

(2011) 09 MAD CK 0175

Madras High Court

Case No: S.A. No. 777 of 2011 and M.P. No. 1 of 2011

Mr. S.
Thirugnanasambandam

APPELLANT

Vs

Mr. P. Kaliyaperumal,
The Junior Engineer
and The Executive
Engineer, T.N.E.B.

RESPONDENT

Date of Decision: Sept. 9, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2
- Specific Relief Act, 1963 - Section 16

Citation: (2012) 1 CTC 46

Hon'ble Judges: R.S. Ramanathan, J

Bench: Single Bench

Advocate: N. Suresh, for the Appellant; V. Viswanathan, for Respondents 2 and 3, for the Respondent

Final Decision: Allowed

Judgement

R.S. Ramanathan, J.

The unsuccessful Defendant is the Appellant herein.

2. The first Respondent/plaintiff filed the suit for specific performance of an agreement of sale, alleged to have been executed by the appellant/defendant on 19.9.1992.

3. The case of the first Respondent/plaintiff was that the appellant/defendant entered into an agreement of sale on 19.9.1992 agreeing to sell the suit property for a sum of Rs. 2,00,000/- and also received a sum of Rs. 1,90,000/- from the first Respondent/plaintiff and both the parties agreed that the agreement can be enforced within 10 years" time and possession was also handed over to the first Respondent/plaintiff on the date of

agreement. The further case of the first Respondent/plaintiff was that, though he was ready to pay the balance sale consideration and complete the transaction, the Appellant/defendant dragged on the issue. As the first respondent/plaintiff was put in possession of the property, he also put up a construction in the building and spent more than a lakh rupee in improving the suit property. In the year 2002, when the first Respondent/plaintiff came to know that the Appellant/defendant was trying to make alienation, he issued notice dated 12.1.2002, calling upon the Appellant/defendant to execute the sale deed and the Appellant/defendant has sent a reply dated 9.2.2002, denying the execution of the agreement of sale and also handing over of possession of the property to the first Respondent/plaintiff. Therefore, the suit was filed for suit for specific performance of the agreement of sale dated 19.9.1992.

4. The Appellant/defendant contested the suit stating that he has neither executed the agreement of sale, as alleged by the first respondent/plaintiff and received a sum of Rs. 1,90,000/-, nor possession was delivered to the first Respondent/plaintiff under the agreement of sale and the first Respondent/plaintiff, after trespassing into the property, filed the suit in O.S. No. 372 of 2002, on the file of the Additional District Munsif, Cuddaore, for the relief of injunction and in that suit itself, the appellant/defendant has filed a written statement, denying the signature in the agreement of sale and also took steps to compare the signature found in the agreement of sale with that of his admitted signature and a Handwriting Expert was also appointed to compare the signature and he has given opinion that the signature found in the agreement of sale was not that of the appellant/defendant. Thereafter, the suit in O.S. No. 372 of 2002, was withdrawn by the first Respondent and the present suit was filed for specific performance and the conduct of the first Respondent/plaintiff will not entitle him to get the relief of specific performance, as the agreement was not executed by the Appellant/defendant and the first Respondent/plaintiff was also not ready and willing to perform his part of the contract.

5. Both the Courts below have held that the agreement of sale was entered into by the Appellant/defendant in favour of the first respondent/plaintiff and though the Expert has given opinion that the signatures found in the agreement of sale was not that of the appellant/defendant, the Expert was not examined and without examining him, his opinion cannot be taken into consideration and as per the agreement of sale, 10 years' time was fixed and the suit was filed within three years from the date of repudiation of the contract by the appellant/defendant and therefore, the suit is also well within time and the first Respondent/plaintiff is entitled to the relief of specific performance of the agreement of sale. Hence, the Second Appeal.

6. The following substantial questions of law arise for consideration in the Second Appeal:

i) Whether the Courts below were right in holding that the first respondent was ready and willing to perform his part of the contract?

ii)Whether the first Respondent was entitled to the discretionary relief of specific performance?

iii)Whether the Appellant/defendant is entitled to the recovery of possession of the suit property?

7. Mr. N. Suresh, the Learned Counsel for the Appellant submitted that both the Courts below erred in decreeing the suit for specific performance, without properly appreciating the conduct of the first Respondent and the delay in filing the suit. The Learned Counsel, therefore, submitted that though under the agreement of sale, as alleged by the first Respondent, 10 years" time was fixed, as per the agreement of sale, the total consideration was for Rs. 2,00,000/- and Rs. 1,90,000/- was paid on the date of agreement and balance sum of Rs. 10,000/- has to be paid by the first Respondent and for 10 years, no attempt was made by the first Respondent to pay the balance sale consideration and that would prove that the first Respondent was not ready and willing to perform his part of the contract, though under the agreement for sale, 10 years" time was fixed.

8. The Learned Counsel for the Appellant further submitted that the first Respondent filed the suit in the year 2002, only for injunction, though earlier to the filing of the suit, the Appellant/defendant had denied the execution of the agreement of sale. Instead of filing the suit for specific performance, the first Respondent filed the suit for injunction and in that suit also, the Appellant/defendant denied the execution of the agreement of sale and also took steps to compare the signature found in the agreement of sale with that of his admitted signature and the Handwriting Expert also given opinion that the signatures found in the agreement of sale was not that of the appellant/defendant and thereafter, the suit was with drawn by the first respondent and three years later, he filed the present suit for specific performance. Hence, the suit is clearly barred by limitation.

9. The Learned Counsel for the Appellant also submitted that as per Section 16(c) of the Specific Relief Act (hereinafter referred to as "the Act"), a purchaser must prove his readiness and willingness from the date of agreement till the date of sale and in this case, even after denying the agreement of sale by the Appellant/defendant, no steps were taken by the first Respondent to file the suit for specific performance, rather, he only filed the suit for injunction initially, and later, the same was with drawn and the present suit for specific performance was filed.

10. The Learned Counsel for the Appellant, therefore, contended that the present suit is barred under Order 2, Rule 2 of Code of Civil Procedure, as the first respondent is not entitled to the discretionary relief of specific performance. The Learned Counsel also relied upon the judgments reported in (2000) 3 M.L.J. 106 in the case of [Indravanthi v. Kamala] and (2007) 5 M.L.J. 222 in the case of [Vallitha and Ors. v. Arulraj] in support of his contention.

11. Though the first Respondent was served and his name is printed in the cause list, there is no appearance on his behalf and the first Respondent is set ex parte. The Respondents 2 and 3, are represented by Mr. Viswanathan, the learned Standing Counsel for Tamil Nadu Electricity Board and he submitted that they are only formal parties and they have nothing to do with the merits of the case.

12. According to me, it is very strange that both the Courts below have decreed the suit for specific performance, without properly appreciating the meaning of readiness and willingness as stated in Section 16(c) of the Act. Further, under the Act, even though the Plaintiff is entitled to the decree, the Court is not bound to exercise the discretionary relief, when the conduct of the Plaintiff does not warrant exercise of such power in his favour.

13. According to the first Respondent, the agreement of sale was dated 19.9.1992, and under the said agreement, he paid Rs. 1,90,000/- towards total consideration for Rs. 2,00,000/- and he has to pay balance sum of Rs. 10,000/-. It was further stated in the agreement of sale that 10 years" time was fixed for completing the transaction. It was not explained by the first Respondent, as to why 10 years" time was fixed for paying the balance sale consideration of Rs. 10,000/-.

14. Further, according to the first Respondent, he was put in possession of the suit property and that was also stated in the agreement of sale and therefore, it can be seen from the circumstances that taking advantage of the possession of the property by the first Respondent, he did not evince any interest in getting the document executed, even assuming that the agreement of sale was a genuine one.

15. In this case, a notice was issued on 12.1.2002, by the first respondent, calling upon the Appellant/defendant to execute the sale deed to which, the Appellant/defendant sent a reply dated 9.2.2002, refuting the execution of the agreement of sale. Thereafter, the first Respondent filed the suit in O.S. No. 372 of 2002, for the relief of injunction and he did not choose to file the suit for specific performance. In that suit also, the appellant/defendant filed the written statement, denying the execution of the sale deed and also prayed for comparing his signature found in the agreement of sale with that of his admitted signature and Expert was also appointed and he also submitted a report stating that the signatures found in the agreement of sale was not similar to that of the admitted signatures of the Appellant/defendant. Thereafter, the first Respondent/plaintiff withdrew the suit and filed the present suit for specific performance. No explanation was submitted by the first Respondent in the present suit as to why the suit for specific performance was not filed immediately, on receipt of reply notice sent by the Appellant/defendant.

16. Therefore, considering the fact that the present suit was filed on 29.12.2004, nearly three years, after the issuance of reply notice by the appellant/defendant and no explanation was forthcoming from the first respondent/plaintiff for not filing the suit

immediately on receipt of reply notice sent by the Appellant/defendant, denying the execution of the sale deed, in my opinion, the conduct on the part of the first Respondent would amply prove that he was not ready and willing to perform his part of the contract, even assuming that the Appellant/defendant had executed the agreement of sale.

17. Further, the Courts below have erred in holding that the agreement of sale was executed by the Appellant/defendant, without taking into consideration, the report submitted by the Expert, holding that the report of the Expert cannot be considered, without examining him. No doubt, the report submitted by the Expert cannot be considered without examining him in Court. However, having regard to the peculiar facts and circumstances of the case that the suit was filed for injunction by the first respondent on an earlier occasion and in that suit, the agreement of sale was denied and the Appellant/defendant had taken steps to compare the signature by an Expert and after realizing that the Expert had given opinion against him, the first Respondent had withdrawn the suit, the Courts below ought to have taken this circumstances against the first Respondent and ought not to have exercised its discretion in favour of the first Respondent/plaintiff.

18. As rightly submitted by the Learned Counsel for the appellant/defendant, in a suit for specific performance, eventhough, the plaintiff is entitled to a decree, on the basis of the agreement of sale, the Court is not bound to grant the discretionary relief in favour of the Plaintiff, if the conduct of the Plaintiff is otherwise.

19. According to me, this is a special case, where the Plaintiff does not deserve any discretionary relief at all from the Court to be exercised in his favour. Moreover, in the judgment reported in (2007) 5 M.L.J. 222 (cited supra) this Court has elaborately discussed the law relating to readiness and willingness and held that having regard to the similar circumstances, the agreement of sale cannot be enforced in favour of the first Respondent/plaintiff.

20. Further, in the judgment reported in (2000) 3 M.L.J. 106(cited supra) this Court has held that when there is a long delay in filing the suit for specific performance, after the receipt of reply notice, the Plaintiff is not entitled to the relief of specific performance. Therefore, in my opinion, both the Courts below have miserably erred in holding that the first Respondent is entitled to the discretionary relief of specific performance, merely on the ground, that the suit was filed in time, without properly appreciating the readiness and willingness and the conduct of the first Respondent/plaintiff.

21. Hence, the substantial questions of law are answered in favour of the Appellant/defendant and I hold that the first Respondent was not ready and willing to perform his part of the contract and therefore, he is not entitled to the discretionary relief of specific performance.

22. The Appellant/defendant also filed a counter claim for recovery of possession, holding that possession was not handed over to the first respondent under the alleged agreement of sale and possession was taken over by force by the first Respondent in the year 2000 and therefore, the first respondent is liable to deliver possession to the Appellant/defendant.

23. Once, the first Respondent is not entitled to the relief of specific performance, even assuming that he was put into possession under the agreement, he is liable to return possession to the Appellant/defendant. In this case, it has not been proved by the first Respondent that agreement of sale was executed by the Appellant/defendant, when the same was specifically denied by the Appellant/defendant and therefore, when the first respondent is not entitled to the relief of specific performance, he is bound to deliver possession to the Appellant/defendant. Hence, the counter claim made by the Appellant/defendant is also allowed and I hold that the appellant/defendant is entitled to the recovery of vacant possession of the suit property from the first Respondent/plaintiff.

24. In the result, the Second Appeal is allowed and the judgment and decree of Courts below are set aside. In the circumstances of the case, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.