

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 05.09.2017

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.246 of 2010
and CMP No.2477 of 2017

M.Shanmugam

.. Appellant/Plaintiff

Vs.

Rajeswari

.. Respondent/Defendant

Prayer : Appeal Suit filed under Section 96 of the Civil Procedure Code, against the Judgment and Decree made in O.S.No.86 of 2007 dated 07.09.2009 on the file of the I Additional District Judge, Coimbatore.

For Appellant : Mr.T.R.Rajagopalan Senior
Counsel for Mr.T.R.Rajaraman

For Respondent : Mrs.Anandha Gomathi Siva Kumar

J U D G M E N T

The plaintiff in O.S.No.86 of 2007 is the appellant in the suit. The suit is filed for seeking specific performance of the registered agreement of sale dated 02.11.2006 entered into between the plaintiff and the defendant. According to the plaintiff, the parties entered into an unregistered agreement of sale on 29.06.2006, in and by which, the defendant agreed to sell land of an extent of 6 cents and 236 sq.ft. for a sale consideration of a sum of Rs.95,000/- per cent and received an advance of Rs.1,50,000/- from the plaintiff. Under the said agreement a period of three months was fixed for the performance of the contract. It is also claimed that the time for performance of the contract was extended for a further period of two months till 29.09.2006. The said un-registered agreement contained a clause which provided that if the Government is to acquire a portion of the land, the said portion will be excluded from the purview of the agreement. Subsequently, on 02.11.2006, parties entered into another registered agreement of sale, in and by which, the defendant had agreed to sell the land of an extent of 6 cents 286 sq.ft. for a total sale consideration of Rs.5,47,900/- and received an advance of a sum of Rs.1,50,000/- from the plaintiff and two months time was also fixed for the performance of the agreement. The registered agreement dated 02.11.2006 does not contain any reference to the proposed acquisition by the Government. Since according to the plaintiff, the defendant did not come forward to

execute the sale deed even after several reminders the plaintiff issued a legal notice dated 02.02.2007 to the defendant and it was dispatched on 06.02.2007. Hence, the plaintiff filed the present suit seeking specific performance.

2.The defendant resisted the suit contending as follows:-

The plaintiff is aware that two months time was fixed as per the agreement dated 02.11.2006. The Plaintiff agreed to purchase the land that remained after the acquisition of the land by the Government. Since no acquisition had taken place, the suit for sale of the entire property is not maintainable. The contract expired on 01.02.2007. On 09.02.2007, the defendant cancelled the agreement of sale dated 02.11.2006 and informed the same to the plaintiff through a legal notice dated 09.02.2007 which was registered on 15.02.2007.

3.On the basis of the above pleadings, the learned Additional District Judge, Coimbatore framed the following issues:

1.Whether the plaintiff is entitled to get a specific performance?

2.Whether the plea for permanent injunction is sustainable?

3.To what relief the plaintiff is entitled to?

4.On the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Ex.A1 to Ex.A7 were marked. On the side of the defendant, D.W.1 and D.W.2 were examined and Ex.B1 to Ex.B7 were marked.

5.There was no dispute with regard to the original sale agreements dated 29.06.2006 and 02.11.2006. The defendant admitted the execution of the sale agreement and receipt of advance of Rs.1,50,000/-. It was contended by the defendant that an agreement was entered into between the parties and that the plaintiff would purchase the property remaining after acquisition of land by the Government, since the acquisition had not taken place and the contract is only for the remaining portion, after acquisition of land, the sale agreement cannot be enforced. It is further contended that the plaintiff was not ready and willing to perform his part of the contract. The learned Trial Judge agreed with the contention of the defendant on the nature of the contract and concluded that the agreement is a contingent contract. The contingency namely the acquisition to be made by the Government, having not taken place, the contract cannot be enforced. On the said finding the learned Trial Judge dismissed the suit for specific performance and further directed the defendant to repay the advance amount of Rs.1,50,000/- (Rupees one lakh fifty thousand) with interest at 12% p.a. from the date of sale agreement. Aggrieved against the said Judgment and Decree passed by the learned Trial Judge, the plaintiff has filed the above appeal.

6. Heard Mr.T.R.Rajagopalan, learned Senior Counsel for Mr.T.R.Rajaraman, for the plaintiff/Appellant and Mrs.Anandha Gomathi Siva Kumar, learned counsel appearing for the respondents.

7. Taking me through the contents of the document Ex.A3, that is the registered agreement dated 02.11.2006 and pointing out the absence of any recital in respect of the proposed acquisition of the land by the Government, as well as absence of a recital to the effect that sale consideration of Rs.5,47,900/- was fixed after deleting the land likely to be acquired by the Government, the learned Senior Counsel would contend that the sale consideration of Rs.5,47,900/- was fixed only for the available land. The contract is for sale for the total sale consideration of Rs.5,47,900/-. However, the plaintiff in his entire evidence has deposed that the sale consideration of Rs.5,47,900/- was fixed only for the available land dehors the proposed acquisition. Whatever land that is likely to be acquired depended on the Governments' action, and there is no definite proposal that has been sent by the Government to acquire any particular extent of the land. According to him the plaintiff expressed his readiness and willingness to perform his part of the contract. He would also refer to the conduct of the defendant in sending a legal notice on 15.02.2007, cancelling the contract. Further, the defendant without receiving the legal notice dated 02.02.2007 has issued legal notice dated 09.02.2007 subsequently on 15.02.2007. He would also point out that the notice in the Interlocutory Application fixing the date of hearing of the Interlocutory Application as 15.02.2007 was received by the defendant prior to 15.02.2007.

8. Per contra, Mrs. Ananatha Gomathi Sivakumar, learned counsel for the respondent would contend that even in the plaint, it is stated that the plaintiff is not ready and willing to perform his part of the contract and therefore, Ex.A3 agreement dated 02.11.2006 is a contingent contract and the non acquisition of land by the Government is admitted by the plaintiff himself. Therefore the trial Court has rightly dismissed the suit and directed the defendant to refund the advance received.

9. On the rival contentions, the following points arises for consideration:

1) Whether it could be said that Ex.A3 is a contingent contract?

2) Whether the plaintiff was ready and willing to perform his part of the

contract under Section 16(c) of the Specific Relief Act.

Point No.1

10. A reading of Ex.A3, Agreement would show that it has not referred to the impending land acquisition proceedings. No doubt Ex.A3 was preceded by Ex.A2 dated 29.06.2006 a

unregistered agreement entered into between the plaintiff and the defendant in respect of the property remaining after land acquisition proceedings. Since the defendant required further time of three months for production of original title deeds and other parent documents, on 02.11.2006, a fresh agreement Ex.A3 was entered into between the parties. DW1, the defendant in her evidence would admit that Ex.A3 agreement does not contain any reference of proposed land acquisition and she was ready and willing to perform her part of the contract. The defendant sent a legal notice dated 09.02.2007 which was despatched on 15.02.2007 and the same was marked as Ex.B1. In the said notice the defendant has not claimed that the agreement is a contingent contract and the plaintiff was not ready and willing to perform his part of contract.

11.Mrs.Anantha Gomathy Sivakumar, learned counsel appearing for the respondent pointed out that the plaintiff himself admitted that the notice dated 02.02.2007 issued by the plaintiff as well as the plaint seeks specific performance for the entire extent of the property for a consideration of Rs.5,47,900/-. DW1 in her evidence, has categorically stated that the specific performance is for the total sale consideration. The Trial Court has come to the conclusion that the agreement is a contingent contract relying upon the un-registered agreement dated 29.06.2006. As per Ex.A3, the contract between the parties is an agreement of sale of an extent of 6 cents and 236 sq.ft. of land for a total sale consideration of Rs.5,47,900/-.

12.Mr.T.R.Rajagopalan, learned Senior Counsel would submit that the trial Court ought not to have looked into the oral evidence which amounts to varying a written contract. The terms of the agreement are set out in a registered instrument. Any evidence produced to vary the terms of such contract cannot be looked into in view of bar enacted by Section 92 of the Indian Evidence Act. Therefore, I am of the opinion that the trial Court is not right in concluding that the contract under Ex.A3 as a contingent contract dependent on the happening of an event namely land acquisition by the Government.

Point No.2:

13.The learned Trial Judge has not doubted the readiness and willingness of the plaintiff to perform his part of the contract as per the agreement dated 02.11.2006, within the period of three months that was fixed for the performance of the contract. A legal notice dated 06.02.2007 was sent by the plaintiff to the defendant seeking performance of the agreement dated 02.11.2006 and the suit has filed immediately after the expiry of three months without waiting any further.

14.Though the defendant would claim that the plaintiff was not ready and willing to perform his part of the contract, the defendant has not issued any notice prior to the notice

dated 09.02.2007, which has been despatched on 15.02.2007. Therefore, this Court is of the opinion that the plaintiff was ready and willing to perform his part of the contract. PWs1 and 2 have also spoken about the fact that they approached the defendant for payment of balance sale consideration and for the execution of the sale deed, even prior to the issuance of the notice dated 02.02.2007, PWs1 and 2 expressed the readiness and willingness of the plaintiff to perform the contract. Therefore, I conclude that the plaintiff is always ready and willing to perform his part of contract.

15.The trial Court has dismissed the suit on the ground that Ex.A3 dated 02.11.2006 is a contingent contract and has held that the plaintiff is entitled to return of the advance paid. I have concluded that the agreement date 02.11.2006 is not a contingent contract while answering point No.1. The contract was not performed by the defendant and the plaintiff is seeking specific performance of the agreement for sale of land of an extent of 6 cents and 236 sq.ft. without reference to any acquisition of land by the Government and the plaintiff was always ready and willing to perform his part of the contract. Therefore, I find that the trial Court was not right in dismissing the suit on the ground that the contract under Ex.A3, is a contingent contract.

16.In the result, the appeal is allowed and the Judgment and decree passed by the learned I Additional District Judge, Coimbatore in O.S.No.86 of 2007 is set aside. The Suit in O.S.No.86 of 2007 will stand decreed as prayed for. The plaintiff is granted six weeks time from the date of receipt of a copy of this Judgment to deposit the balance sale consideration. However, there will be no order as to costs in this appeal. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ah

To

The learned I Additional District Judge,
Coimbatore.

Copy to:The Section Officer,
VR Section, High Court, Madras

+1cc to M/s.Ananda Gomathy, Advocate SR.no.64258

+1cc to M/s.T.R.Rajaraman, Advocate Sr.No.64178

A.S.No.246 of 2010

SAI (CO)

<https://hcservices.ecourts.gov.in/hcservices/>

Sm.4.12.2017