



WEB COPY



S.A.No.390 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.03.2024

CORAM

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.390 of 2017

Ambeeswaran ... Appellant/Respondent/Plaintiff

Vs.

1.Dhanabakkiam

2.Venkatesh ... Respondents/Appellants/Defendants

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and decree in A.S.No.20 of 2016 on the file of the Principal District Court, Namakkal, dated 22.03.2017, reversing the well considered judgment and decree in O.S.No.310 of 2003 on the file of the Subordinate Court, Namakkal, dated 08.02.2016.

For Appellant : Mr.C.Jagadish

For Respondents 1 & 2 :Mr.T.Dhanyakumar

JUDGMENT

The plaintiff is the appellant having suffered a reversal finding before the first appellate Court in a suit for specific performance of an agreement of sale dated 13.07.2001.



S.A.No.390 of 2017

2. The parties are described as per the litigative status before the trial Court.

3. The material facts that are necessary for deciding the present second appeal are hereunder:

(i) The plaintiff entered into an unregistered agreement of sale with the husband of the first defendant and father of the second defendant on 13.07.2001 for sale/purchase of the suit property, for a total sale consideration of Rs.4,10,000/- and on the date of the agreement of sale, the plaintiff claims to have paid Rs.3,10,000/- and another Rs.50,000/- was paid by him on 13.10.2000 towards discharge of mortgage created over the suit property by the original owner, namely the husband of the first defendant and father of the 2nd defendant, in-respect of which the first defendant has paid a sum of Rs.50,000/-. According to the plaintiff, the balance sale consideration was only a sum of Rs.50,000/- and claiming that he was always ready and willing to perform his part of the contract, he has filed a suit within time, since the agreement of sale provided for two years time to conclude the sale transaction.



S.A.No.390 of 2017

(ii) The defendants denied the execution of the agreement of sale and also the factum of the discharge of mortgage by the plaintiff.

The defendants also stated that the plaintiff was never ready and willing to perform his part of the contract and therefore sought for dismissal of the suit.

4. The trial Court, finding that the agreement of sale was true and binding on the defendants, decreed the suit. The defendants preferred an appeal in A.S.No.20 of 2016 before the Principal District Judge, Namakkal. The first appellate Court reversed the findings of the trial Court on primarily two grounds namely,

i) The suit was barred in view of the provision under Order II Rule 2 of Code of Civil Procedure (herein after referred as 'CPC'), in view of the earlier suit in O.S.No.1 of 2003 filed by the plaintiff for permanent injunction and thereby, he had lost his right to seek specific performance to the agreement of sale, as no leave was obtained by him to file a suit for specific performance at the time of instituting the suit for permanent injunction.

ii) Secondly, the plaintiff having pleaded that he was put in possession in pursuance of the agreement with the deceased Thirumalai, the husband of



S.A.No.390 of 2017

the first defendant and father of the second defendant, the agreement of sale being unregistered, the plaintiff cannot seek enforcement of the same before the Court of law, in view of Section 17 of the Indian Registration Act as amended by the State of Tamil Nadu.

The first appellate Court, therefore dismissed the suit for specific performance, by allowing the appeal.

5. Aggrieved by the dismissal of the suit, the plaintiff is on second appeal. The second appeal has been admitted by this Court, on 08.11.2023 and the following two substantial questions of law have been framed:-

“(i) Whether the Lower Appellate Court is right in law in reversing the decree for specific performance on the ground that the agreement for sale dated 13.07.2001 marked as Exhibit A1 is not receivable in evidence in view of the amending Act 48 of 2001 introducing section 17(1-A) of the Registration Act, 1908, which came into force only on 24.09.2001 and ignoring the proviso to Section 49 of the Registration Act, 1908?

(ii) Whether the Lower Appellate Court is right in law in holding that the agreement for sale dated 13.07.2001 marked as Exhibit A1 cannot be received in



WEB COPY



S.A.No.390 of 2017

evidence and is liable to be compulsorily registered in view of Section 17(1-A) of the Registration Act, 1908 which amendment came into force only on 24.09.2001 by amending Act 48 of 2001, which is prospective?”

6. The learned counsel for the appellant has filed a memo, dated 07.11.2023, regarding one more substantial question of law to be framed under Order II Rule 2 of Code of Civil Procedure .

7. I have heard Mr.C.Jagadish, the learned counsel for the appellant and Mr.T.Dhanyakumar, the learned counsel for the respondents.

8. After hearing the learned counsel, apart from the above two substantial questions of law, I deem it fit to frame the following additional substantial question of law:

“Whether the suit for specific performance is barred under Order II Rule 2 of Code of Civil Procedure, in view of filing of O.S.No.1 of 2003 for permanent injunction without obtaining leave of the Court?”



S.A.No.390 of 2017

9. I have gone through the pleadings, oral and documentary evidence adduced by the parties before the trial Court as well as the judgment of the Courts below. I have also carefully considered the rival submissions advanced by the learned counsel on either side.

10. The specific case of the plaintiff is that he entered into an agreement of sale, though unregistered, with one Thirumalai on 13.07.2001. The sale consideration mutually agreed upon under sale agreement was Rs.4,10,000/- and Rs.3,10,000/- was paid as advance and Rs.50,000/- towards discharge of mortgage on 13.10.2000 was also adjusted towards payment of balance sale consideration. The parties have fixed two years as the time for execution of the sale agreement.

11. It is the further specific case of the plaintiff that the owner Mr.Thirumalai died and therefore, there was some delay in getting the details of the legal representatives of the deceased Thirumalai, especially since the husband and wife namely said Thirumalai and the first defendant was not in cordial terms, even at the time of agreement of sale. However, according to the learned counsel for the appellant, the suit has been filed even on 09.04.2003, within two years from the date agreed



S.A.No.390 of 2017

upon under the agreement of sale dated 13.07.2001.

WEB COPY

12. Further, the learned counsel for the appellant would state that the issue of bar under Order II Rule 2 has been extensively discussed by the first appellate Court. The first appellate Court has however, not even given a final decision as to whether the suit for specific performance was liable to be dismissed invoking the bar under Order II Rule 2 of CPC. Only in such circumstances, he has suggested the additional substantial question of law, by filing a memo. The learned counsel for the appellant would also invite my attention to the amended provisions of the Indian Registration Act where Section 17 has been amended by the State of Tamil Nadu and new provision of Section 17(1-A) has been inserted by Tamil Nadu Amendment Act 48 of 2001 dated 24.09.2001. In and by the State amendment, wherever there is contract for sale of immovable property for consideration, for the purposes of Section 53A of Transfer Property Act 1882, such agreement shall be registered, on or after the commencement of the amendment Act 2001 and it also stipulates that any such agreement, which is not registered, on or after such commencement of the Act namely 24.09.2001, it would not have any effect for the purposes of Section 53-A of Transfer of Property Act. Referring to the said agreement, Mr.C.Jagadish would state that



S.A.No.390 of 2017

admittedly in the present case, the suit agreement was dated 13.07.2001 and the date of amendment was 2 months later, only on 24.09.2001 and therefore, it would not affect the suit agreement. That apart, the learned counsel would also state that he is not claiming any right of part performance under Section 53-A of the Transfer of Property Act and therefore, the amendment would not in any way affect the maintainability of the suit or enforceability of the suit agreement. Insofar as Order II Rule 2 of CPC is concerned, he would state that the cause of action for the suit for permanent injunction was entirely different and the cause of action for the suit for specific performance was also on a totally different cause of action and therefore, the bar under Order II Rule 2 of CPC would not apply.

13. He would place reliance on the judgment of the Hon'ble Supreme Court in *Rathnavathi and another Vs. Kavita Ganashamdas* reported in **2015 5 SCC 223** where the Supreme Court, in identical circumstances, held that a suit for specific performance of an agreement of sale would not be affected by the bar under Order II Rule 2 CPC, even if the plaintiff had filed the suit for permanent injunction earlier. The Division Bench of this Court in *Neela Sports Development and*



S.A.No.390 of 2017

Educational Trust Vs. Vadhula Engineering Co. Pvt. Limited and Ors.

reported in ***Manu/TN/0847/2023*** has also followed the judgment of the Hon'ble Supreme Court and held that the plea of Order II Rule 2 CPC cannot be entertained in such circumstances. The learned counsel would also rely on judgment of the Hon'ble Supreme Court in ***Sucha Singh Sodhi (Dead) Through Legal representatives Vs. Baldev Raj Walia and another*** reported in ***(2018) 6 SCC 733*** where the Hon'ble Supreme Court, in similar circumstances, held that the earlier suit for permanent injunction would not be a bar or hit the subsequent suit for specific performance and Order II Rule 2 CPC cannot be applied.

14. The learned counsel would therefore pray for the second appeal being allowed on all the three substantial questions of law.

15. Per contra, the learned counsel for the respondent Mr.T.Dhanyakumar would submit that the defendants have denied the execution of the sale agreement by their husband and father respectively, namely Thirumalai and therefore, the plaintiff cannot seek to specifically perform the agreement against them. Further he would contend that the agreement was admittedly unregistered and the plaintiff claims that he



S.A.No.390 of 2017

has been put in possession of the suit property under the agreement of sale. The suit has to be necessarily dismissed in view of the bar under Section 17 (1-A) inserted by the Tamil Nadu State by way of amendment, as the agreement is admittedly an unregistered document and cannot be specifically enforced. He would take me through the findings of the first appellate Court and state that the findings of the first appellate Court are reasonable and well merited and do not require any interference and therefore prayed for dismissal of the second appeal.

16. Insofar as Order II Rule 2 of CPC is concerned, the Hon'ble Supreme Court has clearly settled the law and the issue is no longer *res integra*. A suit for permanent injunction is on a particular set of facts and the cause of action for the same would not be a bar to a subsequent suit for specific performance in respect of the very same property, as the cause of action for the suit for specific performance is entirely distinct. Therefore, I have no hesitation in accepting the contentions of the learned counsel for the appellant that the suit for specific performance, even though instituted subsequent to the suit for permanent injunction, without obtaining the relief of the Court under Order II Rule 2 of CPC, would not in any way affect the subsequent suit for specific performance.



S.A.No.390 of 2017

This substantial question of law is answered accordingly.

WEB COPY

17. The other two substantial questions of law pertains to the registration of the sale agreement and the effect of the amending Act 48 of 2001 inserted by the Tamil Nadu State Amendment Act 48 of 2001. Admittedly, the Amending Act 48 of 2001 has come into force only on 24.09.2001. Section 17 as amended by Act 48 of 2001 runs as follows:-

“(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property Act, 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 53-A)”

18. It is further clear that even the newly inserted provision clearly states that it would affect only agreements that are entered into on and after the date of amendment i.e.24.09.2001. Admittedly, in the instant case the agreement is before the said amendment, having been entered into on 13.07.2001. Therefore, the newly inserted provision Section 17 (1-A) would not apply to the suit sale agreement. Even



S.A.No.390 of 2017

otherwise, I do not find that the bar under Section 17(1-A) would affect the enforceability of the suit sale agreement for yet another reason. A reading of Section 17(1-A) clearly states that bar is only in respect of part performance relief and it would not affect the enforceability of the agreement as such. Section 49 of the Registration Act clearly carved out an exception viz., a suit for specific performance and that agreements can be received as evidence and enforced in a Court of law, even though they are unregistered.

19. Though Section 17(1-A) was again amended by Tamil Nadu Amendment Act 29 of 2012 with effect from 01.12.2012, making agreement of sale compulsorily registerable, Section 49 was never amended and therefore insofar as a suit for specific performance of contracts of immovable property is concerned, the amendment introduced by Tamil Nadu Act 29 of 2012 would also not apply or disable the plaintiff to approach the Court, seeking specific performance on the basis of an unregistered agreement of sale. The first appellate Court has proceeded to allow the appeal on a wrong understanding of the law, especially after having extracted the amendment Act 48 of 2001 entirely. Insofar as the readiness and willingness is concerned, though the trial



S.A.No.390 of 2017

Court has not framed a specific issue whether the plaintiff was ready and willing, it chose to frame an issue whether the plaintiff was entitled to the relief of specific performance and while discussing the same, the trial Court has found that the plaintiff deserved for relief of specific performance.

20. Admittedly, the plaintiff's case is that the plaintiff was put in possession of the suit property even on the date of agreement of the sale and he continued to be in possession and what remained was only the payment of Rs.50,000/-. The same was not specifically challenged by the defendants in the written statement because the entire case of the defendants was that the agreement itself was not true and genuine agreement and therefore, the said agreement executed by Late.Thirumalai would not bind them. In such circumstances, the Court below had found that the agreement was true and genuine. The question of readiness and willingness does not assume great significance in the facts of the present case when the specific defence was that the agreement itself was not true and genuine. Moreover, the suit has been filed within 2 years i.e the time fixed under the agreement of sale. Therefore, on all these grounds the plaintiff has certainly established readiness and willingness and even



S.A.No.390 of 2017

though the trial Court has not expressly used the phrase 'readiness and willingness', it has found that the plaintiff was entitled to the relief of specific performance. The appellate Court has reversed the findings of the trial Court only on two legal issues and not on any of the factual aspects. However, having found that both the legal issues having answered without proper application of law, I am constrained to interfere with the findings of the first appellate Court. The substantial questions of law are answered in favour of the appellant.

21. Consequently, the second appeal is allowed, all substantial questions of law are answered in favour of the appellant. No costs.

08.03.2024

Index : Yes/No
Speaking Order : Yes/No
Neutral Citation : Yes/No
dpa



WEB COPY



S.A.No.390 of 2017

P.B.BALAJI, J.

dpa

To:

- 1.The Principal District Court, Namakkal
- 2.The Subordinate Court, Namakkal
- 3.The Section Officer,
Vernacular Section,
High Court of Madras.

S.A.No.390 of 2017

08.03.2024