

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.10.2017

Delivered on: 07.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

A.S.No.500 of 2011

G.Thomas Noel ... Appellant/Plaintiff

Vs.

Tmt Vijayalakshmi Ammal ... Respondent/Respondent

Prayer : Appeal Suit filed under order 41 Rule 1 r read with Section 96 of the Code of Civil Procedure, against the Judgment and Decree, dated 21.06.2011 made in O.S.No.24 of 2010 on the file of the District Judge, Nilgiris at Udagamandalam.

For Appellant : Mr.G.Ethirajulu
For Respondent : Mr.Prakash Gokalaney

JUDGMENT

(Judgment of the Court was delivered by
P.KALAIYARASAN, J)

Challenging the Judgment and Decree, dated 21.06.2011 passed by the learned District Judge, Nilgiris at Udagamandalam in O.S.No.24 of 2010, dismissing the suit for the relief of specific performance of contract and permanent injunction and directing the defendant to pay the advance amount with interest, the plaintiff as appellant preferred this Appeal Suit.

2. The plaint averments are as follows :

(i) The defendant is the absolute owner of the suit property. The defendant executed a Power of Attorney Deed in favour of one P.N.Raman, Advocate on 23.10.2016, to negotiate, enter into an agreement of sale, receive advance and issue receipt in respect of the plaint schedule property. The legal heirs of the husband of defendant, late Anantha Krishnan also signed in the power deed. The defendant, through her agent executed a sale agreement dated 25.10.2006 in favour of the plaintiff for a total consideration of Rs.1 crore 20 lakhs and

received an advance amount of Rs.5,00,000/-. As per the agreement, the defendant shall measure the suit property with Government Surveyor and hand over the sketch within 15 days and shall vacate the watchman from the suit property and hand over the possession. The plaintiff shall pay Rs.25,00,000/-, out of the balance sale consideration within a month and the sale is to be completed within 60 days from the date of agreement.

(ii) Though the plaintiff expressed his willingness to perform the contract and ready to pay the balance sale consideration, the defendant did not comply the conditions and measure the suit property and evict the watchman within the stipulated period and therefore, the plaintiff would not pay Rs.25,00,000/-. However, at request of the defendant, the plaintiff paid a further advance of Rs.5,00,000/- on 15.12.2006. The wife of the watchman appointed by the defendant instituted a suit in O.S.No.79 of 2007 on the file of the District Munsif Court, Ooty for permanent injunction. In the said circumstances, the plaintiff entered into an agreement of extension of time with the defendant through her power agent on 12.02.2007. Thus time was extended till 10.03.2007. The defendant further extended the time by way of an endorsement dated 07.03.2007 for a further period of five months in view of the pendency of the suit.

(iii) The plaintiff has always been ready and willing to perform his part of contract by paying the entire balance sale consideration. The defendant has not taken any steps to vacate the watchman and gave evasive reply. The defendant issued legal notice on 18.07.2008 with false allegations thereby returned Demand Draft for Rs.5,00,000/-. The plaintiff returned the Demand Draft with reply notice dated 22.07.2008 denying the allegations found in the notice. The plaintiff also issued a legal notice dated 10.05.2010 expressing his readiness and willingness to perform his part of the contract and calling upon the defendant to fulfill her part within four weeks from the date of receipt of the notice. Therefore, the suit has been filed by the plaintiff for specific performance and injunction and in the alternative for recovery of the advance amount of Rs.10,00,000/-.

3. The defendant in her written statement avers that the plaintiff has not come to Court with clean hands and therefore, he is not entitled to the relief of specific performance. All allegations and averments made in the plaint are denied. There has been an agreement entered into by the power of attorney of the defendant, one Mr.P.N.Raman who had a very limited power of entering into an agreement. The receipt of the advance amount is admitted. The question of measurement did not arise as the document was clear and it would have been necessary only if

there was a doubt. The conduct of the plaintiff would clearly show that the clause was not meant to be acted upon. The vacating of the watchman cannot be taken as a condition to be fulfilled within a month from the date of agreement and the same is fatal to the plaintiff's case. At no point of time, the defendant sought any smaller further advance.

4. At no point of time before the notice did the plaintiff call upon the defendant to comply with such condition. The agreement as to the extension of time has never been referred to earlier in the correspondence including the reply to the notice of the defendant, the plaintiff's own notice or his publication. In any event such extension was wholly unauthorized as the power of attorney agent had no authority to cause such extension and the power of attorney is very clear and unequivocal in its terms. Neither the alleged extension agreement, dated 12.02.2007 nor the alleged endorsement of extension dated 07.03.2007 are genuine documents. Both the documents are forged, false and fabricated. The documents have been prepared to avoid the limitation. The document is even otherwise void as there was no authority in the power of attorney to grant any extensions. The plaintiff was never ready and willing and had not expressed his readiness and willingness at any point of time. There was a telegram sent by the plaintiff to the power agent of defendant seeking time till 16.01.2008 to complete the transaction, failing which he was beyond to pay damages. The fact that the plaintiff has waited for over two years even after the notice only fortifies the case of the defendant.

5. The trial Court framed necessary issues. On the side of the plaintiff two witnesses were examined and 12 Exhibits marked. On the side of the defendant, one witness was examined and two Exhibits were marked. The trial Court after analysing the evidence both oral and documentary of both sides, partly decreed the suit as aforesaid. Aggrieved by the dismissal of the relief of specific performance and permanent injunction, the plaintiff as appellant preferred this Appeal Suit.

6. The learned counsel appearing for the appellant argued that as per the power deed, Ex.A.8, the power holder has the authority to extend the sale agreement; that if the period of extension is taken into account, the question of limitation does not arise and that the defendant did not comply with the conditions in the sale agreement and actually the wife of the watchman employed by the defendant filed a suit for bare injunction and the same is a collusive suit only to delay the execution of the sale deed in favour of the plaintiff.

7. The learned counsel appearing for the respondent per contra contends that the principal cannot be made liable for the acts done by the agent in excess of the express authority given under the deed. It is contended that the extension of time by power agent is without any authority and the same has not even been spelt out in the earlier communications by the plaintiff. Vacating the watchman is not a pre-condition as per the terms of the agreement. The plaintiff had not paid Rs.25,00,000/- within a month from the date of agreement as stipulated. He was also not ready and willing to pay the sale consideration.

8. There is no dispute that the suit property belongs to the defendant. She executed the power of attorney deed dated 23.10.2006 in favour of one P.N.Raman, Advocate to negotiate, enter into an agreement of sale, receive advance and issue receipt in respect of the suit property. The power agent on behalf of the defendant executed the sale agreement on 25.10.2006 with the plaintiff. The sale agreement is marked as Ex.A.1.

9. The terms of the agreement are as follows :

- (i) The sale consideration is Rs.1,20,00,000/-.
- (ii) Rs.5,00,000/- was paid as an advance.
- (iii) The copies of the title deeds shall be produced by the vendor within four weeks from the date of agreement.
- (iv) The sale deed is to be executed within a period of 60 days from the date of agreement.
- (v) The purchaser shall pay the balance sale consideration of Rs.1,15,00,000/- on or before the execution of the sale deed.
- (vi) The purchaser also further agrees to pay a sum of Rs.25,00,000/- out of the aforesaid balance within one month from the date of the agreement.
- (vii) The possession of the property shall be handed over by the vendor to the purchaser on the date of execution of the sale deed.
- (viii) The vendor shall vacate the watchman who is in the schedule of property and shall hand over the vacant possession of the schedule of the property.

10. As per the terms of the sale agreement, the plaintiff has to pay Rs.25,00,000/- within one month, out of the balance, i.e., Rs.1,15,00,000/-. Handing over of the documents within four weeks is not a pre-condition to pay Rs.25,00,000/-. The plaintiff examined as P.W.1 also says that either in his reply notice issued by the defendant, Ex.A.4 and his suit notice, Ex.A.6, he has not mentioned about the failure of the defendant to hand over the documents. He further says that xerox copies of the documents, patta and chitta were already given to him even

on 22.10.2006. Further in the agreement it is stipulated that possession of the property is to be handed over on the date of execution of the sale deed and on such handing over of vacant possession, the watchman shall have to be vacated. Therefore, handing over document and vacating the watchman is no way concerned for payment of Rs.25,00,000/- by the plaintiff within a month from the date of sale agreement. Even after 50 days, i.e., on 15.12.2006 the plaintiff paid only Rs.5,00,000/- towards further advance to the power agent.

11. It is well settled that readiness and willingness must be shown to have existed throughout ever since the time of the agreement. The first legal notice was issued only by the defendant on 18.07.2008. In the reply to that notice, dated 22.07.2008, the plaintiff no doubt expressed that he is ready and willing to pay the sale consideration; but there is absolutely no proof to show that the plaintiff has been either ready with the requisite sale consideration or willing to pay the same through his conduct. Therefore, this Court holds that the plaintiff was not ready and willing to perform his part of the contract.

12. As per the sale agreement, dated 25.10.2006, the period for execution of the sale deed is specified as 60 days. According to the plaintiff, time was extended by the power agent under agreement for extension of time dated 12.02.2007. Under the said agreement, time was extended till 10.03.2007. Further as per the endorsement made by the power agent on 07.03.2007 in the above said agreement, five months time was extended. The suit has been filed by calculating time from such extended period.

13. The defendant attacks the documents extending the period in two folds. The first attack is that both the agreement for extension of time dated 12.02.2007 and the endorsement dated 07.03.2007 thereon extending further period of five months are subsequently created documents for the purpose to cover the limitation. The second attack is that the above documents are void as the power of attorney had no authority to grant any extensions.

14. The agreement for extension of time dated 12.02.2007 was executed by the power agent of the defendant with the plaintiff, which is marked as Ex.A.2. The endorsement thereon was made by the power agent of the defendant on 07.03.2007 and the same is marked as Ex.A.9. On 18.07.2008, the defendant issued first legal notice to the plaintiff, which is marked as Ex.A.3. Only for that notice, the plaintiff sent reply notice on 22.07.2008 under Ex.A.4. Then before instituting the suit, the plaintiff issued the legal notice, dated 10.05.2010 under

Ex.A.6. In both the reply notice as well as the suit notice, the plaintiff has not mentioned about the extension of time granted under Ex.A.2 and Ex.A.9. It is also pertinent to note that even in the telegram sent by the plaintiff to the power agent on 16.11.2008, there was no mention about the extension of time.

15. The plaintiff examined as P.W.1 during his cross-examination admits that he has not mentioned about the extension agreement in Ex.A.4 and Ex.A.6. He further says that he never informed the defendant about the extension made by the power agent. Therefore it is quite probable that Ex.A.2 and Ex.A.9 have been subsequently created to cover the period of limitation.

16. The copy of power deed is marked as Ex.A.8. The recitals of the deed is as follows :

"... as power of attorney agent to negotiate on our behalf, enter into an agreement of sale, receive advance and issue receipt with respect to property described below..."

17. A power of attorney is a formal instrument by which the authority is conferred on an agent. Such an instrument is construed strictly and confers only authority given expressly or by necessary implication. A power of attorney is to be fairly construed from the language used. A careful reading of the recitals of the power deed depicts that the agent has been authorised to do a particular job, namely to negotiate, enter into an agreement of sale, receive advance and issue receipt with respect to the property mentioned therein. Through this power deed, the agent has not been given authority either to extend the time or to execute the sale deed. Therefore, Ex.A.2 and Ex.A.9 have been executed by the power agent in excess to his authority and therefore reliance cannot be placed on those documents. In the absence of extension of time under the above documents, the suit is not within time.

18. The trial Court partly decreed the suit directing the defendant to refund the advance amount of Rs.10,00,000/- with interest at 8% p.a., and the same is not under challenge from the side of the respondent / defendant. As already pointed out, the trial Court has rightly dismissed the suit with respect to the relief of specific performance and permanent injunction and this Court does not see any reason to interfere with the above findings.

19. In fine, this Appeal Suit is dismissed with costs, confirming the dismissal of the relief of specific performance and permanent injunction of the trial Court, dated 21.06.2011 made in O.S.No.24 of 2010 on the file of the District Judge, Nilgiris at Udagamandalam.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

tsvn

To

The District Judge, Nilgiris
Udagamandalam

COPY TO

The Section officer,
V.R. Section, High court,
Madras.

+2 to MR.PRAKASH GOKLANEY Advocate, S.R.No. 78737
+1cc to Mr.R.SREERANGAN, Advocate, S.R.No. 79042

Judgment in
A.S.No.500 of 2011

VD(CO)
TR(13/12/2017)

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