

Kandaswami Mudaliar Vs. Munuswamy Udayar and ors.

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Court : Chennai

Decided On : Nov-21-1973

Reported in : (1974)2MLJ62

Appellant : Kandaswami Mudaliar

Respondent : Munuswamy Udayar and ors.

Judgement :

P.S. Kailasam, J.

1. The defendant in the suit is the appellant in this Letters Patent Appeal. The plaintiffs filed the suit for specific performance of an agreement dated 21st August, 1952 executed by the defendant in favour of the plaintiffs for conveyance of certain items of the suit properties. The plaintiffs wanted to purchase one item of property from one Ramaswami. They were unable to raise funds. They approached the defendant and the defendant told the plaintiffs that because of the Debt Relief Act, he would not be in a position to advance money to the plaintiffs at a high rate of interest, but if the plaintiffs agreed, he would advance money on condition that the plaintiffs should convey not only the property that was proposed to be purchased but also the property they owned to the defendant and after such conveyance, the defendant would agree to transfer the property back to the plaintiffs on their paying the entire money with interest stipulated. Accordingly, sale deeds were executed in favour of the defendant by registered documents, dated 29th May, 1950. The defendant agreed to sell the property back to the plaintiffs and executed a registered agreement to sell in favour of the plaintiffs on 21st August, 1952. The agreement provided that the defendant agreed to sell the land to the plaintiffs for Rs. 7,000 and took an advance of Rs. 10 on 21st August, 1952 and agreed that if the plaintiffs paid the balance of Rs. 6,990 at any time before 12th April, 1957 to the defendant, the defendant or his heirs and representatives should execute and register a sale deed in favour of the plaintiffs at their cost. The defendant also agreed that if the plaintiffs paid Rs. 6,990 before 12th April, 1957 and if the defendant or his heirs and representatives failed to execute and register the sale deed in favour of the plaintiffs, the plaintiffs could file a suit for specific performance of the contract of sale. The agreement further provided that if the plaintiffs failed to pay the amount of Rs. 6,990 within 12th April, 1957 the plaintiffs would forfeit the advance paid by them and also forfeit the right to enforce specific performance and the agreement would stand cancelled. It is common ground that the plaintiffs did not pay Rs. 6,990 before 12th April, 1957 but filed the suit on 12th April, 1960 for specific performance. But before filing the suit, they issued a notice saying that they were ready to meet the defendant at the Sub-Registrar's Office, Tirupattur with Rs. 6,990 for taking the sale deed. The defendant repudiated his liability to specifically perform the agreement.

2. The defence taken to the suit was that the transaction was in the nature of an agreement of reconveyance and that time is the essence of the contract and as the plaintiffs had failed to pay the balance of Rs. 6,990 before 12th April, 1957, the plaintiffs could not specifically enforce the contract.

3. The trial Court found that the agreement was an agreement to sell and not an agreement to reconvey and time is not the essence of the contract. It also found that the suit filed by the plaintiffs is within time. In this view, the trial Court decreed the suit. The defendant appealed to the District Judge, North A cot. In the appeal, the appellate Court considered two questions, namely, whether time is the essence of the contract and whether the suit is barred by time. The appellate Court held that the document Exhibit A-1 is an agreement to reconvey the property and time is the essence of the contract and that as the plaintiffs had failed to pay the money before 12th April, 1957, the time stipulated, the plaintiffs cannot enforce the agreement for specific performance.

4. The plaintiffs took the matter in second appeal to this Court. Venkatadri, J., considered the question whether Exhibit A-1 is an agreement simpliciter to sell the suit property or an agreement for reconveyance of the suit property. The learned Judge came to the conclusion that the agreement is an agreement simpliciter and that it was not an agreement for reconveyance and therefore time is not the essence of the contract and decreed the plaintiffs' suit. Hence this Letters Patent Appeal.

5. The learned trial Judge in paragraph 10 of his judgment has elaborately gone into the question as to whether the document is an agreement of reconveyance or an agreement of sale simpliciter. He has pointed out that the property was sold by the plaintiff's to the defendant for a total consideration of Rs. 5,500, while the agreement between them stipulated that the plaintiffs should pay Rs. 7,000 to the defendant on or before 12th April, 1957, Apart from the difference in the price, the sale deeds and the agreement to convey are not contemporaneous documents. The sale deeds were executed in 1950 but the agreement to convey was entered into only in 1952. It was in fact not claimed in the written statement by the defendant that the agreement was executed in pursuance of an agreement to reconvey the property. It may also be noted that out of the two properties conveyed to the defendant, one property alone belonged to the plaintiffs and another to one Ramawwami. Both the properties were conveyed in the name of the defendant as security for payment of the money due by the plaintiffs to the defendant. In such circumstances, it cannot be said, that there was any agreement of reconveyance of properties, one belonging to a stranger and another to the plaintiffs. It was an agreement entered into two years after the execution of the sale deed wherein the defendant agreed to sell the property. Taking all these facts into account, we agree with the trial Court and the learned Judge who heard the second appeal that the transaction was an agreement to sell simpliciter and not an agreement for reconveyance.

6. In all the agreements to convey immoveable property, usually time is not the essence of contract. The question has been elaborately dealt with by the Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* I.L.R. (1916) Bom. 289, In that case the contract provided that should the purchaser not pay the amount within the fixed period mentioned in it he was to have no right to the deposit or earnest money paid on account and any claim of his was to be void, and the vendor was, after that date, to be at liberty to re-sell. In spite of such a specific clause the Privy Council held, after referring to Section 55. of the Indian Contract Act, 1872 that the law of

equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Their Lordships observed:

But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified.

In this case, Mr. M.S. Venkatarama Iyer, strongly relied on the provision in the agreement that if the plaintiff failed to pay the amount, the agreement not only gets cancelled, but also he would stand to lose the advance amount and shall be deemed to have lost all rights in the property. This clause in the agreement is more or less similar to the one that was dealt with by the Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunibhai* I.L.R. (1916) Bom. 889 and that decision is on all fours and is applicable to the facts of this case. We therefore consider that time is not the essence of the contract.

7. In this Letters Patent Appeal Mr. M.S. Venkatarama Iyer, submitted that the Courts below lost sight of the essential condition that is necessary to enable the plaintiffs to succeed in a suit for specific performance, namely, that the plaintiff, should aver and prove that they were always willing and ready to perform their part of the contract. According to the learned Counsel, as in their notice the plaintiffs had stated that they were unable to find money till 12th April, 1957, the period stipulated under the agreement, it must be held that they were not ready and willing to perform their part of the contract and they were not entitled to a decree for specific performance. This plea was not taken in the trial Court. The trial Court decreed the suit and the defendant preferred an appeal. Even in the memorandum of appeal grounds, this ground was not raised. But being a question of law we allowed the learned Counsel to raise this point. In support of his contention the learned Counsel relied on the decision of the Supreme Court in *Gomathinayagam Pillai v. Palaniswami Nadar* : [1967]1SCR227 submitted relying on paragraph 10 of the judgment that before a decree for specific performance could be granted, the plaintiff would have to prove his readiness and willingness continuously from the date of the contract till the date of hearing of the suit and if he failed in that his suit was liable to fail. Learned Counsel would construe this observation as meaning that the plaintiff should be ready and willing to perform his part of the contract by keeping the money ready to be paid to the defendant. We are unable to accept the interpretation put upon the sentence of the judgment of the Supreme Court by the learned Counsel. All that it means is that during the course of the continuance of the contract and subsequently the plaintiff must be ready and willing to perform his part of the contract. Section 16 of the Specific Relief Act (XLVII of 1963) provides that specific performance of a contract cannot be enforced in favour of persons specified in Clause (a) (b) and (c) of that section. Sub-section (b) provides that specific performance cannot be had in favour of

a person who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of the relation intended to be established by the contract. The sum and substance of sub-clause (b) is that the plaintiff should continue to stand by the contract and should not have become incapable of performing the contract or violated any of the terms of the contract. Sub-section (c) provides that the plaintiff should 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 terms the performance of which has been prevented or waived by the defendant. This position is made clear by the Supreme Court in the latter part of the paragraph wherein it states:

A ground for rejecting the respondent's claim for specific performance will not arise merely because the respondent was not ready with the necessary funds on 30th April, 1959, if time was not of the essence.

The above sentence makes it abundantly clear that the plaintiff will not lose his right to get specific performance merely because he had not the necessary funds before the last date provided under the contract but he will not be entitled to specific performance 'is the respondent was not ready and willing to perform his part of the contract. ' Thus it is clear that it is not essential that the plaintiff should have money ready in contracts where time is not the essence but should always stand by and be ready and willing to perform his part of the contract. We are unable to agree with the submission of the learned Counsel that the decision of the Supreme Court in *Gomathinayagam Pillai v. Palaniswami Nadar* : [1967]1SCR227 , would negative the claim of the plaintiff for specific performance.

8. The learned Counsel submitted that in any event the burden is on the plaintiffs to prove that they were always ready and willing to perform the contract and that this has not been proved as no oral evidence has been let in. This point was not specifically raised or put in issue in either the trial Court or the appellate Court or even before the learned Judge who heard the second appeal. As a matter of fact, on the materials available, we are satisfied that the plaintiffs were always ready and willing to perform their part of the contract. They wanted really to get back the property.

9. In the result, we do not see any reason for not accepting the conclusion arrived at by the learned Judge. The Letters Patent Appeal is dismissed with costs.