

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.11.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.653 of 2012
and
M.P.No.1 of 2015

N.Venkatesan

.. Appellant/Respondent/
Plaintiff

-Vs-

1. D.Govindasamy

2. D.Chandrankantha

.. Respondents/Appellant/
Defendants

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree passed in A.S.No.13 of 2011 dated 28.02.2012 on the file of the Principal District Judge, Tiruvallur reversing the decree and judgment made in O.S.No.35 of 2006 dated 04.03.2010 on the file of the Subordinate Judge, Ponneri.

For Appellant : Mr.S.Doraisamy

For Respondents : Mr.R.Krishnaswamy

J U D G M E N T

The plaintiff in O.S.No.35 of 2006 on the file of the learned Subordinate Judge, Ponneri is the appellant herein. The respondents are the defendants in the suit. The said suit was filed by the plaintiff for a decree for Specific Performance of contract of sale of immovable property and for permanent injunction to restrain the defendants from in any manner alienating the suit property to any third parties and also for permanent injunction to restrain the defendants from in any manner interfering with the peaceful possession and enjoyment of the plaintiff in the suit property. The trial court decreed the suit by decree and judgment dated 04.03.2010. Challenging the same, the defendants filed an appeal in A.S.No.13 of 2011 before the learned Principal District Judge, Tiruvallur. By decree and judgment dated 28.02.2012, the lower appellate court allowed the appeal, set aside the decree and judgment of the trial court and dismissed the suit. As against the same, the plaintiff is before this Court with this Second Appeal.

2. By consent, the Second Appeal has taken up today for final disposal. I have perused the records carefully.

3. The case of the plaintiff is as follows:

Admittedly, the defendants are the absolute owners of the suit property. On 03.05.2014, according to the plaintiff, the defendants entered into a sale agreement with the plaintiff by which the defendants agreed to sell the suit property for a total sale consideration of Rs.2,66,000/-. A sum of Rs.50,000/- was paid as advance and the balance of sale consideration was only Rs.2,16,000/-. According to the plaintiff, he was all along ready and willing to perform his part of contract. But on 12.6.2015, 24.06.2015 and 18.07.2015, the defendants attempted to disturb the possession of the plaintiff which forced the plaintiff to file the suit in O.S.No.182 of 2005 on the file of the learned District Munsif, Ponneri seeking a decree for permanent injunction to restrain the defendants from in any manner interfering with his possession. (According to the learned Counsel for the appellant, the said suit in O.S.No.182 of 2005 was dismissed as not pressed whereas according to the learned Counsel for the respondents, the said suit in O.S.No.182 of 2005 was dismissed for default). Subsequently, since the plaintiff issued a notice dated 07.06.2006 calling upon the defendants to perform their part of contract and since the defendants did not come forward, the plaintiff filed the present suit on 26.06.2006 before the trial court. It has further pointed out that attempts were made by the defendants to alienate the suit property to someone else and there was also attempt to disturb the possession of the plaintiff. With these averments, the plaintiff filed the above suit.

4. In the written statement, the defendants admitted the fact that the suit property is owned by them and that they have agreed to sell the suit property to the plaintiff for a total sale consideration of Rs.2,66,000/-. They have also admitted the execution of the sale agreement dated 03.05.2004 and also the receipt of Rs.50,000/- as advance. Thus, it is the admitted case of the defendants themselves that the balance sale consideration was only Rs.2,16,000/-.

5. But, it was contended by the defendants before the lower appellate court that in this case as per the sale agreement, since it was agreed to complete the sale within 60 days, the time was essence of contract. It was further contended that since the plaintiff did not come forward to perform his part of contract, they issued a notice as early as on 08.11.2004 calling upon the plaintiff to perform his part of contract by paying the balance sale consideration of Rs.2,16,000/- and to get the sale completed in his favour within a further period of ten days. After receipt of the said notice, according to the defendants, the plaintiff did not come forward

to perform his part of contract, neither did he send any reply. Thus, according to the defendants, the said contract cannot be performed now because the time prescribed in the sale agreement which is the essence of contract had expired long before. It was also contended before the lower appellate court that the cause of action for seeking the relief of specific performance arose even before the filing of the suit in O.S.No.182 of 2005. But still, the plaintiff had chosen to file the simple suit for bare injunction in O.S.No.182 of 2005 and he allowed the same to be dismissed for default. It was also contended that the present suit is, therefore, barred as per Order II Rule 2 of CPC. It was also contended that possession was never handed over by the defendants to the plaintiff. In the sale agreement, by means of forgery, the plaintiff had inserted the words as though the possession was handed over to him on the date of the sale agreement itself. According to the defendants, the possession of the suit property has all along only with them. Thus, according to the defendants, the plaintiff is not entitled for any relief as prayed for.

6. Based on the above materials, the trial court framed appropriate issues. In order to prove his case, on the side of the plaintiff two witnesses were examined. P.W.1 is the plaintiff and P.W.2 is one of the attestors of the sale agreement and as many as 12 documents were exhibited. On the side of the defendants, the 1st defendant was examined as D.W.1 and one Munusamy Reddiar was examined as D.W.2 to speak about the fact that the plaintiff was not ready and willing to perform his part of contract and as many as 2 documents were marked. Ex.D.1 is the legal notice sent by the 1st defendant to the plaintiff on 08.11.2004 and Ex.D.2 is the Postal Acknowledgment Card.

7. Having considered all the above, the trial court decreed the suit as prayed for by the plaintiff which was reversed by the lower appellate court. That is how, the appellant is before this Court with this Second Appeal.

8. In this Second Appeal, it is contended by the learned Counsel for the Appellant that there are substantial questions of law involved. Having heard him and also the learned Counsel for the respondents, I have framed the following substantial questions of law which have arisen for consideration:

'1. Whether the time is the essence of contract in the instant case?

2. Whether the suit is barred by Order 2 Rule 2 of CPC?"

9. The learned Counsel for the appellant would submit that in the instant case, the time is not at all the essence of contract. He would further submit that the lower appellate court was not right in going by the literal meaning of the words employed in the document. He would also submit that the plaintiff was all along ready and willing to perform his part of contract by paying the balance sale consideration of Rs.2,16,000/- and to get the sale completed. This fact has been proved by means of the oral evidence of the P.W.1 and P.W.2 and Ex.A.1 and Ex.A.2. He would further submit that a legal notice was issued by the plaintiff on 07.06.2006 calling upon the defendants to perform their part of contract and even after that since the plaintiff did not come forward to perform their part of contract, the plaintiff had to file the suit. According to the learned Counsel for the appellant, the intention of the parties in this case is not to treat 60 days mentioned in the document as essence of contract. He would further submit that in general, the time is not the essence of contract in respect of the contract of sale of immovable properties. At any rate, according to the learned Counsel for the appellant, the lower appellate court was not right in treating the time as essence of contract. Thus, according to the learned Counsel for the appellant, the appeal deserves to be allowed.

10. The learned Counsel appearing for the respondents would vehemently oppose this Second Appeal. According to him, it is in evidence that the time is the essence of contract. The very fact that even after the service of the notice by the defendants on 08.11.2004, the plaintiff did not come forward to perform his part of contract would go to show that the plaintiff was not ready and willing to perform his part of contract at all. The learned Counsel would further submit that it is in evidence that the sale was necessitated for the defendants because they were under heavy pressure to clear the loans raised from third parties. Thus, they needed money within the time stipulated. Therefore, it is clear that the time is essence of contract in this case. The learned Counsel for the respondents would further point out that the words as though the possession of the suit property was handed over to the plaintiff had been subsequently inserted by forging the document for which also there is sufficient evidence. Thus, according to the learned Counsel for the respondents, the lower appellate court was right in dismissing the suit in allowing the appeal and reversing the decree and judgment of the trial court.

11. I have considered the above submissions.

12. It is true that in a particular sale agreement in respect of an immovable property to decide as to whether the time prescribed therein is to be treated as an essence of contract or not for the purpose of limitation, one should not go

by the literal meaning of the words employed therein, instead, it is for the court to gather the intention of the parties from the evidences available and the circumstances under which the agreement was entered into. Applying the said broad principle to the facts of the case, let us now go into the question as to whether time is the essence of contract. Here in this case, tacitly, it has been mentioned in the sale agreement that the sale shall be completed within 60 days from the date of execution. So far as the intention of the parties as to whether the said time of 60 days should be treated as essence of contract is concerned, let us consider the evidences available.

13. It is the case of the plaintiff himself that the necessity for the defendants to propose to sell the suit property arose because the defendants were under tremendous pressure to sell the suit property for the purpose of utilising the sale consideration to reimburse the loan amounts which they had raised from various third parties. It is the plaintiff's case itself that the persons who had lent money to the defendants were pressurising them to a greater extent to settle the loans. It was in those circumstances, the defendants decided to sell the suit property to the plaintiff. Thus, the intention of the defendants was to mobilise funds by selling the property as early as possible to settle the loans raised by them from third parties. This is the admitted case of the plaintiff himself. If this intention of the parties, more particularly, that of the defendants, is read along with the contents of the sale agreement, it is inescapable that the intention of the parties is to treat the time only as essence of contract.

14. It is in evidence that on 08.11.2004, the defendants issued a legal notice to the plaintiff calling upon him to pay the balance of sale consideration and to get the sale completed at least within a further period of ten days from the date of receipt of the notice. Even thereafter, the plaintiff did not come forward to pay the balance of sale consideration. But, a plea has been now taken by the plaintiff that the said notice was never received by him. But the Postal Acknowledgment Card bears his signature. That signature is also disputed. It is common knowledge that as per the provisions of the Indian Evidence Act, if a notice is sent by Registered Post, the legal presumption is that the same would have been delivered to the addressee. Apart from this presumption, the lower appellate court has compared his signature found in Ex.D.2 along with the signature of the plaintiff in the other documents like vakalath etc. and has concluded that the signature in the acknowledgment card is that of the appellant. The trial court was perfectly right in doing so in view of the specific provision contained in Section 73 of the Indian Evidence Act. This is a factual finding. I do not find any reason to take a different view. The lower appellate court has also pointed out that when the

plaintiff was under cross-examination, he not only denied the signature found in Ex.D2., but also denied the signature found in his Vakalath itself. The lower appellate court has, therefore, concluded that the plaintiff was opt to say any lie before the court. Thus, as rightly concluded by the trial court, it is crystal clear that Ex.D.1 notice was duly served on the plaintiff and despite the same, he did not come forward to perform his part of contract.

15. Apart from that, the plaintiff filed the suit in O.S.No.182 of 2005 on the file of the learned District Munsif, Ponneri for permanent injunction alleging that the defendants attempted to disturb his possession on 12.06.2005, 24.06.2005 and 18.07.2005, that means, even before the filing of the suit in O.S.No.182 of 2005, there was cause of action for the plaintiff to file a suit for specific performance. The legal notice issued by the defendants on 08.11.2004 itself gave rise to a cause of action to file a suit for specific performance. But, instead of filing a suit for specific performance against the defendants, he had chosen to file the suit in O.S.No.182 of 2005 only for a decree for permanent injunction. Atleast in that suit, the plaintiff would have deposited the balance of sale consideration to show his bonafideness. That also he did not do. He has chosen to file O.S.No.182 of 2005 only for permanent injunction instead of seeking a decree for specific performance. This would go to show that even at the time when he filed the suit in O.S.No.182 of 2005, he did not have sufficient fund to perform his part of contract.

16. The learned Counsel for the respondents would submit that the suit in O.S.No.182 of 2005 shall be a bar for the plaintiff to maintain the present suit as per the provision contained in Order II Rule 2 of CPC. A perusal of the judgments of the courts below would go to show that such a plea was taken before the trial court. But the trial court held the said issue against the defendants. The lower appellate court also held the same against the defendants. Since the said findings has not been challenged by the defendants, the same has become final and, this Court cannot reopen the same. Thus, though on a technical ground that by virtue of the bar under Order II Rule 2 of CPC, the present suit cannot be dismissed, certainly, it is possible to hold that as on the date of filing of the suit in O.S.No.182 of 2005, the plaintiff was not possessed with sufficient money to perform his part of contract.

17. The suit in O.S.No.182 of 2005 was dismissed as not pressed, the learned Counsel for the appellant claims. But the learned Counsel for the respondents/defendants would submit that the said suit in O.S.No.182 of 2005 was dismissed for default on the part of the plaintiff herein. At any rate, the decree and judgment of the trial court in O.S.No.182 of 2005 has not been

marked in evidence. It is not explained to the Court as to why the suit in O.S.No.182 of 2005 was allowed to be dismissed. It is not even known as to when and on what circumstances, the said suit was dismissed. Thereafter, on 07.06.2006, the plaintiff issued the notice calling upon the defendants to perform their part of contract and immediately, thereafter he filed the present suit on 26.06.2006. From the above narration of facts, it is crystal clear that the intention of the parties is to treat the time as essence of contract. Since the plaintiff had not performed his part of contract within the stipulated time, he is not entitled for the decree for specific performance.

18. So far as the possession of the suit property is concerned, the case of the appellant/plaintiff is that the possession was handed over to him on the date of the sale agreement itself. But, it was contended by the defendants that the possession was never handed over to the plaintiff and by means of forgery, the plaintiff had inserted the words later on as though the possession was handed over to him on the date of the sale agreement itself. The lower appellate court has given a positive finding in respect of the same. I do not find any reason to differ with the conclusion arrived at by the lower appellate court that the possession has all along been only with the defendants and the same was never handed over to the plaintiff. In view of all the above, I find that there is no merit at all in this Second Appeal warranting interference at the hands of this Court.

19. In the result, the Second Appeal fails and the same is accordingly dismissed and the decree and the judgment of the lower appellate court is confirmed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1.The Subordinate Judge, Ponneri.

2.The Principal District Judge, Tiruvallur.

+ 1 cc to Mr.V.Ajoikhose, Advocate Sr.63314

S.A.No.653 of 2012.11.2015

CNR (CO)

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