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**M.Vasanthi Vs. Pechiannan**

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**SooperKanoon Citation** : sooperkanoon.com/926154

**Court** : Chennai

**Decided On :** Mar-05-2012

**Judge** : G.Rajasuria, J.

**Acts** : Hindu Succession Act - Section 8 clause 1; Specific Relief Act - Section 20, 16

**Appeal No.** : A.S.No.693 of 2009

**Appellant** : M.Vasanthi

**Respondent** : Pechiannan

**Advocate for Pet/Ap.** : Mr.V.Nicholas, Adv.

**Judgement** :

## JUDGMENT

1. This appeal is focussed by the defendants in the suit, as against the judgement and decree dated 9.1.2009 passed by the Additional District and Sessions Judge and Fast Track Court No.2, Coimbatore, which was one for specific performance of an agreement to sell.

2. The parties, for the sake of convenience, are referred to hereunder according to their litigative status and ranking before the trial Court.

3. Compendiously and concisely, the relevant facts absolutely necessary and germane for the disposal of this appeal would run thus:

(i) The respondent herein, as plaintiff, filed the suit for specific performance based on the agreement to sell dated 4.10.2006, which emerged between the plaintiff and one Murugan the husband of D1 and father of D2 and D3-the minor children, whereby, the latter agreed to sell in favour of former the suit property for a total sale consideration of Rs.5,90,000/- and a sum of Rs.1,00,000/- was paid as advance by the plaintiff to the said Murugan. The period of performance was four months.

(ii) It so happened that the said Murugan committed suicide by 3.1.2007. Thereafter, the plaintiff, after issuing pre-suit notice filed the suit for specific performance with the following prayer: to pass a decree and judgement in favour of the plaintiff:

(i) by directing the defendants to execute the sale deed in favour of the plaintiff by receiving the balance sale price of Rs.4,90,000/- within a specified date or on their failure to do so, the court may execute the sale deed in favour of the plaintiff by directing the plaintiff to deposit the balance sale price into this Court. (ii) by directing the defendants to pay cost of this suit to the plaintiff. (extracted as such)

(iii) The defendants resisted the suit on various grounds, including the one that the minor defendants have right as co-parceners in the suit property, as it happened to be the property of their grand father, namely, Mummoorthy even though it stood in the name of their grand mother-Masanammal. (iv) According to the defendants, the said Murugan was a sot having bad habits and taking undue advantage of the same, the plaintiff got his signatures in the said agreement to sell with an intention to purchase the property for a song. Accordingly, the defendants would pray for the dismissal of the suit. (v) The trial Court framed the issues.

(vi) During trial, the plaintiff examined himself as P.W.1 along with P.Ws.2 to 4 and Exs.A1 to A14 were marked. On the defendants' side the first defendant examined himself as D.W.1 along with D.W.2 and marked Exs.B1 to B10. (vii) Ultimate, the trial Curt decreed the suit.

4. Being aggrieved by and dissatisfied with the said judgement and decree, the defendants preferred this appeal on various grounds.

5. The learned counsel for the appellants/defendants, by placing reliance on the grounds of appeal, would develop his arguements, the pith and marrow of them would run thus:

(i) The trail Court failed to take into consideration the fact that the suit property belonged to Mummoorthy-the paternal grandfather of D2 and D3-the minors, even though it stood in the name of Mummoorthy's wife Masanammal. (ii) No specific performance could be ordered in respect of the minors' property.

(iii) The lower Court also failed to consider the fact that the suit property worth Rs.10 lakhs per cent was allegedly intended to be sold by Murugan in favour of the defendants for a paltry sum. (iv) The bad character of Murugan was not taken into account by the lower Court.

(v) The burden of proof was not properly applied by the Court in evaluating the evidence.

(vi) The plaintiff was not ready and willing to perform his part of the contract by paying the remaining sale consideration, because he was not having financial wherewithal to perform his part of contract. Accordingly, the learned counsel for the appellants/defendants would pray for setting aside the judgement and decree of the trial Court and for allowing this appeal.

6. In a bid to shoot down and make mincemeat of the arguements as put forth and set forth on the side of the appellants/defendants, the learned counsel for the respondent/plaintiff would advance his arguements, the gist and kernal of them would run thus: (a) The contentions as put forth on the side of the defendants are ex facie and prima facie untenable for the reason that the property stood in the name of Masanammal; Mummoorthy pre-deceased his wife and thereafter, Masanammal died leaving behind her only two sons namely, Subramaniam and Murugan, who partitioned the property into two halves; one half was sold by Subramaniam already, whereas, Murugan during his life time, entered into the suit

agreement to sell his share of the property to the plaintiff. As such, absolutely there is nothing to indicate that the property happened to be the co-parcenary property and that the minors are having any share in that. (b) Merely by citing some imaginary price for the land, the defendants cannot try to achieve success in the litigative process, because the witnesses examined on the side of the plaintiff would clearly highlight the point that Ex.A1 is the document which emerged genuinely between the plaintiff and Murugan. (c) The trial Court also considered the readiness and willingness on the part of the plaintiff in performing his part of the contract.

(d) The dates and events, as found expatiated and portrayed from the records would show that within a short span of time, the suit itself was filed for specific performance and that absolutely there are no laches on the part of the plaintiff. Accordingly, the learned counsel for the respondent/plaintiff would pray for the dismissal of the appeal.

7.The points for consideration are as under:

(i) Whether the plea of the defendants that the suit property happened to be the coparcenary property, over which the minors D2 and D3 are having share, is tenable? and whether the lower Court failed to take note of the same in its judgement? (ii) Whether the plaintiff was ready and willing to perform his part of the contract and whether the lower Court properly appreciated those facts in deciding the lis?

(iii) Whether Ex.A1 is not a genuine agreement to sell as contended by the defendants?

(iv) Whether there is any perversity or illegality in the judgement of the lower Court?

8. Point No.(i): At the outset itself I would like to point out that even for arguement's sake it is taken that the suit property originally belonged to Mummoorthy-the paternal grandfather of D2 and D3, so to say, father of Murugan, still the concept 'coparcenary' cannot be ushered in and pressed into service for

achieving success in the litigative process by the defendants. The law is well settled that if a grandfather dies, leaving his self-acquired property, his property would devolve upon his son as absolute property as per Section 8 read with clause I of the Hindu Succession Act. The grand sons of the deceased cannot have any right over it. But on the other hand, if the property left behind by the grandfather happened to be an ancestral property, then the grandsons of the deceased would have right over it, because, the coparcenary concept could be pressed into service. Hardly the Court could see any evidence to display and demonstrate that the suit property was treated as coparcenary property by Mummoorthy or his sons Subramaniam and Murugan. But in this case, even in the pleadings or in the deposition, there is nothing to show that Mummoorthy owned the suit property as an ancestral property and enjoyed the same. Wherefore, very plea taken by the defendants that the suit property happened to be the coparcenary property, over which, the defendants 2 and 3 are having right as coparcenars is a misconceived one. However, the facts are very clear that the suit property stood in the name of Masanammal; Mummoorthy pre-deceased Masanammal; after the death of Masanammal, her only two sons inherited it; Subramaniam sold his half share to a 3rd party and whereas, Murugan entered into the suit agreement with the plaintiff. As such, this point has been correctly decided by the lower Court, over which, this Court could find no reason to interfere with. Accordingly, this point is decided in favour of the plaintiff and as against the defendants.

9. Points (ii) to (iv): All these points are taken together for discussion, as they are interwoven and interlinked, interconnected and entwined among one another.

10. My mind is reminiscent and redolent of the following maxims:

(i) Affirmatis est probare He who affirms must prove.

(ii) Affirmanti, non neganti incumbit probatio The burden of proof lies upon him who affirms, not upon one who denies.

11. It is the duty of the person who affirms a particular fact to prove it and he cannot call upon the other side to prove the negative aspect.

12. The concept 'burden of proof' is ambulatory and not static. No doubt, it is the duty of the plaintiff to prove that Ex.A1 is a genuine document. Incontrovertibly and unassailably the signatures found in Ex.A8-the agreement to sell dated 4.10.2006 are that of deceased Murugan. Whereas, the defendants would like to project their case, as though when Murugan was virtually out of his senses or compos mentis, he was made to sign Ex.A8-the agreement to sell dated 4.10.2006 and that too, the plaintiff got it executed with the help of Murugan's own friends, namely, Chandrasekaran, Ramesh and Ganapathy and also with the help of Kamalakannan-the scribe. P.W.2-Ramesh and P.W.3-Ganapathy are the attesting witnesses to Ex.A8. P.W.4-Kamalakannan is the scribe. They all in unison would detail and delineate the circumstances under which Ex.A8-the agreement to sell emerged.

13. No doubt, P.W.2 and P.W.3 might be the friends of Murugan. Such a plea is a double edged weapon, in my opinion. Had really Murugan been possessed of bad habits and abnormalitis, his friends like P.Ws.2 & 3 would not have agreed to be witnesses. There is nothing to demonstrate and exemplify that Murugan's friends were won over by the plaintiff, so as to get his alleged nefarious intention carried out by getting Ex.A1 executed in his favour unfairly. Not to accept the evidence of Pws.2 to 4, in this case, would lead to travesty of justice.

14. P.W.4-Kamalakannan-the scribe would also speak about the genuineness of Ex.A8. The lower Court properly appreciated the evidence on record and arrived at the conclusion that there is nothing to doubt about the genuineness of Ex.A1. Unless there are clinching factors to show that the trial Court misled itself in appreciating the evidence, this Court cannot simply countenance the plea of the defendants that Murugan was out of his sense, while executing Ex.A8. The trial Court virtually in its judgement referred to the factum of the currency notes having been handed over by the plaintiff to Murugan. When P.W.3-one of the witnesses to the document was cross-examined about it, he detailed the fact that in hundred rupee notes, a sum of Rs.1,00,000/- was paid by the plaintiff to Murugan as advance.

15. The trial Court also adverted to the fact that even though the defendants contended that there was a police complaint relating to Ex.A8 and that there was some enquiry at the police station, yet there is nothing to substantiate such a plea.

16. Over and above that the trial Court also notwithstanding no issue having been framed relating to the readiness and willingness on the part of the plaintiff to perform his part of the contract, elaborately dealt with that fact in the course of rendering judgement. In the plaint, in paragraph No.9 it is found spelt out that the plaintiff was always ready and willing to perform his part of the contract. The trial Court also considered those facts by pointing out that pre-litigation notices were sent, as evidenced by Ex.A11 to A13, for nothing but to be returned, with the postal endorsement as refused.

17. The trial Court adverted to the said fact and found that in the factual matrix of this case the factum of refusal endorsements are not bogus endorsements but genuine ones and that was indicative of the fact that the plaintiff was willing to perform his part of the contract, whereas, the defendants evaded performance and their plea also betokens and bespeaks that they wanted to wriggle out of their liability under Ex.A8 by hook or by crook.

18. The trial Court also in paragraph No.38 of its judgement adverted to the financial wherewithal of the plaintiff to perform his part of the contract. The deposition of the plaintiff also would reveal that his monthly income was Rs.4000/- at the relevant time and he was residing in his own house.

19. At this juncture, I would like to recollect the following decisions of the Honourable Apex Court emerged under Sections 16 read with Section 20 of the Specific Relief Act:

(i) 2010(10) SCC 512 [Man Kaur (Dead) By L.Rs. v. Hartar Singh Sangha]; certain excerpts from it would run thus:

40. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to

enforcement of a specific performance by persons enumerated in Section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by the defendant. But in that case, if the plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract has to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by the defendant, as he was not ready and willing to perform his obligations. (ii) (2011) 1 SUPREME COURT CASES 429 J.P.BUILDERS AND ANOTHER V. A.RAMADAS RAO AND ANOTHER would run thus:

27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. Readiness and willingness to perform the part of the contract has to be determined/ascertained from the conduct of the parties.

20. It has to be seen as to whether there are any laches on the part of the plaintiff so as to lable him or dub him as the one who suffered from personal bar under Section 16 of the Specific Performance Act.

21. Here the agreement to sell-Ex.A8 is dated 4.10.2006, wherein the period of performance was contemplated as four months, whereby one could understand that by 4.2.2007, the sale was intended to get fructified. In the meanwhile, Murugan died. However, even on pre-suit notice, the plaintiff issued notices promptly to the defendants, which were returned as refused. On 9.5.2007, so to say, hardly three months and odd thereafter, the suit itself was filed, which showed the promptitude with which the plaintiff approached the Court for specific performance and as such, by no stretch of imagination he could be labelled as one who committed laches in approaching the Court. As such, I hold that the personal bar under Section 16 of the Act cannot be pressed into service as against the plaintiff.

22. No doubt, granting specific performance is a discretionary remedy, as per Section 20 of the Act. Here, simply because the defendants ventured to put forth a case that the Subramaniam's share was sold by his power agent-D.W.2 at the rate of Rs.10,000/- per cent, the Court cannot refuse specific performance. The following decision of the Division Bench of his Court could fruitfully be cited: (i) 1995(1) L.W. 716 [K.M.Madhavakrishnan vs. S.R.Swami and another], certain excerpts from it would run thus:

39. Even though the fairness of the price was concluded by the3 earlier Division Bench judgment, Mr.G.Subramaniam contended that the question of grant of equitable relief of specific performance has got to be seriously considered by us. According to him, a paltry sum of Rs.10,011/- was paid by way of advance and that all through the respondents have never moved the trial Court for trial of the suit and they have been only delaying and subsequently, the old lady herself has been fighting the litigation. However, since the decree for specific performance is against deceased Paramayammal and at present against her heirs, if it is granted, it will be grossly inequitable. The respondents have taken possession of the property as early as 19.3.1968 and that they have been enjoying the property. This

contention of Mr.G.Subramaniam is also liable to be rejected. Increase in price of properties cannot be a ground for refusing the decree for specific performance. The parties are not responsible for the law's delays. The respondents have denied that they have enjoyed the property. Once the fairness of price is concluded by the earlier Division Bench judgement of this Court, which was later on confirmed by the Apex Court, it is not at all open to the learned Senior counsel for the appellant to raise this contention once over again. Hence, we reject this contention as well. (emphasis supplied)

23. A bare perusal of the above precedent and also explanation (1) to sub-Section (2) of Section 20 of the Specific Relief Act would reveal that a mere escalation in value of the land or by projecting that the suit property is of higher value, one cannot try to wriggle out of his liability to execute the sale deed.

24. The learned counsel for the plaintiff would appropriately and appositely point out that Subramaniam's share was sold by D.W.2 himself for a sum of Rs.3 lakhs and this agreement to sell emerged on 4.10.2006 and in such a case, it would not lie in the mouth of D.W.2 to say that per cent of land was worth Rs.10 lakhs at the relevant point of time. Between 2003 and 2006 there could not be such Himalayan increase in price, D.W.2 also was not justified in giving evidence to the effect that the property belonged to Mummoorthy because it was D.W.2 who sold the property as the one belonging to Subramaniam to a third party, as Power Agent of Subramaniam and there is nothing to indicate that Mummoorthy was projected therein as the original owner of the suit property. As such, all these facts would clearly show that absolutely there is no shard or shred, jot or iota extent of evidence to fortify the contentions or the plea of the defendants. Based on tenny-wenny evidence, as put forth on the side of the defendants, the case of the plaintiff cannot be negatived. The trial Court appropriately dealt with the issues and decided the lis, warranting no interference in the appeal.

25. In the result, the appeal stands dismissed. However, there is no order as to costs.

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