

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27 - 10 - 2015

Coram

The Hon'ble MRS. JUSTICE PUSHPA SATHYANARAYANA

Second Appeal No. 798 of 2009

A. Kailasam .. Appellant/Plaintiff

vs.

1. P. Muthuraman

2. T.S. Thiyagarajan ... Respondents/Defendants 1 & 2

Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 23.01.2008 in A.S. No. 74 of 2007 on the file of the Court of Principal District Judge, Salem, partly reversing the judgment and decree dated 06.08.2007 made in O.S. No. 2 of 2005 on the file of the Subordinate Judge, Mettur.

For Appellant : Mr. R. Thirugnanam
for Mr. C.H. Pandian

For R 1 : No appearance

For R 2 : Mr. V.C. Selvasekaran

JUDGMENT

The plaintiff, who filed the suit for specific performance of the execution of sale deed, has projected the instant second Appeal inveighing the judgement and decree dated 23.01.2008 passed by the Principal District Judge, Salem, in A.S. No. 74 of 2007 wherein and by which the judgment and decree dated 06.08.2007 recorded in O.S. No. 2 of 2005 on the file of the

Subordinate Judge, Mettur, were reversed in part allowing the First Appeal at the instance of the second defendant.

2. The admitted facts are that the suit property belonged to the second defendant, who executed Ex. A.2, General Power of Attorney dated 11.9.2002 in favour of the first defendant. Based on the same, he agreed to sell the suit property to the plaintiff for a sum of Rs.2,25,000/- as per Ex. A.1 dated 13.10.2003 receiving an advance of Rs.1,75,000/- with further condition that he had to pay the balance amount of Rs.50,000/- within a period of one year. It is seen that subsequent to the filing of the suit, the second defendant had cancelled the Power of Attorney and pursuant to the order of the High Court in C.R.P. No. 1757 of 2005, he has been arrayed as a party defendant in the suit. It is not denied that the second defendant cancelled the power after execution of sale agreement between the plaintiff and first defendant in respect of the suit property. It is also seen that the second defendant, who is the owner of the property, has given an undertaking on 12.10.2002 as per Ex. A.5 by making an endorsement behind the agreement itself, to the effect that he will not cancel the power of attorney.

3. Based on the above facts, both the Courts below, on consideration of the materials placed thereon, concurrently held the agreement Ex. A.1 as valid. As regards the readiness and willingness of the plaintiff to perform his part of agreement, though the trial Court decreed the suit, the Lower Appellate Court reversed the finding holding that the plaintiff was not ready and willing to complete the sale. Feeling aggrieved, the plaintiff has come up with the instant appeal.

4. Despite service of notice, the first respondent / first defendant has not chosen to appear either in person or through counsel. Heard Mr. R. Thirugnanam, learned counsel appearing for the appellant / plaintiff and Mr. V.C. Selvasekaran, learned counsel representing the second respondent / second defendant and perused the records.

5. The only point to be decided in this Second Appeal is whether the Lower Appellate Court was right in holding that the plaintiff / appellant had not proved his readiness and willingness to perform his part of contract from the date of sale agreement till the date of filing the suit.

6. The relief of specific performance being an equitable relief, it is the discretion of the Court in the light of the facts and circumstances of the case, either to refuse or grant the relief of specific performance. At the same time, it could not be lost sight of that the discretion exercised by the Court should not be arbitrary but should be based on sound judicial principles coupled with the intention of the parties. The plaintiff, who comes to the Court for the grant of equitable relief of specific performance, has to establish his readiness and willingness throughout from the date of agreement till the date of filing of the suit.

7. From the materials available on record, it is seen that despite repeated requests by the plaintiff to the first defendant to execute the sale deed by receiving the balance sale consideration, the first defendant, who entered into the sale agreement with him in the capacity of power agent of the second defendant, never showed any interest resulting in issuance of pre-suit notice dated 04.10.2004 under Ex.A.3 and the acknowledgment card is marked as Ex.A.4. It is also seen that pursuant to the pre-suit notice, the first defendant convened a panchayat on 08.10.2004 and made endorsement in the agreement to execute the sale deed on 13.10.2005.

8. The contention of the learned counsel for the appellant / plaintiff is that despite the several attempts made by the plaintiff calling upon first defendant to execute the sale deed in his favour, the first defendant had not heeded to his request and that though he was ready and willing to perform his part of the agreement by paying balance consideration, the first defendant was evading the same. He further submitted that the Court has to grant relief based on conduct of person seeking relief on perusal of the plaint.

9. In support of such contention, learned counsel seeks in aid the decision of the Hon'ble Supreme Court in Aniglase Yohannan vs. Ramlatha and others [2005 (5) CTC 800].

10. The said contention of the plaintiff / appellant was assailed by the learned counsel representing the second defendant / respondent stating that the plaintiff, to show his bona fide, had not deposited the balance amount of Rs.50,000/- out of Rs. 2,25,000/-. According to the learned counsel, if the plaintiff was ready with the money, he should have deposited the amount before the Court at the time of filing the suit.

11. The said contention of the learned counsel for the second respondent is only to be rejected in view of Section 16 of the Specific Relief Act, which reads as follows:-

"16. Personal bars to relief:

(a)
.....

(b)
.....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation - For the purpose of clause (c) -

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract accordingly to its true construction."

12. The Hon'ble Apex Court as well as this Court, have time and again held that it is not mandatory to the plaintiff in a suit for specific performance to deposit the balance of sale consideration into the Court as a condition precedent to file suit. But if the parties have specifically agreed to do so, it mandates the party agreeing to comply with the said condition.

13. In the instant case, the agreement for sale was executed on 13.10.2003 on which date, part payment of Rs.1,75,000/- was made and the period during which the sale was to be completed on payment of balance amount was indicated to be one year. Undisputedly, before the close of the agreement period, the plaintiff had issued legal notice Ex. A.3 on 04.10.2004 pursuant to which, the first defendant convened a panchayat on 08.10.2004 wherein he had stated that he was ready and willing to perform his part of agreement. It is seen that on the basis of his assurance made on that day on the reverse of the sale agreement, the plaintiff, after prior intimation to the first defendant, had waited at the Tharamangalam Sub-Registrar Office with the balance amount of Rs.50,000/- on 13.10.2004. Even for Ex. A.3 notice, the first defendant had not replied and only after issuance of notice, the power of attorney was cancelled. On finding inaction in his part, the suit was filed on 03.01.2005. This factual position, which has been proved through the Exhibits, lead to inference about the plaintiff's readiness and willingness. Therefore, it is clear that the plaintiff throughout the proceedings, has been ready and willing to perform his part of agreement by paying the balance sum of Rs. 50,000/- for execution of the sale deed. The totality of circumstances when taken into consideration, it is clear that the breach is on the part of the first respondent / first defendant and that the plaintiff / appellant was not at fault because had it not been renounced by the first defendant, he would have completed it.

14. In view of the above discussions, this Court is of the considered view that the Lower Appellate Court, being the final Court of fact, did not consider this aspect in its proper perspective and dismissed the suit without considering the reasons given by the trial Court regarding the failure on the part of the first defendant to perform his part of agreement

thereby leading to perverse finding. As such, this Court is inclined to hold that the preponderance of probabilities are in favour of the plaintiff and the point is answered materially and substantially in favour of the plaintiff. The dismissal of the suit by the Lower Appellate Court, is to be held as not based on correct reasoning.

In the light of the foregoing discussion, the Second Appeal succeeds and stands allowed setting aside the judgment and decree of the Lower Appellate Court. Consequently, the judgment and decree of the trial Court dated 06.08.2007 passed in O.S. No. 2 of 2005 are restored decreeing the suit, directing the respondents to execute the sale deed in favour of the plaintiff. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar (CS-II)

True Copy

Sub Assistant Registrar

To

1. Principal District Judge
Salem
2. Subordinate Judge
Mettur
3. The Section Officer
V.R. Section
High Court
Madras

+1cc to Mr.C.H.Pandian, Advocate SR.58333

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