

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
16.03.2022	06.06.2022

CORAM:

THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

APPEAL SUIT NO.1084 OF 2009

AND

M.P.NO.1 OF 2009

1.Ratchagar (Died)
2.Jancy Rani
3.Paul Vibin
4.R.Monisha

(Appellants 2 to 4 brought on record as LR's of the deceased sole appellant, vide order of Court dated 01.03.2021 made in C.M.P.Nos.3435, 3433 & 3009 of 2021 in A.S.No.1084 of 2009.)

... Appellants/Plaintiff

Versus

Anthoni Ammal

... Respondent/Defendant

Appeal Suit is filed under Section 96 of the Civil Procedure Code against the Judgment and Decree dated 15.06.2009 in O.S.No.108 of 2008 on the file of the Principal District Court, Cuddalore.

For Appellants : Mr.R.Gururaj

For Respondent : Mr.P.Dinesh Kumar

J U D G M E N T

This appeal suit arises out of the judgment and decree, dated 15.06.2009, passed by the learned Principal District Judge, Cuddalore, in Original Suit No.108 of 2008.

2.The sole plaintiff before the Court below is the appellant herein. Pending this appeal, the sole plaintiff died on 01.07.2015 and therefore, his legal heirs were brought on record as appellants 2 to 4.

3.The sole plaintiff filed the suit in O.S. No. 108 of 2008 for specific performance. The case of the plaintiff is that the defendant borrowed a sum of Rs.25,000/- from him and executed a simple mortgage deed dated 15.06.1993 in his favour in respect of the suit property. In order to discharge the loans availed from the plaintiff and several other persons, the defendant offered to sell the suit property to the plaintiff and sale price was fixed at Rs.7,00,000/-. On 10.05.2008, an agreement of sale was entered into between the plaintiff and the defendant, in which, the sale consideration was indicated as Rs.7,00,000/-. The plaintiff agreed to discharge the loans availed by the defendant to the tune of Rs.4,00,000/- and the same was adjusted towards the sale consideration. On the date of agreement, the plaintiff paid a sum of Rs.2,00,000/- in cash towards sale advance and agreed to pay the balance within a period of three months on which event, the sale has to be completed. Therefore, the plaintiff has totally paid a sum of Rs.6,00,000/- to the defendant as sale advance. Since only a small portion of amount, i.e., Rs.1,00,000/- was remaining to be paid, the defendant also handed over the possession of the suit property to the plaintiff. According to the plaintiff, right from the date of agreement of sale, the plaintiff has been ready and willing to perform his part of contract. However, since the defendant has been evading to perform her part of contract, the plaintiff was constrained to file the suit.

4.Despite paper publication, the defendant had not chosen to appear before the trial Court and contest the suit, she remained absent and hence, was called absent and set ex parte before the trial Court.

- 5.The trial Court framed the following issues :
- i. Whether the plaintiff is entitled to a decree as prayed for ?
 - ii.To what relief the plaintiff is entitled ?

6.Before the trial court, Mr. Ratchagar, sole plaintiff, examined himself as P.W.1 and Exs.A1 and A2 were marked.

7.Though there was no contest by the defendant, the trial Court observed that the agreement of sale Ex.A2 is an unregistered document as contemplated under Section 17 (1-A) of Registration Act, 1908, as such, the sale agreement shall have

no effect for the purpose of Section 53-A of the Transfer of Property Act, 1882. Accordingly, the trial Court held that the claim of the plaintiff as to part performance of contract under Ex.A2 cannot be valid. Since Ex.A2 is an unregistered document, the plaintiff is not entitled to the relief of specific performance but entitled only for alternative relief. As such, the Court below decreed the alternative relief, directing the defendant to pay a sum of Rs.6,00,000/- with interest at 12% per annum from the date of sale agreement i.e., 10.05.2008 till the date of realization.

8.Challenging the findings of the Court below, the plaintiff has come forward with the present appeal.

9.The learned counsel appearing for the appellants would contend that the findings of the Court below holding that Ex.A2 is an unregistered sale agreement and therefore, the plaintiff is not entitled to the relief of specific performance, are not tenable and are liable to be set aside. The learned counsel would further contend that, even though the defendant remained ex parte, the Court below has stepped into the shoes of the defendant and decided the matter in favour of the defendant, instead of decreeing the suit as prayed for. The defendant was given adequate opportunities to contest the suit and even paper publication was effected as substituted service. In spite of the same, the defendant did not appear before the trial court. While so, the Court below instead of passing an ex parte decree and judgment, dismissed the suit under the garb of weighing the merits of the case. Therefore, the learned counsel prayed for decreeing of the suit as prayed for.

10.The learned counsel appearing for the respondent would submit that the Court below has rightly dealt with the issues involved in the suit and held that, as per Section 17(1-A) of Registration Act, the sale agreement was not registered and therefore, it shall have no effect for the purpose of Section 53-A of the Transfer of Property Act and the claim of the plaintiff for grant of relief of specific performance has been rightly rejected. Section 17 of the Registration Act makes it obligatory and mandatory to register an instrument without which it will not confer any transferable right over the immovable property. Taking note of the above, even in the absence of contest by the defendant, the trial Court has rightly appreciated the legal position and dismissed the suit. There is no embargo for the trial Court to appreciate the facts as well law and pass a judgment even in the absence of contest by the contesting defendant. In such a case, it is always open to the trial Court to appreciate the available materials on record and pass appropriate orders. In the present case, the trial court,

on noticing the effect of the unregistered document projected by the plaintiff, has rightly refused to grant a decree for specific performance. Therefore, the learned counsel for the respondent prayed for dismissal of the appeal.

11. Heard the learned counsel for the appellants as well as the learned counsel for the respondent and perused the materials available on record.

12. Based on the rival submissions, the points arising for consideration are :

- i. Whether the trial Court was right in dismissing the suit for specific performance on the ground of non-registration of the sale agreement Ex.A2 ?
- ii. Whether the plaintiff is entitled to the relief of specific performance ?
- iii. To what other relief, the plaintiff is entitled to ?

Point Nos.1 and 2 :

13. Admittedly, the plaintiff has filed the suit for specific performance based on an unregistered agreement. The trial Court, by referring to Section 53-A of the Transfer of Property Act and Section 17(1-A) of Registration Act, has held that, for transfer of an immovable property, it is mandatory that such transfer should be preceded by a registered instrument and in the event of the document not being registered, it will not have any effect for the purpose of fulfilling the ingredients contained under Section 53-A of the Transfer of Property Act. As per Section 53-A of the Transfer of Property Act, a transfer of immovable property must be preceded by a registered instrument without which such transfer of immovable property will not confer any right on the transferee.

14. In the present case on hand, the plaintiff has averred and also deposed in his evidence that, since a major portion of the sale consideration has been paid, possession has been handed over to the plaintiff and the plaintiff is in possession of the suit property. Even in Ex.A2, it is averred that possession has been handed over to the plaintiff. Therefore, the trial Court has proceeded on the legal footing that the plaintiff claims right over the suit property by way of part performance of the contract under Section 53-A of the Transfer of Property Act and hence, for the purposes of Section 53-A, the contract Ex.A2 ought to have been registered and since it has not been done, the suit has to fail. However, in order to decide a suit for specific performance, the plaintiff is required only to aver and prove the contract/agreement inter se the parties as true and genuine, by way of oral and documentary evidence, and also his continuous readiness and willingness to perform his part of the

contract from the date of the contract till the date of hearing of the suit. Of course, it is true that, as per Section 17(1-A) of the Registration Act, the protection qua part performance of the contract cannot be claimed unless the subject document is registered, however, there is no embargo for the document to be admitted as evidence in a suit for specific performance in order to substantiate any contract/agreement between the parties. In Ameer Minhaj v. Dierdre Elizabeth (Wright) Issar and Others reported in 2018 (5) L.W. 363, the Hon'ble Supreme Court has held as follows:

"9. In other words, the core issue to be answered in the present appeal is whether the suit agreement dated 9th July 2003, on the basis of which relief of specific performance has been claimed, could be received as evidence as it is not a registered document. Section 17(1A) of the 1908 Act came into force with effect from 24th September, 2001. Whereas, the suit agreement was executed subsequently on 9th July, 2003. Section 17 (1A) of the 1908 Act reads thus:

"17. Documents of which registration is compulsory- (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

XXX XXX XXX

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

XXX XXX XXX"

10. On a plain reading of this provision, it is amply clear that the document containing contract to transfer the right, title or interest in an immovable property for consideration is required to be registered, if the party wants to rely on the same for the purposes of Section 53A of the 1882 Act to protect its possession over the stated property. If it is not a registered document, the only consequence provided in this provision is to declare that such document shall have no effect for the purposes of the said Section 53A of the 1882 Act. The issue, in our opinion, is no more res integra. In *S. Kaladevi Vs. V.R. Somasundaram and Ors.*, MANU/SC/0246/2010 : (2010) 5 SCC 401 this Court has re-stated the legal position that when an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received as evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of the 1908 Act. Section 49 of the 1908 Act reads thus:

"49. Effect of non-registration of documents required to be registered.- No document required by section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall-

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument."

11. In the reported decision, this Court has adverted to the principles delineated in K.B.Saha and Sons Private Limited Vs. Development Consultant Limited, MANU/SC/7679/2008 : (2008) 8 SCC 564 and has added one more principle thereto that a document is required to be registered, but if unregistered, can still be admitted as evidence of a contract in a suit for specific performance. In view of this exposition, the conclusion recorded by the High Court in the impugned judgment that the sale agreement dated 9th July, 2003 is inadmissible in evidence, will have to be understood to mean that the document though exhibited, will bear an endorsement that it is admissible only as evidence of the agreement to sell under the proviso to Section 49 of the 1908 Act and shall not have any effect for the purposes of Section 53A of the 1882 Act. In that, it is received as evidence of a contract in a suit for specific performance and nothing more. The genuineness, validity and binding nature of the document or the fact that it is hit by the provisions of the 1882 Act or the 1899 Act, as the case may be, will have to be adjudicated at the appropriate stage as noted by the Trial Court after the parties adduce oral and documentary evidence."

15. In the light of the above decision, in a suit for specific performance, an unregistered document can also be admitted as evidence in order to show a contract between the parties, but it is for the Court to decide its genuineness, validity and its binding nature, by appreciating the oral and documentary evidence, and accordingly, decree or dismiss the suit for specific performance. In other words, irrespective of whether the plaintiff claims any part performance of an unregistered contract under Section 53-A of Transfer of Property Act or not, if the plaintiff is able to prove the trueness, validity and genuineness of the unregistered document through oral and documentary evidence and also is able to prove his/her willingness and readiness to perform the remaining part of the contract, the relief of specific performance can be granted. However, in the present lis on hand, merely because the plaintiff has claimed part performance based on an unregistered document, the trial Court has rejected the relief of specific performance. Therefore, the reasoning given by the trial Court for rejection of specific performance alone is liable to be set aside and the same is set aside.

16. Therefore, the next question is as to whether the plaintiff has proved the trueness, validity and genuineness of the unregistered document Ex.A2. Though the plaintiff, in the plaint as well as his evidence, has averred/deposed to the effect that the plaintiff and the defendant entered into a sale agreement Ex.A2 on 10.05.2008, the plaintiff has not chosen to examine any of the witnesses to Ex.A2, to prove the said document, nor any other independent witness to prove the averments of Ex.A2. Moreover, it can be seen that the Mortgage Deed (Ex.A1) which is said to have been executed between the parties earlier in the year 1993 for a sum of Rs.25,000/- itself has been written on a stamp paper, whereas, the subject document Ex.A2, which is for a substantial amount of Rs.7,00,000/-, has been written in an ordinary white paper, which by itself does not gain confidence of this Court, and leaves room for doubt. It is well settled that, in a suit for specific performance, regardless of the defence, it is for the plaintiff to aver and prove the contract, however, the plaintiff has failed to satisfactorily prove the contract, Ex.A2, based on which the suit has been laid. Therefore, the primary criterion for grant of relief of specific performance itself has not been satisfied and hence, this Court holds that the plaintiff is not entitled to the relief of specific performance. Point Nos.1 and 2 are answered accordingly.

Point No.3 :

17. However, in a suit for specific performance, the Court is vested with a discretion to do justice. In the opinion of this Court, the trial Court has rightly granted the alternative relief of refund of money. Therefore, this Court does not find any ground to interfere with the decree granted by the trial Court. Point No.3 is answered accordingly.

18. Insofar as the contention of the learned counsel for the appellants that the trial Court went wrong in dismissing the suit even in the absence of any contest by the defendant, is concerned, such a contention cannot be countenanced by this Court for the simple reason that the trial Court is always empowered to go into the merits of the claim made by the plaintiff even if there is no contest on the part of the defendant. If the defendant in a case is absent and did not come forward to contest the suit, the trial Court is not expected to mechanically decree the suit even though the plaint does not qualify a decree to be passed thereon. Thus, the trial Court is always empowered to weigh the merits of the claim made by the plaintiff. It is not as if the trial court, only in cases where there is a contest by the defendant, can analyze the merits or otherwise of the case. In the present case, even in the absence of contest by the defendant, the trial Court had taken pains to

go through the plaint averments and dismissed the suit. Of course, the trial Court has felt that interest of justice requires that the alternative relief must be granted in favour of the plaintiff and accordingly, it has directed the defendant/respondent herein to repay the sum of Rs.6,00,000/- received by her from the deceased sole plaintiff/first appellant herein as advance sale consideration, which according to this Court, is fair and justified.

19.In fine, except the reasoning given by the trial Court for rejecting the relief of specific performance, as discussed supra, rest of the judgment and the entire decree of the trial Court stand confirmed. Accordingly, the appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

gbi

To

The Principal District Judge,
Cuddalore.

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The Section Officer | with a direction to send back the
(V.R. Section), | original records to the Court below,
High Court, Madras. | immediately

+1cc to Mr.D.Baskar, Counsel for the Appellant, S.R.No.32162

+1cc to M/s.P.Dinesh Kumar, Counsel for the Respondent,
S.R.No.32160

A.S.No.1084 of 2009

KJ(CO)
RLP(20/07/2022)