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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.11.2016

CORAM :

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Second Appeal (MD) No.1233 of 2011

S.V.Sankar

... Appellant/Respondent/Plaintiff

-Vs-.

Motcha Mary

... Respondent/Appellant/Defendant

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 13.07.2011 made in A.S.No.23 of 2010 on the file of the District Judge, Sivagangai reversing the judgment and decree dated 20.10.2010 made in O.S.No.72 of 2010 on the file of the Subordinate Judge, Devakottai.

For Appellant

: Mr.I.Velpradeep

For Respondent

: Mr.S.P.Maharajan

for Mr.C.Arulvadivel @ Sekar

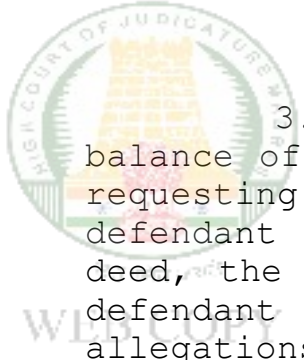
JUDGMENT

The unsuccessful plaintiff before the lower appellate Court is the appellant in this Second Appeal.

2.The plaintiff filed the suit for specific performance of an agreement of sale deed dated 11.12.2003 in respect of the suit property namely an extent of 2.62 acres in Survey No.370/3 in Kadambavanam Village, Surakudi Panchayat, Karaikudi Taluk and Registration District.

3.The case of the plaintiff / appellant in the suit are as follows:

3.1.The suit property originally belonged to the defendant and it was in the possession and enjoyment of the defendant. The defendant agreed to sell the suit property at the rate of Rs.2,300/- per cent and executed a sale agreement in favour of the plaintiff on 11.10.2003. A sum of Rs.5,000/- was paid by the plaintiff as advance and the balance amount was agreed to be paid within a period of one year from the date of sale agreement. In part performance of the sale agreement, possession was also handed over to the plaintiff by the defendant. Hence, the plaintiff is also entitled to protection under Section 53A of the Transfer of Property Act.



3.2. The plaintiff was always ready and willing to pay the balance of sale consideration and to complete the sale and he was requesting the defendant to execute the sale deed. Since the defendant was unnecessarily delaying the execution of the sale deed, the plaintiff issued a legal notice dated 21.10.2004. The defendant sent a reply dated 01.11.2004 contending false allegations that the advance amount of Rs.5,000/- was also returned by way of Demand Draft. The plaintiff thereafter sent a rejoinder notice on 04.11.2004 denying the allegations in the reply notice. The plaintiff is ready and willing to deposit the balance of sale consideration and to get the sale deed registered at his cost. The defendant has no right to refuse to execute the sale deed. Since the defendant was making arrangements to sell the suit property to third parties, the plaintiff also given a paper publication on 27.10.2004. Thereafter, the plaintiff negotiated with the defendant in the presence of important persons in the locality and the defendant had agreed to execute the sale deed. But she was delaying the execution of sale deed and ultimately, in June, 2006, the defendant refused to execute the sale deed. Hence, the present suit is filed.

4. The defendant / respondent filed a written statement *inter alia* contending as follows:

4.1. The plaintiff was not known to the defendant. The defendant requested some of the land brokers to arrange for the sale of the suit property as the defendant was in need of money for the purpose of conducting the marriage of her son. Though the brokers promised to bring some prospective buyers within ten days, they could not. Later when the xerox copy of the document handed over by the defendant to the land brokers, the plaintiff has fabricated the suit agreement and has filed the suit. There was no connection whatsoever between the plaintiff and the defendant.

4.2. The defendant though admitted the reply notice sent by him and the return of Rs.5,000/-, denied the contentions of the plaintiff. Finally, the defendant refuted the contention of the plaintiff that he had been demanding the defendant to execute the sale deed and that the defendant was delaying the execution.

5. Though the suit was decreed by the trial Court, the appellate Court reversed the findings of the trial Court and set aside the decree for specific performance granted by the trial Court. The appellate Court found that the plaintiff was not ready and willing to perform the contract and that the conduct of the plaintiff to file a suit after two years from the date of receipt of reply under Ex.A3 would disentitle him to seek specific performance on the ground of delay and laches in approaching the Court. Aggrieved by the judgment and decree of the lower appellate Court, the plaintiff / appellant has filed the above Second Appeal.



6. The following substantial questions of law were raised by the plaintiff / appellant in the memorandum of grounds:

(1) Whether the untenable refusal on the part of the executant of the sale agreement is found, the question of readiness and willingness on the part of the agreement holder will come into service or not?

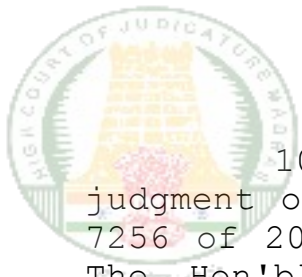
(2) Whether lower appellate Court rightly reversed the judgment and decree of the trial Court on the ground of non-readiness and unwillingness?

(3) Whether the findings of the lower appellate Court without any pleadings is sustainable in law?

7. The main contention of the learned counsel for the plaintiff / appellant is that the suit agreement was disputed by the defendant / respondent on various grounds. The stand taken by the defendant / respondent in the reply notice is different from the stand taken by the defendant / respondent in the written statement. Further, the defendant / respondent has come forward with a different version during trial which is contrary to her own stand in the reply notice and in the written statement. Thus, it was the submission by the learned counsel for the appellant that the defendant / respondent has come forward with a false plea. The learned counsel for the appellant also submitted that in a suit for specific performance, the conduct of the defendant also should equally weigh the mind of Court while granting the discretionary relief of specific performance.

8. The learned counsel for the appellant then argued that the lower appellate Court has erroneously found that the appellant is not ready and willing to perform his part of contract ignoring the admitted facts. Finally, the learned counsel for the appellant attacked the findings of the lower appellate Court and the conclusions reached by the lower appellate Court to reverse the findings of the trial Court on the ground of laches.

9. As against the strenuous arguments of the learned counsel for the appellant, the learned counsel for the respondent submitted that the plaintiff has not approached the Court within the reasonable time from the date on which the suit agreement was specifically denied by the defendant. The learned counsel for the respondent further pointed out a material discrepancy in the plaint which is now produced in the typed set of papers filed by the appellant and the sale agreement Ex.A1. According to him, in the original plaint, the agreement referred to was only an agreement dated 11.10.2003 and that this fact is established by the copy of the notice that was issued to the defendant under Ex.B8. The next submission of the learned counsel for the respondent is regarding the entitlement of the plaintiff to seek the equitable remedy of specific performance in the wake of an attempt made by the appellant to seek specific performance by manipulating the agreement to suit his prayer.

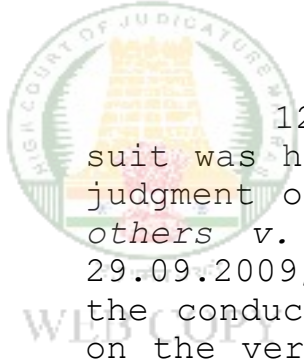


10. The learned counsel for the respondent relied upon the judgment of the Hon'ble Supreme Court in Civil Appeal Nos. 7254 to 7256 of 2002 [Saradamani Kandappan vs. S. Rajalakshmi and others]. The Hon'ble Supreme Court in the said judgment has held in paragraph 25 as follows:

"25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs. One lakh and received Rs. Ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs. Ninety Thousand, when the property value has risen to a crore of rupees."

11. The learned counsel then relied upon a judgment of the learned Single Judge of this Court in A.S.No.485 of 1999 [S. Gananatha Perumal vs. S. Valliappan] wherein the learned Single of this Court has held as follows:

11. After the notice dated 20.09.1980, the respondent did not move his little finger to enforce of his right of specific performance. He has not sent any communication nor had he filed the suit within a reasonable time. He filed the present suit in January, 1982 after the lapse of 14 months. During this period of 14 months he did not take any steps to show that he was ready and willing to perform his part of contract."

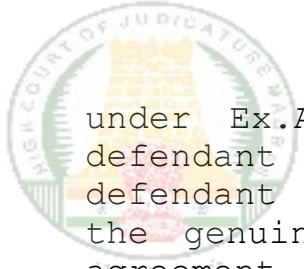


12. Thus even a period of 14 months delay in filing the suit was held to be fatal in the said judgment. In tune with the judgment of the Hon'ble Supreme Court, in the case of *Janaki and others v. S. Desikan* in A.S.No.700 of 2003, by judgment dated 29.09.2009, another Single Judge of this Court has also held that the conduct of plaintiff in remaining silent and filing the suit on the verge of limitation would disentitle the plaintiff to seek specific performance and that the specification of the time in the suit agreement would also be a relevant factor to determine the fact whether time is essence of the contract or not. The law is settled that specific performance cannot be granted merely because it is lawful to do so. In the absence of proof of readiness and willingness, the plaintiff is not entitled to get a decree for specific performance.

13. Delay in approaching the Court is a relevant factor to be considered before exercising discretion. In the judgment in *Chelliah Nadar, G. and four others v. Perriasami Nadar and three others* reported in 1993-2-L.W.-84 it has been held that an unexplained delay will disentitle the plaintiff from getting the relief of specific performance. The Hon'ble Supreme Court in the judgment reported in (1996) 4 SCC 526 [*His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar*] has made a distinction between the readiness and willingness. Readiness would only mean the capacity, wherewithal or the finance position to perform the contract. It is also held by the Hon'ble Supreme Court that for determining the willingness of the plaintiff to perform his part of the contract, his conduct has to be properly scrutinised. Hence, the factum of readiness and willingness has to be adjudged with reference to the conduct of the plaintiff and other attending circumstances. In the judgment reported in (1993) 1 MLJ 618 [*The Kancheepuram Kamakshi Amman Silk Handloom Weavers' Cooperative Production and sale Society Limited v. Yamuna Bai and others*] the Hon'ble Division Bench of this Court had dealt with a case where the plaintiff issued suit notice after one year from the date of agreement and that he has filed the suit after one year thereafter. Since there was no explanation for the inordinate delay in approaching the Court, the Hon'ble Division Bench inferred that the plaintiff therein had waived the performance of the contract. This case also is a case where the long delay was neither explained nor can be justified as reasonable, having regard to the sequence of events. Hence, absolutely, there is no evidence to justify as to why and how the plaintiff was keeping silent nearly for a period of two years. Though mere delay in seeking specific performance would not disentitle the plaintiff to get the relief, unexplained delay in approaching the Court would lead to legitimate inference that the plaintiff has abandoned the contract and that there would be undue hardship to the defendants.

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14. In the present case, the following bare facts are not in dispute. The agreement of sale was entered into on 11.12.2003



under Ex.A1. Under Ex.A2 the suit notice was given by the defendant on 21.10.2004. The reply under Ex.A3 was given by the defendant to the plaintiff on 01.11.2004 categorically disputing the genuineness of the suit agreement and describing the suit agreement as a forged one. Despite this stand was taken by the defendant even in the reply notice dated 01.11.2004, and the second notice also was issued on 04.11.2004 by the plaintiff, the suit was filed only on 01.11.2006 merely after a period of two years from the date of reply notice under Ex.A3. This shows that the plaintiff was keeping quiet for a period of more than two years after the agreement was denied by the defendant. This huge delay is not explained. This unexplained delay would certainly disentitle the plaintiff from getting the equitable relief of specific performance. Thus, applying the well settled principles on the legal implications of delay and laches particularly with reference to the context of appreciating the entitlement to an equitable relief of specific performance, this Court is of the view that the plaintiff is not entitled to the relief of specific performance because of his conduct in approaching the Court nearly after two years from the date of denial of the sale agreement by the defendant.

15.The next contention is regarding the genuineness of the suit transaction under Ex.A1. It is no doubt true that in a suit for specific performance the Court is expected to appreciate the conduct of the plaintiff as well as the defendant. However, the conduct of the plaintiff is more important than the conduct of the defendant, as the plaintiff who has come forward to seek an equitable relief is required to prove that his conduct was always fair and equitable, from the stand point of the other. The position in the case of the defendant is different. However, it cannot be ruled that the conduct of the defendant is not relevant in any case. The learned counsel for the appellant strenuously contended that the defendant who has come forward with the false plea denying the execution of agreement has to equally suffer. Having regard to the inconsistent stand that was taken by the defendant in the reply notice, the written statement and in the evidence, the learned counsel for the appellant submitted that the defendant cannot be shown any undue favour while considering the case on equity.

16.The leaned counsel for the respondent submitted that the plaintiff being an Advocate was trying to succeed in the suit by hook or crook and it is only for this purpose he set up an agreement by fabricating the original agreement dated 11.10.2003. The typed set filed by appellant contains the uncorrected plaint. In the notice under Ex.A2 dated 21.10.2004 also the agreement dated 11.10.2003 is altered. He also relied upon the notice dated 21.10.2004 that was served on him which is also marked as Ex.B8. In this notice, the date is very clearly mentioned as 11.10.2003. The document Ex.B9 is a paper publication effected by the



appellant. This notice was issued to the public to inform about the agreement which he had entered into with the defendant. Even in the paper publication the agreement referred to is the agreement dated 11.10.2003. Having regard to the facts narrated above, the contention of the learned counsel for the plaintiff that the defendant has come forward with a false plea cannot be accepted. Going by the documents and the mischief with regard to the two dates of agreement, this Court is not in a position to treat the sale agreement under Ex.A1 as a *bona fide* transaction between the parties.

17.It is not in dispute that the suit agreement contains a specific stipulation as to the time. Though time is not always an essence of the contract with regard to sale agreement in respect of immovable property, it can be made as essence of contract or it can be expected to be performed within a reasonable time. In the present case, the Court below is right in concluding that the plaintiff has not proved his readiness and willingness in terms of the agreement of sale inasmuch as the plaintiff / appellant has come forward and filed a suit for specific performance, after two years from the date of notice and nearly after two years from the date of reply sent by the defendant under Ex.A2.

18.The learned counsel for the appellant further submitted that the plaintiff has proved his readiness by depositing the balance amount immediately during the pendency of the suit. This cannot be a reason to accept the case of the plaintiff / appellant that he is always ready and willing to perform the contract of sale agreement under Ex.A1. The only point that requires to be answered in the present case is that whether the plaintiff has proved his readiness and willingness in terms of the agreements of sale and whether the plaintiff is entitled to the equitable relief of specific performance and whether the Court in exercise of its discretionary power can grant any relief to the plaintiff. Having regard to the foregoing discussions, I am of the view that the plaintiff / appellant has not proved his readiness and willingness in terms of the agreement. Similarly, having regard to the conduct of the plaintiff / appellant, the plaintiff / appellant is not entitled to the relief of specific performance which is only an equitable relief. Finally, having regard to the serious prejudice that would be caused to the defendant, in case the agreement of sale is enforced, this Court also find that the plaintiff / appellant is not entitled to the discretionary relief and this Court is not in a position to appreciate any equity in favour of appellant. Hence, there is no other question of law that arises and the lower appellate Court has considered all the issues in the light of the pleadings and evidence let in by both parties. The conclusions of the lower appellate Court is supported by reasons and hence, I am



not inclined to entertain this appeal. Hence, the Second Appeal is dismissed. However, there is no order as to costs.

Sd/-

Assistant Registrar(CSI)

/True Copy/

Sub-Assistant Registrar

To

1.The District Judge,
Sivagangai.

2.The Subordinate Judge,
Devakottai.

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+One cc to Mr.I.Vel Pradeep, Advocate, SR.No.69496

+One cc to M/s.C.Arul Vadivel @ Sekar, Advocate, SR.No.69044

srm

RL/6C/8P/BS/10.2.2017

Judgment made in
Second Appeal (MD) No.1233 of 2011

15.11.2016