

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : **03.02.2017**

Judgment pronounced on : **.02.2017**

CORAM

THE HONOURABLE MR.JUSTICE **C.V.KARTHIKEYAN**

C.S.No.715 of 2009

A.Aswin Solomon

... Plaintiff

Vs

R.Kaviraj

... Defendant

Prayer : Plaint filed under Order VII Rule 1 & 2 of the CPC and Order IV Rule 1 of the Original Side Rules, praying for the following judgment and decree:-

- (a) For specific performance of contract of agreement of sale dated 6.9.2007 between the plaintiff and defendant herein by directing the defendant herein to execute a deed of sale in favour of the plaintiff herein relating to the suit schedule mentioned property and register the same before the office of Sub-Registrar having jurisdiction.
- (b) to pay the costs of the suit;

For Plaintiff : Mr.S.Ilamparithi

For Defendant : Mr.M.Balasubramanian

J U D G M E N T

This suit has been filed seeking the relief for specific performance of an agreement of sale dated 06.09.2007, entered into between plaintiff and the defendant and for a direction against the defendant to execute a sale deed in favour of the plaintiff in relation to the suit schedule property and to register the same, in the office of the Sub-Registrar having jurisdiction and for costs. The suit property is land and building at Door No.15, Vengupillai Street, Egmore, Chennai 600 008 measuring of about 1044 sq. ft. It is the case of the plaintiff that the defendant is the absolute owner of the suit property having acquired the same from his mother by settlement deed dated 06.09.2007 registered as document No.809/2007 on the file of the Sub-Registrar, Periyamet.

2. It had been stated, that pursuant to an offer of sale and acceptance to buy, the parties had entered into an agreement of sale deed dated 06.09.2007 in relation to the suit property. According to the agreement, the total sale consideration was fixed at Rs.36,50,000/- and an advance amount of Rs.6,50,000/- has to be paid. It was agreed, that the defendant shall demolish the building

and the sale will be completed within 7 days from the completion of demolition. It had been stated that advance amount was paid by the plaintiff by Cheque No.930094 dated 06.09.2007 drawn on Standard Chartered bank for Rs.2,50,000/- and by cash of Rs.4,00,000/-. The plaintiff also applied for home loan before the LIC Housing Finance Ltd, based on the agreement of sale and the loan amount of Rs.18,35,000/- was sanctioned. The plaintiff sold another property belonging to his father at Kanchipuram Pachiyappa Mudali Street 3rd Lane, New Door No.3, Door No.1/1B, for Rs.7,00,000/- on 15.11.2007. It had been stated that the plaintiff was ready and willing to pay the balance sale consideration and purchase the house. However, the defendant did not take any steps. The plaintiff sent a notice dated 30.11.2007. The said notice was returned with an endorsement 'always absent'. However, another copy of the notice was sent through certified post.

3. The defendant sent a letter on 23.01.2008 to the plaintiff along with a demand draft for Rs.6,50,000/- informing that the agreement dated 23.08.2007 had lapsed. The plaintiff disputed this allegation. The plaintiff sent a rejoinder dated 26.01.2008 calling upon the defendant to complete the sale and informed him that the demand draft for Rs.6,50,000/- had been deposited in fixed deposit in

Standard Chartered Bank. A telegram was also sent on 26.01.2008.

4. The plaintiff then filed a suit for permanent injunction restraining the defendant from alienating the suit property in OS. No.865 of 2008 on the file of the XI Asst. City Civil Court, Chennai and a conditional order was also passed. The plaintiff complied with the conditional order by depositing Rs.15,00,000/- in Allahabad Bank, Ayanavaram Branch. The plaintiff stated that he obtained the *ex-parte* decree dated 13.08.2008 in OS. No.865 of 2008. Since the defendant had not come forward to execute the sale deed, this suit has been filed.

5. In the written statement filed by the defendant, it was admitted that the agreement of sale was entered into between the parties for a total price of Rs.36,50,000/- on 06.09.2007. The receipt of advance for Rs.6,50,000/- was also admitted. However, it had been stated, that since the plaintiff did not comply with the mandatory terms of the contract, the defendant returned the advance amount of Rs.6,50,000/- by way of demand draft in favour of the plaintiff. It had been stated that the agreement is no longer in force and there is no agreement to be enforced by this Court. It had been stated that the tenant had filed a suit in City Civil Court, restraining

the defendant from evicting except due process of law. It had been stated that the defendant was not in a position to comply with the conditions in the agreement and consequently the agreement became impossible of performance. It had been stated that the plaintiff did not have sufficient means to pay the total sale consideration.

6.It had been stated, that the plaintiff had delayed in performing his obligations in the contract. The plaintiff also encashed the demand draft and consequently the contract has come to an end. The defendant had denied the allegations regarding obtaining loan from the Life Insurance Corporation and sale of another property by the plaintiff. The defendant denied each and every allegation in the plaint and prayed that the suit shall be dismissed.

7.On the basis of above pleadings, this Court has framed the following issues:

1.Whether the present suit is hit by Order II Rule 2 of C.P.C in view of the suit for bare injunction filed before the City Civil Court in respect of the very same cause of action.

2.Whether the plaintiff is entitled to ask for the equitable relief of executing the sale deed in respect of the suit property even after the receipt of the advance amount

by way of demand draft?

3. To what other relief the plaintiff is entitled to?

8.The parties went for trial and the plaintiff examined himself as P.W.1 and also examined his father as P.W.2. The plaintiff filed exhibits P1 to P14. Among the Exhibits, Ex.P1 dated 06.09.2007 is the certified copy of the sale agreement, Ex.P2 dated 30.11.2007 is the notice issued to the defendant, Ex.P5 dated 23.01.2008 is the reply letter received from the defendant, Ex.P6 dated 26.01.2008 is the rejoinder notice sent by the plaintiff, Ex.P8 is the copy of the telegram dated 28.01.2008 sent to the defendant, Ex.P9 and P10 are the certified copies of the judgment and decree in OS.No.865 of 2008 dated 30.08.2008. Ex.P11 is the affidavit, petition and order in OS.No.865 of 2008 filed under Order II Rule 2 CPC. Ex.P12 is the sale deed dated 15.11.2007 executed by P.W.2 Anthony Raj. Ex.P13 and P14 are the deposit details and balance sheet issued by Allahabad Bank. P.W.2, Mr.Anthony Raj, did not mark any documents. The defendant did not examine any witnesses and did not mark any documents.

9.Brief Facts:

It is the admitted case between the plaintiff and the defendant that

- (1)The defendant was the owner of the suit property at Door No.15, Vengupillai Street, Egmore, Chennai 600 008.
- (2)The plaintiff and the defendant entered into an agreement of sale deed dated 06.09.2007 for a total consideration of Rs.36,50,000/-.
- (3)The advance amount of Rs.6,50,000/- was paid to the defendant.
- (4)The defendant returned the advance amount by way of demand draft for a sum of Rs.6,50,000/- and the demand draft was deposited by the plaintiff in fixed deposit in Standard Chartered Bank.
- (5)The plaintiff filed OS. No.865 of 2008 before the XI Asst. City Civil Court, Chennai for permanent injunction not to alienate the suit property.

10. Issue No.1: This issue relates to whether the present suit is hit by Order II and Rule 2 C.P.C., in view of the fact that OS. No.865 of 2008 was filed by the plaintiff before the XI Asst. City Civil Court, Chennai, seeking a limited relief of injunction. In this connection Order II Rule 2 C.P.C. is as follows:

2. Suit to include the whole claim- (1) *Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*

(2) *Relinquishment of part of claim:- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*

(3) Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation – For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

11. The defendant is the owner of the suit property, land and building at Door No.15, Vengupillai Street, Egmore, Chennai 600 008. He had acquired the same by deed of settlement from his mother, registered as document No.809 of 2007. On 06.09.2007, the plaintiff and the defendant entered into an agreement of sale with respect to the said property. The total sale consideration was fixed at Rs.36,50,000/-. The said agreement of sale has been filed before this Court as Ex.P1.

12. Ex.P1 is the certified copy of the agreement of sale. The certified copy had been applied and obtained from the City Civil Court, Chennai, wherein OS.No.865 of 2008 had been filed by the plaintiff. Clause II of the Ex.P1 stipulated that the sale shall be completed within 7 days on the day of fully demolished condition of

schedule mentioned property within 3 months and time is the essence of this agreement. It is therefore seen, that the parties had agreed that the time should be essence of the agreement.

13. According to the plaintiff, he had taken steps to obtain loan from Life Insurance Corporation and also sold another property belonging to his father to mobilise funds for purchase of the suit property. In this connection, the plaintiff filed Ex.P12. Ex.P.12 is a certified copy of the sale deed dated executed by Mr.Anthony Raj, who was examined as P.W.2 in favour of S.Mohamad Asath. A perusal of Ex.P12 reveals that the owing to "என் குடும்பார்த்த அவசர அவசிய செலவிற்காக தொகை வேண்டி", he had come forward to sell the property. There was no recital in Ex.P12 that the sale was to mobilise funds on behalf of the plaintiff herein, who had entered into an agreement of sale to purchase the suit property.

14. It is also to be seen that the vendor was the father of the plaintiff. In the plaint, the plaintiff had stated with respect to the said sale that the property was sold towards mobilising funds for purchase of the suit property. There is a contradiction between the averments in the plaint and the averments in the registered document

Ex.P.12. This Court has to accept the version in Ex.P12 that the property was sold by P.W.2 towards immediate family expense necessities. Though P.W.2 had stated that he had sold the property to enable the plaintiff herein, who was his son to purchase the suit property, this statement cannot be accepted by this Court in view of Section 92 of Evidence Act, precluding oral evidence against a written document.

15. The plaintiff also produced Ex.P13 and Ex.P14. Ex.P.13 is a certificate issued by the Allahabad Bank regarding fixed deposits. A perusal of the said certificate shows that the plaintiff herein had deposited a sum of Rs.6,00,000/- on 17.09.2011, a sum of Rs.5,00,000/- on 17.09.2011 and another sum of Rs.4,00,000/- on 17.09.2011 and they have been renewed periodically and they were in force till 2012. Ex.P.14 is an Interest and Balance Certificate addressed to the plaintiff. The said certificate had not been certified in accordance with law. Consequently, this Court cannot rely on the same. Ex.P13 by itself cannot be relied on by the plaintiff to show that he was ready and willing to purchase the suit. Even otherwise, this issue relates on the file of OS.No.865 of 2008 in the City Civil Court and whether necessary orders under Order II Rule 2 C.P.C. had been obtained by the plaintiff.

16. The document relating to the same are filed as Ex.P9, Ex.P10 and Ex.P11. Ex.P9 and Ex.P10 are certified copies of the judgment and decree dated 13.08.2008. Ex.P9 is the *ex-parte* judgment, which runs as follows:

"JUDGMENT

Suit for permanent injunction and for costs.

The claim of the plaintiff is proved through documents marked as Ex.A1 and Ex.A6.

The suit is decreed as prayed for with costs."

This judgment cannot be upheld in the eye of law. There was no discussion on each of the documents produced and on the evidence adduced before the Court. The defendant could have been set *ex-parte*. It is to be noted that there was a duty cast upon the Court to at least discuss the documents to find out whether there was a real threat of alienation of the suit property. I hold that Ex.P9 and Ex.P10 cannot be pressed into the service by the plaintiff and they do not advance the cause of the plaintiff.

17. Ex.P11 is a Certified copy of the affidavit, petition and docket order in I.A.No.2226/2008 filed under Order II Rule 2(3) of C.P.C. seeking leave to file a suit for permanent injunction against the respondent/defendant with right to subsequently sue for specific

performance. In the docket sheet the following order was passed by the Ist Assistant Judge,

"IA No.2226/2008
SR No.6911/08

By the petitioner/plaintiff prays as to permit the petition for filing the separate suit for specific performance subsequently.

Or 2 R 2(3) of CPC 'perused'.

S/d
IAJ"

Again it is seen that the Ist Assistant Judge, City Civil Court, Chennai had not passed any order granting permission to the plaintiff to file a subsequent suit. He had only noted "perused" which is not granting permission to the plaintiff. The plaintiff had not explained as to why he had not preferred the suit for specific performance at the earliest stage. In this connection, P.W.1 during his cross examination on 26.11.2013 had also stated as follows:

*....As per Ex.P11 series in page No.9 in I.A.No.2226
of 2008 for SR.No.6911/2008 the learned City Civil Court
Judge has mentioned as 'perused'....*

It is thus seen that the plaintiff was aware that a speaking order had not been passed in his favour.

18. In this connection the learned counsel for the learned for the plaintiff relied on [(**2014**) (**4**) **CTC 333**] Rathnavathi & another v.Kavita Ganashamdas and claimed that the cause of action for both the suits were on difference dates and consequently Order II Rule 2 will not apply. In that case, pursuant to an agreement of sale, the plaintiff therein was put in possession of the suit property. The defendant threatened to interfere with such possession. Consequently, the plaintiff filed a suit seeking injunction from dispossession. Thereafter, the plaintiff filed a suit for specific performance. Here the plaintiff did not have any specific cause of action to file the suit for injunction restraining the defendant from alienating the property. Thus the present case is totally distinguishable.

19. As a matter of fact, even before the plaintiff filed OS.No.865 of 2008, the defendant had returned the advance amount. Consequently, I hold that the judgment cited by the plaintiff would not have any bearing on this suit. It is seen from Ex.P13 that OS.No.865 of 2008 was filed on 08.02.2008. Ex.P5 is a letter dated 23.01.2008 wherein, the defendant had returned the advance amount along with the demand draft. It was only pursuant, that the plaintiff had filed OS.No.865 of 2008.

20. I hold that the plaintiff should have filed the suit for specific performance at the earliest stage since the defendant had categorically stated that he had acknowledged the agreement. Consequently, for this issue, I hold that the suit is barred under Order II Rule 2 C.P.C. and the issue No.1 is answered against the plaintiff.

21. Issue No.2:

This issue relates to whether the plaintiff can seek the relief of specific performance after receipt of the advance amount by way of demand draft. As mentioned above, in Ex.P.1, agreement of sale, the plaintiff had paid a sum of Rs.6,50,000/- as advance. It has been admitted by the defendant. Subsequently, since the parties did not move forward with the execution of the sale deed, the plaintiff had issued a legal notice dated 30.11.2007 to the defendant, which was marked as Ex.P2. The returned cover of the said legal notice was marked as Ex.P3. Proof of certificate of post was marked as Ex.P4. In reply to that notice, the defendant issued a notice dated 23.01.2008 which was marked as Ex.P5. In Ex.P5, the defendant stated as follows:

I refer you to the sale agreement entered into between both of us on 23.8.2007 and followed by the

extension of the same for seven days. The said agreement has lapsed.

As there was no response from you with regard to registration of the property in spite of repeated appeal for registration of the property, drawing your attention to the lapse of agreement. As such I am enclosing a demand draft for Rs.6,5,000/- (Rupees Six lakhs fifty thousands only), though there is a penalty clause for Rs.1,00,000/- (you have failed to register the property within the stipulated period) without any prejudice to either of us.

Further an amount of Rs.50,000/- (Rupees Fifty thousands only) had been paid to the mediator on the day of execution of sale agreement. Out of Rs.1,50,000/- (from the sale price of Rs.36,50,000/-)

The matter is closed once and for all. If you cause any nuisance or precipitate the issue further, you will be dealt with severely accordingly to the Law of Land. Neither you nor your representative/s should pursue the matter any further.

22. It is seen that the defendant has taken a categorical stand that the agreement had lapsed and that the matter has been closed once and for all. It is an admitted case of the plaintiff that the demand draft which was sent by the defendant, had been deposited by the plaintiff in fixed deposit account. He had mentioned the same in rejoinder notice, which was marked as Ex.P6.

23. It is a common knowledge that while purchasing the demand draft, the party has to pay cash and then purchase the demand draft. This is equivalent to cash transaction. In this case, the defendant had repaid the entire advance amount to the plaintiff. Instead of returning the demand draft or returning the amount back, the plaintiff deposited the amount in his bank account. In Ex.P6, it had been stated that the plaintiff had deposited the amount in fixed deposit account. The name of the Bank was not given. However, in the plaint, it is stated that the said amount was deposited in the Standard Chartered Bank. However, the branch name was not given. The plaintiff has also not produced the statement of account from the said Bank to show that the deposit was still kept pending at the time of the suit. Consequently, inference has to be drawn to the effect that the plaintiff utilised the advance amount returned back by the defendant. Once the advance amount had been returned back by the defendant and the plaintiff has utilised it, the agreement is cancelled by conduct of both the parties. The statement was not produced even during trial to show that the amount was actually available.

24. Therefore, I hold that nothing further survives in the agreement. There is no further act to be performed by either party.

The defendant did not have any obligation to demolish the building and vacate the tenant. He did not have any obligation to execute the sale deed. Similarly, the plaintiff did not have obligation to pay the balance sale consideration since the advance amount itself has been returned back to him and he had utilised the same. There is no issue of payment of advance and payment of balance sale consideration. In fact, no consideration had passed and the only consideration which passed had been returned back. The parties were again put in the same position in which they were prior to the agreement of sale, namely total strangers. Consequently, this suit by the plaintiff seeking specific performance on payment of balance consideration, has to fail. This issue is answered accordingly that the plaintiff is not entitled to ask for equitable relief to execute the sale deed in respect of the suit property after the receipt of the advance amount by way of demand draft. The issue No.2 is answered against the plaintiff.

C.V.KARTHIKEYAN, J.

jv

25. Issue No.3: In the result, this court, having no other option, has to dismiss the suit with costs.

In the result, the suit is dismissed with costs.

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Index: Yes/No

Internet: Yes/No

To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

C.S.No.715 of 2009

<http://www.judis.nic.in>