

RESERVED ON : 03.01.2018

DELIVERED ON : 08.01.2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2018

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

A.S No.414 of 2007

S.Karuppanna Gounder ... Appellant/2nd Defendant

v.

K.Sadayappa Gounder Died) ... 1st Defendant in the Suit

1.N.Balachandran

2.Chellammal ... Respondent/Plaintiff

3.Annakkodi

4.Chinnammal ... Respondent/Defendant 3 & 4

5.Deivanai

(Cause title accepted vide order of
court dated 28.06.2007 made in

M.P.No.1 of 2007) ... Respondents/LRS of the 1st Defendant

Appeal filed under Section 96 of the Code of Civil
Procedure judgment and decree dated 18.08.2006 made in
O.S.No.37 of 2004 on the file of Additional District Court cum
Fast Track Court No.1, Erode.

For Appellant :Mr.A.Sundaravadhanam
for Mr.D.Balachandran

For Respondents :Mr.V.Lakshmi Narayanan
for Mr.M.Guruprasad - for R1

Mr.S.Saravanan
for Mr.C.Kulanthaivel - for R2 to R4

No appearance - for R5

JUDGMENT

The above appeal arises against the judgment and decree
passed in O.S.No.37 of 2004 on the file of Additional District
Court cum Fast Track Court No.1, Erode.

2. The 2nd defendant is the appellant, the 1st respondent is the plaintiff, the respondents 2 and 3 are the defendants 3 and 4 and the respondents 4 and 5 are the legal heirs of the deceased 1st defendant.

3. The plaintiff filed the suit in O.S.No.37 of 2004 for specific performance or in the alternative, directing the defendants to pay a sum of Rs.5,97,870/- with interest and for creating a charge over the suit properties for the due payment of the suit claim with interest.

4. The brief case of the plaintiff is as follows:-

(i) According to the plaintiff, the 1st defendant is his paternal grand father and the father of the 2nd defendant and husband of the 3rd defendant. The 4th defendant is the daughter of the 2nd defendant and grand daughter of the defendants 1 and 3.

(ii) The suit properties originally belonged to one Sellayammal, viz., the mother of the 1st defendant. By virtue of the registered settlement deed dated 13.08.1948 executed by the said Sellayammal in favour of the 1st defendant, he became the absolute owner of the suit property. Due to his old age, the 1st defendant was unable to personally cultivate the suit properties and wanted to sell it. After negotiations, the 1st defendant agreed to sell the suit properties to the plaintiff and they entered into a written sale agreement on 11.07.2002 for a total sale consideration of Rs.8,51,000/-. Two years period was fixed for the completion of the sale. On the same day, the plaintiff paid a sum of Rs.5,11,000/- as advance to the 1st defendant.

(iii) According to the plaintiff, he was always ready and willing to perform his part of the contract. The plaintiff approached the 1st defendant several times and expressed his readiness to pay the balance sale consideration and take a sale deed at his cost. However, the 1st defendant was postponing the execution of the sale deed. The plaintiff came to know that the 1st defendant had executed 3 settlement deeds on 30.01.2003 in favour of the defendants 2 to 4 in respect of the suit properties. The defendants 2 to 4 were well aware of the valid sale agreement executed by the 1st defendant in favour of the plaintiff. According to the plaintiff, the said settlement deeds have been collusively created to defeat the plaintiff's right.

(iv) The plaintiff sent a lawyer's notice to the defendants. The defendants 1 and 2 issued a reply on 19.11.2003 containing false allegations. The 1st defendant had falsely alleged that the signatures contained in the sale

agreement are not that of his and that the said signatures are forged. In these circumstances, the plaintiff has filed the suit.

5. The brief case of the defendants 1 and 2 is as follows:-

(i) According to the defendants, the plaintiff has falsely alleged that ever since the date of execution of the agreement, he was ready and willing to perform his part of the contract. The defendants also denied the averment that the plaintiff has approached the 1st defendant several times and expressed his readiness to pay the balance sale consideration and take the sale deed at his costs.

(ii) According to the 1st defendant, he has not received any amount from the plaintiff towards the sale of the property and the plaintiff does not have the source of income to pay such huge amount as advance of sale consideration.

(iii) According to the defendants, the suit agreement is a forged document and the plaintiff has created the said agreement only with a view to compel the 1st defendant to settle some properties in his favour. In these circumstances, the defendants 1 and 2 prayed for dismissal of the suit.

6. Before the trial Court, on the side of the plaintiff, 4 witnesses were examined and 10 documents, Ex.A-1 to Ex.A-10 were marked and on the side of the defendants, D.W.1 was examined, however, no document was marked. An Officer of the Forensic Science Department was examined as C.W.1. and 2 court documents, Ex.C-1 and Ex.C-2 were marked.

7. The trial Court, after taking into consideration, the available oral and documentary evidences let in by the parties, decreed the suit by granting a decree for specific performance.

8. Aggrieved over the judgment and decree of the trial Court, the 2nd defendant has filed the above appeal.

9. Heard Mr.A.Sundaravadhanam, learned counsel appearing for the appellant and Mr.V.Lakshmi Narayanan, learned counsel appearing for the 1st respondent.

10. The only contention raised by Mr.A.Sundaravadhanam, learned counsel appearing for the appellant is that the trial Court had decreed the suit for specific performance even without framing an issue with regard to the readiness and willingness of the plaintiff, which is mandatory requirement under section 16 C of the Specific Relief Act.

11. Countering the submission made by the learned counsel appearing for the appellant, Mr.V.Lakshmi Narayanan, learned counsel appearing for the 1st respondent submitted that since the trial Court had given a finding with regard to readiness and willingness in spite of the defendants disputing the execution of the agreement, there is no necessity for framing an issue with regard to the same. Further, the learned counsel submitted that under Order 41 Rule 25 of CPC, this Court can frame an issue and refer them for trial to the trial Court and the judgment and decree passed by the trial Court may not be set aside till such time. In support of his contentions, the learned counsel relied upon the following judgments: -

(i) 2005(1) LW 472 [Murugesu Naicker (Died) and 3 others v. Govindaraja Nattar and another] wherein, this Court, in paragraph Nos. 8, 13, 15 and 15A, held as follows:-

"8. Learned counsel for the Appellant / D.1 has forcibly contended that the trial Court ought to have framed the prime issue on the Readiness and Willingness of the Plaintiffs and the failure to frame that issue vitiates the Judgments of the Courts below. Contending that there had been no pleading and proof on the issue of Readiness and Willingness by the Plaintiffs, the trial Court without framing the prime issue has not properly appreciated the evidence. It is further submitted that in the First Appellate Court also on the question of Readiness and Willingness, no point was framed which vitiates the concurrent findings of the Courts below. Drawing the attention of the Court to Exs.A.2 to A.5, it is submitted that when the case of the Plaintiffs on payment of Rs.2,001/- under Exs.A.2 to A.5 had been disbelieved, the trial Court ought not to have granted the decree for Specific Performance exercising the discretion. In support of his contention, the learned counsel for the Appellant / D.1 has relied upon (2002) 8 Supreme Court Cases 146, A.I.R. 1971 ANDHRA PRADESH 279, 2003 - 3 - L.W. 479 and A.I.R.1983 Madras 169 = (1983) 96 L.W.88.

13. Throughout the trial and before the First Appellate Court, D.1 has adopted a consistent stand denying the genuineness of Ex.A.1 as is clear from the following averments in the Written Statement of D.1 :-

" ... But the alleged agreement of conveyance dated 14.04.1980 is neither true nor valid nor supported by consideration nor enforceable under law ... "

" ... Thus the said agreement dated 14.04.1980 is a sham and nominal document and

as such invalid and unenforceable and the plaintiffs have merely obliged this document to bring into existence such a document ... "

In view of such categoric denial of Ex.A.1, the trial Court framed the main contentious Issue Numbers 1 and 2 on the validity of Ex.A.1 as:-

Issue No.1 / 14,04,1980 தேதியிட்ட ஒப்பந்தம் உண்மையானதா
செல்லத்தக்கதா- and /
Issue No.2 / 14,04,1980 தேதியிட்ட ஒப்பந்தம் முதல் எதிர்வாதி தன்
எதிர் வழக்குரையில் கூறியுள்ள சூழ்நிலையில் பெயரளவில் ஏற்பட்டுள்ள
ஒப்பந்தமா-

15. Though D.1 has not raised the plea of Readiness and Willingness of the Plaintiffs, duty has been cast upon the Court to raise the issue of Readiness and Willingness. On behalf of Appellant / D.1, it is mainly contended that non-framing of that issue vitiates the findings of the Courts below. Clause (c) of S. 16 provides that the person, seeking Specific Performance of the contract, must file a suit wherein he must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him. Even if there is lack of pleading on this point, it is the duty of the Court to satisfy itself on the twin mandatory requirements of pleading and proof. It is contended that there is no proper pleading and proof and the failure of the Court to frame the specific issue on the Readiness and Willingness of the Plaintiffs vitiates the findings of the Courts below. Attacking the case of the Plaintiffs that the Plaintiffs were never ready and willing to perform their part of the contract, it is contended that after Ex.A.1 - Agreement of Sale (14.04.1980), there was no response from the Plaintiffs. Pointing out that there had been no issuance of notice between 1980 and 1989 and that there is not even one pre-suit notice, learned counsel for Appellant / D.1 has submitted that in the absence of pleading and proof on the Readiness and Willingness by the Plaintiffs, the Courts below erred in exercising the discretion to grant the relief, of Specific Performance.

15.A The above contention raised by D.1 does not merit acceptance. As noted earlier, in the light of denial of Ex.A.1 and the defence plea set forth that the suit has been filed in the premature stage, no

issue of Readiness and Willingness was framed. In fact, D.1 has not raised this point even before the First Appellate Court. No doubt even if no defence had been raised on the point of Readiness and Willingness, the Court is called upon to determine the point. From the pleadings and the evidence adduced, this Court finds that it is not as if there is a complete lack of pleading.

The following averments in Para (7) of the Plaint express the Readiness and Willingness of the Plaintiffs in performing their part of contract:-

" ... The Plaintiffs are always ready and willing to pay the balance of sale consideration and obtain the conveyance from the defendants ... "

(ii) 1990 (2) MLJ 192 [P. Lakshmi Ammal vs S. Lakshmi Ammal And Others] wherein, this Court, in paragraph No.8, held as follows:-

"8. On the first of these submissions. I find that as against the definite plea in paragraph 7 of the plaint that

"Plaintiff has been and is still ready and willing specifically to perform the agreement of her part of which the 1st defendant has had notice". The only plea in the written statement of the 1st respondent is "the allegations in paragraph 7 of the plaint that this defendant is aware of the contract is denied as false.

"Thus, it is found that there is no denial at all to the plea that the plaintiff was ready and willing to perform her part of the contract. Likewise, the 2nd respondent also has not denied the said plea, in his written statement. Further, to the specific averment in paragraph 5 of the plaint

"by the latter part of July, 1974, the plaintiff informed the defendants of her readiness to complete the sale",

there is no specific denial at all. There is only a vague and evasive denial by the 1st respondent as follows :-- The allegation contained in paragraph 5 of the plaint are frivolous and denied".

Likewise, the 2nd respondent also has not specifically denied the above said averment in the plaint."

12. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that it is the case of the plaintiff that the plaintiff had entered into Ex.A1 agreement of sale dated 11.07.2002 with the 1st defendant, who is his paternal grand father. The agreement was entered into between the parties for the sale of the suit properties for a sum of Rs.8,51,000/-. On the date of the sale agreement, the plaintiff paid a sum of Rs.5,11,000/- as advance to the 1st defendant and for the completion of the sale, two years period was fixed in the sale agreement. The trial Court decreed the suit and also given a finding that the plaintiff was ready and willing to perform his part of the contract. However, the said finding was given by the trial Court without framing an issue with regard to the readiness and willingness of the plaintiff. Under Section 16 C of the Specific Relief Act, the plaintiff should plead and prove his readiness and willingness to perform his part of the contract, which is the mandatory requirement under the Act.

13. In the case on hand, the plaintiff had pleaded that he was ready and willing to perform his part of the contract. However, the defendants disputed the said averment in their written statement stating that it is a false averment. When the averment stated by the plaintiff was denied by the defendants, the trial Court must have framed an issue with regard to readiness and willingness of the plaintiff. In a suit for specific performance, it is mandatory that the plaintiff has to prove his readiness and willingness to perform his part of the contract. In the case on hand, in spite of the fact that the defendants had denied the averment stated in the plaint with regard to readiness and willingness of the plaintiff, the trial Court erroneously failed to frame an issue with regard to the same. But, without framing an issue with regard to readiness and willingness of the plaintiff, the trial Court decreed the suit for specific performance. Unless the plaintiff proves that he was always ready and willing to perform his part of the contract, a suit for specific performance cannot be decreed. The issue of readiness and willingness is not ancillary and it is one of the main issues that has to be decided in a suit for specific performance. In other words, if the plaintiff fails to prove that he was ready and willing to perform his part of the contract, the suit for specific performance cannot be decreed. Since this is one of the main issues that has to be decided in a suit for specific performance, the provisions of Order 41 Rule 25 of CPC cannot be applied. Only if the trial Court frame

an issue with regard to readiness and willingness, the parties will be in a position to let in evidence to prove or disprove the said issue. The trial Court should have framed an issue with regard to readiness and willingness and decided the suit in accordance with law.

14. For the reasons stated above, the judgments relied upon by the learned counsel appearing for the 1st respondent are not applicable to the present case.

15. In these circumstances, the judgment and decree of the trial Court are set aside. The suit in O.S.No.37 of 2004 is remitted to the Additional District Court cum Fast Track Court No.1, Erode for framing an issue with regard to readiness and willingness of the plaintiff and decide the said issue on merits and in accordance with law, after giving opportunities to both sides for letting in oral and documentary evidences in support of their respective cases. The Additional District Judge, Erode is directed to dispose of the suit on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this judgment.

With these observations, the Appeal is allowed. No costs.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

Rj

To

1.The Additional District Court cum
Fast Track Court No.1
Erode

2.The Section Officer,
VR Section,
High Court,
Madras.

+ 1 cc to Mr.D.Balachandran Advocate,SR.1248
+ 1 cc to Mr.M.Guruprasad Advocate,SR.2156

A.S No.414 of 2007

AD(CO)
NR 11/01/2018