

Devaki and Another Vs. V.R. Kannappan

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Court : Chennai

Decided On : Dec-05-2012

Judge : P.R. Shivakumar

Appeal No. : S.A. No. 809 of 2012 & M.P. No. 1 of 2012

Appellant : Devaki and Another

Respondent : V.R. Kannappan

Advocate for Pet/Ap. : For the Appellants: S. Kadarkarai, Advocate. For the Respondent: T.R. Rajaraman, Sr. Counsel for D. Ravichander, Advocate.

Judgement :

(Prayer: Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree passed in A.S. No.5 of 2011 by the Principal Subordinate Judge and Appellate Authority, Coimbatore dated 25.11.2011 confirming the Judgment and Decree passed in O.S.No.1239 of 2006 by the II Additional District Munsif, Coimbatore dated 29.04.2010.)

1. The plaintiffs in the original suit are the appellants. They had filed the suit on the file of the court of II Additional District Munsif, Coimbatore as O.S.No.1239/2006 for the relief of specific performance of an agreement of re-conveyance. The suit was dismissed by the trial court by a judgment and decree dated 29.04.2010. The appeal filed by the plaintiffs before the lower appellate court, namely the court of Principal Subordinate Judge, Coimbatore as A.S.No.5/2011 was also dismissed

on 25.11.2011 and thereby the decree of the trial court dismissing the suit for specific performance was confirmed by the lower appellate court. Hence the plaintiffs have come forward with the present second appeal.

2. The case of the appellants/plaintiffs as per the plaint averments, in brief, are as follows:

One acre of land forming a portion of 4.50 acres of land comprised in Survey No.341/2 in Goundampalayam village, Coimbatore Taluk morefully described in the plaint schedule originally belonged to one Subramaniam Chettiar, the father-in-law of Devaki, the first appellant/first plaintiff. Renuka, the second appellant/second plaintiff is the daughter of Devaki. The said Subramaniam Chettiar, during his life time received a sum of Rs.2,000/- from V.R.Kannappan, the respondent/defendant as loan on the understanding that he should execute a mortgage deed. However taking advantage of the illiteracy and the present needs of Subramaniam Chettiar he was made to execute a sale deed in respect of the suit property in favour of the respondent/defendant on 03.03.1969, registered as document No.299/1969 on the file of Sub Registrar, Gandhipuram. On the same day, a deed of re-conveyance was executed by the respondent/defendant in favour of Subramaniam Chettiar and the said re-conveyance deed was registered on the file of the very same Registrar as document No.300/1969. Though a sale deed and a re-conveyance agreement had been executed, in effect, the transaction was understood to be a mortgage. The respondent/defendant was also put in possession of the suit property in lieu of interest. As such in 1978, the said Subramaniam Chettiar tendered the amount due on the mortgage and wanted to redeem the mortgage. Since the respondent/defendant refused, Subramaniam Chettiar issued a lawyer's notice enclosing a draft for a sum of Rs.200/- being the balance amount due under the mortgage. As he claimed benefits under the provisions of Act 13 of 1980, the same was also refused by the respondent/defendant. Hence a suit for possession was filed by Subramaniam Chettiar in O.S.No.256/1984 on the file of District Munsif, Coimbatore. During the pendency of the suit, Subramaniam Chettiar died and the appellants/plaintiffs pursued the suit. The suit was dismissed by the trial court. An appeal filed before the Subordinate Judge, Coimbatore in A.S.No.148/1991 was also dismissed. The

second appeal filed before the High court in S.A.No.924/2005 was also dismissed. Similar was the fate of S.L.P. No.7405 of 2006 filed before the Supreme Court and it was dismissed on 05.05.2006. Since the contention of the appellants/plaintiffs that the documents constitute a mortgage was negated holding that the remedy available to them was to file a suit for specific performance on the basis of agreement for re-conveyance, the present suit for the relief of specific performance of the agreement for re-conveyance has been filed. Though the time for completion of the transaction of the re-conveyance was fixed as seven years from the date of agreement and the said period of seven years ended on 03.03.1976, since the plaintiffs were prosecuting a case, namely O.S.No.256/1984 and the appeals arisen therefrom, the present suit is not barred by limitation. Since the question of the right of the plaintiff to seek performance on the basis of the agreement for re-conveyance was not made an issue in the previous suit, the judgment of the previous suit could not constitute res judicata. Hence the appellants/plaintiffs seek a decree for specific performance of the agreement for the re-conveyance directing the respondent/defendant to execute a sale deed in favour of the appellants/plaintiffs and deliver possession of the property to the appellants/plaintiffs and in case the respondent/defendant fails to do the same within a period to be fixed by the court, the court shall execute the said deed in favour of the appellants/plaintiffs. For the said purpose, the plaintiffs have deposited to the credit of the suit a sum of Rs.2,000/- being the consideration mentioned in the agreement for re-conveyance.

3. The suit was resisted by the respondent/defendant by filing a written statement containing the following averments.

The present suit filed by the appellants/plaintiffs is nothing but an abuse of process of court with a view to fight and harass the respondent/defendant. Since the appellants/plaintiffs have suppressed material facts, they are not entitled to the discretionary and equitable relief of specific performance. It is true that the suit property originally belonged to Subramaniam Chettiar. On the other hand, the contention of the appellants/plaintiffs that there had been a transaction of mortgage by the execution of a sale deed and an agreement for re-conveyance, both dated 03.03.1969 is absolutely false, as outright sale was made by

Subramaniam Chettiar by a sale deed dated 03.03.1969 conveying the suit property absolutely to the respondent/defendant. After the said sale, the respondent/defendant got his name entered in the revenue records and was enjoying the same by paying kists to the government. Subramaniam Chettiar himself filed O.S.No.256/1984 on the file of District Munsif, Coimbatore for recovery of possession of the suit property and other reliefs contending that the sale deed dated 03.03.1969 was only a mortgage. The said suit was dismissed and the same was upheld by the hierarchy of the courts up to the Supreme Court in S.L.P.No.7405/2006. Though the appellants/plaintiffs rely on the agreement for re-conveyance dated 03.03.1969, they had lost their right by efflux of time and the same was clearly stated in the written statement filed in the previous suit, namely O.S.No.256/1984. Apart from that, the appellants/plaintiffs were not always ready and willing to perform their contract under the agreement for re-conveyance. The suit for specific performance based on the agreement for re-conveyance dated 03.03.1969 is hopelessly barred by material. So far as right of re-conveyance is concerned, time is the essence of the contract. As the plaintiffs did not seek re-conveyance within the time stipulated in the agreement for re-conveyance, the right conferred on Subramaniam Chettiar through whom the appellants/plaintiffs claim has got extinguished. The suit is also barred by the principles of res judicata. Hence the suit must be dismissed with exemplary cost.

4. Based on the above said pleadings the trial court framed the following three issues, which are as follows:

- i) Is the plaintiff entitled to the relief of specific performance as prayed for?;
- ii) Is the plaintiff entitled to the relief of recovery of possession? And
- iii) Whether the suit is barred by res judicata?

5. In the trial, the party witnesses appeared as PW.1 and DW.1 respectively. Four documents were marked as Exs.A1 to A4 on the side of the appellants/plaintiffs and three documents were marked as Exs.B1 to B3 on the side of the respondent/defendant. The learned trial judge, upon considering the pleadings and evidence came to the conclusion that the suit was not barred by res judicata, but

decided the issues 1 and 2, namely regarding the entitlement of the appellants/plaintiffs for the relief of specific performance and for the relief of recovery possession against the appellants herein/plaintiffs and non-suited them for the reliefs sought for and dismissed the suit. As against the decree of the trial court dated 29.04.2010 dismissing the suit, the appellants herein/plaintiffs filed an appeal in A.S.No.5/2011 on the file of the Principal Subordinate Judge, Coimbatore. The learned Principal Subordinate Judge (lower appellate judge), after hearing, dismissed the appeal by his judgment and decree dated 25.04.2011 and thereby confirmed the decree of the trial court dismissing the suit. As against the said decree of the lower appellate court confirming the decree of the trial court, the present second appeal has been filed on various grounds set out in the memorandum of grounds of second appeal.

6. This court heard the arguments advanced by Mr.S.Kadarkarai, learned counsel for the appellants and by Mr.T.R.Rajaraman, learned senior counsel appearing for the counsel on record for the respondent. This court also perused the appeal memorandum, copies of judgments and decrees of the courts below, records sent for from the courts below and other documents produced in the form of typed set of papers.

7. An appeal from the decree of an appellate court, subordinate to the High Court, shall lie to the High Court under section 100 of the Civil Procedure Code only on a substantial question of law. At the time of admission of an appeal, the court shall formulate substantial question of law. The mere fact that the court has admitted the second appeal accepting the contention of the appellant that the second appeal involves a substantial question of law and the High Court has also formulated the substantial question of law, it does not mean that the respondent in such second appeal cannot canvas during the hearing of the appeal that no such substantial question of law has arisen in the second appeal or that the question of law, which is said to have arisen in the second appeal is in fact no substantial question of law. Apart from that, the respondent also can contend that even if the substantial question of law is decided in favour the appellant, the same will be of no consequence, since the decree of the court from which the appeal has arisen, is liable to be sustained on other grounds. For better appreciation section 100

CPC is reproduced here under:

" 100. Second appeal. - (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question as formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

8. In this case, the only substantial question of law formulated at the time of admission of second appeal is as follows:

"Whether the lower Appellate Court has failed in its duty to render a judgment in consonance with the requirements found in Order 41 Rule 31 CPC, in so far as no point for determination has been mentioned before discussing the points?"

9. In the certified copy of the judgment of the lower appellate court pronounced in A.S.No.5/2011, after reproducing the plaint averments, averments in the written statement, evidences adduced in the case and the points raised in the grounds of appeal, there appears a paragraph titled as point for consideration. But, except the title, nothing is found in the certified copy of the judgment filed along with the

appeal. Immediately thereafter paragraph 7 begins from which the lower appellate judge started discussing the points for consideration. Only pointing out the same, it was argued before this court by the learned counsel for the appellants in the second appeal that the learned lower appellate judge had proceeded with the pronouncement of judgment without precisely formulating the points for determination as required under Order 41 Rule 31 CPC. However, on appearance, the very same point was sought to be canvassed on behalf of the appellants at the time of final hearing of the appeal. However, learned counsel for the respondent/defendant submits that there was an omission in the certified copy of the judgment of the lower appellate court obtained by the appellants and the same is sought to be capitalized by projecting the omission in the certified copy as an omission committed by the lower appellate court. The records of the lower appellate court have been sent for and the original judgment of the lower appellate court is also available. In page 5 of the original judgment of the lower appellate court, paragraph 6 is titled as points for consideration and two points for consideration have been formulated by the lower appellate court, which are as follows:

" 1) Whether the decree of the trial court is liable to be set aside or to be confirmed?

and

2) Whether the appellant is entitled to the relief as prayed for?"

Pursuant to the verification of the original judgment of the lower appellate court, this court is convinced that the contention of the learned counsel for the appellants that the learned lower appellate judge failed to formulate the points for consideration and hence the judgment of the lower appellate court is not in accordance with Order 41 Rule 31 CPC, is based on misconception and hence unsustainable. However, an attempt was made by the learned counsel for the appellants to contend that though two points have been framed as points for determination by the lower appellate court, yet necessary points for determination were not formulated by the lower appellate court and hence the judgment and decree of the lower appellate court is liable to be set aside.

10. As an answer to the above said contention of the learned counsel for the appellants/plaintiffs, the learned counsel for the respondent/defendant relied on a judgment of the Hon'ble Supreme Court in G.Amalorpavam and Others vs. R.C.Diocese of Madurai and others reported in (2006) 3 SCC 224. In the said case, the Hon'ble Supreme Court has held that substantial compliance with the requirement of Order 41 Rule 31 shall be enough and justice had not suffered, where entire evidence has been considered and discussed in detail and conclusions and findings based on such discussion were supported by reasons even though no point had been framed. The relevant portion in the judgment is as below:

" 9. The question whether in a particular case there has been a substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate Court is in a position to ascertain the findings of the lower appellate Court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisal of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination...."

11. In the present case, though the points for consideration formulated by the lower appellate court are not happily worded, the lower appellate court has clearly considered the respective pleadings of the parties and the evidence regarding the nature of the transaction between the parties including the question of readiness and willingness on the part of the plaintiffs and also the question of limitation. This court is of the considered view that there had been a substantial compliance with the provisions found in Order 41 Rule 31 CPC.

12. It is also the contention of the learned counsel for the appellants/plaintiffs that though a sale deed and an agreement for re-conveyance were the documents executed between Subramaniam Chettiar and the respondent/defendant, both the documents put together would constitute only a mortgage and hence the limitation for the same would be 30 years. It is unnecessary to go into the factual matrix necessary to deal with the question as to whether the transaction between the respondent/defendant and Subramaniam Chettiar was a mortgage or a sale and an agreement for re-conveyance? Subramaniam Chettiar was the original owner of the suit property. Admittedly, the said Subramaniam Chettiar filed a suit O.S.No.256/1984 on the file of District Munsif, Coimbatore for redemption of mortgage on the premise that the said transaction was only a mortgage. He executed a sale deed in favour of the respondent/defendant on 03.03.1969, which was registered as document No.299/1969 on the file of Sub Registrar, Gandhipuram. On the very same day, the respondent/defendant executed an agreement for re-conveyance, which was also registered on the file of very same office as document No.300/1969. A certified copy of the said agreement for re-conveyance has been produced as Ex.A1. Since the sale deed and the agreement for re-conveyance were executed on one and the same day and the consideration quoted therein was also agreed, pursuant to the sale, possession was delivered to the respondent/defendant. Subramaniam Chettiar claimed the said transaction to be a mortgage and filed a suit on the above said contention for redemption of mortgage and recovery of possession. The same was dismissed by the trial court and the appeals filed on the sub court and then in the High Court were dismissed and the Special Leave Petition filed before the Supreme Court was also dismissed. The printed copy of the judgment of the trial court in O.S.No.256/1984 and the printed copy of the judgment of the appellate court i.e. II Additional

Subordinate Judge, Coimbatore in A.S.No.148/1991 and the copy of the order passed by the Hon'ble Supreme Court in S.L.P.No.7405/2006 have been produced as Exs.A2, A3 and A4 respectively. During the pendency of the suit, Subrmaniam Chettiar died and the present appellants/plaintiffs continued the suit and unsuccessfully prosecuted the second appeal and SLP. The same will make it clear that the contention of the appellants/plaintiffs that the transaction evidenced by the sale deed and the agreement for re-conveyance, both dated 03.03.1969, was not a mortgage and it was only an outright sale and an agreement for re-conveyance.

13. So far as the agreement for re-conveyance is concerned, the time stipulated therein shall be the essence of the agreement. This has been held so by the Hon'ble Supreme Court in Bishwanath Prasad Singh vs. Rajendra Prasad and another reported in (2006) 4 SCC 432. Referring to section 58(c) of the Transfer of Property Act, 1882, the Hon'ble Supreme Court held that a mortgage by conditional sale must be evidenced by a single document, whereas a sale with a condition for re-transfer may be evidenced by more than one document. It has also held that the sale with a condition of re-transfer is not a mortgage and is also not a partial transfer. It was also held that by reason of such transfer all rights got transferred reserving only a personal right to purchase and such personal right would be lost unless the same was exercised within the stipulated time.

14. In this case, as per Ex.A1-agreement, seven years time has been prescribed as the time for re-purchase. Within the period of seven years from 03.03.1969, Subramaniam Chettiar, through whom the appellants/plaintiffs make their claim, did not volunteer to pay the amount and get the property re-conveyed. He kept quiet till 1984 and only in 1984, he chose to file a suit for redemption contending that the transaction was only a mortgage; that he was also entitled to the benefits of Tamil Nadu Act 13 of 1980 and that the balance amount payable under the mortgage was only Rs.200/-. The said claim of Subramaniam Chettiar, which was pursued by the appellants herein after his death was negated by the courts below. The plaintiffs fought up to the Supreme Court till the disposal of S.L.P.No.7405 of 2006. Only thereafter, the appellants/plaintiffs have chosen to file the present suit. Even in the present suit, the plaint averments make it clear

that they are very much aware of the legal position that the limitation for filing a suit for specific enforcement of the rights under the agreement for re-conveyance was three years from the date of expiry of the period stipulated in the agreement. As per Ex.A1-agreement dated 03.03.1969, seven years period stipulated therein expired on 03.03.1976. As per the judgment of the Supreme Court referred supra, Subramaniam Chettiar through whom the plaintiffs make their claim ought to have fulfilled his obligation under the agreement for re-conveyance and volunteered to get the performance under the agreement within the period of seven years stipulated in Ex.A1, since the time stipulated in the agreement for re-conveyance shall be the essence of the contract. It is not in dispute that Subramaniam Chettiar did not volunteer to get the re-conveyance deed executed by making payment of the amounts stipulated in the agreement within the period stipulated in Ex.A1. As such the right to get re-conveyance got forfeited from 03.03.1976 itself.

15. Even assuming that the time was not considered to be the essence of the contract, still since time has been prescribed in Ex.A1, limitation started running from the expiry and the time stipulated as per article 55 of the Limitation Act, 1963 is three years. Even within three years from 03.03.1976, Subramaniam Chettiar had not filed the suit. He waited for five more years and filed the earlier suit O.S.No.256/1984 for redemption. Therefore, even the earlier suit itself was after the expiry of the period of limitation for enforcement of the right under the agreement for re-conveyance. Hence the prosecution of the earlier suit cannot be cited as a diligent prosecution of another proceeding under section 14 of the Limitation Act to claim exclusion from the period of limitation. Therefore, the finding of the courts below that the present suit for specific performance is hopelessly barred by limitation deserves no interference.

16. Even otherwise, the appellants/plaintiffs based on their own pleadings are not entitled to the relief of specific performance, since they had claimed that the transaction under the documents dated 03.03.1969 (sale deed) and agreement for re-conveyance was only a mortgage and they were entitled to redeem the mortgage by making payment of a sum of Rs.200/- alone as against Rs.2,000/- stipulated in Ex.A1-Agreement on the basis of their claim that their predecessor interest was entitled to the benefit of Act 13 of 1980, which would clearly show the

absence of readiness and willingness on their part to perform their part of the contract under Ex.A1-agreement till the date of filing of the present suit. On that score alone, the appellants/plaintiffs are liable to be non-suited to the reliefs sought for. The courts below have not committed any error in non-suiting the appellants/plaintiffs for the relief of specific performance and the consequential relief of recovery of possession. For the reasons stated above, this court comes to the conclusion that the second appeal deserves to be dismissed.

17. Accordingly, the Second Appeal is dismissed with cost. Consequently, connected miscellaneous petition is closed.

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