

Sankunthala Vs. Murugesan

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Court : Chennai

Decided On : Nov-03-2000

Reported in : (2001)1MLJ376

Appellant : Sankunthala

Respondent : Murugesan

Judgement :

M. Karpagavinayagam, J.

1. Sakunthala, the appellant herein, is the defendant in the suit.
2. Murugesan, the respondent/plaintiff, filed a suit for recovery of the advance money of Rs. 95,000 based on an agreement of sale dated 30.8.1990 on the ground that there is a cloud over the title of the appellant to the suit property. The trial court decreed the suit as prayed for. The lower appellate court also confirmed the said decree in an appeal filed by the appellant/defendant. Hence, this second appeal by the defendant having lost in both the courts below.
3. The case of the plaintiff/respondent is this:
 - (a) On 30.8.1980, the appellant/defendant executed an agreement of sale in respect of the suit property for a sale consideration of Rs. 2,32,000. She obtained a sum of Rs. 75,000 from the plaintiff as advance. It was agreed that the sale deed

has to be executed on payment of the balance amount of sale consideration on or before 15.1.1991. Again on 4.10.1990, the plaintiff/respondent gave Rs. 20,000 and obtained receipt. Thereafter, the plaintiff approached the defendant on several occasions informing that he was ready with the money and requesting her to execute the sale deed, but the appellant evaded.

(b) In the meantime, the plaintiff came to know that there was a cloud over the title to the suit property. The property in question was a poramboke land which was allotted for the purpose of construction of police quarters by the Government. So, on 7.1.1991, the plaintiff sent a notice and the same was returned as 'the addressee not found'. Again on 22.2.1991, he sent another notice and there was no reply.

(c) Ultimately, on 24.3.1991, the plaintiff sent a notice asking her to refund the money paid to her earlier. This time, the defendant sent a reply dated 5.4.1991 stating that she obtained only Rs. 23,101 and there was no cloud over the title to her property and she also filed a suit against the Government for declaration of title and injunction and as such, the plaintiff would not be entitled to the return of the money, as the period for performing the contract had already expired.'Hence, the suit.'

4. The case of the defendant/appellant is this:

Though the sale agreement was executed on 30.8.1990 for a sale consideration of Rs. 2,32,000, the defendant had totally received only Rs. 21,101: as advance. On 4.10.1990, the plaintiff received a receipt for Rs. 20,000 from the defendant on compulsion. There is no cloud over the title to the property, since the land in question was purchased from her vendor on 20.8.1980 and subsequently, she constructed a building therein. Moreover, she filed a suit in O.S.No. 44 of 1991 before the civil court against the Government for declaration of title over the suit property. Since the plaintiff had not approached with the balance amount of money within the time stipulated (i.e.) 15.1.1991, the plaintiff would not be entitled to refund of the money advanced and as such, the suit is liable to be dismissed.

5. On the basis of the above pleadings, various issues were framed. During the course of trial, the plaintiff examined himself as P.W.1 and Exs.A-1 to A-7 were marked and on the side of the defendant, three witnesses were examined. The defendant was examined herself as D.W.1. The trial court, on consideration of the evidence, both oral and documentary, rejected the case of the defendant and upheld the contention of the plaintiff and decreed the suit as prayed for.

6. Feeling aggrieved over the same, the defendant filed an appeal in A.S.No. 108 of 1997. During the pendency of the appeal, the defendant filed two documents as additional evidence, namely, Exs.B-1 and B-2, the judgment and decree rendered by the civil court in O.S.No. 44 of 1991 declaring the title of the suit property in favour Sakunthala, the defendant herein, and against the Government.

7. On the strength of these documents also, it was argued before the lower appellate court that the defendant had a valid title over the suit property and the plaintiff's contention that there is a cloud over her title to the property is baseless. Even then, the lower appellate court dismissed the appeal and confirmed the judgment and decree of the trial court. This judgment and decree of the first appellate court are the subject matter of challenge in this second appeal filed by the defendant.

8. The substantial questions of law raised before this Court, as mentioned in the grounds of appeal, are as follows:

(i) Whether having admitted Exs.B-1 and B-2 as additional evidence in the appeal, the lower appellate court ought to have held that the defendant had proved her title to the house property agreed to be sold and therefore, the plaintiff was not entitled to claim the advance amount paid?

(ii) Whether the lower appellate court ought to have found on the basis of the judgment and decree in O.S.No. 44 of 1991 on the file of the District Munsif Court, Kallakurichi ought to have held that there was no cloud over the defendant's title to the suit property agreed to be sold and therefore, the plaintiff is not entitled for, the return of advance paid? (iii) Whether in the circumstances of the case, the courts below ought to have held that the plaintiff has no capacity to pay the sale price of

Rs. 2,32,000 or Rs. 75,000 as advance?

9. In elaboration of these substantial questions of law, Mr. M.V. Krishnan, the learned Counsel for the appellant, would argue that the lower appellate court, without considering the impact of the additional documents filed and without going into the valid grounds raised by the defendant in the appeal, simply confirmed the judgment of the trial court without adducing proper reasons.

10. According to the counsel for the appellant, when the title of the defendant has been clearly established by the decree and judgment in O.S.No. 44 of 1991 giving declaration in favour of the defendant and against the Government, the lower appellate court ought to have held that there is no cloud over the title to the property, particularly, when the contention of the plaintiff that he would be entitled to the refund of the advance money paid on the reason that there was a cloud over the title to the property cannot be accepted and therefore, the plaintiff would not be entitled to the refund of the advance money, once the period of the contract was over.

11. On the other hand, Mr. Valliappan, the learned Counsel for the respondent, would contend that on hearing the news that there was some encumbrance over the property and that the property belonged to the Government, immediately, the plaintiff contacted the defendant to remove the encumbrance and to execute the sale deed. But, the defendant evaded. Therefore, even prior to the expiry of the stipulated date, namely, 15.1.1991, he sent a notice to the defendant asking for the refund of the money advanced and as such, he would be entitled to approach the court asking for the refund of the money advanced with interest, more so when, the defendant herself filed a suit against the Government in respect of the suit property. He would further state that the questions of law raised in this case cannot be said to be the substantial questions of law and as such, the findings rendered by the courts below cannot be disturbed by invoking Section 100, C.P.C.

12. I have given my anxious consideration to the rival contentions urged by the counsel for the parties.

13. The main issue urged in this case throughout is as to whether the plaintiff/respondent would be entitled to the refund of the money given as advance for the sale of the suit property, as the plaintiff has no more interest in purchasing the property, as there is a cloud over the defendant's title to the property.

14. Both the courts below, have carefully considered the said issue and given detailed reasons as to why the contention of the plaintiff has to be accepted and the case put forward by the defendant has to be rejected.

15. Mr. M.V. Krishnan, the learned Counsel for the appellant, on the strength of the decisions: (1) *Mulpuri Veerayya v. Sanaya Varpu Sivayya* 38 M.L.J. 482; (2) *Natesa Aiyar v. Appavu Padayachi* I.L.R. (1913) Mad. 178; and (3) *H.C. Mills v. Tata Air Craft* : [1970]3SCR127 , would contend that the plaintiff failed to comply with the conditions, as he did not make payment of the balance of sale consideration within the date stipulated in the agreement and as such, there is a default on the part of the purchaser. Consequently, the contract goes off and the plaintiff has no right to recover the advance amount, as provided in Ex.A-1 agreement.

16. Learned Counsel for the appellant would point out the principles enunciated regarding the return of earnest deposit, as laid down in *H.C. Mills v. Tata Air Craft* : [1970]3SCR127 . The relevant paragraph in the said judgment is as follows:

From a review of the decisions cited above, the following principles emerge regarding 'earnest':

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract on default committed by the buyer, the seller is entitled to forfeit the earnest.

17. It is held in *Natesa Aiyar v. Appavu Padayachi* I.L.R. (1913) Mad. 178 as follows:

When there is a delay on the part of the purchaser in performing the contract before the stipulated date, the purchaser would not be entitled to return of the deposit as the stipulation for forfeiture of the deposit in the agreement in case of breach is not one by way of penalty and the same is permissible under law.

18. It is also held in *Mulpuri Veerayya v. Sanaya Varpu Sivayya* 38 M.L.J. 482 as follows:

Where a contract of sale falls off by reasons of the default of the vendor, the vendee is entitled to retain the earnest money.

19. Per contra, Mr. Valliappan, the learned Counsel for the respondent, would cite the following decisions:

(1) *Naturam v. Ullur Chand* : AIR1926 Cal1041 ; (2) *Seetharamamma v. Patta Reddi* : AIR1940 Mad739 ; (3) *Lallubhai v. Mohanlal* : AIR1935 Bom16 ; (4) *Sachidananda v. G.P.& Co.* : AIR1964 Ori269 . (5) *Gouri Shankar v. Fakir Mohan* : AIR1989 Ori201 ; and (6) *Subayya Chowdary v. Garikapati* A.I.R. 1957 A.P. 307.

20. On going through the above decisions, it is seen that some important principles have been laid down with reference to the point in issue arising in this case. Those principles are given as under:

(i) If the defendants were not willing to perform the contract, the plaintiff might very well say that he did not want to have the contract specifically performed but that he would be satisfied if he gets the earnest money with proper damages;

(ii) Practically the same considerations would govern the question of grant of specific performance to the vendor and of directing the refund of the deposit to the purchaser. This is, in effect, the provision in Section 18(d) of the Specific Relief Act;

(iii) A buyer is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say not discoverable by the exercise of ordinary care or if the title is not free from reasonable doubt; a defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy. The liability of property to be compulsorily acquired may fairly be said to amount to a material defect which is not capable of being discovered with ordinary care;

(iv) It is very difficult to lay down any hard and fast rule with regard to the requirement of 'marketable title' or a 'title free from reasonable doubt'. Generally speaking, a marketable title is one which at all times and under all circumstances could be forced on an unwilling purchaser under a contract for sale made without special conditions;

(v) The language of Section 70 of the Contract Act is quite wide and be applied at the discretion of the court to enable the court to do substantial justice. It that is the true meaning of Section 70 of the Act, on the finding that the plaintiff did pay the money to the defendant and the defendant obtained benefits out of the said money by way of saving the house in question, even if the plaintiff's suit for specific performance fails, there cannot be any justification to deny the plaintiff the relief of refund of the money which he had paid to the defendant and the defendant had obtained sufficient advantage out of the said money;

(vi) In order to make out a good title to the property, the vendor must show that the property is free from all encumbrances. The vendee could not be expected to take a title with a cloud thereon or compelled either to accept a doubtful title without investigation or rescind the contract;

(vii) If the plaintiff is within his right in calling upon the defendant to specify him the property agreed to be purchased was free from encumbrances, the defendant is not entitled to call upon the plaintiff to pay balance of sale price and take a conveyance without complying with the requisition regarding the discharge of the encumbrance.

21. In the light of the settled position of law, as mentioned earlier, let us now go into the materials placed by the parties in order to decide the issue raised herein.
22. According to the plaintiff, as per Ex.A-1 Agreement for sale dated 30.8.1990, it was agreed to sell the suit property for a sale consideration of Rs. 2,32,000 and towards advance, the plaintiff gave Rs. 75,000 and both of them agreed to perform the contract on or before 15.1.1991, after payment of the balance amount.
23. It is the further case of the plaintiff that since there was a demand from the defendant for some more amount towards advance in view of some urgency, P.W.1 the plaintiff, handed over Rs. 20,000 to the defendant on 4.10.1990 and obtained Ex.A-2 receipt. With reference to his aspect, the evidence of P.W.1, the plaintiff, had been supported by Exs.A-1 and A-2.
24. According to the defendant, he did not receive Rs. 75,000 as advance on 30.8.1990 and he received only Rs. 101 on that date and subsequently, piecemeal payments were made and totally, she received only Rs. 23,101.
25. This part of the evidence had been disbelieved by the trial court, since in Ex.A-2 also, which was executed on 4.10.1990, it was stated that she earlier received Rs. 75,000 towards advance and she was receiving further amount of Rs. 20,000 on 4.10.1990. Though D.W.2 and D.W.3 were examined on behalf of the defendant, they had stated that they did not know whether this amount had been paid subsequently or not.
26. Furthermore, till the defendant sending Ex.A-5 reply on 5.4.1991, she did not send any notice to the plaintiff stating that she did not receive Rs. 75,000 as advance on 30.8.1990 and Ex.A-2 was given to the plaintiff on 4.10.1990 only out of compulsion even without making payment.
27. Under those circumstances, there is no difficulty in upholding the factual findings with reference to the total payment of Rs. 95,000 made on 30.8.1990 and 4.10.1990 as advance.
28. The other part of the evidence projected by the plaintiff is that he came to know about the encumbrance over the suit property, since he was informed that

the property in question was a Government poramboke land earmarked for construction of police quarters. Immediately thereafter, on 7.1.1991, P.W.1 sent a notice to the defendant intimating about the encumbrance and asking her to remove the said encumbrance and execute the sale deed in favour of the plaintiff. The said notice was not received by defendant and the same was returned to the sender with an endorsement 'addressee not found'. This would clearly show that he was having readiness and willingness to perform the contract, even before the stipulated date, namely, 15.1.1991, by demanding her to execute the sale deed on 7.1.1991 itself.

29. It is further stated by P.W.1 that he sent another notice with the same demand on 22.2.1991 under certificate of posting and when there was no reply, he contacted the defendant through the panchayatdars and requested her to remove the cloud over her title to the property and to execute the sale deed. But, even then, the defendant was not prepared to do so.

30. At that stage, on 24.3.1991, the plaintiff sent Ex.A-4 notice stating that since the cloud over her title to the property was not removed, he would be entitled to the refund of the advance amount and he demanded the same. This was replied by the defendant by Ex.A-5 reply dated 5.4.1991 stating that there was no cloud over her title to the property and as the time stipulated in the agreement was over, she would not execute the sale deed in favour of the plaintiff and the plaintiff would not be entitled to the refund of the advance amount, as it had already been forfeited. Only on receipt of this reply, the plaintiff had approached the civil court seeking for the refund of the advance money with interest by filing the suit in O.S.No. 48 of 1996,

31. In this context, it is relevant to point out that in Ex.A-5 reply notice dated 5.4.1991, it is admitted by the defendant that she filed the suit in O.S.No. 44 of 1991 on the file of the District Munsif, Kallakurichi against the Government for declaration of title and for permanent injunction in respect of the suit property.

32. Two things would emerge out of the stand taken by the parties as mentioned above.

33. Firstly, even before the date of expiry of the stipulated date, namely, 15.1.1991, the plaintiff issued Ex.A-2 notice on 7.1.1991 stating that he came to know that the property belonged to the Government and it was allotted for construction of police quarters and therefore, the plaintiff demanded that the said encumbrance should be removed and the sale deed should be executed on or before 15.1.1991. In the said notice, it had been specifically stated that the defendant had to complete the transaction under some protest or other. The return of Ex.A-3 cover would show that this was sent on 7.1.1991 by giving clear details to the defendant. Even then, it was returned as 'addressee not found'. Even in Ex.A-4 notice sent on 24.3.1991, these details were clearly mentioned. Thus, it is clear that the continued correspondence between the plaintiff and the defendant, which commenced from 7.1.1991 onwards, would show that defendant was called upon to remove the cloud over her title to the property and to execute the sale deed and since the said cloud over the defendant's title to the property was not removed, the plaintiff wanted the advance money to be returned to him.

34. Secondly, as admitted by the defendant in Ex.A-5 reply notice dated 5.4.1991, she filed the suit in O.S.No. 44 of 1991 against the Government for declaration of title in respect of the suit property in order to remove the cloud over her title. Admittedly, the suit was filed on 11.1.1991 prior to the receipt of Ex.A-4 notice dated 24.3.1991. In other words, even before the stipulated date, namely, 15.1.1991, was over, the defendant had correctly approached the civil court in order to remove the cloud over her title to the property in question, as requested by the plaintiff either through notices or through the panchayatdars, as stated by P.W.1 in his evidence. Under those circumstances, it cannot be contended by the defendant that since the plaintiff was not ready to perform the contract on or before 15.1.1991, the advance amount would be forfeited as per Ex.A-1 agreement, as noted above.

35. It is true, as pointed out by the learned Counsel for the appellant, it is permissible under law to provide any stipulation for forfeiture of the advance amount in the event of default on the part of the purchaser, as laid down in the decisions cited by the counsel.

36. But, in this case, when the plaintiff entertained a doubt over the defendant's ownership over the property or cloud over her title to the property even before 15.1.1991 by issuing a notice on 7.1.1991 and especially, when the defendant filed a suit on 11.1.1991 against the Government to remove the cloud over her title to the property, it would be futile to contend that the advance amount is liable to be forfeited.

37. Under those circumstances, it can be safely held that prior to 15.1.1991, the plaintiff was ready to perform the contract, but since the cloud over defendant's title to the property, as requested by the plaintiff, was not removed, the plaintiff cannot be compelled to pay the balance of sale consideration before the stipulated date, i.e., 15.1.1991 and to get the sale deed executed,,

38. In my view, there is no default on the part of the plaintiff. On the other hand, the defendant had failed to remove the encumbrance, despite the receipt of notice from the defendant. Moreover, it is an admitted fact, as noted above, the defendant went to the civil court and commenced the process of removing the cloud over her title to the property.

39. Under those circumstances, in my opinion, the findings given by the courts below, on the basis of factual materials, cannot be said to be wrong and as such, no substantial question of law would arise in this second appeal.

40. In the result, the second appeal is dismissed confirming the judgments and decrees of both the courts below. Consequently, C.M.P.No. 21574 of 1999 stands dismissed. No costs.