(2010) 11 KAR CK 0069

In the Karnataka High Court

Case No : Regular First Appeal No. 812 of 2005

T.M.C. Basanna — APPELLANT

Vs

Pavithra Halakatti, Mr. Hara. C. Halakatti and Mrs. Sheela Hara — RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : (2010) 11 KAR CK 0069

Hon'ble Judges : K.L. Manjunath, J;B. Manohar, J

Bench : Division Bench

Advocate : Padmanabha Mahale, for R. Nataraj, for the Appellant; Brijesh Patil, for R. 1 to 3, for the Respondent

Judgement

K.L. Manjunath, J.—The legality and correctness of the judgment and decree passed by the XI Additional City Civil Judge, Bangalore dated 22-2-2005 passed in O.S. No. 857/04 is called in question by the Appellant herein.

2. Appellant was the Defendant in the suit and the Respondents were Plaintiffs before the court below.

3. The facts leading to the filing of this appeal are as hereunder:

Defendant is the owner of the property bearing No. 9/3, Richmond Road, Bangalore. Under an agreement dated 9-7-2003, the Appellant-Defendant agreed to sell the same in favour of the Plaintiffs for a sum of Rs. .1,70,00.000/- and on the date of the agreement, a sum of Rs. .25,00,000/- was paid as advance. The balance sale consideration of Rs. .1,45,00,000/- was to be paid at the time of registration of the sale deed. The time stipulated to execute the sale deed was on 15th December 2003. The Plaintiffs further stated that in order to secure the better title, a paper publication was also issued inviting objections if any, by the third parties to complete the dealings. Accordingly, it was notified in English daily Deccan Herald dated 16-07-2003. The Plaintiffs did not receive any response to the said public notice. Thereafter, the Plaintiffs made arrangements to pay the balance sale consideration of Rs. .1,45,00,000/-. Accordingly, a legal notice was got issued on 25-8-2003 calling upon the Defendant to execute the sale deed. On the ground that the Defendant was unwell, the sale deed could not be executed. However, the power of attorney was executed on 21-8-2003 authorizing his wife to execute the sale deed in favour of the Plaintiffs. The Plaintiffs made arrangements to get the sale deed in the first week of October 2003. Accordingly, the Defendant was requested to appear before the Sub-Registrar on 3-10-2003 at 10.30 a.m. However, the Defendant did not attend the Sub-Registrar office and did not execute the sale deed and thereafter a legal notice was got issued on 1-10-2003 calling upon him to comply with the terms and conditions of the agreement dated 9-7-2003 and to complete the transaction on or before 15-10-2003. In the meanwhile, as the Defendant was trying to alienate the property, a suit for bear injunction was filed by the Plaintiffs against the Defendant in O.S. No. 7638/2003 to restrain the Defendant from dispossessing the Plaintiffs or alienate or creating any third party interest in the schedule property.

4. The Plaintiffs have stated that an application under Order II Rule 2 of CPC was also filed seeking leave of the court to institute a separate suit for specific performance on the same cause of action at a later date. Therefore, filed a suit for specific performance of the agreement to direct the Defendant to execute the sale deed by receiving the balance sale consideration and also to pay a sum of Rs. .5,00,000/- as liquidated damages towards the loss caused to the Plaintiffs for having not executed the sale deed within the stipulated time.

5. The Defendant contested the suit. According to the Defendant, the Plaintiffs were not ready and willing to perform their part of the contract. The Defendant is a close friend of Rajashekhara Murthy and they were friends for a period of 30 years. The second Plaintiff is none other than the son-in-law of Rajashekhara Murthy and the third Plaintiff is the daughter of Rajashekhara Murthy. The Plaintiffs taking advantage of their relationship with Rajashekhara Murthy, prevailed over the Defendant to execute the agreement. According to the Defendant, the sale consideration shown in the agreement was not the actual and final consideration agreed between the parties. It is his contention that the Government itself has fixed the minimum price for the vacant land in the locality at Rs. .4,000/- per sq.ft., which would be more than Rs. .2,50,00,000/-. Therefore, it was contended that there was no consensus-ad-idem between the parties. According to him, considering the market value of the property itself, the Defendant must have taken the difference of Rs. .30,00,000/- between the State Government''s minimum price shown in the agreement. Since the Plaintiffs were not willing to pay the Defendant, the Defendant did not agree to execute the sale deed. In the suit filed by the Plaintiffs for bear injunction, an application was filed calling upon the Defendant to deposit the advance sale consideration of Rs. .25,00,000/- paid by the Plaintiffs to the Defendant. Therefore, the Defendant has returned the amount of Rs. .25,00,000/- with interest at 9% pa.

and the same was deposited to the account of Plaintiffs 1 and 2 and therefore the Plaintiffs cannot maintain a suit for specific performance and it was also contended that the Plaintiffs have not suffered any loss in order to claim the liquidated damages of Rs. .5,00,000/-. It was also contended that the suit for specific performance is not maintainable, hence, the question of paying the liquidated damages does not arise for consideration. Therefore, the Defendant requested the Court to dismiss the suit.

6. Based on the above pleadings, the following issues were framed by the court below:

(i) Whether the Defendant proves that the amount shown in the agreement was not the actual and final consideration agreed between the parties?

(ii) Whether the Defendant proves that there is no conseus-ad-idem between the parties?

(iii) Whether the Plaintiff proves that they have been always ready and willing to perform their part of the contract?

(iv) Whether the time is the essence of the contract?

(v) Whether the Defendant proves that the suit for specific performance is not maintainable for the reasons stated in para-38 of the written statement?

(vi) Is there any cause of action for this suit?

(vii) Whether the Plaintiffs are entitled to the relief of specific performance of contract?

(viii) Whether the Plaintiffs are entitled to a sum of Rs. .5 lakhs along with the interest at the rate of 24% pa. as liquidated damages? and

(ix) To what order or decree?

7. In order to prove the respective contentions, on behalf of the Plaintiffs 3 witnesses were examined as P.W.1 to P.W.3. The first and second Plaintiffs got examined themselves as P.W.1 and P.W.2. One Sri. R. Vishnu Murthy was examined as P.W.3. The Plaintiffs relied upon Ex.P.1 to Ex.P.13. On behalf of the Defendant, he got himself examined as D.W.1 and he relied upon Ex.D1 to Ex.D.18.

8. The Trial Court after considering the evidence let in by the parties held issues 1 to 3 and 7 in the negative and issue Nos. 4 to 6 and 8 in the affirmative. Ultimately the suit filed by the Plaintiff came to be decreed in part directing the Defendant to pay a sum of Rs. .5,00,000/- to the Plaintiffs as liquidated damages and the relief of specific performance sought by the Plaintiffs came to be rejected by its judgment and decree dated 22nd February 2005.

9. Being aggrieved by the judgment and decree passed by the court below directing the Appellant to pay a sum of Rs. .5,00,000/- as liquidated damages,

the Defendant has filed the present appeal. Being aggrieved by the non-amendment of relief of specific performance, the Plaintiffs have not preferred any appeal. Therefore, the judgment and decree of the Trial Court has become final in so far as the rights of the Plaintiffs are concerned.

10. We have heard the learned Counsel for both the parties.

11. Mr. Padmanabha Mahale, learned Senior Counsel appearing for the Appellant submits that the Trial Court has committed a grave illegality in directing the Appellant to pay a sum of Rs. .5,00,000/- as liquidated damages. According to him, the Trial Court did not appreciate the pleadings and the evidence let in by the parties. It is the specific case of the Plaintiffs that they are entitled for specific performance of the contract and it was the prayer of the Plaintiffs that the Defendant should be directed to execute a sale deed by receiving the balance sale consideration of Rs. .1,45,00,000/- and also liable to pay liquidated damages of Rs. .5,00,000/-only on the ground of delay in executing the sale deed by the Defendant to the Plaintiffs. In other words, the liquidated damages claimed by the Plaintiffs was in respect of the loss caused to the Appellants in executing the sale deed at belated period. According to him, when the Plaintiffs could not get the relief of specific performance, the question of directing the Defendant to pay a sum of Rs. .5,00,000/- as liquidated damages on account of delay in executing the sale deed. Therefore, he contends that the Trial Court misdirected in itself about the pleadings and evidence let in by the parties and has wrongly directed the Appellant to pay the liquidated damages of Rs. .5,00,000/-. According to him, how the Plaintiffs have sustained loss and how they are entitled to liquidated damages of Rs. .5,00,000/- has not been discussed and no finding has been given by the court below. He further contends that the Plaintiffs in their evidence did not whisper even a sentence in regard to the loss sustained by them on account of latches committed by the Appellant in executing the sale deed. According to him, to get a decree for awarding liquidated damages of Rs. .5,00,000/-, it is for the Plaintiffs to let in evidence and prove the loss sustained by them, in order to get a decree. In the absence of the evidence, the Trial Court was not justified in directing the Appellant. To pay the liquidated damages of Rs. .5,00,000/-. He further contends that when the Defendant has refunded the advance sale consideration of Rs. .25,00,009/- received by him by the Plaintiff with interest at 9% p.a. and when the same has been received by the Plaintiffs, without prejudice to their rights, the question of considering the loss sustained by the Respondents does not arise at all. According to him, if really the Respondents were interested to purchase the property by paying balance sale consideration, there was no necessity for them to file a civil suit for bear injunction in O.S. No. 7638/2003 and also in the said suit, they had filed an application seeking direction to the Appellant to deposit the advance sale consideration paid by them. The moment application is filed by the Plaintiffs calling upon the Defendant to deposit the advance sale consideration paid by them and on deposit of Rs. .25,00,000/- with interest at 9% p.a. by the Defendant, there would be no cause of action for the Plaintiffs

either to claim the liquidated damages or for specific performance. In the circumstances, he requested the court to allow the appeal and to set aside the judgment and decree.

12. In order to support his arguments, he has relied upon two judgments of the Hon''ble Supreme Court. M.L. Devender Singh and Others Vs. Syed Khaja, decision reported in Union of India (UOI) Vs. Raman Iron Foundry, The learned Counsel relied upon these two judgments and requested this Court to set aside the judgment and decree of the court below.

13. Per contra, learned Counsel appearing for the Respondents contends that the Trial Court is justified in granting a decree for Rs. .5,00,000/- as liquidated damages. According to him, the Plaintiffs were ready and willing to perform their part of the contract. The evidence let in by the Plaintiffs would show that they were ready and willing to perform their part of the contract and also they were ready with the balance sale consideration 10 take the sale deed at their own costs. However, the Defendant evaded to execute the sale deed. Therefore, considering the terms and conditions of the agreement, the Trial Court is justified in awarding a sum of Rs. .5,00,000/- as liquidated damages from the Defendant. According to him, the refund of Rs. .25,00,000/- by the Defendant to the Plaintiffs is his unilateral action and the Plaintiffs never called upon Mm to refund the advance amount of Rs. .25,00,000/-. He further contends that even the amount of Rs. .25,00,000/-deposited by the Defendant unilaterally along with interest at 9% p.a. is inadequate and insufficient. Therefore, considering the fact that the amount of Rs. .25,00,000/- paid by the Plaintiffs to the Defendant, which has been made use by the Defendant and on account of the failure to execute the sale deed by the Defendant within the time stipulated even though the Plaintiffs were ready. The Trial Court is justified in considering the loss sustained by the Plaintiffs. Accordingly, a sum of Rs. .5,00,000/- has been awarded as liquidated damages. Therefore, he requested the court to dismiss the appeal.

14. Having heard the learned Counsel for the parties, the following points are to be considered by us in this appeal:

(i) Whether the Trial Court is justified in granting a decree awarding liquidated damages of Rs. .5,00,000/-and also rejecting the relief of specific performance?

(ii) Whether the Respondents-Plaintiffs have proved the loss sustained by them on account of the conduct of the Defendant in not executing the sale deed? and

(iii) Whether the judgment and decree of the court below requires to be interfered with?

15. Since all the points are inter-linked with each other, we would like to deal with them together.

16. The facts of the case, which are not in dispute are to the following extent:

It is not in dispute that the Defendant agreed to sell the property to the Plaintiffs on 9-7-2003 for a sum of Rs. .1,70,00,000/- and a sum of Rs. .25,00,000/- was paid as advance to the Defendant by the Plaintiffs. However, the Defendant denied that the agreement entered into between them and he disputes the quantum of sale consideration payable by the Plaintiffs to the Defendant. Be that as it may, it is not in dispute that based on the agreement dated 9-7-2003, a suit was instituted by the Plaintiffs for bear injunction restraining the Defendant from alienating the suit schedule property or creating any charge or third party interest over the property. According to the Defendant, in the suit filed by the Plaintiffs for bear injunction, an application I.A. No. IV was filed for a direction to the Defendant to deposit a sum of Rs. .25,00,000/- which was received by him as advance sale consideration and pursuant to the said application, a sum of Rs. .25,00,000/- was deposited on 10-11-2003. A further sum of Rs. .76,500/- was also deposited by the Defendant on 24-11-2003 calculating the interest at the rate of 9% p.a. It is also not in dispute that the Plaintiffs have withdrawn and utilize the said amount deposited by the Defendant with interest. The question is when the Plaintiffs have received the advance sale consideration paid by them the Defendant with interest at 9% p.a. is it permissible for the Plaintiffs to file a suit for specific performance of the contract? and in such a suit, is it permissible for the Plaintiffs to seek a direction to pay a sum of Rs. .5,00,000/- as liquidated damages towards loss sustained by them on account of delay in executing the sale deed?. By looking into the prayer, this Court has noticed that the Plaintiffs have not filed a suit to recover a sum of Rs. .5,00,000/- as liquidated damages towards the loss sustained by them on account of cancellation of the agreement. But, the prayer is to direct the Defendant to pay a sum of Rs. .5,00,000/- towards loss sustained by the Plaintiffs on account of delay in executing the sale deed. But, the court below has not granted the relief of specific performance. If there is no direction to execute the sale deed in favour of the Plaintiffs by the Defendant, the question would be whether the Trial Court is justified in granting a decree directing the Defendant to pay a sum of Rs. .5,00,000/- as liquidated damages, in the background of Plaintiffs receiving the advance sale consideration of Rs. .25,00,000/- with interest at 9% p.a. even before instituting the present suit.

17. We have perused the entire evidence let in by the Plaintiffs. P.W.1-Smt. Pavithra Halhkatti, in paragraph 17 of her examination-in-chief has stated as hereunder:

In the circumstances of the case, we are entitled to a decree of specific performance directing the Defendant to execute and register a sale deed conveying the suit schedule property in our favour in terms of the agreement to sell dated 9-7-2003. In addition to a decree for specific performance, we are also entitled to recover a sum of Rs. .5,00,000/- from the Defendant as damages for the Defendant''s wrongful refusal and consequent delay in execution of the sale deed in terms of the agreement to sell dated 9-7-2003 thereby causing loss to us.

18. P.W.2 the second Plaintiff Harak Chand has not stated anything about his claim of Rs. .5,00,000/''-. Therefore, only sentence available in the evidence of Plaintiffs is as stated above. It is also useful for us to refer to the prayer in the plaint:

(i) Pass a judgment and decree against the Defendant for specific performance directing the Defendant to execute and register the sale deed conveying the suit schedule property in favour of the Plaintiffs in terms of the agreement to sell dated 9-7-2003 and also to direct ''he Defendant to pay a sum of Rs. .5,00,000/- as damages for wrongful refusal to execute the sale deed and consequent delay along with interest at the rate of 24% p.a from the date of agreement to sell to date of realization and this Rs. .5,00,000/- has been claimed as an alternative prayer in the event of refusal to execute the sale deed.

In the entire pleadings, there is no mention in regard to the rights of the Plaintiffs to claim liquidated damages of Rs. .5,00,000/-

19. From looking into the evidence and pleadings of the Plaintiffs, the Plaintiffs have not stated how they have sustained loss of Rs. .5,00,000/- and when they received an advance sale consideration of Rs. .25,00,000/-with interest at 9% p.a. Now, in this background, it is for us to refer to the judgment relied upon by the learned Senior counsel who is appearing for the Appellant. The Hon''ble Supreme Court in the case of M.L. Devender Singh has held that

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.

The Hon''ble Supreme Court in the case of Union of India v. Raman Iron Foundry, has held that

6. "It is true that the words "any claim for the payment of a sum of money" occurring in the opening part of Clause 18 are words of great amplitude, wide enough to cover even a claim for damages, but it is a well settled rule of interpretation applicable alike to instruments as to statutes that the meaning of ordinary words is to be found not so much in strict etymological property of language nor even in popular use as in the subject or occasion on which they are used and the object which is intended to be attained. The context and collocation of a particular expression may show that it was not intended to be used in the sense which it ordinarily bears. Language is at best an imperfect medium of expression and a variety of meanings may often lie in a word or expression. The exact colour and shape of the meaning of any word or expression should not be

ascertained by reading it in isolation, but it should be read structurally and in its context, for its meaning may vary with its contextual setting. We must therefore, read the words ''any claim for the payment of a sum of money'' occurring in the opening part of Clause 18 not in isolation but in the context of the whole clause, for the intention of the parties is to be gathered not from one part of the clause or the other but from the clause taken as a whole. It is in the light of this principle of interpretation that we must determine whether the words ''any claim for the payment of a sum of money'' refer only to a claim for a sum due and payable which is admitted or in case of dispute, established in a court of law or by arbitration or they also include a claim for damages which is disputed by the contractor.

21. We are of the opinion that the parties have understood and fixed the liquidated damages payable by the Defendant to the Plaintiffs only in the event of Defendant committing breach of agreement and if the Defendant has committed any breach of agreement, the right has been given to the Plaintiffs to claim the liquidated damages of Rs. .5,00,000/- and Clause 9.1 of the agreement reads that in the event of Plaintiffs committing breach, the Defendant has agreed to reimburse the advance amount of Rs. .25,00,000/- after a period of one year, but before the expiry of 24 months without any interest. Therefore, the parties were required to adduce evidence in the background of Clause 9.1 and 9.2 of the agreement. The Trial Court has refused to grant the relief of specific performance on the ground that the Plaintiffs were not ready and willing to perform their part of the contract and if the Plaintiffs were not ready and willing to perform their part of the contract, the question of claiming the liquidated damages as contemplated under Clause 9.2 of the agreement Ex.P.1 does not arise at all. The Trial Court having given a finding on the rights of the Plaintiffs, to get a decree of specific performance in favour of the Defendant without considering the Clause 9.2 of the agreement and without assigning any reason and without looking into the entire pleadings and evidence of the parties has erroneously granted a decree for liquidated damages of Rs. .5,00,000/-. Therefore, we are of the opinion that the Trial Court has committed an error in granting a decree of directing Defendant to pay the liquidated damages of Rs. .5,00,000/-. However, considering the background of this case, we are of the opinion that refund of Rs. .25.00,000/- by the Defendant-Appellant with interest at 9% p.a. is on lower side. Therefore, we are of the opinion that the Appellant has to pay the interest at the rate of 18% p.a. as against 9% p.a. as deposited by him.

22. In the circumstances of the case, we are of the opinion that even though the Respondents-Plaintiffs have claimed liquidated damages of Rs. .5,00,000/- considering the nature of the agreement entered into between the parties, in view of refund of Rs. .5,00,000/-with 9% interest by the Appellant to the Respondents-Plaintiffs, we are of the opinion that Appellants had to be directed to pay the difference interest at 9% p.a. on Rs. .25,00,000/-. The Appellant himself has deposited a sum of Rs. .25,00,000/- and Rs. .76,500/-. Accordingly, we modify the judgment and decree of the court below.

23. All the points formulated by us are answered against the Respondents and in favour of the Appellant, in view of the finding that the Respondents are entitled to claim interest at 18% p.a. on Rs. .25,00,000/-, we have to allow this appeal. In the result, the appeal is allowed in part. Judgment and decree passed by the 11th Additional City Civil Judge, Bangalore dated 22-2-2005 passed in O.S. No. 857/2004 are hereby modified by holding that the Respondents-Plaintiffs are entitled for Rs. .76,500/- towards the difference of interest on the said amount which shall carry interest at the rate of 6% p.a. from the date of suit till the date of realization.

Parties to bear their own costs.

