



IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

Reserved on	05.01.2022
Pronounced on	24.01.2022

THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN

S.A.No.427 of 2010
&
C.M.P.No.13017 of 2016

C.Natesan

..Appellant

Vs.

Shak Jaffar

..Respondent

Prayer: Second Appeal filed under Section 100 Civil Procedure Code against Judgment and Decree dated 20.11.2009 made in A.S.No.11 of 2009 on the file of District Judge, Tiruvannamalai confirming the Judgment and Decree dated 28.06.2004 made in O.S.No.66 of 2001 on the file of the learned Principal Subordinate Judge, Tiruvannamalai.

For Appellant : M/s.R.Sripriya
for Mr.V.Ragavachari

For Respondent : Dr.A.Thiyagarajan
Senior Advocate for
Mr.R.Ashraf Khan

J U D G M E N T

The Second appeal is focussed as against the Judgment and Decree dated 20.11.2009 passed in A.S.No.11 of 2009 by the learned District Judge, Tiruvannamalai in confirming the Judgment and Decree dated 28.07.2004 passed in O.S.No.66 of 2001 by the learned Principal Subordinate Judge, Tiruvannamalai.

2. The appellant is the defendant and the respondent is the plaintiff. The parties, for convenience sake, are referred to herein according to their litigative status before the trial court.



the defendant to execute mortgage deed in respect of the property settled in favour of the defendant.

(ii) Though the defendant told the plaintiff that the settlement deed was not acted upon, the plaintiff insisted the defendant to handover the original settlement. The defendant being illiterate person, believing that mortgage deed was executed; signed in the sale agreement and the said , sale agreement was not handed over to the defendant. The scribe and the witness to the sale agreement are the henchmen of the plaintiff. Even at the time of registration, agreement of sale was not read over to the defendant. The agreement of sale was obtained by the plaintiff on the basis of misrepresentation and deceit and undue influence, in a fraudulent manner. During the month of April, 2000, the plaintiff compelled the defendant to execute the sale deed, but only then, the defendant came to know that he was deceived by the plaintiff. The defendant did not execute any sale agreement in favour of the plaintiff and the said agreement is not binding on him and it has not been acted upon. The plaintiff has come to the court with unclean hands and hence the suit is liable to be dismissed.

5. Based on the above materials, the trial court framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 and P.W.2 were examined and eleven documents were marked as Exs.A.1 to A.11. On the side of the defendant, D.W.1 and D.W.2 were examined and three documents, Exs.B.1 to B.3 were marked.

6. Having considered the materials placed before the trial Court, the learned Subordinate Judge, Tiruvannamalai, came to the conclusion that the suit shared agreement is an enforceable document and accordingly, granted the relief of specific performance in favour of the plaintiff. In the appeal, the learned District Judge, Tiruvannamalai, confirmed the findings arrived at by the trial court and dismissed the appeal. Feeling aggrieved over the same, the defendant is before this Court with the Second Appeal.

7. When the Second Appeal is taken up for hearing, this Court has formulated the following substantial questions of law for consideration:-

"1. Whether the Courts below have committed an error in law in not considering the effect of delay in filing the suit even after the refusal on the question of readiness and willingness on the part of the plaintiff to perform his part of the contract?

2. Whether the finding of the Courts below that the suit land has not been proved to be the land assigned



by the Government to a member of the depressed community?

3. Whether the Courts below have committed an error in not holding that the suit property, being a property assigned by the Government to a member of the depressed community, could not alienated to any person other than another member of the same community?"

8. Heard the learned counsels appearing on either side and perused the documents placed on record.

9. The first and foremost contention raised by the learned counsel appearing for the appellant / defendant is that without framing an issue in respect of the readiness and willingness, the court below rendered a judgment in favour of the respondent / plaintiff that the plaintiff is entitled for the relief of specific performance which is erroneous. The learned counsel for the appellant / defendant referred to various decisions rendered by this Court in support of his arguments and the same are as follows:-

(i) In the Judgment of this Court reported in 2018 (3) Law weekly 789, [J.Vincent Vs. S.Srinivasan] at Paragraph No.27, it is held as follows:-

"27. The law is now fairly well settled by means of a catena of decisions of the Hon'ble Supreme Court and this Court and also of various other Hon'ble Court's that the Readiness and Willingness on the part of the agreement holder must be continuously shown at all stages right from the date of agreement, till the date of decree that is passed in the suit. The conduct of the agreement holder must be blemish less through out to entitle him for the equitable relief of specific performance"

(ii) In the Judgment of this Court, in respect of the Appeal Suit, in A.S.No.414 of 2007 [S.Karuppanna Gounder Vs. K.Sadayappa and Others] at Paragraph no.11, among other things, it is laid down as under:-

" (i) 2005(1) LW 472 [Murugesu Naicker (Died) and 3 others V. Govindaraja Nattar and another] wherein, this Court, in Paragraph Nos. 8, 13, 15 and 15A, held as follows:-

"8. Learned counsel for the Appellant / D.1 has forcibly contended that the trial Court ought to have framed the prime issue on the Readiness and Willingness



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of the Plaintiffs and the failure to frame that issue vitiates the Judgments of the Courts below. Contending that there had been no pleading and proof on the issue of Readiness and Willingness by the Plaintiffs, the trial Court without framing the prime issue has not properly appreciated the evidence. It is further submitted that in the First Appellate Court also on the question of Readiness and Willingness, no point was framed which vitiates the concurrent findings of the Courts below. Drawing the attention of the Court to Exs.A.2 to A.5, it is submitted that when the case of the Plaintiffs on payment of Rs.2,001/- under Exs.A.2 to A.5 had been disbelieved, the trial Court ought not to have granted the decree for Specific Performance exercising the discretion. In support of his contention, the learned counsel for the Appellant / D.1 has relied upon (2002) 8 Supreme Court Cases 146 , A.I.R. 1971 ANDHRA PRADESH 279, 2003 - 3 - L.W. 479 and A.I.R.1983 Madras 169 = (1983) 96 L.W.88." S. Karuppanna Gounder v. K. Sadayappa Gounder Died) and Others.

(iii) In the Judgement of this Court in A.S.No.463 of 1995 dated 03.10.2017 [S.Kalianna Gounder and others Vs. S.Periyasamy and Others] at Paragraph No. 27, inner paragraph no.20 among other things it is held as follows:

"20. In a suit for specific performance, it is for the plaintiff to plead and prove his readiness and willingness to perform his part of the contract. That being a mandatory requirement, the Court before passing judgment against the Defendant has to scrutinise the facts set out in the plaint to find out whether the said requirements, specially those indicated in Section 16(1) (c) of the Act have been complied with or not.

10. Now, in view of the principles set out in the above referred Judgments, the settled position of Law is, 'for availing the relief of specific performance', it is for the plaintiff to prove his readiness and willingness in performing his part of contract. Besides the above, on going through the scope of specific Relief Act, 1963, it is true that the specific issues were necessary in this regard. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. Therefore, it is for this Court to examine the same as to whether the said findings of the rial court was sustainable or not in law and on facts.



11. Grover J., points out in the case reported in (1971) 2 S.C.J. 619 [Ramesh Chandra Vs. Chunilal] the readiness and willingness cannot be treated as a strait-jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the parties concerned. Accordingly, it is made clear that provisions of Section 16 (c) of Specific Relief Act should be used only as a step in aid of justice and not as a road block to justice, as held in Kalipa Das Vs. Bimal Krishna Sen Gupta reported in AIR 1983 SC 876.

12. At this juncture it is relevant to point out that in Page No. 2 of the plaint, the plaintiff pleaded about his readiness and willingness and also stated about notice sent to the defendant. After entering into the sale agreement on 12.04.1999, on 13.10.1999 itself the plaintiff issued lawyer's notice, wherein he requested the defendant to come forward to receive the balance sale consideration and for executing the sale deed. The said notice has also been received by the defendant by way of private acknowledgement, which is evident in Ex.A.3, therefore, it is apparent that though time for completion of sale is fixed as two years, within six months from the date of agreement, the plaintiff sent a notice to the defendant, through which he has shown his readiness and willingness. The court below has clearly held the said aspect narrated by the plaintiff and the same is sufficient to accept the case of the plaintiff, as he is ready and willing to perform his part of contract through out the period of sale agreement. In my view, the findings rendered by the courts below that the plaintiff always expressed his readiness and willingness, is within the parameters of law already settled and therefore, it cannot be said that separate issue in respect of readiness and willingness is necessary for disposing the suit filed for the relief of specific performance.

13. It is the submission made by the learned counsel appearing for the appellant / defendant that the said agreement dated 12.04.1999 alleged to be executed by the plaintiff is a fabricated one. It is the further submission made by the learned counsel appearing for the appellant that believing the earlier representation by the plaintiff that the said document is a mortgage deed, the defendant went to the Sub-Registrar's office and signed in the said document. In this regard, it was further submitted that the evidence let in by D.Ws.1 and were sufficient to accept the case of the defendant that sale agreement is a fabricated one.

14. Now, on considering the said submissions with the relevant records, it is clear that, if a plea of fraud / misrepresentation or undue influence is urged by the parties in



a suit, normally, the burden is on the party, who asserted the said fraud, undue influence or misrepresentation. Further, in respect of burden of proof, Section 101 of the Indian Evidence act reads as follows:-

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"Section 101. Burden of Proof - "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

In terms of the said provision, the burden of proving the fraud rests on the party, who substantially asserts the affirmative issues and not the party, who denies it. That apart, in the written statement submitted by the defendant, he had pleaded that at the time of entering into the sale agreement, it was represented by the plaintiff that for the loans availed, the alleged sale deed is nothing but a mortgage deed for a loan of Rs.50,000/- hence, the defendant have also gave evidence in support of the said pleadings. Now, on considering the said issue in the present case, the alleged sale deed entered between the plaintiff and the defendant is a registered document, therefore, the same is having some additional force in favour of the plaintiff.

15. In the said circumstance, in order to prove a forgery, the defendant has to let in a probable evidence as the sale agreement dated 12.04.1999 is a forged one. Here it is a case, he has not examined the scribe, who prepared the sale agreement. However, he has not examined the persons, who have signed as a witness in the said document. More than that, the plaintiff had informed the existence of the sale agreement by sending advocate notice dated 13.10.1999, vide Ex.A.2, on the other hand, the defendant had not denied the contents of the advocate notice. By way of reply notice dated 17.05.2000, only after a lapse of six months he denied the existence of sale agreement. In fact, notice dated 13.10.1999 was received by the defendant on 16.10.1999, which is apparent from Ex.A3 acknowledgement. Therefore, a mere oral evidence given by the defendant that the alleged sale deed is a forged document, cannot be extended up to level of creating a doubt over the case of the plaintiff. Accordingly, the submission made by the appellant's counsel that the alleged sale deed is a fabricated one, cannot be sustained.

16. Another submission made by the learned counsel appearing for the appellant / defendant is that the defendant belongs to the oppressed community, and considering the same, in



order to develop different community, the suit land was assigned by the Government in favour of predecessor of the defendant. Further, it is contended that the properties covered under Ex.A.1 are allotted to the people, who belongs to depressed classes and therefore, Ex.A.1 cannot be in force, as it would be opposed to the public policy. The said submission made by the defendant's counsel is seriously challenged on the side of the plaintiff.

17. Now, on considering the said submissions with relevant records, it is seen that at the time of giving evidence, D.W.1 in his cross examination, gave evidence that after paying a sum of Rs.550/- he purchased the property, which is covered under Ex.B.1 on 12.09.1961. It is true that the connected records with respect to Ex.B.1 is not been summoned by either of the parties. Accordingly, the said document has not been proved by producing the relevant documents. The defendant gave evidence that in respect to the suit property, patta has been granted in favour of his father. Therefore, if the patta alleged to be issued by the Government was produced before the Court, it would disclose whether the suit property is inalienable or not.

18. In the said occasion on the side of the defendant, the copy of 'A' registers are marked as Exs.A.7 to A.9. The entries made in those registers reveal the fact that the said lands are ryotwari lands and accordingly, it cannot be said that the property covered under Ex.A.1 is a deceived land. More than that, if a property covered under Ex.A.1 belongs to the Government, only the Government has to initiate action and in this regard, nothing had happened for the past several years, therefore, the contention raised by the defendant that the suit land is a deceived and is also not proved up to the level of defeating the plaintiff's case. Further, after receiving the major sale consideration, a submission was made on the side of the appellant / defendant that the suit lands are allotted by the Government to the livelihood of the defendant, cannot be accepted.

19. Yet another submission made by the learned counsel appearing for the appellant / defendant is that as per the case of the plaintiff, for the payment of Rs.10,000/-, which is the balance sale consideration, time is fixed for two years, which is unbelievable and cannot be held. More than that, after receipt of reply notice in the month of May, 2000, the plaintiff has filed the present suit only after 17 months, which is also one another aspect, creates a doubt over the case of the plaintiff.

20. Now, on considering the said submission, it is true that for the payment of Rs.10,000/- time was fixed for two years. As



rightly pointed out by the learned counsel appearing for the plaintiff that though the time was fixed for two years for payment of Rs.10,000/-, it is a case here that within a period of six months from the date of sale agreement, the plaintiff sent a notice for the purpose of completing his performance. In this regard, it is for the defendant, who had waited for sometime without sending any reply. Therefore, fixation of two years for payment of balance consideration, cannot be a ground for disposing the case in favour of the defendant and mere delay in filing the suit is not a sufficient ground for refusing the specific performance. In this regard, it is useful to refer the decision of Hon'ble Supreme Court reported in AIR 1965 SC 1405 [Madamsetty Satyanarayana Vs. G.Yelloogi Rao and two others and the decision of this Court reported in (1965) 2 S.C.J. 678 [Janaki Vs.S.Desigan It is a case where it is held that time is not the essence of contract for sale of immovable property. It is true that delay may amount to abutment of claim, but, here, it is a case, having a reason that balance sale consideration is only Rs.10,000/-, it cannot be said that the plaintiff is not having any respective fund for purchase of property within a stipulated time. Therefore, in this aspect also the submissions made by the appellant's counsel is not having any significance in order to disbelieve the case of the plaintiff.

21. Accordingly, the courts below had also travelled in the same line and came to the conclusion that plaintiff is entitled to the relief of specific performance. The substantial questions of law are all answered as above.

In fine, the Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar

ssd

To

1. The District Judge,
Tiruvannamalai
2. The Principal Subordinate Judge,
Tiruvannamalai.



Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

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+1cc to Mr.V.Ragavachari, Advocate, S.R.No.3866
+1cc to Mr.R.Ashraf Khan, Advocate, S.R.No.4359

S.A.No.427 of 2010
&
C.M.P.No.13017 of 2016

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