(2004) 01 KAR CK 0081

In the Karnataka High Court

Case No : Regular Second Appeal No. 941 of 1992

V.S. Munirathanam, since deceased by LRs. APPELLANT

Vs

P. Sundaram, since deceased by LRs and Others RESPONDENT

Date of Decision : 08-01-2004

Acts Referred:
Limitation Act, 1963 — Section 4

Citation : AIR 2004 Kar 383 : (2004) 2 CivCC 675 : (2004) ILR (Kar) 2328 : (2004) 3 KCCR 1649

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : V.K. Bhat, for Kumar and Kumar, for the Appellant; G.S. Visweswara for B.C. Rajeeva, for LR of R2, for the Respondent

Final Decision : Dismissed

Judgement

K. Sreedhar Rao, J.—The appeal filed against the judgment and decree passed in RA No. 15/88 on the file of Civil Judge, K.G.F. arising out of the judgment and decree passed in O.S.No. 391/76 on the file of Munsiff, K.G.F.

2. The appellants are the legal representatives of the plaintiff who had filed a suit for specific performance of the agreement of sale against the respondents herein. The first respondent is the first defendant in the suit. The second respondent is the second defendant in the suit. The suit property is a house property. Under Ex.D.2 the plaintiff sold the suit property for a sum of Rs. 3,000/- in favour of the first defendant on 7.6.1971. On 16.7.1971 under Ex.P.1 the first defendant agreed to reconvey the property on repayment of Rs. 4950/- within a period of 5 years and an advance of Rs. 50/- was paid to the first defendant. The possession was allowed to be with the plaintiff. Again on 25.9.1971 the first defendant advanced a sum of Rs. 3,000/- to the plaintiff, an endorsement was made on Ex.P.1 stating that the total amount payable is in a sum of Rs. 7950/-. The plaintiff paid a sum of Rs. 5,000/- on 22.4.1974. An endorsement is made by the first defendant on the obverse of Ex.P.1

acknowledging receipt of Rs. 5,000/- and makes a mention that there is a balance of Rs. 3,000/- payable. The plaintiff in the suit contends that the transaction relating to payment of Rs. 3000/ - on 25.7.1991 is a distinct transaction not related to the transaction of reconveyance therefore contends that by 22.4.1974 the entire agreed consideration of Rs. 5,000/- has been paid as per the terms of Ex.P.1. The first defendant despite the request refused to execute the reconveyance deed.

3. The second defendant purchased the property under Ex.D.22 registered sale deed from first defendant. The plaintiff claims that the purchase made by second defendant is bad in law and cannot invest any title. It is also alleged that the second defendant has trespassed into the portion of the suit property. Therefore, the suit is filed for relief of specific performance for execution of a registered sale deed by defendants 1 and 2 in favour of plaintiff.

4. The first defendant in his written statement denies payment of Rs. 5,000/- on 22.4.1974 by the plaintiff. Further contends that the plaintiff is not entitled to seek reconveyance of the property on the ground that within the stipulated time the plaintiff has failed to carry out his obligations and prayed for dismissal of the suit.

5. The second defendant contends that she is the bonafide purchaser for value and that she has purchased the property after the expiry of the stipulated time in the agreement. Therefore prayed for dismissal of the suit.

6. The Trial Court dismissed the suit of the plaintiff on the ground that the time is the essence of the contract and plaintiff has failed to perform his part of the contract within the stipulated time and as such barred by time. The Trial Court also holds that the 2nd defendant has purchased the property after the expiry of the stipulated time in Ex.P.1 for valuable consideration, therefore, derives a valid title. The first appellate Court holds that the plaintiffs has failed to prove that he was ready and willing to do his part of the contract and he failed to pay the agreed consideration within the time stipulated time. Also holds that the suit is barred by time. The Appellate Court confirmed the finding of the Trial Court that the second defendant is a bonafide purchaser for valuable consideration and has purchased after the expiry of the stipulated time in Ex.P.1. Accordingly dismissed the appeal of the plaintiff. Hence, the second appeal.

7. The Supreme Court has set aside the judgment and decree of this Court in Civil Appeal 1780/2002 on the ground that the judgment is rendered without framing question of law. Accordingly remanded the matter for fresh disposal after framing substantial questions of law if any.

8. The following substantial questions of law are framed for consideration.

1. Whether the Appellate Court was in legal error in holding that the plaintiff has performed his part of the contract and such a finding is contrary to the evidence on record which shows that the entire agreed sale consideration of Rs. 5,000/-

was paid as per endorsement at Ex.P.1 (j). Therefore the finding in that regard by the Appellate Court is perversely contrary to law and evidence on record?

2. Whether the finding of the appellate Court that the second defendant is a bonafide purchaser for, the value is contrary to law and evidence on record which shows that despite the knowledge of the agreement, the second defendant purchases the property, therefore, the finding in that regard is perversely contrary to law and evidence on record?

3. Whether the Appellate Court was in error in holding that the suit is barred by time when the suit is obviously filed within three years from the stipulated period under Ex.P.1?

9. The conduct of the parties in recording the transaction of payment of Rs. 3000/- on 25.9.1971 in Ex.P.1 has led to some sort of confusion creating a doubt whether the payment of Rs. 3000/- gets included in the consideration amount for obtaining reconveyance and whether the payment of Rs. 7,950/- becomes a condition precedent for obtaining reconveyance. In the second endorsement made by the first defendant dated 22.4.1974 he acknowledges the receipt of Rs. 5000/- and records that there is a balance of Rs. 3000/- to be payable. If the endorsements are read in isolation it does create a doubt about the intention of the parties. However, in the context of oral evidence of P.W.3 it becomes clear that the payment of Rs. 3000/- by the first defendant to the plaintiff on 25.9.1971 was a distinct transaction and not related to agreement of reconveyance. The endorsement only states the aggregate liability as Rs. 7,950/-. The second endorsement dated 22.4.1974 also gives raise to a serious doubt whether the first defendant appropriated payment of Rs. 5,000/- towards discharge of the loan of Rs. 3000/- and balance of Rs. 2000/- was appropriated to the consideration for reconveyance. However, the oral evidence clarifies the position and would show that the amount of Rs. 5000/- received was paid towards the consideration for reconveyance. In this regard the first defendant has not let in any evidence nor cross-examined the plaintiff to challenge the version that Rs. 5000/- was paid towards the consideration for reconveyance. In the face of such evidence, it is untenable to hold that the plaintiff has failed to perform his part of the contract by not paying the full amount of consideration agreed under Ex.P.1. The balance of Rs. 3000/- noted by the first defendant should be taken as a distinct liability not related to the agreement of reconveyance under Ex.P.1. Therefore, the view taken by the appellate Court that the plaintiff has failed to perform his part of the contract is untenable and contrary to the evidence on record. In that view, I answer first question of law in the affirmative.

10. When the plaintiff has performed his obligation under the contract, only the formality of obtaining registered sale deed remains to be done. It is the case of the plaintiff that he insisted execution of the sale deed. But the first defendant evaded to execute the sale deed. No doubt within three years from stipulated time under Ex.P.1 the suit is filed. The relief of specific performance is not a

technical right. It is an equitable relief to be granted by the Court depending upon the conduct of the parties and facts and circumstances of the case. The terms of Ex.P.1 categorically stipulated that the consideration amount is to be paid within five years and sale deed is to be obtained, on failure the terms specifically stipulated that the agreement shall stand frustrated without giving right on the part of the plaintiff to seek reconveyance. The Counsel for the defendants argued that the stipulation indicates that the time was the essence of the contract. If the parties in the agreement stipulate that the rights under the agreement get frustrated, in the event of breach it is not tenable for the plaintiff to contend that the suit could be filed within the period of three years. In this regard reliance is placed on the ruling of the Madras High Court in N. PATTAY GOUNDER v. P.L. BAPU SWAMI in para 8 the following observations are made:

"The second ground of Sri R. Gopalaswami Ayyangar, namely, that as no offer has been made by the purchaser or his assigns or their assignee, to repurchase by tendering the required amount to the vendor within the specified time, the right to enforce the covenant was lost, has, however, much force and has to be accepted. The stipulation in Ex.B1 was that at any time after five years and within seven years of the execution of the deed the vendor could tender the sum of Rs. 4000/- to the purchaser and call upon him to reconvey the property to him."

The deed expressly stated that this condition would be void after the expiry of the specified period. The right to purchase must be exercised according to the strict terms of the power. The English doctrine referred to in Fisher on Mortgages has been accepted by Sadasiva Aiar and Napier JJ - Mad 802 AIR 1919 Mad 544 to be applicable to this country as well. The learned Judges have held that the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale Of immovable property, is not applicable to contracts of resale of property conveyed. The same principle was applied by the Federal Court in Shanmugam Pillai v. Annalakshmi Ammal, AIR 1950 FC 38. The Federal Court by a majority observed:

"The agreement reserved an option to A to repurchase the property and was in the nature of a concession or privilege on fulfillment of certain conditions with a proviso that in case of default the stipulation should be void. A not having paid the installment punctually according to the terms of the contract, the right to repurchase was lost and could not be specifically enforced. It was not in the nature of penalty and the Court has no power to afford relief against forfeiture for its breach."

The Lower Appellate Court approached the question as one of limitation and formulated the point whether the suit was barred by limitation. Dealing with the point so formulated, it went on to say.

"The suit would be within time if filed on 28.5.1953. But the Court was then closed on account of summer vacation. The suit was filed originally in the Sub-

Court, Coimbatore, as O.S.No. 216/1953 on 26.6.1953, the date when the Court reopened after summer vacation.

Considered as a mortgage by conditional sale, it is admitted the suit is not bared. Thus either way the suit is not barred by limitation. In my opinion, this is obviously a misdirection. Where the condition for repurchase has under the terms of the agreement to be performed within the stipulated time and the time limit has not been adhered to with the result that the right is lost, I fail to see what the limitation Act has to do with it.

Sri K.S. Desikan, the learned Counsel for the plaintiff-respondent referred me to Section 4 and Article 113 of the Limitation Act and contended that as the Court remained closed on 28.5.1953, the suit filed on the date of the reopening should be considered to be within time, In my opinion, the argument has only to be stated to be rejected. The period fixed in the document is a condition for the performance and after the expiry of the period, the right reserved is itself at an end. The period fixed in the deed is not the period of limitation prescribed for any suit. Section 4 of the Limitation Act can, therefore, have no application to the present case.

No offer was made at any time within the stipulated period by tendering the required amount for repurchase. There is nothing in Ex.A.8 to which my attention was drawn by Sri K.S. Desikan to show that any offer or tender was made by the plaintiff within the stipulated time to repurchase the property. That being the case, and the right to repurchase having been lost after the expiry of the period, by reason of the very terms of the covenant, it seems to me that Article 113 of the Limitation Act can have no application. The plaintiff having defaulted and as a result lost the right to repurchase, he cannot resurrect and save the right by resort to the Limitation Act."

11. No doubt, it is in the domain of the contracting parties to stipulate any of the lawful and legal conditions. A condition of the nature that the agreement shall stand frustrated without giving right to the parties for enforcing the terms in the event of breach or upon happening of any contingency contemplated is a valid and a binding condition. But in the instant case, I find that there is no default committed by the plaintiff. The amount agreed has been paid to the first defendant, only the formality of obtaining registered sale deed remained to be done. In Ex.P.1 it is also stipulated that if the first defendant were to evade executing sale deed the plaintiff could have recourse to law and through process of the Court, he can get a registered sale deed executed.

12. The dispute in the case is not merely confined to vendor and vendee. The 2nd defendant purchaser has emerged in the scene. Therefore, his conduct and his rights have also to be taken note of vis-a-vis the rights of the plaintiff and first defendant while granting the relief of specific performance. Merely because the plaintiff has performed his part of the contract and that suit is filed within time shall not be a sole decisive factor to appreciate the rights of the plaintiff

while granting relief of specific performance.

13. The second defendant contends that after the expiry of the time stipulated in Ex.P.1 the property is purchased for valuable consideration. In the evidence, she also states that the scribe of Ex.P.1 was consulted and after knowing from him that the time stipulated under Ex.P.1 is expired and that reconveyance is not obtained. Therefore, the second defendant purchased the property for valuable consideration.

14. It is also come in the evidence of the second defendant that the suit property originally belongs to the husband of the second defendant. The plaintiff purchased from her husband with an agreement to reconvey the property to the husband of the second defendant within the stipulated time. Later on the plaintiff sells the property to the first defendant and obtains an agreement of repurchase. The Counsel for the appellant argued that the second defendant has right of repurchase from the plaintiff but abandoned the right. The second defendant was fully aware of the tact of agreement in Ex.P.1 yet purchased the property without consulting the plaintiff. Therefore, cannot be considered as a bonafide purchaser and cannot derive any right under Ex.D.2.

15. The facts disclose that plaintiff paid the entire sale consideration amount by 22.4.1974, it is about two years before the stipulated time for payment of the consideration amount under Ex.P.1. But the plaintiff remained inert despite the refusal of the first defendant to execute the sale deed, no legal action is initiated immediately. It is one thing to say that within the stipulated period of limitation the suit is filed and that the plaintiff has performed his part of the contract by paying the sale consideration. But to appreciate the stand point of second defendant, the laches on the part of the plaintiff in not filing the suit immediately makes all the difference in law. It may not be that the suit is barred by limitation, but on the ground of latches, the plaintiff would not be entitled to the relief of specific performance.

16. The evidence placed by the second defendant clearly discloses that the suit property is purchased after the expiry of the stipulated period of five years, and before the filing of the suit. There is no plausible explanation offered by the plaintiff as to why he remained inert from 22.4.1974 till filing of the suit for not vindicating his right in the Court of law. The explanation of the second defendant that they purchased the property after the expiry of the time and after consulting the scribe and the other persons cannot be brushed aside as an artificial explanation.

17. In the instant case, the conduct of the second defendant in not consulting the plaintiff cannot be viewed seriously. It was not necessary for the second defendant to take consent of the plaintiff while purchasing the property. Obviously when there is a dispute regarding the interpretation of the rights under the agreement, the second defendant was well within her right to assume that time stipulated is expired and she is entitled to purchase the property from the

first defendant. That apart the property was not reconveyed in favour of the plaintiff and no suit was filed by the plaintiff. The plaintiff by his conduct allowed a doubtful and a misleading situation to prevail exposing the third parties to the risk of purchase with consequent litigation. Indeed the second defendant has risked the purchase in view of the misleading situation. Within the reasonable time the suit is not filed, and no valid reason is given for not filing the suit immediately. Therefore the laches of the plaintiff in not filing the suit goes heavily against the case of the plaintiff to seek the equitable relief of specific performance. Merely because the second defendant has not made enquiry with the plaintiff cannot be a ground to hold that the second defendant is not a bonafide purchaser. But it is to be noted that the second defendant enquired with the scribe and comes to know that the time under agreement is expired. Therefore purchased the property.

In that view of the matter, the third substantial question of law is answered in the negative.

Accordingly, the appeal is dismissed.

