

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.02.2017

Pronounced on : 20.02.2017

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.402 of 2012

S.Durai Pandian

.. Plaintiff

vs.

1. A.K.M.Zahir Hussain

2. V.Suresh

.. Defendants

Civil Suit filed under Order IV Rule 1 of Original Side Rules 1956 read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendant.

a) Directing the 1st defendant to perform the contract as per sale agreement dated 03.08.2010 on receipt of the balance sale consideration of Rs.1,30,00,000/- within the time specified by this Court, failing which this Court may execute the sale deed in favour of the plaintiff.

b) alternative in the event of this Court coming to the conclusion that the plaintiff is not entitled to the relief of specific performance, direct the defendants 1

and 2 jointly and severally to refund the advance amount of Rs.20 lakhs to the plaintiff with 18% interest.

c) costs of the suit.

For plaintiffs : Mr.V.Vnekatasamy

For Defendants : No appearance

J U D G M E N T

The suit is filed for specific performance or in the alternative for refund of the advance amount of Rs.20,00,000/- together with interest at the rate of 18% per annum and for costs.

2. The brief facts of the case of the plaintiff are as follows:

The defendants 1 and 2 entered into an agreement dated 03.08.2010 for the sale of the suit property for a total sale consideration of Rs.1,50,00,000/-. The agreement itself acknowledged the receipt of Rs.20,00,000/- by the second defendant and a receipt has also been given to the plaintiff for the said Rs.20,00,000/-. The original agreement was handed over to the plaintiff. The first defendant also permitted the plaintiff to clear the shop in the suit property and for clearance of such shops, the second defendant also received a sum of

Rs.10,00,000/-. Thereafter, the second defendant's has evaded and his whereabouts could not be found. When the plaintiff met the first defendant in the second week of November, he informed plaintiff that the second defendant received an advance amount of Rs.20,00,000/- paid by the plaintiff and the cheques issued by him. It is the case of the plaintiff that the defendants 1 and two have colluded and involved in fraudulent activities and did not come forward to execute the sale deed. Therefore the plaintiff has issued a legal notice dated 28.04.2011. The first defendant replied the notice. But the first defendant under the pretext of tracing out the second defendant delayed execution of the sale deed. Finally, the second defendant was found on 16.11.2010 and he has given two cheques for a sum of Rs.15,00,000/- and Rs.10,00,000/- respectively to the plaintiff. When the above cheques were presented, the same were dishonoured. Thereafter, the second defendant paid a sum of Rs.10,00,000/- towards part payment of the due under the dishonoured cheques. In the last week of February 2011, the plaintiff met the first defendant. At that time, he came to know about the malafide intention of the second defendant and how he was cheated by the defendants. But the first defendant asked the plaintiff to wait for some time. The first defendant was having confidence to trace out the second defendant and get back the amount from him. When the plaintiff was seeking to get the sale deed to be executed, the second defendant caused notice dated 21.03.2011 containing false and untenable allegations. The plaintiff has sent a suitable reply for the

same. The plaintiff was always ready and willing to perform his part

of the contract. Hence, the suit for specific performance for directing the first defendant to perform his part of the contract or in the alternative to direct the defendants to return the advance amount of Rs.20,00,000/- together with 18% interest per annum.

3. The first defendant has been served notice, but he remained *exparte*. The second defendant having entered appearance through counsel, the second defendant has not filed the written statement. Hence, the defendants were set *exparte*.

4. On the side of the plaintiff, husband of the plaintiff was examined himself as P.W.1 and Ex.P.1 to Ex.P.7 were marked.

Exhibits produced on the side of the plaintiff:

S.No.	Exhibits	Date	Description
1.	P-1	--	Original Agreement for Sale
2.	P-2	21.03.2011	Legal notice sent by the second defendant to the plaintiff
3.	P-3	03.04.2011	Copy of reply notice sent by the plaintiff to the second defendant with

S.No.	Exhibits	Date	Description
			acknowledgment
4.	P-4	28.04.2011	Copy of legal notice sent by the plaintiff to the first defendant
5.	P-5	18.05.2011	Reply notice given by the first defendant to the plaintiff
6.	P-6	--	Copy of rejoinder sent by the plaintiff to the first defendant
7.	P-7	--	Copy of the letter sent by the plaintiff to the first defendant sent by courier

Witnesses examined on the side of the plaintiffss:

P.W.1. - Durai Pandian

5. Heard the learned counsel for the plaintiff and perused the records.

6. P.W.1 has spoken about the fact that only the second defendant approached him for development of some properties and he has received some amount. Thereafter, he has paid a sum of Rs.20,00,000/- to the second defendant on various dates and agreement was executed by both the defendants for the sale of the suit property for a sum of Rs.1,50,00,000/- Thereafter the defendants evaded execution of the sale deed. It is the further evidence of P.W.1 that he has also issued legal notice on 18.05.2011. The plaintiff is always ready and willing to perform his part of the contract. Hence, this suit has been filed seeking specific performance.

7. Ex.P.1 is the agreement entered into between the first defendant as a vendor as first part and the plaintiff and the second defendant as a purchaser, as another part. The vendor agreed to sell the property for Rs.1,50,00,000/- to the purchaser and also acknowledged the receipt of Rs.20,00,000/-. It is also stated in the agreement that another Rs.15,00,000/- has been paid by way of cheque. However, cheque number, date and the bank details have not been mentioned in the agreement. The time stipulated in the agreement is three months from the date of the agreement. It is curious to note that the date of the agreement has not been mentioned in the agreement. Ex.P.2 is the legal notice issued by the second defendant to the plaintiff on 21.03.2011, wherein the second defendants herein has issued a legal notice to the plaintiff that he has not handed over any cheque payable to the vendor and he himself filled the cheque and tried to implicate the second defendant. Ex.P.3 is the reply notice given by the plaintiff to the second defendant denying the allegation and stated that he has already paid a sum of Rs.20,00,000/-, wherein he has specifically pleaded from the defendant a sum of Rs.20,00,000/- within 10 days. Ex.P.4 is the legal notice dated 20.04.2011 sent to the first defendant by the plaintiff herein stating about the agreement and also called upon him to comply and to execute the sale deed or to return the advance amount of Rs.20,00,000/- with interest at the rate of 24% within a period of 7 days for which a reply notice was sent by the first defendant denying the very

agreement itself. Similarly, he has also denied the identity of the plaintiff himself and contended that the document is a forged and fabricated document. Ex.P.6 is the re-joinder issued by the plaintiff. Ex.P.7 is said to be a letter addressed by the plaintiff sent by courier. There is no evidence available on record for service of Ex.P.7 to the defendants. The evidence of P.W.1 has not been traversed.

8. From the evidence of P.W.1 and the documents Ex.P.1 to P.7, particularly Ex.P.1, it can be seen that the agreement was entered the first defendant as first part as vendor and the plaintiff and the second defendant as purchasers as second part. It is the specific evidence of P.W.1 that the second defendant was made as a party only in order to promote residential apartment in a partnership. Therefore, he was also made a party in the agreement as a purchaser. Whereas, he has paid the advance amount of Rs.20,00,000/-. In Ex.P.1, though specific date has not been mentioned, it is signed by the first defendant as a vendor. The terms of the agreement shows that the first defendant has agreed to sell the property for a total sale consideration of Rs.1,50,00,000/- and also acknowledged the receipt of Rs.20,00,000/- from the purchaser, besides, also received one cheque from the second defendant for a sum of Rs.15,00,000/-. Though the agreement show as if the payment through a cheque is also made, the pleadings of the plaintiff clearly indicate that the above amount has not been paid to the first defendant.

9. The suit is filed for specific performance or for the alternative relief. But from the entire pleadings and evidence of P.W.1, this Court does not find any evidence to show that the plaintiff was always ready and willing to perform

his part of the contract from the very beginning, except issue of legal notice after dispute arose between the parties. The entire evidence and documents clearly show that the second defendant is also not co-operating with the plaintiff. The fact remains that the plaintiff himself pleaded that the second defendant had given a cheque for Rs.25,00,000/-, two cheques for Rs.10,00,000/- and for Rs.15,00,000/- and when one cheque for Rs.15,00,000/- was presented for encashment, the same was dishonoured. Subsequently, the second defendant gave a pay order for a sum of Rs.10,00,000/- in the name of the plaintiff towards part payment of amount due under the dishonoured cheques. The pleadings in the plaint clearly indicate that the second defendant has already paid a sum of Rs.10,00,000/- said to be due to the plaintiff. In that case, the plaintiff cannot seek for the alternative relief for return of Rs.20,00,000/-, in view of the fact that he himself pleaded that he received Rs.10,00,000/- by way of pay order. That being the case, the plaintiff cannot take advantage of the agreement and claim Rs.20,00,000/-. Therefore, this Court, on considering the the entire evidence on record, is of the view that the plaintiff has not made out any case for specific

performance and at the most he is entitled for recovery of a sum of Rs.10,00,000/- from the defendants, the advance said to have been paid by him, which is not denied by the defendants. Accordingly, the issues are answered.

9. In the result, the suit is decreed for a sum of Rs.10,00,000/- with interest at the rate of 6% from 03.08.2010 till the date realisation with costs.

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Index : Yes
Internet: Yes

N.SATHISH KUMAR, J

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