

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 31-08-2016

PRONOUNCED ON : 15-09-2016

CORAM

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

Appeal Suit No.405 of 2016
and
C.M.P.No.9746 of 2016

1. S. Mathrubootham
2. Mrs. M. Sai Girija ... Appellants/Defendants
Vs
S. Gunasekaran ... Respondent/Plaintiffs

Appeal suit filed under Section 96 of CPC read with Order 41 and 41-A of Code of Civil Procedure against the judgment and decree, dated 04-01-2016 made in O.S.No.449 of 2008 by the Additional District Judge, Kancheepuram at Chengalpet.

For Appellants :Mr. V. Srikanth

For Respondent :Mr. R. Thiagarajan

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM,J.)

This appeal suit is directed against the judgment and decree dated 04-01-2016 passed in O.S.No.449 of 2008 by the Additional District Court, Kancheepuram at Chengalpet.

2. The respondent herein as plaintiff has instituted O.S.No.449 of 2008 on the file of Trial Court praying to pass the decree of specific performance, in pursuance of the sale agreement dated 14-06-2007 wherein the present appellants have been shown as defendants.

3. The epitome of the plaint is that the suit property is originally belong to the persons namely, Sulochana Gopalan, Sudha, Lakshmi, Sridharan and through their Power Agent by name

Devadoss have sold the same in favour of one Mrs. D. Uma under the sale deed dated 02-03-1990. The first defendant has purchased the suit property from the said Uma under the registered sale deed dated 28-02-2002 and since then he has become absolute owner of the same. The first defendant has agreed to sell the suit property in favour of the plaintiff and accordingly, the sale agreement dated 14-06-2007 has come into existence. The total sale consideration has been fixed at Rs.24 lakhs (Rupees Twenty Four Lakhs only). On the date of execution of sale agreement, the first defendant has received a sum of Rs.2,00,000/- (Rupees Two lakhs only). Since the first defendant has deposited the Original sale deed in ICICI Bank, Santhome Branch, Chennai, a xerox copy of the same has been given to the plaintiff. The plaintiff and first defendant have approached the Bank and known that a sum of Rs.2,20,000/- (Rupees Two lakhs Twenty thousand only) is outstanding. The plaintiff has paid a sum of Rs.20,000/- to the first defendant. But the same has not been endorsed in the sale agreement. The plaintiff has always been ready and willing to perform his part of the contract. On several occasions, the plaintiff has demanded the first defendant to execute a sale deed, after receipt of balance of sale consideration and all the attempts of the plaintiff have become futile and ultimately, the plaintiff has sent a legal notice dated 23-10-2007 and a copy of the same is not traceable and thereafter, on 12-09-2008, the plaintiff has sent another legal notice. The first defendant has refused to receive the same. The plaintiff has to pay a balance of sale consideration of Rs.21,80,000/- (Rupees Twenty One lakhs Eighty thousand only) to the first defendant. Since the first defendant has failed to perform his part of the contract, the present suit has been instituted for the relief sought therein.

4. In the written statement filed on the side of the first defendant, it is averred that the suit property is the absolute property of the first defendant and it is false to aver in the plaint that the first defendant has agreed to sell the suit property in favour of the plaintiff. The plaintiff is a money lender. The first defendant has received a loan from the plaintiff and compelled him to execute a receipt. Under the said circumstances, the first defendant has executed the alleged suit sale agreement. The plaintiff has also obtained the signature of wife of the first defendant. Both the plaintiff and first defendant are well aware of the fact that the receipt is not an agreement of sale. It is false to aver that the plaintiff has paid a sum of Rs.20,000/- (Rupees Twenty thousand only). It is also equally false to aver that the plaintiff on several occasions has demanded the first defendant to execute a sale deed in his favour. The plaintiff has not approached the Court with clean hands and there is no merit in the suit and the same deserves to be dismissed.

5. On the basis of the divergent pleadings raised on either side, the Trial Court has framed necessary issues and after analysing both the oral and documentary evidence decreed the suit as prayed for. The judgment and decree passed by the Trial Court are being challenged in the present Appeal Suit.

6. The consistent case of the plaintiff is that the suit property is the absolute property of the first defendant and by virtue of a sale deed dated 28-02-2002, he has agreed to sell the same in favour of the plaintiff and accordingly, the suit agreement has come into existence on 14-06-2007 wherein the total sale consideration has been fixed at Rs.24,00,000/- (Rupees Twenty Four lakhs only). On the date of its execution Rs.2,00,000/- (Rupees Two lakhs only) has been paid by the plaintiff to the first defendant and subsequently, the plaintiff has paid a sum of Rs.20,000/- (Rupees Twenty thousand only). Despite repeated demands made by the plaintiff to the first defendant, he failed to execute the sale deed in favour of the plaintiff. Under the said circumstances, legal notices have been issued and even after receipt of the same, the first defendant has not come forward to execute a sale deed in favour of the plaintiff. Under the said circumstances, the present suit has been instituted for the relief sought in the plaint.

7. The defence put forth on the side of the first defendant is that the suit property is the absolute property of the first defendant and he never executed the sale agreement dated 14-06-2007. The plaintiff is a money lender and first defendant has received loan from him. Under the said circumstances, the first defendant has executed a receipt. Both the plaintiff and first defendant have known very well that the said receipt is not an agreement of sale. Further, it is false to say that the plaintiff has paid subsequent payment of Rs.20,000/- (Rupees Twenty thousand only). By way of suppressing the material facts, the plaintiff has approached the Court and therefore, the plaintiff is not entitled to get the discretionary relief of specific performance.

8. As stated earlier, the Trial Court, after analysing the available evidence on record, has decreed the suit as prayed for.

9. The learned counsel appearing for the appellants/defendants has raised the following points:

(1) The suit sale agreement has been marked as Ex-A1 and the same has been executed as a Guarantee Letter in respect of the loan advanced by the plaintiff to the first defendant and therefore, on the basis of Ex-A1, discretionary relief of specific performance cannot be granted.

(2) The Trial Court has failed to frame a separate issue as to whether the plaintiff has shown his readiness and willingness to perform his part of the contract from the date of execution of Ex-A1 and on that ground also the judgment and decree passed by the Trial Court are liable to be set aside.

(3) The specific case of the plaintiff is that after execution of Ex-A1, the plaintiff has paid a sum of Rs.20,000/- (Rupees Twenty thousand only) to the first defendant and the same has not been mentioned even in the pre-suit notices.

10. As a repartee to the contentions raised on the side of the appellants/defendants, the learned counsel appearing for the respondent/plaintiff has meticulously contended that Ex-A1 has been written by the first defendant himself wherein necessary recitals for an agreement of sale are found place. Further, in the plaint, in so many places, the plaintiff has specifically averred to the effect that he has always been ready and willing to perform his part of the contract. Even though after execution of Ex-A1, the plaintiff has paid a sum of Rs.20,000/- (Rupees Twenty thousand only) to the first defendant, such payment has not been mentioned in Ex-A1 and the Trial Court after considering the lack of evidence has found to the effect that on the side of the plaintiff, payment of Rs.20,000/- (Rupees Twenty thousand only) has not been proved. However, the Trial Court after considering the available evidence on the side of the plaintiff has rightly decreed the suit and therefore, the judgment and decree passed by the Trial Court are not liable to be interfered with.

11 . On the side of the appellant/defendants, the following decisions are relied upon:

(1) 1990 (3) SCC 1 (Mayawanti Vs. Kaushalya Devi) at paragraph No.18, it is observed as follows:

"The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. ..."

(2) In 2013 (4) SCC 546 (Garre Mallikharjuna Rao (dead) Vs. Nalabothu Punniah) at Paragraph No.9, the Honourable Supreme Court has observed that whatever may be the legal position involved in this case the facts as pleaded and proved before the Courts-below are far from being satisfactory.

(3) In 2013 (3) MWN(Civil) 110(P. Arumugam Vs. M. Shunmugam Pillai) at Paragraph No.13, this Court has observed that it is a settled principle of law that as per Section 16(c) of the Specific Relief Act, 1963 in a suit for specific performance, the plaintiff must plead and prove his readiness and willingness to get a sale deed from the defendant from the date of execution of sale agreement. Further, it is also a settled principle of law that the concerned defendant need not deny the alleged readiness and willingness on the part of the concerned plaintiff.

(4) In 2006 (2) SCC 496 (H.P. Pyarejan Vs. Dasappa) the Honourable Supreme Court has observed that Section 16(c) of the Specific Relief Act, 193 mandates the plaintiff to aver in the plaint and establish the fact by evidence that he has always been ready and willing to perform his part of the contract.

(5) In 2011 (1) SCC 429(J.P. Builders Vs. A. Ramadas Rao), the Honourable Supreme Court has reiterated the mandatory provision of Section 16(c) of the Specific Relief Act, 1963.

(6) In 2016 (1) SCC 762 (K.Nanjappa Vs. R.A. Hameed alias Ameersab), the Honourable Supreme Court reiterated the same principle.

11. On the side of the respondent/plaintiff, the following decisions are relied upon:

(1) 1998 (2) SCC 488 (Smt. Indira Kaur Vs. Sheo Lal Kapoor) wherein the Honourable Supreme Court has held that the only conclusion which could be reasonably drawn was that the defendant wanted to wriggle out of the obligation undertaken by him. Under the circumstances, the finding recorded by the Courts-below must be unhesitatingly set aside.

(2) In 1993 (1) SCC 519 (Chand Rani Vs. Kamal Rani) the Honourable Supreme Court has held that it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract.

(3) In 1997 (2) SCC 200(Sukhbir Singh Vs. Brij Pal Singh) if the plaintiff has made his presence in Sub-Registrar Office and that itself shows readiness and willingness and also possession of necessary funds.

(4) In 1999 (6) SCC 337 (Syed Dastagir Vs. T.R. Gopalakrishna Setty) the Honourable Supreme Court has held that readiness and willingness of the plaintiff have to be pleaded and proved.

(5) In 2000 (9) SCC 214 (Boramma Vs. Krishna Gowda) in analysing evidence of a particular witness an isolated answer given in cross-examination cannot be a basis.

12. From a cumulative reading of the decisions cited on either side, it can be easily deduced that in a suit for specific performance as per Section 16(c) of the Specific Relief Act, 1963, the plaintiff has to plead and prove his readiness and willingness to perform his part of the contract from the date of its execution. Further, insofar as the immovable properties are concerned that in a contract of sale, time is not the essence of contract.

13. With these legal backdrop, the Court has to perpend the contentions raised on the side of the appellants/defendants.

14. The first and foremost contention put forth on the side of the appellants/defendants is that Ex-A1, the alleged suit sale agreement is not at all an agreement of sale. The first defendant has received a loan from the plaintiff and as a security, the first defendant has executed Ex-A1 and he also insisted the second defendant to put her signature. Under the said circumstances, Ex-A1 has come into existence and further, there is no consensus ad idem among the plaintiff and first defendant to execute a sale agreement since in Ex-A1, signature of the plaintiff is not found place. It is an admitted fact that Ex-A1 has been written by the first defendant himself. The first defendant has been examined as D.W.1. During the course of cross-examination, he candidly admitted to the effect that Ex-A1 has been written by him, wherein no mention has been made with regard to alleged loan transaction. Since Ex-A1 has been written by the first defendant himself and since he has given categorical evidence in consonance with the terms mentioned in Ex-A1, it is pellucid that Ex-A1 is an agreement of sale of immovable property. Further, it is settled principle of law that in an agreement of sale, signature of plaintiff is not at all necessary. In the instant case, in pursuance of Ex-A1, the plaintiff has paid a sum of Rs.2,00,000/- (Rupees Two lakhs only) to the first defendant even on the date of its execution. Therefore, it is clear that only on the basis of consensus ad idem of both the plaintiff and first defendant, Ex-A1 has come into existence. Under the said circumstances, the first and foremost contention raised on the side of the appellants/defendants is sans merit.

15. The second limb of argument put forth on the side of the appellants/defendants is that the Trial Court has not at all framed a specific issue with regard to the alleged readiness and willingness on the part of the plaintiff and further, the plaintiff has not at all proved the same, for getting discretionary relief of specific performance.

16. As rightly pointed out by the learned counsel appearing for the respondent/plaintiff in the plaint, in so many places, it has been specifically pleaded to the effect that from the inception of Ex-A1, the plaintiff has always been ready and willing to perform his part of the contract. The plaintiff has been examined as P.W.1 and his specific evidence is that from the date of execution of Ex-A1, he has always been ready and willing to perform his part of the contract and on several occasions, he approached the first defendant to get a sale deed registered in his favour. The first defendant has failed to perform his part of the contract. Further, P.W.2 has also given clear evidence with regard to execution of Ex-A1 and also payment of Rs.2,00,000/- (Rupees Two lakhs only) to the first defendant.

17. It is seen from the records that the plaintiff has issued legal notices and one of the notices has been marked as Ex-B1 on the side of the defendants and the same has also been accepted by the first defendant (D.W.1). Even after receipt of Ex-B1, no reply notice has been sent by the first defendant. Therefore, it is very clear that from the date of execution of Ex-A1, the plaintiff has clearly shown his readiness and willingness to perform his part of the contract.

18. On the side of the appellants/defendants, a fatuous exercise has been made to the effect that the plaintiff is not having sufficient funds to pay balance of sale consideration and even in Ex-A8, no sufficient amount is found place and the Trial Court without considering the financial position of the plaintiff has erroneously decreed the suit as prayed for.

19. For the purpose of proving financial capacity of the plaintiff, Ex-A8 has been filed. Ex-A8 is nothing but series of statement of accounts from the year 2007-2012. As per Ex-A8, the Court can easily discern that the plaintiff is having account in ICICI Bank wherein it is shown that the plaintiff is having huge amounts. Further, absolutely there is no contra evidence on the side of the defendants to the effect that the plaintiff is not having sufficient funds to pay the balance sale consideration. Therefore, it is needless to say that the residual contention put forth on the side of the appellants/defendants also goes out with merit.

20. The entire case of the plaintiff is based upon Ex-A1, the suit sale agreement dated 14-06-2007. It has already been pointed that Ex-A1 has been executed by the first defendant and during the course of cross-examination, he candidly admitted its execution. Since the first defendant has candidly admitted its execution and since on the side of the plaintiff plenitude of evidence is available for the purpose of proving his readiness and willingness, the Court can very well grant discretionary relief of specific performance.

21. The Trial Court after analysing the available evidence on record has rightly decreed the suit. In view of the foregoing enunciation of both factual and legal aspects, this Court has not found any acceptable force in the contentions put forth on the side of the appellants/defendants and therefore, the present appeal suit deserves to be dismissed.

In fine, this Appeal Suit is dismissed with costs. The judgment and decree passed in O.S.No.449 of 2008 dated 04-01-2016 by Additional District Court, Kancheepuram at Chengalpet are confirmed. The connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Additional District Judge,
Kancheepuram at Chengalpattu.

2.The Section Officer,
VR Section, High Court, Madras.

+2cc to Mr.R.Thiyagarajan, Advocate Sr.52273

+1cc to Mr.Srikant, Advocate SR.52670

Appeal Suit No.405 of 2016

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srg 28/09/2016