

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.SATHYANARAYANAN

S.A.No.605 of 2015

and M.P.No.1 of 2015

A.Mahendran ... Appellant/Appellant/Plaintiff

vs.

1.Palanisamy
2.Elumalai
3.Govindammal
4.Chinnaponnu
5.Kamala
6.Alamelu
7.Shanthi

... Respondents/Respondents/
Defendants

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 17.03.2015 passed in A.S.No.61 of 2014 on the file of the II Additional District and Sessions Judge, Salem reversing the decree and judgment dated 22.07.2014 passed in O.S.No.278 of 2011 on the file of the Principal Subordinate Judge, Salem.

For Appellant : Mr.R.Nalliyappan

For Respondents : Mr.R.Jayaprakash for R2 to R7

For R1 : No Appearance

JUDGMENT

The plaintiff, who lost before the Trial Court and was partially successful in getting the relief of refund of advance amount of Rs.1,25,000/- from the first defendant vide judgment of the Lower Appellate Court, is before this Court as the appellant in this Second Appeal. The Second Appeal was listed for admission on 06.08.2015 and this Court ordered notice to the respondents returnable in four weeks and also directed to issue private notice and on service of notice, Mr.I.C.Vasudevan, learned counsel entered appearance on behalf of the first respondent and Mr.R.Jayaprakash, learned counsel entered appearance on behalf of the respondents 2 to 7.

2. Facts leading to the filing of this Second Appeal briefly narrated for the purpose of disposal of this Appeal are as follows. This Court, for the sake of convenience,

adopting the array of parties as adopted by the Trial Court, in this Second Appeal also.

2.1. The appellant/plaintiff filed O.S.No.278 of 2011 on the file of the Principal Subordinate Judge, Salem, praying for the relief of Specific Performance of Made Over Agreement dated 25.09.2009 under Ex.A4 or in the alternative directing the defendants to return the advance amount paid by the plaintiff with interest @ 24% per annum from the date of the Suit till realisation and also for a permanent injunction restraining the defendants and their men in any way alienating or encumbering the Suit property and also cost of the Suit.

2.2. The Suit Property admeasures 0.20 cents in S.No.50/5, Reddiyur Village, Salem District and Taluk. The plaintiff would aver among other things that the first defendant had entered into an agreement with the second defendant and his father Molaiyan, who is a deaf and dumb, on 09.02.2007 under Ex.A1 and agreed to sell the Suit Property for a sum of Rs.6,56,000/- and the first defendant paid an advance of Rs.1,00,000/- to the second defendant and his father on 09.02.2007. A registered agreement was entered into between the first defendant and the second defendant and his father and it was registered as Doc.No.812/2007 and as per the terms of the said agreement, the second defendant and his father agreed to execute sale deed in favour of the first defendant within 11 months from the date of the agreement to the first defendant or to his nominee and on 04.04.2007, the first defendant paid a sum of Rs.50,000/- to the second defendant and his father and made an endorsement to that effect in Ex.A2, on the back side of Ex.A1.

2.3. The plaintiff would further aver that the total extent of property agreed to be conveyed by the second defendant and his father to the first defendant is 35 cents of land and out of this, 14.5 cents of land has been sold to the first defendant, by virtue of the Sale Deed/Ex.A3 dated 04.04.2007 for a sum of Rs.2,81,000/- and there is a balance of 20 cents of land available. The second defendant and his father had also agreed to execute the sale deed in favour of the first defendant and extended the time for a further period of two years on 04.04.2007. The first defendant also agreed for the execution of the sale deed, however, the father of the second defendant, namely Molaiyan died in the year 2009, leaving behind the defendants 2 to 7 as his legal heirs.

2.4. The first defendant has executed a Made Over Agreement dated 25.09.2009 under Ex.A4 and according to the plaintiff, in terms of the said Made Over Agreement, the first defendant along with the defendants 2 to 7 are bound to execute the sale deed in his favour. As per the Made Over Agreement, the total amount fixed by the second defendant and his father is Rs.6,56,000/- and out of the said amount, 14.5 cents of land were sold to the first defendant for a

consideration of Rs.2,81,000/- and the total advance amount is Rs.1,50,000/-, out of which Rs.25,000/- was adjusted by virtue of the Sale Deed dated 04.04.2007 and the remaining amount of Rs.1,25,000/- has been paid by the plaintiff to the first defendant and though the plaintiff is always ready and willing to perform his part of obligation, the first defendant is postponing the same with some pretext or other. Thus, it is the case of the plaintiff that in respect of the balance sale consideration of Rs.2,50,000/-, he is ready and willing to perform his part of contract and only due to the non-cooperative attitude on the part of the first defendant, sale deed could not be executed. On 10.07.2011, the plaintiff became aware that the defendants are trying to alienate the property in favour of third parties and therefore, came forward to file the Suit for Specific Performance and other reliefs.

2.5. The first defendant had entered appearance through his Advocate, but he did not file the written statement. The second defendant had filed the written statement and it was adopted by the defendants 3 to 7. The second defendant, in the written statement, denied the allegations made in the plaint and contended that the understanding is that only 14.5 cents of land alone is to be conveyed in favour of the first defendant and the first defendant with a view to grab the entire property, took the second defendant and his father to the Office of the Sub-Registrar and made a false representation that the land agreed to be conveyed is only for 14.5 cents, but managed to get sale deed executed for full extent of 35 cents of land and thereby perpetuated fraud. It is further contended by the second defendant that the plaintiff is none other than the elder brother of the first defendant's son and the first defendant has set up the present claim and engineered the Made Over Agreement dated 25.09.2009 and to file the present Suit and therefore, the said Made Over Agreement is a collusive transaction, executed only with a view to get illegal gain and the second defendant also denied that the plaintiff is ready and willing to perform his part of obligation and also took the plea that the Suit is barred by time and also did not admit the endorsement dated 04.04.2007. The second defendant also took a plea that since the advance amount is deemed to be an earnest money and the plaintiff has not come with clean hands, he is not entitled to any remedy or relief. Insofar as the plea made by the plaintiff that the defendants are attempting to alienating the property, it is the stand of the second defendant that any alienation is subject to the pending lis and therefore, prayed for dismissal of the Suit.

2.6. The Trial Court, on consideration of the pleadings, framed the following questions:

- (i) Whether the plaintiff is entitled to the relief of Specific Performance?

(ii) Whether the plaintiff is entitled to a Decree for Permanent Injunction?

(iii) Whether the Suit Agreement came into being by practicing deceit and fraud ?

(iv) Whether the Suit is barred by limitation?

(v) To what other relief, the plaintiff is entitled?

2.7. During the course of trial, the plaintiff examined himself as PW1 and examined one Mr.Kesavan as PW2 and marked Exs.P1 to P6. The second defendant examined himself as DW1 and he did not mark any document. The Trial Court, on perusal of the pleadings and on consideration of oral and documentary evidence, has dismissed the Suit with costs, vide judgment and decree dated 22.07.2014.

2.8. The plaintiff, aggrieved by the same, had filed A.S.No.61 of 2014 on the file of the II Additional District Judge, Salem. The Lower Appellate Court, on consideration of the grounds of appeal and other materials, framed the following points for consideration:

(1) Whether the plaintiff is ready and willing to perform his part of contract?

(2) Whether the plaintiff is entitled to the relief of specific performance?

(3) Whether the plaintiff is entitled to the alternative relief of the refund of advance amount? If so, from whom?

2.9. The Lower Appellate Court found that as per the recitals in Ex.A3, a sum of Rs.25,000/- was received under Exs.A1 and A2 from the first defendant and it was adjusted and further, a sum of Rs.2,56,000/- was paid by the first defendant to the second defendant and his father and they in-turn executed the Sale Deed under Ex.A3 dated 04.04.2007 in favour of the first defendant. The Lower Appellate Court also taken note of the fact that though the first defendant entered appearance through Counsel before the Trial Court as well as before it, did not come forward to state as to why an extent of 14.5 cents of land alone has been conveyed under Ex.A3/Sale Deed dated 04.04.2007.

2.10. The Lower Appellate Court has recorded the following reasons for non-granting the relief of Specific Performance to the plaintiff:

(a) The first defendant had executed the Made Over Agreement under Ex.A4 dated 25.09.2009 in favour of the plaintiff and that too after a period of one year and 7 months from the date of execution

of the Agreement of Sale/Ex.A1 dated 09.02.2007 and for doing so, not assigned any specific reason.

(b) The plaintiff did not issue any Pre-Suit Notice to the defendants 2 to 7 before instituting the Suit for Specific Performance and the Suit was filed only in the year 18.07.2011 i.e., two years after the Made Over Agreement and therefore, it shows that the plaintiff is not ready and willing to perform his part of obligation.

(c) The first defendant even at the time of execution of the Agreement of Sale/Ex.A1 dated 09.02.2007, was aware that the Suit Property was the ancestral property of Molaiyan and as a consequence, executed the Agreement of Sale along with the second defendant and if so, the non inclusion of the defendants 3 to 7 in the Agreement of Sale is fatal to the case of the plaintiff and even as per the amendment made in the Hindu Succession Act, 2005, female members are also entitled as Co-parceners.

(d) Insofar as the refund of advance amount is concerned, the Made Over Agreement/Ex.A4 came into being between the plaintiff and the first defendant on 25.09.2009 and as such, he is entitled to get the advance amount from the first defendant or from the second defendant

The Lower Appellate Court had recorded the above reasons and accordingly, partly allowed the appeal with regard to alternative relief of refund of advance amount of Rs.1,25,000/- from the defendants with interest @ 9% p.a from the date of Suit till the date of decree and thereafter 6% p.a. till the date of realisation and dismissed the Suit as against the defendants 2 to 7. The plaintiff aggrieved by the said judgment and decree passed by the Lower Appellate Court, came forward with this Second Appeal.

3. In the Memorandum of Grounds of Second Appeal, the appellant raised/formulated the following substantial questions of law:

(1) Whether the Suit for Specific Performance is not maintainable in the event of not sending pre-suit notice by the plaintiff by expressing his readiness and willingness?

(2) Whether agreement holder has to assign any special reason in the deed of made over agreement while executing made over agreement?

(3) Whether the Court below is correct in holding that plaintiff is not ready and willing to perform his part of contract despite of that the defendants has not made any specific pleading that the plaintiff has not shown his readiness and willingness?

(4) Whether the Court below is correct in holding that the subject matter of the suit property is ancestral property even though the defendants has not specifically pleaded that the suit property is a joint family property?

(5) Whether the Court below is correct in declaring that the suit property is ancestral property by considering that the executor of the sale agreement, namely Molaiyan acquired the suit property by partition?

(6) Whether the Court below is correct in granting alternative relief alone and thereby directing the first respondent to refund the amount advanced i.e., Rs.1,25,000/- instead of directing the 2nd respondent who received the advance amount from the 1st respondent originally at the time execution of sale agreement?

4. The learned counsel appearing for the appellant/plaintiff would contend that the execution of the Agreement of Sale dated 09.02.2007 under Ex.A1 has not been put to serious dispute and under Ex.A3/Sale Deed, the parties to the agreement thought fit to enter into sale in respect of 14 cents of land and since the Made Over Agreement under Ex.A4 is fully supported by consideration and it is also a continuance of the Agreement of Sale/Ex.A1, all the defendants are bound by the same. Insofar as readiness and willingness to perform the part of obligation on the part of plaintiff is concerned, it is the submission of the learned counsel appearing for the appellant/plaintiff that further time has been extended for a period of two years and prior to the expiry of the said period, Suit has been filed. The learned counsel appearing for the appellant further submitted that it is not mandatory to issue Pre-Suit Notice before instituting a Suit for Specific Performance and the plaintiff, through oral and documentary evidence, has proved that he was always ready and willing to perform his part of obligation right from the date of Made Over Agreement till execution of the Sale Deed and the Courts below had failed to properly advert to the oral and documentary evidence. It is also the submission of the learned counsel appearing for the appellant/plaintiff that insofar as the advance amount is concerned, since Ex.A4/Made Over Agreement is in further continuance of the Agreement of Sale/Ex.A1 and further that all the defendants are jointly and severally liable for refund of the advance amount, the said

fact has been completely overlooked by the Lower Appellate Court and prays for interference.

5. There is no representation on behalf of the first respondent

6. The learned counsel appearing for the respondents 2 to 7 would contend that in a Suit for Specific Performance, grant of relief is equitable and the Courts below had recorded concurrent findings as to the non willingness to perform his part of obligation on the part of the plaintiff and having waited for two years, came forward to file the Suit and the plaintiff is under mandate to express his readiness and willingness to perform his part of obligation continuously in terms of Ex.A4/Made Over Agreement and however, he has failed to do so. It is the further submission of the learned counsel appearing for the respondents 2 to 7 that the best person to speak about Exs.A1 and A4 is the first defendant and though he entered appearance through counsel before the Trial Court, Lower Appellate Court and also before this Court, did not advance any argument and dehors the fact that he has not instructed his counsel to advance arguments, the defendant could have cross-examined the plaintiff, but he failed to do so and would further contend that there is no substantial question of law arises for consideration and prays for dismissal of the Second Appeal with exemplary costs.

7. This Court paid its best attention and anxious consideration to the rival submissions and also perused the entire materials placed before it.

8. It is a well settled position of law that in terms of Section 16(c) of the Specific Relief Act, 1963 [Central Act 47 of 1963], plaintiff is under legal mandate to establish his readiness and willingness to perform his part of obligation right from the date of agreement till the hearing of the Suit in order to become entitled to get a decree for specific performance. It is also a settled position of law that the relief of Specific Performance is discretionary and even though the plaintiff has fulfilled the necessary ingredients, the Court should look into the facts and attendant circumstances while exercising its judicial discretion for granting the relief of specific performance.

9. This Court, taking into consideration the time tested well settled legal position, has scanned through the materials placed before it.

10. The first defendant, after receipt of summons, had entered appearance before the Trial Court, but he did not file any written statement and whereas the written statement was filed by the second defendant and it was adopted by the defendants 3 to 7. The Suit in O.S.No.278 of 2011 on the file of the Subordinate Judge at Salem, after contest, came to be

dismissed and the plaintiff filed an appeal in A.S.No.61 of 2014 before the II Additional District Judge, Salem and here again, the first defendant was issued with notice and he entered appearance through Counsel, but he did not chose to contest the appeal.

11. Admittedly, Ex.A1/Agreement of Sale dated 09.02.2007 was in respect of 35 cents of lands agreed to be conveyed and only 14.5 cents have been sold to the first defendant by virtue of Ex.A3/Registered Sale Deed dated 04.04.2007 for a sum of Rs.2,81,000/-. The second defendant and his father Molaiyan had agreed to extend the time for a further period of 2 years on 04.04.2007. In the interregnum, Ex.A4/Made Over Agreement dated 25.09.2009 has been executed in favour of the plaintiff for the remaining extent of 20 cents of land and the two years extended period had expired on 03.04.2009 and Ex.A4/Made Over Agreement came to be executed on 25.09.2009. The reason for execution of the Made Over Agreement is that there was some inconvenience to execute the sale deed and getting possession and that the first defendant also was in urgent need of money paid towards advance and therefore, thought fit to execute Ex.A4/Made Over Agreement in favour of the plaintiff.

12. A perusal of Ex.A4/Made Over Agreement would also reveal that no time limit has been fixed for performance. The plaint was sworn to on 18.07.2011 and it was also presented on 18.07.2011. Though there is no requirement to issue Pre-Suit Notice, in the light of the fact that Ex.A4/Made Over Agreement is dated 25.09.2009 and the Suit came to be filed nearly after two years on 18.07.2011, issuance of Pre-Suit Notice assumes importance and however it was not issued.

13. As per the recitals in Ex.A3, a sum of Rs.25,000/- was received under Exs.A1 and A2 from the first defendant and that was adjusted and the first defendant has paid the remaining sum of Rs.2,56,000/- to the second defendant and his father and they have executed the sale deed in favour of the first defendant under Ex.A3 dated 04.04.2007, conveying 14.5 cents out of 35 cents of land and therefore, balance land to be conveyed is 20.5 cents. The Schedule of Property under Made Over Agreement/Ex.A4 would disclose that the lands agreed to be conveyed admeasure to an extent of 20 cents and it is not made clear as to why the remaining extent of land has been left out. In the considered opinion of the Court, the best person to speak about the conveyance of 14.5 cents out of 35 cents of land agreed to be conveyed as well as execution of Ex.A4/Made Over Agreement, is the first defendant and as already pointed out, though he entered appearance before the Trial Court, Lower Appellate Court as well as before this Court, did not take any steps to instruct his counsel to project his case and also not filed any written statement.

14. Though a particular party cannot be compelled to be a witness to the case, the fact remains that admittedly, the first defendant is a party to Ex.A4/Made Over Agreement and therefore, the plaintiff ought to have taken some effort to summon him and examine him as a witness and inspite of such an effort taken, if he did not appear, adverse inference can be drawn and unfortunately, the plaintiff did not take any effective steps to do so. The Lower Appellate Court in para 24 of it's impugned judgment, after analyzing the oral and documentary evidence, had recorded reasons as to why it is not inclined to grant the relief of specific performance in favour of the plaintiff.

15. In the light of the well settled legal position that the plaintiff has to express his readiness and willingness to perform his part of obligation continuously and further that the relief of specific performance is a discretionary and equitable remedy, this Court is of the view that the plaintiff has miserably failed to fulfill the said ingredients. The plaintiff has also prayed for the alternative relief of refund of the advance amount and the said plea has been negatived by the Trial Court and however, the Lower Appellate Court has granted the equitable relief of refund of advance from the first defendant.

16. It is the vehement submission of the learned counsel appearing for the appellant/plaintiff that since Ex.A4/Made Over Agreement is the continuation of Ex.A1/Agreement of Sale, rest of the defendants is also to be mulcted with the liability to refund the advance amount along with the first defendant. In the considered opinion of the Court, the said submission lacks merits for the reason that as per Ex.A4/Made Over Agreement, the first defendant has received the advance amount and despite opportunities made available to him to enter the witness box and even in this appeal, his Counsel did not appear and advance arguments on his behalf.

17. The Courts below, on a proper appraisal of oral and documentary evidence, had reached the conclusion that the plaintiff is entitled to the relief of Specific Performance and the Lower Appellate Court had exercised it's equitable jurisdiction in a fair manner and ordered refund of the advance amount in favour of the plaintiff. In the considered opinion of the Court, the findings rendered by the Courts below are based on proper appreciation of facts and also based on well settled legal position. The grounds raised by the learned counsel appearing for the appellants have been dealt with by the Courts below and rightly declined to grant the relief of Specific Performance. This Court is of the view that there are no questions of law much less substantial questions of law arises for consideration in this Second Appeal.

18. In the result, this Second Appeal is dismissed, confirming the judgment and decree dated 17.03.2015 passed in A.S.No.61 of 2014 on the file of the II Additional District and Sessions Judge, Salem and the Suit in O.S.No.278 of 2011, on the file of the Principal Subordinate Judge, Salem is decreed insofar as the refund of advance amount by the defendants to the plaintiff. No costs. Consequently, connected Miscellaneous Petition is dismissed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

1.II Additional District and Sessions Judge, Salem.

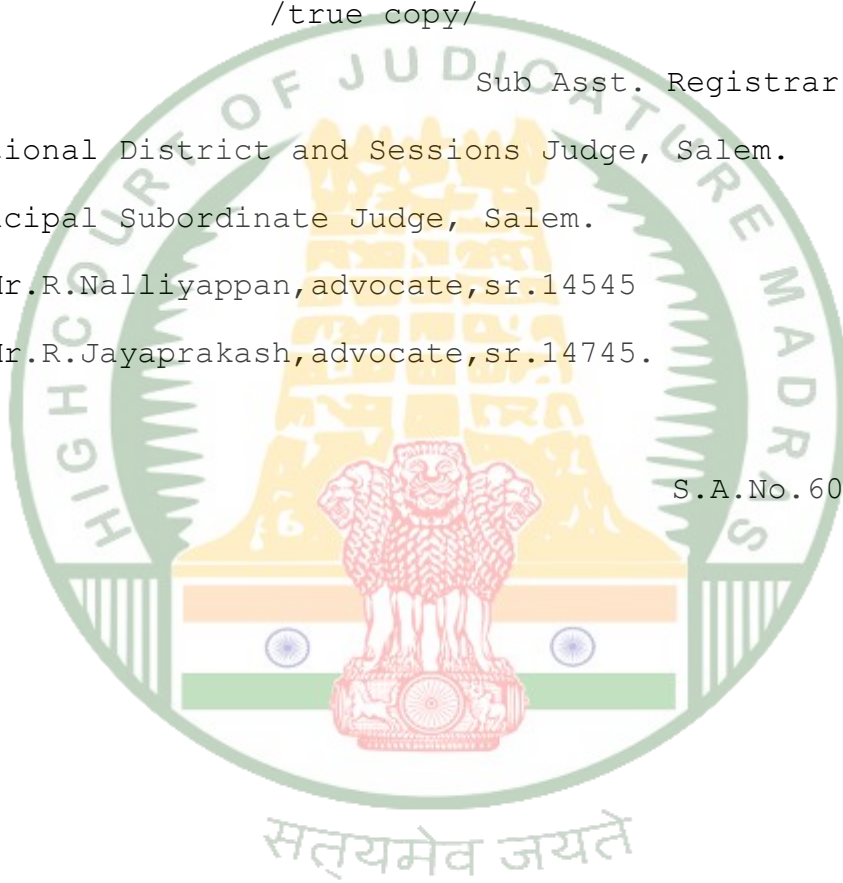
2.The Principal Subordinate Judge, Salem.

+1 cc to Mr.R.Nalliyappan,advocate,sr.14545

+1 cc to Mr.R.Jayaprakash,advocate,sr.14745.

gj (co)
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