

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.11.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.491 of 2015

and

M.P.No.1 of 2015

Rajamanickam Appellant/Appellant/Defendant

vs.

PerumalRespondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 29.02.2012 made in A.S.No.8 of 2011 on the file of the Sub Court, Attur, confirming the the judgment and decree dated 10.03.2011 made in O.S.No.314 of 2005 on the file of the District Munsif Court, Attur.

For Appellant : Mr.T.Murugamanickam

For Respondent : Mr.R.Vasudevan

J U D G M E N T

The appellant is the defendant in a suit for specific performance. The respondent as the plaintiff filed the suit seeking for specific performance of an agreement of sale dated 23.06.2003 marked as Ex.A1.

2.According to the plaintiff and as per Ex.A1, the total consideration fixed was Rs.80,500/-, out of which, a sum of Rs.60,000/- was paid as advance on the date of the agreement and for paying the balance sum of Rs.20,500/-, two years time limit was fixed. It is the contention of the plaintiff that though he was ready and willing to perform his part of the contract, the defendant has not come forward to execute the sale deed by receiving the balance sale consideration. Therefore, he contended that after issuing a notice on 17.06.2005, marked as Ex.A2, the present suit is filed on 23.06.2005.

3.The defendant contested the suit. Though he admitted the execution of the suit agreement, it is his case that the same was not intended to be acted upon, since it was executed as a security towards a loan transaction between the parties. It is also contended that even assuming that Ex.A1 is an agreement of

sale with real intention to sell, as the plaintiff was not ready and willing to perform his part of the contract, he is not entitled to the relief.

4. Before the trial court, the plaintiff examined himself as PW1 and examined the attesting witnesses as PWs.2 and 3. He marked Exs.A1 to A3 in support of his case. The defendant examined himself as DW1 and examined other two independent persons as Dws.2 and DW3. He marked Exs.B1 and B2 in support of his case.

5. The trial court after considering the rival pleadings of the parties and the evidence let in by them, found that the agreement marked as Ex.A1 is binding on the defendant and that the defendant having admitted its execution, cannot take a different stand with regard to its intention. The trial court in support of such conclusion relied on Section 92 of the Indian Evidence Act. Accordingly, the trial court decreed the suit as prayed for.

6. The appeal preferred by the defendant came to be dismissed thereby confirming the judgment and decree of the trial court by accepting its findings, again by placing reliance on Section 92 of the Indian Evidence Act.

7. Challenging the concurrent finding, the present second appeal is filed and this court while admitting the same has raised the following substantial questions of law:

"a) Whether the judgments of the Courts below are vitiated in that, we have not allowed the appellant herein to read evidence under Sec.92 of Indian Evidence Act to prove that, Ex.A1 was not intended to an agreement of sale but was executed only as a security for loan obtained?

b) Whether the very fact the respondent sought time for 2 years to tender the balance sale consideration of a meagre amount of Rs.20,500/- will itself not prove, that, Ex.A1 was not a sale agreement but, only a security for a loan obtained to enable the appellant to repay the amount within this time period?"

8. Mr.T.Murugamanickam, learned counsel for the appellant submitted that the suit agreement was not actually intended to be acted upon, as the same was executed as a security towards the loan transaction. Therefore, he submitted that based on such agreement, the plaintiff cannot seek the relief of specific performance. He further submitted that even assuming that the agreement was intended for selling the property, as the

plaintiff has not established his readiness and willingness as required under section 16(c) of the Specific Relief Act, the courts below totally erred in law in granting the decree more particularly, when the same is a discretionary one.

9.Per contra, learned counsel for the respondent supported the findings rendered by the courts below and submitted that the defendant having admitted the execution of the suit agreement is not entitled to take a different stand by contending that the same was executed for the purpose of the loan transaction. He further contended that the plaintiff has proved his readiness and willingness by issuing Ex.A2 notice.

10.Heard both sides and perused the materials placed before this court.

11.The plaintiff seeks the relief of specific performance based on an agreement of sale dated 23.06.2003 marked as Ex.A1. It is not in dispute that the total sale consideration fixed in the agreement is Rs.80,500/- and a sum of Rs.16,000/- was paid as advance on the date of execution of such agreement itself. Therefore, the balance sale consideration of Rs.20,500/- has to be paid for getting the sale deed executed, for which the agreement stipulated two years time for the respective parties to perform their respective part of the contract.

12.It is seen that no convincing reason with cogency is stated by the plaintiff as to why such two years time is given for paying the balance sum especially when the plaintiff has chosen to pay the major portion of the total sale consideration as advance on the date of the agreement itself. Therefore, it certainly gives doubt in the mind of the court with regard to the nature of transaction between the parties more particularly, when the plaintiff himself has come forward to issue the notice seeking for specific performance only at the end of the second year viz., on 17.06.2005. For the period in between, the plaintiff has not pleaded and proved with concrete material evidence regarding his readiness and willingness from the date of the agreement. This court has held in similar cases that the time limit fixed for performance of the agreement cannot be construed as the exact time fixed for the performance and on the other hand, such entitlement is to start run from the date of the agreement. It is the bounden duty of the plaintiff to plead and prove each and every action of himself towards his readiness and willingness as required under Section 16(c) of the Specific Relief Act with material pleadings and evidence. In this case, it is totally absent. The courts below, unfortunately, failed to consider this aspect. They simply granted the decree of specific performance only because the agreement was admitted by the defendant and the suit was filed within the period of

limitation. I do not think that it could be the proper approach for granting the relief of specific performance, that too when such relief is discretionary in nature.

13. When coming to the next question as to whether the defendant is entitled to take a defense contra to the terms of the agreement, having admitted its execution in view of the provision made under section 92 of the Indian Evidence Act, this court has already considered the very same issue in its recent decision made in S.A.No.135 of 2015 dated 11.11.2016 and by following the decision of the Apex Court reported in 2003(6) SCC 595, Roop Kumar vs Mohan Thedani and the Division Bench decision of this court reported in 2007(1)LW 309, Kamireddi Sattiaraju vs. Kandamuri Boolaeswari, and held that the defendant is entitled to take a defense stating the different intention of the parties with regard to the agreement and such defense is not hit by Section 92 of the Indian Evidence Act.

14. Considering all these aspects, I am of the view that the courts below are not justified in relying on Section 92 of the Indian Evidence Act to reject the contention of the defendant. However, the fact remains that the defendant has admitted the execution and received the advance amount of Rs.60,000/-. Whether it is towards the loan transaction or towards the agreement, the fact remains that the defendant received the money and the same has not been repaid to the plaintiff so far. It is the bounden duty of the defendant to refund such advance amount to the plaintiff. Accordingly, the questions of law raised in this appeal are answered in favour of the appellant and against the respondent. Thus, the second appeal is allowed and the judgment and decree of the courts below are set aside and the defendant is directed to repay the advance amount of Rs.60,000/- (Rupees Sixty Thousand only) with interest at the rate of 12% p.a. within a period of two months from the date of receipt of a copy of this judgment. If the said amount is not paid, the respondent/plaintiff is at liberty to seek such payment by way of filing an execution petition. No costs. The connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Vri

To

1.The Sub Court,
Attur.

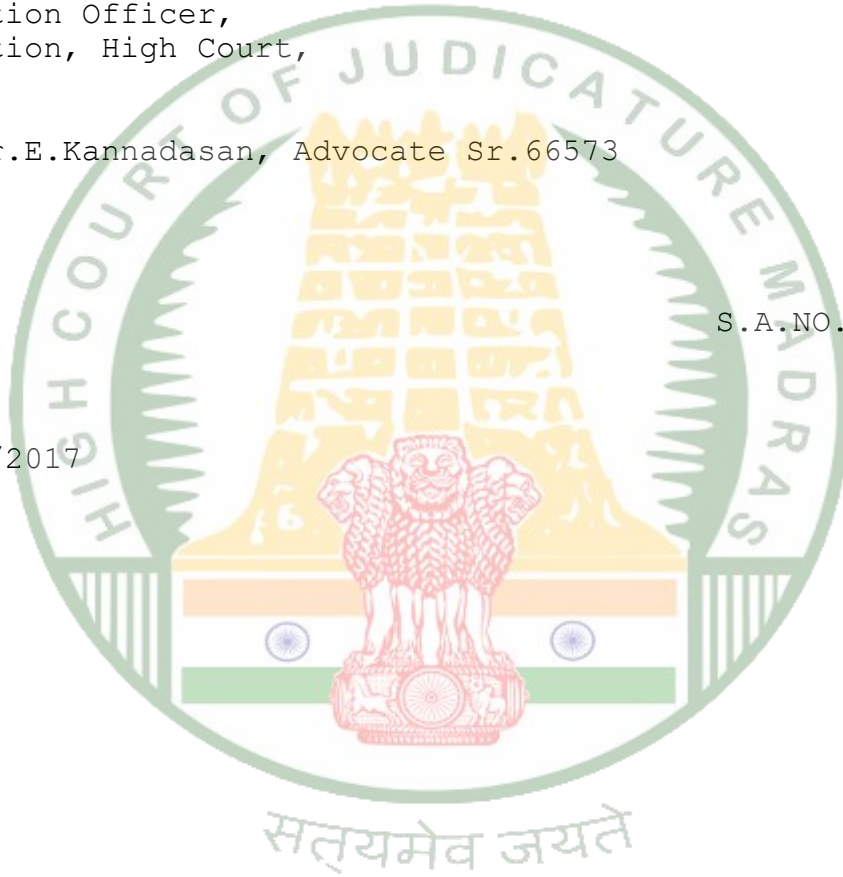
2.The District Munsif Court,
Attur.

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

+lcc to Mr.E.Kannadasan, Advocate Sr.66573

S.A.NO.491 OF 2015

nrjk[col]
srg 03/01/2017



WEB COPY