(2010) 04 MAD CK 0351

Madras High Court

Case No: SA. No. 1410 of 2003 and CMP. No. 205 of 2010

Balamurugan		APPELLANT
	Vs	
Arumugam and Others		RESPONDENT

Date of Decision: April 23, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100(5)
- Specific Relief Act, 1963 - Section 20

Citation: (2011) 3 MLJ 25

Hon'ble Judges: Aruna Jagadeesan, J

Bench: Single Bench

Advocate: V. Lakshminarayanan, for Sarfudeen Ali Ahmed, for the Appellant; A. Seshan and Bhavani Subburayan, SGP, for the Respondent

Final Decision: Allowed

Judgement

Aruna Jagadeesan, J.
The 3rd Defendant is the Appellant herein. For the sake of convenience, the parties are hither to descried as they were referred to in the suit.

2. The brief facts are as follows:

The Plaintiff is the paternal uncle of the 1st Defendant and brother in law of the 2nd Defendant. The Plaintiff filed the suit for specific performance of the agreement of sale dated 22.9.1997 and the sale price fixed was Rs. 20,100/-. An advance amount of Rs. 2,000/- was said to have been paid on the date of agreement and the balance of sale price of Rs. 18,100/- was agreed to be paid on or before 22.12.1997. According to the Plaintiff, he was ready and willing to perform his part of the contract, but the Defendants 1 and 2 were evading to perform their part of the contract. In the mean while, the Plaintiff had come to know that the Defendants 1 and 2 colluding with the 3rd Defendant created a spurious document of sale in favour of the 3rd Defendant to cheat and defraud the Plaintiff and presented the same for Registration, which

had been kept pending by the 4th Defendant/the Sub-Registrar, Peranamallur, Thiruvannamalai District. Hence, the suit has been filed.

3. The 3rd Defendant in his defence contended that the Defendants 1 and 2 never executed any agreement of sale in favour of the Plaintiff and never agreed to sell the suit property nor received any advance amount from him. In fact, the Defendants 1 and 2 agreed to sell the suit property in favour of the 3rd Defendant on 1.9.1997 and executed a written agreement on the said date and in pursuance to the said agreement, the 3rd Defendant got the sale deeds from the Defendants 1 and 2 on 20.10.1997 and he is in possession and enjoyment of the suit property. The Plaintiff being the neighbour of the 3rd Defendant made all attempts to purchase the property from the Defendants 1 and 2, but it did not fructify. The Plaintiff having failed in his attempt created and concocted the sale agreement and has filed the suit with a view to grab the suit property. According to him, the suit itself became infructuous as the suit property had been conveyed in favour of the 3rd Defendant even before filing of the suit. There is nothing to be specifically enforced and as such, the suit for specific performance is not at all maintainable.

4. The Defendants 1 and 2 filed a memo to the effect that they were adopting the Written Statement filed by the 3rd Defendant.

5. The 4th Defendant/Sub Registrar submitted that the Defendants 1 and 2 executed the sale deed in respect of the suit property in favour of the 3rd Defendant even prior to the suit and the said documents were registered in accordance with law and after complying with the formalities as required in the Registration Act, 1908. The 4th Defendant further submitted that he is not the necessary party.

6. On the pleadings of both the parties, necessary issues were framed by the Trial Court. Before the Trial Court, the Plaintiff had marked Exhibit A-1 and examined himself as P.W. 1 and one T. Rajendran and Ganesa Pillai as P.W. 2 and P.W. 3. The Defendants had marked Exhibits B-1 to B3 and examined the 3rd Defendant as D.W. 1 and one Muthalappan as D.W. 2.

7. The Trial Court, after considering both the oral and documentary evidence, decreed the suit with costs insofar as the Defendants 1 to 3 are concerned and dismissed the suit as against the 4th Defendant and the appeal filed by the 3rd Defendant as against the judgment and Decree of the Trial Court was dismissed by the lower Appellate Court, confirming the judgment and Decree of the Trial Court. Hence, aggrieved against the concurrent findings of the Courts below, the unsuccessful 3rd Defendant has filed this Second Appeal.

8. This Court, while admitting this second appeal, had formulated the following substantial questions of law:

1. Whether the decree and judgment of the lower Appellate Court is liable to be quashed on the ground that failure on the part of the appellate Court to frame

points for determination and state the reasons for the decision, as per the mandatory provisions of Order 41, Rule 31 of Code of Civil Procedure?

2. Whether the decision of the lower Appellate Court is liable to be quashed as per the decision of the Division Bench judgment of our Hon''ble High Court as 1997 1 CTC 559-failure to frame the points for determination?

9. This Court heard the submissions of the learned Counsel on either side and also perused the material records placed.

10. In the course of arguments, the Appellant has filed a petition in CMP. No. 205 of 2010 to permit the Appellant to raise the additional grounds and also for formulating additional substantial questions of law as below:

(1) Whether the Courts below are correct in decreeing a suit for specific performance when the Plaintiff had failed to prove his readiness and willingness?

(2) Whether the Courts below are right in decreeing the suit against the Appellant herein when the Appellant is an agreement holder prior to the Plaintiff?

(3) Have not the Courts below erred in decreeing the suit without considering the fundamental principle that a suit need not be decreed merely because the agreement is found to be valid?

11. Mr. Lakshmi Narayanan, the learned Counsel for the Appellant strenuously contended that the Courts below have fell in error in decreeing the suit for specific performance, when the Plaintiff had failed to prove his readiness and willingness to perform his part of the contract. The learned Counsel would submit that in order to satisfy the requirement of Section 16(c) of the Specific Relief Act 1964 (herein after referred to as the Act), the Plaintiff not only requires to plead that he is ready and willing to perform his part of the contract, but also to prove that aspect. As in this case no proof was adduced, it was the duty of the Courts below to see as to whether the person who seeks to enforce the contract satisfied the mandatory provision of Section 16 of the Act. The learned Counsel for the Appellant contended that though interference of the High Court in exercise of jurisdiction u/s 100 of CPC is confined to hearing on the substantial questions of law formulated, but it is apparent on going through the judgment of the Courts below that they have not adverted to the mandatory provisions of Section 16(c) of the Act, inasmuch as no finding is recorded by both the Courts below on the question of readiness and willingness to perform the contract on the side of the Plaintiff. He would contend that in the absence of such finding, which is statutorily provided u/s 16(1)(c) of the Act, the same is purely on the question of law and it can be raised in this Second Appeal and be decided on the materials available on record.

12. On the other hand, Mr. A. Seshan, the learned Counsel for the 1st Respondent would submit that the averments as required u/s 16(l)(c) have been satisfactorily averred in the plaint and when the vendor, the Defendants 1 and 2 having failed to

raise this point by filing a separate Written Statement, the same is not available to the purchaser, the 3rd Defendant herein. The learned Counsel placed reliance on the decision of this Court rendered in the case of P. Lakshmi Ammal Vs. S. Lakshmi Ammal and others, in support of his contention that when the said plea averred by the Plaintiff has neither been specifically denied nor deposed by the purchaser/the 3rd Defendant, the said contention that the above said readiness and willingness has not been proved cannot be accepted.

13. The learned Counsel for the Respondent also drew the attention Of this Court to the observation made by the Honourable Supreme Court in the case of Abdul Raheem Vs. The Karnataka Electricity Board and Others, that the question as to whether the Plaintiff was ready and willing to perform his part of the contract by itself may not give rise to a substantial question of law and should admittedly be formulated relying on the basis of finding of fact arrived at by the Trial Court and the first appellate Court.

14. In the above said decision in a suit for specific performance of contract, the Trial Court dismissed the suit on the premise that the Plaintiff did not perform his part of the contract and the appeal also stood dismissed affirming the said finding. In the second appeal, the High Court reversed the finding. It was contended before the Honourable Supreme Court that having regard to the factual findings arrived at by the first appellate Court regarding readiness and willingness of the Plaintiff, the High Court should not have interfered therewith in exercise of its power u/s 100 of Code of Civil Procedure. In the said context, the Honourable Supreme Court made the above said observation. However, in the same decision, the Honourable Supreme Court has emphasized that consideration of irrelevant fact and non consideration of relevant fact would give rise to a substantial question of law.

15. In the instant case, admittedly the Courts below have not considered and discussed about the relevant and material fact regarding the readiness and willingness of the Plaintiff and the statutory requirement u/s 16(1)(c) of the Specific Relief Act.

16. In the case of Rajeshwari Vs. Puran Indoria, , the Honourable Supreme Court has held that though an order in exercise of discretion may not involve a substantial question of law, the question whether a Court could in law, exercise a discretion at all for decreeing specific performance could be a question of law that substantially affects the rights of parties in that suit. The Honourable Supreme Court has held as below at p. 161 of MLJ:

4. ...Normally, a suit for specific performance of an agreement for sale of immovable property involves the following questions: (1) whether the Plaintiff was ready and willing to perform his part of the contract in terms of Section 16 of the Specific Relief Act, 1963, (2) whether it was a case for exercise of discretion by the Court to decree specific performance in terms of Section 20 of the Specific Relief Act and (3) whether

there were laches on the part of the Plaintiff in approaching the Court to enforce specific performance of the contract. In some cases, a question of limitation may also arise in some cases. No doubt, a finding on the three primary aspects indicated above would depend upon the appreciation of the pleadings and the evidence in the case in the light of the surrounding circumstances. These questions, by and large, may not be questions of law of general importance. But, they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the question of limitation is involved). Though an order in exercise of discretion may not involve a substantial question of law the question whether a Court could in law exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the rights of parties in that suit....

17. As regards the contention of the learned Counsel for the 1st Respondent that the said plea is available only to the vendor and not to the subsequent purchaser, the same cannot be sustained, as the position of law is well settled by the Honourable Supreme Court in the case of Ram Awadh (Dead) by Lrs. and Others Vs. Achhaibar Dubey and Another, . The decision of the Honourable Supreme Court on this aspect in the case of Jugraj Singh v. Labh Singh AIR 1995 SC 945 was held to be erroneous and it is held thus in paragraph 6 of the said judgment:

6. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a Plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a Plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one Defendant and not to another. It is open to any Defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh v. Labh Singh (supra) is erroneous.

18. Therefore, the well settled principle of law is that not only the original vendor, but also a subsequent purchaser would be entitled to raise a contention that the Plaintiff was not ready and willing to perform his part of the contract. The said principle of law is reemphasized in the recent pronouncement of the Honourable Supreme Court in Azhar Sultana Vs. B. Rajamani and Others, .

19. A pertinent argument was advanced by the learned Counsel for the 1st Respondent that despite the averment made by the Plaintiff in the plaint expressing his readiness and willingness, there was no denial by the Defendants, more particularly by the Defendants 1 and 2 and therefore, there was no occasion for him to lead any evidence to prove his readiness and willingness.

20. In a suit for specific performance, it is for the Plaintiff to plead and prove his readiness and willingness to perform his part of the contract. That being a mandatory requirement, the Court before passing judgment against the Defendant has to scrutinise the facts set out in the plaint to find out whether the said requirements, specially those indicated in Section 16(1)(c) of the Act have been complied with or not.

21. The Honourable Supreme Court in the case of Balraj Taneja and Another Vs. Sunil Madan and Another, has held that even though Written Statement had not been filed by the Defendant, the fact that he was ready and willing to perform his part of the contract has to be proved by the Plaintiff and the Court decreeing the suit merely on the grounds of failure of Defendants in filing the Written Statement is illegal.

22. In the case of Prabhakaran v. Bhavani and Ors. (1974) KLT 115, the learned Single Judge of the Kerala High Court has held that it is not possible to hold that a pleading in the plaint to the effect that the Plaintiff is always ready and willing to perform his part of the contract is an empty formality, more so when the legislature has chosen to make a positive provision in the statute to the effect that such an averment is necessary for granting a decree for specific performance. That apart, a subsequent purchaser in a suit for specific performance can only contend whether he is a bona fide purchaser for value and he cannot be expected to canvass the facts relating to the transaction which emerged between the parties to the agreement of sale.

23. The word "aver" and the word "prove" are entirely two different things. The word "aver" means that it should be asserted or mentioned. Section 16(c) indicates that the said averment which is pleaded in the plaint must be proved by leading evidence in the course of trial. The question of proof would arise only if an averment is made in the plaint. In the plaint there is no question of proof at all. Therefore, a reading of Section 16 makes it absolutely clear that it is quite imperative for the Plaintiff to aver in the plaint that he has performed or has always been ready and willing to perform the essential terms of the contract; it is not simply sufficient to mention in the plaint the various circumstances showing the readiness and willingness of the Plaintiffs to perform their part of the contract. But, they must go further and allege in the plaint that they were and are ever willing and ready to perform their part of the contract. The expression "readiness and willingness" cannot be treated as a straitjacket formula and has to be determined from the totality of facts and circumstances relevant to the case and also to the conduct of the party concerned and in order to be real has to be backed by the capacity to do so.

24. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the Court, which discretion requires to be exercised according to the settled principles of law and not arbitrarily, as adumbrated u/s 20 of the Act. u/s 20 of the Act, the Court is not bound to grant the relief just because there as a

valid agreement of sale. Section 16(1)(c) of the Act envisages that the Plaintiff must plead and prove that he had performed or has always been ready and willing to perform. Therefore, the continuous readiness and willingness on the part of the Plaintiff is a condition precedent to grant the relief of specific performance.

25. To adjudicate whether the Plaintiff is ready and willing to perform the part of the contract, the Court must take into consideration the conduct of the Plaintiff prior and subsequent to the filing of the suit along with attending circumstances. It could be inferred from the facts and circumstances and from the evidence adduced.

26. On a scrutiny of the judgments of the Courts below, it is apparent that they have not dealt with this material aspect regarding the readiness and willingness of the Plaintiff to perform his part of the contract. Admittedly, no relevant issue on this question has been raised and examined by the Courts below.

27. Coming to the facts of the case, the agreement of sale in favour of the 3rd Defendant is the earliest one executed on 1.9.1997, whereas the agreement of sale projected by the Plaintiff is dated 22.9.1997. Admittedly, the sale deeds in favour of the Defendants 1 and 2 have been executed on 20.10.1997. According to the Plaintiff, only the Defendants 1 and 2 were the executants of the sale agreement, but Exhibit A-1 is signed by three persons and there is no explanation from the Plaintiff as to who is the other person who had signed the agreement apart from the Defendants 1 and 2. P.W. 2 one of the attestors to the document has admitted that three persons have signed the agreement of sale and he does not know the other person except the 1st Defendant. The evidence of P.W. 1 to P.W. 3 would only suggest that Exhibit A-1 agreement could not have been executed in the manner as pleaded by the Plaintiff. The defence of the 3rd Defendant is that he had no notice of the agreement of sale alleged by the Plaintiff. Admittedly, the Defendants 1 and 2 are closely related to the Plaintiff and in such circumstances, the possible inference that could be drawn is that the agreement of sale Exhibit A-1 could have come into existence in order to deprive the rights of the purchaser to the suit property.

28. P.W. 1 the Plaintiff during his cross examination stated that he came to know about the sale deed in favour of the 3rd Defendant only at the time when it was registered. In spite of it, he has not tried to contact the Defendants 1 and 2 and clarify as to how they have executed the sale in favour of the 3rd Defendant, when an agreement of sale is executed in his favour. Being closely related, it is unbelievable that he has not made such an enquiry since they were out of stations. It is clearly admitted by the Plaintiff that he has not taken any steps to get the sale executed from the Defendants 1 and 2 either by approaching them or by sending notice to them asking them to execute the sale in their favour. As already noticed, there is no iota of explanation coming from the side of the Plaintiff as to why he kept quiet without taking any steps or without making known his readiness and willingness to the other party. Mere averment in the plaint that he was ready and willing is not sufficient. Such an averment should be supported by satisfactory

evidence. That is utterly lacking in this case. It is also significant to point out to the admission made by the Plaintiffs that in spite of the direction by the Court, he has not deposited the balance sale consideration into the Court. It is relevant to extract the said portion of evidence which is given as under:

Vernacular (Tamil) matter omitted

29. The conduct of the Plaintiff both prior and subsequent to the filing of the suit would clearly show his reluctance and unwillingness to perform his part of the contract. The reference to the validity of the sale deeds executed by the Defendants 1 and 2 in favour of the 3rd Defendant are immaterial. The conduct of the Defendants is not sine qua non for granting the relief to the Plaintiff. The Plaintiff has to independently establish his readiness and willingness and without the said important elements being established by the Plaintiff, the Courts below have erred in casting in of deficiencies or alleged illegalities committed by the Defendants assuming that the the sale deeds are executed for lesser value than one quoted in the sale agreement in favour of the 3rd Defendant. It is to be noted here that the 4th Defendant has categorically stated that the sale deeds were registered in accordance with law and after complying with the formalities as required in the Registration Act.

30. The contention of the learned Counsel for the Appellant is that the Courts below had not gone into nor recorded a finding in accordance with law on the question of readiness and willingness of the Plaintiff to perform his part of the contract and in the absence of any such finding, the decree passed in favour of the Plaintiff for specific performance cannot be sustained. There is considerable force in the submission made by the learned Counsel for the Appellant. It is relevant to point out that readiness and willingness cannot be treated as a straitjacket formula and it has to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the Plaintiff. The Courts below have not focussed its attention towards this relevant factor and failed to deal with the question.

31. It has been consistently held by this Court that the first appellate Court should raise points for determination and state reasons for decreeing the suit. The provision of Order 41 Rule 31 of CPC is mandatory and failure to follow mandatory provisions would render judgment defective. The Division Bench of this Court has reiterated the said view in the case of K.M.M. Kadar Hussain Vs. O.M.R. Selvaraj and Others, .

32. In this case, the lower Appellate Court did not consider whether the mandatory requirements of Section 16(c) of the Act has been complied with, which was necessary to determine and grant a decree in favour of the Plaintiff. Merely, the first appellate Court expressed its agreement with the finding of the Trial Court on other aspects. The first appellate Court, which is a final Court of facts, must independently weigh the evidence of parties and must to do so with a clear consciousness of the

relevant points which arise for adjudication and bearing of the evidence on those points. But, in the present case, the first appellate Court did not consider the substantive issue and hence, the findings given by it is not in conformity with Order 41, Rule 31 of Code of Civil Procedure. Accordingly, the substantial questions of law (1) and (2) are answered in favour of the Appellant.

33. A difficulty has arisen during the course of arguments that a substantial question of law whether the Courts below erred in granting a decree for specific performance without giving a finding as to whether the Plaintiff has established his readiness and willingness having not been specifically formulated by this Court, whether this Court can give findings on that issue or not. It may be mentioned here that the substantial questions of law which were framed by this Court at the time of admission certainly does not cover the issue just mentioned above.

34. According to Sub-section (4) of Section 100 of Code of Civil Procedure, where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question and in this case, two such substantial questions of law had been framed which does not cover the substantial issue in real sense, but the proviso to Sub-section (5) of Section 100 of CPC further provides that nothing in this Sub-section shall be deemed to take away or abridge the power of the Court to hear, for the reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

35. The Honourable Supreme Court in the case of Ushabai and Others Vs. Balkrishna Biharilal and Others, has held that it is open to this Court to frame some more substantial question of law if it considers that it is warranted on the facts and circumstances of the case.

36. In the case of Mousa v. Moideen (2001) 1 CLT 426, the Kerala High Court, after considering the scope of Section 100 of CPC came to the conclusion that in terms of Section 100 of Code of Civil Procedure, the High Court can also raise any other substantial question of law that may arise in the light of arguments advanced before it. Thus, it is clear that the High Court can frame additional substantial question of law subject to two limitations. The first one is that the question to be framed must be a substantial question of law. The second limitation is that it can be formulated provided that the opposite party should be put on notice thereon and should be given a fair or proper opportunity to meet out the point.

37. In the present case, the arguments have been addressed by both the learned Counsel on that point and the Appellant also has sought for permission by filing an application in CMP. No. 205 of 2010 for framing of additional substantial questions of law on this substantial issue. It is pertinent to point that the Courts below have failed to advert to this issue though there was an averment in the plaint as to the readiness and willingness of the Plaintiff to perform his part of the contract and there was evidence available to decide this issue.

38. In the present case, the learned Counsel for the Plaintiff from the very beginning was arguing on this point and attention was also drawn to the additional grounds and additional substantial questions of law set out in the application filed under Order 41 Rule 2 of Code of Civil Procedure. Therefore, it can easily be said that the learned Counsel for the 1st Respondent has notice of this question.

39. The question whether the Plaintiff has proved his readiness and willingness, in my considered opinion, in the facts and circumstances discussed above is nothing but a pure substantial question of law and therefore, the same is now framed as substantial question of law No. (3) in the following manner keeping in mind the parameters at this stage.

(3) Whether the Courts below are correct in decreeing the suit for specific performance when the Plaintiff had failed to prove his readiness and willingness?

40. Insofar as the decision of the above substantial question of law (3) is concerned, it has been discussed earlier and this Court has come to the conclusion that the Plaintiff has failed to prove his readiness and willingness and the Court below should not have granted a decree for specific performance on such facts and circumstances. As a consequence, the judgment and Decree of the lower Appellate Court confirming the judgment and decree of the Trial Court is liable to be set aside and accordingly, it is set aside.

41. In the result, this Second Appeal succeeds and stands allowed and the connected MP is disposed of. No costs.