

(2002) 02 MAD CK 0187
In the Madras High Court
Case No : A.S. No. 1100 of 1986

Marimuthu Ammal

APPELLANT

Vs

K.S. Arunachala Iyer, K.S. Viswanatha Iyer and B. Vanaja

RESPONDENT

Date of Decision : 08-02-2002

Acts Referred:

Citation : (2002) 02 MAD CK 0187

Hon'ble Judges : Prabha Sridevan, J

Bench : Single Bench

Advocate : N. Krishnaveni, for the Appellant; S. Parthasarathy for R1, Mr. Anantharamakrishnan for R2 and No appearance for R3, for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—The plaintiff is the appellant. The suit is filed for specific performance of the agreement dated 29.08.1979. The plaint averments in brief are as follows: The first respondent is the owner of the suit property. On 29.08.1979, he agreed to sell the property to the appellant for a consideration of Rs. 40,000/-. Thousand rupees was given as advance. The first respondent agreed that he would fulfill the contract, after vacating his brother, the second respondent who had been permitted to occupy a portion. To this effect, a receipt was issued which is marked as Ex. A5. The third respondent is the tenant. The appellant was always ready from the date of agreement to perform her part of the agreement. On 05.12.1979, the first respondent issued a notice to the second respondent asking him to vacate the premises. This is Ex. A6. Second respondent has no right in respect of the suit property. The appellant issued a lawyer's notice which is marked as Ex. A31 dated 29.05.1982, belatedly reply was given by the first respondent under Ex. A32 dated 02.08.1982. The reason given in the reply for the agreement is totally false. The first respondent now wants to set up a case that the agreement was entered into only to use it as lever for evicting the second respondent from the suit property. This is an after thought and cannot be sustained. The suit must be decreed. The written

statement of the first respondent alone is relevant for the purpose of the appeal. In this, the first respondent contended that the second respondent was his brother who was permitted to occupy the premises and while the second respondent ought to have been grateful to the first respondent, he started creating trouble. Since the effort of the first respondent to throw out the second respondent proved fruitless, he sought the assistance of the appellant's husband who was a Vakil's clerk and also the assistance of the appellant's son, who was also a vakil's clerk. The appellant's husband advised him that a notice should be issued to the second respondent retaining a carbon copy stating that he intended to sell the property. The appellant's husband also kept the carbon copy of the notice. The suit property is the self acquired property of the first respondent. In spite of this notice, the second respondent refused to vacate the premises and subsequently a plan was mooted by the appellant's husband and her son that an agreement would be brought about only for the purpose of using it as lever to remove the second respondent. Neither was any advance paid nor received. The very fact that out of the alleged consideration of Rs. 40,000/-, only thousand rupees was said to have been paid under Ex. A5, shows that it is not a genuine sale agreement. The suit itself has been filed only because of the rise in prices and with the intention to snatch away the property at a very low price. Ex. A5 which is stated to be the agreement to be specifically enforced is written on a plain piece of paper and it is not believable that a vakil's clerk would have consented to have an agreement on a plain paper, especially when it related to sale of immovable property. The documents produced along with the plaint have all been obtained only because the appellant's husband and son have been vakil's clerks and they have taken advantage of the fact that certain copies were in the office of the lawyer, who had issued a notice on behalf of the appellant. The first respondent never intended to sell the property since it was purchased for the benefit of his family. The suit should be dismissed.

2. The trial court on a consideration of the oral and documentary evidence came to the conclusion that the appellant had not made out a case that there was a sale agreement. The suit was dismissed.

3. The point for consideration is whether the appellant is entitled to a decree of specific performance.

4. The learned counsel for the appellant would submit that the court below erred in totally accepting the respondent's case. If the agreement itself was brought about only so that it could be used to evict the brother, the second respondent herein, then A6 notice issued by the counsel for the first respondent to the second respondent, will have some reference to the sale agreement in favour of the appellant. But there is no such mention. Even subsequently thereafter, the first respondent has not taken any action to evict his brother. Therefore the case that the agreement was nominal, cannot be believed. From the pleadings, it was pointed out that the first respondent knew the legal position that no one can be evicted except in accordance with the provisions of the Rent Control Act and

therefore, it was difficult to believe that the first respondent would have thought that a mere agreement with the appellant would result in the second respondent moving out of the suit property. In his evidence, D.W.I, the first respondent had stated that he had worked as a Selection Grade Superintendent and if problems arose in the office, he could take decisions based on the fives and he would draft letters well and he had a good name in office. It was unlikely that such a person would be gullible enough to execute Ex. A5 merely for the purpose of throwing out his brother. The learned counsel also submitted that even an oral agreement can be enforced so the fact that there was no stamped agreement cannot tilt the scales in favour of the respondent. According to P.W.I, the husband of the appellant, the genesis of the agreement between the parties was in January, 1979, when there were negotiations between them which was disbelieved by the trial court. The learned counsel for the appellant submitted that this conclusion is wrong. The cause of action for the suit can only be the date on which the negotiations between the parties had fructified into an agreement and therefore, failure to mention January, 1979 in the cause of action paragraph, is not fatal to the case. It was submitted that Ex. A5 is merely in the nature of a receipt and it has been witnessed by the son of the first respondent. The learned counsel for the appellant pointed out that it was not for the appellant to examine the scribe of the Ex. A5 to prove its truth. But actually the trial court ought to have drawn adverse inference from the non-examination of the first respondent's son, who could have been cross-examined regarding the actual nature of A5. The last few lines of Ex. A5 were pointed out, wherein it is stated that the first respondent agrees to the appellant effecting repairs if the need arises and also that the appellant should make payments towards the sale consideration if financial necessity arises. The learned counsel would submit if the Ex. A5 was merely nominal there was no justification for these recitals. It was submitted that though the first respondent had stated in his written statement that the rise in prices of immovable property had incited the greed of the appellant which was actually the converse. Because of the rise in prices, the first respondent grew reluctant to adhere to the agreement between the parties. The learned counsel also submitted that the trial court was not right in holding that the specific performance cannot be granted as the property was not vacant but was in the possession of tenant. In the plaint at para 5, it is averred "29.09.1979, the first defendant herein after due deliberation...." According to the learned counsel, this was in consonance with the evidence of P.W.I that the negotiation for purchase began earlier in January, 1979. Ex. A3 and A4 are the two letters allegedly written by the first respondent to his brother, the second respondent. Here the respondent referred to a proposal to purchase the property started even before April and May, 1979 which also supports the appellant's case. The pleadings and evidence would show that the appellant has always been ready and willing to purchase the suit property. She has also produced documents to show the prices of similar properties all of which would show that the sale consideration is fair and the appellant has also marked documents to show that she had the funds to purchase the suit property. In particular, Ex. A1 was referred to whether the

husband of the appellant had sold the other property to a third person for Rs. 30,000/-which was thereafter available for the purchase of the suit property. According to the learned counsel, the trial court had erred in the construction of the oral and documentary evidence.

4-A.The learned counsel for the respondent on the other hand, would submit that, while a certain leeway can be given for variance between the pleadings and evidence in any other suit, this cannot be permitted in a suit for specific performance and for this purpose, he would rely on *M. Naresh Kumar Vs. B. Nagalaxmi*, . The appellant is not even clear in her mind as to which agreement has to be enforced. The evidence of P.W.I, the appellant's husband is to the effect that Ex. A5 is not the suit agreement. It is only a receipt for receiving advance and that there was an agreement for sale in January, 1979 itself. He has also stated in his evidence that he knows what cause of action is and the cause of action for the suit is the oral agreement dated January, 1979. But when the evidence is tested against the plaint, it is found that there is no mention of an agreement in January for the sale of the suit property. The appellant had marked Ex. A5 and A33. A5 is the letter written by the first respondent which forms the basis for the suit. The same recitals are found in A33. But it is allegedly written by the appellant's husband to the first respondent. The words "office copy" are also found in this exhibit. A perusal of the original of this document would show that a revenue stamp was stuck and thereafter removed. The learned counsel would submit that this and other factors were taken note of by the trial court to come to the conclusion that the appellant has not approached the court with clean hands. So, though the suit cannot be dismissed solely on the ground of variance between pleadings and evidence, the other circumstances also do not come to the appellant's aid. It is also pointed out by the learned counsel for the respondent that the documents filed by the appellant to show the correctness of the sale consideration relate to smaller extent of properties. Ex. A5 is the document which is sought to be enforced. This is signed by the first respondent and the recitals therein show that the respondent had agreed to sell the property upon receiving the balance of sale consideration of Rs. 39,000/- after his brother K.S.Viswanathan who is residing there, vacates the premises. Therefore, the agreement itself contemplates the sale only, if vacant possession can be given. If the second respondent does not vacate the premises, no right accrued in favour of the appellant. Reliance was also placed on 2000 (IV) CTC 278.

5.The decision in (1998) 5 SCC 388, the following extract found:

greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in a contract which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-performance is not enough; its object is to procure a

performance by the defendant, and this demands a clear, definite, and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced. This quality of certainty can best be illustrated by examples selected from the decided cases,

and in the same decision, the Supreme Court has held that it is again well settled that in suit for specific performance, the evidence and proof of the agreement must be "absolutely clear and certain"

(emphasis supplied).

6-9. In this case, it is true that the appellant had stated in the plaint that the respondent agreed to sell the property on 29.08.1979 after due deliberation. But the evidence is that there was an oral agreement in January, 1979. There is no pleading regarding an agreement in January, 1979. When the plaintiff in suit for specific performance seeks to enforce what is claimed to be a consensus arrived at between the parties, the time, nature and terms of the agreement must be made clear so that the party resisting the suit can muster the materials to defend his case. The case of an oral agreement in January, 1979 was never put forth until the appellant's husband got into the box. For the first time, this has been stated to be the origin of the agreement between the parties. Ex. A3 and A4 letters addressed by the first respondent to the second respondent are shown as proof of the fact that the agreement between the parties was there from January, 1979. As noted by the trial court, it is not clear how the carbon copies of A3 and A4 which have nothing to do with the appellant were produced from her custody. According to P.W.I, a copy of these two documents were marked to him. But Ex. A3 and A4 do not show that copies were marked to the appellant's husband. Further, in Ex. A4, the first respondent has stated that he had agreed to sell the property to someone on or before May 31 and that he would suffer a loss of Rs. 5,000/-, if he cannot perform his side of the contract. In the first place, Ex. A5 is subsequent to May 31 and there is nothing in Ex. A5 to show that if breach of this contract is committed by the first respondent the appellant would be entitled to liquidated damages of Rs. 5,000/-. The reference to the sale in Ex. A4 is not to the agreement between the parties, because Ex. A5 does not speak of quantified damages at Rs. 5,000/-. On the other hand, it only probablises the case of the first respondent that with the help and advice of the appellant's husband, he had been issuing letters to his brother setting up a case that there was a proposal for sale hoping that the brother would leave the suit property. But these letters did not bear fruit. So, the appellant's husband advised the first respondent that, if a written document is available, with the aid of police, he would be able to throw out the second respondent. A person who files a suit for specific performance must have equity in his favour. He cannot come to court with a case which is shrouded in doubt and expect a decree in his favour.

10. The other factor to be noted is that the deed that is sought to be enforced should spell out a clear intention. Ex. A5 states that the sale would be executed

upon receipt of Rs. 39,000/- after the second respondent vacates the premises. Therefore, even if Ex. A5 is accepted as an agreement, the intention appears to be to execute the sale deed, subject to the brother vacating the premises. Ex. A33 does not look like a carbon copy. It is written in original with the words "O.C." in the corner. It is the appellant who produced it as the copy of the letter given by her husband to the first respondent. P.W.I in his evidence, has stated that he would take steps to call upon the first respondent to produce the original but no such steps appear to have been taken. Ex. A33 also contains the same recital as Ex. A5 that the sale would be completed after the second respondent vacates the premises. The words used are

11. In N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, it was held that to obtain a decree for specific performance, the readiness and willingness of the plaintiff should continue from the date of agreement till the date of hearing of the suit. In this case, the appellant based her suit on an agreement under which the appellant is ready and willing to pay the balance of sale consideration after a certain event takes place. The appellant's husband who is purported to have signed Ex. A3, the counter part of Ex. A5 has also agreed to take the property only on such a condition. Therefore, it cannot be stated that the willingness on the part of the plaintiff existed from the date of the agreement. No doubt, in the plaint it is stated that the appellant is ready to take the property as it is. Pleading readiness and willingness in the plaint, when the evidence is not to the effect, is of no avail. There is no certainty regarding the agreement nor is the Readiness and willingness proved beyond doubt. The discussion by the trial court on all these aspects does not appear to suffer from any irregularity or error. The appeal is therefore dismissed.