

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 17.08.2017

JUDGMENT PRONOUNCED ON : 01.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.1097 of 2009

and

MP No.1 of 2009

1.M.A.Palanisamy
2.M.A.Ramasamy
3.M.A.Selvaraj
4.Tmt.R.Revathi
5.M.Poongodi
6.P.Saravanakumar

... Appellants/Defendants
1 to 3 & 7 to 9

Vs

1.M.Mylsamy
2.Tmt.Alagathal
3.A.Appachi
4.Sub-Registrar
Thondamuthur Registrar Office
Thondamuthur, Coimbatore 641 109.

... Respondents/Plaintiff
& Defendants 4 to 6

This appeal is filed under Order 41 Rule 1 read with Section 96 of Civil Procedure Code, against the judgment and decree dated 18.5.2009 in O.S. No.511 of 2006 on the file of the Additional District Court cum Fast Track Court No.2, Coimbatore.

For Appellants : Mr.C.R.Prasanan

For 1st Respondent : Mr.S.V.Jayaraman,
Senior Counsel
for Mr.Su.Srinivasan

For 3rd Respondent : Mr.G.Ponnambala Thiyagarajan

For Respondents : No Appearance
2 & 4

J U D G E M E N T

The defendants 1 to 3 and 7 to 9 in OS No.511 of 2006, on the file of the Additional District Judge cum Fast Track Court No.2 Coimbatore are the appellants in the present appeal.

2. The said suit was filed by the 1st respondent in this appeal seeking specific performance of an agreement of sale dated 18.02.2002, entered into between the plaintiff, defendants 1 to 3 and their mother Marakkal @ Marudhathal. The sale price was fixed at Rs.2,05,000/- per acre and the extent of land agreed to be sold is 3 acre and 5 cents in Kuluvampatti Village of Coimbatore South Taluk, Coimbatore District. The plaintiff would further contend that the defendants have received an advance of Rs.2,00,000/- on the date of the agreement and a further advance of Rs.25,000/- on 07.09.2002 and Rs.20,000/- on 06.03.2004. While the payment made on 07.09.2002 was endorsed in the agreement itself the payment of Rs.20,000/- made on 06.03.2004 was evidenced by a separate receipt. Though the plaintiff was always ready and willing to perform his part of the contract, the defendants 1 to 3 and their mother have evaded execution of the sale deed. He has also stated that the 5th defendant, who is the brother of the defendants 1 to 3, has filed a suit in OS.No.853 of 2002 on the file of the District Munsif, Coimbatore, seeking a permanent injunction restraining the plaintiff, defendants 1 to 3 and their mother from alienating the property until partition is effected between them. It is also stated that the said suit had been decreed on 19.08.2004 despite contest.

3. It is further claimed that the 1st defendant had filed the suit in OS No.826 of 2003 on the file of the Sub Court, Coimbatore, seeking partition and separate possession of the suit properties and the same is said to be pending as on the date of the filing of the present suit for specific performance. It is also the claim of the plaintiff that the 4th defendant who is the sister of defendants 1 to 3 has also acknowledged the agreement by signing the endorsement for the receipt of Rs.25,000/- on 07.09.2002. According to the plaintiff another endorsement was made on 19.12.2005 in the agreement itself wherein the defendants 1, 2 and 4 have agreed to execute the sale deed after the disposal of the pending suit instituted by the 5th defendant. Therefore, according to the plaintiff he has paid total sum of Rs.2,45,000/- as advance and he is ready and willing to pay the balance of sale consideration. It is also not in dispute that in the agreement 10 months period was fixed for the performance of the contract. However, it is contended that time is not the essence of the contract. On the above contentions the plaintiff filed the suit on 08.11.2006, seeking specific performance.

4. The suit was resisted by the defendants contending that the suit agreement was not intended to be an agreement of sale. It was executed as a security for the loan borrowed by the defendants' mother from the plaintiff. The claim that the plaintiff paid a sum of Rs.25,000/- on 07.09.2002 and Rs.20,000/- on 06.03.2004 and the endorsement as well as the receipt were denied by the defendants. The claim that the defendants on 19.12.2005, promised to execute the sale deed was also specifically denied. The defendants would claim that the actual understanding between the parties was only a loan transaction. It was also further contended that the endorsement dated 07.09.2002 was obtained over the dead body of Marakkal @ Marudhathal, by duress and coercion therefore, the same cannot bind the defendants. It was also contended that the plaintiff was never ready and willing to perform his part of the contract. The absence of pre-suit notice was also pointed out as defence to show that the plaintiff was not ready and willing to perform his part of the contract.

5. The 4th defendant, who is the sister of defendants 1 to 3, practically supported the case of the plaintiff, she would however, claim she should be paid her 1/5th share in the said proceeds. She would also contend that she had filed an appeal against the preliminary decree passed in OS. No.826 of 2003 filed by the 1st defendant seeking partition since she was not granted equal share along with the defendants 1 to 3.

6. The 5th defendant filed a separate written statement contending that he was not a party to the agreement, therefore, the agreement is not binding on his share of the property. He sought for dismissal of the suit insofar as his share is concerned.

7. The defendants 7 to 9 who are the legal representatives of the 1st defendant, filed a separate written statement reiterating the claim of the 1st defendant.

8. On the above pleadings the learned Trial Judge, namely the Additional District Judge cum Fast Track Court II, Coimbatore framed the following issues.

1. Whether the suit sale agreement dated 18.02.2002 is true and valid?
2. Whether the plaintiff is entitled to a decree for specific performance with reference to the suit property?
3. Whether the plaintiff is entitled to a decree for permanent injunction as prayed for?
4. To What other relief the plaintiff entitled to?

The following additional issue was framed on 30.10.2008:

Whether the suit is bad for non-joinder of necessary parties?

9. Before the Trial Court, the plaintiff examined himself as P.W.1 and Exhibits A.1 to A.24 were marked. D.W.1 was examined on behalf of defendants 1 to 3, the 5th defendant examined himself as D.W.2 and D.W.3 was examined on behalf of the defendants 7 to 9. Exhibits B1 to B3 were marked on the side of the defendants.

10. Upon a consideration of oral and documentary evidence the learned Trial Judge rejected the plea of the defendants that the suit agreement was not intended to be an agreement of sale and the same was executed only as security for the loan borrowed by the mother of the defendants 1 to 3, namely Marakkal @ Marudhathal. The learned Trial Judge also concluded that the plaintiff has established his readiness and willingness to perform his part of the contract and the performance was delayed only due to the pendency of the Civil proceedings, namely the suit for injunction filed by the 5th defendant and the suit for partition filed by the 1st defendant.

11. Having concluded that the suit agreement is true and valid and that the plaintiff was ready and willing to perform his part of the contract, the learned Trial Judge decreed the suit with reference to the share of defendants 1 to 4 alone in the suit properties. Insofar as the share of the 5th defendant, the suit was dismissed on the ground that the 5th defendant is not a party to the document. The trial Court also granted an injunction restraining the defendants 1 to 4 from alienating the share of the property to any other person. The learned Trial Judge rejected the plea that the legal representatives of defendants 2, 3 and 5 are necessary parties to the suit. On the above findings the Trial Judge decreed the suit in respect of 14/20th share of the defendants 1 to 4 and 7 to 9 in the suit property. Insofar the 5th defendant is concerned the suit was dismissed.

12. Aggrieved the defendants 1 to 3 and 7 to 9 have come forward with the above appeal.

13. I have heard Mr.C.R.Prasanan, learned counsel appearing for the appellants and Mr.S.V.Jayaraman, Senior Counsel appearing for Mr.Su.Srinivasan, learned counsel for the 1st respondent/plaintiff. Mr.G.Ponnambala Thiyagarajan, learned counsel appearing for the 3rd respondent. The other respondents though served have not appeared either in person or through counsel.

14. Mr.C.R.Prasanan, learned counsel appearing for the appellants would vehemently contend that the trial Court erred in granting the relief for specific performance without even framing an issue regarding the readiness and willingness on the part of the plaintiff. Having rejected the plea of the defendants that the suit agreement was not intended to be a sale agreement but the same was executed to serve as a security for the borrowing, the learned Trial Judge should have gone into the question of readiness and willingness on the part of the plaintiff. The absence of findings regarding the readiness and willingness on the part of the plaintiff, according to the learned counsel, would vitiate the judgment of the trial Court.

15. The learned counsel would also point out the evidence of P.W.1, particularly in cross examination and contend that the endorsements said to have been made under Exs.A2 and A3 on 07.09.2002 and 06.03.2004 are highly doubtful. He would also contend that the suit filed by the 5th defendant A.Appachi was disposed of even in the year 2004 and therefore, the endorsement said to have been made on 09.12.2005 referring to the pendency of the said suit should not have been accepted by the learned Trial Judge. The learned counsel would also point out that the date of the agreement is 18.02.2002, the period of 10 months prescribed under the agreement expired on 18.12.2002. Therefore under Article 54 of the Limitation Act, the suit should have been filed within 3 years from 18.12.2002 i.e. on or before 18.12.2005. Therefore, the learned counsel would contend that the suit is barred by limitation.

16. Per contra, Mr.S.V.Jayaraman, learned Senior counsel appearing for the 1st respondent would contend that once the plea of the defendants that the suit sale agreement was executed for purposes of securing a loan transaction is rejected a decree for specific performance must automatically follow. He would also contend that the 4th defendant Alagathal has admitted the agreement and receipt of money thereunder. The learned counsel would point out that the endorsement dated 09.12.2005 makes it very clear that the defendants had undertaken to execute the sale deed after the conclusion of the legal proceedings.

17. Pointing out the pendency of the suit in OS.No.826 of 2003 filed by the 1st defendant seeking partition, the learned Senior Counsel would contend that the reference to the legal proceedings in Ex.A4 endorsement dated 09.12.2005, would only be the suit filed by the 1st defendant and not the suit filed by the 5th defendant which had by then disposed of. Drawing strong support from the admission made by the 4th defendant in her written statement, the learned Senior Counsel would contend that the trial Court was justified in granting a decree for specific performance. He would also contend that absence of a pre-suit

notice would not lead to an automatic presumption that the plaintiff is not ready and willing to perform his part of the contract. On the question of limitation, the learned Senior Counsel would submit that the period for performance should be deemed to have been extended by the endorsement dated 09.12.2005 marked as Ex.A4.

18. On the above arguments the following points arise for consideration in this appeal.

1. Whether the plaintiff has established that he was always ready and willing to perform his part of the contract?
2. Whether the endorsement dated 09.12.2005, if true, would it amount to extension of period fixed under the agreement?
3. Whether the suit is barred by limitation?

Point No.1:

19. In a suit for specific performance, it is the duty of the plaintiff to prove that he was ready and willing to perform his part of the contract throughout that is from the date of the agreement till date of filing of the suit. No doubt true the defendants had raised the plea that the agreement was executed as security for loan transactions, the same cannot absolve the plaintiff of his duty to prove his readiness and willingness. The agreement is dated 18.02.2002 and according to the plaintiff there were two payments made on 07.09.2002 and 06.03.2004 while the payment dated 07.09.2002 is admitted the payment evidenced by Ex.A3 receipt dated 06.03.2004 is denied by the defendants. The plaintiff would also contend that an endorsement was made on 09.12.2005 under Ex.A4 which extended the period for performance of the contract. The genuineness of the said endorsement under Ex.A4 is also disputed by the defendants. The endorsement under Ex.A4 is in the form of an undertaking by the defendants to execute the sale deed after disposal of the suit filed by the 5th defendant A.Appachi. In fact on the said date i.e. on 09.12.2005 the suit filed by the 5th defendant was already disposed of and the same was not pending. The truth and genuineness of the receipt dated 06.03.2004 and endorsement dated 09.12.2005 will be gone into while discussing the Point No.2 framed for determination in this appeal. Even assuming the receipt and the endorsement to be true, the plaintiff has filed the suit only on 08.11.2006 i.e. nearly 11 months after the endorsement dated 09.12.2005. The plaintiff does not assign any reason for the said delay of 9 months between endorsement dated 09.12.2005 and the date of filing of the suit i.e. 08.11.2006. Even in his evidence as P.W.1 the plaintiff has not come forward to explain the delay. There was no pre-suit notice, therefore, the second limb of Article 54 of the Limitation Act

cannot be invoked to say that the suit is within 3 years from the date of refusal. Though the plaintiff has produced certain documents to prove that he has possessed sufficient funds that by itself will not prove his readiness and willingness. Section 16 (c) of the Specific Relief Act makes its obligatory on the part of the plaintiff to show that he was always ready as well as willing to perform his part of the contract. "The term willing does not only encompass within itself the ability to pay the money". The plaintiff should go one step further to prove that he was actually willing to take the sale deed. Such evidence is totally absent in the case on hand. Therefore, I find that the plaintiff has not established continuous readiness and willingness as required under Section 16 (c) of the Specific Relief Act.

20. Mr.C.Prasanan, learned counsel appearing for the appellants would invite my attention to the Judgments of the Hon'ble Supreme Court in the cases of Saradamani Kandappan v. Rajalakshmi and others, [2011 (4) LW 97] and Padmakumari and ors. v. Dasayyan and others in [2015 (6) CTC 545], wherein the Hon'ble Supreme Court has reiterated the essential requirement in a suit for specific performance as to readiness and willingness on the part of the plaintiff. In the light of the pronouncements of the Hon'ble Supreme Court, I am constrained to hold that the plaintiff has not established such readiness and willingness so as to satisfy the statutory requirements under Section 16 (c) of the Specific Relief Act.

Point No.2:

21. The fact is that the agreement is dated 18.02.2002 and it fixes a period of 10 months for the performance is not in dispute. Therefore, the time fixed for performance under the agreement expired on 18.12.2002. Unfortunately, the mother of the defendants 1 to 5 namely Marakkal @ Marudhathal died on 07.09.2002, on the same day the plaintiff has paid a sum of Rs.25,000/- to the defendants, which is evidenced by Ex.A2 endorsement. Subsequently, on 06.03.2004, it is claimed that the plaintiff has paid a sum of Rs.20,000/- under a separate receipt marked as Ex.A3. The execution of said receipt is denied by defendants 1 to 3. The evidence of P.W.1 on the execution of Ex.A3 is not satisfactory. P.W.1 in his cross examination had deposed that defendants 1 to 4 have signed Ex.A3. Whereas Ex.A3 endorsement shows that it has been signed only by the 3rd and 4th defendant. Insofar as the signature of the 4th defendant is concerned, the plaintiff would depose that she did not sign. It is stated that her signature was obtained by his son and the son has not been examined. He is unable to give definite answer to the question as to whether the 4th defendant Alagathal has signed the endorsement. He would also deny the knowledge about the scribe of Ex.A3. Therefore, the

truth and genuineness of Ex.A3 receipt is highly doubtful. Even with reference to the endorsement made on 07.09.2002, P.W.1 deposed that the 3rd defendant M.A.Selvaraj had not signed the same which is contrary to the document.

22. Insofar as the Ex.A4 endorsement is concerned the same is also denied by the defendants. The endorsement namely Ex.A4, specifically refers to a suit filed by the 5th defendant A.Appachi in OS.No.853 of 2002, Ex.A4 endorsement is dated 09.12.2005, it very clearly states that the sale deed executed after the disposal of the suit filed by the 5th defendant namely A.Appachi. From the copy of the judgment and decree produced as Ex.B1, it could be seen that the suit in OS.No.853 of 2002 filed by the said A.Appachi was disposed of even on 19.08.2004 and same was not pending on 09.12.2005. Even on the execution of the document namely Ex.A4, the evidence of the plaintiff is rather sketchy. The said endorsement is not signed by all the defendants. The plaintiff himself was a party to the suit filed by the A.Appachi. P.W.1 had further admitted in cross examination that only the 1st defendant M.A.Palanisamy has signed the endorsement made on 09.12.2005 under Ex.A4, the other defendants namely M.A.Ramasamy and M.A.Selvaraj have not signed the said endorsement. The plaintiff would plead ignorance about the same and he is unable to affirm the genuineness of the signature of Alagathal, namely the 4th defendant in the endorsement dated 09.12.2005. At one point, in cross examination, he would say that the endorsement were written by his son and his son got the signature of Alagathal in the endorsement. At a subsequent point in cross examination he would say that the endorsements were written by defendants themselves and they themselves obtained the signature of Alagathal in the endorsement. It is also seen from the cross examination of P.W.1 that his son has played a major role in the execution of the agreement as well as the endorsements marked as Exs.A2 and A4, but the plaintiff has not chosen to examine his son. Therefore, I find that the receipt dated 06.03.2004 and the endorsement dated 09.12.2005, are highly doubtful going by the answers given by P.W.1 in his cross examination. Unfortunately, the learned Trial Judge has not adverted to the discrepancies in the evidence of P.W.1. After rejecting the claim of the plaintiff that the agreement was not intended to be an agreement of sale, the trial Court had straight away gone ahead to decree the suit for specific performance which, in my opinion, is not the correct approach. The execution of the receipt dated 06.03.2004 and the endorsement dated 09.12.2005 marked as Exs.A3 and A4 respectively have been specifically denied by the defendants. Therefore, it is for the plaintiff to have proved the said documents by unimpeachable evidence. Except the interested testimony of P.W.1, which is also not very satisfactory, as already discussed, there is no other evidence

forthcoming from the plaintiff to prove the truth and validity of the receipt dated 06.03.2004 marked as Ex.A3 and the endorsement dated 09.12.2005 marked as Ex.A4. The very fact the Ex.A4 endorsement refers to the suit filed by A.Appachi, the 5th defendant as pending makes it highly doubtful. The plaintiff is a party to the said suit. The said suit was disposed of as early as on 19.08.2004 as per the Ex.B1. Ex.A4 endorsement which is claimed to have been made on 09.12.2005, nearly one year 4 months thereafter refers to the suit filed by the 5th defendant A.Appachi as pending. Though Mr.S.V.Jayaraman, learned Senior Counsel appearing for the 1st respondent/plaintiff would contend that it was actually the suit in OS.No.826 of 2003 which was referred in the endorsement dated 09.12.2005, I am unable to accept the said explanation of the learned Senior Counsel as it is not supported by any evidence. Therefore, I am of the considered opinion that Exs.A3 and A4 have not been properly proved to be genuine and valid documents.

Point No.3:

23. The next question that arises is whether the suit is barred by limitation. The agreement provides a period of 10 months for performance, the said period of 10 months ends on 18.12.2002. Under the first limb of Article 54 of the Limitation Act the Limitation for filing of the suit runs from the last date fixed for performance under the contract i.e., 18.12.2002, 3 years from the said date would be 18.12.2005. The suit has been filed on 08.11.2006. In answer to the contention of Mr.C.R.Prasanan, that the suit filed on 08.11.2006 is barred by limitation, Mr.S.V.Jayaraman, learned Senior Counsel would submit that as per the endorsement dated 09.12.2005 the defendants have extended the period of performance. The said extension of the time for performance would operate to extend the period of limitation for the suit also. The decision on the question of limitation rests upon the truth or otherwise of the endorsement dated 09.12.2005. While discussing the validity of endorsement dated 09.12.2005, I have already concluded that the truth and genuineness of the endorsement is highly doubtful. Therefore, the said endorsement cannot be taken into account. It has thus become the obligation of the plaintiff to show that the suit is filed within a time allowed under Article 54 of the Limitation Act de hors the endorsement dated 09.12.2005. If the endorsement dated 09.12.2005 is eschewed the inevitable conclusion is that the suit is barred by limitation because it has been filed after three years from 18.12.2002. Ex.A3 receipt dated 06.03.2004 has also been held to be doubtful. The said receipt cannot also operate to extend the time for performance of the contract. I, therefore, find that the suit filed on 08.11.2006 is hopelessly barred by limitation.

24. An attempt is made on the part of the 1st respondent/plaintiff to take advantage of the admissions made by the 4th defendant in her written statement. A reading of the written statement itself shows that the 4th defendant was not in very good terms with other defendants inasmuch as her claim is that the property is self acquired property of the Arukutti Gounder, she is entitled to equal 1/5th share along with defendants 1 to 3 and 5 but it has been resisted by them and they have succeeded in such resistance in the suit for partition. Therefore much credence cannot be given to her contentions.

25. For all the above reasons the appeal is allowed, setting aside the judgment and decree of the trial Court. The suit in OS.No.511 of 2006 on the file of the Additional District Judge cum Fast Track Court No.2, Coimbatore will stand dismissed. However, in the peculiar facts and circumstances of the case, I make no order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

jv

To

1.The Additional District Judge,
Fast Track Court No.2,
Coimbatore.

2.The Section Officer,
V.R.Section.
High Court, Madras.

+1cc to Mr.C.R.Prasannan, Advocate, S.R.No.63491
+1cc to Mr.Su.Srinivasan, Advocate, S.R.No.63425

A.S.No.1097 of 2009
and
MP No.1 of 2009

AK(CO)
CA(10/10/2017)