



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 19.01.2018

CORAM :

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

S.A. (MD) No.19 of 2018

1.Balaji
2.Sanjeevaraj

...Appellants/Appellants/
Plaintiffs

Vs.

Leelavathi

...Respondent/Respondent/
Defendant

Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree passed by the learned Principal District Judge, Dindigul, made in A.S.No.28 of 2012, dated 22.04.2013, confirming Judgment and Decree passed in in O.S. No.319 of 2010, dated 15.06.2012, on the file of the learned Principal Subordinate Judge, Dindigul.

For Appellants : Mr.M.S.Balasubramania Iyer

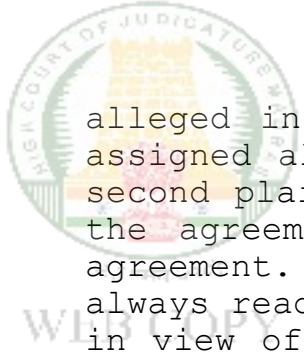
JUDGMENT

This Second Appeal is filed against the Judgment and Decree passed by the learned Principal District Judge, Dindigul, in A.S.No.28 of 2012, dated 22.04.2013, confirming the Judgment and Decree passed in O.S.No.319 of 2010 dated 15.06.2012, on the file of the learned Principal Subordinate Judge, Dindigul.

2. Heard the learned counsel appearing for the appellants.

3. The appellants are the plaintiffs in the Suit and the Suit was filed for specific performance of an agreement of sale, dated 12.09.1998 stated to have been entered into between the first plaintiff and the defendant, namely, the respondent in this appeal.

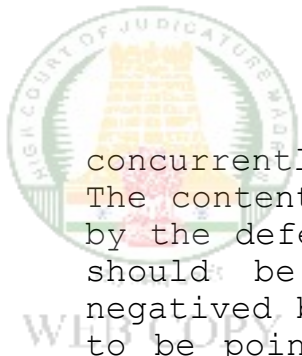
4. The case of the plaintiffs in the plaint is that the suit property belongs to the defendant and that she entered into an agreement of sale on 12.09.98 for a sale consideration of Rs.5,90,000/- with the first appellant. It is contended by the plaintiffs that a sum of Rs.1,50,000/- was paid on the date of agreement and a further sum of Rs. 2,00,000/- was paid subsequently and in total a sum of Rs.3,50,000/- was paid towards sale agreement by the first plaintiff. It is further stated in the plaint that as per the agreement, the defendant should execute a sale deed either to the first plaintiff or to his nominee within a period of three months after receiving the balance sale consideration. It is also



alleged in the plaint that on 10.04.2001 the first plaintiff has assigned all his rights under the sale agreement in favour of the second plaintiff and the suit was filed by the plaintiffs, who are the agreement holder and assignees of the rights under the suit agreement. It is stated in the plaint that the plaintiffs were always ready and willing to perform their part of the contract. But, in view of the pendency of a Suit in O.S.No.880 of 1997 which was filed by the defendant against his neighbour in respect of a dispute over the northern wall of the property, the defendant could not perform her part of the contract but agreed to complete the sale after the civil dispute is over. It is also contended in the plaint that the second plaintiff is in possession and enjoyment of the property originally as a tenant. However it is stated that an eviction petition was filed by the defendant against the second plaintiff in R.C.O.P.No.23 of 2001 on the file of the Rent Controller, Dindigul. The eviction petition was dismissed by the Rent Controller and the appeal was also dismissed by the Appellate authority in R.C.A.No.11 of 2003. The eviction petition was contested by the second appellant on the ground that he is in possession as an agreement holder and that the relationship of landlord and tenant does not exist.

5. It is admitted that a Revision petition is pending before this Court at the instance of the respondent. It is contended by the plaintiffs that the Suit filed by the defendant in respect of Northern wall of the suit property was dismissed on 08.04.2002. It is also admitted that an Appeal was preferred by the defendant before the learned Additional Subordinate Judge in A.S.No.94 of 2002 and that the same was also dismissed on 17.12.2007. Since the plaintiffs were not informed about the disposal of the proceedings, it is stated in the plaint that the defendant was expected to clear the cloud over title in respect of the property and that therefore the Suit though filed in the year 2008 is maintainable. It is stated in the cause of action paragraph that the dispute between the defendant and her neighbour reached finality as if it is also an event which gives raise to the plaintiffs to wait for filing the Suit for specific performance. It was also contended that the petition filed by the defendant for evicting the plaintiffs and the demand of the plaintiffs requesting the defendant to execute a sale deed were also stated to be the cause of action for filing the Suit for specific performance. The defendant filed a written statement mainly contending that the Suit is scopelessly barred by Limitation.

6. The agreement of sale was entered into on 12.09.1998 and the time specified in the agreement is only three months. The defendant relied upon the reply notice sent by her in January 2001, cancelling the contract. It was contended that the Suit ought to have been filed within three years from the date on which the defendant refused to perform the contract by issuing a reply notice repudiating the contract.



7. The trial Court as well as the Appellate Court concurrently found that the Suit is hopelessly barred by limitation. The contention of the plaintiffs that the dismissal of appeal filed by the defendant confirming the dismissal of the Suit filed by her, should be the starting point for Limitation is specifically negated by the trial Court as well as the Appellate Court. It is to be pointed out that the specific case of the defendant in the written statement is that due notice was given by the defendant repudiating the contract and refusing to perform the contract in the year 2001. It was pointed out that even in the proceedings that was initiated by the defendant for evicting the second plaintiff, a specific stand was taken by the defendant repudiating the contract and the cancellation of sale agreement was referred to. Hence, the Suit is therefore stated to be beyond the period of Limitation.

8. The Courts below found that the Notice, dated 16.01.2001 was not marked but found that in the subsequent reply notice dated 16.02.2007, the earlier reply dated 16.01.2001 was referred to. However, the Courts below found that Ex.A.6 Notice, dated 16.02.2001, reiterating the stand taken by the defendant that the suit agreement was cancelled, can be taken as a statement refusing to perform her part of the contract. It is therefore, the Appellate Court has come to the definite conclusion that the Limitation starts from the date of Ex.A.6 Notice, dated 16.02.2001. Since the Suit is not filed on or before 16.02.2004, but filed only on 19.12.2008, it was held that the Suit is hopelessly barred by Limitation. Legal and factual submissions on the scope and applicability of Article 54 of Limitation Act, 1963, was gone into by the trial Court and the Appellate Court with reference to several Judgments cited before the Courts below. Aggrieved by the concurrent findings and the Judgments and Decrees of the Courts below, the plaintiffs have preferred the above Appeal.

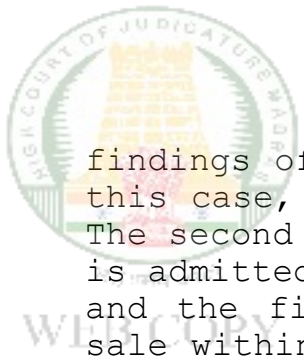
9. Learned counsel appearing for the plaintiffs/appellants has raised the following substantial questions of law in the grounds of Appeal.

"(1) Whether the Courts below are correct in holding that the Suit was barred by limitation.

(2) When the Clause 1 in Column 3 of the Article 54 of the Limitation Act, 1963, is applicable whether the Courts below are correct in applying Clause 2 of that Article to the facts of the case.

(3) When the defendant had not produced the copy of the alleged notice, dated 16.01.2001 and failed to prove that any such notice was sent by her, whether the Courts below are correct in holding that the defendant had refused to perform the contract by sending that notice.

(4) As the plea of limitation is a mixed question of fact and law, whether the Courts below are correct in deciding the plea of limitation without recording any oral evidence."



10. The first question of law is general. Since the findings of the Courts below are based on pleadings and evidence in this case, this question cannot be taken as a pure question of law. The second questions of law as framed is against the plaintiffs. It is admitted in this case that the suit agreement is dated 12.09.1998 and the first plaintiff and the defendant agreed to conclude the sale within a period of three months after receiving the balance of sale consideration. If first Limb of column 3 of Article 54 of Limitation Act were to be applied, Limitation starts running from 12.12.1998. Hence, this argument does not hold water.

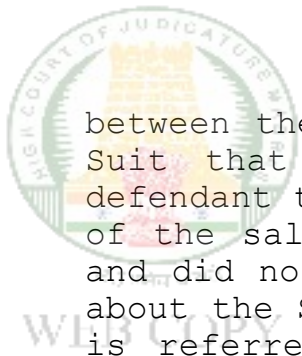
11. It was contended by the learned counsel for the appellants that the defendant had not produced the copy of the notice, dated 16.01.2001 and failed to prove that such notice was sent by her. Therefore, it is submitted that the Courts below are therefore wrong in holding that the defendant had refused to perform the contract by sending that notice.

12. In this case, it is submitted that Ex.A.6 Notice, dated 16.02.2001 is also a subsequent reply notice sent by the defendant to the plaintiffs, in response to the plaintiffs' legal notice. Even in the said notice, a reference was made to the earlier notice that was sent on 16.01.2001. It is admitted that by Ex.A.6 Reply Notice, the defendant has specifically repudiated the contract. Though the receipt of notice was acknowledged by the plaintiffs in the course of evidence, the contention of the plaintiffs before the Court below was that Limitation would run only from the date on which finality is reached in the civil Suit filed by the defendant. However, the Courts below have held that the limitation would run atleast from the date of receipt of the notice Ex.A.6, dated 16.02.2001 as the reply dated 16.01.2001 was not marked. The submission of the learned counsel for the appellants has no merits as Ex.A.6 is admitted and based on admission, the Courts below have held that Limitation would start run from Ex.A.6.

13. The learned counsel for the appellants further submitted that as per the terms of the suit agreement, the defendant has agreed to execute a sale deed free from encumbrances. Since the Suit was pending between the defendant and his neighbour in respect of the northern wall, it is contended that the defendant was not in a position to perform her part of the contract. It was further contended that the defendant cannot repudiate the contract when she is not in a position to perform her part of the contract. It was suggested that the Limitation will start only from the date on which the defendant could perform her part of the contract. It is reiterated that the defendant cannot repudiate the contract at the time when she could not perform and that therefore there is no question of defining the starting point for Limitation as the date on which the defendant repudiated the contract.

14. *This Court is unable to accept this argument for the following reasons:-*

First of all, in this case, the agreement entered into



between the first plaintiff and the defendant did not refer to the Suit that was filed by the defendant. It is the case of the defendant that the plaintiffs are also aware of the Suit at the time of the sale agreement. The Courts below have not focussed on this and did not give any finding as to the knowledge of the plaintiffs about the Suit filed by the defendant. But the pendency of the Suit is referred to in the proceedings for eviction initiated by the defendant against second plaintiff on whose behalf the Suit for specific performance is laid. The suit agreement of-course refers to the fact that the defendant should execute the sale deed free from encumbrances, as it is an usual clause found in every agreement of sale. Unless a specific reference is made either in the agreement or by evidence adduced, it cannot be presumed that the parties had in their mind about the pendency of suit and that the defendant was expected to perform her part of the contract, only after the disposal of the Suit in favour of the defendant. The Suit filed by the defendant was dismissed and the appeal was also dismissed. Further the Suit against the stranger is only in respect of the northern wall alleging some encroachment by the stranger in the wall. It is admitted that the second plaintiff is in possession of the property as a tenant.

15. The contention of the learned counsel for the appellants is that the defendant could perform her part of the contract only after succeeding in the Suit. The submissions of the learned counsel for the appellants is absurd and unacceptable. The Suit and Appeal preferred by the defendant being dismissed, the finality in the Suit has no consequences in this case. When the plaintiffs filed the Suit in the year 2008, the Suit filed by the defendant against the stranger had already been dismissed. It is to be noted that the appeal filed by the defendant as against the dismissal of the Suit filed by her was also dismissed. The defendant has lost in the Suit. Therefore, it cannot be taken that the disposal of the Suit and the appeal filed by the defendant will be the starting point for limitation. It is also to be noted that the Suit agreement does not refer to the pendency of the Suit. The suit property is in tact and this fact cannot be denied by the second plaintiff who is in possession of the suit property as a tenant. Hence, the parties did not attach any significance to the pendency of Suit. If the plaintiffs want the title to be cleared before the defendant to execute the sale deed, the suit prayer must be different. The prayer should indicate the contract to be specifically enforced. The Suit cannot be entertained to enforce something which is impossible. Hence, it was only open to the plaintiffs/appellants to repudiate the contract on the ground that the defendant could not perform her part of the contract. However, it cannot be taken advantage by the plaintiffs for the purpose of saving Limitation which would be unethical and inequitable.

16. Article 54 of Limitation Act reads as follows:-

https://hcservices.ecourts.gov.in/hcservices/	<i>Description of suit</i>	<i>Period of</i>	<i>Time from which period</i>
		<i>Limitation</i>	<i>begins to run</i>



54. For performance contract.	specific of a	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
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17. In this case, admittedly, the date fixed in the agreement is three months from the date of agreement. Therefore, the Suit ought to have been filed within three years from 12.12.1998. Since, the defendant has received the amount even after the date specified in the agreement, the plaintiffs contended that the date fixed in the agreement is insignificant as time is not the essence of the contract and that therefore the starting point for Limitation cannot be taken from the date fixed for performance.

18. However, the second Limb of Article 54 of Limitation Act, 1963, specify that the period of limitation would start run from the date on which the plaintiffs had notice about the refusal of the performance by the defendant. In this case, Ex.A.6 Notice as it has been referred to by the Courts below, indicates that the defendant has refused to perform the contract for specific reasons.

19. Hence, the present plaint is not saved and the Suit is hopelessly barred by limitation. The substantial questions of law raised by the appellants are therefore answered against the appellants.

20. As a result, the Second Appeal is dismissed and Judgment and Decree passed by the learned Principal District Judge, Dindigul, in A.S.No.28 of 2012, dated 22.04.2013, is confirmed. However, no order as to costs.

Sd/-

Assistant Registrar(T&P)

/True copy/

Sub Assistant Registrar

To

1. The Principal District Judge,
Dindigul.
2. The Principal Subordinate Judge,
Dindigul.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court, Madurai. (2 COPIES)

+1cc to Mr.M.S.BALASUBRAMANIA IYER,Advocate,SR.42894

S.A.(MD)No.19 of 2018
19.01.2018