IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 08.06.2023

Judgment Pronounced on : 31.07.2023

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

C.S.No.752 of 2012

V.Saravanan .... Plaintiff

Vs.

1.C.Narayanamma

2.Canara bank
represented by its Manager,
Sarojini Devi Road Branch,
Secunderabad, Andrapradesh.
(amended as per order dated 08.09.2021
in A.No.3082 of 2021) .... Defendants

Prayer : Civil Suit filed under Order VI Rule 1 of Madras High Court O.S.Rules read with Order VII Rule 1 of CPC., praying for a judgment and decree in favour of the plaintiff:

(a) directing the 1st defendant to specifically perform the conditional sale agreement dated 17.04.2012 by executing a necessary sale deed in favour of the plaintiff and also to handover the possession of the suit property bearing New No.9, old No.15, Mylai Ranganathan Street, T.Nagar, Chennai-9 Old No.15, Mylai Ranganathan 600 017, in an extent of 2430 sq.feet more fully described in the schedule here under on receipt of the balance sale consideration over and above the subsisting mortgage dues to the 2nd defendant, and also after adjusting the balance loan due amount of Rs.1,60,00,000/- (rupees One Crore and Sixty lakhs Only) which is due and liable to be paid by the 1st defendant to the plaintiff, and in default directing an officer of this Court to execute the sale deed on behalf of the 1st defendant.

(b) to pay the costs of the suit of the plaintiff

(c) granting such further or other reliefs as this Court may deem fit and proper in the circumstance of the case.

For Plaintiff : Mr.C.S.K.Sathish

For Defendants : M/s.T.Hemalatha for D2

JUDGMENT

The suit has been filed seeking specific performance of contract of sale agreement dated 17.04.2012 in respect of the suit property situated in Mylai Ranganathan Street, T.Nagar in an extent of 2430 sq.ft more fully described in the schedule of the plaint by executing a Sale deed and on receipt of the balance sale consideration over and above the subsisting mortgage dues to the 2nd defendant and also after adjusting the balance loan due amount of

Rs.1,60,00,000/- which is due and liable to be paid by the 1st defendant.

2. The 1st defendant is the owner of the suit property, situated at T.Nagar bearing door No. 9/15, Mylai Ranganathan Street, Chennai 600 017, measuring an extent of 2430 sq.ft. The 1st defendant had availed financial assistance of Rs.2,20,22,000/- from the plaintiff on various dates by agreeing to repay the same with interest. By way of security, the 1st defendant had entered into a registered conditional sale agreement dated 17.04.2012 in respect of the suit property by agreeing to repay the loan amount of Rs.2.20 Crores along with interest to the plaintiff on or before 30.07.2012 and on failure to repay the same to sell and convey the suit property in favour of the plaintiff.

2.1. It was further agreed by the 1st defendant that she would make an interim repayment of Rs.1 Crore on or before 31.05.2012. The sale value of the property was mutually agreed and fixed at Rs.5 Crores. As per the conditional sale agreement if the 1st defendant is not able to repay the said sum of Rs.2.20 Crores within 30.07.2012, the property should be conveyed in favour of the plaintiff subject to the subsisting mortgage entered into between the 1st defendant in favour of the 2nd defendant viz, Syndicate Bank, Sarojini Devi Road branch, Secundrabad, Andhra Pradesh.

2.2. The mortgage amount should be paid by the plaintiff and the sale consideration over and above the mortgage dues shall be paid by the plaintiff to the 1st defendant before execution and registration of the sale deed, after adjusting Rs.2.20 Crores payable to the plaintiff by the 1st defendant. It was agreed between the parties that in case of any breach of the conditions the plaintiff is entitled to enforce the sale agreement.

2.3. The 1st defendant had repaid a sum of Rs.30 lakhs on 30.05.2012 and an another sum of Rs.30 lakhs by way of cash on 16.06.2012 altogether a sum of Rs.60 lakhs to the plaintiff. However, the 1st defendant did not abide the conditions and made repayment on or before 29.06.2012. The plaintiff sent two legal notices on 14.08.2012 to the 1st defendant's son in respect of the loan transaction between himself and the 1st defendant's son C.Romesh Babu.

2.4. The 1st defendant's son sent a reply notice on 01.09.2012 and made false allegations. He has further stated that the conditional sale agreement is a coercive one and it will not bind upon the 1st defendant and hence, the plaintiff was constrained to issue a legal notice to the 1st defendant on 13.09.2012 and called upon her to sell the property on the agreed sale consideration to the plaintiff. The sale agreement also contains a clause that the time is the essence of the contract. Through the legal notice dated 13.09.2012 the plaintiff called upon the 1st defendant to furnish the mortgage dues to the 2nd defendant in order to enable him to discharge the same before getting the sale deed registered in his favour. The 1st defendant has sent a legal notice on 29.09.2012 with false allegations. Hence the plaintiff has filed this suit for seeking the relief of specific performance.

3. The written statement of the first defendant is in brief:

The 1st defendant never borrowed the said sum as alleged in the plaint; the plaintiff is a politically influenced person; he obtained the signature of the 1st defendant forcibly. It is correct to state that the 1st defendant is the owner of the suit property. However, the alleged sale agreement is neither a conditional agreement nor a genuine one and hence that will not bind the 1st defendant.

3.1. The suit property has already been mortgaged with the 2nd defendant's bank and hence, there is no possibility for the 1st defendant to enter into a conditional sale agreement as alleged by the plaintiff. The 1st defendant's husband and her son availed some loan from the plaintiff for business purpose and they have repaid the same. Since the 1st defendant did not avail any loan from the plaintiff, there is no question of execution of any conditional sale agreement in favour of the plaintiff.

3.2. The plaintiff and one Abdul Mujeeb Mion of Tirunelveli jointly received a sum of Rs.3.35 crores and another sum of Rs.2.65 crores on various dates for promoting their export business from the 1st defendant's husband. Till date, they have not started the business and neither the amount was repaid. Hence, a police complaint was given by the 1st defendant's son in this regard. For the legal notice issued by the plaintiff, the 1st defendant suitably sent a reply notice. The plaintiff never wrote a piece of letter to the 1st defendant for this purpose or for clearing the mortgage dues. Since the conditional sale agreement has been obtained by coercive means, it is not valid in the eyes of law.

3.3. Even if the conditional sale agreement is true, the plaintiff was not ready and willing to perform his part of the contract by taking appropriate steps to discharge the loan dues in favour of the 2nd defendant's bank. Hence the plaintiff is not entitled to any relief as prayed for.

4.The 2nd defendant's written statement in brief:

The suit property has been offered as security towards repayment of credit availed by the first defendant and by M/S. Gurucare Technologies and Sri

Suresh Kumar. The property has been offered as security for the loan not only availed by the 1st defendant but also for the loan availed by her family members who are running M/S. Gurucare Technologies and the loan availed by one Sri Suresh Kumar. On 04.04.2008 itself, the 1st defendant had executed a Memorandum of Deposit of Title Deeds by depositing the title deeds of the suit property as a security for the above loan credit facilities availed up to a limit of Rs. 1.50 crores enjoyed by the above mentioned persons.

4.1. Since the 1st defendant and others had committed default in paying the loan amount, the accounts has been classified as 'Non Performing Assets' and the bank had initiated proceedings under SARFAESI Act by issuing the demand notice dated 17.06.2011 under section 13(2) of the SARFAESI Act and called upon the 1st defendant and others to pay the outstanding liability. Since the loan was not repaid, the 2nd defendant issued a possession notice on 04.01.2012 under Section 13(4) of the SARFAESI Act. However, the 1st defendant filed S.A.No.58/2012 before the Debt Recovery Tribunal-II, Chennai and challenged the possession notice, but the same was dismissed.

4.2. A fresh possession notice was issued by the 2nd defendant on 17.12.2012. In the interregnum, the plaintiff had filed this suit for specific performance on the basis of a conditional sale agreement dated 17.04.2012. The 1st defendant had already offered the suit property as a security for the loan availed from the 2nd defendant. The conditional sale agreement entered into between the plaintiff and the 1st defendant is an invalid one. No prior permission was taken from the 2nd defendant's bank to execute such a sale agreement. It is the duty of the 1st defendant to discharge the subsisting mortgage of the suit property in favour of the bank. The plaintiff never approached the 2nd defendant bank and gave any offer to discharge the mortgage created by the 1st defendant in respect of the suit property. In view of the above submission the suit deserves to be dismissed.

5. On the above pleadings, the following issues are framed :

1.*Whether the agreement of sale dated 17.04.2012 executed between the plaintiff and the first defendant is true and valid?*

2*.Whether the suit is maintainable when the subject matter of the suit is already under the mortgage granted by the first defendant in favour of the 2nd defendant?*

3. *Whether the plaintiff is ready and willing to perform his part of the contract?*

4*.Whether the plaintiff is entitled to the relief of specific performance without discharging the mortgage?*

5.*Whether the agreement of sale is for specific performance,* *when the outstanding payment due to the second defendant is more than the sale consideration?*

6.*Whether the suit is collusive one between the plaintiff and the first defendant in order to defraud the second defendant?*

7.*To what other reliefs, the parties are entitled to?*

6. During the course of the trial, on the side of the plaintiff, one witness was examined as PW.1 and Exhibits Ex.P1 to Ex.P8 were marked. On the side of the defendant, 1st defendant was examined as DW.1; but she did not subject herself for cross examination. No oral or documentary evidence was adduced by the 2nd defendant.

7. The learned counsel for the plaintiff submitted that the 2nd defendant had executed a conditional sale agreement Ex.P1 on 17.04.2012 by agreeing to repay the loan amount of Rs.2.20 crores borrowed from him on various dates, on or before 30.07.2012; however, the 1st defendant did not repay the entire loan amount as agreed. The repayment of a portion of the loan amount to the extent of Rs.60 lakhs was alone made and the remaining amount was not paid. The plaintiff is entitled to get the relief of specific performance subject to the mortgage executed by the first defendant in favour of the 2nd defendant. Even though the plaintiff was ready and willing to settle the mortgage in favour of the

2nd defendant, he did not get any concrete reply from the 2nd defendant in this regard and hence, the plaintiff is entitled to get the decree for specific performance of sale of the suit property, subject to the mortgage in favour of the 2nd defendant. DW.1 had not come to the box and subjected herself for cross examination and hence, the plaintiff is entitled to the decree as prayed for.

8. The learned counsel for the 2nd defendant bank submitted that without getting any permission from the 2nd defendant bank , the plaintiff had entered into a conditional sale agreement with the 1st defendant; the sale agreement has been created only for the purpose of defrauding the existing mortgage in the name of the 2nd defendant executed by the 1st defendant. The 2nd defendant bank is consistently initiating SARFAESI proceedings and even at the time of filing the suit the SARFAESI proceedings which was initiated by the bank was pending. As on 30.6.2022, the loan due with the 2nd defendant bank is shown to be Rs.3,58,89,839/-. So, granting a decree as prayed by the plaintiff would defeat the interest of the 2nd defendant and hence, the suit should be dismissed.

9. The suit is based upon the alleged sale agreement Ex.P.1 dated 17.04.2012 executed between the plaintiff and the 1st defendant. The sale agreement is marked as Ex.P.1. Even though the 1st defendant had denied that the sale agreement is not genuine and her signatures was obtained by force, the said contention was not substantiated and proved before the Court. The sale agreement Ex.P1 is a registered one and the 1st defendant had affixed her signature knowing well that she has executed the sale agreement in favour of the plaintiff. In fact, the 1st defendant had filed her written statement and chief in affidavit. However, she did not turn up for cross examination, though the matter was adjourned for several hearings. Hence she was set ex-parte. So the mere statement of D.W.1 that the conditional sale agreement Ex.P1 was obtained by her by cannot be considered as a proved fact. Had the 1st defendant was serious in asserting such a condition, she would not have avoided the box for subjecting herself to be cross examined by the plaintiff. So there is no difficulty to hold that the Ex.P1 has been executed between the plaintiff and the 1st defendant.

10. As per Section 91 of the Indian Evidence Act, when the terms of the contract are reduced into writing, the same has to be proved only by producing the original written contract. In compliance thereof, the plaintiff produced the original registered conditional sale agreement and it is marked as Ex.P1. As per Sec.92 of the Indian Evidence Act when the terms of such contract are reduced into writing, the same should be proved by the production of the written agreement, in compliance of Sec.91 of the Indian Evidence Act and in that case no evidence shall be admitted for the purpose of contradicting and varying its contents.

11. As stated already the 1st defendant in her written statement and in her proof affidavit admitted the fact that she has affixed her signature in Ex.P1 and the same is a registered instrument. When that being the case, the 1st defendant cannot deny the same, except by proving that the said agreement has been executed due to fraud or coercion. However, the burden to prove the said fact would shift upon the 1st defendant and it is the duty of the 1st defendant to prove that Ex.P1 sale agreement has been executed due to threat or force.

12. As stated already, the 1st defendant did not discharge the said burden. So, the plaintiff has proved through his oral and documentary evidence that Ex.P1 sale agreement dated 17.04.2012 has been genuinely executed between the plaintiff and the 1st defendant and that it is true. Since Ex.P1 is a valid sale agreement in the eyes of law, by producing Ex.P1 and adducing evidence thereon the plaintiff had proved the contents of Ex.P1 also in terms of Sec.91 and 92 of the Indian Evidence Act. The 2nd defendant bank had raised a strange contention that the plaintiff has to obtain prior permission from the 2nd defendant in order to enter into a conditional sale agreement with the 1st defendant, in view of the existing mortgage in his favour. The plaintiff and the 1st defendant knowingly entered into Ex.P1 conditional sale agreement by being aware of the subsisting mortgage in respect of the suit property in favour of the 2nd defendant bank. In the terms of the agreement itself the said fact has been stated and there cannot be any quarrel on that. Even though the 2nd defendant has filed his written statement he has not adduced any oral evidence.

13. The plaintiff himself has admitted the subsisting mortgage in respect of the suit property in favour of the second defendant bank. However, it is submitted by the 2nd defendant that the 1st defendant ought to have obtained permission from the 2nd defendant bank before entering into Ex.P1 sale agreement and hence, it is illegal. The 1st plaintiff had knowingly taken the risk of entering into a sale agreement in respect of the suit property, when the mortgage in favour of the 2nd defendant bank was already in subsistence. As per the contention of the plaintiff he had advanced certain sum to the 1st defendant as loan and by way of a security he had obtained the conditional sale agreement from the 1st defendant. So, the law does not prohibit any second mortgage in respect of the same property when the earlier mortgage is subsisting. But the second mortgagee cannot have a better right than the first mortgagee and his rights will only be subject to the existing mortgage.

14. The plaintiff has also admitted the same and he has stated that he was always ready and willing to discharge the mortgage dues to the 2nd defendant's bank. Though it is contended by the 2nd defendant bank that the suit itself is not maintainable since the suit property is subject to the SARFAESI proceedings, no documents have been produced on the side of the 2nd defendant to support his contention that the SARFAESI proceedings were pending at the time when the suit was initiated. Only if the SARFAESI proceedings were pending, it is open to the plaintiff is to implead himself as party to the SARFAESI proceedings and make due submissions before the Debt Recovery Tribunal, Chennai.

15. It is further submitted by the plaintiff that if the 2nd defendant bank had given details of the outstanding dues, it would have been possible for him to settle the bank loan and get the sale deed executed in his favour. Even though the plaintiff had executed Ex.P1 as a conditional sale agreement, it is only a written contract where the 1st defendant offered her property as a security for the loan availed by her. But what makes the difference is the primary intention of the plaintiff while executing Ex.P1 agreement. It is with an intention to get back the loan amount given to him to the 1st defendant by creating a security and not to purchase the suit property. In the event of failure to make such payment the property is considered as sold in his favour.

16. In mortgage by conditional sale there is an ostensible sale of the specific immovable property by the mortgagor. On the failure to make the repayment of the loan the sale will become absolute. For the reasons best known to the plaintiff, he entered into a conditional sale agreement instead of a conditional sale with the 1st defendant. It is probably because the value of the suit property was fixed at Rs.5 Crores and the alleged mortgage in favour of the plaintiff is only for a loan of Rs.2.20 Crores. Whatever may be the case, Ex.P1 agreement has been executed subject to the earlier mortgage in favour of the 2nd defendants bank. Hence the plaintiff cannot have a better remedy without discharging the earlier mortgage.

17. Even though it is claimed by the 2nd defendant bank that there is a collusion between the plaintiff and 1st defendant to defraud the 2nd defendant, the said fact was not proved by the 2nd defendant bank. In view of the above discussions, I hold that the conditional sale agreement dated 17.04.2012 executed between the plaintiff and the 1st defendant is true and valid. **Thus issue Nos.1 & 6 are answered.**

18. It is not disputed by the plaintiff himself that Ex.P1 sale agreement is subjected to the mortgage created by the 1st defendant in favour of the 2nd defendant bank. So the plaintiff is not entitled to the relief of specific performance without discharging the mortgage in favour of the 2nd defendant. **Hence Issue No.4 is answered.**

19. The 2nd defendant has raised a contention that the suit is not maintainable in view of the earlier mortgage in favour of the 1st defendant. At the risk of reputation, it is reiterated that the entitlement of the plaintiff under Ex.A1 sale agreement is only subject to the mortgage in favour of the 2nd defendant and hence, even if the plaintiff could get a decree for a specific performance that is subject to the earlier mortgage. **Thus issue Nos.2 and 4 are answered**.

20. It is the contention of the 2nd defendant that the outstanding dues is more than the agreed sale consideration in Ex.P1, and hence the decree for specific performance cannot be granted. When the said fact was not established before the Court, it is for the plaintiff to discharge the loan dues of the 1st defendant with the 2nd defendant. If the plaintiff is willing to perform his part of his contract, it is always open to him to get the information from the 2nd defendant bank by exercising his Right to get Information and do the needful. But the plaintiff has not done anything on this aspect so far. Since the 2nd defendant has got no other interest over the suit property except to recover the loan, there cannot be any hesitation on the part of the second defendant to specify the quantum of the outstanding due to him. Hence, the plaintiff's excuse that he is not been able to get the right details from the 2nd defendant is not acceptable. Since the plaintiff has filed this suit immediately after the 1st defendant violated the conditions, the willingness on the part of the plaintiff can be presumed in his favour. **Thus, issue No. 3 is answered.**

21. But in the existing situation even if the decree for specific performance is granted in favour of the plaintiff, he cannot be in a position to get the sale deed executed in his favour. Taking into consideration of the same, I feel the plaintiff can be grant into an alternate relief of recovery of the balance loan amount of Rs.1,60,00,000/- with interest. **Thus, issue Nos.5 & 7 are answered.**

22. Considering the complex nature of the facts incurred, the suit is

decreed for recovery of a loan of Rs.1,60,00,000/-[Rupees One Crore and Sixty Lakhs only] with interest at the rate of 9% from the date of the agreement till the date of the suit and at the rate of 6% from the date of the suit till the date of decree and at the same rate of 6% from the date of decree till date of realization.

23. The plaintiff's charge over the suit property for the said decree amount in terms of Sec.55(6)(b) of the Transfer of Property Act will be subject to the charge held by the 2nd defendant over the suit property.

31.07.2023

Index : Yes / No
Speaking order / Non-speaking order
Internet: Yes/No
Neutral :Yes/No
jrs

APPENDIX

I. Witnesses :

Plaintiff :	
PW.1	V.Saravanan
Defendant :	
DW.1	C.Narayanamma

II. Exhibits :

Sl. No	Exhibits	Description of documents
1	P1	The original sale agreement dated 17.04.2012 entered into between the plaintiff and the 1st defendant.
2	P2	The legal notice dated 14.08.2012 issued by my counsel to the 1st defendant
3	P3	The original reply notice dated 1.9.2012 issued by the 1st defendant's son's advocates to the plaintiff's advocate
4	P4	The office copy of Lawyer notice dated 13.09.2012 issued by my counsel to the 1st defendant
5	P5	The original acknowledgement card
6	P6	The original encumbrance certificate dated 24.09.2012
7	P7	The original reply notice dated 29.09.2012 issued by the1st defendant's advocate to my counsel.
8	P8	The office copy of re-joinder notice dated 05.10.2012 from plaintiff's advocate to 1st defendant's son's advocate.

31.07.2023

R.N.MANJULA.J.,

jrs

C.S.No.752 of 2012

31.07.2023