Vasantha and Others Vs. M. Senguttuvan

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Court : Chennai

Decided On : Jun-30-1997

Reported in : 1998(1)CTC186; (1997)IIMLJ576

Judge : S. S. Subramani, J.

Acts : Specific Relief Act, 1963 -- Sections 5, 9 and 16; Transfer of Property Act, 1881 -- Sections 53-A; Tamil Nadu Urban (Ceiling and Regulation) Act, 1978 -- Sections 25(1); Indian Limitation Act, 1963

Appeal No. : S.A.No. 314 and 2101 or 1986

Appellant : Vasantha and Others

Respondent : M. Senguttuvan

Advocate for Def. : Mr. R. Vijayan, Adv.

Advocate for Pet/Ap. : Mrs. Sudha Ramalingam, Adv.

Disposition : Appeal dismissed

Judgement :
ORDER

1. Second Appeal No.314 of 1986 arises from O.S.No.1482 of 1981 a suit for specific performance filed by the appellants Second Appeal No. 2101 of 1986 arises O.S.No. 197 Of 1981, filed by the defendant in O.S. 1482 of 1981. It was a

suit for recovery of the property from the appellants. Both the suits were tried jointly, and evidence was taken in O.S.No. 197 of 1981, i.e., the suit filed by the respondent in both the appeals. In this judgment reference to parties will be according to their rank in O.S.No. 1482 of 1981, which relates to Second Appeal No. 314 of 1986, in which the plaintiffs in O.S. 1482 of 1981 are the appellants.

2. The plaint property admittedly belonged to the defendant, respondentherein. On 29.1.1978, an agreement for sale was executed between theparties. The plaintiff M.S. Mani agreed to purchase the plaint scheduleproperty for a total consideration of the Rs. 3,180 and paid and advance of Rs.1,000. As per the terms of the agreement, the plaintiff agreed to take the saledeed within a period of six months from the date of the agreement on paymentof the balance sale consideration at his expenses. The defendant-Senguttuvan,in his turn, agreed that he will provide the plaintiff with 'No ObjectionCertificate' from the Urban Ceiling Authorities and also would satisfy himthat the property is free from any encumbrance. It is the case of the plaintiffthat subsequent to the agreement, the defendant was not ready to give a saledeed. Plaintiff was put in possession of the property, and with the consent ofthe owner, he has put up the construction, and for house-warming ceremony,the defendant was also invited. His close friend who was residing jut oppositeto the plaint property also attended the house-warming ceremony. In the suitfor specific performance., it is said that the plaintiff (M.S. Mani) was alwaysready and willing to take the sale deed in accordance with the terms of theagreement. But he could not take the sale deed, since the defendant demandeda higher price, and he also did not get 'No objection Certificate' from theUrban Ceiling Authorities, nor was the no-encumbrance certificate obtainedby him. Plaintiff prayed that the defendant may be directed to, execute a saledeed in his favour.

3. In answer to the suit claim, defendant contended that the plaintiff was never ready to take the sale deed, and the suit for specific performance was filed long after he filed the suit for recovery of the property. It is his case that he is residing far away from the plaint property and talking advantages of his absence from the locality, the plaintiff trespassed into the same and put up unauthorised construction. He never agreed to put the plaintiff in possession. He further said that either during the term of agreement or thereafter, plaintiff was never ready to

take the sale deed, and he did not have sufficient funds. It is further said that there was a shed put up by him, and that was occupied by plaintiff for sometime, and later, the same was rent out to one Mohanavelu on a monthly rent of Rs. 60. He contended further that before he instituted the suit, he himself demanded the plaintiff to take the sale deed. But he never came forward with the balance of sale consideration, and only when theplaintiff failed, he thought of filing a suit for recovery of the property. He prayed for dismissal, of the suit.

4. O.S. No.197 of 1981 was filed on 11.8.1979, though it was numbered long thereafter. In that suit filed by Senguttuvan (who is the defendant in.O.S. No.1482 of 1981), he has made averments in accordance with the defence which he has taken in the written statement filed in O.S. No.1482 of 1981, the defendant has filed a written statement contending that he is not liable to be dispossessed, and that he is in possession of the property in part performance of the agreement for sale. He also contended that he is not liable for mesne profits, either past or future, since his possession is permissive. He also said that he is prepared to take the sale deed at his expense.

5. The specific performance suit was filed on 23.1.1980.

6. As already said, both the suits were clubbed together, and evidence was taken in the suit filed by M. Senguttuvan (Plaintiff in O.S. No. 197 of 1981), respondent herein.

7. Trail Court, after recording evidence, both oral and documentary, found that even though six months time was provided in the agreement time was not the essence of the contract. It further found that the stipulation for getting sanction from the Urban Land Ceiling Authorities was not taken seriously by the respondent, nor was the non-production of the non-encumbrance certificate a mitigating circumstance for not taking the sale deed. Trial Court that these two clauses cannot be said as stipulations which prevented the appellant from taking the sale deed. That part of the finding by the trial Court was not disturbed by the lower appellate Court. The Trial Court further held that even though time was not the essence of the contract, and the respondent was prepared to waive the same and receive the balance of consideration even after the expiry of the period, and

since the appellant has spent more than Rs. 11,000 for putting up construction in the plaint property, it cannot be said that he was not having sufficient funds to take the sale deed. Even though the appellant was not having sufficient funds for some period to take the sale deed, that will not debar him from getting a decree for specific performance. The appellant's suit was decreed, and the respondent's suit was dismissed.

8. Against the common judgment, two appeals were preferred as A.S. Nos.62 of 1983 and 21 of 1984, respectively arising from O.S. Nos.1482 of 1981 and 197 of 1981. The lower appellate Court, by separate judgments, reversed the findings of the trial Court and allowed both the Appeals filed by the respondent. The lower appellate Court came to the conclusion that the appellant was never ready and willing to take the sale deed at his expense. He did not have sufficient funds. Even though time may not be the essence of the contract, appellant was never diligent to take sale deed within a reasonable time. He entered the property not with the consent of the owner, and the construction put up by him was also unauthorised. His suit for specific performance was dismissed, and the respondent's suit for recovery of possession was allowed. It is against these judgments these two Second Appeals have been preferred.

9. At the time of admission of S.A. No.314 of 1986, the following substantial questions of law were raised for consideration:-

(1) Whether the relevant provisions of Section 5 to 9 and Section 16 of the Specific Relief Act (Act XLVII of 1963) have been properly understood and applied by the lower appellate Court in reversing the judgment and decree of the trial Court, especially when the trial Court has applied the provision of Section 16, Clause (c) to the facts of this case while discussing the evidence available on record, both oral and documentary, in paragraph 13 of its judgment? and

(2) Whether the provisions of Section 25(1) of the Tamil Nadu Urban (Ceiling and Regulation) Act 1978 had been properly considered and applied in this case?'

The following substantial questions of law were raised for consideration in Second Appeal No. 2101 of 1986:-

(1) Whether the claim of the plaintiff/respondent herein to get the sanction from the competent authorities and to furnish the title deed and the encumbrance certificate, strictly accordance to the agreement between the parties, is correct and in accordance with law?

(2) Whether the defendant/appellant herein owed his duty to perform the terms of the contract and his failure to comply with the terms of the contract of receiving Rs. 1,000 as and towards advanced, showed his mala fide intention to sell the plot to somebody else for better price? and

(3) In what manner the possession in the instant case can be taken into consideration in the light of the evidence let in by both sides, so as to conform to the law relating to the proof of possession.?'

10. According to me, even thought the lower appellate Court has written two judgments, I do not think that is necessary in this case, when common evidence was taken and common judgment was pronounced by the trial Court. Therefore, I am considering the substantial questions of law formulated for consideration in these second appeals, together.

11. I will first consider whether the appellant is entitled to get specific performance of agreement of sale. Ex.B-1 is the agreement for sale. As per the terms of the agreement, the appellant is bound to take the sale deed within a period of six months. In the meanwhile, the respondent is also bound to satisfy the appellant that the property is free from encumbrance, and he should also get 'No Objection Certificates' from the Urban Land Ceiling Authorities. Trial Court has found that the obligations on the part of the respondent were not taken seriously be either party, and that was not an impediment for getting specific performance. In fact, the respondent has satisfied the trial Court that he along with the appellant had been in the Office of the Urban Land Tax Authorities, and from them, information was given to the appellant that their sanction was not required for executing a sale deed. It has been further proved by the respondent that he has shown that the property was unencumbered for 14 years, and the appellant was also satisfied about the non-encumbrance nature of the property. The evidence was accepted by the trial Court and the findings on those aspects were also not disturbed by the

lower appellate Court. It is aconcurrent finding. It has, therefore, to be taken that the respondent has discharged his obligation under the contract.

12. Therefore, the next question that arises for consideration is whether the appellant was ready and willing to take the sale deed in terms of the agreement. Both the trial Court and the lower appellate Court have found that the appellant was not ready to take the sale deed, and he was not ready to take the sale deed, and he was not having sufficient funds. Ex.A-3 is a letter written by the appellant to the respondent herein, wherein he has said that he can take the sale deed only after he sells his property at Perambur, and till then, he wanted the respondent to wait. There is an admission on the part of the appellant that he was not having sufficient funds Ex.A-3 is dated 8.2.1979 which shows that even after the expiry of the term fixed under the agreement, appellant was not ready to take the sale deed. The trial Court was of the view that even though the appellant was not ready to take the sale deed, since the respondent was willing to give some more time, the appellant's lack of readiness for that period should not be taken seriously. The trial Court further found that since the appellant has put up construction worth more than Rs. 11,000 it cannot be said that he was not having sufficient funds to pay the balance sale consideration. This approach of the trial Court was found fault with by the lower appellate Court holding that it is not the case put forward by either party, and even if the appellant has put up a construction, that will not show that he was willing to take the sale deed. Even if he had sufficient funds in his possession, willingness is absent. In that view of the matter, it came to the conclusion that the equitable remedy of specific performance should not be granted. Learned counsel for the appellant had at any time, expressed his willingness to take the sale deed in terms of the contract. An argument was taken by learned counsel that immediately after Ex.A-3, the respondent was demanding a higher amount to execute the sale deed and that was the reason why a document could not be executed in time. According to learned counsel, the appellant was ready and willing to take a sale deed and there was no obligation on the part of the respondent to execute the sale deed and the same could not be prepared in view of the demand by the respondent. It is a concession by the respondent, when he expressed that he will execute the sale deed even after expiry of the period, if Rs. 500 is paid. When he expressed his desire to sell the property if more amount is

given, that will not take away the obligation on the part of the appellant to take the sale deed in time. In this connection, it may also be noted that the respondent herein has already filed a suit for recovery of the property on 11.8.1979, and even after receipt of summons, appellant did not file a suit for specific performance. More than a year thereafter, be filed the suit for specific performance. alleging that he is ready and willing to perform his part of the contract, even if the period stipulated under the agreement had expired. In August 1978, the respondent had filed his suit, and it was after a period of 2 years and 4 months, appellant has filed the suit for specific performance. When the respondent filed the suit for recovery, it means he is not prepared to execute the sale deed. The conduct of the appellant shows that he was never ready and willing to take the sale deed.

13. Learned counsel for the appellant argued that in case of immovable property time is never the essence of contract. According to him since the suit by the appellant was filed within a period of three years after the institution of the suit by the respondent, it is well within time, and courts having found that time is not the essence of the contract, and the appellant having deposited the balance of consideration into Court, even though it is after the decree passed by the trial Court, it shows the readiness and willingness. Along with the same, he also pleaded that the appellant has put up construction, and if at this stage, the appellant is directed to handover possession to the respondent, it will result in great hardship to the appellant.

14. According to men, none of these arguments could be count enhanced when an equitable relief is sought for.

15. In Gomathinayagam Pillai and others v. Palaniswami NadarA.I.R. 1967 (II) SCWR 147 the Supreme Court held that in a suit for specific performance, plaintiff must prove readiness and willingness. The relevant portion of the said decision reads thus:-

'The respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council

in Ardeshir Mama v. Flora Season.' 'In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit.'

Even if for single day, plaintiff - agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement upto the date of hearing. In this case, the concurrent finding is that the appellant was not ready to take the sale deed and that is proved by Ex.A-3.

16. The approach of the trial Court, according to me, was rightly reversed by the lower appellate Court. The finding of the trial Court is that since the appellant has put up a construction worth more than Rs. 11,000 it cannot be said that he was not having the funds. 'In my opinion, this finding is not in accordance with the settled principles of law.

17. In His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar, : AIR 1996 SC2095 , their Lordships made a distinction between 'readiness' and willingness', to perform a contract. In that case, their Lordships said thus:-

'There is a distinction between readiness to perform the contract and willingess to perform the contract. By readiness may be meant the capacity ofthe plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by

27.2.1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's 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.'

18. Even if we accept the finding of the trial Court that the appellant has sufficient funds since he had put up construction, that will not show his willingness. 'Willingness' must be to implement the contract in accordance with terms, within the stipulated period, or within a reasonable time thereafter. If he had the necessary funds, he has to explain why he did not offer or tender the balance sale consideration and get the sale deed. That was not the conduct of the appellant. In spite of putting up a construction, he was not prepared to take a sale deed. It shows that the conduct of the appellant, namely, that he was not ready and willing to perform his part of the contract. That will be sufficient to dismiss Second Appeal No.314 of 1986.

19. That apart, a recent judgment of the Supreme Court also has to be taken into consideration while exercising the discretion. It is well settled that even if the appellant proves all the ingredients of Section, he cannot claim specific performance as of right. It is only a discretion and that discretion will have to be exercised on well established judicial principles. In this case, the discretion has been rightly exercised by the lower appellate Court, declining the relief. Unless the appellant shows that the discretion exercised by lower appellate Court is perverse in this Second appeal that finding cannot be disturbed. Even though the second appeal was filed in 1986, it is now more than 11 Years, when the matter is heard. The sale agreement is in the year 1978, and the property is also situated close to Madras City at Saidapet Taluk.

20. In K.S. Vidyanandham and others v. Vairavan, : AIR 1997 SC1751 , their Lordships said that the Court can take judicial notice of the inflation, and how far rise in prices has affected after the date of agreement, and this also will have to be taken into consideration while exercising the jurisdiction. The decision of this Court

in V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar, : AIR1952 Mad389 wherein it was held that the subsequent rise in prices is not to be considered, was held no longer good law. Their Lordships of the Supreme Court held thus:-

'It has been consistently held by the courts in India, following certain early English decisions that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which doesnot provide specifically that time of the essence is of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time - limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. While exercising its discretion, the court should also bear in mind that when the parties prescribed certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties). In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades particularly after 1973. It is not possible to agree with the decision is understood as saying that the said factor is not at all the be taken into account while exercising the discretionvested in the court by law. The rigor of the rule evolved by courts that time is not of essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, the courts do so.'

Taking into consideration the proved facts and the settled legal position. I hold that Second Appeal No.314 of 1986 is liable to be dismissed, and the questions of law

raised in that Second Appeal should be found against the appellants.

21. The other question that arises for consideration is whether the respondent is entitled to recover the property. Admittedly, he is the owner. The suit for specific performance also stands dismissed. The trial Court entered a finding that the appellant cannot be treated as a trespasser,' not as a person in possession without consent of the owner. This finding of the trial Court was not accepted by the lower appellate Court. The lower appellate Court held that the construction put up by the appellant was without authority and the owner's consent was not obtained. Once the suit for specific performance is dismissed, the only question that arises for consideration is whether the appellant is entitled to the benefit of Section 53A of the Transfer of Property Act. Once 1 hold that the plaintiff was not ready and willing to take the sale deed, even if the appellant claims the benefit of Section 53A of the said Act, that also will have to be found against him.

22. In a recent decision of the Supreme Court reported in Mohan Lal v. Mirza Abdul Gaffar, : (1996)1SCC639 , their Lordships considered the scope of Section 53A of the Transfer of Property Act. Paragraph 6 of the judgment reads thus:-

'Even otherwise in a suit for possession filed by the respondent successor in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he s ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has notexpressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16(c) of Specific Relief Act. 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks enforcement of the agreement is enjoined to establish the same. Equally, when the transferee seeks to avail of Section 53A to retain possession of the property which he had under the contract, it would also be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness

and willingness is an emphatic way of expression to establish that the transfer always abides by the terms of the contract. Part performance, as statutory right, is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenated thereunder.'

All the ingredients that are essential for specific performance should be proved in a claim under Sec. 53-A of the Transfer of Property Act also. In fact, before the lower appellate Court, I do not find any serious arguments was put forward by the appellant under S. 53-A of the Transfer of Property Act. Ex.B-1 does not say that possession was handed over to the appellant. It is also admitted that on that date, possession did not pass to the appellant. The respondent is residing far away from the plaint property and it no man's land. It is his case that except for a shed, it is being used by any one. It was under those circumstances, appellant trespassed into the shed and let out the building to a third person thereafter. Of course, the trial Court has entered a different finding. A witness was also asked to swear to a statement that the respondent's friend also attended a house-warming ceremony after a new construction was put up. But the lower appellate Court has entered a finding that the construction is unauthorised, and the appellant has exploited the absence of the respondent in the locality. This finding is based on the appreciation of facts, and it cannot be said as perverse. In second appeal, I do not think I should re-appreciate the evidence for the purpose of entering a different finding.

23. A question arises as to what has to be done regarding the constructions. The lower appellate Court has found the constructions to be unauthorised. Naturally, appellants can only be directed to remove the same. I direct the appellants to remove the same within a period of two months from today failing which the respondent will be entitled to take possession of the property, and he is also entitled to have the structures removed at the expense of the appellants. Second Appeal No 2101 of 1986 is also dismissed with the above directions. This Second Appeal is dismissed with costs.

24. In the result both the Second Appeals are dismissed. In Second Appeal No.314 of 1986, there will be no order as to costs. In Second Appeal No 2101 of 1986, the respondent is entitled to his costs. C.M.P. No.2615 of 1986 in S.A.314 of

1986 and C.M.P. No. 15579 of 1988 in S.A.No.2101 of 1986 are also dismissed. No costs in the C.M.Ps.