

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2016

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.526 of 2016

and

CMP No.9277 of 2016

1.Bakkiya Lakshmi

2.Palaniammal

... Appellants/Plaintiffs

vs.

Ram Palaniappan

...Respondent/Defendants

Prayer: Second Appeal filed under Section 100 of C.P.C. against the judgment and decree passed by the learned II Additional District and Sessions Judge, Tiruppur, in A.S.No.22 of 2014 dated 28.01.2016, dismissing the appeal and confirming the judgment and decree passed by the learned Principal Subordinate Judge, Tiruppur, in O.S.No.698 of 1994 dated 07.07.2014.

For Appellants : Mr.A.Nissar Ahmed

For Respondent : Mr.R.Siddharth

for M/s.Veena Suresh

J U D G M E N T

The unsuccessful plaintiffs in a suit for specific performance are the appellants. Their case is as follows:

The defendant entered into an agreement of sale on 16.12.1992, agreeing to sell the suit property for a sum of Rs.1,75,000/- and received a sum of Rs.1,50,000/- as advance on the same day. For payment of the balance sale consideration and for execution of the sale deed, the time limit was fixed till 16.11.1993. However, the time was extended further by an agreement dated 04.11.1993 upto 16.10.1994. Though the plaintiffs were ready and willing to perform their part of the contract, the defendant has not come forward to perform his part of the obligation. Therefore, after issuing suit notice on 11.03.1994, the suit came to be filed on 04.10.1994.

2.The defendant contested the suit. The case of the defendant is as follows:

The suit agreement was executed by the defendant at the instance of the plaintiffs in respect of a loan transaction. There was no intention for the defendant to sell the property to

the plaintiffs. The suit property is worth about Rs.6,00,000/- and therefore, there is no need for the defendant to sell the same for Rs.1,75,000/-. As the suit agreement was entered into as a security towards loan transaction of Rs.1,50,000/- received by the defendant, the plaintiffs are entitled only for refund of such money and not for the relief of specific performance. Even otherwise, the plaintiffs have not taken any steps to perform their part of the contract within a period of 11 months and the suit filed after a long time would show that the plaintiffs were not ready and willing to perform their part of the contract.

3.Before the trial court, the first plaintiff examined himself as PW1 and Attestor and the scribe of the suit agreement as P.W.2 and P.W.3. They marked Exs.P1 to P15 in support of their case. The defendant examined himself as DW1 and examined another two independent witness as P.W.2 and P.W.3. On the side of the defendant, he marked Exs.B1 and B2.

4.The trial court on appreciation of the facts and circumstances of the case and the evidence let in by the parties, came to a conclusion that the suit agreement was entered into between the parties not with the intention to sell the suit property but only as a security towards the loan transaction. It was also found by the trial court that even otherwise, the plaintiffs were not ready and willing to perform their part of the contract and therefore, they were not entitled to the relief of specific performance. However, the trial court found that the defendant, having borrowed the said sum of Rs.1,50,000/-, is bound to refund the same. Accordingly, the trial court dismissed the suit for the relief of specific performance and however, decreed the suit for refund of the advance amount of Rs.1,50,000/- together with the interest at the rate of 9% p.a.

5.The plaintiffs preferred the first appeal. The First Appellate Court confirmed the finding of the trial court and dismissed the appeal, also by pointing out that since the relief of specific performance is a discretionary one, the same need not be granted owing to the fact that the suit agreement itself is of the year 1992 and the passage of 23 years of time in between, would have increased the value of the suit property by many folds. Challenging such concurrent findings rendered by the courts below, the present second appeal is filed by the aggrieved plaintiffs.

6.The matter is listed before this court at the notice of motion stage after issuing notice before admission to the respondent.

7. Since the appeal has not been admitted so far, this court has to see whether any substantial question of law arises for consideration in this appeal.

8. Mr. N. A. Nissar Ahmed, learned counsel appearing for the appellants submitted that once the defendant has admitted the execution of the agreement, he is not entitled to canvass that the intention of the agreement was not to sell the suit property but towards the loan transaction. In support of such submission, the learned counsel relied on Section 92 of the Indian Evidence Act. He also submitted that once the defendant admitted the execution of the suit agreement, he is bound by the same and the courts below erred in law in rejecting the suit for specific performance. He further submitted that two times, the plaintiffs' suit was allowed to be decreed *ex parte* and the consequences of such *ex parte* decree, a sale deed was also executed on 23.07.2007, in an execution proceedings initiated in the year 2005.

9. Learned counsel appearing for the respondent supported the findings rendered by the courts below and submitted that such concurrent findings rendered on factual aspects of the matter need not be interfered with. The learned counsel also submitted that the defendant is bound to pay the decretal amount, which he would certainly abide.

10. Heard Mr. N. A. Nissar Ahmed, learned counsel for the appellants and Mr. R. Siddharth, the learned counsel for the respondents and perused the materials placed before this court.

11. The appellants/the plaintiffs seek the relief of specific performance based on the agreement dated 16.12.1992. It is their case that the total sale consideration fixed was Rs.1,75,000/- out of which they paid Rs.1,50,000/- as advance and for payment of the balance amount of Rs.25,000/-, one year time limit was fixed. On the other hand, it is the case of the defendant that the said agreement was executed not for the purpose of selling the suit property but only to secure the loan transaction made between the parties. In other words, the defendant though admitted the receipt of Rs.1,50,000/- but denied it as advance under an agreement to sell the property.

12. No doubt, the learned counsel for the appellants sought to rely on Section 92 of the Indian Evidence Act, to contend that the defendant having admitted the execution of the suit agreement, is not entitled to raise a plea of different intention. I do not think that the learned counsel for the appellants can be permitted to raise the said objection, as this court has already considered the very same issue in S.A.No.135 of 2015 dated 11.11.2016 and by following the decisions of the Apex Court reported in 2003(6) SCC 595, Roop Kumar vs Mohan

Thedani and the Division Bench of this Court reported in 2007(1) LW 309, Kamireddi Sattiaraju vs. Kadamuri Boolaeswari, held that the defendant is entitled to raise such defense pleading a contra intention and such defense is not hit by Section 92 of the Indian Evidence Act. Therefore, this court rejects the contention of the learned counsel for the appellants in this aspect.

13. Even otherwise, assuming that the suit agreement was entered into with the real intention to sell and buy, the plaintiffs cannot get the relief of specific performance unless they also succeed in establishing their mandatory obligation contemplated under section 16(c) of the Specific Relief Act. Considering the fact that the agreement was entered into on 16.12.1992, fixing only one year as the time limit and considering the fact that till the expiry of the time, the plaintiffs have not taken any steps to seek for its execution either by issuing notice or making any attempt calling upon the defendant to perform his part of the contract, this court is of the view that there is absolutely no required pleadings followed by evidence to show the readiness and willingness on the part of the plaintiffs till the end of the time limit fixed in the first agreement.

14. No doubt, it is true that an extension agreement was entered into on 04.11.1993 extending the period upto 16.11.1994. It is not pleaded and established as to under what circumstances, such extension of time was given. Even though an attempt is made by the learned counsel for the plaintiffs to contend that it is only at the instance of the defendant such extension of agreement was entered into, in the absence of any such specific pleadings and evidence, the learned counsel for the appellants is not justified in making such submission before this court. The suit was filed on 04.10.1994, after issuing a notice only on 11.03.1994. Therefore, it shows that even assuming that the agreement was entered into for the purpose of selling the property, the plaintiffs were not ready and willing to perform their part of contract by making any earnest attempts. When such mandatory requirement under Section 16(c) of the Specific Relief Act on the part of the plaintiffs has not been established in this case, more particularly, when the same was not specifically pleaded and proved, this court is of the view that the plaintiffs are not entitled for specific performance, which both the courts below have rightly denied. Also by considering the fact that the agreement is of the year 1992 and in between a long period has lapsed and that the value of the property would have also been increased by this time, this court is of the view that such discretionary relief of specific performance need not be granted in this case, when the plaintiffs have been granted the other relief of refund of the advance amount with interest. I find both the courts below have rightly considered all these aspects on appreciation of facts and circumstances and the evidence let in by the parties.

Therefore, I find no question of law arises for consideration to entertain this second appeal. Accordingly, the second appeal fails and the same is dismissed. No costs. The connected miscellaneous petition is also dismissed.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

1.The Principal Subordinate Judge,
Tiruppur.

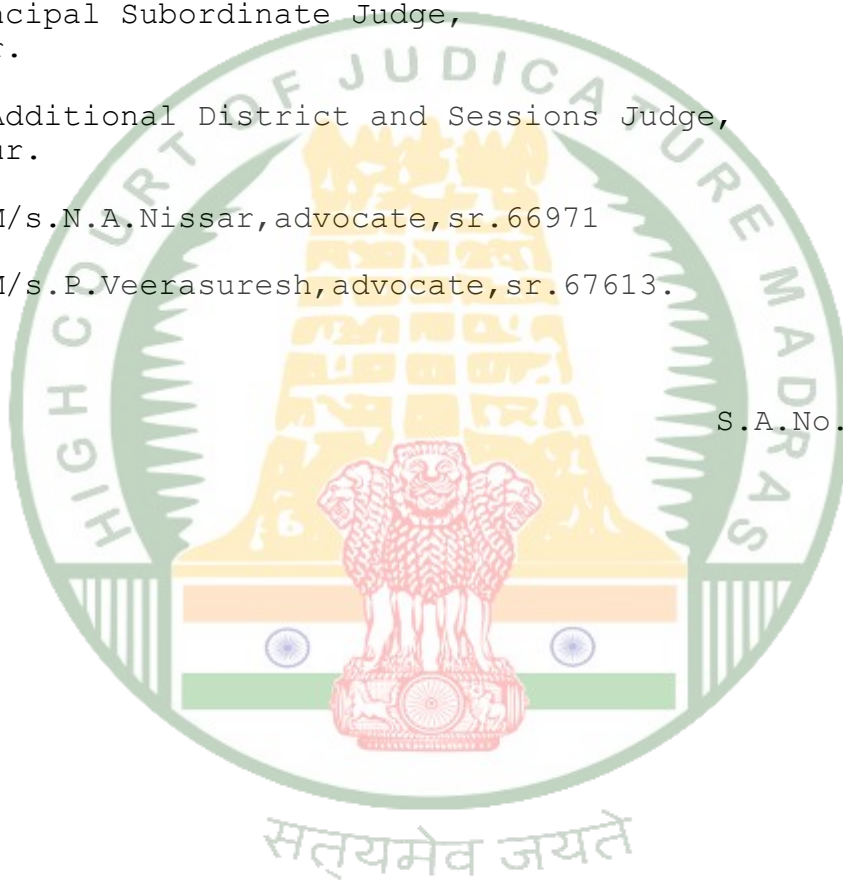
2.The II Additional District and Sessions Judge,
Tiruppur.

+1 cc to M/s.N.A.Nissar,advocate,sr.66971

+1 cc to M/s.P.Veerasuresh,advocate,sr.67613.

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krd 3/1

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