

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.08.2015

CORAM :

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.1109 of 2008

and MP.No.1 of 2008

N.Chinnaraj Nainar

.. Appellant/Defendant

Vs.

K.Shanmugam

.. Respondent/plaintiff

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 16.02.2008 made in A.S.No.19 of 2007 on the file of the District Court, Tiruvannamalai reversing the Judgment and Decree dated 13.04.2007 made in O.S.No.31 of 2005 on the file of the Subordinate Court, Arni.

For Appellants : Mr.D.Ravichander

For Respondent : Mrs.Mythili Suresh
for M/s.Sarvabhauman Associates.

J U D G M E N T

The defendant in OS.No.31 of 2005 is the appellant herein.

2.The second appeal is filed against the judgment and decree of the lower appellate court, thereby reversing the judgment and decree of the trial Court.

3.The parties are referred to in this appeal as per their rank in the suit.

4.The respondent/plaintiff filed the suit seeking specific performance of the suit sale agreement dated 11.12.2004. The suit sale agreement was entered into between the plaintiff and the defendant in respect of the suit wet lands. The plaintiff has come forward with the suit stating that the parties agreed to measure the suit property and to determine the sale price at Rs.2150/- per cent and to get the sale deed executed and the plaintiff has been always ready and willing to execute the sale deed within three months from the date of the agreement and he approached the defendant with balance sale consideration and requested him to measure the field and

determine the price and to execute the sale deed, whereas the defendant had been evading to do so and was not cooperative, which compelled the plaintiff to issue Ex.A2 legal notice on 25.03.2005 with the same averments and thereafter filed the suit for the relief stated supra.

5. Per contra, it is the contention of the defendant/owner that he agreed to sell the property for the marriage purpose of his grand daughter and other family expenses and the sale consideration agreed was not Rs.2,150/- per cent, but it is the market price and the plaintiff did not perform his part of the contract for measuring the field and by offering to pay the balance sale consideration as agreed between the parties and as agreed in the sale agreement and the time is essence of the contract, and on the failure of the plaintiff to pay the balance sale consideration within the time stipulated in the agreement, the agreement stands cancelled and the plaintiff is hence disentitled to get the discretionary relief of specific performance. The defendant also raised a plea as if the suit property is ancestral property having other cosharers and the sale agreement is not enforceable against the other cosharers.

6. Both the parties in support of their respective contentions examined themselves as PW1 and DW1 and the defendant also examined his sons as DW2 and DW3 and the parties also produced Exs.A1 to A3 and Exs.B1 to B7 documents on their sides.

7. The trial Court on the basis of the available evidence, arrived at the conclusion that Ex.A1/sale deed was executed between the plaintiff and the defendant and advance of Rs.10,000/- was paid on the same day and the time of three months agreed between the parties is the essence of the contract and the plaintiff failed to prove his readiness and willingness to perform his part of the contract within the time specified in the agreement. The trial Court further found that the property belonged to the joint family and other sharers are not parties to the agreement and the plaintiff is hence disentitled to get the suit relief for specific performance and accordingly negatived the relief of specific performance and granted the relief of refund of advance of Rs.10,000/- with 12% interest from the date of plaint till the date of decree and thereafter 6% interest till payment.

8. Aggrieved against the same, the plaintiff preferred AS.No.19 of 2007. The lower appellate Court though confirmed the findings of the trial Court regarding genuineness of Ex.A1/sale agreement, disagreed with the other findings of the trial Court. The lower appellate Court having found that the defendant failed to prove that the property was agreed to be sold for the marriage purpose of the grand daughter and the sale consideration agreed was Rs.2,150/- per cent and the defendant did not come forward to execute the sale deed by claiming higher sale price at Rs.3,250/- per cent and the plaintiff had sufficient funds and always ready and willing to perform his part

of the contract and the defendant did not come to Court with clean hands and the plaintiff is hence entitled to the relief of specific performance. The lower appellate Court on the basis of such findings, reversed the judgment and decree of the trial Court and allowed the appeal and decreed the suit for specific performance. Hence, this present second appeal by the defendant before this Court.

9.The Second appeal is admitted on the following substantial questions of law :-

(1)When the plain reading of the agreement dated 11.12.2004 no way suggests a completed contract between the parties, whether the lower appellate court is right in granting a decree for specific performance on the basis of the said agreement.

(2)Whether the lower appellate Court is right in granting a decree when the plaintiff has not let in any acceptable evidence to show his readiness and willingness.

10.After hearing both sides, the first substantial question of law is recast on 30.03.2015 as follows : -

(1) Whether the reason given by the lower appellate court for holding that the time is not the essence of the contract is contrary to evidence and such finding is hence perverse?

(1-A) Whether the lower appellate Court has failed to see that the recitals contained in Ex.A1 make it abundantly clear that time is the essence of the contract?

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

12.Though the appellant/defendant has in his written statement come forward with denial of execution of the agreement and denial of exclusive right over the suit property and denial of enforceability of the document for want of any consent and signature from the other co-sharers of the suit property, which is according to the defendant, joint family in nature, the same are answered against the defendant by the courts below. Both the courts below on the basis of the oral and documentary evidence adduced on both sides, duly upheld the validity and voluntary execution of suit sale agreement and self acquired nature of the property. The defendant has neither in the written statement nor during the course of trial questioned the validity of the suit agreement and on the ground that it is an incomplete agreement and no reason at all is made out to construe the document as invalid. On the other hand, both the Courts below on due appreciation of oral and documentary evidence upheld the valid execution of sale agreement.

13.Regarding the other plea that time is the essence of the contract, according to the plaintiff he has always been ready and

willing to perform his part of contract within three months from the date of the agreement and to measure the suit field, to determine the actual extent and to determine the sale price at Rs.2,150/- per cent for the extent available and to offer the balance sale consideration and to execute the sale deed, and it is the defendant who has been delaying the same. Whereas according to the defendant, the plaintiff was never ready and willing to perform his part of the contract and as the time is the essence of the contract and the plaintiff did not offer to pay the balance sale consideration at the market rate as agreed between the parties or as agreed in the agreement within three months and on his failure to do so, the agreement stood cancelled and became unenforceable.

14. In this regard, the material document to be looked into is Ex.A1 suit sale agreement wherein, the time specified for completing the transaction is three months. It is specifically stated therein that the property is agreed to be sold for getting money for marriage expenses of the grand daughter by name Nalini, through the son of the defendant and for other family expenses. The agreement further says that in the event of the failure of the plaintiff to pay the balance sale consideration within three months, the advance amount will be forfeited and in the event of the defendant's failure to execute the sale deed, the sum of Rs.10,000/- received by way of advance will be repaid as Rs.20,000/-. The fact that the agreement was entered into for meeting out the expenses of the grand daughter marriage, is also admitted by PW1 in the witness box. It is admitted by him that the balance sale consideration was agreed to be received for the marriage expenses of the grand daughter. It is also specifically stated so by DW1 to DW3. The combined appreciation of oral evidence of DW1 to DW3 and the recitals contained in Ex.A1/sale agreement would to considerable extent probablise the defendant's theory that the time agreed to in the document is the essence of the contract and the contrary finding of the lower appellate court by overlooking the material evidences and in perverse.

15. In that event, the plaintiff is bound to plead and prove that he has always been from the date of agreement till date, ready and willing to perform his part to get the sale deed executed. What he was required to do is to approach the defendant to measure the suit land, to fix the extent and to offer price and to pay the balance sale consideration and all have to be done within three months from the date of the agreement. However, except the statement of PW1 in the plaint and in the witness box, the plea regarding his readiness and willingness was not duly proved. The plaintiff has nowhere in the plaint or in the witness box furnished the particulars regarding the approximate dates and the place at which he approached the defendant for measuring the property and for paying the balance sale consideration. There was no independent witness to substantiate his theory about his readiness and willingness and the acts performed by him. The trial court has also taken note of the failure of the plaintiff to prove either his possession of sufficient amount or his

source to gather sufficient funds for payment of balance sale consideration and for meeting out the expenses for preparation and registration of sale deed and rightly negatived his plea and accepted the defendant's theory that the plaintiff failed to act according to the terms of the agreement within the time specified in the agreement. Even the legal notice was issued after the expiry of three months. Whereas the lower appellate Court without duly considering the aspects discussed by the trial Court, and mainly by relying on the uncorroborative oral statement of PW1 who is party to the suit, reversed the findings of the trial court in this regard. The findings so rendered by the lower appellate Court are contrary to the evidence and by overlooking the material aspects and are not supported by sufficient reasonings and are hence perverse and is unsustainable. The learned counsel for the appellant at this juncture brought it to the notice of this Court about the conduct of the plaintiff in allowing the suit to be dismissed for default for nearly seven months and argued that had the plaintiff been always willing and ready, he would not have just allowed the suit to be dismissed for default and would not come forward with the application under Order 9 Rule 9 after seven months. Such conduct of the plaintiff would not support his version regarding plea of his continuous readiness and willingness. That being his conduct in the event of any decree for specific performance being granted in his favour it would certainly give him unfair advantage or is inequitable.

16. In this context, the other authorities to be relied on are : (i) (1995) 5 SCC 115 (N.P.Thirugnanam (dead) by LRs v. Dr.R.Jagan Mohan Rao and others. (ii) (2009) 17 SCC 27 (Azhar Sultana v. B.Rajamani and others) (iii) (2010) 1 SCC 287 (A.K.Lakshmipathy (Dead) and others v. Rai Saheb Pannalal H.Lahoti Charitable Trust and others) and (iv) 1998 (I) CTC 186 (Vasantha and others v. M.Senguttuvan). It is held by the Hon'ble Supreme Court in the first decision reported in (1995) 5 SCC 115 (N.P.Thirugnanam (dead) by LRs v. Dr.R.Jagan Mohan Rao and others) that "the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right from the date of the execution till date of the decree, he must prove that he is ready and has always been willing to perform his part of the contract. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief"..... "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 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 of necessity be proved to be available. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract".

17. The Apex Court in the second judgment reported in (2009) 17

SCC 27 (Azhar Sultana v. B.Rajamani and others) observed that "the plaintiff indisputably in view of Section 16(c) of the Specific Relief Act, 1963 was required to make requisite averments that she had all along been and still is ready and willing to perform her part of the contract and also establish the same". It is further observed therein that "Section 16(c) of the Specific Relief Act 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract". In the third case reported in (2010) 1 SCC 287 (A.K.Lakshmipathy (dead) and others v. Rai Saheb Pannalal H.Lahoti Charitable Trust and others), the Apex Court held that "it is well settled that in a suit for specific performance of a contract for sale, it has to be proved that the plaintiff who is seeking for a decree for specific performance of the contract for sale must always be ready and willing to complete the terms of the agreement for sale". Similar views are reiterated by the learned brother judge of our High court in the last decision reported in 1998(I) CTC 186 (Vasantha and others v. M.Senguttuvan).

18.The learned counsel for the appellant has also cited the judgment of the Hon'ble Supreme Court reported in (2008) 7 SCC 310 - Mohammadia Cooperative Building Society Ltd., V. Lakshmi Srinivasa Cooperative Building Society wherein the Apex Court is of the view that conduct of the plaintiff plays an important role in a suit for specific performance. In the other judgment cited herein 2014 (4) CTC 290 - Farooque Dadabhoy V. Dr.Usha S.Bhat the learned brother judge of this Court negatived the relief for specific performance on the ground that the plaintiff was not ready and willing to perform his part of the contract at all point of time.

19.On the other hand, the learned counsel for the respondent has cited the decision of single judge reported in 1998 (II) CTC 613 - N.Saraswathi Ammal v. Jayaram Rao and two others wherein it is decided the principle the party should approach the court with clean hands would apply equally to the plaintiff as well as to the defendant. It is argued herein that the defendant by reason of contradictory stand taken regarding the execution of the document and regarding the clause for measuring the suit site before executing the sale deed and regarding the price agreed between the parties per cent is not entitled to seek equity. The same judgment was further relied on to say that the normal presumption is the time is not essence of the contract for enforcing agreement of sale in respect of immovable property and mere stipulation of date and time in an agreement is not conclusive and the intention of the parties is to be gathered from various circumstances coupled with conduct of the parties and there must be positive evidence in this regard etc.,

20.This Court has no quarrel with the observation of the learned brother judge in the judgment above cited. But the specific clauses in the agreement and the admission made by the parties that the property was agreed to be sold for meeting out the marriage expenses

of the grand daughter and the balance sale consideration was agreed to be received for the marriage purpose and that the pleading raised in the plaint to the effect that the plaintiff approached the defendant for execution of the document within three months is sufficient enough to rebut the normal presumption, that the time is not essence of the contract but the time agreed is the essence of the contract in the present case.

21.Thus, having regard to the conduct of the parties, this Court has no hesitation to hold that the lower appellate court has erroneously reversed the findings of the trial Court in this regard. The plaintiff having failed to do the necessary acts on his part within the time agreed between the parties, is disentitled to get the discretionary relief. The well considered judgment of the trial Court is erroneously reversed by the lower appellate Court on mere surmises and presumptions and the judgment of the lower appellate Court hence warrants interference. The second substantial question of law is accordingly answered in favour of the defendant.

22.In the result, the second appeal is allowed by setting aside the judgment and decree of the lower appellate Court and by restoring the judgment and decree of the trial Court. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The District Court, Tiruvannamalai.

2.The Subordinate Court, Arni.

Copy to:

The Section Officer,
High Court, Madras.

+1cc to Mr.D.Ravichander,Advocate sr.44551
+1cc to M/sSarabhauman Associates, Sr.44141

S.A.No.1109 of 2008

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