

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 8425 OF 2009

C.S. VENKATESH**... APPELLANT****VERSUS****A.S.C. MURTHY (D) BY
LRS. & ORS.****... RESPONDENTS****J U D G M E N T****S. ABDUL NAZEER, J.**

1. This appeal is directed against the judgment and decree in RFA No.626 of 2001 dated 21.08.2006 passed by the High Court of Karnataka at Bangalore, whereby the High Court has allowed the appeal and set aside the judgment and decree in O.S. No. 3308 of 1988 passed by the Civil Judge, Bangalore City.

2. A.S.C. Murthy was the plaintiff in the suit. He died during the pendency of the suit. Therefore, his wife Smt. Jayashree was brought on record as his legal representative. She is the first respondent in this appeal. C.S. Venkatesh, the appellant herein, was defendant No.2 in the suit. C. Sethurama Rao, was the defendant No.1 in the suit. He also died during the pendency of the suit,

therefore, his wife Smt. C.S. Lalithamma was brought on record as his legal representative. She is arrayed as respondent No. 2A in this appeal. Defendant Nos. 3 and 4 are respondent Nos. 3 and 4 in this appeal. The parties are hereinafter referred to in their respective capacities before the trial court.

3. The subject matter of the suit was the property situated at Site No. 522, 17th Main Banashankari, I Stage, First Block, Srinagar, Bangalore – 560 050 (hereinafter referred to as ‘the schedule property’).

4. A.S.C. Murthy had filed the above suit against defendants for specific performance of the agreement of reconveyance dated 23.04.1975 in respect of the schedule property and alternatively to declare that the sale deed dated 23.04.1975 executed by him in favour of the defendants is null and void. It was alleged in the plaint that the City Improvement Trust Board, Bangalore (for short ‘CITB’) had allotted the site in question in favour of the plaintiff. Thereafter, he commenced construction of the building on the said site. Since he did not have sufficient funds, he approached the defendants for certain financial assistance. Accordingly, the defendants advanced a sum of Rs.2,000/- as loan. Subsequently, a further sum of Rs.10,000/- was advanced on the condition of payment of interest at the rate of 18% p.a. However, the plaintiff failed to pay the interest on the said sum as agreed, except for a period of two months. Since the defendants were in need of accommodation, the plaintiff put them in possession of the schedule property by executing a deed of mortgage dated 11.10.1973. According to the plaintiff, the defendants have advanced, in all, a sum of Rs.29,000/-. As the plaintiff could not pay the interest regularly,

the defendants asked the plaintiff to execute a nominal sale deed in order to ensure prompt payment of interest. Accordingly, the plaintiff executed a deed of sale dated 23.04.1975 in favour of the defendants for a sale consideration of Rs.35,000/- by receiving Rs.6000/-, the difference in the sale price. It was alleged that the sale deed was executed as a security for the amount advanced by the defendants. It was contended that the defendants executed an agreement of reconveyance in respect of the schedule property dated 23.04.1975 in favour of the plaintiff. It was also agreed that the defendants were put in possession of the schedule property on the understanding that they need not pay rent and the plaintiff need not pay interest on the amount advanced by them to the plaintiff. After the expiry of five years and the defendants having received the sum of Rs.35,000/- advanced by them, the plaintiff demanded that the defendants execute a reconveyance deed in terms of the agreement of reconveyance dated 23.04.1975. However, the defendants have failed to execute sale deed.

5. The second defendant filed the written statement admitting the execution of the mortgage deed dated 11.10.1973 and borrowing of a sum of Rs.29,000/- by the plaintiff. It was contended that the defendants agreed to reconvey the property and executed the reconveyance agreement prior to the execution of the sale deed. However, the plaintiff did not agree for reconveyance. The plaintiff gave up his demand for reconveyance and executed the sale deed. It was contended that even otherwise the reconveyance agreement was not to be acted upon. It was further contended that the plaintiff had borrowed the loan from the

bank on different occasions by mortgaging the title deeds of the property. As the plaintiff failed to discharge his debt to the bank, the defendants paid the said dues in order to save the schedule property from auction. It was also contended that there was no plea or proof regarding readiness and willingness to perform the plaintiff's part of the contract as required under Section 16(c) of the Specific Relief Act, 1963 (for short 'the Act'). It was denied that the sale deed dated 23.04.1975 was nominal and was executed for the purpose of security for the loan advanced by the defendants.

6. On the basis of the pleadings of the parties, the trial court framed the relevant issues. In support of the suit claim, wife of the deceased plaintiff was examined as PW-1 and exhibited documents P-1 to P-19 in her evidence. The second defendant was examined as DW-1 and exhibits D-1 to D-15 were marked in his evidence. On consideration of the evidence of the parties and materials on record, the trial court came to a conclusion that the plaintiff has established the execution of agreement of reconveyance. The Court also came to a conclusion that the sale deed dated 23.04.1975 was not a nominal one, as contended by the plaintiff. The Court recorded a finding that the plaintiff has averred in the plaint that there was sufficient plea in relation to readiness and willingness of the plaintiff to perform his part of the contract. However, it was held that the plaintiff had failed to prove that he was ready and willing to perform the contract. Consequently, the trial court dismissed the suit.

7. The plaintiff filed R.F.A. No. 626 of 2001, challenging the judgment and decree of trial court. The High Court on consideration of the rival contentions

of the parties held that the sale deed executed by the plaintiff in favour of the defendants was security for the loan advanced by the defendants. Consequently, the High Court allowed the appeal. The defendants were directed to execute a deed of reconveyance in respect of the schedule property in favour of the plaintiff.

8. Appearing for the appellant/defendant No.2, Shri S.N. Bhat, learned counsel submits that the suit filed by the plaintiff was for specific performance of an agreement to reconvey. Therefore, he has to plead and prove his readiness and willingness to pay the consideration amount to the defendants. In this case, the plaintiff has failed to plead and prove his readiness and willingness. He had no financial capacity to pay the consideration amount. He did not discharge the earlier debt owed by him to Sri Thyagaraja Co-operative Bank and the defendants had to pay off the debt in order to save the property. He had no capacity to pay the consideration amount. It is further argued that the sale deed dated 23.04.1975 was not a nominal sale deed, as contended. The High Court instead of upholding the well-reasoned judgment of the trial court has set aside the said judgment and decreed the suit.

9. On the other hand, Ms. Sanya Kumar, learned advocate appearing for the respondent-plaintiff has sought to justify the impugned judgment and decree of the High Court.

10. We have carefully considered the submissions of the learned counsel made at the Bar.

11. The suit filed by the plaintiff was for specific performance of the agreement of reconveyance dated 23.04.1975. Alternatively, he had also sought

for a declaration that the sale deed dated 23.04.1975 was null and void and not binding on the plaintiff. On appreciation of the materials on record, the trial court has held that the plaintiff has proved the existence and execution of agreement of reconveyance. It has negated the plaintiff's claim that the sale deed was a nominal one. However, the High Court has held that the plaintiff had executed the sale deed in favour of the defendants as security for the loan advanced by the defendants and that it cannot be considered a sale. Further, the High Court has directed specific performance of the agreement of reconveyance. Therefore, the first question for consideration is whether the sale deed dated 23.04.1975 executed by the plaintiff in favour of the defendants is a nominal sale deed obtained as security for the loan advanced by the defendants.

12. Execution of the sale deed and the deed of reconveyance are not in dispute. According to the plaintiff, he could not pay the interest except for two months after the execution of the sale deed and that the understanding between the parties was that the defendants need not pay any rent and plaintiff need not pay the interest on the amount advanced by them to the plaintiff. It was contended that sale deed was executed to ensure prompt payment of the amounts. But a reading of the sale deed marked at Exhibit P-8, along with other surrounding circumstances, would clearly indicate that it is an outright sale.

13. It is settled that the real character of the transaction has to be ascertained from the provisions of the documents viewed in the light of surrounding circumstances. Since two documents were executed on the same day, the

transaction cannot be a mortgage by way of conditional sale in view of the express provisions contained in Section 58(c) of the Transfer of Property Act, 1882. A perusal of the recitals contained in the sale deed at Exhibit P-8 shows that the property was agreed to be sold absolutely for a total consideration of Rs.35,000/-. The plaintiff has also stated that since possession has already been delivered earlier under a deed of mortgage, delivery of possession under this document does not arise. It was further stated that henceforth neither himself nor his heirs have any right, title or interest in the property and that the plaintiff is entitled to water, air, right of easement, etc. concerning the property together with all rights, title and interest and right of disposal of the property. The defendant, his son and grandson, etc. unto posterity are entitled to enjoy the property without any obstruction or trouble either by the plaintiff or from anyone claiming under him. He has delivered the possession certificate issued by the CITB and Khata certificate for transfer of Khata from Bangalore City Corporation. Thus, the language employed in this document is plain and unambiguous and the intention of the parties is also very clear from its recitals. Even the evidence led by the parties does not indicate to the contrary. Thus, a careful perusal of all the clauses of the sale deed and the evidence on record would clearly show that the intention of the parties was to make the transaction a sale. We are also of the view that since the execution of the reconveyance deed has already been established, question of holding the sale deed to be nominal cannot be accepted.

14. The next question for consideration is in relation to compliance of Section 16(c) of the Act by the plaintiff. Though a question was raised before the trial court that there are no pleadings as regards the plaintiff's readiness and willingness to perform the contract, the trial court has rightly held that there is sufficient compliance of Section 16(c) of the Act to the extent of pleadings. Therefore, the question to be considered is whether the plaintiff was ready and willing to perform his part of the contract.

15. The words 'ready and willing' imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

16. In N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao and Others¹, it was held that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must necessarily be proved to be available.

17. In Pushparani S. Sundaram and Others v. Pauline Manomani James (deceased) and Others², this Court has held that inference of readiness and willingness could be drawn from the conduct of the plaintiff and the totality of circumstances in a particular case. It was held thus:

“So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16(c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved.”

¹ 1995 (5) SCC 115

² 2002 (9) SCC 582

18. Similar view has been taken by this Court in **Manjunath Anandappa URF Shivappa Hanasi v. Tammanasa and Others**³ and **Pukhraj D. Jain and Others v. G. Gopalakrishna**⁴.

19. The judgment of this Court in **Umabai and Anr. v. Nilkanth Dhondiba Chavan (Dead) by LRs. and Anr.**,⁵ is almost similar to the case at hand where the plaintiff had filed a suit for specific performance of the agreement to re-convey property. The plea of the plaintiff was that the transaction was one of mortgage and the sale stood redeemed and the plaintiff was discharged from the debt and he was ready to pay the defendant the amount for the property only in the alternative that the plea of mortgage was not accepted by the Court, would show that his readiness was conditional. The plaintiff did not have any income and could not raise the amount required for re-purchase of the property. In the totality of the circumstances, it was held that the plaintiff was not ready and willing to perform the contract. The conditions laid for the specific performance of the contract are in para 30, which is as under:

“30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having

³ 2003 (10) SCC 390

⁴ 2004 (7) SCC 251

⁵ (2005) 6 SCC 243

regard to the entirety of the pleadings as also the evidences brought on records”.

20. In the instant case, the plaintiff has alleged that he was ready to pay Rs.35,000/- to the defendants and called upon them to execute the re-conveyance deed. However, in para 11 of the plaint it is pleaded that the plaintiff was running contract business wherein he suffered heavy loss and as such he gave up the business. It is also pleaded that at present the plaintiff has no business or profession and has no source of income. He has no property, either movable or immovable. Mere plea that he is ready to pay the consideration, without any material to substantiate this plea, cannot be accepted. It is not necessary for the plaintiff to produce ready money, but it is mandatory on his part to prove that he has the means to generate the consideration amount. Except the statement of PW-1, there is absolutely no evidence to show that the plaintiff has the means to make arrangements for payment of consideration under the reconveyance agreement.

21. It is relevant to state here that before filing the suit, the plaintiff had filed an application before the competent authority under the Karnataka Debt Relief Act seeking extinguishment of the debt and delivery of the property back to him. No doubt, the application was dismissed by the authority. But the fact remains that the intention of the plaintiff was not to pay the amount as per the re-conveyance agreement.

22. The deed of re-conveyance, contains a clause for payment of interest on the consideration amount of Rs.35,000/-. However, the plaintiff has pleaded that

there is no agreement to pay the interest. This shows that the plaintiff was not ready to perform his part of the obligation as per the agreement. Further, the plaintiff had mortgaged the property with the bank and the bank had obtained an award against the plaintiff. When the suit property was put up for auction, the defendants paid the entire amount to the bank which was payable by the plaintiff under this award. This aspect also indicates the conduct of the plaintiff.

23. Taking an overall view of the matter, the trial court has rightly held that the plaintiff was not ready and willing to perform his part of the contract. The High Court, in our view, was not justified in reversing the well-reasoned judgment of the trial court.

24. In the result, this appeal succeeds and it is accordingly allowed. The judgment of the High Court in R.F.A. No.626 of 2001 dated 21.08.2006 is set aside and the judgment and decree passed by the trial court in O.S. No.3308 of 1988 dated 12.04.2001 is restored.

25. There will be no order as to costs.

.....J.
(S. ABDUL NAZEER)

.....J.
(DEEPAK GUPTA)

New Delhi;
February 07, 2020.

