

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.07.2018

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.399 of 2015
and M.P.No.1 of 2015

Pottiammal (died)

1.Srinivasan

2.Gopalakrishnan

...Appellants/Appellants/
Defendants

C/T accepted vide order of
court dated 12.08.2014 in MP.1/14
in SA.SR.70086 of 2013

Vs

K.Sridhar

...Respondent/Respondent/
Plaintiff

PRAYER :-

Second Appeal filed under Section 100 of C.P.C against the judgment and decree dated 29.06.2010 passed in A.S.No.13 of 2009 on the file of the Sub Court, Attur confirming the judgment and decree dated 31.07.2009 passed in O.S.No.11 of 2006 on the file of District Munsif Court, Attur.

For Appellant : Mr.J.Rajmohan

For Respondent : Mr.D.Shivakumaran

J U D G M E N T

This Second Appeal is filed against the judgment and decree dated 29.06.2010 passed in A.S.No.13 of 2009 on the file of the Sub Court, Attur confirming the judgment and decree dated 31.07.2009 passed in O.S.No.11 of 2006 on the file of District Munsif court, Attur.

2. The defendants 2 & 3 who lost in both the courts below filed the present Second Appeal. The respondent/plaintiff filed O.S.No.11 of 2006 against one Pottiammal, the first defendant and appellants herein as defendants 2 & 3 for specific performance of agreement of sale dated 30.12.2004 registered as Doc.No.4037 of 2004 executed by Pottiammal and appellants.

3. According to the respondent, the deceased Pottiammal and the appellants are the absolute owners of the suit property and they agreed to sell the suit property for a total sale consideration of Rs.1,00,000/- and received a sum of Rs.70,000/- as advance. The balance sale consideration of Rs.30,000/- was agreed to be paid within eleven months from 30.12.2004 by the respondent to Pottiammal and appellants and get the sale deed executed in his favour. Even though time is not the essence of the contract, the respondent was ready and willing to perform his part of contract by paying the balance sale consideration to the appellants and the deceased Pottiammal, but the appellants and the first defendant were evading to execute the sale as agreed. They were arranging to sell the suit properties to third parties. Hence, the respondent issued notice dated 05.12.2005 through his Advocate. The first defendant Pottiammal received the said notice. Notice sent to the appellants were returned unserved. They sent reply containing false averments. In the said circumstances, the respondent filed the suit for the reliefs stated above. The respondent in alternative, prayed for refund of advance amount of Rs.70,000/- paid to the first defendant Pottiammal and appellants with interest @ 10% from the date of suit without prejudice to the main relief of specific performance of agreement, as per Specific Relief Act.

4. The first appellant filed written statement and the same was adopted by second appellant and first defendant Pottiammal. They denied that they agreed to sell the property to the respondent for a sum of Rs.1,00,000/- and received a sum of Rs.70,000/- as advance. They also denied that they executed agreement of sale on 30.12.2004. According to the appellants and first defendant, the respondent is a money lender. The first defendant and appellants, for their urgent family expenses, borrowed a sum of Rs.35,000/- from the respondent agreeing to repay the same with interest @ Rs.1400/- per month and paid interest for 12 months totalling to Rs.18,800/-. At the request of the respondent, they executed an agreement of sale for double the amount borrowed by them. The suit property is measuring 1 acre 63 cents and value is more than Rs.3,50,000/- and that they are willing to repay the amount of Rs.35,000/- borrowed from the respondent. The respondent never called upon the appellants and deceased Pottiammal to execute the sale deed. The agreement of sale was executed only as a security for the amount borrowed from the respondent.

5. Based on the pleadings, the learned Trial Judge framed necessary issues. The respondent examined himself as PW1 and one Venkatesan was examined as PW2 and marked seven documents as Exs.A1 to A7. The first appellant examined himself as DW1 and one Rameswari was examined as DW2. The appellants did not mark any document.

6. The learned Trial Judge, considering the pleadings, oral and documentary evidence, held that the appellants and the first defendant executed agreement of sale and they failed to prove that the said document is only a security document for the loan of Rs.35,000/- borrowed by them. The learned Trial Judge also held that the appellants and the first defendant have not let in any evidence to prove that the agreement of sale is infact only a security document for the loan and decreed the suit granting decree of specific performance of agreement of sale and granted one month's time to the respondent to deposit the balance sale consideration to the appellants.

7. Against the said judgment and decree dated 31.07.2009 made in O.S.No.11 of 2006, appellants and the first defendant filed A.S.No.13 of 2009. The learned First Appellate Judge, framed necessary points for consideration. Considering the materials on record, judgment of the Trial Court as well as the arguments of the learned counsel for the appellants and respondent, dismissed the appeal confirming the judgment and decree of the Trial Court.

8. Against the said judgment and decree dated 29.06.2010 made in A.S.No.13 of 2009 and O.S.No.11 of 2006, the appellants have come out with the present Second Appeal.

9. At the time of filing of the Second Appeal, the first defendant died and the appellants filed M.P No.1 of 2014 in SASR No.70086 of 2013 for accepting the cause title. This Court, by order dated 12.08.2014, allowed the said petition.

10. At the time of admission, this Court framed the following substantial questions of law -

(i) whether the courts below are correct in granting specific relief when there is discrepancy in the suit property, neither in the sale agreement nor in the plaint, the plaintiff did not disclose the existence of building and the E.B. Connection ?

(ii) Whether the courts below ought to have granted the relief of alternative prayer only, especially when there are discrepancy in the schedule of property and when the respondent/plaintiff himself sought for alternative prayer for refund ?

11. The learned counsel for the appellants contended that the courts below erred in granting the decree of specific performance when there is discrepancy in the suit property, in the sale agreement. The respondent did not disclose the

existence of the building and electricity service connection. Both the courts below failed to consider that the respondent, as PW1 has admitted that he issued notice only after expiry of period fixed in the sale agreement and did not express his willingness and readiness by mentioning the date of registration with balance sale consideration. The courts below, in view of such evidence, ought not to have granted decree of specific performance but ought to have granted only alternate relief of refund of amount. The courts below failed to appreciate the contradictions of evidence of PWs1 & 2 about the readiness and willingness of respondent. The respondent did not know the guideline value of the suit property which clearly shows that the amount received by the appellants and deceased first defendant is only under loan and it is not for sale of the suit property. In view of the discrepancy in the suit property, courts below ought to have granted only the alternative relief of refund of the amount to the respondent.

11(a) The learned counsel for the appellants, in support of his contention, relied on the following judgment -

(i) Judgment of the Hon'ble Apex Court in Civil Appeal No.3049 of 2017 dated 21.02.2017 [Jayakantham & Ors. v. Abaykumar]

12. For the above reasons a decree for the payment of compensation in lieu of specific performance would meet the ends of justice. As we have noted earlier the father of the respondent paid an amount of rupees sixty thousand to the appellants in June 1999 of the total agreed consideration of Rs. 1.60 lakhs. The appellants have voluntarily offered to pay an amount of rupees ten lakhs, as just compensation in lieu of specific performance. In our view, the ends of justice would be met by directing the appellants to pay to the respondent an amount of rupees fifteen lakhs in lieu of specific performance.

12. Per contra, the learned counsel for the respondent contended that the appellants and the deceased first defendant agreed to sell the suit property for a total sale consideration of Rs.1,00,000/- and executed a registered agreement of sale and received a sum of Rs.70,000/- as advance. The respondent, as PW1 in his oral evidence as well as PW2 has proved that Ex.A1 is only an agreement of sale and it is not a security document for the loan as alleged by the appellants and the deceased first defendant Pottiammal. The time is not the essence of the

agreement of sale and the respondent, by notice dated 05.12.2005 called upon the appellants and the deceased first defendant to execute the sale deed. The respondent was always ready and willing to pay the balance sale consideration and get the sale deed executed in his favour. The learned counsel for the respondent further contended that the appellants have not filed any documents to show that Ex.A1 is only a security document for the loan transaction. They have not produced any document to prove that the value at the time of agreement is more than Rs.3,50,000/-.

12 (a) The learned counsel for the respondent, in support of his contention, relied on the following judgment -

(i) CDJ 2018 MHC 3017 [M.Subramaniam (died) & Ors. v. T.Abaranji Ammal]

16. In the instant case, execution of the agreement to sell is not disputed. The consistent case of the appellant/defendant is that it was only a loan transaction. However, there is no evidence to substantiate his case. The defendant had not even examined his son or his partner to speak about the same. There is no piece of paper produced evidencing payment of interest, though pleaded inconsistently. Even so far as escalation is concerned, there is no pleading or relevant material produced before the Court to take judicial note of the fact before exercising discretion. The trial Court as well as the appellate court had comprehensively analysed the pleading and evidence of the parties and held that the respondent was ready and willing to pay balance price. There is a distinction between readiness to perform and willingness to perform the contract. While readiness may mean the capacity of the plaintiff, including financial position, willingness would refer to the conduct of the parties. In the present case, the appellant neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather the plea taken that it was intended to be a mortgage deed and that it was never intended to be acted upon is found to be wholly untenable.

13. Heard the learned counsel appearing for the appellants as well as respondent and perused the materials available on record.

Substantial questions of law 1 & 2 :

14. The contention of the learned counsel for the appellants and deceased Pottiammal is that Ex.A1 is only a security document and it is not an agreement of sale. They never intended to sell the property to the respondent. Their contention is that the respondent is a money lender. They borrowed a sum of Rs.35,000/- from the respondent for their urgent need and at the insistence of the respondent, they executed Ex.A1, agreement of sale and without receiving Rs.70,000/-, even though they have mentioned in Ex.A1 that they received Rs.70,000/- from the respondent. They also contended that it is the usual practice in their village by the money lender to get the agreement of sale for double the amount advanced by him. The appellants failed to prove these contentions. They also failed to prove that they paid interest @ Rs.1400/- for 12 months. They admitted that they have not repaid Rs.35,000/-, admittedly received by them. Considering these facts, courts below have held that Ex.A1 is agreement of sale and not a security document. This finding is finding of fact and there is no error of law.

15. The Second Appeal is liable to be allowed as the respondent has not proved his readiness and willingness to pay the balance sale consideration and get the sale deed executed in his favour. The respondent has admitted that time of completion for sale is 11 months from the date of agreement of sale. The respondent, in the plaint has stated that he was all along willing to perform his part of contract by paying the balance sale consideration to the appellants and they were evading to execute the sale deed. In the plaint, he has not stated that when he offered to pay the balance sale consideration, the appellants evaded to receive the same and evading execution of sale deed. In the chief examination, he has stated that within one or two months, he offered to pay the balance sale consideration and demanded execution of sale deed. The appellants were evading execution of sale deed. In spite of such evasion by the appellants within one or two months of execution of agreement of sale, the respondent did not take any steps in enforcing the agreement of sale. He did not even issue notice before expiry of period fixed in the agreement. He issued notice only on 05.02.2005, after expiry of 11 months from the date of agreement of sale.

16. The respondent has admitted in cross examination that as per agreement of sale, if he fails to pay the balance sale consideration within the time limited, advance amount shall be forfeited. PW2, one of the witnesses to the agreement of sale deposed that when the respondent demanded execution of sale deed, after receiving the balance sale consideration, appellants informed that they would execute the sale deed after harvesting the crops standing in the suit property. This is not the case

of the respondent himself. Readiness and willingness does not mean that purchaser must always have cash in hand or must have balance in his bank account to perform his part of contract to pay the amounts due by him to the vendors. It is sufficient to prove his capacity to pay balance sale consideration and his willingness to pay the same.

17. In the present case, the respondent has not taken any steps to perform his part of contract and he has not taken steps even though the appellants have evaded to perform their part of contract within one or two months from the date of agreement of sale. The respondent has stated that the intention of the appellants is to sell the suit property to some third party. In spite of such a situation, the respondent did not take any steps till he issued notice on 05.12.2005, after expiry of period fixed in the agreement of sale. Grant of decree of specific performance is a discretionary relief. It is well settled that courts must exercise such discretionary power judicially and should not in an arbitrary manner reject the decree of specific performance. In the present case, the respondent has failed to prove that he was ready and willing to perform his part of contract within the period specified in the agreement of sale. In view of such circumstances, the respondent is not entitled to decree of specific performance. The courts below have failed to properly appreciate the readiness and willingness of the respondent to perform his part of contract and erroneously granted decree of specific performance, without judicially exercising the discretion.

18. For the above reason, the judgment of the Trial Court granting the relief of specific performance is set aside. The appellants and Pottiammal admitted that they borrowed a sum of Rs.35,000/- and agreed to repay the same together with interest. It is not their case that they repaid the amount borrowed from the respondent. Even though they have stated that they borrowed only Rs.35,000/-, in Ex.A1, Rs.70,000/- was mentioned and the respondent has sought for refund of Rs.78,490/- together with interest @ 12% per annum as alternative relief.

19. Considering these allegations and counter allegations, I hold that the appellants are liable to pay a sum of Rs.70,000/- together with interest @ 6% per annum from the date of agreement of sale till repayment in full to the respondent. The substantial questions of law are answered accordingly.

20. In the result, the Second Appeal is partly allowed setting aside the decree of specific performance and granting decree for refund of Rs.70,000/- together with interest @ 6% per annum from the date of agreement of sale, i.e. 30.12.2004 till

repayment in full to the respondent. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

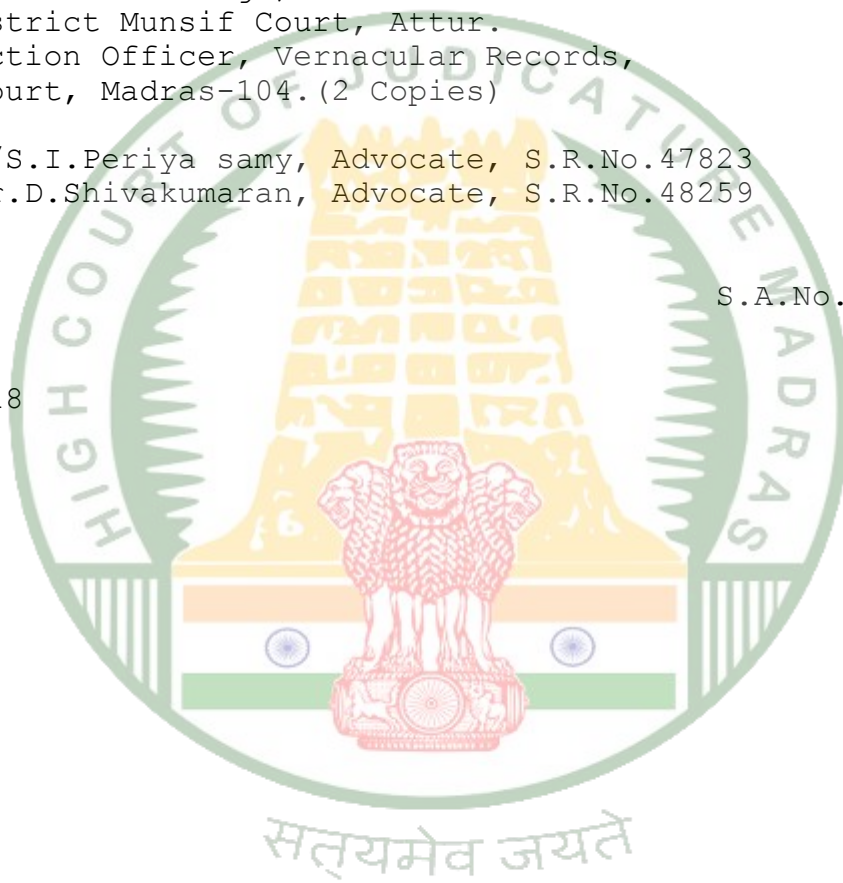
rgr

1. The Subordinate Judge, Attur
2. The District Munsif Court, Attur.
3. The Section Officer, Vernacular Records,
High court, Madras-104.(2 Copies)

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S.A.No.399 of 2015

CNR(Co)
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