

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.12.2017

C O R A M

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.820 of 2017
and C.M.P.No.20437 of 2017

1. P.Sakthivel
2. P.Saravanan ..Appellants/Defendants

-Vs-

1. Sengodan
2. Palanisamy
3. P.Shanthi ... Respondents/Plaintiffs

PRAYER: Second Appeal filed under Section 100 C.P.C against the Judgment and Decree of the learned Principal District Judge, Erode dated 16.08.2011 in A.S.No.100 of 2010 confirming the judgment and decree of the learned Subordinate Judge, Bhavani, Erode District dated 26.06.2007 in O.S.No.93 of 2002.

For Appellant : Mr.T.M.Hari Haran
For Respondent-1: Ms.Zeenath Begum

O R D E R

The defendants 2 and 3 in a suit for specific performance are the appellants herein. The suit is filed for specific performance by the first respondent / plaintiff based on an agreement dated 03.06.1999. The defendants 2 and 3 were minors at the relevant point of time and even at the time of filing of the suit. The Courts below had specifically refused to grant the relief of specific performance, however, granted the relief of refund of the advance amount. Admittedly, the plaintiff has not preferred any appeal against the dismissal of the suit with respect to the relief of specific performance. Though the defendants 2 and 3 were represented by their father-the first defendant in the suit, only the defendants 2 and 3 have preferred the appeal. It is the case of the appellants that the guardian of the minors neglected to act as the guardian ad-litem and remained ex-parte. After setting them ex-parte, there was no guardian appointed for minors and the case was proceeded with. Section 22 of the Specific Relief Act mandates that the relief of refund of earnest money deposit or advance amount paid

by the plaintiff can be granted, only if the same is pleaded for. Admittedly, in this case, the plaintiff has not asked for the alternative relief of return of advance amount. But, the trial Court had erroneously granted the relief of refund as per Clause 2 of the Original Suit decree. The same was also confirmed by the lower appellate Court, despite the appeal preferred by the defendants 2 and 3.

2. In view of Section 22 of the Specific Relief Act and also in view of proposition laid down in the case of T.P.Latha @ Hemalatha and Others -vs- P.Sukumar in 2013 (1) MWN (Civil) 753, wherein the Division Bench of this Court has held that the refund of advance amount cannot be granted in the absence of any pleading. The relevant portion of the said judgment of the Division Bench reads as follows:-

"42. As we have held that the respondent is not entitled for the decree of specific performance, it has to be seen as to whether he is entitled for the refund of the advance amount of Rs.5,00,000/- paid by him to the appellants. Section 22 of the Specific Relief Act provides that in an appropriate case of suit for Specific performance the plaintiff can ask for the reliefs provided for in clause (a) and (b), but sub-Section (2) of Section 22 mandates that the aforesaid reliefs in Section 22(1)(a) and (b) shall be granted only if the same is specifically claimed. In this case, unfortunately, the respondent/plaintiff has not claimed the alternative relief of the refund of the advance amount paid. Therefore, the appellants cannot be directed to refund the advance amount of Rs.5,00,000/- paid by the respondent to the appellants / defendants."

3. In the light of the above, the judgment and decree of the Courts below are set aside to the extent of directing the defendants to refund the advance amount and the Second Appeal is allowed as indicated above. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

srn

To

1. The Principal District Judge, Erode
2. The Subordinate Judge, Bhavani,
Erode District
3. The Section Officer,
V.R.Section, High Court, Madras

+ 1 cc to Mr.T.M. Hariharan, Advocate Sr.88311

+ 1 cc to Ms. Zeenath Begum, Advocate Sr.88313

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KS (CO)
EU (06/02/2018)



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