

(2014) 11 MAD CK 0462

Madras High Court

Case No: Second Appeal No. 612 of 2008 and M.P. No. 1 of 2012

Sundarakanthi

APPELLANT

Vs

B.N. Govindaraj

RESPONDENT

Date of Decision: Nov. 7, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 100
- Evidence Act, 1872 - Section 102, 103
- Specific Relief Act, 1963 - Section 21, 21(5), 22, 28

Hon'ble Judges: S. Tamilvanan, J**Bench:** Single Bench

Judgement

S. Tamilvanan, J.

The second appeal has been preferred under Section 100 of the Code of Civil Procedure against the Judgment and Decree, dated 19.12.2007 passed in A.S.No. 16 of 2007 on the file of the District Court, Uthagamandalam, confirming the judgment and decree, dated 31.01.2005 passed in the suit in O.S.No. 233 of 2003 on the file of the Subordinate Judge, Uthagamandalam.

2. It is seen that the suit was filed by the respondent / plaintiff against the appellant / defendant, seeking specific performance of an agreement, dated 16.05.2001, directing the appellant / defendant to execute registered sale deed in favour of the respondent / plaintiff and if the appellant failed to execute sale deed, the trial court to execute the sale deed through an officer of the court, at the cost of the respondent / plaintiff.

3. It is not in dispute that after the trial, the trial court, granted a decree, directing the appellant to pay a sum of Rs.4,50,000/- together with 12% interest from 16.05.2001 till the date of decree and 6% subsequent interest till the date of realisation to the respondent herein with cost. Aggrieved by which, the defendant preferred appeal in A.S.No. 16 of 2007 before the District Court, Uthagamandalam,

and by Judgment and Decree, dated 19.12.2007, confirming the judgment and decree passed by the trial court, the appeal preferred by the appellant herein was dismissed with costs by the first appellate court. Aggrieved by which, this second appeal has been preferred by the appellant / defendant.

4. The second appeal was admitted by this Court on the following substantial questions of law :

1. Is not the Judgment and Decree of the courts below vitiated by its failure to apply the provision of Section 22 of the Specific Relief Act, 1963 to the instant case ?

2. Are the Courts below justified in granting a decree for refund of money, especially, when the only relief of specific performance is rejected ?

5. Substantial Question of Law No. 1 :

The suit was filed by the respondent herein as plaintiff, seeking specific performance of agreement of sale, dated 16.05.2002, seeking Judgment and Decree, directing the appellant / defendant to execute registered sale deed in favour of the plaintiff or his nominee(s) at the cost of the respondent / plaintiff and if the appellant / defendant failed to execute sale deed in respect of the suit property, the trial court to execute the sale deed on behalf of the appellant / defendant, by an officer of the Court and also for costs. Another prayer relating to the suit is to grant such further or other relief as the Court below may deem fit to grant in the circumstances of the case.

6. The trial court, by its Judgment and Decree, dated 31.01.2005, directed the appellant / defendant, to return the advance amount, that was paid as part of sale consideration received from the respondent / plaintiff with interest and costs, however, dismissed the suit, in respect of the main prayer, seeking specific performance of the agreement is concerned. Aggrieved by which, appeal was preferred by the appellant / defendant herein in A.S.No. 16 of 2007. Confirming the Judgment and Decree passed by the trial Court, the appeal was dismissed by the first appellate court, by its Judgment, dated 19.12.2007, on merits, against which, this Second Appeal has been preferred.

7. In the instant case, it is seen that there is a concurrent finding by the Courts below, whereby it has been held that the respondent / plaintiff had entered into an agreement for sale of the suit schedule property under Ex.A.1, dated 16.05.2001. Sale consideration fixed under the agreement was Rs.4,95,000/-, out of which, an advance and part payment of sale consideration of Rs.4,50,000/- was received by the appellant / defendant from the respondent / plaintiff, which is not in dispute. As per Ex.A.1, sale agreement, the appellant / defendant, after receiving the balance of sale consideration, Rs.45,000/-, within two years from the date of the sale agreement, has to execute registered sale deed at the cost of the respondent / plaintiff.

8. As found by the Courts below, the appellant / defendant, who was a Teacher working in a school had not disputed the execution of Ex.A.1, sale agreement and it was also established that a sum of Rs.4,50,000/- was received by the appellant / defendant from the respondent / plaintiff towards part of sale consideration. The defence raised by the appellant / defendant is that the said amount was received only as a loan and for which, she executed, Ex.A.1 agreement was executed only as a security and not with an intention of executing sale deed. The further defence raised by the appellant / defendant is that the appellant repaid the amount and accordingly, discharged the debt. As per Sections 102 and 103 of the Indian Evidence Act, the burden is upon the appellant / defendant to establish that the amount admittedly received by the appellant / defendant was repaid by her. However, there is no supporting document on the side of the appellant / defendant for discharging the loan. The appellant as defendant had produced and marked documents, Ex.B.7 to Ex.B.9, stating the same as receipts for repayment of the amount. It is seen that the document filed on the side of the appellant / defendant, as Ex.B.7, dated 18.07.2002 is said to be a receipt given by one Priya for receiving a sum of Rs.50,000/- from the appellant, Sundarakanthi and a similar alleged receipt issued by one Kavitha for receipt of Rs.20,000/- and another receipt by one B.N.Govindaraj for receiving Rs.3 lakhs were marked as documents on the side of the appellant / defendant. Admittedly, the aforesaid Priya, Kavitha and Govindaraj are not parties to the suit or appeal and there is no pleadings, on the side of the appellant / defendant, to show that the said amounts were given by the appellant / defendant, on the instructions given by the respondent / plaintiff towards discharging the loan obtained by the appellant / defendant from the respondent / plaintiff.

9. It was argued on behalf of the respondent / plaintiff, that Ex.B.7 to Ex.B.9 are only fabricated documents created by the appellant for making a plea of discharge, contrary to law. It is well settled that without pleadings, evidence could not be adduced by any party. In the absence of specific pleadings on the side of the appellant, the appellant / defendant is not entitled to raise a plea that the amount, Rs.4,50,000/- admittedly received from the respondent was repaid by the appellant, by making payment to various persons, on the instructions of the respondent / plaintiff, merely by producing the alleged receipts, said to have been obtained from some third parties to the suit, which would show that it is an improper attempt of the appellant / defendant to substantiate the plea of discharge. As the plea of the appellant / defendant is that amount had been received by her from the respondent / plaintiff was repaid and that the loan was discharged. Hence, the burden is heavily upon the appellant / defendant, to establish that on the instructions given by the respondent / plaintiff, the same was paid by her to various persons, stated by her. However, there is no specific pleadings made in the written statement filed by the appellant to that effect and there is no proof to show that the amounts were paid only on the instructions given by the respondent / plaintiff and further, the appellant

has not established that the amount received by her was repaid by her to persons, as per the instructions given by the creditor, the respondent herein. However, there is no such pleadings and supporting evidence to establish the plea of the appellant that the alleged loan was discharged by her. The aforesaid attempt would show that the said plea of repayment of the advance amount / part of sale consideration, received by the appellant / defendant is an unreasonable and unsustainable defence raised by the appellant, in the eye of law.

10. The Courts below have concurrently held, based on the evidence both oral and documentary that the appellant / defendant had received Rs.4,50,000/- from the respondent / plaintiff and executed sale agreement, which has been the document, Ex.A.1, however, sale deed was not executed by the appellant, as per Ex.A.1 and the amount received by appellant from the respondent herein was also not repaid. It is not in dispute that the trial Court has not granted the relief for specific performance of the agreement, directing the appellant / defendant to execute the sale deed or to execute the same by an officer of the Court, as prayed for in the suit. However, the trial court, passed a decree, directing the appellant / defendant to return the advance amount / part of sale consideration, Rs.4,50,000/- together with 12% interest from 16.05.2001 till the date of decree and 6% subsequent interest from the date of decree till realisation of the amount to the plaintiff. Appeal was preferred by the appellant / defendant, challenging the judgment and decree passed by the trial court, however, no cross appeal was preferred by the respondent / plaintiff, seeking relief of specific performance, as per the agreement for sale. The first appellate Court, confirming the Judgment and Decree passed by the trial court, dismissed the appeal preferred by the appellant / defendant. On the aforesaid circumstances, the only legal question to be answered by this Court is whether the Courts below are empowered to pass a decree, directing the respondent / plaintiff, to return the advance amount, Rs.4,50,000/- with interest and costs, on the ground that specific plea has not raised for alternative relief to return the advance amount received by the appellant with costs.

11. Mr.S.K.Ragunathan, learned counsel appearing for the appellant mainly argued that the Judgment and Decree of the trial court is vitiated by Section 22 of the Specific Relief Act, 1963, since relief of specific performance of contract, sought for by the respondent / plaintiff, to execute the sale deed, as per the agreement was negated by the Courts below and there was no specific alternative prayer to repay the advance amount and part of sale consideration. In support of his contention, learned counsel relied on the decision rendered by the Hon"ble Supreme Court reported in [Shamsu Suhara Beevi Vs. G. Alex and Another](#), .

12. In [Shamsu Suhara Beevi Vs. G. Alex and Another](#), , the Hon"ble Apex Court has held that under Section 21(5) of Specific Relief Act, 1963, awarding damages, in addition to specific performance of contract is contrary to law. It is further held that, on equitable consideration, the Court cannot ignore or overlook the provisions of

the statute, since equity must yield to law. In this regard, the Hon"ble Supreme Court has observed in the decision as follows :

"11...The relief was claimed under Section 28 and not under Section 21 of the Act. The High Court came to the conclusion that Section 28 would not be applicable to the facts of the case but granted the relief under Section 21 of the Act. In our view, the High Court has clearly erred in granting the compensation under Section 21, in addition to the relief of specific performance. Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable considerations court cannot ignore or overlook the provisions of the statute. Equity must yield to law."

The Hon"ble Supreme Court has categorically held that equity must yield to law, since Court cannot ignore or overlook the provisions of any statute, while deciding the matter on equitable considerations.

13. The aforesaid decision cited by Mr.S.K.Raghunathan, learned counsel for the appellant is not applicable to the facts and circumstances of the case on hand, since as per the plaint averments, the respondent / plaintiff has made prayer (d) thus : "(d) grant such further or other relief as the Hon"ble Court may deem fit to grant in the circumstances of the case."

14. In the decision referred to by the learned counsel for the appellant, it is seen that against awarding damages, in addition to specific performance under Section 21(5) of the Specific Relief Act, the aforesaid dictum has been laid down. Here, in the instant case, it cannot be said that there is no alternative relief sought for, merely because the respondent / plaintiff has not specifically stated the alternative prayer, mentioning the amount of advance / part payment of consideration paid by him to be returned with interest.

15. Learned counsel for the appellant also drew the attention of this Court to the decision in [D.G., Employees" State Insurance Corporation and Another Vs. B. Raghava Shetty and Others,](#), wherein it was held by the Apex Court that instead of decreeing the suit for specific performance of sale agreement, justice would be met by granting alternative relief sought for in the suit viz. decree for refund of the money due with simple interest @ 12% p.a.

16. Learned counsel appearing for the appellant submitted that in the said decision, alternative relief of refund of the advance amount was ordered, since there was alternative relief sought for. In the instant case, according to him, there is no alternative relief sought for, however, the Courts below could have granted the same.

17. Mrs.R.Gowri, learned counsel appearing for the respondent / plaintiff submitted that in a suit for specific performance, plaintiff would be entitled to get alternative relief, if the sale agreement and passing of advance or part of sale consideration is

established even in the absence of any alternative relief sought for. In the decision cited above, it has been held that even in the absence of alternative relief in the plaint, the Court is empowered to grant relief for refund of the advance amount in a suit for specific performance, on the ground of equity, wherein this Court has held as follows :

"11... The plaintiff has not asked for any alternative relief of recovery of money. Though it was not asked for, since it is for the relief of specific performance, on the ground of equity, the Court can order so. Accordingly, the defendant is directed to make payment of Rs.7,02,876.25 (Rupees seven lakhs two thousand eight hundred and seventy six and twenty five paise only) to the plaintiff within a period of three months and those amount carries interest at the rate of 12% per annum from the respective dates of payments by the plaintiff to the defendant, till realisation..."

The aforesaid decision rendered by Division Bench of this Court is squarely applicable to the facts and circumstances of this case.

18. The concurrent finding of the Courts below is that the respondent / plaintiff has established that there was an agreement of sale between the appellant and the respondent, pursuant to the same, the appellant / defendant received advance and part of sale consideration at Rs.4,50,000/-, out of the total consideration of Rs.4,95,000/-. As discussed earlier, the appellant / defendant has admitted that she had received the aforesaid amount, Rs.4,50,000/- from the respondent / plaintiff, however, her defence raised by her is that it was a loan amount, that was discharged by her. There is no legally acceptable evidence on the side of the appellant / defendant to establish that the amount that had been received by the appellant was repaid by her. Therefore, the trial Court, holding that the amount was not repaid to the respondent / plaintiff, granted decree, directing the appellant / defendant to return the money with interest, that was confirmed by the appellate court. The claim of the appellant / defendant, raising a defence that the amount was repaid without evidence, cannot be accepted. On the facts and circumstances, the appellant / defendant is not entitled to reap an unjust enrichment, by not repaying the amount, that was admittedly received by her from the respondent / plaintiff.

19. Though the trial court has not granted specific relief as prayed for, decree was passed, directing the appellant / defendant to return the advance amount together with interest and the same was confirmed by the appellate court, considering equity and also with a view to prevent the appellant / defendant from getting unjust enrichment, the Courts below have passed the Judgment and Decree, so as to meet the ends of justice.

20. Section 22 of the Specific Relief Act reads as follows :

"22. Power to grant relief for possession, partition, refund of earnest money, etc - (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the

transfer of immovable property may, in an appropriate case, ask for -

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid of (made by) him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court, unless it has been specifically claimed :

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."

21. In the light of decisions rendered by the Hon"ble Apex Court, it is clear that the Court is empowered to grant a decree, directing the defendant in the suit for specific performance, to return the advance amount with interest, even in the absence of a specific alternative plea for return of the amount. In the instant case, prayer (d) is also available for passing the decree, for repayment of the advance amount received by the appellant, to meet the ends of justice.

22. On the aforesaid circumstances, this Court is not inclined to accept the unreasonable plea of the appellant / defendant that the Judgment and Decree of the Courts below were vitiated by failure to apply the provisions of Section 22 of Specific Relief Act and accordingly, the first substantial question of law is answered against the appellant / defendant and in favour of the respondent / plaintiff.

23. Substantial Question of Law No. 2 :

It has been categorically found by the Courts below that the appellant / defendant had received a sum of Rs.4,50,000/- from the respondent / plaintiff, for which executed, Ex.A.1, agreement for sale was executed by the appellant / defendant. The Courts below have concurrently found that the amount received by the appellant was not repaid by the appellant, though she has admitted that the said amount was received by her only as loan, in spite of the fact that Ex.A.1 is an agreement for sale between the appellant and the respondent herein and as per the decree, the appellant / defendant has to return the advance amount / part of sale consideration with interest and costs. On equity, the Courts below are empowered to pass the decree, to meet the ends of justice. In fact, the appellant / defendant, who has not performed her part of the contract, cannot retain the advance amount, as it would be an unjust enrichment, which is contrary to law. It is well settled that the trial Court is empowered to direct the appellant / defendant to return the money, on the

facts and circumstance of the case, which cannot be construed as against law and further, in the plaint, the respondent / plaintiff has specifically made the prayer (d) to grant such further or other relief as the Court may deem fit to grant the relief, in the circumstances of the case. Even such prayer is not raised, the Court is empowered to grant appropriate decree, to meet the ends of justice and therefore, the Courts below are justified in granting the decree for refund of the advance amount, though there is no specific alternative prayer for return of the amount and in fact, the defence raised by the appellant / defendant could not be justified. Hence, the second Substantial Question of Law is also answered in favour of the respondent / plaintiff and against the appellant / defendant.

24. In view of answering the said substantial questions of law, this Court is of the view that the second appeal is liable to be dismissed with costs.

In the result, confirming the Judgment and Decree passed by the Courts below, this Second Appeal is dismissed with costs. Consequently, connected miscellaneous petition is also dismissed.