(2014) 10 KAR CK 0166

In the Karnataka High Court

Case No : Regular Second Appeal 1779/2010

H.S. Prema — APPELLANT

Vs

K.G. Venkatesh — RESPONDENT

Date of Decision : 20-10-2014

Acts Referred:

Income Tax Act, 1961 — Section 230A
Specific Relief Act, 1963 — Section 12, 12(3), 17, 20

Citation : (2014) 10 KAR CK 0166

Hon'ble Judges : H.G. Ramesh, J

Bench : Single Bench

Advocate : Udaya Holla, Sr. Counsel for Vivek Holla, Advocate for the Appellant; T. Seshagiri Rao, Advocate for the Respondent

Judgement

H.G. Ramesh, J.—Defendant 3, 4 and 5 are in second appeal challenging the judgment and decree passed by the Addl. District Judge, Chitradurga in RA 2/2009 confirming the judgment and decree passed by the II Addl. Civil Judge (Sr. Dvn.), Chitradurga in favour of the plaintiff in the suit OS 155/2000 filed for specific performance.

2. Plaintiff entered into an agreement with the defendant for sale of the property in his favour for a total consideration of Rs. 6,90,000/-. Agreement was executed on 7.8.1993 before the Chitradurga Sub-Registrar. Time was fixed as 36 months for execution of the sale deed from the date of agreement. On the date of agreement, plaintiff paid a sum of Rs. 3 lakhs through a cheque. It appears, the defendants could not get the occupants of the hotel premises vacated in time and also income tax clearance certificate was also to be obtained. According to the plaintiff, defendants approached the plaintiff seeking for extension of time on 12.7.1996, for another 24 months. Accordingly on 7.8.1993 one more agreement was executed. This was an ancestral property of the defendants. Subsequent thereafter, during October 1993 through a cheque another Rs. 1 lakh has been received by the defendants and during 1995 another Rs. 40,000/- is said to have

been paid to the defendants. Nearly Rs. 4,40,000/- amount is said to have been received and the extended time was expired on 11.7.1998. Stating that defendants did not come forward with the clearance certificate from the income tax under S. 230A of the Income Tax Act and did not get the premises vacated, plaintiff issued a notice calling upon the defendants to execute the sale deed directing the defendants immediately to execute the sale deed on 22.2.1999 with the original documents. Contending that in stead of executing the sale deed, they have taken a frivolous contention, accordingly suit was filed. The suit was contested by the defendants denying the very sale transaction. According to the defendants, time was the essence of contract though it has not been agreed by the plaintiff. It is also stated that defendants have not undertaken to get the tenants evicted from the hotel; during December, 1997 major extent of the premises was demolished for the extension of double road. On the demolition of one of the shops leased to Srinath, he filed a suit which came to be dismissed which is under consideration before the appellate court. Based on the contentions, trial court raised as many as seven issues for consideration. After inquiry, trial court held that plaintiff proved that defendants have executed the sale agreement in respect of the suit schedule property and having agreed to sell the same for Rs. 6,90,000/- plaintiff made payment of Rs. 4,40,000/- in all. That is held in favour of the plaintiff. Also in respect of extension of time sought by the defendants to execute the sale deed, it is held in his favour. In respect of readiness and willingness is concerned, according to the submission of the plaintiff he has deposited the remaining amount in the court to demonstrate his conduct. So far as the issue with regard to time was the essence of the contract as argued by the defendant, is held in the negative. With regard to demolition of the portion of the building for extension of road is concerned, it is held that defendants have failed to establish the same.

3. Even assuming that demolition took place subsequently, however the issue with respect to readiness and willingness and market value etc., the trial court has on an over all analysis of the evidence on record, held that plaintiff is entitled for specific performance of the contract. In appeal, the lower appellate court while confirming the order of the trial court decreeing the suit for specific performance, in a concurrent finding held in favour of the plaintiff. As against this order, appeal is filed by the defendants.

4. Heard the counsel representing the parties.

5. The following substantial questions of law were framed on 29.7.2010.

6. Whether the lower courts have committed an error in granting an decree for specific performance ignoring the stipulation in the agreement regarding payment of double the advance amount in case of nonperformance by the appellant, which is a clear stipulation of damages being adequate remedy.

7. Whether the lower courts erred in not talking into account and consideration the provisions of S. 12(3) of the Specific Relief Act.

8. Whether the judgment of the trial court is vitiated for not framing an issue concerning as to whether the document agreement of sale is a lease agreement or an agreement of sale, in the light of the defence taken and evidence on record.

9. According to the appellants'' counsel, the amount was taken as security for loan and not specifically to execute the sale deed. Time was the essence of contract but within that period plaintiff did not come forward to get the sale deed executed. At the most, it is a case of damages or alternate relief of refund of money and accordingly, sought to contend that both the courts below have erred in not framing a specific issue with regard to the fact whether it is a loan agreement or a sale agreement; whether the agreement entered into was only as security for loan transaction and also the specific clause in the agreement was being ignored by both the courts below which stipulated that the contract attracts double the advance amount to be paid in case of nonperformance of the contract.

10. According to the respondent''s (plaintiff) counsel, it is a clear case of agreement to sell. One of the tenant who was in occupation had not been evicted from the premise. Of course in that regard, there was a lis between the defendant and the tenant themselves and the defendant has undertaken to execute the sale deed after getting the tenant evicted. Time was not the essence of contract and accordingly, sought to contend that the trial court much less the lower appellate court have considered the fact whether it is a outright sale or it is a security for the loan extended by the plaintiff and in that regard, the say of the plaintiff is that, in the absence of specific issue being raised it should have been a case of invoking S. 12 of the Specific Relief Act to seek return of money and also plaintiff committed default in making full payment and it should have been a specific case for return of the earnest money and not a case for specific performance.

11. Counsel for the appellants has relied upon the following decisions - His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, ; 2002(9) SCC 532 - Bhagwan Bala Mahanavar Vs. Sandipan Laxman Shinde & Ors. to stand by his contention that there was no ready and willingness on the part of the plaintiff even as demonstrated by producing the pass book, etc. and contending that the remaining part of the amount though he sought to demonstrate was in his account, it was only during 1999 and that itself shows that plaintiff himself was not ready and willing to perform his part of the contract. It is also contended that granting specific performance is as good as granting unfair advantage against the defendant to the plaintiff and in all fairness, according to the appellants'' counsel, the remedy would be by way of damages for return of the amount with interest and accordingly, sought to allow the appeal contending that both the courts below have not applied their mind while dealing with the aspect as to whether the transaction is in the form of loan agreement or a sale agreement.

12. It appears there was an agreement entered into during 1993. Initially Rs. 3 lakhs was paid and thereafter within a span of one year, another Rs. 1 lakh and

Rs. 40,000/- was paid. The total consideration was Rs. 6,90,000/- It is not specifically demonstrated by the defendants that it is an outright sale agreement or a loan transaction. Rather both the courts below in a concurrent finding held that it is a specific case of sale agreement. So far as readiness and willingness is concerned, it is seen though at the time the sale agreement is executed plaintiff was not ready to perform his part of the contract but during 1999 a demand draft is said to have been obtained by the plaintiff for the remaining amount to execute the sale deed in his favour by the defendant and it appears he was capable of managing things and he was said to be a person running business and also a money lender. However, it appears nearly 60% of the amount is paid within the stipulated period of one year although time to get the sale deed executed was three years. Subsequently it appears as a matter of conduct on the part of the defendants, they have agreed to get the hotel premises vacated as it was tenanted and they themselves sought time to get the sale deed executed in the year 1995. It appears conduct of the defendants in seeking extension of time naturally was for want of vacant possession of the building to be handed over to the plaintiff at the time of executing the sale deed. In the circumstances, as rightly held by both the courts below, time was not the essence of contract as there was extension of time by the defendants themselves. This would mitigate the circumstance as regards time was the essence of contract and to show that there was readiness and willingness. If the defendants had not sought extension of time, then the plaintiff in all probability would have made an attempt to keep the money ready with him to get the sale deed executed. His conduct and capacity has to be looked into along with other aspects viz., he was a business man doing hardware business and was also a money lender. The only thing to be looked into now is whether it was a case of specific performance or it is only a loan transaction. When time was extended by the defendants themselves to get the premises vacated, the conduct of the parties show that it was a case of execution of sale agreement by way of specific performance and not security for loan.

13. Further, the argument advanced on behalf of the appellants is, discretion has to be exercised while ordering for specific performance and balance would tilt in favour of the defendants as substantial consideration was not readily available to the plaintiff before completion of three years and except a mere paltry amount as shown in the pass book, no other document is placed. What is pertinent to note in the context is, 60% of the amount has been paid by the plaintiff to the defendants to show that he was capable of performing his part of the contract. But the fact remains that as noted earlier, plaintiff was said to be a money lender and also doing hardware business. In the context 40% of the amount was not ready to be parted, might be plaintiff was having capacity to pay but suitable compensation has to be paid to the defendants by way of damages for the remaining 40% and as on the date of the decree/order, market value of the property should be taken into consideration. In that regard, it would meet the ends of justice and also to comply with S. 17 and S. 20 of the Specific Relief Act,

while directing the defendants to execute the sale deed in favour of the plaintiff, plaintiff is directed to part with Rs. 15 lakhs within three months. Amount in deposit also be paid to the defendants. Another six months time is granted to the plaintiff to get the sale deed executed.

14. Appeal is allowed in part. The application filed for additional evidence is also disposed of. Parties to bear their own costs in this appeal.

