

P.Murugesan Vs. Arukutty Gounder @ Arumugha Gounder and ors.

P.Murugesan Vs. Arukutty Gounder @ Arumugha Gounder and ors.

SooperKanoon Citation : sooperkanoon.com/910607

Court : Chennai

Decided On : Feb-21-2011

Judge : R.Mala, J.

Appeal No. : Appeal Suit (First Appeal) No.1085 of 2007

Appellant : P.Murugesan

Respondent : Arukutty Gounder @ Arumugha Gounder and ors.

Advocate for Pet/Ap. : Mr.A.R.Suresh; Mr.R.Ravindran, Advs.

Judgement :

1. Appeal Suit (First Appeal) against the judgment and decree dated 31.7.2007 in O.S.No.172 of 2006 on the file of the Additional District and Sessions CourtFast Track Court No.V, Coimbatore at Thiruppur.

2. The averments in the plaint are as follows:

(a) The suit property belongs to first defendant. First defendant executed a Power of Attorney in favour of second defendant, empowering him to deal with the property. Second defendant as Power of Attorney of first defendant, entered into a sale agreement dated 9.9.2005 for Rs.4,54,400/- and received advance of Rs.1 lakh; three months' time was stipulated for execution of the sale deed.

(b) The plaintiff was always ready and willing to perform his part of contract. The plaintiff requested second defendant to execute the sale deed after receiving the balance sale consideration. Second defendant represented that the parent document of the suit property is mortgaged with the Bank while availing of the loan and he assured to execute the sale deed after getting back the documents from the Bank after clearing the loan.

(c) Since second defendant was postponing to execute the sale deed, the plaintiff issued legal notice dated 30.3.2006 to first defendant and second defendant. The plaintiff received reply notice dated 10.4.2006 with false and frivolous allegations. Third defendant is the brother of second defendant, and third defendant was very well aware of the sale agreement dated 9.9.2005. After exchange of notice, second defendant executed a nominal sale deed in favour of third defendant.

(d) The sale deed was only sham and nominal document and that has been executed only to defeat and defraud the plaintiff's valuable rights available under the sale agreement. Third defendant is not a bona-fide purchaser for value.

(e) Hence, the plaintiff has come forward with the present suit for decree of specific performance, alternatively, the plaintiff prayed for refund of advance amount with 18% p.a. interest from 9.9.2005 till realisation and also creating a charge over the property and also for permanent injunction restraining the defendants from alienating or encumbering the property and for costs.

3. The gist and essence of the written statement filed by second defendant are as follows:

(a) The suit property belongs to first defendant and he executed a registered Power of Attorney dated 29.8.2005, is admitted. It is also true that second defendant entered into an unregistered sale agreement on 9.9.2005 and the sale consideration was fixed at Rs.4,54,400/- and received Rs.1 lakh as advance towards the abovesaid sale agreement. Time for execution of the sale deed was fixed as three months, i.e. upto 9.12.2005. Time is the essence of the contract. As per the sale agreement, the plaintiff has to pay the balance sale consideration of Rs.3,54,400/- within stipulated period of three months to this defendant and get

the sale deed executed in his favour. If he fails to do so, as per the recitals of the sale agreement, the plaintiff has to loose the advance amount, which was paid by him.

(b) The plaintiff never approached this defendant to execute the sale deed. In order to repay the mortgage loan within stipulated time, second defendant decided to sell the property and to get the subsidy amount for the same. The plaintiff was silent regarding the execution of the sale deed. The defendant only called the plaintiff to pay the balance sale consideration and get the sale deed executed. The plaintiff's reluctant behaviour made that the very purpose of selling property, became no use, since the plaintiff was not ready to pay the balance sale consideration and get the sale deed executed.

(c) The plaintiff issued notice on 30.3.2006, but the sale agreement got elapsed and he could not claim such a right. So, the defendant issued reply notice dated 10.4.2006 and expressed his readiness to pay the advance amount of Rs.1 lakh. The property was sold in favour of third defendant for valid consideration and third defendant is the bona-fide purchaser for value. So, the plaintiff is not entitled to relief of specific performance. Second defendant thus prayed for dismissal of the suit.

4. The trial Court, after considering the averments in the plaint and in the written statement, and arguments of both sides' counsel, framed four issues and considering the oral evidence of P.W.1 and D.Ws.1 to 3 and the documentary evidence of Exs.A-1 to A-6, B-1 to B-4 and X1 to X-4, dismissed the suit, stating that the plaintiff is not entitled to decree of specific performance, but the trial Court directed first defendant and second defendant to return the advance amount of Rs.1 lakh with interest @ 18% per annum from 9.9.2005 till the date of filing of the suit and at the rate of 12% per annum, from the date of suit till the date of judgment and thereafter, at 6% per annum from the date of judgment till realisation, and also for costs, and it was also observed by the trial Court that the plaintiff is entitled to have a charge over the suit property for the due recovery of the said amount due to him. Challenging the judgment and decree of the trial Court, the present First Appeal has been preferred by the plaintiff.

5. After hearing the arguments of the learned counsel for the appellant/plaintiff, this Court frames the following points for consideration:

(i) Whether the trial Court is correct in holding that the appellant/plaintiff was not ready and willing to perform his part of the contract and so, he is not entitled to decree of specific performance ?

(ii) Whether the trial Court is correct in holding that the time is the essence of the contract ?

(iii) Whether the judgment and decree of the trial Court, are sustainable and

(iv) To what reliefs the appellant/plaintiff is entitled to ?

6. Even though notice to the respondents have been served, neither they appeared in person and advanced their arguments, nor did they engage any counsel. The arguments of the learned counsel appearing for the appellant/plaintiff are heard.

7. Learned counsel appearing for the appellant/plaintiff submitted that the trial Court committed error in coming to the conclusion that the appellant/plaintiff was not ready and willing to perform his part of contract, but the trial Court directed respondents 1 and 2/defendants 1 and 2, to refund Rs.1 lakh paid as advance. The execution of Ex.A-2 sale agreement is admitted. Three months' time was granted for execution of the sale deed. Notice has been issued to the defendants under Ex.A-3 on 30.3.2006. The suit had been filed on 10.5.2006. The appellant/plaintiff was always ready and willing to perform his part of contract and to prove the same, he has filed Ex.A-6 savings account pass book of the Indian Overseas Bank, of the plaintiff. Since the title documents were deposited and equitable mortgage was created, the defendants were not in a position to get the sale deed executed. But, the trial Court has not considered this aspect in proper perspective and committed error in refusing to grant the relief of specific performance.

8. Learned counsel appearing for the appellant/plaintiff further submitted that in the suit for specific performance, time is not the essence of contract and this factum

has not been considered by the trial Court in proper circumspection. Even though the trial Court has granted the relief of return of advance amount to the plaintiff, with interest, which is the alternative relief, and the trial Court ought to have granted the relief of specific performance. Learned counsel further stated that the trial Court is correct in holding that Ex.A-5 registered copy of sale deed, in favour of the third respondent/third defendant, is a sham and nominal document and in such circumstances, the trial Court ought to have granted the decree of specific performance. Learned counsel further relied upon the evidence of P.W.1 and D.Ws.1 to 3 and stated that the appellant/plaintiff was always ready and willing to perform his part of contract. To substantiate his contentions, learned counsel relied on the following judgments of the Supreme Court and prayed for allowing the First Appeal: (a) 2004 (6) SCC 649 = 2004 (4) CTC 150 (SC)

(P.D'Souza v. Shondrilo Naidu) and

(b) 2008 (4) SCC 464 (Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar)

9. While considering the submissions made by learned counsel appearing for the appellant/plaintiff, it is seen that the first respondent/first defendant is the owner of the suit property. The second respondent/second defendant is the Power of Attorney as per Ex.A-1 Power of Attorney Deed and as the Power of Attorney, the second respondent/second defendant entered into sale agreement with the appellant/plaintiff, i.e. Rs.5,54,400/- in respect of 2 acres and 84 cents. Rs.1 lakh had been paid by the plaintiff as advance amount. Three months' time was stipulated for execution of the sale deed. That factum is not disputed. Point No.(ii):

10. Now, this Court has to decide as to whether time is the essence of the contract.

11. The appellant/plaintiff has not filed any document to show that within three months, i.e. on or before 8.12.2005, he was ready with his funds and was willing to perform his part of contract. He issued notice only on 30.3.2006 under Ex.A-3. In that notice, it was mentioned that the respondents/defendants were wantonly evading to execute the sale deed. The reply notice had been marked as Ex.A-5,

dated 17.4.2006, in which the execution of the sale agreement was admitted by the defendants. It is specifically stated in the said reply notice that three months' time elapsed on 9.12.2005 and the plaintiff was not ready and willing to perform his part of the contract. The defendants further submitted therein that then and there, the second respondent/second defendant has approached the plaintiff through telephone and asked him to come forward with the execution of the sale deed, but the plaintiff did not do so. In paragraph 3 of the said reply notice, it is further stated that since the plaintiff had not paid the amount within stipulated time, the respondents/defendants have lost the subsidy amount, since he has not paid the amount due on the mortgage within stipulated time.

12. In such circumstances, it is appropriate to consider the documents filed by the defendants. Exs.B-1 and B-2, dated 20.5.2006 and 28.5.2005, respectively, are the notices sent by the Tirupur Co-operative Primary Agricultural and Rural Development Bank to D.W.2 requesting for One Time Settlement. Exs.D-3 and D-4, dated 30.12.2005 and 17.2.2006, respectively, are the receipts given to D.W.2 in the said Bank for Rs.70,050/- and Rs.1,94,850/- respectively. Exs.X-1 to X-4 are the documents filed by D.W.3; Ex.X-1 is the loan ledger extract relating to loan; Ex.X-1 shows that D.W.2 Kandasamy has obtained loan for Rs.2 lakhs on 13.2.1996 and repaid the loan amount on 30.12.2005 and the original document was returned on 22.3.2006. Ex.X-2 is the xerox copy of the Register of Mortgages to loan for house, in which it is mentioned that for Ex.X-1 loan, which shows that he has mortgaged the property, i.e. the subject matter of the suit property. Ex.X-3 is the xerox copy of the Loan Ledger, which shows that D.W.2 Kandasamy borrowed Rs.2 lakhs on 11.9.2000 and that had been discharged on 17.2.2006 and the documents had been returned on 22.3.2006. Ex.X-4 is the xerox copy of the extract from the Register of Mortgages and the document was executed on 28.9.2000 and the registration was on 23.10.2000 and the present suit item is one of the properties mortgaged. While considering these Exs.X-1 to X-4 along with Exs.D-1 to D-4, which clearly prove the discharge of the loan and the respondents 1 and 2/first and second defendants entered into the sale agreement with the appellant/plaintiff. Exs.B-1 and B-2 are respectively dated 20.5.2005 and 28.5.2005, which are the notices sent by Bank to D.W.2 Kandasamy and on the basis of the same, the defendants wanted to settle the mortgage loan, and so, he

has to get subsidy and in view of the same, the sale agreement under Ex.A-2 was entered into between the plaintiff and the defendants on 9.9.2005.

13. After paying Rs.1 lakh as advance, the appellant/plaintiff has not paid any amount. So, the respondents/defendants were forced to arrange some mode to repay the money.

14. At this juncture, it is appropriate to consider the deposition of P.W.1/plaintiff. P.W.1 in his cross examination fairly conceded that on 9.12.2005, there is no evidence to show in the Pass Book Ex.A-6 that he has sufficient means to pay the balance sale consideration. Further, he candidly admitted in his cross examination that he has deposited the amounts on 24.3.2006, 15.5.2006, 11.7.2006 and 16.12.2006, which shows that after the stipulated time fixed in Ex.A-1 sale agreement, the plaintiff deposited the major portion of the sale proceeds. In his cross-examination, P.W.1 plaintiff fairly conceded that D.W.2 Kandasamy has approached the plaintiff and requested him to conclude his contract to get the sale deed executed. P.W.1 plaintiff stated in his cross-examination as follows:

VERNACULAR (TAMIL) PORTION DELETED

15. The above evidence of P.W.1/plaintiff shows that the plaintiff was not always ready and willing to perform his part of contract. As already stated in the earlier paragraphs of this judgment, as per Exs.X-1 to X-4, being the subject matter of the property, was mortgaged and so, the second respondent/second defendant has approached the appellant/plaintiff before the stipulated time and requested him to perform his part of contract. The second respondent/second defendant also has given an undertaking that if the plaintiff paid Rs.2 lakhs, a portion of the sale consideration, he was ready to redeem the mortgage and execute the sale deed. The plaintiff has not paid the amount and got the sale deed executed in his favour. The plaintiff kept quiet all along. On 30.3.2006, the plaintiff issued notice under Ex.A-3.

16. The cross-examination of P.W.1 plaintiff himself show that the time is the essence of the contract. As already discussed, after receipt of Exs.D-1 and D-2 notices, for the mortgage loan due to Bank, the second respondent/second

defendant approached the appellant/plaintiff and they have entered into the sale agreement and three months' time was stipulated and within the stipulated time, the second respondent/second defendant approached the appellant/plaintiff and requested him to perform his part of the contract. He also requested the plaintiff for part performance of Rs.2 lakhs to facilitate the discharge of the mortgage and hand over the original sale deed. However, the appellant/plaintiff was not ready and so, that factum had been clearly proved that the respondents/defendants had intention that the time is the essence of the contract. Therefore, in the facts and circumstances, it has clearly proved that the time is the essence of the contract.

17. Learned counsel for the appellant/plaintiff relied on the decision of the Apex Court reported in 2008 (4) SCC 464 (Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar) for the contention that time is not the essence of contract, unless contrary intention is expressed in unequivocal language. That decision is not applicable to the facts of the present case.

18. The trial Court in its judgment, considered issue No.2 that the time is the essence of contract and the said finding of the trial Court does not warrant any interference. Point No.(ii) is answered accordingly.

Point No.(i):

19. Learned counsel for the appellant/plaintiff submitted that the appellant/plaintiff was always ready and willing to perform his part of contract. As already decided in Point (ii) above, even though time is stipulated in Ex.A-2 sale agreement, the second respondent / second defendant approached the appellant/plaintiff and requested him to perform his part of contract; even then the appellant/plaintiff has not performed his part of the contract.

20. From the cross-examination of P.W.1/plaintiff, quoted above, it is to be concluded that the plaintiff was not always ready and willing to perform his part of contract.

21. It is true that for the deposit of the amount before Court, jingling of coins is not mandatory to show that the appellant/plaintiff was ready and willing to perform his

part of contract. The purchaser need not jingle coins or produce the money unless called upon to do so by the Court."

22. At this juncture, it is appropriate to consider the decision of the Supreme Court relied on by the learned counsel for the appellant/plaintiff reported in 2004 (6) SCC 649 = 2004 (4) CTC 150 (SC) (P.D'Souza v. Shondrilo Naidu), wherein, the Apex Court held as follows: "19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this behalf." "23. It appears from the records that the defendant himself did not produce the original documents nor redeemed the mortgage. If the mortgage was not redeemed and the original documents were not produced, the sale deed could not have been executed and in that view of the matter, the question of the plaintiff's readiness and willingness to perform her part of contract would not arise."

23. Learned counsel appearing for the appellant/plaintiff relied upon paragraph 23 of the said decision, and submitted that if the mortgage was not redeemed and original documents were not produced, the sale could not have been executed and in that view of the matter, the question of the plaintiff's readiness and willingness to perform his part of the contract, would not arise.

24. The above argument of the learned counsel does not hold merit, because, P.W.1 plaintiff himself admitted in his evidence in cross-examination regarding his readiness and willingness, as quoted above, and in such circumstances, the appellant/plaintiff ought to have paid the balance amount of Rs.3,54,400/- and even though the second defendant demanded and requested the plaintiff to perform his part of contract and also requested him for part performance of Rs.2 lakhs for the discharge of the mortgage and handing over the original documents to him, even then, the appellant/plaintiff has not paid the amount. He kept quiet all along and he issued notice only on 30.3.2006.

25. In the same decision reported in 2004 (6) SCC 649 = 2004 (4) CTC 150 (SC) (cited supra), it was held by the Apex Court that, "the purchaser agreed to

purchase property for specified consideration and within stipulated time; vendor had agreed to produce original title deeds within specified time and agreed to redeem mortgage in respect of property; purchaser paid part consideration on different dates; the vendor failed to redeem mortgage and produce the documents in original as agreed, consequently, contention of vendor that purchaser was not ready and willing to do his part of the contract, rejected."

26. There is no quarrel over the above proposition of law in the said citation. As already stated, the second respondent/second defendant requested the appellant/plaintiff to perform his part of contract and also requested the plaintiff for payment of Rs.2 lakhs and even the balance amount is more than Rs.3,54,400/- for discharge of mortgage. In such circumstances, I am of the view that the above citation is not applicable to the facts of the present case.

27. Considering the evidence as well as the decisions of the Supreme Court, when once the appellant/plaintiff has sought for equitable relief of specific performance, it is the bounden duty of the plaintiff to prove that from the date of sale agreement, he was continuously ready and willing to perform his part of contract, but however, as per the version of the appellant/plaintiff himself in his oral evidence of cross-examination as quoted above, it is clearly proved that the appellant/plaintiff has not been ready and willing to perform his part of contract. That factum has been considered by the trial Court after considering the various decisions and the trial Court came to the correct conclusion that the appellant/plaintiff was not always ready and willing to perform his part of contract. Hence, the appellant/plaintiff is not entitled to the decree of specific performance. I am forced to concur with the findings of the trial Court in this aspect and the judgment and decree of the trial Court in this regard do not warrant any interference by this Court. Point No.(i) is answered accordingly.

28. Points (iii) and (iv) : Even though the trial Court rejected the plea of decree for specific performance, the trial Court has declared that the sale deed in favour of third defendant is a sham and nominal document, against which, there is no appeal. Furthermore, the trial Court granted the alternative relief of refund of the advance amount, against which also, there is no appeal. So, I am of the view that

the trial Court's judgment and decree are sustainable, and the same do not warrant any interference. The appellant/plaintiff is not entitled to any relief in this appeal. Points (iii) and (iv) are answered accordingly.

29. For the reasons stated above:

(a) The First Appeal is dismissed.

(b) The judgment and decree of the trial Court are hereby confirmed.

(c) No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com