
(2011) 03 MAD CK 0270

In the Madras High Court

Case No : S.A. No. 553 of 2009 and M.P. No. 2 of 2011

M.N. Rangasamy

APPELLANT

Vs

K. Govindasamy and Tamil Nadu Electricity Board

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100
Evidence Act, 1872 — Section 137, 20
Specific Relief Act, 1963 — Section 16, 20

Citation : (2011) 03 MAD CK 0270

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : N. Manoharan, for R. Jeyaprakash, for the Appellant; K.M. Vijayan for K.M. Vijayan Associates, for R1 and N. Muthuswami, for R2 to R4, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This second appeal is filed by the first Defendant, inveighing the judgment and decree dated 18.11.2008 passed by the

Subordinate Judge, Tiruppur, in A.S. No. 58 of 2007 confirming the judgment and decree dated 21.9.2007 passed by the District Munsif,

Tiruppur, in O.S. No. 35 of 2005, which was filed for specific performance of an agreement to sell.

2. The parties, for the sake of convenience, are referred to here under according to their litigative status and ranking before the trial Court.

3. The epitome and the long and short of the relevant facts absolutely necessary and germane for the disposal of this second appeal would run thus:

(i) The first Respondent herein, as Plaintiff, filed the suit seeking the following reliefs:

to pass a decree

a) directing the first Defendant to receive the balance of sale price of Rs. 50,000/- and execute and register a Sale Deed for Rs. 1,00,000/- in

favour of the Plaintiff in respect of the plaint schedule property within a date to be specified by the Hon''ble Court and in default thereof, this

Honourable Court itself may execute and register the sale deed;

b) directing the first Defendant to put the Plaintiff in possession of the plaint schedule property;

(c) directing the first Defendant to pay the Plaintiff the costs of the suit;

Or In The Alternative

a) directing the first Defendant to pay the Plaintiff the sum of Rs. 55,000/- with costs of the suit and future interest @ 24% per annum on Rs.

50,000/- from the date of suit till realisation and creating a charge upon the plaint schedule property for the due payment of the decree amount and

granting such other and further reliefs as may be deemed just and proper in the circumstances of the case.

(b) Written statement was filed by the first Defendant, resisting the suit. Whereupon issues were framed.

(c) During trial, the Plaintiff examined himself as P.W.1 along with P.W.2 and P.W.3 and Exs.A1 to A13 were marked. On the Defendants' side,

the first Defendant examined himself as D.W.1 along with D.W.2 and Exs.B1 and B2 were marked.

(d) Ultimately, the trial Court decreed the suit for specific performance, as against which, the appeal was filed for nothing but to be dismissed by

the first appellate Court, confirming the judgment and decree of the trial Court.

4. Challenging and impugning the Judgments and decrees of both the Courts, this second appeal has been filed on various grounds, and also

suggesting the following substantial questions of law:

a. Whether the Courts below are right in decreeing a suit for specific performance, when it is lucidly proved that the transaction is a loan

transaction?

b. Whether the Courts below are right in not holding that the suit is premature and when there is no cause of action could have been started as on

the date of presentation of plaint?

- c. Whether the Courts below are right in decreeing a suit for specific performance, when the agreement is one sided?
- d. Whether the Courts below are right in not taking judicial notice as to the price of the suit property as on the date of the agreement?
- e. Whether the Courts below are right in decreeing the suit for specific performance, when the readiness and willingness is not proved by the Plaintiff?
- f. Whether the Courts below are right in not appreciating the evidence properly as emphasized in Section 137 of the Indian Evidence Act, 1872?

(extracted as such)

5. My learned predecessor framed the following substantial questions of law.

- 1. Whether the Courts below have committed an error in completely omitting to consider the evidence of D.W.2 making the finding perverse?
- 2. Whether the Courts below have committed an error in not considering the necessity to exercise the discretion in favour of the Plaintiff u/s 20 of the Specific Relief Act?

(extracted as such)

6. The gist and kernel, the pith and marrow of the arguments, as put forth and set forth on the side of the Appellant/first Defendant would run thus:

(a) Ex.B1-the earlier agreement to sell dated 20.12.1999 emerged between P.W.3-the sambandhi of P.W.1-the Plaintiff on the one side and the

first Defendant on the other side, would refer to the sale consideration as one lakh; however, after three years, so to say, after cancelling the earlier

agreement to sell-Ex.B1, as per Ex.B2, Ex.A1 dated 21.06.2002 emerged between the Plaintiff and the first Defendant for the same sale

consideration and that itself is a suspicious circumstance, which would convey and connote, display and demonstrate that the said Ex.A1 is not an

agreement to sell in stricto sensu, but it was only a document brought about by both sides purely for the purpose of securing the prompt repayment

of loan of Rs. 50,000/-, which the first Defendant borrowed from the Plaintiff and that too, for the purpose of discharging the dues towards P.W.3

under Ex.B1.

(b) P.W.2 during cross-examination admitted that relating to payment of interest and rate of interest is concerned, only P.W.1 and D.W.1 might be

knowing and that itself is indicative of the fact that the transaction was a loan transaction.

(c) One year period was contemplated in Ex.A1. P.W.1, during cross-examination candidly and categorically without mincing words would

depose that even as on the date of Ex.A1 he was having the full sale consideration with him, if that be so, there was no explanation forthcoming

from the Plaintiff's side as to what made him not to get the sale deed executed in his favour immediately on the date of Ex.A1 itself.

(d) The property was actually worth Rs. 10,00,000/- (Rupees ten lakhs only) as on the date of Ex.A1, but the very fact that the sale consideration

was specified as one lakh would show that the transaction was not relating an agreement to sell, but only a loan transaction.

(e) The Courts below fell into error in placing implicit reliance on P.W.2 and P.W.3, who are interested witnesses, and discarding the evidence of

D.W.2 in rendering their Judgments, warranting interference in second appeal.

7. Per contra, in an attempt to torpedo and pulverise the arguments as put forth and set forth on the side of the Appellant/first Defendant, the

learned Senior counsel for the first Respondent/Plaintiff would advance his arguments, which could tersely and briefly be set out thus:

(a) The written statement was vague as vagueness could be and it is niggard and bereft of details relating to the alleged loan transaction and there

could be no loan transaction without any agreement relating to payment of interest, but no such reference has been made in the written statement

relating to payment of interest, but only in the chief-examination affidavit filed by D.W.1 there is some reference to usurious interest etc., allegedly

demanding by the Plaintiff and that itself is indicative of the fact that as an after thought, by way of embellishment and improving upon his earlier

false case, the first Defendant did choose to set out such facts in the chief examination affidavit.

(b) D.W.2 is in no way connected with the suit transaction and he has been made to depose by D.W.1 in his support, which is having no probative

force of its own.

(c) The alleged inadequacy of sale consideration itself is not a bar for specific performance, as explanation (i) to Section 16(c) of the Specific

Relief Act would exemplify the same.

(d) Both the Courts below correctly pointed out that no evidence has been placed before them to the effect that as on the date of emergence of

Ex.A1, the suit property was worth Rs. 10,00,000/- (Rupees ten lakhs only) and not Rs. 1,00,000/- (Rupees one lakh only).

(e) Simply because the sale consideration was stated as one lakh in Ex.B1 as well as in Ex.A1 there is no presumption that the transaction intended

under Ex.A1 was only a loan transaction and not a transaction relating to agreement to sell.

(f) Both the Courts below, after analyzing the evidence, gave the factual finding in this case in favour of the Plaintiff and normally while this Court

exercising its power u/s 100 of CPC would not interfere with such concurrent finding of facts.

Accordingly, the learned Senior counsel for the Plaintiff would pray for the dismissal of the second appeal.

8. Substantial Questions of law (i): At the outset itself I would like to refer to some decisions, which are spotlighting the law relating to specific performance.

(i) M. Ramalingam (died), R. Ramesh, Sailakshmi, R. Krishnakumar and Lalitheswari Vs. V. Subramanyam (died), S. Prema, Veerasamy, Hari

and Sudha, , an excerpt from it would run thus:

10. ...When the Defendant came with a plea stating that the intention of the parties was only to treat the same as a loan transaction, and it was

never intended to be acted upon, which is inconsistent with the terms of the document, a duty is cast upon the Defendant to strictly prove that it

was a different transaction altogether, and what was recorded in the document was intended to be of no consequence whatsoever. No doubt, the

Defendant who came with such a plea, can well adduce evidence to show that Ex.A-1 agreement though executed by him, was never intended to

be operated as an agreement for sale, but only for a loan transaction, which was not recorded in the document. After careful consideration of the

available materials, the Court may hasten to say that the Appellants have miserably failed to prove that it was a loan transaction, and the agreement

was never intended to be acted upon. The Defendant has not examined any independent witness or the attestors to the document, nor has he

placed acceptable materials to hold so. Except the interested testimony of the

Defendant, nothing more is available on record.

(ii) (2010) 10 SCC 512 [Man Kaur (dead) by Lrs. v. Hartar Singh Sangha]

12. Section 16(c) of the Specific Relief Act, 1963 ("the Act", for short) bars the specific performance of a contract in favour of a Plaintiff "who

fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be

performed by him, other than terms of the performance of which has been prevented or waived by the Defendant".

Explanation (ii) to Section 16 provides that for purposes of clause) of Section 16, "the Plaintiff must aver performance of, or readiness and

willingness to perform, the contract according to its true construction.

Thus, in a suit for specific performance, the Plaintiff should not only plead and prove the terms of the agreement, but should also plead and prove

his readiness and willingness to perform his obligations under the contract in terms of the contract. (See N.P. Thirugnanam (D) by L.Rs., Vs. Dr.

R. Jagan Mohan Rao and others, ; Pushparani S. Sundaram and Others Vs. Pauline Manomani James (Deceased) and Others, and Manjunath

Anandappa Urf. Shivappa Hanasi Vs. Tammanasa and Others, .

13. In the first case, this Court held: (N.P. Thirugnanam case, SCC p.118, para 5)

5. ...The continuous readiness and willingness on the part of the Plaintiff is a condition precedent to grant the relief of specific performance. This

circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the Plaintiff fails

to either aver or prove the same, he must fail. To adjudge whether the Plaintiff is ready and willing to perform his 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 other attending circumstances. The

amount of consideration which he has to pay to the Defendant must of necessity be proved to be available. Right from the date of the execution till

date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his

readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending

circumstances. The court may infer from the facts and circumstances whether the Plaintiff was ready and was always ready and willing to perform

his part of the contract.

(iii) 2009(2) T.N.C.J.527 (Mad) " T.G. Pongiannan v. K.M. Natarajan and Another, certain excerpts from it would run thus:

28. The learned Counsel for the Defendants would submit that the trial Court did not look into the factum of readiness and willingness on the part

of the the Plaintiff to perform his part of the contract and the first appellate Court also did not apply its mind on that aspect. Obviously, the first

appellate Court thought fit to set aside the judgment of the lower court on the ground that the very Ex.A1 itself was not intended to be an

agreement to sell.

29. Alternis visibus, the argument of the learned Counsel for the Defendants would be to the effect that in the event of this Court finding fault with

the judgment of the first appellate Court, the matter has to be remitted back to the first appellate Court for considering as to whether the Plaintiff

was ready and willing to perform his part of the contract.

30. At this juncture, I would like to point out that such an alternative argument failed to hold water or carry conviction with this Court, for the

reason that it is not the case of the Defendants anywhere either in the reply to the pre-suit notice or in the written statement that the Plaintiff was not

ready and willing to perform his part of the contract. On the contrary, the stand of the Defendants was that the Plaintiff and the Defendants did not

enter into an agreement to sell at all. Whereas, the Plaintiff in his plaint, in commensurate with Section 16(c) of the Specific Relief Act, 1963 clearly

and categorically, unambiguously and unequivocally pointed out that he has been ready and willing to perform his part of the contract.

31. Trite the proposition of law is that in the absence of any plea on the part of the Defendants, they cannot expect the Court to concentrate on a

point on its own accord.

9. A mere perusal of all those Judgments would exemplify and demonstrate that the relief of specific performance, no doubt is a discretionary

remedy and the Court is expected to exercise its judicial discretion in ordering specific performance. The Plaintiff who seeks specific performance,

as per Section 16 of the Specific Relief Act, should necessarily approach the Court with clean hands and there should not be any falsehood on the

part of the Plaintiff. In this background, the Judgments of the Courts below have

to be analyzed in the light of the evidence available on record.

10. A mere poring over and perusal of the case records would exemplify and demonstrate that the Courts below held that the evidence of P.W.2

and P.W.3-the attesting witnesses to Ex.A1-the agreement to sell are in corroboration of the evidence given by P.W.1 and no material

contradictions could be highlighted by the Defendant. Relating to the fact as to why in Ex.B1 as well as in Ex.A1 a sum of Rs. one lakh was stated

to be as the sale consideration, P.W.3 would state that there was no increase in value in that area. However, such a question was not even put to

P.W.1

11. To the risk of repetition and pleonasm, but without being tautologous, I would like to refer to the trite proposition of law that mere inadequacy

of sale consideration would not be a ground for refusing to enforce specifically the agreement to sell.

12. The fact remains that in the written statement there is no detailing or delineation of the alleged loan transaction. There is no reference to any

payment of interest. However, only in the chief examination affidavit of D.W.1 there is some reference to the alleged usurious interest demanded by

the Plaintiff.

13. The lower Court advertent to Ex.A3-the legal notice dated 2.11.2002 would give a finding that had the Plaintiff been only a creditor, he would

not have chosen to issue such a notice to the Electricity Department to the effect that the first Defendant, pending execution of sale deed, should

not get electricity connection and develop the land concerned. I could see considerable force in the inference made by the trial Court. Here, there

is nothing to indicate that the first Defendant of his own accord came forward to discharge the loan. In fact, in response to the Plaintiff's lawyer's

notice-Ex.A10, dated 8.11.2002, the reply notice-Ex.A12 dated 14.11.2002 emerged, which would contain that there was one year's time for

repaying the loan amount and even there, there was no whisper at all regarding payment of interest.

14. The learned Counsel for the first Defendant would invite the attention of this Court to the following sentence in the cross-examination of P.W.2:

Vernacular (Tamil) Portion Deleted

15. The learned Senior counsel for the Plaintiff would explain and expound that

such a sentence in isolation should not be read quite antithetical to the trite proposition of law that deposition of witnesses should be understood by reading the whole deposition and not certain sentences in isolation.

16. The fact remains that before giving such an answer extracted supra, the first Defendant denied the alleged factum of loan as well as the alleged agreement relating to payment of interest, and in such a case, simply because lastly such a sentence, extracted supra, emerged in the cross-examination of P.W.2, it cannot be taken as the sole criterion to decide the issue to the effect that the transaction contemplated in Ex.A1 is a loan transaction; wherefore such an approach would be anathema to justice and fair play.

17. Notwithstanding D.W.2 deposed in support of D.W.1, the versions of D.W.2 had not been found reflected in the written statement itself.

Hence, such evidence cannot be relied on.

18. At this juncture, I recollect and call up the maxim ""Judicis est judicare secundum allegata et probata" " It is the duty of a judge to decide according to facts alleged and proved.

19. Any amount of evidence without the back up of the pleadings should be eschewed. As such, both the Courts below considered in detail the depositions of the witnesses and also the documentary evidence and arrived at the conclusion justly.

20. In this case, the scribe of Ex.A1 was not examined on either side and since the Plaintiff examined both the attesting witnesses the first

Defendant cannot raise his accusative finger as against the Plaintiff for such non-examination of the scribe. If at all the Defendant wanted to examine

him, he could have done so, but he has not chosen to do so.

21. It is a run of the mill proposition that the onus of proof is ambulatory and static. Here, the Plaintiff, by examining P.W.2 and P.W.3 " the

attesting witnesses to Ex.A1, in addition to examining himself, shifted the burden to the first Defendant and he did not simply fobbed off the burden.

But the first Defendant, by examining D.W.2 along with him failed to discharge the burden cast on him.

22. I recollect the following maxims:

(i) Affirmatis est probare " He who affirms must prove.

(ii) Affirmanti, non neganti incumbit probatio " The burden of proof lies upon him who affirms, not upon one who denies.

23. The plea of loan transaction is the defence theory and it is for D1 to prove it. Hence, once the burden got shifted on the Defendant's side, D1

ought to have proved his plea, but he did not do so.

24. The learned Counsel for the first Defendant would cite the following decisions:

(i) N.P. Thirugnanam (D) by L.Rs., Vs. Dr. R. Jagan Mohan Rao and others, ;

(ii) S. Rangaraju Naidu Vs. S. Thiruvarakkarasu, ;

(iii) Tejram Vs. Patirambhau, ;

(iv) His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, ;

(V) Kanshi Ram Vs. Om Prakash Jawal and others, .

(vi) K. Narendra Vs. Riviera Apartments (P) Ltd., .,

(VII) 2001(1) CTC 200 - Pankajam Parthasarathy and Five Ors. v. Kasturi Guna Singh

(viii) (2001) 3 SCC 316 - V. Muthusami (Dead) By Lrs. v. Angammal and Ors.

(ix) 2007 1 LW 318 - V.K. Bhuvaneswari v. N. Venugopal

(x) 2007 1 LW 267 " A. Ganapathy v. S. Venkatesan

(xi) 2007 2 LW 791 "1.Chinnakannu Naidu, 2. Saroja V. Chinnappan

(xii) 2007(1) MLJ 479 " Senbagasundari v. Kothandapani Pillai

(xiii) Sita Ram and Others Vs. Radhey Shyam,

25. A mere reading of those decisions would clearly exemplify that once the Plaintiff discharges his burden of proof in proving that Ex.A1 is a

genuine document, then as a sequale, he is entitled to specific performance and that cannot be denied. No doubt, granting the relief of specific

performance is a discretionary one and adhering to Section 20 of Specific Relief Act, it can be rejected.

26. The core question arises as to whether the first Defendant in his evidence highlighted the hardship.

27. D1 would only plead that the transaction, as contained in Ex.A1, is not a real transaction relating to agreement to sell, but only a loan

transaction and nowhere it is found set out in what manner if specific performance is enforced, he would be prejudiced or he has not even

highlighted as in what manner Section 20 of the Specific Relief Act is attracted in his favour.

28. From the perusal of the aforesaid precedents, it is clear that if the Plaintiff established his right to get specific performance, as a normal Rule, it

has to be granted and unless the facts and circumstances attract and the plea that as an exception alone Section 20 of the Specific Relief Act.

29. Once again, the burden was on the Defendant to display and demonstrate as to how it was inequitable to enforce the agreement to sell, but he

has not projected any evidence in that regard. But on the other hand, well before the expiry of one year period contemplated in Ex.A1, so to say,

even during the month of November 2002 itself, the Plaintiff took active steps to get the agreement enforced. As such, strictly in compliance with

Section 16 of the Specific Relief Act, the Plaintiff expressed his readiness and willingness to perform his part of the contract, but it was the

Defendant, who backed out of his commitment.

30. The learned Counsel for the first Defendant would submit that the Defendant was a poor agriculturists and owing to adverse circumstances,

without knowing that he was making a rod for his own back, he simply signed the agreement, for which he should not be penalized.

31. However, P.W.3, no doubt the Sambandhi of P.W.1, would state that earlier he entered into an agreement to sell as per Ex.B1 with D1 and

since he did not want to proceed with the agreement, he got his advance back and in turn P.W.1 entered into such an agreement to sell Ex.A1 and

under that he paid the said advance. No doubt, P.W.1 would state that even as on the date of emergence of Ex.A1, he was having the full sale

consideration, but on the same day, the sale deed was not got executed in his favour from the Defendant, for which the explanation that would be

forthcoming from P.W.1 during cross was that it was the first Defendant who wanted him to put such a time clause in the agreement stipulating one

year period for performance.

32. Simply because a period of one year is contemplated for performance, despite the Plaintiff having money with him, no adverse inference could

be drawn and that too, in the wake of an explanation forthcoming from the Plaintiff that the Defendant in fact wanted to incorporate such a "time

clause" in the agreement.

33. Here a little, there a little inconsistencies which occurred in the pleadings and evidence on the Plaintiff's side should not be taken as the decisive

factors for deciding the lis. Considering the pro et contra and the over all circumstances, the case has to be decided. Accordingly if seen, I could

see no perversity or illegality in the conclusion arrived at by both the Courts below and the first Defendant failed to discharge his burden.

34. During the pendency of the second appeal M.P.2 of 2011 was filed by D2 under Order 41 Rule 27 of C.P.C for adducing additional evidence

by way of filing the following two documents:

1. Proceedings of Chief Engineer TNEB, dated 19.1.2009

2. Proceedings of Chief Engineer, TNEB dated 19.1.2009

35. However, counter was filed by the Plaintiff resisting the said application.

36. The learned Counsel for the Defendant would implore and entreat that the Plaintiff's son-in-law who is none but the son of P.W.3 is working in

the Electricity Department and doing money lending business in the name of the Plaintiff and P.W.3, whereupon, departmental proceedings were

taken as against him and he was also punished as evidenced by the aforesaid additional documents.

37. I would like to point out that such evidence is totally untenable before the civil Court. Simply because the Plaintiff's son-in-law was taken to

task by his employer that he was doing money lending business etc. and even touching upon the suit transaction, the first Defendant would not be

justified in putting it as evidence before the civil Court, which is expected to decide the case based on the evidence before it and not based on any

departmental proceedings initiated as against the relative of the Plaintiff. As such, I could see no merit in this petition and it is dismissed.

38. In view of the ratiocination adhered to above, the Substantial Questions of Law are decided in favour of the Plaintiff and as against the first

Defendant as under:

Substantial question of law (i) is answered to the effect that the Courts below have not committed any error in omitting to consider the evidence of

D.W.2 and in giving their findings because the courts below based their judgments au fait with correct proposition of law and au courant with

relevant and crucial evidence available on record.

Substantial Question of Law (ii) is answered to the effect that the Courts below have not committed any error in not rejecting the prayer for

specific performance as per Section 20 of the Specific Relief Act.

As such, I could see no merit in the second appeal and it is dismissed. However, there is no order as to costs.