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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.7.2015

Delivered on: 31.7.2015

CORAM

THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HON'BLE MR.JUSTICE T.MATHIVANAN

A.S.No.43 of 2013
and
M.P.No.1 of 2013

R. Velusamy .. Appellant/Plaintiff

Versus

Thaayaarammal ..Respondent/Defendant

Prayer: First Appeal is filed under Section 96 r/w Order 41 Rule 2 of C.P.C. against the Judgment and Decree, dated 27.7.2012 and made in O.S.No.70 of 2011 on the file of the learned I Additional District Judge, Coimbatore.

For Appellant : Mr.R. Subramanian
for M/s.Ma.P. Thangavel.

For Respondent : Miss. P.T. Asha
for M/s. Sarvabhauman Associates

JUDGMENT

(T. MATHIVANAN, J.)

The appellant is the plaintiff in the suit in O.S.No.70 of 2011, whereas the respondent is the defendant and as such the character of the parties to the suit need not be changed and they may be referred as it is in the suit wherever the context so require.

2. Heard Mr. R. Subramanian, learned counsel appearing for the appellant and M/s.P.T.Asha, learned counsel appearing on behalf of M/s. Sarvabhauman Associates, who is the counsel on record for the respondent.

3. The plaintiff and the defendant had entered into an agreement of sale, dated 12.1.2010 and thereby the defendant had agreed to sell her property measuring 5.258 cents, which is described in the plaint schedule with specific boundaries on all four sides.



4. The sale consideration was fixed at Rs.3,30,000/- per cent and at the time of agreement of sale, i.e., on 12.1.2010, a sum of Rs.2.00 lakhs was paid by the plaintiff to the defendant towards advance and it was also agreed by the plaintiff to pay the remaining balance of sale consideration within a period of one month to get the sale deed executed in his favour or in favour of his nominee or assignee at his cost.

5. According to the plaintiff, in spite of his repeated demands, the defendant had been postponing and dodging her performance of contract and she had also failed to survey the schedule mentioned property so as to execute the sale deed by receiving the balance of sale consideration which the plaintiff was always keeping in his hand and was ready to pay and get the sale deed executed as per the terms of the agreement of sale.

6. Since the defendant had failed to perform her part of contract, the plaintiff was constrained to file the above suit.

6a. On the other hand, the defendant has contended that in the agreement of sale, dated 12.1.2010, one month time was stipulated to complete the contract of sale and that the term as to measuring the suit property was not an essential term of the contract as the boundaries are well demarcated with side measurements specifying its extent perfectly.

7. She has also contended that since the plaintiff was not ready and willing to perform his part of contract within the time specified, he is not entitled to get the relief of specific performance.

8. She has also maintained that he is also not entitled to get the alternative relief of refunding of the advance amount of Rs.2,00,000/- as he had failed to pay the remaining balance of sale consideration within the stipulated period of one month and therefore, the advance amount of Rs.2.00 lakhs is liable to be forfeited.

9. Based on the pleadings of the parties to the suit, the trial Court has formulated as nearly as four issues and one additional issue as detailed as hereunder:-

a. Whether the time is of the essence of the suit agreement to sell?

b. Has the plaintiff been ready and willing to perform his part of the contract?

c. Is the plaintiff entitled to seek specific performance?



d. To what relief is the plaintiff entitled?

10. In order to substantiate their respective cases, the plaintiff had examined himself as P.W.1, besides his evidence, four more witnesses were also examined on his side. During the course of their examination Exs.A1 to A6 were marked. Neither oral nor documentary evidence was adduced on the side of the defendant.

11. In so far as this appeal is concerned, the following two points are arisen for our consideration:-

a. Whether the time of one month stipulated in the agreement of sale is the essence of contract?

b. Whether the defendant is bound to measure and handover the property to the plaintiff prior to the execution of the sale deed?

12. We have meticulously analysed the testimonies of the witnesses ranging from P.Ws.1 to 5 and also scrutinised the documentary evidences, viz., Exs.A1 to A6.

13. The execution of Ex.A1 sale deed has not been disputed. But what Mr.R. Subramanian, learned counsel appearing for the plaintiff would contend is that though one month time was stipulated in the agreement of sale, it could not be treated as an essence of contract and that despite the plaintiff had been ready and willing to perform his part of contract, the defendant had deliberately failed to measure and handover the property to the plaintiff prior to the execution of the sale deed.

14. He has also argued that even though the plaintiff was having the remaining balance of sale consideration in his hand and was ready to perform his part of contract, on account of failure on the part of the defendant to measure and handover the property, the plaintiff was constrained to file the suit seeking the relief of specific performance as per the terms of the sale agreement.

15. Secondly, he has submitted that the agreement of sale was entered into between the plaintiff and the defendant on 12.1.2010 and the Ex.A2 legal notice was sent by the plaintiff to the defendant on 16.7.2010. Thereafter, on 22.2.2011 the suit was filed seeking the relief of specific performance.

16. In this connection, he would submit that even as per the finding of the trial court, if the time was construed to be an essential element in this case, then it was per se illegal and incongruous and it would definitely warrant the intervention of this Court.



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17. This portion of argument advanced by Mr.R.Subramanian is not able to be countenanced because the law is now well settled in the case of Saradamani Kandappan vs. S. Rajalakshmi and others (2011 (4) CTC 640) holding that the time is the essence of the contract.

18. In the above cited decision, viz., Saradamani Kandappan's case, the Apex Court has made reference to the following two decisions:-

a. Chand Rani (Smt) (Dead) by Lrs. vs. Kamal Rani (Smt) (Dead) by Lrs ((1993) 1 SCC 519).

b. Balasaheb Dayandeo Naik (Dead) through LRs and others vs. Appasaheb Dattatraya Pawar (2008 (1) CTC 530).

19. Though P.W.5 has been examined on behalf of the plaintiff, his evidence seems to be in total support of the case of the defendant saying that at the time of determination of sale price, it was initially decided that the contract of sale shall have to be completed within three months.

20. Since Thaayaarammal (defendant) had represented that she had to meet out certain expenses she wanted the sale to be completed within the period of one month, one month time was stipulated to complete the contract of sale.

21. Having appreciated the evidence of P.W.5, we are of the considered view that the trial Court has rightly decided that the time is essence of the contract.

22. In so far as the second point is concerned, we would like to point out that the suit property is a house site measuring an extent of 5.258 cents situated in an approved lay out bearing approval No.LP/R (LPN) 240/87 in Mounasamy Naidu Nagar, Vilankurichi, Coimbatore. This has not either been disputed or denied by the plaintiff.

23. Admittedly, the defendant has not chosen to enter into the box to adduce her evidence and no document was also marked on her side. But this does not mean that the plaintiff's case has to be upheld.

24. Having come forward with the suit seeking the discretionary relief of specific performance, it is the prime duty of the plaintiff to substantiate his case with adequate legal evidence. But here the term that the defendant shall measure and handover the property to the plaintiff prior to the execution of sale is not material term as observed by the trial Court and therefore, no importance could be with this term as it is attached with the term that time is the essence of the contract, which



has been discussed in point No.1. Therefore, the second point goes out automatically.

25. To prove his readiness and willingness, the plaintiff has marked Ex.A.5 and Ex.A.6 Statement of Accounts issued by the Indian Bank.

26. In this connection, we would like to point out that money might have been available in his bank account, but the absence of intention, i.e., to make the balance of sale consideration physically to the defendant, operates as an obstacle or impediment in granting the discretionary relief of specific performance in favour of the plaintiff.

27. Admittedly, the suit was dismissed in respect of the main relief of specific performance. But in so far as the alternative relief of refunding the advance amount of Rs.2.00 lakhs is concerned, it was granted by the trial Court in favour of the plaintiff directing the defendant to pay a sum of Rs.2.00 lakhs with interest at 9% p.a.

28. It is significant to note here that the defendant has not chosen to prefer any cross objection as there was lack of readiness and willingness on the part of the plaintiff and since the plaintiff failed to pay the remaining balance of sale consideration to the defendant within the stipulated period of one month and to have the sale deed executed in his favour, the suit in respect of the main relief was rejected by the trial Court, which according to our view, it does not require any interference.

In the result, the appeal is dismissed with costs. Connected M.P. is also dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

1. The First Additional District Judge, Coimbatore.

+ 1 cc to M/s. Sawabhauman, Associates, Sr.39230

+ 1 cc to M/s. Ma.P. Thangavel, Advocate SR.38457

A.S.NO.43 OF 2013
and
M.P.No.1 of 2013

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