
(2014) 06 MAD CK 0231

In the Madras High Court

Case No : A.S. No. 1089 of 2009 and Cross-Objection No. 159 of 2010

P. Samiappan

APPELLANT

Vs

Rukmani
R. Venkatachalapathy Vs P. Samiappan

RESPONDENT

Date of Decision : 19-06-2014

Acts Referred:

Citation : (2014) 4 CTC 330 : (2014) 3 LW 781 : (2014) 6 MLJ 294

Hon'ble Judges : Pushpa Sathyanarayana, J

Bench : Single Bench

Judgement

Pushpa Sathyanarayana, J.—The Plaintiffs are the Appellants. The Suit O.S. No. 333 of 2006 having been dismissed by the Additional District Judge, Coimbatore at Tiruppur, by Judgment and Decree dated 31.8.2009, with regard to the prayer for Specific Performance of Agreement of Sale, the Plaintiffs have come forward with this Appeal. The Appellants/Plaintiffs filed the Suit for Specific Performance to direct the Defendants to perform the contract and to execute and register the Sale Deed in respect of the Suit property pursuant to the agreement dated 19.10.2004 and for a direction to deliver vacant and actual possession of the Suit property at the time of sale, and alternatively, to direct the Defendants 1 to 4 & 6 to execute the Sale Deed for their undivided 4/5th share or in the alternate, to direct them to return the sum of Rs. 1,75,000/-.

2. As per the Plaint averments, the Suit property originally belonged to one Rangasamy Gounder, who had purchased the same on 23.12.1970 by virtue of registered Sale Deed. The First Defendant is the wife of Rangasamy Gounder and Defendants 2 to 4 are his children while the Fifth Defendant is his daughter-in-law and the Sixth Defendant is his grandson. After the death of Rangasamy Gounder, the property devolved on his Legal Heirs. The Plaintiffs and the Defendants entered into an Agreement dated 19.10.2004, to sell the property and the said Agreement was duly signed by them. On behalf of the minor Defendant, the Second Defendant has signed the Agreement. As per the Agreement, the Sale consideration was fixed at Rs. 8,50,000/- and a sum of Rs.

1,50,000/- was paid towards advance, on the same date and the time fixed for execution of the Sale Deed was four months. After receipt of the balance of sale consideration, it was agreed by the Defendants that they shall measure and fix the demarcation stones for the property. It was also agreed that in the event of the Defendants committing default on their part of the terms and conditions, the Plaintiffs are entitled to enforce the same through Court. As there was a delay in measuring and fixing the demarcation stones, the Defendants requested for some time for which the Plaintiffs also agreed. On 24.11.2004, a further sum of Rs. 25,000/- was paid by the Plaintiffs. With that, the outstanding to be paid was Rs. 6,75,000/-. Despite the fact that the Plaintiffs were ready with the money to execute their part of the contract, the Defendants have been delaying the execution of the Sale Deed. Therefore, the Plaintiffs issued a Legal Notice Ex. A. 3 on 11.2.2005 which was received by the First Defendant on 15.2.2005 and issued a reply on 1.3.2005. It is contended in the Plaint that the First Defendant, after receiving the Legal Notice, met the Plaintiffs along with the other Defendants and expressed their inability to measure the Suit property and fix the demarcation stones. The Plaintiffs also had issued an amended Legal Notice on 12.4.2006 and again, on 13.4.2006, another Notice was issued by the Plaintiffs calling upon the Defendants to execute the Sale Deed in their favour. The Plaintiffs also undertook to deposit the balance sale consideration into Court if the Court directs them to do so. It is further seen that the Plaintiffs also amended the Plaint as the Fifth Defendant could not sign the agreement binding her 1/5th share in the Suit property. Therefore, the Plaintiffs had stated that insofar as the 4/5th share is concerned, there is a concluded contract and if, for any reason, the Court finds that the Agreement is not binding regarding the 1/5th share of the Fifth Defendant, the Plaintiffs will be satisfied to take a decree only for 4/5th share. The Plaintiffs had also asked for an alternative relief of refund of advance with interest. As the sale did not come through as per the Agreement, the Suit was laid for Specific Performance of the Agreement dated 19.10.2004 with respect to an undivided 4/5th share in the Plaint property and deliver possession of the same or in the alternative, to refund the advance amount of Rs. 1,75,000/- paid.

3. Resisting the Suit, the Defendants filed Written Statement. The first objection taken by the Defendants was that there was no concluded agreement as alleged in the Plaint. It is stated that one of the sharers, viz., Komalam was not available to sign the agreement as she has been in U.S.A. from that time. The Defendants also denied receipt of any sum, much less advance sale consideration of Rs. 1,50,000/-. Further, the allegation that an additional sum of Rs. 25,000/- was paid on 24.11.2004, was also denied by the Defendants. Even if the Agreement is held to be true, the Plaintiffs have not pleaded that they were ready and willing to perform their part of contract and the Suit is barred by limitation. They, therefore, prayed for dismissal of the Suit.

4. Before the Trial Court, the Second Plaintiff examined himself as PW 1 besides examining one Natarajan as PW 2 and marked Exs. A1 to A21. On the side of the

Defendants, the Second Defendant-R. Venkatachalapathy and Fourth Defendant Devi examined themselves as DW 1 & DW 2 and marked Ex. B1 copy of Sale Agreement dated 19.10.2004.

5. On an analysis of the evidence placed before the Trial Court, the learned Judge found that Ex. A1 is not a concluded contract and declined to grant the relief of Specific Performance of Agreement of Sale but, however, decreed the Suit in respect of the prayer for refund of advance, in part with proportionate costs against the Second Defendant for Rs. 1,75,000/-. The Suit was dismissed against the other Defendants. The non-suited Plaintiffs before the Trial Court have preferred this Appeal.

6. From the materials available on record, it is seen that the Plaintiffs have filed the Suit for Specific Performance seeking to enforce an Agreement of Sale, viz., Ex. A1 dated 19.10.2004. The total sale consideration as per the Agreement was Rs. 8,50,000/- and a sum of Rs. 1,50,000/- was paid as advance on the same day. Four months time was fixed for performance of the contract. It is also evident from Ex. A2 that the Plaintiffs paid a further sum of Rs. 25,000/- on 24.11.2004. As the Defendants did not come forward to execute the Agreement, the Plaintiffs issued a Notice through their Counsel, on 11.2.2005 under Ex. A3 which was received by the First Defendant on 15.2.2005 and he sent a reply on 1.3.2005 under Ex. A5. Thereafter, the Plaintiffs again issued Ex. A10 dated 13.4.2006 wherein it has been stated that the Plaintiffs have not paid the entire sale consideration and the averments mentioned in Ex. A3 were due to oversight and typographical error. After issuing Ex. A10, the Plaintiffs once again, issued another Notice under Ex. A12 dated 13.4.2006 calling upon the Plaintiffs to come to the Registrar office to execute the Sale Deed, on 18.4.2006 since they did not comply with the previous Notice. As there was no response from the Defendants, the Suit came to be filed.

7. It is also seen that the fifth party in Ex. A1-Agreement, Smt. Komalam, daughter-in-law of Rangasamy Gounder, had not signed the Agreement as she was residing outside India. In the Written Statement, the main attack of the Defendants was that the contract was not a concluded contract. It is to be seen that originally the Suit was filed for the entire property and thereafter, it was amended excluding the 1/5th share of the said Komalam. The Defendants further submitted that the Plaintiffs were not ready to perform their part of contract and the time was also the essence of contract. The Defendants also had marked the agreement as Ex. B1, which is a copy of Ex. A1.

8. Now, the points arise for consideration in this Appeal are:

(i) Whether there is a concluded contract under Ex. A1?

(ii) Whether the Plaintiffs are entitled to decree for Specific Performance?

9. Learned Counsel appearing for the Defendants would submit that when the Plaintiffs approached the Defendants for purchase of the Suit property, it was

specifically expressed to them that since one of the sharers was not available to sign the contract, the property cannot be sold in her absence. However, the Plaintiffs expressed that only for the purpose of reducing the agreed terms in to writing, Ex. A1 was to be written, and that it will not be specifically enforced and believing the words of the Plaintiffs, the Defendants had signed in Ex. A1.

10. From a perusal of Ex. A1, it can be seen that excepting the fifth party, viz., Komalam, all the other parties have signed. Merely because one of the parties, who is one of the undivided sharers has not signed, whether the Ex. A1 can be termed as not concluded contract.

11. In this regard, it would be relevant to refer to the deposition of DW 1 R. Venkatachalapathy, who has deposed as follows:

12. The deposition of DW2 is also relevant in this regard. The relevant passage of the same is extracted below:

13. From the above depositions of DWs. 1 & 2, to decide whether the Agreement-Ex. A1 is a concluded contract or not, it would be suffice to analyse the point whether the parties have settled their terms of contract under Ex. A1. If it is agreed between the parties that the Agreement was reduced to writing only to settle down the final terms and conditions, certainly, it can safely be concluded that Ex. A1-Agreement is a concluded contract. The Defendants who are the signatories to Ex. A1-Agreement, had clearly deposed in their evidence that they have settled the terms, viz., extent of the properties, sale consideration and the time for performance. The only reason stated by the Defendants for not performing their part of contract was that the Fifth Defendant party Komalam has not signed the contract and they were waiting for her arrival to execute the Sale Deed. The said defence, according to him, may be proper, because of the other terms and conditions of the contract, which have been set out in Ex. A1 with clear and unambiguous terms and non-availability of one of the party, who has not signed the Agreement, will not invalidate the Agreement. Therefore, I have no hesitation to hold that the Agreement is a concluded contract.

14. In support of his contention, learned Counsel for the Plaintiffs relied on the decision of this Court in P.A.K.A. Shahul Hamid Vs. A. Abdul Rashid Khan (died) and Others, , wherein it has been held as follows:

Ex. A1-Sale Agreement, admittedly was not signed by Respondents 10 & 11, though it is purported to be by all the parties including Respondents 10 & 11. In all the pages of Ex. A1, the places where the Respondents 10 & 11 should have signed remained blank. So there is no proof that Respondents 10 & 11 also agreed to sell their respective shares in the Suit property.

We have to see whether Respondents 1 to 9 atleast agreed to sell their share in the Suit property to the Appellant and whether in view of the fact that Respondents 10 & 11 did not join in Ex. A1-Sale Agreement, there was no agreement even by Respondents 1 to 9 in respect of their share and in other

words, whether the contemplated agreement was one and indivisible.

In the light of Ex. B3 and the original Written Statement, it is clear that what is deposed by DWs. 1 & 2 that unless Defendants 10 & 11 joined in the Sale Agreement, there was no contemplation of sale at all, cannot be believed at all. It is clear that there is a valid and enforceable contract between Respondents 1 to 9 on the one hand and the Appellant on the other hand.

15. The above case is similar to the set of facts in the present case. Therefore, placing reliance on the above decision, I am to hold that as per Ex. A1, there is a concluded contract between the parties, whoever had executed the same. Question No. 1 is answered accordingly.

16. Learned Counsel appearing for the Appellants also relied on the following decisions:

- (a) Pandurang Ganpat Tanawade Vs. Ganapat Bhairu Kadam and others, ;
- (b) Syed Dastagir Vs. T.R. Gopalakrishnasetty, ;
- (c) Manzoor Ahmed Margray Vs. Gulam Hassan Aram and Others, ;
- (d) Surinder Singh Vs. Kapoor Singh (Dead) th. Lrs. and Others, ;
- (e) P.C. Varghese v. Devaki Amma Balambika Devi and others, AIR 2006 SC 145;
- (f) Most. Etwari Devi and Others Vs. Most. Parvati Devi, ;
- (g) Shri Rameshwar Prasad (d) by L. Rs. Vs. Shri Basanti Lal ;
- (h) Alka Bose Vs. Parmatma Devi and Others, ;
- (i) Kammana Sambamurthy (D) by LR. Vs. Kalipatnapu Atchutamma (D) and Others, ;
- (j) Coromandel Indag Products (P) Ltd. Vs. Garuda Chit and Trading Co. P. Ltd. and Another, ;
- (k) Rattan Lal (since deceased) through His Legal Representatives Vs. S.N. Bhalla and Others, ;
- (l) Mrs. Leela Raghavan and 2 others Vs. Zacheria and 8 others ; and
- (m) B. Rajamani Vs. Azhar Sultana and Others, .

17. The next question to be answered is whether the Plaintiffs are entitled for discretionary relief of Specific Performance. It is well settled principle that the Plaintiff, who comes to the Court claiming the discretionary relief of Specific Performance has to satisfy the Court whether he has got an unblemished conduct right from the date of execution of the agreement till the end of the proceedings. To decide this issue, the factual aspects have to be gone into.

18. Firstly, it is to be seen whether the Plaintiffs were ready and willing to

perform their part of the contract from day one. Secondly, whether the Plaintiffs have come to Court with clean hands. The third aspect would be whether the Suit has been laid within the time prescribed.

19. In Paragraph 6 of the Plaint, the salient features of Agreement for Sale under Ex. A1 have been incorporated. For better appreciation of the case, the same may be usefully re-produced hereunder:

a. That the total sale consideration fixed is Rs. 8,50,000/- and the Defendants have received sum of Rs. 1,50,000/- from the Plaintiffs in the presence of the attester of the sale price on the date of Agreement of Sale.

b. That the Defendants sell and convey the Suit property in favour of the Plaintiffs and register the same at the costs of the Plaintiffs, within the period of four months (4) from the date of Agreement for Sale, after receiving the balance of the sale consideration.

c. It was further agreed and undertook by the Defendants to obtain the necessary Encumbrance Certificate for the property for the period of 14 years and also to produce all the receipts for payments of all taxes inclusive of the Kist Receipt relating to the Suit property.

d. It was further agreed that the Defendants shall measure the lands and fix the demarcation stones at their costs.

e. It was further agreed that in the event of the Defendants commit default in discharging their part of the terms and conditions of the Agreement for Sale, the Plaintiffs are entitled to seek and enforce Specific Performance of the Agreement for Sale through a Court of justice.

f. The Defendants also agreed and undertook to put the Plaintiffs in possession of the Suit property after the lands are measured afresh and demarcation stones are fixed.

20. From a reading of the above said salient features incorporated in the Agreement for Sale, I find that excepting (a) & (b), the rest of the clauses are not found in the Sale Agreement-Ex. A1. The Defendants have agreed to obtain the Encumbrance Certificate for 14 years and produce all the tax receipts, inclusive of the kist receipts for the Suit property. Even regarding Clause (d), whether it was agreed by the Defendants to demarcate the land and fix the stones, the same is absent in the agreement. Insofar as Clause (e) is concerned, the Plaintiffs have referred that in case of default on the side of the Defendants, the Plaintiffs are entitled to seek enforcement of the agreement for the purposes through Court of law. The above said Clause (d) finds place in the Agreement. However, the Plaintiffs have conveniently given up the essential condition before going to Court, viz., to deposit the balance of sale consideration into Court, then seek for relief of Specific Performance. The said Clauses found in the Agreement read as under:

21. Despite agreeing to a specific condition that the Plaintiffs have to deposit the entire amount or entire sale consideration before the Court and proceed to file the Suit, the Plaintiffs have conveniently given a go-by to the same. Learned Counsel for the Defendants also pointed out that the Plaintiffs have not deposited the sale consideration as agreed in the Agreement. But, by way of reply, learned Counsel for the Plaintiffs submitted that though it is mentioned in the Agreement to deposit the balance of sale consideration before proceeding to Court, it is not mandatory to deposit excepting by direction of the Court. Having agreed to deposit the money as per the precondition and having failed to do so, at least, in my considered opinion, the Plaintiffs in all fairness, ought to have mentioned the same in the Plaint. The Plaintiffs have deliberately failed to do so and in view of such omissions, it could be concluded that the Plaintiffs have not come to Court with true set of facts.

22. At this juncture, it would be relevant to advert to Ex. A3-Notice dated 11.2.2005 and the relevant passage reads as follows:

.... Our client paid the further part of the sale consideration of Rs. 25,000/- to you on 24.11.2004. Our clients have since paid the balance sale consideration of Rs. 6,75,000/-, which has been acknowledged by all of you. Our clients have been ready and willing and insisting on all of you to register the Sale Deed in their favour of their cost....

23. From a reading of the above extract, it can be seen that the Plaintiffs have claimed that they have paid the entire balance sale consideration and the same was acknowledged by the Defendants. The First Defendant gave a reply to the same under Ex. A5 dated 1.3.2005 denying the execution of the agreement and also denying any payment of advance and the further payment of Rs. 25,000/- 25,000/- and the balance sale consideration as mentioned in Ex. A3. Under Ex. A5, the First Defendant has denied both the execution of agreement and receipt of money. After the receipt of Ex. A5, the Plaintiffs have issued an amended Notice under Ex. A10 on 13.4.2006, i.e., after one year and 2 months, to the learned Counsel for the Defendants stating that due to oversight and typographical error, it was mentioned that balance sale consideration of Rs. 75,000/- was paid further stating that they are ready and willing to pay the balance amount. The relevant passage in Ex. A10 is extracted below:

Even now my clients are ready and willing and insisting on all of your clients to register the Sale Deed in my client's favour of their cost and ready to pay the balance sale consideration of Rs. 6,75,000/-.

24. Again, on the very next day, i.e., on 13.4.2006, the Plaintiffs issued another Notice under Ex. A12, to the Defendants and Komalam and the relevant passages are usefully extracted below:

2. Our clients have to pay the balance sale consideration amount of Rs. 6,75,000/- which has been acknowledged by all of you.

... ..

4. After receipt of the said notice, all of you, met our clients requested one year time to execute a Sale Deed in favour of our clients.

... ..

5. Our clients have already performed their part of agreement fairly....

25. Before going into the averments in Exs. A3, A10 & A. 12, it would be appropriate to refer to Ex. A5 dated 1.3.2005, Reply Notice of the First Defendant, wherein it has been mentioned that Defendants 2 to 4 & 6 are not residing in the address mentioned in the notice and they are living at different places. The Plaintiffs, once again, had issued Ex. A10 to the same address. In Ex. A5, it has been referred to that after issuance of Ex. A3, all the parties including Komalam met the Plaintiff and sought for a year time to execute the Sale Deed and the reason stated was that Komalam was residing outside India. The Plaintiffs have mentioned in the Notice that the Defendants had sought for time for performing their part of contract citing the non-availability of Komalam. The averments made by the Plaintiffs cannot be accepted to be true and the same are illogical because the First Defendant had clearly expressed their desire not to perform their part of contract under Ex. A5. In this regard, it is relevant to advert to the pleadings in Paragraphs XII & XIII in the Plaint, which is extracted below:

XII. There upon, the Plaintiffs issued a Legal Notice dated 11.2.2005 by registered post, through their Counsel calling upon the Defendants to complete the contract. The 1st Defendant received the Legal Notice on 15.2.2005 and the issued a false and vexatious reply to the Plaintiffs on 1.3.2005. The other Defendants are refused to receive the above said Legal Notice. The above said Legal Notice and acknowledge, postal return covers, and reply notice are produced herewith.

XIII. The 1st Defendant received the Legal Notice and met the Plaintiffs along with the Defendants and expressed their inability to measure the Suit property and plant the demarcation charge over the 4/5 share of the Plaint Schedule property for the due payment of the advance amount, interest and cost.

26. A combined reading of Notice under Ex. A12 and the pleadings in the above mentioned paragraphs are not only contradictory but they are mutually destructive. The reasons assigned in the Legal Notice is that the Defendants had sought for time due to non-availability of Komalam. Whereas, in the Plaint, it has been pleaded that the time was sought to measure the Suit property and plant demarcation stones. In the cause of action paragraph in the Plaint also, absolutely, there is no averment that the Defendants met the Plaintiffs immediately after issuance of Ex. A3-Notice. If really, the Defendants had sought time to perform their obligation, the Plaintiffs would have given an assertive statement. From the above, the act of the Plaintiffs in giving different statements at different points of time creates cloud over their conduct. The Plaintiffs have

raised all kinds of false pleas before the Court when they are asking for discretionary relief of Specific Performance, which would disentitle them for the same. When the Agreement specifically stipulates a condition that the Plaintiffs have to deposit the balance of sale consideration at the time of filing of the Suit, the Plaintiffs have given a goby for the same.

27. In view of the above findings, I have no hesitation to hold that the Plaintiffs have set up a false case and approached the Court with unclean hands and, therefore, they are not entitled to a discretionary relief of Specific Performance.

28. Insofar as the question of readiness and willingness is concerned, in Paragraph 9 of the amended Plaint, the Plaintiffs have pleaded that they are ready and willing to perform their part of contract. However, the same is not challenged by the Defendants. Even in the Additional Written Statement, the readiness and willingness was not challenged. However, it can be seen from Ex. A20-Statement of Accounts filed by the Plaintiffs, the Plaintiffs were not possessed of the Sale consideration of Rs. 6,75,000/- on that date. When the Plaintiffs have specifically pleaded that they were ready and willing to perform their part of the contract, it is for them to prove the same and the readiness and willingness should be there throughout the proceedings. It is the trite position of law that the Plaintiff has to fail or succeed on the strength of his own case and not take advantage of the lacuna in the case of the Defendants. In the instant case, the Plaintiffs, having failed to demonstrate their readiness and willingness, cannot take advantage of the fact that the same is not challenged by the Defendants. Therefore, I am of the considered opinion that the Plaintiffs were not ready and willing to perform their part of contract.

29. Insofar as the alternate relief of refund is concerned, the Second Defendant, on his behalf and also on behalf of his son Fifth Defendant, has filed a Cross-Objection. The Plaintiffs had stated that they had paid a sum of Rs. 1,50,000/- as advance on the date of Agreement and further a sum of Rs. 25,000/- as per Ex. A2. The execution of Ex. A1 is admitted by the defendants in their Written Statement in clear terms. Hence, the burden of non-receipt of Rs. 1,50,000/- is on the Defendants. There is absolutely no positive evidence on the part of Defendants for non-receipt of the sum of Rs. 1,50,000/-. Therefore, there is no difficulty to hold that the Defendants received Rs. 1,50,000/-. Now the question to be decided is whether the Plaintiffs are entitled to receive the further sum of Rs. 25,000/- as per Ex. A2.

30. The Defendants had specifically denied and disputed the receipt of Rs. 25,000/-. It would be normal practice of any party to record further transaction by way of acknowledgment or enforcement. The Plaintiffs herein contend that Ex. A2 is a Receipt issued. Once the execution of Ex. A2 itself is denied, the burden is on the Plaintiffs to satisfy the execution of Ex. A2. The Second Plaintiff, who was examined as PW 1, in his chief-examination had stated about the execution of Ex. A2. Admittedly, there is no witness to the execution of Ex. A2. It would be useful to extract the relevant portion hereunder:

31. From the above, it is clear that there is no positive evidence on the part of the Plaintiffs to establish the payment of further sum of Rs. 25,000/-. The Plaintiffs are expected to plead and lead evidence as to when, where and before whom such amount was paid. In the absence of the same, it can be held that there is no positive and plausible evidence for payment of further sum of Rs. 25,000/-. The Trial Court, unfortunately, without going into the aspect of further payment of Rs. 25,000/-, had denied the alternate relief without assigning any reasons. In view of the above findings, I am inclined to decree the Suit for alternative remedy only to the tune of Rs. 1,50,000/- with 12% interest p.a., from the date of Agreement to the date of Decree and at 6% thereafter till the date of payment. Accordingly, the Judgment and Decree of the Trial Court is modified with regard to alternative remedy. As regards relief of Specific Performance of Agreement of Sale, the Appeal stands dismissed confirming the Judgment and Decree of the Trial Court. However, in the circumstances of the case, there shall be no order as to cost.

In view of the foregoing discussion, the Cross-Appeal preferred by the Defendants 2 & 5 against the decreeing of alternative relief, is allowed in part.