

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 24.08.2017

Judgment Pronounced on : 25.06.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.BASKARAN

S.A.No.404 of 2012

S.Chinnasamy

... Appellant/Plaintiff

Vs.

Palaniammal

... Respondent/Defendant

PRAYER: This second appeal has been filed under Section 100 of CPC, against the judgment and decree dated 22.09.2011 made in A.S.No.78 of 2010 passed by the learned First Additional District Judge, Coimbatore, reversing the Judgment and decree dated 24.03.2010 passed by the learned II Additional Subordinate Judge, Coimbatore in O.S.No.1056 of 2001.

For Appellant : Mr.S.Gunalan for
Mr.M.Parthasarathy
For Respondent : Mr.S.Mukunth for
M/s.Sarvabhauman Associates

JUDGMENT

This second appeal arises out of the judgment and decree dated 22.09.2011 made in A.S.No.78 of 2010 passed by the learned First Additional District Judge, Coimbatore, reversing the Judgment and decree dated 24.03.2010 passed by the learned II Additional Subordinate Judge, Coimbatore in O.S.No.1056 of 2001.

2.Brief facts of the case is as follows:-

The suit properties belongs to the defendant. The plaintiff and the defendant entered into a sale agreement dated 12.10.1986, by which the defendant agreed to sell the suit property to the plaintiff and the sale price was fixed at Rs.98,000/-. A sum of Rs.30,000/- was paid as advance on the date of agreement and to complete the sale, the time was fixed as 24 months from the date of agreement. Since the defendant's

husband was not well, the defendant was periodically requesting the plaintiff to pay portion of the amounts to meet out her urgent needs and totally the plaintiff paid a sum of Rs.92,000/- and balance amount to be paid was only Rs.3,000/-. When the plaintiff demanded execution of the sale deed, the defendant informed that she would execute the sale deed after her husband recovers from the ailment. The husband of the defendant died on 19.02.1999. Thereafter, the plaintiff demanded execution of the sale deed, but the defendant evaded. Hence, the plaintiff filed the suit for specific performance.

3. On the other hand, resisting the same, the defendant denied the contention of the plaintiff and stated that she has not executed any sale agreement in favour of the plaintiff and she has only borrowed a sum of Rs.30,000/- as loan for interest at the rate of 12% per annum from the plaintiff on 12.10.1986. The plaintiff had fabricated the signature of the defendant and made acknowledgement with criminal intention for cheating the defendant and falsely created cause of action for filing the suit. Even as per the sale agreement, the duration of 24 months was fixed for execution of the sale deed, but, for the past 15 years, the plaintiff has not taken any steps to execute the sale deed. Hence, the plaintiff is not entitled to the relief of specific performance. Thus the Defendant sought for dismissal of the suit.

4. After contest, the trial Court decreed the suit in favour of the plaintiff as prayed for. Aggrieved upon that the defendant preferred the first appeal before the lower appellate Court and after contest, the lower appellate Court reversed the finding of the trial Court on the ground that the plaintiff was not ready and willing to perform his part of the contract and dismissed the suit. Aggrieved upon that the plaintiff has preferred the second appeal.

5. At the time of admission, the following substantial question of law are framed by this Court in this appeal:-

- 1) Whether the lower appellate Court is rightly in dismissing the suit on the ground of latches, when the suit was filed within the period of limitation and also rejected the alternate prayer for refund of advance amount with interest on the ground of limitation.
- 2) Whether the lower appellate Court is right in rejecting the opinion of the hand writing

experts and the evidence of P.W.2 and come to his own conclusion invoking Section 73 of the Indian Evidence Act, contrary to the pronouncement of Hon'ble Apex Court?

6. The learned counsel appearing for the appellant would submit that the plaintiff has proved Ex.A1 Sale Agreement as well as the endorsement made by the defendant and her husband through expert opinion. The only defence put forth by the defendant is that she has not entered in to any sale agreement with the plaintiff and she has signed only for the purpose of loan as security and she signed before the Registrar Office. This is the only defence. The Trial Court, after considering the entire material available on record, came to the correct conclusion, but the first appellate Court, without any reason and without any pleadings on the side of the defendant, reversed the findings of the trial Court, on the ground of latches, which is against law. Hence, the findings of the first appellate Court has to be set aside and the suit is to be decreed by allowing this appeal.

7. Per contra, the learned counsel appearing for the respondent/defendant would submit that the first appellate Court after considering the oral and documentary evidences let in by both sides as well as the conduct of the plaintiff, set aside the trial Court Judgment and dismissed the suit on the ground of latches. On the part of plaintiff who kept quiet for long time without taking any steps to complete the sale and also on the ground that the endorsement found in Ex.A1 agreement is not true. As such, it is contested that there is no infirmity in the order passed by the lower appellate Court. Hence, the respondent/defendant prays that the appeal is to be dismissed.

8. I have heard the rival submissions and also perused the materials available on record.

9. On perusal, it is clear that Ex.A1 sale agreement was entered into between the plaintiff and defendant with regard to the suit property on 12.10.1986. The sale price was fixed at Rs.95,000/-. On the date of agreement Rs.30,000/- was paid by the plaintiff to the defendant. Subsequently, on 05.10.1988, 30.09.1990, 22.09.1992, 07.09.1994, 27.08.1996 and 16.09.1998 payments were made to the tune of Rs.92,000/- and the balance sale consideration to be paid is only Rs.3,000/-. For the above said payments, endorsement were obtained in the Ex.A1 sale agreement itself. The plaintiff caused to issue Ex. A2 a legal notice to the defendant to execute the sale deed and inspite of

receiving the same as evidence by Ex. A3 acknowledgement card, she evaded to execute the sale deed. Hence the plaintiff came forward with the suit. This is the specific contention on the side of the plaintiff.

10. On the other hand, according to the defendant, she borrowed a sum of Rs.30,000/- from the plaintiff as a loan and as security for the same, she had signed before the Registrar Office and she never endorsed for various payments as alleged by the plaintiff. Thus, according to the defendant she has not executed any sale agreement as claimed by the plaintiff. On the side of the plaintiff to prove his case, the plaintiff invoked Section 45 of the Evidence Act and sent the signature of the defendant and her husband for comparison and the handwriting expert gave opinion that the signature found in the endorsements and the sale agreement are one and the same. On that basis, the trial Court held that the plaintiff proved his case and negated the contention of the defendant. Thus, the trial Court decreed the suit. However in appeal, the lower appellate Court reversed the findings of the trial Court on the ground that the plaintiff had payments and obtained endorsement in the intervals of 12 years so as to save the limitation and to keep the contract alive. The plaintiff was never ready and willing to perform his part of contract and it amounts to laches on his part. Thus, the first appellate Court came to the conclusion that even though the plaintiff proved his case and disproved the defence, the plaintiff is not entitled to the discretionary relief of Specific Performance on the ground of laches.

11. Now the points for consideration is whether the findings of the lower appellate Court on the ground of laches is sustainable.

12. Before going to the merits of the case, we have to analyse the legal position with regard to the relief of specific performance contemplated under Section 16 of the Specific Relief Act which runs as follows:-

"Section 16 in The Specific Relief Act, 1963

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant."

13. As per Section 16(c) of the Specific Relief Act, the plaintiff must plead and prove his readiness and willingness, right from the date of agreement till culmination of the sale agreement. Thus, it is to be considered whether in the case on hand the plaintiff has proved that he was ready and willing to perform of his part of the contract at all points of time. According to the plaintiff, Ex. A1 sale agreement was entered into between the plaintiff and the defendant on 12.10.1986 and on that date Rs.30,000 was paid and it was agreed upon that the contract is to be completed within 24 months. The sale price was fixed as Rs.95000/- and from 1986 to 1998, a total sum of Rs.92000/- was paid. Apparently, the said payments was not made within the period of 24 months, but only to save the agreement the payments have been made over a period of time. If really, the plaintiff is interested to perform his part of the contract and he was ready and willing to get the sale deed executed, he could very well have paid the entire sale consideration and asked the defendant to execute the sale deed within the time stipulated. The claim of the plaintiff is palpable and it is clear that the plaintiff paid some amount once in two years and prolonged the agreement till, 2001. The last payment was made on 16.09.1998 and the suit was filed on 10.09.2001. From the last payment made by the plaintiff, the 3 years period ended on 15.09.2001. Thus, just before that the said suit was filed on 10.09.2001. Even after the last payment made by him, the plaintiff has filed the suit after three years, i.e., just 5 days before the end of 3 years. Even the Ex.A2 legal notice dated 22-1-2000 was issued only 14 years after entering into Ex. A1 agreement. Even after issuing the legal notice, the plaintiff filed the suit nearly after two years only. The said attitude of the plaintiff clearly reveals that he was not willing and ready to perform his part of contract.

14. On the side of the respondent/Defendant, the learned counsel relied upon the ruling reported in 2017 (4) CTC 225 in SOUNDARRAJAN Vs. VETTOBAI(DECEASED) AND OTHERS, to contend that the alleged endorsement in Ex.A1 was obtained only to keep the agreement alive and there was no real intention on the part of the plaintiff to perform the agreement. In the said ruling, it it held as follows:-

"The conduct of paying the amounts in piecemeal on various occasions, as seen from Ex.A12 to A15, clearly gives an inference that the 1st defendant being the widow, is under economic duress. The plaintiff has successfully kept the contract alive by making payments on various dates, including paltry amounts from the year 2002 to 2005. This conduct of the plaintiff paying paltry amount would also gives an inference that, in fact, he has made such payments only to keep the contract alive and to make himself enriched in the entire transaction.

From the entire evidence adduced on the side of plaintiff and the defendants, this Court is of the view that the plaintiff is very meticulous in getting the endorsement from the 1st defendant without adhering to the conditions stipulated in the agreement and at no point of time, he has proved his readiness and willingness to perform his part of the contract. The nature of the payments received by the 1st defendant clearly indicates that she has received the above payment under economic duress. The manner in which the payments were made in intervals would clearly explicit the fact that the 1st defendant was in adversity."

The facts narrated in the above said ruling is identical to the facts of the case on hand. In the above said case, he has made payments at intervals within three years, but in the case on hand, payment is made over a period of 10 years that too in regular intervals of 2 years. Thus, the conduct of the buyer in paying the sale consideration in instalment clearly shows that

he was not ready and willing to perform his part of the contract at all points of time. Thus, as rightly pointed out by the Respondent/Defendant, the plaintiff failed to comply with Section 16(c) of the Specific Relief Act. Hence, the lower appellate court rightly refused to grant the relief of specific performance on the ground of laches. Admittedly, mere proving of the signature and contract alone is not sufficient to grant the relief under the Specific Relief Act, which is an equitable relief. For the reasons stated above, this court does not find any error or infirmity in the findings of the lower appellate court. Thus the substantial questions of law raised by the Appellant/plaintiff is answered against him.

15. As far as the alternative prayer is concerned, the lower appellate Court has not given any finding, even though the plaintiff sought for in the suit, viz relief of specific performance or in the alternative refund of Rs.2,15,300/- with interest from the date of suit till the date of realization at the rate of 12% per annum. When the Specific performance is refused by the lower appellate Court, the alternative prayer has to be considered, but, the lower appellate Court rejected the same also. The receipt of the amount in various dates to the tune of Rs.92,000/- by the defendant is proved by the plaintiff through Ex.C1 expert opinion as well as the endorsement made in Ex.A1 Sale Agreement viz Ex.A4.. In such circumstances, when the prayer for specific performance was denied, the advance amount has to be returned to the plaintiff by the defendant. The receipt of loan was admitted by the defendant to the tune of Rs.30,000/- only and subsequently payments is denied by the defendant. There is nothing on record to show that the said loan amount was repaid by the Defendant. In such circumstances, the defendant should not be permitted to enrich herself with the amount of the plaintiff. Hence, it will be appropriate to grant the alternative relief sought for by the plaintiff. Therefore, to that extent, interference with the conclusion of the lower Appellant court finding is necessary and the appeal is to be entertained to that extent only. The point is answered accordingly.

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16. In the result, the second appeal is allowed in part modifying the judgement and decree dated 22.09.2011 passed in A.S.No.78/2010 on the file of First Additional District Judge, Coimbatore, and the suit is decreed for the alternative relief of refund of advance amount of Rs.92,000/- by the defendant to the plaintiff with 6% interest from the date of plaint till the date of realization and confirming the decree and judgment of

the lower appellate Court with regard to the prayer for specific performance. Considering the circumstances of the case, there is no order as to costs.

Sd/-
Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

rrg/nvsri

To

1. The I Additional District Judge,
Coimbatore.
2. The Additional Subordinate Judge,
Coimbatore.
3. The Section Officer, V.R.Section,
High Court, Madras.

+1cc to M/s.S.Gunalan, Advocate, S.R.No.39860

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.39759

S.A.No.404 of 2012

RR(CO)
SSM(02/04/2019).

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