

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.02.2015

CORAM:

THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

S.A.No.805 OF 1998

1. Jayalakshmi (Deceased)
2. Kundappan
3. R.Sunmugam

(Third appellant brought on record
as LR of the deceased 1st appellant vide
order of Court dated 07.07.2011 made
in M.P.Nos.423 to 425 of 2011) ... Appellants/Defendants

Vs.

M.Kullappan ... Respondent/Plaintiff

PRYER : This second appeal filed under Section 100 C.P.C. against the judgment and decree dated 06.03.1998 passed in A.S.No.95 of 1996 on the file of the Principal District Judge, Dharmapuri at Krishnagiri, in reversing the well considered judgment and decree dated 31.07.1996 passed in O.S.No.285 of 1987 on the file of the Subordinate Judge, Krishnagiri.

For Appellants : Mr.V.Raghavachari
For Respondent : Mr.P.Tamizhkumaran

J U D G M E N T

The defendants 1 and 2 are the appellants herein. The suit was filed by the respondent/plaintiff for specific performance of the sale agreement dated 09.03.1987 entered into between the plaintiff and the first defendant in respect of the suit property.

2. It is the case of the plaintiff that the first defendant having agreed to sell the suit property to the plaintiff for a sum of Rs.31,000/- executed the agreement of sale- Ex.A1 and received a sum of Rs.10,000/- as advance and agreed to receive the balance of sale consideration at Rs.21,000/- from the plaintiff and to execute the sale deed within two months, i.e., on or before 09.05.1987. It is his further case that it is also agreed between the parties that the plaintiff can pay the balance amount at any time within a period of one year and get the sale deed executed from the first defendant and the plaintiff offered the balance sale consideration on several times before 09.05.1987, but the plaintiff said that she will receive the amount leisurely as there is time till 09.03.1988. Alleging that the

first defendant failed to perform his part of the suit agreement, the suit came to be filed. As the suit property was prior to the institution of the suit, sold to the second defendant, the subsequent purchaser is also arrayed as the second defendant in the suit. The suit is contested by both defendants 1 and 2.

2. According to the first defendant-owner, the time is essence of the contract. As the first defendant was in need of money, a short time was fixed in the agreement and there was no oral agreement to extend the time limit upto 09.03.1988 and the plaintiff has written a letter dated 04.06.1987 to the first defendant, admitting his inability to gather funds and the same was also suitably replied by the first defendant. It is also the definite case of the first defendant that the plaintiff was not ready and willing to perform his part of contract for want of sufficient funds and it is the plaintiff who postponed the payment of balance sale consideration and execution of the document. It is also the case of the first defendant that on failure of the plaintiff to complete the transaction in time, the first defendant sold the property to the second defendant and the plaintiff is not entitled to claim any relief for specific performance.

3.As far as the second defendant is concerned, he claims that he is a bona fide purchaser for valuable consideration, without notice of the agreement of sale.

4.The trial Court, after considering the oral and documentary evidence adduced on both sides arrived at a conclusion that the theory of oral agreement extending time limit for making payment of balance sale consideration upto 09.03.1988 is not believable and the plaintiff had no sufficient funds to pay the balance sale consideration and the plaintiff was not ready and willing to perform his part of contract for want of sufficient funds and the cancellation of the agreement was duly intimated to the plaintiff and thereafter, the property was sold to the second defendant and the second defendant is the bona fide purchaser of the property for valuable consideration and as the sale agreement was not in force on the date of institution of the suit the plaintiff is dis-entitled to get the relief and the suit was accordingly dismissed. Aggrieved against the same, the plaintiff preferred the appeal in A.S.No.95 of 1996.

5.The lower Appellate Court reversed the judgment and decree of the trial Court on the basis of the finding that the time is not the essence of the contract and the plaintiff had been always ready and willing to pay the balance sale consideration and get the sale deed executed and the first defendant had been postponing the execution of sale deed and executed the sale deed in favour of the second defendant, who is not a bona fide purchaser and accordingly, allowed the appeal and decreed the suit. Hence, the Second Appeal is filed before this Court by the defendants 1 and 2.

6. The Second Appeal was admitted on the following Substantial Questions of Law:

1. Whether the lower appellate Court is right in decreeing the suit for specific performance even after the plaintiff had failed to establish continuous readiness and willingness to perform his part of the contract?

2. Whether the lower appellate Court should have seen that the plaintiff had come to court with unclean hands and pleaded oral extension of time for one year and failed to substantiate the same and under such circumstances, whether the lower appellate Court should have followed the well settled principles laid down by Madras High Court in 1993

(2) Law Weekly page 411, and dismissed the suit."

7. During the pendency of the second appeal, the first defendant-owner died and her legal representative was brought on record as third appellant.

8. Heard the rival submissions made on both sides and perused the records.

9. The defendants 1 and 2 have, in this second appeal questioned the correctness of the judgment and decree of the lower Appellate Court based on its findings that the plaintiff is always ready and willing to pay the balance sale consideration and to get the sale deed executed. In order to appreciate the same the material aspect to be considered is as to what is the time limit agreed between the parties to pay the balance sale consideration of Rs.21,000/-. As per the terms of Ex.A1 dated 09.3.1987, the time limit agreed between the parties for the payment of balance sale consideration is two months i.e. on or before 09.05.1987. Ex.A1 sale agreement contains a specific clause that in the event of failure on the part of the plaintiff to pay the balance sale consideration within such time, the entire advance amount be forfeited and the plaintiff is also liable for the loss, if any, sustained by the first defendant. That being the terms agreed between the parties and reduced in writing, the oral theory pleaded by the plaintiff that the time limit was extended to one year and the plaintiff had always been ready to do so within such extended time is contrary to the specific clause in the agreement in writing, and such oral theory is hence not legally permissible. The plaintiff failed to prove such oral theory regarding extension of time upto 1988 and is unbelievable. While the trial Court has rightly held so the lower appellate Court reversed such finding of the trial Court without any evidence and proper reasoning and the finding to the effect is seriously perverse and legally unsustainable.

10. Even assuming the oral theory to be true, the next aspect to be considered is whether the plaintiff has been ready and willing to pay the balance sale consideration to get the sale deed executed. In

this regard, the important document can be looked into is Ex.B1, dated 04.06.1987. The same is the letter addressed by the plaintiff to the first defendant in which the plaintiff expressed his inability to pay the sale consideration within the time fixed in the document and the first defendant was informed by the plaintiff that he will sell the house site belonging to the plaintiff for the purpose of paying this balance sale consideration and the plaintiff will collect the amount within 10 or 15 days from the purchaser and will pay the amount due to the first defendant and thereafter, will get the sale deed executed. The plaintiff in para 6 of his plaint referred to this letter and sought to explain that it is written in his capacity as the first defendant's family friend describing his various difficulties in life, without meaning or referring to the agreement of sale. It is not in dispute that the same is duly replied by the first defendant under Ex.A3, under which, the plaintiff was intimated of Ex.A2 and the plaintiff was informed that the time was the essence of the contract and during the agreed period, the first defendant's husband made several attempts by sending mediators for completing the transaction and the same was not fruitful because of the plaintiff's inability to complete it for want of funds and the first defendant is not interested in selling the property and the agreement entered into between the parties stood lapsed. Though Ex.A2-reply with the contents as stated above was issued as early as on 12.06.1987 by the first defendant to the plaintiff. The rejoinder-Ex.A3 was sent by the plaintiff only on 27.10.1987 and the suit was filed during December 1987. Only in this rejoinder letter Ex.A3 dated 27.10.1987, it is stated by the plaintiff that the other letter Ex.B1 was sent in friendly manner and not pertaining to agreement. Such a stand taken on the side of the plaintiff/respondent is totally untenable.

11.The reading of the recitals contained in Ex.B1 would indisputably show that it refers to the agreement and relates to payment of balance sale consideration which was agreed to be completed within two months, i.e. on or before 09.05.1987 and execution and registration of the sale deed. The conduct of the first defendant in immediately replying the notice on 12.06.1987, thereby calling upon the plaintiff to comply the terms of the agreement for completing the sale transaction within two months, would probablise their theory that the time is considered essence of the contract. The very fact that short time was fixed in the agreement would disclose the urgency of the first defendant to get the money. As rightly pointed out by the learned Senior Counsel appearing for the first defendant the conduct of the plaintiff in writing Ex B1 letter would show that the plaintiff though willing to get the sale deed executed, was financially unable and not ready to pay the balance sale consideration to get the sale deed executed and registered. Contrary to the recitals in Ex.B1, the plaintiff has come forward with the present suit as if the plaintiff had been from the beginning, offering to pay balance of sale consideration and it is the first defendant, who had been postponing to receive the same.

It is stated so in the plaint as well as in the evidence of the plaintiff as PW1. The plaintiff as PW1 has definitely deposed in the witness box as if he had been frequently approaching the first defendant from the date of agreement within two months or one year and also thereafter for paying the balance sale consideration and it is the first defendant who had been evading to receive the same.

12. The averments so raised in the plaint and oral evidence adduced by the plaintiff-PW1 in the witness box is contrary to actual state of affairs and factually incorrect. The plaintiff has thus come to Court with false statement and with unclean hands. The trial Court has rightly on due appreciation of the oral and documentary evidence adduced before it, found that the entire stand raised by the plaintiff regarding the oral extension of time and his plea of continuous readiness and willingness to pay the balance sale consideration and to get the sale deed executed is unbelievable and unacceptable. Whereas the lower Appellate Court by misconstruing the recitals in the document and by overlooking the other conduct of the parties and other material evidence reversed the well considered findings of the trial Court, and arrived at an erroneous conclusion as if the plaintiff is always ready and willing to perform his part of the contract. As a matter of fact, the plaintiff had not raised any specific averment to that effect in his plaint and the plaintiff's evidence in the witness box is contrary to the actual facts which were overlooked by the lower Appellate Court. The findings of the lower Appellate Court, without duly considering the evidence, are hence perverse and unsustainable. This Court on the basis of available evidence, is of the considered view that the trial Court has truly decided the issues and rightly dismissed the suit and the lower Appellate Court reversed the same by overlooking material evidence as such the same is liable to be set aside and the judgment and decree of the Trial Court is restored.

13. In the result, the Second Appeal is allowed by setting aside the judgment and decree of the first Appellate Court and by restoring the judgment and decree of the trial Court. No order as to costs.

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Sd/-

Assistant Registrar

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True Copy

Sub Assistant Registrar

To

1.The Principal District Judge,
Dharmapuri at Krishnagiri.

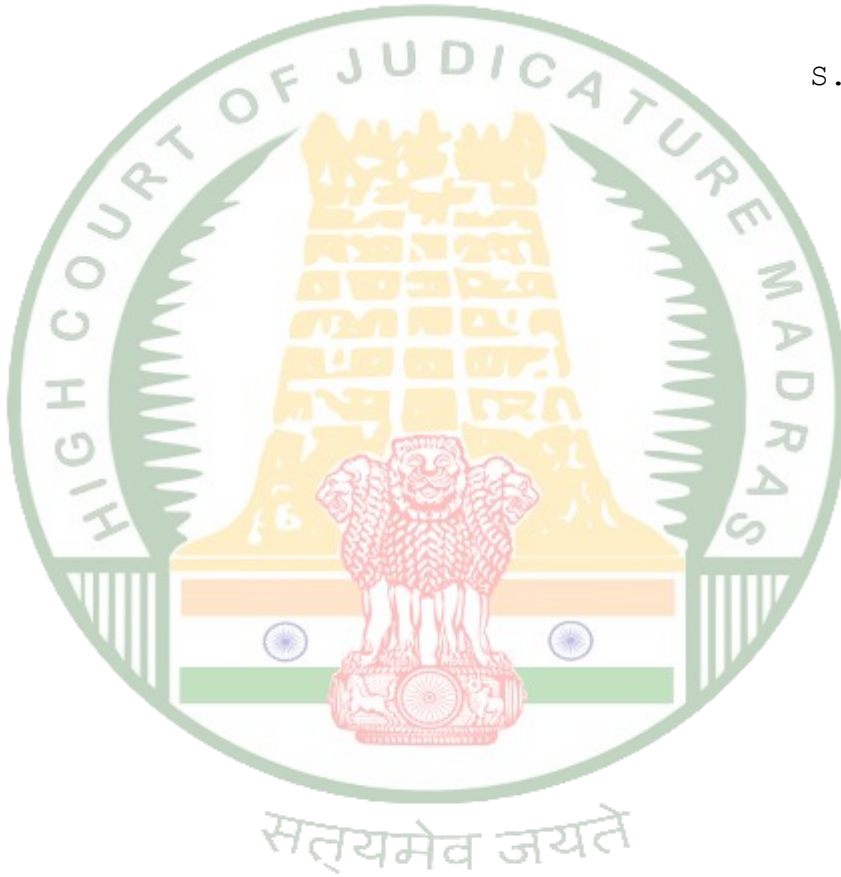
2.The Subordinate Judge, Krishnagiri.

+1 cc to Mr.P.Tamilkumaran, Advocate,SR.6073

+1 cc to Mr.V.Raghavachari, Advocate,SR.5157.

Tej (co)
krd 12/6

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