

**(2010) 10 MAD CK 0246**

**Madras High Court**

**Case No:** Second Appeal No. 1171 of 2010 and M.P. No. 1 of 2010

Absal Saheb and Others

APPELLANT

Vs

N. Gajendran and Others

RESPONDENT

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**Date of Decision:** Oct. 7, 2010

**Acts Referred:**

- Specific Relief Act, 1963 - Section 20, 20(2)

**Hon'ble Judges:** M. Jeyapaul, J

**Bench:** Single Bench

**Advocate:** A. Rajendrakumar, for the Appellant;

**Final Decision:** Dismissed

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### **Judgement**

M. Jeyapaul, J.

The defendant who suffered a decree for specific performance of the agreement for sale both before the trial Court as well as the first appellate Court, are the appellants herein. Originally the first and second defendants alone were parties to the suit laid by the plaintiff. As both of them passed away, the other defendants/appellants herein have come on record, as legal representatives of the original defendants 1 and 2.

2. The plaintiff laid the suit contending that the first and second defendants having agreed to sell the suit properties for a sum of Rs. 91,000/-, executed the agreement for sale on 14.9.1982, receiving a sale advance of Rs. 10,100/-. The plaintiff has contended that he has been ready and willing to perform his part of the contract. In spite of the notice served on the defendants 1 and 2, they had not expressed their willingness to perform their part of the contract. Hence, the plaintiff has filed the suit for specific performance of the agreement for sale.

3. The defendants 1 and 2 have contended in the written statement that they have not executed the agreement for sale with a free mind. The first defendant was old and sick at the time of execution of the agreement for sale. Exploiting the pitiable

situation, the plaintiff obtained the signatures of the defendants 1 and 2. It is alleged that the agreement of sale lacks consensus of mind. It is also contended that the plaintiff was never ready and willing to perform his part of the contract. In fact, he was ready to get back the advance amount within a week from the date of the alleged agreement. It is further contended that the price offered for the suit properties was unconscionable. With the aforesaid contentions, the defendants prayed for dismissal of the suit.

4. The trial Court having thoroughly adverted to the materials on record has returned a finding that the agreement for sale-Ex.A1 was really executed by the defendants 1 and 2 without any undue influence. The trial Court rejected the contention of the defendants that there was no consensus ad idem in executing the agreement for sale-Ex.A1. The alleged reconveyance agreement-Ex.B1 dated 21.11.1973 was also rejected by the trial Court. The trial Court having come to the conclusion that it was only the defendants 1 and 2 who had not expressed their willingness to execute the sale deed, despite the fact that the plaintiff was ever ready and willing to pay the balance sale consideration to take a sale deed, decreed the suit and granted a decree for specific performance of the agreement for sale. The first appellate Court on a thorough perusal of the materials on record chose to confirm the judgment of the trial Court.

5. The learned Counsel appearing for the appellants would submit that Ex.A1 was not executed in a fair manner. Coercion and force were applied to the second defendant, who is none other than the wife of the first defendant, to put her signature in Ex.A1. The plaintiff having taken advantage of the signature of the first defendant has got the agreement executed in an unfair way. It is also contended that the second defendant who is a pardhanashin woman had no occasion to read the terms of the agreement and as a result of which, she was not aware of the terms of the agreement. It is also submitted that the aforesaid circumstances would go to show that there was no consensus ad idem to execute the agreement-Ex.A1 by defendants 1 and 2. He would also contend that the second defendant would not have ventured to enter into an agreement for sale when she had already executed a reconveyance agreement in favour of one K.M. Abdul Magith, way back on 21.11.1973. The last submission made by the learned Counsel appearing for the appellants is that after all the plaintiff has come forward with a prayer for alternative relief with a view to get back the advance paid by him. Therefore, he would submit that discretionary relief of specific performance of agreement for sale may not be granted to the plaintiff, as the plaintiff would get an unfair advantage over the defendants 1 and 2 if they are directed to execute the sale deed in favour of the plaintiff.

6. The execution of the agreement for sale-Ex.A1 was admitted by defendants 1 and 2. It is the plea of the second defendant in the written statement that the signature of the first defendant was taken advantage of by the plaintiff while clinching the

agreement for sale. It is also contended that the second defendant simply subscribed her signature to the agreement for sale-Ex.A1 without knowing the terms thereon.

7. The execution of Ex.A1 was candidly admitted by defendants 1 and 2. There is an allegation that an undue influence was exerted on the defendants taking advantage of the signature of the first defendant and the pardhanashin status of the second defendant. Under such circumstances, the onus lies on the defendants to establish that such an undue influence was exerted on them by the plaintiff at the time when the agreement-Ex.A1 was executed. The Courts below having thoroughly analysed the evidence on record has returned a finding that the defendants failed to establish that the plaintiff took advantage of the signature of the first defendant and the pardhanashin status of the second defendant when the agreement for sale-Ex.A1 was clinched.

8. Of course the learned Counsel appearing for the appellants would submit before this Court for the first time that coercion and force were applied on the second defendant while executing the agreement for sale-Ex.A1. Firstly, such an argument cannot be entertained by this Court for the first time at the second appeal stage. Secondly, if such coercion and force had been applied for execution of the agreement-Ex.A1, defendants 1 and 2 would not have kept quiet till the suit was filed by the plaintiff seeking for specific performance of the agreement for sale. Surprisingly, the defendants have not set up such a plea either in the reply notice Ex.A7 or in the written statement filed by them. It is only the defendants who had to lead evidence to establish that there was no consensus ad idem while executing the agreement-Ex.A1. No evidence worth mentioning has been let in to establish such a contention of the defendants.

9. As regards the reconveyance agreement-Ex.B1 dated 21.11.9173, the Courts below have returned a concurrent finding that this document was concocted for the purpose of this case. Firstly it is found that the said document is an unregistered document, which could be created at the convenience of the party to suit the occasion at any point of time. The existence of reconveyance agreement-Ex.B1 was not even projected in the written statement filed by defendants 1 and 2. Therefore, the Courts below have rightly held that the unregistered reconveyance agreement-Ex.B1 has been concocted for the purpose of this case. In fact, the Courts below have held that Ex.B1 was antedated to suit the contentions of defendants 1 and 2. Such a concurrent finding on fact cannot be upset by the second appellate Court.

10. On facts it has been held by the Courts below that the plaintiff having been aggrieved by the delay caused by defendants 1 and 2 in not executing the sale deed by receiving the balance sale consideration shot off a pre-suit notice Ex.A6. But quite unfortunately defendants 1 and 2 have come out with a contention in the reply notice-Ex.A7 that they were prepared to execute the sale deed subject to the rights

of the beneficiary under the reconveyance agreement-Ex.B1. When the reconveyance agreement was not at all referred to in the agreement for sale-Ex.A1, the first and second defendants had unfairly put a pre condition to execute the sale deed in favour of the plaintiff. The aforesaid facts and circumstances would go to show, as rightly held by the Courts below, that it was only the defendants 1 and 2 who delayed the execution of the sale deed on one pretext or the other, whereas, the plaintiff had been ever ready and willing to perform his part of the contract.

11. By abundant caution the plaintiff has sought for the alternative prayer to return the sale advance he had paid to the defendants 1 and 2 at the time when the agreement for sale was clinched. Unless the plaintiff prays for an alternative relief, he may not get such a relief, in case the Court was convinced with the counter contentions of the defendants 1 and 2. Therefore, the plaintiff shrewdly sought for alternative relief. Seeking such an alternative relief does not take away the right of the defendants to insist for the primary relief of specific performance of the agreement for sale, they had prayed for before the Court.

12. Of course, the relief of specific performance of the agreement for sale is a discretionary relief, as per Section 20 of the Specific Relief Act, 1963. The Court may exercise its discretion not to grant the decree for specific performance where the terms of the contract or the conduct of the parties at the time of entering into the contract act or the other circumstances under which the contract was entered into gives the plaintiff an unfair advantage over the defendant or where the performance of the contract would involve some hardship on the part of the defendant which he did not foresee at all, or where the defendant entered into the contract under such circumstances, which makes it inequitable to enforce specific performance.

13. It has been made clear u/s 20 of the said Act that mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant shall not be deemed to constitute an unfair advantage.

14. The learned Counsel appearing for the appellants cited the decision of the Division Bench of this Court in Manoharakumari v. Anitha and Anr., 2010 (2) L.W. 851 wherein it has been held as follows:

As per Section 20 of the Specific Relief Act discretion as to decreeing specific performance, grant of decree for specific performance of contract is not automatic and is one of the discretions of the Court and the Court has to consider whether it would be fair, just and equitable. But the discretion of the Court is not arbitrary. But the one of the sound and reasonable and discretion guided by Principles of Justice, equity and good conscience. In Section 20(2) of the Act, certain circumstances have been mentioned as to under what circumstances, the Court shall exercise such discretion. If under the term 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. In exercising discretion, court is obliged to take into consideration circumstances of the case, conduct of the parties and respective interests under the contracts.

48. The mother of defendants 2 and 3, who were then minors, had entered into Ex.A1-agreement of sale in entirety of the property. Now mother has passed away and the defendants No. 2 and 3 cannot be compelled to execute the agreement of sale at this distant point of time. Having regard to the facts and circumstances of the case and that now the value of the property in Coimbatore had gone up, the decree for specific performance would cause undue hardship the defendants 2 and 3. On the other hand, by declining the relief of specific performance, no serious prejudice to the plaintiff would be caused. The interest of justice would be sub-served by directing the defendants 2 and 3 to repay the amount of Rs. 3,20,000/-.

15. That was a case where the mother of the defendants 2 and 3, who were then minors, entered into an agreement for sale in respect of the share of those minors also. After the mother passed away, specific performance of the agreement for sale was insisted as against the minor defendants 2 and 3. That was a case where the mother being the natural guardian, in the absence of the father, had not obtained due sanction from the competent Court to alienate the shares of the minors. Under such circumstances, the hardship that would be faced by the minor defendants 2 and 3 was taken into consideration to decline the discretionary relief for specific performance sought for by the plaintiff.

16. In the instant case, no share of the minor was agreed to be alienated under the agreement for sale-Ex.A1 by the defendants 1 and 2. The properties absolutely belonged to the first and second defendants were agreed to be sold by the defendants 1 and 2 to the plaintiff. Within a short while the plaintiff having sensed the delay caused by the defendants 1 and 2 issued pre-suit notice and laid the suit for specific performance of the agreement for sale. The second defendant has projected a concocted antedated document to knock away the rights of the plaintiff flowed under the agreement for sale-Ex.A1. Under such circumstances, the Courts below found that the discretion cannot be exercised in favour of the defendants 1 and 2. The Trial Court has rightly held that the plaintiff is entitled to the relief of specific performance of the agreement for sale. No substantial question of law has arisen for determination in this second appeal. The second appeal therefore fails and it stands dismissed. However, there is no order as to costs.