IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	16.06.2023
Pronounced on	15.09.2023

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

Appeal Suit No.261 of 2013

Manimegalai ....Appellant

Vs.

1.Sithisamona

2.Devi ...Respondents

Prayer: First Appeal has been filed under Section 96 of Code of Civil Procedure, against the Judgement and Decree passed in O.S.No.54 of 2010 on the file of the District Judge at Karaikal, dated 23.03.2013.

For Appellant : Mr.V.Ayyadurai,
Senior Counsel
for Mr.V.B.Perumal Raj

For R1 : Mr.K.Muralidharan

For R2 : Mr.T.Saikrishnan

JUDGMENT

The above appeal is directed against the judgment and decree dated 02.03.2013 passed by the learned District Judge at Karaikal in O.S.No.54 of 2010 filed by the appellant/plaintiff.

Brief facts:-

2. The brief facts giving rise to the present appeal is that the plaintiff and the first defendant entered into a sale agreement on 30.04.2009 in respect of the suit property for a sale consideration of Rs.10,50,000/-. On 07.05.2009, the agreement was reduced into writing and registered vide document No.1304/2009. On the said date the first defendant received a sum of Rs.10,00,000/- and the said deed of sale agreement the first defendant received a sum of Rs.10,00,000/- and the said deed of sale agreement the first defendant handed over the antecedent original deed of the suit property to the first defendant. The plaintiff was always ready and willing to perform her part of contract. The plaintiff agreed to give time to the first defendant to vacate the suit property before the execution of the same as contemplated in the sale agreement. In spite of request by the plaintiff, the first defendant has

not come forward to execute the sale agreement, but was giving evasive reply. Therefore, on 28.10.2009, the plaintiff sent an advocate notice calling upon the first defendant to come forward to execute the sale deed. The first defendant did not give any reply and has not come forward for execution of the sale deed. On 07.11.2009, the plaintiff issued notice through her advocate calling upon the first defendant to complete the sale. On 09.11.2009, the first defendant acknowledged the notice but did not sent any reply. On 23.08.2010, when the plaintiff applied for certificate of encumbrance over the suit property from 06.10.2007, she found that on 17.08.2009, the first defendant had mortgaged the suit property in favour of the second defendant. The said mortgaged deed has been prepared by the document writer one R.B.Senthilkumar. With the connivance of the document writer and the Sub Registrar, Karaikal, the first defendant had executed a mortgage deed in favour of the second defendant in order to defeat the rights of the plaintiff. The said mortgage is not valid and binding upon the plaintiff. Hence, the plaintiff is constrained to enforce the sale agreement. The plaintiff is ready to pay the balance consideration of Rs.50,000/- at any point of time. Hence, the suit.

3. Per contra, the first defendant would submit that she was in need of money for the college education of her son and the business of her husband. The first defendant came to know that the plaintiff was lending money on interest through one person V.G.Naganathan. So, she approached the plaintiff through the said person for a loan of Rs.10,00,000/-. The plaintiff agreed to lend the money with interest at the rate of 26% per annum on she insisted for an agreement for sale of her house property as security for the amount. Left with no other option the first defendant agreed to create a registered document for sale for the said loan amount. The plaintiff insisted for handing over all the antecedent title deed to her as security. Therefore, the first defendant gave the antecedent document to the plaintiff. There was no letter dated 28.10.2009 issued by the plaintiff under certificate of positing to this defendant. The first defendant requested the plaintiff for further loan amount for which the plaintiff permitted her to raise money by mortgaging the suit property in favour of the second defendant as she did not have money with her. Therefore, the first defendant created mortgage in favour of the second defendant with the permission and approval of the plaintiff for a sum of Rs.9,00,000/-. The plaintiff had also given the original sale deed to the first

defendant for producing the same to the sub Registrar of Karaikal. The second defendant is a bona fide mortgagee and the mortgage deed is legal and valid. The suit property is worth more than Rs.28,00,000/-. The first defendant was regularly and punctually paying the interest at Rs.30,000/- per month till September 2009. As the first defendant could pay the interest to the plaintiff, the plaintiff started enforcing the sham and nominal agreement. In order to create a cause of action, she applied for an encumbrance certificate on 23.08.2010. The plaintiff has knowledge about the mortgage deed executed by the first defendant in favour of the second defendant over the suit property. The document writer is also known to the plaintiff. Now, the plaintiff has decided to change her attitude and filed the present suit with ulterior motive. The first defendant has been permitted by the plaintiff to create the mortgage deed in favour of the second defendant. The registering authority verified the original sale deed and created the mortgage deed in favour of the second defendant. The plaintiff was not ready and willing to conclude the sale deed as the document was not intended to be an agreement to sell. Therefore, the first defendant prayed for the dismissal of the suit with costs.

4. The second defendant in her written statement would submit that the sale agreement is only security for the payment of Rs.10,00,000/- as loan to the first defendant by the plaintiff. As the first defendant required further amount for the study of her son and business of her husband on permission and approval from the plaintiff the mortgage was created in her favour for a sum of Rs.9,00,000/-. The plaintiff herself has given the original sale deed for verification for creating a mortgage between herself and the first defendant. Therefore, the mortgage deed is not invalid. This defendant is not at all aware of the agreement for sale dated 07.05.2009 between the plaintiff and the first defendant. The suit property is worth more than Rs.28,00,000/-. The plaintiff permitted the first defendant to create a mortgage in her favour. The plaintiff after giving permission and producing the original deed before the Sub Registrar, cannot say that she has no knowledge about the creation of the mortgage in her favour. Hence, she prayed for the dismissal of the suit with costs.

5. The trial Court, on the above pleadings framed the following issues and additional issue for consideration:-

1.Whether the suit agreement is only a security document for the loan amount borrowed by the first defendant from the plaintiff or an agreement to sell as alleged by the plaintiffs?

2.Whether the mortgage dated 17.08.2009 was created by the first defendant in favour of the second defendant without the consent and approval of the plaintiff is invalid?

3.Whether the plaintiff was always willing and ready to perform her part of contract?

4.Whether the plaintiff is entitled for a declaration that the mortgage deed dated 17.08.2009 by the first defendant in favour of the second defendant is invalid and not binding on her?

5.Whether the plaintiff is entitled for a decree for specific performance as prayed by her or in the alternative for a decree for Rs.10,00,000/- with subsequent interest at 18% per annum on suit amount from the date of agreement till realization with costs?

Additional Issue:-

Whether the suit is bad for non-joinder of necessary parties?

6. After hearing the parties and appreciating the evidence on record, the

trial Court vide judgment and decree dated 02.03.2013 held that the plaintiff failed to prove that she is entitled for specific performance of the contract. Resultantly, the suit for specific performance was dismissed by holding that the plaintiff is entitled for a decree as against the first defendant for a sum of Rs.10,00,000/- with interest at 12% per annum from 07.05.2009 till the date of plaint with subsequent interest at the rate of 6% per annum on Rs.10,00,000/- from the date of plaint till realization with costs. Aggrieved by the judgment and decree of the trial Court, the plaintiff filed the present appeal in A.S.No.261 of 2013 before this Court.

Submissions:-

7. The learned Senior Counsel appearing on behalf of the appellant contented that though the learned trial Judge having rightly held that the registered sale agreement under Ex.A1 was valid, erroneously declined to grant the relief of specific performance and to invalidate the subsequent mortgage deed created in favour of D2 on the wrong premises that the plaintiff/appellant being an agreement holder, has no right or interest over the subject property nor has got *locus standi* to challenge the mortgage deed executed by the owner. He would further submit that granting of the

alternative relief of refunding of advance amount of Rs.10,00,000/- together with 10% interest from the date of agreement and thereafter at the rate of 6% till realization is wholly unsustainable either in law or on facts more in particular when the agreement of sale (Ex.A1) was held to be valid and that the plaintiff established her ready and willingness and called for first defendant to complete the sale within the agreement time of six months by issuing letter dated 28.10.2009 and in view of the pre-suit notice dated 07.11.2009 sent by registered post with acknowledgment due. Further, the learned trial Judge materially erred in appreciating the oral evidence of attesting witness to Ex.A1 and the Sub Register whose evidences would establish that the mortgage deed was created in violation of the conditions stipulated in the sale agreement (Ex.A1) and that the said mortgage deed was registered in contravention of circular guidelines.

8. The learned counsel for the petitioner would further submit that the findings and conclusion of trial Court that the plaintiff/appellant has not established her ready and willingness due to the fact that the suit came to be filed after lapse of about an year from the date of pre-suit notice etc., are not sustainable both on facts and in law having regard to the fact that the plaintiff

on her coming to know of the fraudulent execution of the mortgage deed through P.W4 in August 2010, immediately she laid the said suit by presenting the plaint dated 30.08.2010 within the prescribed period of limitation for filing a suit for specific performance. He would further submit that the trial Court is not right in holding that the first plaintiff being agreement holder has no proprietary title until a sale deed is executed in his favour. The further finding that inspite of violation of terms of Ex.A1 in creating mortgage, the plaintiff was entitled to either to rescind the contract or claim for damages is contrary to law. The trial Court ought to have seen that 90% of the total consideration has already been given to the vendor and the time for completion of sale as specified in the Ex.A1 would only to facilitate the vendor to handover delivery of vacant possession in the light of the attending circumstances of the given case. The contra finding recorded in this aspect that absence of such reason in the form of recital in Ex.A1 and found that plaintiff for guilty of latches etc., are not supported by any legally acceptable materials. The learned trial Judge ought to have held that the plaintiff was always ready and willing to perform her part owing to the admitted case that a sum of Rs.10,00,000/- out of Rs.10,50,000/- was paid at the time of validity executed the sale agreement under Ex.A1 and that the plaintiff called upon the first defendant to complete the sale within stipulated time of six months and that the said suit was laid within the period of limitation prescribed in law. The plaintiff had also deposited the balance sale consideration into Court deposit as such ought to have decreed the suit for specific performance of the sale agreement. Further, the trial Court ought to have held that the mortgage deed under Ex.A13 was fraudulently created in collusion with the scribe and registering authority. Since no interest was said to have paid by first defendant to second defendant as fixed in terms of Ex.A13, but the said mortgage deed was registered in violation of the mandatory procedure. In any event the decree and judgment of the Court below is liable to be set aside as being contrary to law and is opposed for non-considering the materials available on record in its proper perspective.

9. The learned counsel for the appellant further argued that, the registered agreement stating proposed sale of specified property for a specified consideration entered between first defendant and plaintiff acknowledging receipt of specified amount of earnest money by the first

defendant from the plaintiff and the agreement contained any mention showing any loan or borrowing by first defendant from the plaintiff and execution of document as security, there cannot be any inference drawn that the said agreement was executed only as security for a loan transaction. The learned counsel would submit that, a contract to be interpreted based on intentions expressed by parties. If language used in document has more than one meaning, contract to be interpreted having regard to meaning reasonably used in line of trade as understood by parties. His further contention is that as per section 92 of the Evidence Act, when the terms of any such Contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the said section, no evidence of any oral Agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms.

10. Reliance was also placed on the judgment in ***Mangala Waman Karandikar (D) TR.L.Rs Vs Prakash Damodar Ranade,*** reported in 2*021*

(4) CTC 852, wherein it was held as follows:-

14. It is manifest from these two sections that it is only in cases where the terms of the document leave the question in doubt, then resort could be had to the proviso. But when a document is a straightforward one and presents no difficulty in construing it, the proviso does not apply. In this regard, we may state that Section 95

only builds on the proviso 6 of Section 92.

15. If the contrary view is adopted as correct it would render Section 92 of the Evidence Act, otiose and also enlarge the ambit of proviso 6 beyond the main Section itself. Such interpretation, provided by the High Court violates basic tenants of legal interpretation.3 Section 92 specifically prohibits evidence of any oral agreement or statement which would contradict, vary, add to or subtract from its terms. If, as stated by the learned Judge, oral evidence could be received to show that the terms of the document were really different from those expressed therein, it would amount to according permission to give evidence to contradict or vary those terms and as such it comes within the inhibitions of Section 92. It could not be postulated that the legislature *intended to nullify the object of Section 92 by enacting exceptions to that section.*

16. In line with the law laid down, it is clear that the contract mandated continuation of the business in the name of 'Karandikar Brothers' by paying royalties of Rs. 90 per month. Once the parties have accepted the recitals and the contract, the respondent could not have adduced contrary extrinsic parole evidence, unless he portrayed ambiguity in the language. It may not be out of context to note that the extension of the contract was on same conditions.

17. On consideration of the matter, the High Court erred in appreciating the ambit of Section 95, which led to consideration of evidence which only indicates breach rather than ambiguity in the language of contract. The evidence also points that the license was created for continuation of existing business, rather than license/lease of shop premises. If the meaning provided by the High Court is accepted, then it would amount to Courts substituting the bargain by the parties. The counsel for respondent has emphasized much on the receipt of payment, which mentions the term 'rent received'. However, in line with the clear unambiguous *language of the contract, such evidence cannot be considered in the eyes of law.*

18. Moreover, the contention that the aforesaid situation is covered by the Bombay Rent Act is misplaced. Once we have determined that the impugned agreement was a license for continuing existing business, Bombay Rent Act does not cover such arrangements. Therefore, the jurisdiction of the trial court is accordingly not ousted.

11. The learned counsel for the appellant would further contend that, in the light of the above said factual and legal aspect, the proper form of decree is to direct specific performance of the contract between the first defendant and the plaintiff. To support his contentions, he has relied upon the decision cases reported in ***(2020) 15 SCC 731, 2021 (4) CTC 852, 2022 and SCC Online SC 435.***

12. Per contra, the learned counsels appearing on behalf of the respondents/defendants argued that the present civil appeal is liable to be dismissed with costs in view of the detailed judgment of the trial Court, which was passed after minutely examining the evidence on record. The learned

counsels further contended that the sale agreement was executed only as collateral security for a loan advanced by the plaintiff and not for the sale of property. The first defendant was in need of money for her sons education and for the business of her husband approached the plaintiff for a loan of Rs.10,00,000/-, who happened to be a money lender. Since the plaintiff insisted for a sale agreement, the first defendant with no other option agreed to create a registered document for sale for the said loan amount. The first defendant further requested the plaintiff for further loan amount for which the plaintiff permitted the first defendant to mortgage the suit property in favour of the second defendant as the plaintiff did not have enough money with her. Therefore, the first defendant created mortgage in favour of the second defendant for a sum of Rs.9,00,000/- with the approval of the plaintiff. They would further submit that even a mortgage is a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, which may give rise to a pecuniary liability. Therefore, it cannot be said that once the encumbrance is made by creating a mortgage, the mortgager is totally prohibited from effecting any further transfer. In fact, if any such transfer is made, it is always subject to mortgage alone. There is no bar for creating subsequent transfer of the immovable property. Therefore, it cannot be said that since the agreement for sale is registered, the owner has no right to execute any document. They would further submit that when a contract has been reduced to the form of a document, Section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and Section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on Section 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence that his signature was a forgery. In their Lordships' opinion oral evidence in disproof of the agreement that, as in *Pym v. Campbell (1856) 6 E. & B. 370*, (1) the signed document was not to operate as an agreement until a specified condition was fulfilled, or (2) that as in the present case, the document was never intended to operate as an agreement but was brought into existence solely for the purpose of creating evidence of some other matter stands exactly on the same footing as evidence that the defendant's signature was forged.

13. Their further contention is that though grant of specific performance is a discretionary power of the Court, circumstances to be considered in exercising the discretion. The total inaction of the plaintiff would be circumstance which would way against exercise of discretion for grant of specific performance of the agreement in favour of the plaintiff. They would further contend that there are several doubts exists regarding genuineness of sale agreement. Since the transaction pertains to loan, the theory of execution of sale agreement was not believed by the trial Court. The plaintiff failed to prove execution of sale agreement by cogent and convincing evidence. Since it was only a security for loan availed by the first defendant, the plaintiff has filed the suit after a long lapse of time from the date of agreement. Moreover, the claim of the plaintiff that the third party interest

was created by the first defendant was not substantiated. Therefore, the trial Court has rightly exercised its discretion under Section 20 (2) (a) of the Specific Relief Act, 1963, not to grant a decree of specific performance having regard to inequitable terms of agreement of sale giving unfair advantage to plaintiff over defendants and other facts. To support his contentions, they have relief upon the decision cases reported in ***(1997) 3 SCC 1, 2020 SCC Online Mad 5231, (2012) 1 SCC 656, (2015) 5 SCC 531, 2012 (4) CTC 100, 2017 (1) CTC 561, 2018 (1) CTC 50, (2020) 15 SCC 731 and 446 The Indial Law Reports (Vol.LIX).***

14. I have carefully considered the rival contentions of the learned counsel appearing for the parties and perused the entire records.

15. **Point for consideration:-**

> **“***Whether the trial Court was justified in declining the relief of specific performance of the contract to the plaintiff?”*

16. The suit is based on a registered agreement of sale dated

30.04.2009, whereby, the first defendant agreed to sell the suit property in favour of the plaintiff for a sale consideration of Rs.10,50,000/- and on 07.05.2009, the same was reduced into writing and registered vide document No.1304/2009. On the same day the first defendant received a sum of Rs.10,00,000/- and the parent documents was handed over to the plaintiff by the first defendant. Since the first defendant failed to perform his part of contract within the stipulated time, the plaintiff issued a legal notice on 07.11.2009 for which no reply notice was sent by the first defendant. On 23.08.2010, when the plaintiff applied for certificate of encumbrance in the suit property, she found that on 17.08.2009 the first defendant had mortgaged the suit property in favour of the second defendant. The said mortgage is not valid and binding on the plaintiff. Hence, the plaintiff was constrained to file the above suit for specific performance.

17. The defendants contested the suit, stating that it is only a loan transaction and there was no intention to sell the property to the plaintiff. Hence, they prayed for dismissal of the suit.

18. The trial Court decreed the suit on the following grounds:-

(i) The execution of Ex.A1 is admitted by both parties

(ii)Out of the sale consideration of Rs.10,50,000/- a sum of Rs.10,00,000/- was received by the first defendant and only a meager sum of Rs.50,000/- was outstanding.

(iii)Though the first defendant contended that it was a loan transaction, the said contention was rejected by the trial Court and came to a conclusion that it was only an agreement of sale.

(iv) However, the trial Court was not inclined to grant a decree for specific performance and directed the first defendant to refund the advance money to the plaintiff at Rs.10,00,000/- with interest at the rate of 12% per annum from 07.05.2009 till the date of plaint with susequent interest at the rate of 6% per annum on Rs.10,00,000/- from the date of plaint till realization with costs by the first defendant to the plaintiff.

19. Aggrieved by this, the present appeal is preferred by the plaintiff stating that the trial Court having held the registered sale agreement is valid ought to have granted the relief of specific performance.

20. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The Court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the Court is not arbitrary but is "sound and reasonable", to be "guided by judicial principles". The exercise of discretion is capable of being corrected by a Court of appeal in the hierarchy of appellate Courts. Sub-section 2 of Section 20 contains a stipulation of those cases where the Court may exercise its discretion not to grant specific performance. Sub-Section 2 of Section 20 is in the following terms :

> *"Section 20 (2):- The following are cases in which the court may properly exercise discretion not to decree specific performance-*
>
> *(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or*

> *(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;*
>
> *(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance." However, explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract.*

21. The precedent on the subject is elucidated below :

(i) In Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and Ors[1], the Hon'ble Apex Court held that :

> *"...14. Section 20 ofthe Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff..."*

(ii) A similar view was adopted by the Hon'ble Apex Court in Sardar Singh v. Smt. Krishna Devi and another :

> *"...14. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract."*

(iii) Reiterating the position in K. Narendra v. Riviera Apartments (P) Ltd[3], the Hon'ble Apex Court held thus :

> "…29. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature , shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David v. Louis Chinnaya Arogiaswamy by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court."

(iv) These principles were followed by the Hon'ble Supreme Court in A.C. Arulappan v. Smt. Ahalya Naik, with the following observations :

> *".....7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff." ……..*
>
> *".....15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court....."*

(v) A Bench of three Judges of the Hon'ble Apex Court considered the position in Nirmala Anand Vs. Advent Corporation (P) Ltd. and Ors.[5], and held thus :

> *".....6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is*

further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance.

22. In this case, the specific defence taken by first defendant is that, she was in need of money for the college education of her son and for her husband's business. Since the plaintiff was a money lender, she approached him through one common person and borrowed a sum of Rs.10,00,000/- with interest at the rate of 26% per annum. At the instant of the plaintiff, she executed Ex.A1-sale agreement as security for the amount borrowed and at the request of the plaintiff handed over the title deeds to the plaintiff. Again

when the first defendant approached the plaintiff for further loan amount, the plaintiff permitted her to raise the money by mortgaging the suit property in favour of the second defendant as the plaintiff was not having enough money with her. Hence, the first defendant created a mortgage deed in respect of the suit property in favour of the second defendant for a sum of Rs.9,00,000/-. The plaintiff had also given the original sale deed to the first defendant for producing the same to the Sub Registrar of Karaikal. The first defendant further submitted that the property is worth about more than Rs.28,00,000/-. Till September 2009, the first defendant was regularly paying the interest at Rs.30,000/- per month to the plaintiff. Thereafter, the first defendant could not pay the interest and taking advantage of the same, the plaintiff started to enforce the agreement. The plaintiff with mala fide intention to grab the property of the first defendant had instituted the present suit. The contention of the second defendant is that the said mortgage in her favour was executed by the first defendant to the knowledge of the plaintiff.

23. Now it has to be determined whether the sale agreement is executed as security for the alleged loan transaction. As pointed out by the learned

counsel appearing for the appellant/plaintiff, as per Section 92 of the Evidence Act, when the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the said Section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms. At the same time, when a contract has been reduced to the form of a document, Section 91 excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless otherwise expressly provided in the Act, and Section 92 excludes oral evidence for the purpose of contradicting, varying, adding to, or subtracting from such terms. Section 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. The objection must therefore be based on Section 91 which only excludes oral evidence as to the terms of a written contract. Clearly under that Section a defendant sued, as in the present case, upon a written contract purporting to be signed by him could not be precluded in disproof of such agreement from giving oral evidence that the plaintiff had unfair advantage over the first defendant.

24. The fact that the husband of the first defendant was assisting the first defendant at the time of execution of the agreement, it cannot be presumed that the alleged sale agreement was executed for selling the property. The other circumstances had to be taken into consideration. If really it was a sale transaction, the plaintiff after parting with the major part of sale consideration and only a meager part of Rs.50,000/- to be paid to conclude the contract within a stipulated period, the plaintiff after issuing notice on 28.10.2009 and 07.11.2009 calling upon the first defendant to complete the sale, filed the suit only on 07.09.2010. The total inaction of the plaintiff would be a circumstance to presume that it is not a sale transaction. The plaintiff failed to prove the execution of sale agreement by cogent and convincing evidence. Though she has parted with 90% of the sale amount and six months time was given for execution of the sale deed, the plaintiff has not shown any urgency to file the suit. In Ex.A1-sale agreement it was clearly mentioned that within six months, the contract has to be performed. Even

assuming that it is a sale agreement, the primary requirement to seek the relief under Section 16(c) of Specific Relief Act was that the plaintiff was ever ready and willing to perform his part of contract, which is not established by the plaintiff.

25. With regard to the mortgage executed by the first defendant in favour of the second defendant, as rightly pointed out by the learned counsels appearing for the respondents, the plaintiff cannot questioned the validity of the mortgage, unless and until a sale deed has been executed in favour of the plaintiff with regard to the suit property. It is settled law that a person who has entered into a contract for the purchase of immovable property gets only a right to compel the other party to execute the sale deed in respect of the said property, for the reason that the intended transferee does not acquire ownership in the property. Therefore, the plaintiff has no legal right to claim the mortgage deed dated 17.08.2009 is not binding on her. The material which has been placed on record indicates that the terms of the contract, the conduct of parties at the time entering into agreement and circumstances under which the contract was entered into gave the plaintiff an

unfair advantage over the first defendant. These circumstances make it inequitable to enforce specific performance. Therefore, the trial Court has rightly exercised its discretion under Section 20 (2) (a) of the Specific Relief Act, 1963, not to grant a decree of specific performance having regard to inequitable terms of agreement of sale giving unfair advantage to plaintiff over defendants and other facts.

26. The trial Court, considering the above factual and legal aspects has rightlyheld that the plaintiff is not entitled for a decree of specific performance as prayed by her and granted refund of advance money to the plaintiff. Therefore, there is no infirmity found in the judgment and decree passed by the learned District Judge, Karaikal, dated 02.03.2013 in O.S.No.54 of 2010. Accordingly, this Appeal Suit is dismissed. No costs.

15 .09.2023

vsn/cp
Internet:Yes/No
Index:Yes/No
Speaking/Non-speaking order

To

The District Judge,
Karaikal.

K.GOVINDARAJAN THILAKAVADI, J.

vsn/cp

PRE- DELIVERY JUDGEMENT MADE IN

Appeal Suit No.261 of 2013

15.09.2023