

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.06.2018

PRONOUNCED ON : 04.07.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No. 2185 of 2004

Jothi Mani

..

Appellant

Vs.

Pottiammal

..

Respondent

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 31.10.2003 passed in A.S.No.15 of 2002 on the file of the Sub Court, Attur, reversing the Judgment and Decree dated 23.07.2002 passed in O.S.No.196 of 1997 on the file of the District Munsif Court, Attur.

For Appellant : Mr.L.Mouli

For Respondent : Mr.P.Jagadeesan

JUDGMENT

In this second appeal, challenge is made to the Judgement and Decree dated 31.10.2003 passed in A.S.No.15 of 2002 on the file of the Subordinate Court, Attur, reversing the Judgment and Decree dated 23.07.2002 passed in O.S.No.196 of 1997 on the file of the District Munsif Court, Attur.

2. The second appeal has been admitted on the following

substantial questions of law:

" (i) Whether the judgment of the lower Appellate Court is vitiated in that it has held that the suit is barred by limitation?

(ii) Whether time is the essence of contracts in agreements relating to sale of immovable property?"

3. Inasmuch as the controversy involved in this second appeal lies in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. Suffice to state that the suit has been laid by the appellant/plaintiff for specific performance on the basis of the sale agreement dated 22.10.1992. The defence has been taken by the respondent contending that no such agreement had been entered into between the parties and on the other hand, the defendant had only approached the plaintiff for securing loan and in connection with the same, the document had been obtained from the defendant by the plaintiff and on the basis of the same, according to the defendant, the sale deed has come to be created by the plaintiff and therefore, it is contended inter alia that the suit laid by the plaintiff for specific performance is not maintainable and liable to be dismissed.

5. Based on the evidence adduced, both oral and documentary, it is

found that both the Courts have, on an appreciation of the materials placed on record, rightly found that the sale agreement projected by the plaintiff dated 22.10.1992 marked as Ex.A1 is true and thereby, held that the sale agreement had not been created by the plaintiff as put forth by the defendant and also rejected the defence version that her signature had been secured by the plaintiff only in the document at the time of lending the loan. Accordingly, it is found that the determination of the Courts below that the sale agreement dated 22.10.1992 is true as such cannot be assailed further and it is thus found that the submissions put forth by the respondent's counsel with reference to the abovesaid aspects of the matter, in my considered opinion, do not merit acceptance.

6. The trial Court as well as the first appellate Court, on the basis of the appreciation of the materials placed on record, noting that the plaintiff has miserably failed to establish the basic requirement of readiness and willingness for seeking the entitlement of the discretionary relief of specific performance and accordingly, holding that the plaintiff has miserably failed to establish the abovesaid aspects of the matter, resultantly, declined the relief of specific performance sought for by the plaintiff.

7. The plaintiff has also sought for the relief of charge in respect of the suit property and on that basis, in view of the determination of the

sale agreement dated 22.10.1992 being true and by way of the same, the defendant had received the part of the sale consideration amounting to Rs.23,000/- on the date of the sale agreement itself, on that footing, the trial Court holding that the plaintiff is entitled to the refund of the abovesaid sum of Rs.23,000/-, accordingly, granted the relief in favour of the plaintiff that he is entitled to get back the refund of a sum of Rs.23,000/- with interest at 9% per annum from the date of the sale agreement till the date of the decree and with subsequent interest at 6% per annum and accordingly, disposed of the suit in favour of the plaintiff. As above seen, the trial Court has negatived the relief of specific performance sought for by the plaintiff.

8. The first appellate Court also, on an appreciation of the materials placed, as above noted, concurred with the judgement and decree of the trial Court as regards the disentitlement of the plaintiff with reference to the relief of specific performance. However, the first appellate Court on the footing that the plaintiff having failed to complete the sale transaction within the time stipulated under the sale agreement and accordingly, invoking the forfeiture clause contained in the sale agreement and holding that the abovesaid clause had not been taken into account by the trial Court, on that basis reversed the judgment and decree of the trial Court as regards the entitlement of the plaintiff to the refund of the sum of Rs.23,000/- with interest and thereby, entertained the first appeal preferred by the defendant in toto and resultantly, dismissed the

plaintiff's suit in entirety. Challenging the same, the present second appeal has been preferred by the plaintiff.

9. As above noted, when the plaintiff has sought for the relief of specific performance along with the charge as regards the suit property and when it is further noted that both the Courts have determined that the sale agreement Ex.A1 had been entered into between the parties concerned and accordingly, the plaintiff, pursuant thereof, had advanced a sum of Rs.23,000/- to the defendant towards the sale consideration, however, on the footing that the plaintiff has failed to establish his readiness and willingness, it is found that the Courts below had negated the relief of specific performance sought for by the plaintiff. As regards the said determination of the Courts below, in my considered opinion, on an analysis of the materials projected by the respective parties, no interference is called for.

10. When it is found that the plaintiff's entitlement to the refund of the advance amount paid by him under the sale agreement is not hit by the law of limitation, in the light of the decisions reported in **2000 (1) CTC 507 (Delhi Development Authority Vs. Skipper Construction Co.(P) Ltd., and others and 2013 (6) CTC 28 (K.Shanmugam and another Vs. C.Samiappan and others)**, particularly, the refund of the advance amount being covered by Article 62 of the Limitation Act, it is found that the plaintiff is entitled to get back the refund of the said

amount, though no specific relief as such had been prayed for by the plaintiff. Accordingly, it is found that the trial Court, after holding that the agreement Ex.A1 is true, on the footing that the defendant had by way of the same received the major portion of the sale consideration amounting to Rs.23,000/-, accordingly, deemed it necessary to grant the relief of refund of the said amount in favour of the plaintiff, after declining the relief of specific performance sought for by the plaintiff. No doubt, in the agreement of sale, there is a forfeiture clause. However, considering the fact that on the materials placed, when as determined by the Courts below, it is found that the defendant had in fact received the advance amount of Rs.23,000/- and had the benefit of enjoying the same, on the disentitlement of the plaintiff to seek the relief of specific performance, in the interest of justice, it is found that the defendant should have voluntarily come forward to return the said amount to the plaintiff as determined by the trial Court. As put forth by the plaintiff's counsel, the defendant is not shown to have incurred any loss or damage on account of the failure of the plaintiff to perform his part of the contract in time and obtain the sale deed. Thus, it is found that when the defendant has not been put to any loss as such on account of the failure of the plaintiff to complete the sale transaction within the time and further, when the defendant had the benefit of the receipt of the advance amount under the sale agreement amounting to Rs.23,000/-, on the declinement of the relief of specific performance prayed for by the plaintiff, in equity, the defendant should be directed to refund the advance amount as

determined by the trial Court and in such view of the matter, on the facts and circumstances of the case, it is found that the first appellate Court is not justified in reversing the judgment and decree of the trial Court by invoking the forfeiture clause contained in the sale agreement, particularly, when no loss or damage has occasioned to the defendant owing to the failure of the plaintiff to comply with the conditions set out in the agreement. The principles of law outlined in the decision reported in **(2009) 17 Supreme Court Cases 341 (Thiriveedhi Channaiah Vs. Gudipudi Venkata Subba Rao (Dead) By Lrs. And others)** relied upon by the plaintiff's counsel are taken into consideration.

11. In the light of the above discussions, the plaintiff's suit cannot be held to be barred by time considering the totality of the reliefs prayed for by the plaintiff including the relief of charge and though time cannot be the essence of the contract in respect of the sale of the immovable property, inasmuch as the plaintiff has failed to establish his readiness and willingness as determined, the Courts below are justified in negating the relief of specific performance sought for by the plaintiff. However, on the basis of the reasonings aforesaid, the first appellate Court is found to be not justified in interfering with the grant of relief in favour of the plaintiff as regards the refund of the advance amount with interest, when it is not shown that the defendant had been put to any loss or damage on account of the failure of the plaintiff in performing his part of the sale agreement.

In conclusion, the Judgement and Decree dated 31.10.2003 passed in A.S.No.15 of 2002 on the file of the Subordinate Court, Attur are set aside in so far as the declinment of the relief of the refund of advance amount in favour of the plaintiff and accordingly, the Judgment and Decree dated 23.07.2002 passed in O.S.No.196 of 1997 on the file of the District Munsif Court, Attur, are confirmed. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

04 .07.2018

Index : Yes / No

Internet : Yes / No

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To

- 1.The Sub Court, Attur.
- 2.The District Munsif Court, Attur.
3. The Section Officer, V.R.Section, High Court, Madras.

T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No. 2185 of 2004**

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