

(2009) 12 MAD CK 0047
In the Madras High Court
Case No : S.A. No. 595 of 2003

A. Jayalakshmi, A. Sakthivel, A. Subramanian @
Balasubramanian and Sumathi @ Kolanchi

APPELLANT

Vs

M. Ramalingam

RESPONDENT

Date of Decision : 19-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 100
Specific Relief Act, 1963 — Section 23, 24

Citation : (2009) 12 MAD CK 0047

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : S. Parthasarathy for Sarvabhauman Associates, for the Appellant;
T.R. Rajaraman, for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—The Second Appeal is filed by the defendants 2 to 5, against the judgment and decree of the Principal District Court,

Perambalur, dated 11.10.2002 in A.S. No. 131 of 2002, against the judgment and decree of the Sub-Court, Ariyalur dated 17.09.2001 in O.S.

No. 210 of 1994.

2. The averments in the plaint are as follows:

The suit properties absolutely belong to the first defendant. He entered a sale agreement on 03.04.1994 to sell the properties to the plaintiff for Rs.

1,69,000/- and also received Rs. 5,000/- in advance. He agreed to receive the balance amount of Rs. 1,64,000/- on or before 30.07.1994 and

execute the sale deed in favour of the plaintiff. It was also agreed that if the first defendant fails to make the sale deed in favour of the plaintiff by

receiving the balance amount, he has to repay, the advance amount of Rs. 5,000/-. Apart from that, he has to give Rs. 25,000/- as damages to the plaintiff and failing to do so, the plaintiff can go to the court and collect the same. Since the first defendant was not ready to execute the sale deed, the plaintiff issued notice on 26.04.1994. He received the reply notice dated 03.05.1994 with false and frivolous allegations. The first defendant has also given a complaint before the Sub-Inspector of Police, Perambalur as if the plaintiff fabricated the sale agreement. After enquiry, the Police directed to settle the matter as per the agreement in the village. The alleged settlement deed in favour of the defendants 2 to 4 is not true and genuine and it was fabricated. Hence, the plaintiff was constrained to implead the defendants 2 to 4 as parties to the proceedings, since the settlement deed in their favour, is fabricated and to avoid future litigation and multiplicity to proceedings. He was constrained to file the suit for specific performance and for other reliefs.

3. The gist and essence of the written statement filed by the first defendant is as follows:

The execution of the sale agreement is not true and genuine. The plaintiff has not executed any sale agreement. The value of the properties on the date of agreement is more than Rs. 3,00,000/- and at the time of the filing of the suit, one acre land value is Rs. 2,00,000/-. The first defendant never agreed for selling the properties. He does not possess any other properties except the suit properties on the date of agreement. The first defendant is not the owner of the suit properties. The first defendant has executed settlement deed in favour of the defendants 2 to 4, which has been duly executed, validly attested, accepted and acted upon. The averment that the settlement deed ante-dated is frivolous. The first defendant has leased out the suit properties to his brother Shanmugham for one year from 10.03.1993. After expiry of the lease period, Shanmugham refused to handover the possession. There was enmity between the first defendant's brother Shanmugam and one Nallathambi. So, Nallathambi has given assurance that he will evict Shanmugham and obtained the signature in the stamp papers. That has been concocted as the sale agreement in favour of the plaintiff, who is the maternal uncle of the said Nallathambi. The first defendant does not know the plaintiff. Hence, he prayed for the dismissal

of the suit.

4. The gist and essence of written statement filed by the third defendant is as follows:

The sale agreement is not true and genuine. The value of the property is more than Rs. 3,00,000/-. Since the first defendant was aged, he wanted to

give something to his wife and children. So, he executed the settlement deed on 11.03.1994. It was duly executed, validly attested, accepted and

acted upon. So, the defendants 2 to 4 are the owners of the properties. So on the date of sale of agreement, first defendant is not the owner of the

properties. The sale agreement is not true and genuine. Nallathambi has obtained signature from the first defendant in Stamp papers. He used the

Stamp paper in favour of his maternal uncle, i.e. the plaintiff and concocted the sale agreement. Hence, he prayed for the dismissal of the suit.

5. The learned Subordinate Judge, Ariyalur, after considering the averments of the plaint and the written statement, has framed 5 issues and

considered the oral evidence of P.Ws.1 and 2 and D.Ws.1 to 3, Exhibits A-1 to A-9, Exhibits B-1 to B-5 and Exhibits X-1 and X-2, and

decreed the suit as prayed for in the plaint, granting one month time for depositing the amount. Against that, the defendants have preferred appeal

in A.S. No. 131 of 2002 on the file of Principal District Court, Perambalur. The learned first appellate Judge has framed four points for

determination and considering the arguments of both the counsel, concurred with the findings of the trial Court and dismissed the appeal. Against

that, the present Second Appeal has been preferred by the defendants 2 to 5.

6. At the time of admission of the Second Appeal, the following substantial question of law was framed for consideration:

Whether on a construction of Ex.A.1 agreement the Court below is correct in law in holding that the plaintiff is entitled to specifically enforce the

same especially when the agreement stipulates that in the event of breach the purchaser will be entitled to only liquidated damages?

7. The respondent as plaintiff, filed the suit for specific performance stating that as per Ex.A-1, the first defendant is the owner of the suit

properties. He executed the sale agreement, but to execute the sale, he created ante-dated settlement deed in favour of the appellants-defendants

2 to 5 in the suit. After issuance of notice, showing his readiness and willingness

to perform his part of the contract, the plaintiff has come forward with the suit for specific performance.

8. The appellants as defendants 2 to 5 raised the contention that on the date of Ex.A-1 sale agreement, the first defendant is the owner of the

properties and he has already executed the settlement deed in favour of his wife and children, who are the appellants. It is further contended that

the first defendant has not executed any sale agreement. He signed the blank stamp papers to evict his brother Shanmugam, who was in possession

of the properties as a lessee. Hence, the appellants-defendants 2 to 5 prayed for dismissal of the suit.

9. The trial Court has framed necessary issues and considered the oral and documentary evidence and decreed the suit and granted one month

time to deposit the sale consideration. Against that, the appellants-defendants have preferred appeal. The first appellate Court concurred with the

findings of the trial Court and dismissed the appeal. Against that, the present Second Appeal has been preferred by the appellants-defendants 2 to

5.

10. The only argument advanced by the learned Counsel for the appellants is that in Ex.A-1 agreement, there was no clause that if the first

defendant refuses to execute the sale deed, the respondent-plaintiff or the intended purchaser is only entitled to Rs. 25,000/- as damages and also

the advance amount paid by the plaintiff and if he has not paid the amount, he is entitled to proceed before Court of law. Learned Counsel for the

appellants-defendants 2 to 5 relied upon Section 23 of the Specific Relief Act and submitted that there is no specific clause for liquidation of

damages in the sale agreement and so, the respondent-plaintiff is not entitled for the decree of specific performance. Learned Counsel for the

appellants also relied upon the decisions of the Supreme Court reported in 1999 (8) SCC 416 Dadarao v. Ramrao and P. D'Souza Vs. Shondriilo

Naidu, and prayed for allowing the Second Appeal.

11. Per contra, learned Counsel for the respondent-plaintiff would submit that the main aim of the first defendant is not to execute the sale deed

and he has gone to the extent of creating a settlement deed in favour of his wife and children, as per Ex.B-5. A cursory reading of Ex.B-5 would

clearly prove that it has been created with ante-date and it has been written in

plain paper, but registered after Ex.A-1 sale agreement came into existence. Even though both the Courts below have accepted that Ex.B-5 is not true and the same has not been accepted and acted upon, granted decree. The appellants-defendants 2 to 5 have not raised a plea that as per clause in Ex.A-1, the respondent-plaintiff is entitled only for damages as mentioned in Ex.A-1 and also return the advance amount and without pleading, no relief can be granted. So, the substantial question of law now raised is without any pleading. Learned Counsel for the respondent-plaintiff relied upon the decision of the Supreme Court reported in 2006 (1) SCC 729 Saraswati Devi Gupta v. Har Narain Johari and the decision of this Court reported in 2001 (1) CTC 451 Govindappa Naidu v. Srinivasalu Naidu and submitted that both the Courts below have come to the correct conclusion and there is no perversity or material irregularity in the judgment and decree passed by both the Courts below and hence, u/s 100 C.P.C., in the Second Appeal, there is no need to interfere with the findings of both the Courts below. Learned Counsel for the respondent-plaintiff further relied upon the decision of this Court reported in Ramani Ammal Vs. Susilammal, and argued that even if there is a provision of payment of damages in the sale agreement, the same is not a bar to pass the decree for specific performance. Learned Counsel for the respondent-plaintiff further submits that as per the decision of the Supreme Court reported in P. D'Souza Vs. Shondrilo Naidu, , the respondent is entitled to specific performance and this decision only favours the respondent-plaintiff and not the appellants. Hence, the learned Counsel for the respondent-plaintiff prayed for dismissal of the Second Appeal.

12. It is true that in the written statement, the appellants-defendants have not pleaded that as per Ex.A-1, the respondent-plaintiff is entitled to damages of Rs. 25,000/- and return of advance amount of Rs. 5,000/-. Per contra, in paragraph 2 of the written statement filed by the first defendant, he has specifically denied the execution of Ex.A-1 sale agreement with the respondent-plaintiff. In paragraph 3, he has stated that the value of the suit properties is more than what was mentioned in the sale agreement. The first defendant in his written statement also pleaded that on the date of agreement of sale, he was not the owner of the properties and that he already settled the properties in favour of his wife and children,

i.e. the appellants-defendants 2 to 5. In paragraph 4 of the written statement, the first defendant has pleaded as to under what circumstances,

Ex.A-1 came into existence. In the above circumstances, there is no pleading that as per Ex.A-1, the respondent-plaintiff is entitled to only damages and also return of the advance money.

13. At this juncture, it is appropriate to consider the decision reported in 2006 (1) SCC 729 (cited supra), wherein, the Apex Court held as follows:

6. The judgment of the High Court clearly indicates that the respondent did not raise any question in respect of that and in view of this matter the contention raised here for the first time cannot be considered....

Following the ratio-decidenti in the said decision of the Supreme Court, new plea raised at the Second Appeal stage cannot be considered.

14. Section 23 of the Specific Relief Act reads as follows:

Section 23. Liquidation of damages not a bar to specific performance:

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of

its breach and the party in default is willing to pay the same, if the Court, having regard to the terms of the contract and other attending

circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving,

to the party in default an option of paying money in lieu of specific performance.

(2) when enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

15. Learned Counsel for the appellants-defendants 2 to 5 relied upon the decision of the Supreme Court reported in M.L. Devender Singh and

Others Vs. Syed Khaja, , wherein, in paragraph 20, the Supreme Court held as follows:

20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong

presumption contemplated by the use of the words "unless and until the contrary is proved". The sufficiency or insufficiency of any evidence to

remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its

breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.

16. In the decision reported in P. D'Souza Vs. Shondrilo Naidu, , the decision reported in Dadarao and Another Vs. Ramrao and Others, has been discussed and in paragraph 34 of the decision reported in P. D'Souza Vs. Shondrilo Naidu, , the decision in Dadarao and Another Vs. Ramrao and Others, has been mentioned as ""per incuriam"" and paragraph 34 reads as follows:

34. In Dadarao and Another Vs. Ramrao and Others, whereupon Mr. Bhat placed strong reliance, the binding decision of M.L. Devender Singh and Others Vs. Syed Khaja, was not noticed. This Court furthermore failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam.

17. Hence, I am not in a position to consider the decision reported in Dadarao and Another Vs. Ramrao and Others, . But while considering the decision relied upon by the learned Counsel for the appellants-defendants 2 to 5, reported in P. D'Souza Vs. Shondrilo Naidu, , as the agreement provided for damage clause in terms thereof, the first defendant has option to pay the liquidated damages, and the distinction between liquidated damages and penalty, may be important in common law, but as regards equitable remedy, the same does not play any significant role. In the said decision reported in P. D'Souza Vs. Shondrilo Naidu, , in paragraph 36, it has been held as follows:

36. Apart from the fact that the agreement of sale did not contain a similar clause, Dadarao Dadarao and Another Vs. Ramrao and Others, does not create a binding precedent having not noticed the statutory provisions as also an earlier binding precedent. (See Government of West Bengal Vs. Tarun K. Roy and Others,).

18. It is well settled that in cases of contract of sale of immovable properties, the grant of relief of specific performance is a rule and its refusal an exception based on valid and cogent grounds. Further, the first defendant cannot take advantage of his own wrong and then plead that the decree for specific performance would be an unfair advantage to the respondent-plaintiff. The respondents-plaintiff has always been ready and willing to

perform his part of the contract at all stages and he has not taken any advantage of his own wrong. The respondent-plaintiff is no way responsible

for the delay at any stage of the proceedings. It is the first defendant who was always not willing to perform his part of the contract. The first

defendant cannot take advantage of his own wrong and then plead that the grant of decree for specific performance would amount to unfair

advantage to the respondent-plaintiff. But here, considering the citations, as per Section 23 of the Specific Relief Act, which specifically mentions

that the liquidation of damages is not a bar to specific performance, it clearly shows that the respondent-plaintiff is entitled to a decree for specific

performance. So, the first defendant has not raised such a plea in the written statement. He neither raised such a plea in the written statement, nor

in the grounds of appeal before the first appellate Court. At this juncture, applying the dictum laid down by the Supreme Court in the decision

reported in 2006 (1) SCC 729 (cited supra), it is seen that the first defendant did not raise such a plea before the trial Court and the first appellate

Court and raised the same for the first time before this Court in the Second Appeal stage, which cannot be considered.

19. Learned Counsel for the respondent-plaintiff relied upon the decision of this Court reported in Ramani Ammal Vs. Susilammal, and submitted

that even if default clause provided for cancellation of contract, there is no bar for grant of specific performance. In the said decision reported in

AIR 1991 MADRAS 163 (cited supra), a Division Bench this Court held as follows:

13. It was next contended by the learned Counsel for the appellant that the trial Court was not justified in invoking default clause mentioned in the

agreement and negating the claim for specific performance while granting the alternative relief of payment of the amount paid by the plaintiff. Even

factually the trial Court is not correct in observing that in the sale agreement there is no clause empowering the plaintiff to cancel the sale agreement

by paying any amount by way of damages to the defendant. On the other hand, it is said that in event of not performing the agreement of sale, the

defendant could have the sale agreement cancelled provided the defendant gives the plaintiff a sum of Rs. 5,001/- in addition to the sum of Rs.

5,001/- already received from the plaintiff. It is to be noted that default clause is provided in respect of the default committed both by the plaintiff

and the defendant in the agreement, that is, in case the defendant committed default, he is liable to return the money with another sum of Rs.

5,001/- and if the plaintiff commits default, she has to forfeit the advance paid and that it cannot be said that the default clause is only in the case of

the default committed by the defendant and not by the plaintiff. Now let us consider the effect of the default clause provided under the agreement.

The learned Counsel for the appellant submitted that in view of Section 23 of the Specific Relief Act, the default clause is not a bar to the grant of

the relief of specific performance and in support of his contentions, he submitted case-laws: Section 23 of the Specific Relief Act reads as follows:

Liquidation of damages not a bar to specific performance--(1) A contract, otherwise proper to be specifically enforced, may be so enforced,

though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same, if the Court having

regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing

performance of the contract and not for the purpose of giving to the party in default of an option of paying money in lieu of specific performance.

In V.K. Kandasami Chettiar (since deceased) and Others Vs. Shanmugha Thevar and Another, , it was pointed out that the default clause in the

contract provided, inter alia, that ""the individual who commits the default shall pay the other individual Rs. 100/- as damages, and in addition this

contract shall become void"". In that case it was held:

The clause merely states the disability of the defaulting party who claims specific performance of the contract u/s 24(b) of the Specific Relief Act

and does not extend the disability to enforce the contract to the other party and further that the party who brought about the default cannot take

advantage of his own wrong and prevent the other party from claiming specific performance.

Thus, in view of the specific provision of Section 23 of the Specific Relief Act (Section 24 is the corresponding provision in the Old Act) and the

ratio laid down in the above decision, the relief of specific performance cannot be negated.

20. Hence, I am of the view that in the trial Court and the first appellate Court, the appellants herein have not raised such a plea and new plea has

been raised before this Court and it will not be considered as per the dictum laid down by the Supreme Court in the decision reported in 2006 (1)

SCC 729 (cited supra).

21. Considering the averments in both the plaint and the written statement, both the Courts below came to the correct conclusion that the

respondent-plaintiff is entitled for decree of specific performance. I do not find any irregularity in the judgment and decree passed by the Courts

below. Hence, the Second Appeal is liable to be dismissed.

22. Accordingly, the Second Appeal is dismissed. The judgment and decree of both the Courts below are confirmed. It is pertinent to note that in

view of the decree passed by the trial Court, the respondent-plaintiff has already deposited the entire sale consideration in the Court. Time for

execution of sale deed is two months.