

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgement reserved on 03.11.2016

Judgment delivered on 15.11.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No. 630 of 2015

and

M.P.No.1 of 2015

Rajammal

..Appellant/Defendant

-Vs-

A.P.Mani

..Respondent/Plaintiff

Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 23.09.2014 made in A.S.No.64 of 2012 on the file of the learned First Additional District Court, Salem reversing the judgment and decree dated 23.12.2011 made in O.S.No.127 of 2010 on the file of the learned Sub-Court, Sankari.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.S.Kalyanaraman

J U D G M E N T

The appellant is the defendant in a suit for specific performance of an agreement of sale.

2. The case of the plaintiff is as follows:

The suit property belongs to the defendant. The defendant had obtained loan for her family expenses and in order to repay the said loan, she decided to sell the properties in favour of the plaintiff. Accordingly, the defendant executed an agreement of sale dated 06.08.2009 by fixing the total sale consideration as Rs.2,00,000/-. On the same day, the plaintiff paid a sum of Rs.1,50,000/- as advance. For payment of the balance sum, nine months time was agreed between the parties. When the plaintiff 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. The pre-suit notice issued to the defendant on 09.04.2010 was returned as unclaimed.

3. The case of the defendant is as follows:

She borrowed a sum of Rs.1,50,000/- as a loan from the plaintiff on 06.08.2009 to meet the medical expenses of her son, who was critically ill at that time. She agreed to repay the loan within nine months with interest. In order to secure the repayment of the loan, the plaintiff demanded and obtained the suit sale agreement from the defendant. In the first week of May 2010, she approach the plaintiff for repaying the entire loan amount and consequently for cancelling the sale agreement. The plaintiff refused to receive the loan amount and on the other hand, demanded execution of the sale deed. Even after compromise talk in the presence of village elders, the plaintiff refused to cancel the sale agreement. On 06.05.2010, the defendant issued a legal notice to the plaintiff seeking for cancellation of the agreement. The suit property is valuable to the tune of Rs.10 lakhs. The defendant is ready to repay the entire loan amount with interest.

4. The plaintiff, in support of his case examined himself as P.W.1 and one Balasubramaniam, the attesor of the suit agreement as P.W.2. She marked Exs.A1 to A6. The defendant examined herself as D.W.1 and also examined one Kanaga as D.W.2 in support of her case. She also marked Exs.B1 to B7. The trial Court found that the plaintiff has not proved the genuineness of the agreement between the parties beyond doubt and therefore, the relief of specific performance cannot be granted. However, the trial Court found that the defendant is bound to repay the loan amount to the plaintiff with interest and accordingly, granted the decree for refund of amount of Rs.1,50,000/- with 14% interest, while dismissing the suit for specific performance.

5. Challenging the judgment and decree passed by the trial Court, the plaintiff filed the appeal. The appellate Court allowed the appeal, thereby reversing the finding of the trial Court by holding that the defence of the defendant is hit by Section 92 of Indian Evidence Act. Thus, the appellate Court decreed the suit as prayed for, by directing the defendant to receive the balance sale consideration of Rs.50,000/- and execute the sale deed in favour of the plaintiff.

6. Challenging the judgment and decree of the appellate Court, the defendant preferred the present appeal before this Court.

7. The appeal was admitted by raising the following substantial questions of law.

a. Whether the first appellate Court has committed an error in extending the equitable jurisdiction in favour of the plaintiff under Section 20 of the Specific Relief Act particularly when the plaintiff

is not entitled to do so on the evidence available before the Court?

b. Whether the first appellate Court is correct in holding that the parties intended to enter into an agreement of sale under Ex.A1 and it is not security for the repayment of loan?

c. Whether the first appellate Court was right in decreeing the suit when the respondent has not proved his readiness and willingness to perform his part of the alleged contract between 06.08.2009 and 31.05.2010?

8. Mr.N.Manoharan, learned counsel for the appellant submitted as follows:

The suit agreement was not entered into with an intention to sell the suit property and on the other hand, it is an outcome of the loan transaction made between the parties. The plaintiff did not issue any notice before suit and on the other hand, the defendant alone issued a notice on 06.05.2010 calling upon the plaintiff to receive the loan amount and to cancel the agreement. The lower appellate Court is not justified in relying on Section 92 of the Indian Evidence Act to decree the suit. Even otherwise, in the absence of proper pleading in the plaint regarding readiness and willingness in conformity with law as contemplated under Order 6 Rule 3 C.P.C. and Form 47, the plaintiff is not entitled to the relief of specific performance.

9. In support of his contention, learned counsel relied on the following decisions:

- i) 2012 (4) CTC 100 (Pappammal @ T.Pappa v. P.Ramasamy)
- ii) 2015(8) SCC 695 (Padmakumari v. Dasayyan)

10. Per contra, Mr.S.Kalyanaraman, learned counsel for the respondent submitted as follows:

The suit agreement is a registered document and therefore, the defendant was fully aware of the contents of the same. Consequently, she cannot plead contra to the terms of Ex.A1 as such defence is hit by Section 92 of the Indian Evidence Act. The original documents were parted with by the plaintiff. The plaintiff was always ready and willing to perform his part of the contract which is proved by marking Ex.A3, the office copy of the telegram followed by notice on 16.04.2010. There is no delay on the part of the plaintiff in approaching the Court. The averments made in the plaint as such with regard to the readiness and willingness is enough for granting the decree.

11. Heard the learned counsel appearing for the respective parties and perused the materials placed before this Court.

12. The plaintiff seeks the relief of specific performance based on an agreement of sale dated 06.08.2009 marked as Ex.A1, executed by the defendant. It is true that the said agreement was registered before the competent registering authority. The plaintiff contended in the plaint that the defendant obtained loan for family expenses and could not repay the loan amount to the concerned parties and therefore, the defendant had come forward to sell the suit property to the plaintiff for a sum of Rs.2 lakhs and thus, executed the sale agreement. The case as projected by the plaintiff, from the reading of the plaint, would show as if the defendant obtained loan from some third parties and in order to repay the same, she had agreed to sell the property to the plaintiff. In other words, the plaintiff has not stated that he lend the money to the defendant. A perusal of the written statement filed by the defendant would show that it is her specific case that she borrowed a sum of Rs.1,50,000/- from the plaintiff on 06.08.2009 to meet out the medical expenses of her son, promising to repay the debt within nine months with interest. This specific averments were made by the defendant, apart from other averments denying the claim of the plaintiff as though the said agreement was entered into with an intention to sell. On the other hand, it is her clear case that the suit agreement was made as a security towards repayment of the loan obtained from the plaintiff. The defendant had further stated in the written statement that she is ready and willing to return the loan of Rs.1,50,000/- with interest.

13. When such is the contention in the written statement specifically claiming that there was a loan transaction between the plaintiff and defendant on 06.08.2009, the same was not denied by the plaintiff by way of filing any reply statement. On the other hand, it is admitted by the plaintiff in the plaint that the defendant borrowed loan for her family expenses. Thus, the hidden fact in the plaint is that the plaintiff is the person who lent the money to the defendant which, in fact, when revealed by the defendant in the written statement, has not been denied by the plaintiff by filing a rejoinder. Further, it is seen that the suit property, which is the only source of the defendant, containing two items is measuring an extent of 27 cents. According to the plaintiff, the said property was agreed to be sold for a total consideration of Rs.2 lakhs, out of which, he paid an advance of a sum of Rs.1,50,000/- on 06.08.2009 itself. It is his specific case that the property was sought to be sold to discharge the debts. If that is the actual intention, why further nine months time was given or taken for payment of the balance some of Rs.50,000/- is not explained. When the plaintiff is admittedly a money lender, what prevented him from paying the entire sale consideration on the same day and getting the sale deed executed and registered, when he has chosen to get the sale agreement itself registered. Further, it is seen that the suit notice dated 16.04.2010 was not

admittedly served on the defendant and the same was returned as unserved. Therefore, there is no presumption that the defendant was aware of the contents of the suit notice. On the other hand, the fact remains that the defendant issued a notice under Ex.B4 on 06.05.2010 and called upon the plaintiff to receive the loan amount and cancel the sale agreement. All these facts and circumstances would only lead to reasonable presumption that the intention of the parties under Ex.A1 agreement was not to sell and buy the suit property and on the other hand, the same was an outcome of the loan transaction between themselves. The trial Court considered all these aspects and rightly rejected the relief of specific performance. However, the appellate Court going by the recitals made in Ex.A1 agreement, granted the relief of specific performance more particularly, by relying on Section 92 of the Indian Evidence Act.

14. Let me now consider the scope of Section 92 of the Indian Evidence Act and the entitlement of the defendant to take a defence with regard to the intention of the parties, though he admits the execution of the agreement. In a recent decision made in S.A.No.135/2015 dated 11.11.2016, this Court has considered the very same issue in detail and by following a decision of the Apex Court reported in 2003(6) SCC 595 (Roop Kumar v. Mohan Thedani) and the Division Bench decision of this Court reported in 2007(1) LW 309 (Kamireddi Sattiaraju v. Kandamuri Boolaeswari) held that the defendant is entitled to plead and establish that the intention of the parties to the agreement was not to sell, even though, the terms and conditions of the agreement refer so. Therefore, applying the above decision which is squarely applicable to the present case, I find that the plaintiff is not entitled to the relief of specific performance.

15. Learned counsel for the appellant raised another legal issue by contending that the averments in the plaint with regard to the readiness and willingness should be in conformity with Form No.47 of Appendix-A of Code of Civil Procedure as required under Order 6 Rule 3 of C.P.C.

Form of pleading: The forms of Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

Form No.47 reads as follows:

No.47

SPECIFIC PERFORMANCE (No.1)

A.B., the above-named plaintiff, states as follows:-

1. By an agreement dated the day of and signed by the defendant, he contracted to buy of (or sale to) the plaintiff certain

immovable property therein described and referred to, for the sum of rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

4. (Facts showing when the cause of action arise and that the Court has jurisdiction)

5. The value of the subject-matter of the suit for the purpose of jurisdiction is..... rupees and for the purpose of court-fees is rupees.

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property (or to accept a transfer and possession of the said property) and to pay the costs of the suit.

16. After inviting to the above provisions of the Code, the learned counsel for the appellant invited this Court's attention to the plaint averments and submitted that except by saying that the plaintiff is always ready and willing to perform his part of the contract as per the sale agreement, he has not specifically averred his readiness and willingness as required under Form No.47. In support of such contention the learned counsel relied on the recent decision of the Apex Court reported in 2015 (5) SCC 695(Padmakumari v. Dasayyan). Paragraph No.21 and 22 of the said decision reads as follows:

21. The second important legal contention raised by defendants 12 to 15 is that the pleadings of the plaintiff are not in conformity with Order 6 Rule 3 CPC, Clause 3 of Form 47 in Appendix A, extracted hereinabove. A careful reading of Para 6 of the plaint makes it very clear that the averment as provided under Clause 3 is not in stricto sensu complied with by the plaintiff. The same is evidenced from the averments made at Para 6 of the plaint which reads thus:

"6. The plaintiff is ready and willing to perform his part of the contract by paying the balance of

sale consideration of Rs.63,000 and take the sale deed in accordance with the provisions of the agreement deed dated 19.04.1992."

22. Upon a careful reading of the abovesaid paragraph we have to hold that the plaintiff has not complied with the legal requirement which is mandatory as provided under Section 16(c) of the Specific Relief Act. Section 16 (c) fell for consideration and has been interpreted by this court in a number of cases, referred to supra, upon which reliance has rightly been placed and the said decisions are applicable to the fact situation in support of defendants 12 to 15 and, therefore, we have to hold that the concurrent finding of fact recorded by the High Court on Issue (1) is erroneous in law and is liable to be set aside."

17. Consideration of the above contention of the learned counsel for the appellant and the above decision of the Apex Court would only show that a mere formal pleading of readiness and willingness is not enough, unless such pleading is in conformity with the requirement of law as contemplated under Clause 3 of Form 47 in Appendix A of C.P.C.

18. In my considered view, apart from making the pleading in conformity with clause 3 of Form 47, the plaintiff is also duty bound to make averments in detail with dates and events as to how and in what manner he/she was ready and willing to perform his/her part of the contract, which the defendant fail to accept and perform his/her part of the counter obligation. Why I am emphasizing this aspect is that the law requires only the plaintiff to plead and prove his readiness and willingness as contemplated under Section 16 (c) of the Specific Relief Act which reads as follows:

Personal bars to relief : Specific performance of a contract cannot be enforced in favour of a person -

- (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 the performance of which has been prevented or waived by the defendant.

Therefore, it is needless to say that even if the defendant has not raised a plea and disputed the readiness and willingness of the plaintiff, the burden is only on the plaintiff to plead and prove such mandatory requirement.

19. In this case, the plaintiff after paying a major sum of Rs.1,50,000/- out of Rs. 2,00,000/, took nine months time to pay the balance amount. There is no acceptable evidence produced before the Court except Exs.A3 and A5 namely, the office copy of the telegram said to have been issued to the defendant and the returned cover of the suit notice dated 16.04.2010. There is no proof or evidence as to when such telegram was sent and whether it was served on the defendant, while the suit notice marked as Ex.A5 was admittedly not served on the defendant. This Court has already held in very many cases that time limit fixed for performance of contract is only the upper time limit and therefore, the plaintiff has to plead and prove the readiness and willingness from the date of agreement till the date of the decree. Those material details are absent in this case. Therefore, the discretionary relief for specific performance cannot be granted which the lower appellate Court failed to consider. In a decision reported in 2012 (4) CTC 100 (Pappammal @ T.Pappa v. P.Ramasamy). The learned single Judge of this Court has observed at paragraph No.34 as follows:

34. Hence, even assuming that Ex.A.2, the Agreement of Sale is a genuine document, having regard to the fact that the Respondent was not ready and willing to perform his part of the contract, he is not entitled to the relief of Specific Performance. Under Section 20 of the Specific Relief Act, the grant of relief of Specific Performance is purely discretionary and even though, the Plaintiff is entitled as per the terms of the contract to the relief of Specific Performance, the Court need not grant such relief."

20. In this case, from the discussion of facts and circumstances as supra, it is evident that the plaintiff has not come to the Court with clean hands by placing all the material facts. On the other hand, it is seen that the plaintiff, by suppressing the material factum of the loan transaction between him and the defendant and camouflaging such fact in the plaint, projected his case as though such transaction was between the defendant and some third parties and sought the relief of specific performance. Such person who suppresses material facts undoubtedly is not entitled to any relief, more particularly, when the relief sought is the

discretionary one, as in the present case of the specific performance.

21. No doubt, in this case, the defendant has admitted that he has to repay loan with interest at the rate of 24% and however, the trial Court granted the decree for repayment of the loan amount only with 14% interest from the date of agreement till the date of realisation of the decretal amount. I find justification in reducing the interest for the following reason.

It is only the defendant who issued the notice to the plaintiff on 06.05.2010 and called upon him to receive the loan amount and cancel the agreement. The plaintiff, instead of doing so, insisted the defendant to execute the sale agreement and thereby, dragged her to the Court and thus, the matter is prolonged all these years. Therefore, I find that because of the conduct of the defendant in not receiving the loan amount in time, inspite of the offer made by the defendant, the reduction of the interest by the trial Court has some justification and therefore, the same need not be interfered with.

22. Considering all these facts and circumstances, this Court is of the view that the appellant is entitled to succeed. Accordingly, the question of law raised in this appeal are answered in favour of the appellant and against the respondent. Consequently, the Second Appeal is allowed and the judgment and decree passed by the lower Appellate Court are set aside and the judgment and decree passed by the trial court are restored. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-
Assistant Registrar

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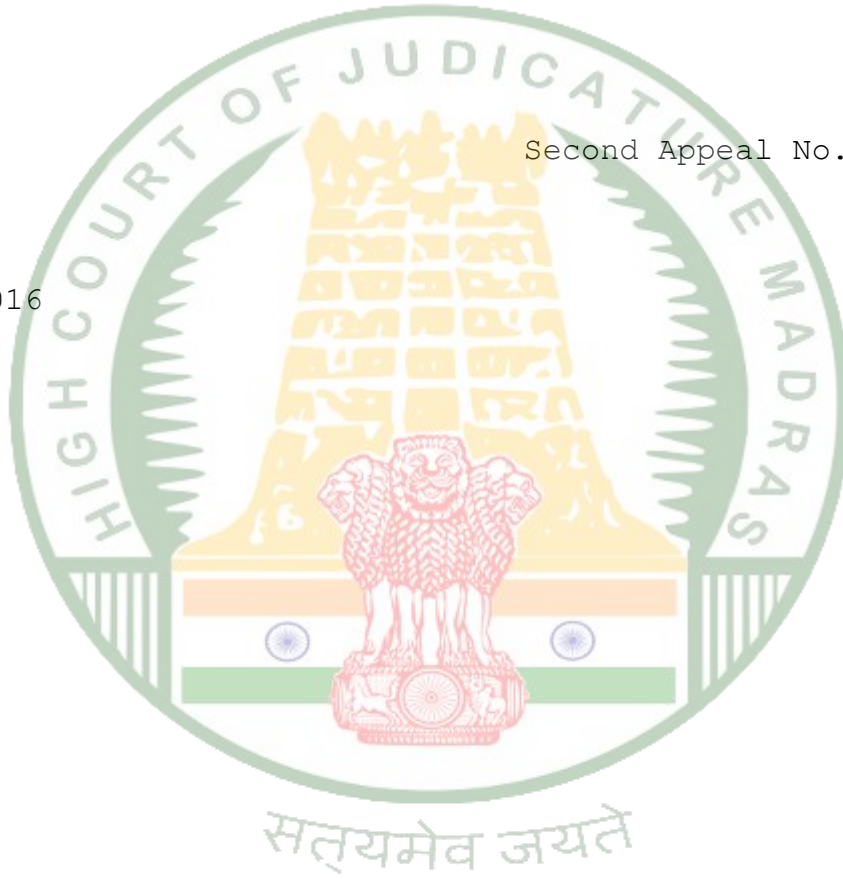
1. The First Additional District Judge, Salem .
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