

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.06.2015

CORAM

THE HONOURABLE MS. JUSTICE R.MALA

S.A.Nos.1275 and 1276 of 2007
and
M.P.No.1 of 2007

Judgment reserved on 19.06.2015	Judgment pronounced on 24.06.2015
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V.Saraswathi

...Appellant in both S.As

Vs

Daweed Beevi

...Respondent in both S.As

Prayer in S.A.No.1275/2007: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 18.07.2007 in A.S.No.173 of 2004 on the file of the Principal District Judge, Chengalpattu and the Judgment and Decree dated 28.11.2003 in O.S.No.734 of 2001 on the file of the Additional Subordinate Judge, Chengalapptu.

Prayer in S.A.No.1276/2007: Second appeal filed under Section 100 of CPC against the Judgment and Decree dated 18.07.2007 in A.S.No.96 of 2006 on the file of the Principal District Judge, Chengalpattu and the Judgment and Decree dated 28.11.2003 in O.S.No.734 of 2001 on the file of the Additional Subordinate Judge, Chengalapptu.

For Appellant : Mr.N.Damodaran

For Respondent : Mr.R.Thirugnanam

COMMON JUDGMENT

These second appeals arise out of the Judgment and Decree made in A.S.No.173 of 2004 and A.S.ANo.96 of 2006 on 18.07.2007 on the file of the Principal District Judge, Chengalpattu and the Judgment and Decree dated 28.11.2003 in O.S.No.734 of 2001 on the file of the

Additional Subordinate Judge, Chengalapptu.

2.The averments made in the plaint are as follows:-

The defendant is the absolute owner of the suit property. She entered into a sale agreement dated 31.03.1994 with the plaintiff to sell the suit property for a sale consideration of Rs.1,55,000/- and received an advance of Rs.30,000/- on the same date. It is also submitted that even though it is stated the time for completing the contract is fixed as three months in the agreement, time was not intended to be the essence of contract. The plaintiff has always been ready and willing to pay the balance of sale consideration and execute the sale deed at her cost. Even though the plaintiff requested the defendant to produce the document, the defendant has not produced the document by giving some reasonable excuses. The defendant issued a notice dated 05.07.1994 to the plaintiff stating that the time stipulated in the agreement is elapsed and further stated that the advance amount was forfeited. The plaintiff sent a reply to the defendant and requested her to produce the document and also called upon the defendant to execute the sale deed after receiving the balance sale consideration. The plaintiff further submits that the agreement is dated 31.03.1994 and the notice issued by the defendant is dated 05.07.1994 which itself will show that the demand by the defendant in her notice is not a genuine one. It is further submitted that after reply notice by the plaintiff dated 28.07.1994, the defendant is trying to alienate the suit property to some third parties. Therefore, the plaintiff filed a suit for specific performance, directing the defendant to receive the balance sale consideration of Rs.1,25,000/- and execute the sale deed in favour of the plaintiff.

3.The gist and essence of written statement filed by the defendant is as follows:

The defendant submitted that it is true that she is the absolute owner of the suit property and entered into a sale agreement with the plaintiff on 31.03.1994 to sell the suit property for a sale consideration of Rs.1,55,000/- and received an advance amount of Rs.30,000/-. The time fixed for executing the sale deed is fixed as three months. The defendant denied all the allegations made in the plaint that the defendant failed to produce the copy of the documents in spite of several request. The defendant has submitted that in fact she has already handed over the copy of the documents prior to the execution of the sale agreement dated 31.03.1994 and she is always ready and willing to perform the contract. The defendant further states that the amount was required as she had incurred heavy debts and also to celebrate the marriage of her sister-in-law and due to the non-payment of the balance sale consideration by the

plaintiff, the defendant's sister-in-law's marriage was also stopped. It is also stated that the plaintiff also aware of this fact and wantonly with a view to harass the defendant, the plaintiff has not fulfilled her part of the agreement by paying the balance sale consideration. Therefore the defendant issued a lawyer's notice dated 05.07.1994 noticing that the sale agreement is time barred and the defendant forfeited the advance amount. For which the plaintiff sent a reply dated 28.07.1994. The defendant further submitted that as per the agreement, the defendant is entitled to forfeit the advance amount and the plaintiff is not entitled to specific performance of the contract as the said agreement is barred by limitation. Hence, she prayed for dismissal of the suit.

4.The Learned Trial Judge after considering the averments both in the plaint and written statement and arguments on either side counsel has framed necessary issues and on perusing the oral and documentary evidence viz., P.W.1, P.W.2, D.W.1 and Exs.A1 to A4, dismissed the suit and directed the defendant to pay to the plaintiff the advance amount of Rs.30,000/- with interest @ 9% p.w. from the date of agreement to the date of decree and thereafter at 6% p.a. after the date of decree till the date of realisation. Aggrieved against the judgment and decree of the trial court, the plaintiff preferred an appeal in A.S.No.173 of 2004 and the defendant preferred an appeal in A.S.No.96 of 2006 on the file of the Principal District Court, Chengalpattu.

5.The learned First Appellate Court has considered the argument advanced on either side and framed necessary point for consideration and dismissed the appeal filed by the plaintiff against the judgment and decree of specific performance in A.S.No.173 of 2004 and allowed the appeal filed by the defendant against the judgment and decree of refund of advance money in A.S.No.96 of 2006. Against the Decree and Judgment of the first Appellate Court, the present second appeals have been preferred by the plaintiff.

6.At the time of admission of the above second appeal, the following substantial questions of law were framed for consideration.

"1.Whether the Courts below are correct in non-suiting the appellant, when the appellant herein has proved her readiness and willingness to perform her part of the Contract, without properly adverting to the evidence of P.Ws.1 and 2 and Exs.A1 to A4 documents especially when the respondent had failed to examine her to disprove the said fact?

2.Whether the Courts below are correct in holding that time is essence of the contract and in denying the

relief to the application when the conduct of the parties to the lis would prove that time is not essence of the contract?"

7. Challenging the judgment and decree of the First Appellate Court, the learned counsel for the appellant/plaintiff would submit that admittedly the respondent is the owner of the property and she entered into a sale agreement on 31.03.1994 for a sale consideration of Rs.1,55,000/- and an advance amount of Rs.30,000/- has been paid and the total extent of property is 1703 sq.ft. Three months time has been fixed to execute the sale deed. The defendant issued a notice dated 05.07.1994 which was marked as Ex.A2 and the plaintiff sent a reply notice dated 28.07.1994 under Ex.A3 and the plaintiff filed a suit on 21.02.1995. In Ex.A2/lawyer's notice itself the defendant/respondent herein has stated that she has forfeited the advance amount. But whereas in the reply notice/Ex.A3, the plaintiff pleaded that she was always ready and willing to perform his part of contract. He would submit that the Trial Court without considering the fact that the time is not the essence of the contract has dismissed the suit and further ordered to repay the advance amount. But the First Appellate Court has dismissed the appeal holding that there is no specific prayer as per Section 22 of the Specific Relief Act and the First Appellate Court has allowed the appeal filed by the respondent filed against the judgment and decree of refund of advance amount. Hence he prayed for setting aside the judgment and decree of both the Court below and pray for the decree of specific performance. To substantiate his argument, the learned counsel appearing for the petitioner has relied upon the decision reported in 2007 (2) CTC 345 (Thiriveedhi Channaiah vs. Gudipudi Venkata Subba Rao (D) by LRs and others).

8. Refuting the same, the learned counsel appearing for the respondent would submit that execution of sale agreement is admitted and time for execution of sale agreement is fixed as three months. The plaintiff kept quiet for four or five months and then, the defendant/respondent issued a notice on 05.07.1994 under Ex.A2 wherein it was specifically mentioned that time has been elapsed, agreement was cancelled and the advance amount is forfeited. The plaintiff sent a reply on 28.07.1994 wherein she has stated that the defendant has not produced the copy of the original documents and Encumbrance Certificate as agreed by the respondent/defendant. But the appellant/plaintiff filed a suit which shows that she is not ready and willing to perform her part of contract. He further submitted that the plaintiff has not sought for alternative relief of refund of advance amount and so, she is not entitled to that relief. That factum was rightly considered by the First Appellate Court and

negatived the same. Hence he pray for dismissal of the appeal. To substantiate his arguments, the learned counsel appearing for the respondent relied upon the decision reported in 2013 (1) MWN (Civil) 753 (T.P.Latha @ Hemalatha and others vs. P.Sukumar), wherein it was held that as per Section 22(2) of the Specific Relief Act unless they claim for return of advance amount, decree cannot be passed for refund of advance amount. He has also relied upon the decision reported in 2014 (1) LW 47 (I.S.Sikandar (d0 by LR.s. vs. K.Subramani and others), and submitted that once the defendant has issued a notice under Ex.A2 for cancellation of sale agreement, the plaintiff ought to have filed a suit for declaring that the cancellation of sale agreement is null and void and without such prayer the suit for specific performance is not maintainable.

9.Considered the rival submissions made on both sides and also perused the material records and both oral and documentary evidence.

10.The admitted facts are that the respondent is the absolute owner of the property and she entered into a sale agreement with the plaintiff as per Ex.A1. The sale consideration was fixed at Rs.1,55,000/-, Rs.30,000/- has been paid as advance and the balance amount of Rs.1,20,000/- ought to have paid within three months and got the sale deed registered. Till 05.07.1994, the appellant/plaintiff has not come forward to execute the sale deed, the defendant sent a notice under Ex.A2, wherein in paragraph No.2, it was specifically mentioned as follows:

"My client and yourself entered into an agreement of sale executed on 31.03.1994 in respect of the property mentikoned in the Schedule hereunder. As per the terms and conditions, the agreement is valid only for three months from 31.03.1994, till date you have not taken any steps for the completion of the sale, as per agreement my client having been ready from the beginning to complete the sale as per agreement.

So my client hereby makes it clear that the aforesaid agreement of sale dated 31.03.1994 in respect of the schedule mentioned property stands elapsed and cancelled by your default and as per the terms, the advance amount paid by you to my client stands forfeited towards liquidated damages and mental agony suffered by her. So, you have no right or claim whatsoever under that agreement and that sale agreement has become dead and inoperative."

The plaintiff sent a reply notice under Ex.A3 only on 28.07.1994 and the present suit has not been filed within time, the plaintiff filed the suit only on 21.02.1995 after the lapse of nearly seven

months. That factum was rightly considered by both the Court below. The appellant/plaintiff is not always ready and willing to perform her part of contract.

11. It is well settled dictum of the Hon'ble Apex Court that in respect of specific performance of immovable property is concerned, usually time is not the essence of the contract. But the conduct of the party has been considered to decide whether the time is the essence of the contract. Here, as soon as the sale agreement came into effect on 31.03.1994, time for execution of sale deed has been fixed as three months. Since the plaintiff has not taken any steps, immediately the defendant sent a notice for cancelling the sale agreement under Ex.A2. Even though the appellant/plaintiff sent a reply notice stating that she is ready and willing to perform her part of contract, the plaintiff filed a suit after seven months from the date of his reply. In such circumstances, I am of the view that the plaintiff/appellant is not always ready and willing to perform her part of contract. So, the appellant/plaintiff is not entitled to the decree of specific performance as per Section 16(c) of the Specific Relief Act. Further, the conduct of the party shows that time is the essence of the contract. Once the plaintiff/appellant has come forward with the suit for specific performance, that too, discretionary relief, she must prove his case. The non-examination of the respondent is not fatal to the case and her husband has been examined. In such circumstances, I am of the view that both the Court below has rightly held that time is the essence of the contract and the appellant is not ready and willing to perform her part of contract. Accordingly, the substantial question Nos.1 and 2 are answered against the appellant.

12. S.A.No.1276 of 2007 has been filed against the judgment and decree of dismissing the refund of advance amount. It is appropriate to consider the prayer in the plaint, wherein the plaintiff has not prayed for alternative relief or return of advance amount. At this juncture, it is appropriate to incorporate Section 22 of the Specific Relief Act.

22. Power to grant relief for possession, partition, refund of earnest money, etc.:— (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for —

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund or any earnest money or deposit paid

or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed:

Provided that whether the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Section 21."

Since the appellant herein has not prayed for alternative prayer of return of advance amount, the plaintiff is not entitled to refund of advance amount.

13. The learned counsel appearing for the appellant would submit that once the respondent forfeited the advance amount, the respondent must prove the damage sustained by her. For which, the learned counsel appearing for the appellant relied upon the decision reported in 2007 (2) CTC 345 (Thiriveedhi Channaiah vs. Gudipudi Venkata Subba Rao (D) by LRs. and others), wherein it was held that the respondent could exercise his right to forfeit the entire amount. It is not his case that he had suffered any loss. It is appropriate to incorporate paragraph No.12, which reads as follows:

"12. The only question which arises for our consideration is as to whether in a situation of this nature, the respondent could exercise his right of forfeiture of the entire amount. It is not his case that he had suffered any damage. He did not deny or dispute that after the Agreement of Sale was executed, a notification under Section 4(1) of the Act had been issued. He himself raised a contention that the Agreement stood frustrated. It may be true that he not only questioned the validity of the said notification, but had also filed a suit, but indisputably the parties were aware that unless and until, the notification was set aside, the Agreement for Sale, in the aforementioned situation, cannot be enforced by either of them."

In the above citation, before the sale deed could be executed notification under land acquisition proceedings has been notified. Hence, the appellant therein has issued a notice requesting the respondent to refund the amount with the interest, wherein it was held that he has not suffered any loss. But herein in the present

case, the respondent herein issued a notice and forfeited the advance amount because in the sale agreement under Ex.A1 itself there was a clause that if the plaintiff has not performed her part of contract within the time stipulated, the advance amount will be forfeited. In such circumstances, I am of the view that the above citation is not applicable to the facts of the present case.

14.The learned counsel appearing for the respondent relied upon the decision reported in 2013 (1) MWN (Civil) 753 (T.P.Latha @ Hemalatha and others vs. P.Sukumar), wherein it was held that the plaintiff can ask for relief provided in Clause (a) and (b) of Sub-Section (2) of Section 22 of the Specific Relief Act. Such relief can be granted only if specific relief is claimed. Since the plaintiff has not claimed alternative relief of refund of advance amount, such relief cannot be granted. It is appropriate to incorporate paragraph No.42, which reads as follows:

42.As we have held that the respondent is not entitled for the decree of specific performance, it has to be seen as to whether he is entitled for the refund of the advance amount of Rs.5,00,000/- paid by him to the appellants. Section 22 of the Specific Relief Act provides that in an appropriate case of suit for specific performance the plaintiff can ask for the reliefs provided for in clause (a) and (b), but sub-section 2 of Section 22 mandates that the aforesaid reliefs in Section 22 (1) (a) and (b) shall be granted only if the same is specifically claimed. In this case, unfortunately, the respondent / plaintiff has not claimed the alternative relief of the refund of the advance amount paid. Therefore, the appellants cannot be directed to refund the advance amount of Rs.5,00,000/- paid by the respondent to the appellants / defendants."

This citation is squarely applicable to the facts of the present case because here in the present case, as already stated the plaintiff/appellant has not sought for the relief of refund of advance amount.

15.The learned counsel appearing for the respondent has also relied upon the decision reported in 2014 (1) LW 47 (I.S.Sikandar (d) by LRs. vs. K.Subramani and others), wherein it was held that the plaintiff has not sought for declaratory relief to declare termination of agreement as bad in law. In the absence of such prayer suit for specific performance and permanent injunction is not maintainable. It is appropriate to incorporate to paragraph No.17, which reads as follows:

"17. Answer to Point No.1

The first point is answered in favour of the defendant No. 5 by assigning the following reasons:

It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos.1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985. The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by

defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law.

(emphasis supplied)

The above citation is squarely applicable to the facts of the present case because Ex.A2, notice of termination has been issued and after that only, the suit has been filed, after the issuance of reply notice and after seven months from the date of reply. The present suit for specific performance has been filed without prayer for declaratory relief for declaring the termination of agreement of sale is bad in law.

16.As discussed earlier, time is the essence of the contract. The appellant is not always ready and willing to perform her part of contract and without prayer for alternative relief of refund of advance money as per Clauses (a) and (b) of Sub-section (2) of Section 22 of the Specific Relief Act, she is not entitled to alternative relief. The suit without prayer for declaratory relief to declare the termination of agreement of sale is bad in law, is not maintainable. So, the appellant is not entitled to any relief. Hence, the decree and judgment passed by the First Appellate Court does not warrant any interference and the same are hereby confirmed. The second appeals are liable to be dismissed and the second appeals are hereby dismissed.

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17.In fine,

- Second appeals are dismissed with cost.
- The Judgment and Decree dated 18.07.2007 in A.S.No.173 of 2004 and A.S.No.96 of 2006 on the file of the Principal District Judge, Chengalpattu are hereby confirmed.
- Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

cse

To

1. The Principal District Judge,
Chengalpattu.
2. The Additional Subordinate Judge,
Chengalapptu.
3. The Record Keeper,
V.R.Section, High Court, Chennai.

1 CC to Mr.N.Damodaran, Advocate SR.No. 30918

2 CCs to Mr.R.Thirugnanam, Advocate SR.No. 30826 & 30827

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S.A.Nos.1275 and 1276 of 2007
and M.P.No.1 of 2007

TEJ (CO)

PSI (05.08.2015)

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