

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.06.2018

PRONOUNCED ON:05.07.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.1122 of 2004

Asha Bi ... Appellant

Vs.

Sheik Ibrahim Sahib Respondent

Prayer:

Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree of the Subordinate Judge at Kallakurichi made in A.S.No.43 of 1999 dated 31.01.2003 reversing the judgment and decree made in O.S.No.1159 of 1993 dated 24.12.1998 on the file of the District Munsif, Kallakurichi.

For Appellant : Mr.R.Balasubramaniam

For Respondent : Mr.Sam Jayaraj Houston
for Sarvabhauman Associates

J U D G M E N T

Challenge in this Second Appeal is made to the Judgment and Decree dated 31.01.2003 passed in A.S.No.43 of 1999 on the file of the Subordinate Court, Kallkurichi, reversing the judgment and decree dated 24.12.1998 passed in O.S.No.1159 of 1993 on the file of the District Munsif Court, Kallakurichi.

2. The parties are referred to as per the rankings in the trial court.

3. Suit for specific performance.

4. The case of the plaintiff in brief is that the suit property belonged to the defendant and the defendant agreed to sell the suit property to the plaintiff for a sum of Rs.15,000/- and accordingly, the parties had entered into a sale agreement on 07.04.1992 fixing the sale price at Rs.15,000/- and the defendant had received the entire sale consideration of

Rs.15,000/- from the plaintiff on the same date and at that point of time, as there was no money available for completing the execution of the sale deed and as the plaintiff was residing at Delhi, it was agreed that the sale deed should be executed as and when the plaintiff comes forward with the request for the same and the sale agreement was executed in the presence of the Notary Public and the suit property is a vacant site and accordingly the suit property was left in the possession of the plaintiff pursuant to the sale agreement and thereafter the plaintiff, in person as well as by the notices dated 05.07.1993 and 27.07.1993 demand the defendant to execute the sale deed in respect of the suit property and to the same, the defendant sent a reply on 19.07.1993 putting forth untenable allegations and delayed the execution and hence according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant in brief is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is false to state that the plaintiff paid the sum of Rs.15,000/- under the sale agreement and on the other hand, the plaintiff paid only Rs.5,000/- and promise to pay the balance sum of Rs.10,000/- one week after the execution of the sale agreement. However, till date, she has not paid the balance sum of Rs.10,000/- and in this connection, the defendant had sent a registered letter to the plaintiff on 01.03.1993 and the same had been returned and therefore the plaintiff is not entitled to seek the relief of specific performance without paying the balance sale consideration and to the notice sent by the plaintiff, the defendant had sent a reply stating the true facts and as the plaintiff had not complied with her part of the contract, she is not entitled to the relief sought for and hence the suit is liable to be dismissed.

6. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A5 were marked. On the side of the defendant, D.Ws.1 to 4 were examined. No document has been marked.

7. The Trial Court, on an appreciation of the materials placed on record, granted the relief of specific performance sought for by the plaintiff on the footing that the plaintiff should pay the sum of Rs.10,000/- towards the sale price within three months from the date of the judgment and accordingly disposed of the suit in favour of the plaintiff. Impugning the same, the defendant preferred the first appeal. The first appellate court, on an appreciation of the materials placed on record, was pleased to set aside the judgment and decree of the trial court and challenging the same, the present Second Appeal has been laid.

8. At the time of admission of the Second Appeal, the following substantial questions of law were formulated for consideration.

- i. In any event, Whether or not the Courts below erred in holding that the suit agreement under Ex.A1 was not supported with consideration, when especially the recitals of the document speaks of the same.

In any event, whatever or not the lower appellate court has mis-construed the scope and admit the Order 41 Rule 22 of CPC.

9. The suit has been laid by the plaintiff for specific performance. The case of the plaintiff in brief is that the defendant agreed to sell the suit property to the plaintiff for a sum of Rs.15,000/- and in this connection, the parties had entered into a sale agreement on 07.04.1992 and according to the plaintiff, she had paid the entire sale transaction on the date of the sale agreement, however due to the paucity of amount for completing the execution of the sale deed, the sale deed could not be effected on the date of the sale agreement and accordingly the defendant had agreed that he would execute the sale deed later at any point of time, as and when the plaintiff directs and thereafter inasmuch as the defendant had failed to execute the sale deed, despite the repeated requests of the plaintiff and also the issuance of the notices, and on the other hand, the defendant having repudiated the entitlement of the plaintiff to get the execution the sale deed on false allegations, hence, according to the plaintiff, she has been necessitated to lay the suit for appropriate reliefs.

10. Though the defendant has admitted the execution of the sale agreement as such, however, it is the case of the defendant that the plaintiff had not paid the entire sale consideration of Rs.15,000/- on the date of the sale agreement and on the other hand, she had paid a sum of Rs.5,000/- only and promised to pay the balance sale price of Rs.10,000/- after returning to Delhi, however, till date, she has not paid balance sale consideration and hence the plaintiff is not entitled to the discretionary relief of specific performance as she had not performed her part of the contract.

11. The parties agree that the sale consideration is fixed at Rs.15,000/-. Now, it is case of the plaintiff that on the date of the sale agreement marked as Ex.A1, she had paid the entire sale consideration to the defendant. However,

according to the defendant, the plaintiff had paid only a sum of Rs.5,000/- and promised to pay the sale consideration of Rs.10,000/- later and however, she had not complied with the said assurance and therefore, according to the defendant, the plaintiff is not entitled to obtain the relief of specific performance. Though it is found that there is a recital contained in Ex.A1 sale agreement that the plaintiff has paid the sale amount of Rs.15,000/- to the defendant on the date of the agreement, however, the Courts below on an appreciation of the evidence of the defendant examined as D.W.1 as well as the scribe of the sale agreement examined as D.W.4 and also the evidence of D.W.3, who was present at the time of execution of the sale agreement, found that, on the basis of their unimpeachable and trustworthy evidence, the plaintiff had paid only the sum of Rs.5,000/- on the date of the sale agreement and had assured to pay the balance sale amount of Rs.10,000/- within one week after returning to Delhi. Thus it is found that as per the oral evidence of D.Ws.1, 3 and 4 which remains unchallenged as such and as rightly appreciated by the Courts below, it is seen that the plaintiff has paid only a sum of Rs.5,000/- towards the sale price and not paid the balance sale amount of Rs.10,000/- as claimed by her. Contra to the evidence of D.Ws.1, 3 and 4, the plaintiff has not placed any material or examined any other witnesses associated with the sale agreement to establish that she has paid the entire sale price of Rs.15,000/- to the defendant on the date of the sale agreement. Accordingly, it is found that the Courts below on an appreciation of the materials placed on record was pleased to determine rightly that only the sum of Rs.5,000/- had been paid by the plaintiff and the plaintiff has failed to pay the balance sale price of Rs.10,000/- to the defendant as put forth by her. The abovesaid determination of the Courts below, on the correct appreciation of the evidence placed on record, do not call for any interference in this Second Appeal.

12. Thus, it is found that the plaintiff is not entitled to seek the discretionary relief of specific performance without performing her part of the contract, when the materials placed on record go to show that the plaintiff has not paid the balance amount of Rs.10,000/- towards the sale consideration. It is found that the plaintiff cannot be allowed to claim the relief of specific performance, despite her shortcomings in completing the sale transaction even after the execution of the sale agreement on 07.04.1992 and immediately thereafter, it is found that the plaintiff had not evinced interest to pay the balance sale amount to complete the sale transaction. On the other hand, she had chosen to issue the notice on 05.07.1993, demanding the defendant to execute sale deed pursuant to the sale agreement in respect of the suit

property. The abovesaid notice has been marked as Ex.A2. To the same, the defendant had sent a reply dated 19.07.1993 marked as Ex.A3 whereunder also the defendant has alleged that the plaintiff had not paid the full sale consideration as claimed by her and kept the balance sum of Rs.10,000/- unpaid, despite promising to pay the said sum within one week after the execution of the sale agreement. Accordingly, it is found that by way of Ex.A3, the defendant had repudiated the claim of the plaintiff that she had paid the entire sale consideration to him as put forth by her in Ex.A2. Thus, it is found that even prior to the institution of the suit, the plaintiff had been put on notice about the definite stand of the defendant that the entire sale consideration had not been paid following the sale agreement. Such being the position, it is for the plaintiff to establish that she has paid the entire sale consideration as recited in Ex.A1 and thereby seek her entitlement to the relief of specific performance. When the defendant had let in acceptable oral evidence through the witness associated with the sale agreement that the plaintiff had not paid the entire sale consideration, despite the same, the plaintiff having not endeavored to examine the other witnesses associated with the sale agreement to prove that she had paid the entire sum as recited in the sale agreement and that apart on the factual matrix also, noted above, if really the plaintiff had paid the entire sale consideration on the date of the sale agreement and the sale deed could not be executed on the same date due to want of money for completing the execution of the sale deed, as rightly argued, even thereafter the plaintiff need not wait for more than one year in coming forward with the demand to execute the sale deed by way of Ex.A2 notice. It is found that prior to Ex.A2 notice, there is no material placed by the plaintiff to show that she had evinced interest to complete the sale transaction by demanding the defendant to execute the sale deed. On the other hand, it is found that merely one year after the execution of the sale agreement, the plaintiff had issued the notice Ex.A2, demanding the defendant to execute the sale deed. This conduct of the plaintiff would only go to show that inasmuch as she had not paid the entire sale consideration and also not been ready and willing to perform her part of the contract for want of money to complete the sale transaction both by way of balance sale consideration and also for meeting the expenses of the execution of the sale deed, it is found that the plaintiff had been keeping quite without showing any interest to complete the sale transaction. Accordingly, it is found that one year after the execution of the sale agreement, she had chosen to send a notice Ex.A2 to the defendant and as above seen, it is found that the defendant has challenged the same, by asserting that the plaintiff had not paid the entire sale consideration and hence not entitled to the relief of specific performance. Further, as above noted, if really the plaintiff had paid the

entire sale consideration on the date of Ex.A1, the plaintiff would not have waited for more than a year to complete the sale transaction and the on the other hand, she would have immediately endeavored to complete the sale transaction after the execution of Ex.A1. The above belated attitude of the plaintiff in approaching the defendant to complete the sale transaction would itself go to expose that inasmuch as the plaintiff was not possessed of money to pay the balance sale consideration and also for meeting the sale expenses, it is found that she had taken her own time in endeavoring to complete the sale transaction. Thus, it is noted that, on the above set of facts, the plaintiff has not performed her part of the contract and in addition to that, it is also found that the plaintiff has never been ready and willing to perform her part of the contract to complete the sale transaction and accordingly, it is found that the first appellate court is justified in not extending the discretionary relief of specific performance in favour of the plaintiff, on account of her laches in completing the sale transaction.

13. On facts, in the light of the above discussions, it is found that the Courts below had on a proper appreciation of the materials placed on record, rightly held that the sale agreement is not supported by consideration as put forth by the defendant particularly, in the light of the acceptable and reliable evidence projected by the defendant establishing the lack of consideration under Ex.A1 and coupled with the same, as above seen, when the plaintiff has failed to establish her readiness and willingness to complete the sale transaction, on that score also, it is found that the plaintiff would have be entitled to obtain the equitable relief of specific performance. The first appellate court is found to have correctly appreciated the materials placed on record in the right perceptive and accordingly, declined the relief of specific performance prayed for by the plaintiff. No interference is called for in the abovesaid determination of the first appellate court. The substantial questions of law formulated in the second appeal are accordingly answered against the plaintiff and in favour of the defendant.

14. In support of his contentions, the plaintiff's counsel relied upon the decision reported in AIR 2018 MADRAS 67 [N.Sekaran and another Vs. C.Rajendran]. The principles of law outlined in the abovesaid decision are taken into consideration and followed as applicable to the facts and circumstances of the present case.

15. In the light of the above discussions, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge at Kallakurichi,
Sub Court,
Kallakurichi.

2.The District Munsif,
District Munsif Court,
Kallakurichi. .

Copy to

The Section Officer,
VR Section,
High Court. (2 Copies)

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.43576

S.A.No.1122 of 2004

CS/16/07/18

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