

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 15.05.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.640 of 1994
and C.M.P.No.7700 of 1994

1.Balakrishnan
2.Kunja Alias Dhakshinamurthy ... Appellants

-Vs-

Rajalakshmi ... Respondent

APPEAL filed under Section 100 of Code of Civil Procedure against the decree in O.S.No.236 of 1990 on the file of the District Munsif Court, Thiruvavur dated 17.9.91 as confirmed in A.S.No.12 of 1992 on the file of the District Court, Nagapattinam dated 24.12.92

For Appellants : Mr. K.Srinivasan

For Respondent : No Appearance.

J U D G M E N T

The unsuccessful defendants in O.S.No.236 of 1990 on the file of the District Munsif Court at Thiruvavur who has suffered a decree for specific performance has filed the above second appeal against the judgment and decree passed in A.S.No.12 of 1992 on the file of the District Court, Nagapattinam confirming the judgment and decree passed in O.S.No.236 of 1990.

2. The case of the respondent is that the first appellant agreed to sell the suit property to her for a sum of Rs.3,240/- on 15.06.1990 and he has received an advance of Rs.2,101/- from her. The terms of sale was reduced into writing and an agreement of sale was executed by the first appellant in favour of the respondent. The respondent through her husband requested the 1st appellant to execute the sale deed but the first appellant was evading, hence a legal notice was issued to the appellant and another brother Paranjjothi. The first respondent alone sent a reply stating that there was a mediation after the sale agreement and in the mediation the respondent has agreed for the cancellation of the agreement. The case of the respondent is that she never agreed for the cancellation of the agreement. In order to defeat the rights of the respondent the first appellant has executed the sale deed in respect of the suit property to his brother the second appellant and according to the respondent the sale deed is not binding on her. The plaintiff was ready

and willing to perform her part of the contract but the first appellant has committed breach of agreement and therefore the respondent is entitled to a decree for specific performance.

3. The first defendant contested the suit inter alia contending that without knowing the contents of the agreement of sale he has signed the same and though it is stated in the agreement as if an advance of Rs.2,101/- has been received by the first appellant infact he has received an advance of Rs.101/- only. It was further contended that there was a Panchayat and as per the decision of the Panchayadhars the respondent agreed for the cancellation of the agreement but when the first appellant offered to refund the advance amount of Rs.101/-, the respondent refused to receive the same and did not return the original copy of the agreement as per the undertaking given before the Panchayadhars and hence the respondent has filed the suit for specific performance. It was also contended by the first appellant that he is an illiterate person and knows only to sign and the agreement was false and fraudulent.

4. On the above said pleadings the following issues were framed by the Trial Court:-

(1) Whether the plaintiff is entitled for a decree for specific performance and for possession ?

(2) To what relief the plaintiff is entitled to on the above said issues ?

On the above issues the parties went into trial and during the trial on the side of the respondent herein, the husband of the respondent was examined as PW1 and one Pa.Chinnayan who attested Ex.A1 Sale Agreement was examined as PW2 and on the side of the respondent Exs. A1 to A5 were marked. On the side of the appellants the first appellant was examined as DW1, one Murugaiyan was examined as DW2 and the second appellant was examined as DW3.

5. On a careful consideration of the oral and documentary evidence available on record, the Trial Court found Ex.A1 Sale Agreement as true and binding on the first appellant and after recording a finding that the respondent was ready and willing to perform her part of the contract, decreed the suit as prayed for. Being aggrieved by that the appellants herein preferred an appeal in A.S.No.12 of 1992 before the District Court, Nagapattinam but the lower Appellate Court by confirming the findings of the Trial Court dismissed the appeal. Being aggrieved by that the above second appeal has been filed by the appellants.

6. While admitting the second appeal the following Substantial Question of Law has been framed:-

"Whether the Courts below have erred in granting the decree for specific performance when there is no mutuality on the recitals in EX.A-1? "

7. Heard Mr.K.Srinivasan, learned counsel for the appellants.

8. The learned counsel for the appellants submitted that Ex.A1 agreement has been executed only by the first appellant and his wife whereas the respondent has not signed Ex.A1 and as such there is no concluded agreement of sale and therefore the Courts below have committed an error in decreeing the suit for specific performance. The learned counsel further submitted that though in the written statement itself the first appellant has contended that his signature was received in Ex.A1 by fraud and misrepresentation the Courts below have not properly considered the same in the light of the oral evidence available on record. The learned counsel further submitted that there is no mutuality on the recitals in Ex.A1 and as such the Courts below have erred in granting a decree for specific performance. In support of the above contentions the learned counsel relied upon the decisions reported in :

- (1)Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma (AIR 1990 Kerala 177)
- (2)S.M.Gopal Chetty Vs. Raman (AIR 1998 Madras 169)
- (3)Pushpa Bai Vs. Dr.Williams ((2001) 3 M.L.J. 52)
- (4)R.Chinnadurai Vs. S.Rajalakshmi (2004-4-L.W.186)

9. Both the Courts below on a careful consideration of the oral and documentary evidence adduced in the case have concurrently found that Ex.A1 agreement is true and genuine and the Courts below have rejected the plea of the first appellant that he had signed Ex.A1 without knowing the contents of the same. Therefore, the concurrent findings of fact which are based on evidence available on record cannot be interfered with by this Court while exercising power under Section 100 of the Code of Civil Procedure unless the said finding is perverse. It is not the case of the appellant that the findings are perverse. Therefore, the contention of the learned counsel has to be considered in the light of the fact that Ex.A1 has been found to be true and genuine.

10. In Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma (AIR 1990 Kerala 177) a learned judge of the Kerala High Court has observed as follows:

"Where an agreement for sale of property was unilaterally executed by the vendor and towards a sale consideration a pronote, liable to become time barred, was executed by the vendee and the pronote had become time barred on the expiry of the term fixed for execution of sale deed, there was no mutuality of parties and the agreement could not be termed as a contract in the circumstances of case and specific performance could not be granted."

<https://e-services.hccourts.gov.in/e-services/> In S.M.Gopal Chetty Vs. Raman (AIR 1998 Madras 169) a learned judge of this Court has observed as follows:

"8. If there is no contract at all, then the question of specific performance does not arise. As per Section 15 of the Specific Relief Act, 1963, the contract can be enforced only by a party to a contract. The plaintiff is not a party at all to the contract. Therefore he is not entitled to obtain a decree from Court for specific performance. Hence the suit has to be dismissed on this ground alone."

In R.Chinnadurai Vs. S.Rajalakshmi (2004-4-L.W.186) it is observed as follows:

"19. An agreement must have two parties and both are to sign the same. Only then it is an agreement. For this basic necessity, there may be exceptions under exceptional circumstances as it has been advocated on the part of the Courts and the case in hand is not falling under the exceptional cases"

In Pushpa Bai Vs. Dr.Williams ((2001) 3 M.L.J. 52) it is observed as follows:

"39. It is well-settled and also not in dispute that even assuming that a contract of sale has been entered by the first defendant, it cannot be enforced against the defendants 3 to 5 who are not parties and parties being Mohammed as the first defendant has no authority to enter into an agreement on behalf of the defendants 3 to 5. If at all the first defendant could convey her undivided interest and not more than that even if it is held that Exs.A-1, A-2 and A-6 are true.

40. In the light of the said plea of the first defendant when the plaintiff is not a signatory to the Ex.A-1 sale agreement and when the sale agreement recital as well as the entire body of the agreement proceeds as if both the parties are to sign, of Ex.A-1 not being signed by the plaintiff, it is too late in the day to contend that the plaintiff is entitled to specific performance of the agreement of sale Ex.A-1.

41. It is well-settled that specific performance of contract may be obtained by (i) any party to the agreement, (ii) representative in interest or any member of any party thereto or assignee of the contract are entitled to sue on the contract. The plaintiff had not signed the agreement, nor anyone else had signed the agreement Ex.A-1, on behalf of the plaintiff as his representative or agent or power of attorney. In the light of the denial and there being no admission and the plaintiff not being a signatory to the agreement Ex.A-1, it is too late for him to claim specific performance. Further, it is not as if the defendant in terms of the recital had addressed the terms to the

plaintiff and bind herself to the stipulation, but being mutual Ex.A-1 is not binding.

44. A contract for sale of immovable property is a contract that sale of such property shall take place on terms settled between the parties. It may be that a contract of sale of immovable property need not be in writing. Yet, even in respect of such oral agreement the burden is on the party to prove that there is consensus ad idem between the parties for a concluded oral agreement of sale of immovable property. A contract to sell in the represent case, if at all it is binding on the first defendant alone and not on the other defendants namely defendants 3 to 5 who are not parties to the sale agreement. Further Ex.A-1 proceeds as if the first defendant had agreed to convey the entire property including the land which would show that the plaintiff's intention and also taking advantage of the possession of the property in the hands of the plaintiff's wife, Ex.A-1 had been created and signature of the first defendant had been secured on some stamp papers, which agreement is neither true nor mutual."

In the decision reported in Kumarasamy Vs. S.K.John (1993 (II) M.L.J. 144), a Division Bench of this Court after considering a number of judgments of different High Courts including Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma (AIR 1990 Kerala 177) has observed as follows:

"10..... Apart from this Section 20, Sub Section (4) of the Specific Relief Act, specifically provides that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. This statutory provision takes care of such an argument as has been advanced on behalf of the appellant. So we do not find any substance in the argument based on lack of mutuality in Ex.A-1 agreement advanced on behalf of the appellants.

11. Once we find that Ex.A-1 agreement is true and the first respondent has paid Rs.15,000/- as advance and deposited the entire balance of sale consideration in Court at the time of filing of the suit, there is no reason for denying the relief of specific performance...."

11. The above said decision of the Division Bench has not been brought to the notice of the learned Judges who have decided the cases reported in S.M.Gopal Chetty Vs. Raman (AIR 1998 Madras 169), R.Chinnadurai Vs. S.Rajalakshmi (2004-4-L.W.186) and Pushpa Bai Vs. Dr.Williams ((2001) 3 M.L.J. 52). The decision reported in Kumarasamy Vs. S.K.John (1993 (II) M.L.J. 144) being a Division Bench decision this Court is bound by the same.

12. In the decision reported in Pushpa Bai Vs. Dr. Williams ((2001) 3 M.L.J. 52), it is not laid down as a proposition of law that unless the plaintiff is a signatory to the agreement of sale he cannot seek specific performance of the same. In Para 41 of the said decision it is observed as follows:

" in the light of the denial and there being no admission and the plaintiff not being a signatory to the agreement Ex.A-1, it is too late for him to claim specific performance. Further, it is not as if the defendant in terms of the recital had addressed the terms to the plaintiff and bind herself to the stipulation, but being mutual Ex.A-1 is not binding."

The above observation makes it clear that the agreement was not admitted by the defendant and the learned judge has found that the defendant in terms of the recitals has not addressed the terms to the plaintiff and bind herself to the stipulation and only in that factual background the learned judge has observed as above. Therefore, it cannot be stated as a proposition of law, the learned Judge has laid down that unless the plaintiff is a signatory to the sale agreement he cannot enforce the same. The learned judge in Para 44 of the said Judgment has observed as follows:

" 44. A contract of sale of immovable property need not be in writing. Yet, even in respect of such oral agreement the burden is on the party to prove that there is consensus ad idem between the parties for a concluded oral agreement of sale of immovable property."

Therefore, it is clear that in a suit for specific performance, if the plaintiff is able to prove that there is consensus ad idem between the parties for a concluded oral agreement, the sale agreement can be enforced. In this case as pointed out above, on the evidence available on record the Courts below have concurrently found that Ex.A-1 agreement as been executed by the first appellant after receiving an advance of Rs.2,101/- from the respondent and as such the respondent has clearly proved that there was consensus ad idem between the respondent and the first appellant. Therefore, merely because the respondent has not affixed her signature to Ex.A-1 agreement the suit for specific performance cannot be dismissed.

13. The observation of the Division Bench of this Court in Kumarasamy Vs. S.K.John (1993 (II) M.L.J. 144) makes it clear that once the Court found that a sale agreement is true and the plaintiff is ready and willing to perform her part of the agreement of sale, the suit has to be decreed granting a decree of relief of specific performance in view of the provisions contained under Section 20 (4) of the Specific Relief Act, 1963 which specifically provides that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

14. Since the substantial question of law has already been decided by the law laid down by the Division Bench of this Court in Kumarasamy Vs. S.K.John (1993 (II) M.L.J. 144) strictly speaking the question of law framed cannot be said to be a substantial question of law at all.

15. For the reasons stated above, the substantial question of law framed is answered against the appellants and in favour of the respondent. Accordingly, the second appeal fails and the same is dismissed. But, however, there will be no order as to costs. Consequently, the connected C.M.P. is closed.

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Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

- 1.The District Munsif Court, Thiruvavarur
- 2.The District Court, Nagapattinam
- 3.The Record Keeper,
VR Section, High Court, Madras.

KLT (CO)
dcp/01.6.07

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