from the date of Ex.A1, is learned counsel's say. Alleging that the proposed vendor has not performed her obligations under Ex.A1, after issuing a notice dated 11.06.2013 (Ex.A2) this specific performance suit was laid on 03.07.2013.

3. The lone defendant in the suit entered appearance and completed pleadings by filing a written statement. The sheet anchor pleading of the defendant in resisting the suit is that it is a loan transaction (not an agreement to sell), the suit property is worth Rs.5,00,000/-, no one would agree to sell it for Rs.1,00,000/- and the suit property was given only as security for the loan transaction.

4. Trial Court, on the basis of aforementioned rival pleadings, framed three issues, which have been captured in Paragraph 4 of the trial Court judgment and the same read as follows:

- '1. தாவா கிரயஒப்பந்தம் உண்மையானதா செல்லத்தக்கதா?
2. வாதி கோரியுள்ள ஏற்றதை ஆற்றுக் பரிகாரம் அவருக்குக் கிடைக்கத்தக்கதா?
3. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரங்கள் என்ன? '

5. Before the trial Court, there was oral and documentary evidence on both sides. Plaintiff examined himself as PW1 and one Kannan was examined as PW2. Sole defendant examined himself as DW1 and one Devarasu was examined as DW2. On the side of plaintiff, three exhibits, namely Exs.A1 to A3 were marked and on the side of defendant one exhibit, namely Ex.B1 was marked.

6. Before this Court proceeds further it is necessary to record that the plaintiff had made an alternate prayer for return/refund of what according to the plaintiff, is advance. It is deemed appropriate to capture and reproduce the prayer in the plaint. It reads as follows:

'VI. The plaintiff therefore prays that the Court may be pleased to--

I. pass a decree for specific performance of the agreement by directing the defendant to execute the sale deed in favour of the plaintiff within a time to be



stipulated by the Court and on his failure, the Court itself may be pleased to execute the same and ;

Alternatively

II. Pass a decree for refund of advance amount of Rs.78,350.00 with subsequent interest at the rate of 12% p.a from the date of plaint till realisation and;

III. Award costs and;

IV. Grant appropriate reliefs in the circumstances of the case.'

7. After full contest, trial Court decreed the suit qua first limb i.e., trial Court decreed the suit qua specific performance prayer. The sole defendant before the trial Court, carried the matter in appeal by way of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) vide A.S.No.18 of 2017 on the file of 'Subordinate Judges Court, Panruti' (hereinafter 'first Appellate Court' for the sake of brevity). After full contest, the first Appellate Court in and by a judgment and decree dated 30.11.2020 partly allowed the appeal. When this Court says that first Appellate Court partly allowed the appeal it is made clear that the first Appellate Court chose to grant the alternate prayer of refund i.e., the second limb and the specific performance prayer decreed by the trial Court was set aside. Therefore, the first Appellate Court partly allowed the appeal.

8. Mr.B.Prashanth Nadaraj, learned counsel on record for sole appellant submitted that trial Court had granted the relief of specific performance to the plaintiff after appreciation of evidence before it and the first Appellate Court erred in partly allowing or in other words modifying the decree of the trial Court. Furthering his argument in this direction, learned counsel for appellant submitted that it is no doubt open to the defendant to take the plea that it is a loan transaction, but the defendant should be able to discharge the onus and establish before Court that it is in fact a loan transaction and not an agreement to sell. There is no difficulty in accepting this proposition. Thereafter, learned counsel drew the attention of this Court to paragraph 26 of the judgment of the first Appellate Court and he submitted that first Appellate Court having accepted the legal proposition that onus of proof is on the defendants ought not to have disturbed the trial Court finding without adequate reasons particularly when there has been evidence pertaining to animosity besides examination of attesting witnesses.



9. Learned counsel, advertent to the memorandum of grounds of appeal, notwithstanding very many grounds and notwithstanding four questions being proposed as substantial questions of law projected and pivoted his arguments on question (b) which reads as follows:

'b. Whether the First Appellate Court has rightly adjudged and ascertained the burdens of proof in the present matter when the Respondent herein has pleaded against the contents of a registered instrument of conveyance?'

10. This Court remains itself about Kanailal principle being legal principle laid down by Hon'ble Supreme Court in Kanailal and Others Vs. Ram Chandra Singh and Others reported in (2018) 13 SCC 715 and Kirpa Ram case being principle laid down by Hon'ble Supreme Court in Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935. In Kanailal case Hon'ble Supreme Court has held that the rigour of Order XLI Rule 31 CPC cannot be given a go by in Section 100 CPC legal drill. In Kirpa Ram case Hon'ble Supreme Court has reiterated the position that if a 'substantial question of law' ('SQL' for brevity) does not arise, a second appeal under Section 100 CPC can be dismissed at the admission stage without formulating a SQL. Reading these two principles together this Court deems it appropriate to set out that the points for determination in the instant second appeal are a) whether the first Appellate Court, was right in partly allowing the appeal after accepting the legal proposition that the onus is on the defendant who pleaded that it is a loan transaction and not a agreement to sell; and b) whether any substantial question of law arises in the case on hand.

11. With regard to the first point for consideration, the answer lies in the judgment of the First Appellate Court itself. Learned counsel, as alluded to supra, drew the attention of this Court to paragraph 26 of the judgment of the first Appellate Court, but in the very next paragraph i.e., paragraph 27, the first Appellate Court has clearly mentioned that the granting of specific performance is a discretionary relief. In this regard, the point that is of significance is, first Appellate Court exercising power under Section 96 CPC is a Court of fact. Being a Court of fact, specific performance is certainly a discretionary equitable remedy qua first Appellate Court also. In this view of the matter, the fact that 70% of the sale



consideration has been paid and a time period of one year has been set out for paying the balance of merely 30% (Rs.70,000/-+Rs.30,000/-) by itself is a point as the incubation period calls for a convincing explanation and with regard to the value of the land there is no contra indicia. Therefore, with regard to the first point for consideration, this Court does not find any infirmity in first Appellate Court interfering with the trial Court, this is more so as the first Appellate Court has granted the alternate relief which has been prayed for and it is not as if the first Appellate Court has completely reversed the judgment of the trial Court and it is not as if the plaintiff is left high and dry without any remedy. It cannot be disputed in cases of this nature that incubation period has to be explained and therefore first Appellate Court being a Court of fact cannot be found fault with. Though justification for incubation period was given and though it find favour with the trial Court it does not follow as a sequitur that it should find favour with the first Appellate Court because the First Appellate Court is a Court of fact as alluded to elsewhere in this judgment.

12. This takes us to the second point whether any substantial question of law arises in the case on hand. The expression 'Substantial Question of Law' occurring in Section 100 CPC has not been defined in CPC and the parameters/determinants which constitute that expression came up for consideration before a Hon'ble Full Bench of Madras High Court way back in 1959 vide Rimmalapudi Subba Rao's case [Rimmalapudi Subba Rao Vs. Noony Veeraju And Others reported in AIR 1951 Madras 969]. In Rimmalapudi Subba Rao's case a Hon'ble Full Bench of Madras High Court explained the expression 'Substantial Questions of Law' occurring in Section 100 CPC. This elucidation was approved by a Hon'ble Constitution Bench of Supreme Court 10 years later in 1962 in the celebrated Chunilal Mehta's case [Sir Chunilal V.Mehta and Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314]. Paragraph 6 of Chunilal Mehta's case is of relevance and the same reads as follows:

'6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial



WEB COPY

would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law. '

13. Thereafter in Santosh Hazari case [Santosh Hazari Vs. Purushottam Tiwari (Deceased) by Lrs reported in (2001) 3 SCC 179] Rimmalapudi Subba Rao principle laid down by a Hon'ble Full Bench of Madras High Court as approved by Hon'ble Constitution Bench in Chunilal case was captured and referred to. Relevant paragraph in Santosh Hazari case is Paragraph 12 and the same reads as follows:

'12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta [AIR 1928 PC 172 : 55 IA 235] , the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the



WEB COPY

case as between the parties. In *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.* [AIR 1962 SC 1314 : 1962 Supp (3) SCR 549] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [ILR 1952 Mad 264 : AIR 1951 Mad 969] :

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'

14. There can be no two ways about the proposition that specific performance is a equitable discretionary remedy.



Equally there can be no two ways about the principle that first Appellate Court exercising power under Section 96 CPC is a Court of fact. In this view of the matter, in the light of the trajectory this matter has taken, in the light of the discussion thus far, if the determinants which go to constitute a substantial question of law are applied to the facts of the case, this Court has no difficulty or hesitation in coming to the conclusion that neither question (b) which has been projected before me (extracted and set out supra) nor any other substantial question of law arises in the case on hand.

15. Therefore it follows as a sequitur that both points for consideration cannot but be answered against the appellant for reasons set out thus far and the result is infra.

16. Following the Kirpa Ram principle, this Court deems it appropriate to dismiss the captioned second appeal at the admission stage by holding that no substantial question of law arises in the captioned second appeal. Consequently, C.M.P.No.6576 of 2021 is also dismissed. Considering the submissions made before this Court and the trajectory which the matter has taken, there shall be no order as to costs.

Sd/-

Assistant Registrar(AD-IV)

//True Copy//

Sub Assistant Registrar

gpa

To

1. The Subordinate Judge,
Panruti.

2. The District Munsif,
Panruti

+1cc to Mr.B.Prasanth Nadaraj, Advocate, S.R.No.23024

S.A.No.345 of 2021 &
C.M.P.No.6576 of 2021

RSI(CO)
SB(06/09/2021)