

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :24.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Second Appeal No.469 of 2018
and C.M.P.No.12617 of 2018

Orders reserved on 25.07.2018	Orders pronounced on 24.08.2018
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T.M.Subramaniam

... Appellant/Plaintiff

vs.

Henry (Died)

1.Annakodi

2.Tamilarasi

3.Malarvizhi

4.Prakash

5.Kanimozhi

6.Elango

7.Manimekalai

8.Santhi

9.Leena

10.Ingarasal

11.Rajendran

12.Poongodai

13.Parthiban [Vincent (Died)]

14.Senguttvan

15.Mathuranthagai

16.Maragatham

17.Jabamalai

18.Padma@Fathima

19.Jothi

20.Minor Rabert Rajkumar

S/o.Late Philips,

Rep by Guardian and mother Jothi

..Respondents/Respondents 2to 6,8 to 14,16to 19, 22 LRS ofD21

Appeal filed Under Section 100 of the CPC against the Judgment and Decree, dated 27.02.2018, made in A.S.No.15 of 2011, on the file of the learned Second Additional District Court, Erode, confirming the judgment and decree, dated 22.11.2010, made in O.S.No.693 of 1995, on the file of the learned First Additional Sub Court, Erode.

For Appellllant : Mr.N.Manokaran

For Respondents: Mr.V.Raghavachari for Caveator
R10

JUDGMENT

This appeal is filed under Section 100 of the Code of Civil Procedure challenging the correctness of the judgment and decree passed in A.S.No.15 of 2011, on the file of II Additional District Court, Erode, dated 27.02.2018, confirming the judgment and decree in O.S.No.693 of 1995, on the file of I Additional Sub-Court, Erode, dated 22.11.2010.

2. The plaintiff is the appellant. The Suit was filed for specific performance to direct the defendants to execute the sale deed in favour of the plaintiff in respect of the Suit property and deliver possession of the same and upon failure, the Court to execute the sale deed in favour of the plaintiff and deliver possession. Alternatively the plaintiff sought for a direction upon the defendants to pay the plaintiff a sum of Rs.1,92,000/-, with subsequent interest at 12% per annum on Rs.1,20,000/- from the date of Suit till the realisation. The above Second Appeal has been filed raising the following substantial questions of law:-

(i) Whether the Courts below have committed an error of law in dismissing the suit on the ground that Ex.A2 endorsement has not been proved by the plaintiff, particularly in the absence of any contra evidence to an expert evidence (P.W.3)?

(ii) When the time is not the essence of the contract in transaction of sale of immovable properties, whether the delay by itself, would stand in the way of the plaintiff from claiming the relief unless the defendants have established prejudice or hardship?

(iii) Have not the Courts below committed an error in ignoring the conduct of the defendants, which is also relevant in the eye of law for granting or refusing to grant the discretionary relief of specific performance?

(iv) Whether the judgment of the first appellate court is perverse for its failure to consider oral and documentary evidence afresh

under Order 41 Rules 31 and 33 read with Sec.96 CPC?

3. Heard Mr.N.Manokaran, learned counsel appearing for the appellant, Mr.V.Raghavachari, learned counsel appearing for the Caveator.

4. Before the Trial Court, the plaintiff examined himself as PW-1 and one T.A.Eswaran, was examined as PW-2 and four documents were marked as Exhibits A1 to A4. On the side of the defendants, 15th defendant was examined as DW-1 and three other witnesses were examined as DW-2 to DW-4 and 9 documents were marked as Exhibits B1 to B9. The Trial Court framed the following issues for consideration:-

1. Whether the plaintiff is entitled decree for specific performance as prayed for?
2. Whether the plaintiff is entitled for alternative claim as prayed for?
3. Whether the endorsement is the agreement dated 14.07.1990 is a fabricated one?
4. Whether the suit time barred?
5. To what relief?

5. The defendants resisted the Suit as being barred by limitation as Exhibit A-1 is dated 15.07.1989, and the time stipulated was one year and the plaint was presented on 13.07.1995. The plaintiff's contention was that in terms of Exhibit A2 endorsement, dated 14.07.1990, the time fixed for performance of contract was extended for further period from 14.07.1990 and therefore, the Suit is not barred by limitation.

6. Thus, it was contended that time is not essence of the contract, as the time stood extended, as the defendants were not able to evict the tenants and execute sale deed in favour of the plaintiff, though the plaintiff was also ready and willing to perform his part of the contract. While considering the effect of the Exhibit A2, the endorsement dated 14.07.1990, which was pressed into service by the plaintiff to support his case that time stipulated in the agreement stood extended for further period of two years, the Trial Court took up the said issue, as the first issue for consideration, because the defendants contended that the endorsement marked as Exhibit A2 is fabricated and the signature is forged. The Trial Court, after considering the oral and documentary evidence, held that Exhibit A2 endorsement contains the signature of the defendants, but it does not contain the signature of the scribe, attesor, plaintiff and the plaintiff neither in the plaint nor in the

proof affidavit has stated about the name of the scribe or the attesor, who were present during the execution of Exhibit A2. During the course of cross examination of PW-1, (plaintiff), he stated that one Nachimuthu, was the scribe and PW-2, Eswaran was present as witness. In the course of cross examination PW-1, candidly admitted that neither PW-2 nor the said Nachimuthu have affixed their signatures in Exhibit A2. The Trial Court, in my view, rightly held that Exhibit A1 & Exhibit A2, are unregistered documents and the defendants having denied their signatures in Exhibit A2, the onus is on the plaintiff to prove the execution of Exhibit A2. The Trial Court also noted that the plaintiff took no steps to compare the signatures, seek for any expert opinion and in the absence of signatures of the scribe or the attesor and with no pleadings to the said effect, the Trial Court rejected the evidence of PW-2, as it is not safe to rely upon the Exhibit A2.

7. Further, while answering the issues No.1, 2 & 4, the Trial Court held that the plaintiff has not given any satisfactory explanation for the inordinate delay of six years. In other words, the plaintiff did not prove continuous readiness and willingness to perform his part of the contract from the date of the agreement till the date of hearing of the Suit and the fact that the plaintiff had enough means to complete the sale transaction, is not sufficient to seek for a relief for specific performance. What is required to be proved by the plaintiff is readiness and willingness continuously from the date of the agreement upto the date of hearing and this is essential because the relief of specific performance is an equitable remedy. The Trial Court granted partial relief with regard to the alternate prayer by directing refund of the advance amount of Rs.40,000/- along with interest at 9% from the date of agreement till the date of decree and at 6% date of decree till repayment.

8. Before the lower Appellate Court, the following points were framed for determination:-

- 1.Has the plaintiff proved that he was ready, willing and capable to perform his part of the agreement during the stipulated time?
2. Is the plaintiff is entitled to relief of specific performance of the suit sale agreement dated 15.07.1989?
- 3.Are the findings of the Trial Court to its issues correct?
- 4.What is the verdict of this Court in this appeal?

9. The Lower Appellate Court considered the evidence of PW-1 and held that there is no evidence on the part of the plaintiff that he is in possession of the balance amount of Rs.1,00,000/- and he was ready, willing and capable to perform his part of the agreement on each day subsequent to the agreement. The Lower Appellate Court took the same view as that of the Trial Court with regard to the veracity of the endorsement, Exhibit A2 and its genuinity.

10. Thus, the Courts below having rightly appreciated the evidence on record and dismissed the Suit, in so far as the relief of specific performance and granted partial relief of refund of advance with interest, I find that no question of law much-less a substantial question of law arises for consideration in this appeal. The substantial question of law No.1 raised by the plaintiff/appellant is entirely factual and both the Courts concurrently have disbelieved Exhibit A2 endorsement and this Court. Exercising power under Section 100 CPC, cannot re-appreciate the evidence for arriving at a different conclusion. Equally so, the substantial question No.2 which pertains to the inordinate and unexplained delay of six years in filing the Suit for specific performance. The Lower Appellate Court has considered the evidence and then come to a conclusion and therefore, it cannot be stated that the Lower Appellate Court had rendered a perverse finding.

Thus, the substantial questions of law, as framed by the plaintiff/appellant are entirely questions of fact and this appeal being devoid of merits, is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS iv)

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pbn

Sub Assistant Registrar

To

1.learned Second Additional District Judge, Erode,

2.learned First Additional Sub Judge, Erode

+1cc to Mr.N.Manokaran , Advocate SR.No. 58494

+1cc to Mr.V.Raghavachari , Advocate SR.No. 57847

order made in

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ASK(20/09/2018)