

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.889 of 2006

K.M.Raju ... Appellant/Defendant

Vs

Javed Sait ... Respondent/Plaintiff

This appeal is filed under Section 96 of C.P.C. against the judgement and decree dated 30.06.2006 in O.S.No.3 of 2005 on the file of the District Court, Nilgiris at Udhagamandalam.

For Appellant : Dr.R.Gowri

For Respondent : Mrs.Asha

for M/s.Sarvabhauman Associates

J U D G E M E N T

The defendant in O.S.No.3 of 2005 on the file of the District Court, Udhagamandalam, who has suffered a decree for specific performance is the appellant.

2. The case of the plaintiff is that the defendant agreed to sell 8 cents of land along with a residential building to the plaintiff for a total consideration of Rs.6,50,000/- and the plaintiff having accepted the offer, entered into an registered sale agreement with the defendant on 29.4.2002. On the date of the agreement, he had paid an advance of Rs.6,00,000/-. The balance amount of Rs.50,000/- was to be paid within a period of one year i.e. on or before 28.04.2003.

3. Since the defendant did come forward to execute the sale deed, the plaintiff had issued a legal notice on 21.3.2003 demanding execution of the sale deed. The defendant sent a reply on 28.03.2003 contending that the agreement dated 29.04.2002 is not an agreement of sale and it was executed only as a collateral security for the loan transaction. It was also claimed that the plaintiff is an agent of a Financier at Kothagiri and he has been arranging the hire purchase loans for vehicles. It is also the

claim of the defendant that the said reply notice mentions the amount of Rs.6,00,000/- which includes the amount payable to the financier and the plaintiff. The defendant would claim that since the plaintiff did not pay the financier as agreed to, he was forced to send the reply dated 28.3.2003. Thereafter, the plaintiff has laid the suit for specific performance on 7.1.2005.

4. The suit was resisted by the defendant reiterating the stand taken in the reply dated 28.03.2003. it was also contended that the plaintiff is not ready and willing to perform his part of the contract. In the written statement, the defendant would claim that the plaintiff had agreed to pay a sum of Rs.2,35,000/- to Nagar Finance and an agreement was entered into to that effect on 5.5.2002.

5. On the above pleadings, the learned District Judge, Nilgiris, at Udhagamandalam framed the following issues:

1. Whether the sale agreement is not true and valid and binding on the parties?

2. Whether the plaintiff has paid Rs.6,00,000/- towards advance to the defendant?

3. Whether the plaintiff has to release the vehicle from Nahar Finance as stated by the defendant?

4. Whether the plaintiff is entitled for specific performance as prayed for?

5. To what other reliefs, the plaintiff is entitled to?

6. The plaintiff was examined as PW1 and Exs.A1 to A4 were marked on the side of the plaintiff. The defendant examined himself as DW1 and one N.Mani was examined as D.W.2 and Exs.B1 to B4 were marked.

7. On a consideration of oral and documentary evidence and law relating to the specific performance as it stood at the time of disposal of the suit, the learned District Judge, Udhagamandalam decreed the suit for specific performance. The claim of alternative relief of refund of advance made by the plaintiff was rejected. Agrieved over the said judgement and decree, the defendant has filed the above appeal.

8. I have heard Mrs.Dr.R.Gowri, learned counsel appearing for the appellant and Mr.P.T.Asha, learned counsel appearing for the respondent. The following points arise for determination in the appeal.

1) Whether the agreement dated 29.04.2002 was not intended to be an agreement of sale and was executed as a security for loan transaction?.

2) Whether the plaintiff has been ready and willing to perform

the part of the contract as required under Section 16 of the Specific Relief Act?

- 3) Whether the Trial Court was right in granting the relief of specific performance in favour of the plaintiff?

Point No.1

9. The agreement Ex.A1 dated 29.04.2001 is a registered instrument. The total sale price as agreed was Rs.6,50,000/-. The agreement recites that a sum of Rs.6,00,000/- was paid on the date of its execution. Curiously, for the payment of balance sale consideration is Rs.50,000/-, a time of one year has been fixed. Though the agreement would state that the plaintiff has been put in possession pursuant to the said agreement, the plaintiff in the plaint itself would plead that she was put in symbolic possession of the property. The fact that the period of one year fixed for specific performance is too large. In the given circumstances, where the sale consideration payable is only Rs.50,000/-. 10. Dr.R.Gowri, learned counsel appearing for the appellant would contend that the agreement was executed only as security for the loan transaction. She also relied upon certain admissions made by the plaintiff as PW1 in his oral evidence, wherein he says that he had introduced the defendant to Nagar Finance and he would also admit his relationship with Nagar Finance. The learned counsel would also invite my attention to the evidence of PW1 in cross-examination, wherein he would depose as follows:

".....5.5.2002-ம் தேதியில் போட்ட ஒப்பந்தப்படி ரூ.2,35,000./ பணத்தினை நான் பைனான்ஸ் கம்பெனிக்கு நான் கொடுக்காததால் பிரதிவாதியே அந்த தொகையை கட்டிவிட்டார் என்றால் அவர் செலுத்தியிருப்பார் என்றால் அது சரிதான்."
"நானும், என் அண்ணனும் பிரதிவாதி மற்றும் அவரது தம்பி ஆகியோர்களுக்கு நாங்கள் இருவரும் சேர்ந்து தான் அறிமுகம் செய்து வைத்ததோம் என்றால் அது சரிதான்."

Relying upon the above evidence as well as documents marked in Exs.B1 to B4, the learned counsel would contend that the fact that the parties had financial transaction between them has been established and the plaintiff as PW1 has admitted that he introduced the defendant to Nagar Finance to enable him to purchase vehicles on hire. According to the learned counsel this by itself would be sufficient to conclude that the agreement was entered into only as security for the loan transaction. Though, the defendant had pleaded that there was another agreement dated 5.5.2002, the said agreement has not been produced before this Court and no convincing reason has been assigned by the defendant for non-production of the said agreement.

11. Apart from that, I find that no suggestion has been made to PW2 to the effect that there was an agreement entered into between the parties during May, 2002. The defendant has not chosen to produce the said agreement also. Though it is claimed that the original agreement dated 5.5.2000 is with the plaintiff,

no effort has been made to call upon the plaintiff to produce the original agreement. While it is true that the defendant has examined one Mani as DW2 with a view to establish the alleged Finance Transaction, the said Mani has admitted that he worked as driver under the defendant, I find that his oral testimony is interested testimony and is unsafe to rely upon the same.

12. Therefore, I am of the considered opinion that the defendant has not made out the claim that the agreement dated 29.4.2002 was entered into as security for the financial transactions and it was not intended to be a sale agreement. Point No.1 is answered against the appellant.

13. It has to be considered whether the plaintiff is entitled to the relief of specific performance, which is a discretionary relief. The pleadings and evidence of the plaintiff are lacking. The agreement is dated 29.4.2002 and a period of one year is fixed under the agreement for performance of the contract. The plaintiff has chosen to issue legal notice dated 21.3.2003 demanding performance of the agreement and defendant had sent a reply dated 28.03.2003 denying the very agreement and expressed his intention to resist the claim for performance of the agreement. However the plaintiff has chosen to keep quiet for over a period of one year and has come forward with the suit for specific performance only on 07.01.2005. No acceptable explanation has been offered by the plaintiff for the aforesaid delay in approaching the court seeking specific performance.

14. The Hon'ble Supreme Court in *Saradamani Kandappan vs. Rajalakshmi* reported in 2011 4 CTC 640 has held that though the time cannot be considered to be the essence of the contract in respect of sale of immovable properties, the Court while exercising discretion in favour of the plaintiff who is seeking the relief of specific performance, must give some importance to the date fixed for performance and the plaintiff cannot at his choice seek specific performance by making empty allegations of readiness and willingness without supporting the same with cogent and convincing evidence. The said decision has been followed by this Court in various pronouncements. In *Padmakumari and others vs. Dasayyan & ors* reported in 2015 8 SCC 695, the Hon'ble Supreme Court has reiterated the law laid down in the *Saradamani Kandappan*. The unexplained delay on the part of the plaintiff would dis-entitle him from seeking the relief of specific performance. In the case of *Rajammal and others vs. Shenbagam* reported in 2016 6 CTC 225 this Court has taken note of the fact that out of sale consideration of Rs.2,00,000/-, a sum of Rs.1,65,000/- was paid as advance and a period of three years was fixed for payment of the balance amount and the suit notice was issued on 16.05.2005, nearly after two years from the date of the agreement and held that the plaintiff has not properly explained

the delay. This Court further held that he was not ready and willing to perform his part of the agreement and non suited the plaintiff on that ground. I had occasion consider a similar claim in T.Baskar vs. S.Venkatammal reported in 2016 (6) CTC 58, the plaintiff was non suited for unexplained delay of two years in filing the suit for specific performance.

15. For the foregoing reasons, I find that the delay in filing the suit between 28.3.2003 to 7.1.2005 for nearly a period of 1 year and nine months, would really dis-entitle the plaintiff from seeking the relief of specific performance. The second point is answered accordingly.
Point No.3

16. Mrs.P.T.Asha, learned counsel appearing for the respondent would contend that even assuming that the plaintiff is not entitled to the relief of specific performance, he would be entitled to a decree for refund of advance with reasonable interest. In fact, the plaintiff has made an alternative prayer in the suit itself. Further he has claimed refund of advance with 24% interest. I have already held that the defendant has not established the fact that the sale agreement was entered into towards security for the loan transaction and that his claim relating to the adjustment, pleaded in the written statement, has not been established.

17. The fact that the plaintiff had paid a sum of Rs.6,00,000/- as advance on the date of agreement remains uncontroverted. The plaintiff has been non-suited on the ground of being not ready and willing to perform his part of the contract. The plaintiff is therefore entitled to the alternative relief of refund with reasonable interest. Hence, I find that the plaintiff is entitled to refund of advance amount Rs.6,00,000/- with interest at 12% per annum from 30.04.2002 till date of decree i.e. on 30.06.2006. The plaintiff would be entitled to interest at 6% per annum from the date of the decree till date of realisation. The plaintiff is also entitled to proportionate costs in the suit. There will be no order as to cost in this appeal.

18. The learned Principal District Judge had decreed the suit upon a finding that the agreement is true and valid. The delay in filing the suit or time taken between the reply notice and filing of the suit was not considered by the learned District Judge, Udhagamandalam to be a factor that would dis-entitle the plaintiff from seeking specific performance in view of the law settled by the decision of the Hon'ble Supreme Court, particularly after the decision in Saradamani Kandappan case, I am constrained to disagree with the findings of the learned District Judge on the question of readiness and willingness.

19. In fine, the appeal is allowed and the judgement and decree of the learned District Judge, Nilgiris, Udhagamandalam are set aside and the suit in O.S.No.3 of 2005 on the file of District Judge, Nilgiris, Udhagamandalam will stand dismissed in so far as the main relief of specific performance and there will be a decree for the alternative prayer namely refund of advance. The defendant is directed to pay a sum of Rs.6,00,000/- with interest at 12% per annum from 30.4.2002 till date of decree i.e. on 30.06.2006 and at 6% per annum from the date of the decree till date of realisation. The plaintiff is also entitled to proportionate costs in the suit. In other aspects the the suit is dismissed. There will be no order as to costs in this appeal. Consequently the connected M.P.No.1 of 2006 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

vk

To

The District Judge Court, Udhagamandalam, Nilgiris District

+1cc to Mr.Dr. R. Gowri, Advocate, S.R.No.71397

+1cc to Mr.Sarvabhauman Associates, Advocate, S.R.No.70928

gr(CO)

md(30/01/2017)

सत्यमेव जयते A.S.No.889 of 2006

WEB COPY