

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.10.2019

PRONOUNCED ON : 22.10.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

A.S.No.422 of 2012

and

M.P.No.1 of 2012

Jasinthamary ..... Appellant/Plaintiff

Vs.

1. G.Paneerselvam

2. G.Ramani

3. V.Usharani

4. David

.... Respondents/Defendants

Prayer:

First Appeal filed under Section 96 of C.P.C., against the judgment and Decree of the District Judge, Nagapattinam in O.S.No.33 of 2009 dated 07.09.2011.

For Appellant : Mr.Sarath Chander  
for M/s.K.M.Vijayan Associates

For RR1 : Mr.S.Sounthar

For R2 to R4 : No appearance.  
Set exparte vide order dated  
16.10.2019

J U D G M E N T

Aggrieved over the judgment and decree dated 07.09.2011 passed in O.S.No.33 of 2009 on the file of the District Court, Nagapattinam, the plaintiff has preferred the First Appeal.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial court.

3. Suit for specific performance or in the alternative for the refund of advance amount with interest.

4. The case of the plaintiff in brief is that the plaintiff schedule property belongs to the defendants 1 to 3. The 4th defendant is her husband. The defendants 1 to 3 agreed to convey the plaintiff schedule property in favour of the plaintiff and the 4th defendant for a sale price of Rs.11,92,000/- and executed an agreement for sale on 21.08.2008 and prior to the same, they had in toto received a sum of Rs.60,000/- as advance and the time for the performance of the contract is 60 days and the balance amount should be paid at the time of registering the instrument. The defendants 1 to 3 orally agreed to hand over the documents pertaining to the suit property and the plaintiff is always ready and willing to pay the balance amount and take the sale deed. The plaintiff is working as a staff nurse and owing to bad contacts, the 4th defendant incurred huge loans in his business and due to a lot of change in his behavior, he is living separately and leading a wayward life and the plaintiff has filed the divorce case against him and the same is pending. The sale advance amount has been paid only by the plaintiff. Despite the endeavors of the plaintiff to complete the sale transaction, the defendants 1 to 3 had been delaying the same and therefore the plaintiff issued a legal notice on 23.12.2008. Despite the receipt of the notice, the defendants neither complied with the demand made thereunder nor replied to the same and therefore according to the plaintiff, she has been necessitated to lay the suit against the defendants for appropriate reliefs.

5. The defendants 1 to 3 resisted the plaintiff's suit contending that the plaintiff's suit is not maintainable either in law or on facts and according to the defendants, the plaintiff in collusion with the 4th defendant has laid the suit falsely. The defendants 1 to 3 agreed to sell the suit property to the plaintiff only for the purpose of celebrating the marriage of the first defendant's daughter and also for meeting the essential needs of the defendants 2 and 3 and accordingly proceeded with the execution of the sale agreement on 21.08.2008 and received a sum of Rs.60,000/- as advance and it is put forth that the parties had agreed to complete the sale transaction within 60 days from the date of the sale agreement. However, the plaintiff has not been able to mobilize his balance sale price and obtain the sale deed within the time stipulated and accordingly the plaintiff as well as the 4th defendant had not evinced interest to pay the balance sale price and get the sale deed executed. On account of the failure of the plaintiff and the 4th defendant to pay the balance sale price in time, the first defendant was unable to celebrate his daughter's marriage and the same had been stopped and the defendants are put to irreparable loss and hardship and the plaintiff and the 4th defendant had no means and capacity and also not willing to complete the sale transaction by paying the balance sale price

and with a view to delay the execution, they had falsely laid the suit in O.S.No.80 of 2009 for the relief of permanent injunction and hence the present suit laid by the plaintiff is barred under Order 2 Rule 2 of C.P.C. Even at the time of laying of the suit in O.S.No.80 of 2009, the plaintiff had relinquished the cause of action to lay the suit for specific performance claimed in the present suit and the plaintiff having failed to seek the permission of the Court for not including the relief of specific performance in the earlier suit, according to the defendants, the present suit laid by the plaintiff is legally unsustainable and barred under Order 2 Rule 2 of C.P.C. The plaintiff has not come to the court with clean hands and the plaintiff has failed to establish her means and capacity to pay the balance amount and willingness to complete the sale transaction and only with a view to harass the defendants and usurp the suit property, the plaintiff has been delaying the matter and hence according to the defendants, the suit is liable to be dismissed.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial court:

i. Whether the plaintiff is entitled for specific performance as prayed for?

ii. Whether the plaintiff was always ready and willing to purchase the property?

iii. Whether the plaintiff is entitled to alternative relief as prayed for?

iv. Whether the time was never essence of contract between the parties?

v. To what relief?

Additional Issue:

vi. Whether this suit is barred by Order 2, Rule 2 of C.P.C?

7. In support of the plaintiff's case, P.W.1 was examined. Exs.A1 to A3 were marked. On the side of the defendants, D.W.1 was examined. Exs.B1 to B4 were marked.

8. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial court was pleased to dismiss the plaintiff's suit. Aggrieved over the same, the present First Appeal has been preferred by the plaintiff.

9. The following points arise for determination in the First Appeal:

i. Whether the plaintiff is entitled to seek the relief of specific performance in respect of the sale agreement dated 21.08.2008?

ii. Whether the plaintiff has been always ready and willing to perform her obligations under the sale agreement?

iii. Whether the plaintiff is entitled to seek the alternative relief claimed in the suit?

iv. Whether the suit is barred under Order 2, Rule 2 of C.P.C?

v. To what relief the plaintiff/appellant is entitled to?

vi. To what relief the defendants 1 to 3 are entitled to?  
Point Nos.1 to 3:

10. It is not in dispute that the defendants 1 to 3 are the owners of the suit property. It is also not in dispute that the sale agreement had been executed between the plaintiff and the 4th defendant on the one hand and the defendants 1 to 3 on the other hand for the sale of the suit property at a price of Rs.11,92,000/- on 21.08.2008. The abovesaid sale agreement had been marked as Ex.A1. It is also not in dispute that the defendants 1 to 3 had received a sum of Rs.60,000/- as advance under the sale agreement. It is noted that as per the terms set out in the sale agreement Ex.A1, the plaintiff and her husband has to pay the balance sale consideration within 60 days and complete the sale transaction. Now according to the plaintiff, time is not the essence of the sale agreement. However, as rightly held by the trial court when the parties had endeavored to fix the time limit for completing the sale transaction, the same cannot be ignored altogether, particularly insofar as this case concerned, when it is found that the defendants 1 to 3 had agreed to sell the suit property in favour of the plaintiff and her husband for the purpose of celebrating the marriage of the first defendant's daughter and also for meeting the essential needs of the defendants 2 and 3, in such view of the matter, the very purpose of the endeavor of the defendants 1 to 3 to sell the suit property in favour of the plaintiff and her husband within a particular time limit cannot be ignored easily. Accordingly it is found that the time limit of 60 days has been fixed by the parties for the completion of sale transaction. Therefore the contention of the plaintiff that time is not considered as the essence of the sale agreement Ex.A1, as such, cannot be believed. No doubt, insofar as the sale agreement



pertaining to the immovable property, time may be not the essence of the contract, however considering the abovesaid factors in toto, it has to be held that the parties had chosen to fix the time limit for the specific performance and therefore the same cannot be discarded easily. It is also found from the materials available on record that due to failure of the plaintiff and the 4th defendant to pay the balance sale price within the time stipulated, the marriage of the first defendant's daughter could not be celebrated. The same has not been seriously controverted by the plaintiff as such.

11. Though the plaintiff would claim that she has been always ready and willing to pay the balance sale price and complete the sale transaction, however with reference to her claim of possessing sufficient means and capacity to pay the balance sale price, absolutely there is no proof forthcoming on the part of the plaintiff. When as per the case of the plaintiff, the marital life between the plaintiff and her husband namely the 4th defendant has become strained and the plaintiff is also found to have laid the divorce case against the husband, the 4th defendant and when according to the plaintiff, her husband had incurred debts in his business and forced to secure huge loss and when the plaintiff is found to be engaged only as a staff nurse and when the plaintiff has not placed any material to hold that she has the independent capacity to pay the balance sale price, in such view of the matter, it is found that the case of the plaintiff that she has been possessed of sufficient means to pay the balance sale price and willing to tender the same to the defendants 1 to 3 and it is only the defendants 1 to 3 who had been avoiding the same, for one reason or the other, as such cannot be believed and accepted. As held by the trial court, insofar as the capacity of the plaintiff to pay the balance sale consideration, there is no proof placed on the part of the plaintiff. As far as the plaintiff's willingness to pay the balance sale price to the defendants 1 to 3 as abovenoted, admittedly, there is no proof placed on the part of the plaintiff that she has offered to pay the balance sale price within the stipulated time. On the other hand, the legal notice had been issued by the plaintiff only after the expiry of the stipulated time i.e., only on 23.12.2008 and furthermore when the plaintiff by way of legal notice had also not called upon the defendants to come to the Registrar's office on a specific date and time and receive the balance sale price and execute the sale deed and when the legal notice is found to be conspicuously absent pertaining to the abovesaid matters, in all, it is found that as held by the trial court, the plaintiff has miserably failed to establish her capacity and means as well as her willingness to pay the balance sale consideration and obtain the sale deed from the defendants within the stipulated period or within a reasonable time

thereafter. Therefore the conduct of the plaintiff would only go to disclose that the plaintiff has never been ready and willing to perform her obligations under the contract because she has not been possessed sufficient means to pay the balance sale price.

12. In the light of the abovesaid factors, I hold that the plaintiff has never been ready and willing to perform her obligations under the sale agreement and I therefore further hold that the plaintiff is not entitled to obtain the relief of specific performance in respect of the sale agreement dated 21.08.2008 and I further hold that the plaintiff is not entitled to obtain the alternative relief claimed in the plaint. Accordingly, the Point Nos.1 to 3 are answered against the plaintiff and in favour of the defendants.

Point No.4:

13. It is found that the plaintiff based on the sale agreement Ex.A1, has laid the suit against the defendants 1 to 3 for the relief of permanent injunction in O.S.No.80 of 2009 on the file of the District Munsif Court, Mayiladuthurai. Therefore, when the abovesaid suit has been levied by the plaintiff only based on the sale agreement Ex.A1, and accordingly it is noted that the plaintiff had the cause of action to seek the relief of specific performance as well as the alternative relief claimed in the present suit in the earlier suit laid by her in O.S.No.80 of 2009 and on the other hand, the plaintiff has not chosen to claim the relief of specific performance or the alternative relief in the abovesaid suit and furthermore the plaintiff has also not obtained the leave from the Court concerned reserving the right to file the suit for specific performance and the alternative relief on the same cause of action at a later point of time, therefore, it is found that as determined by the trial court, the plaintiff has relinquished her claim of specific performance and the alternative relief at the time of the earlier suit and in such view of the matter, the trial court is found to be justified in holding that present suit laid by the plaintiff on the same cause of action for specific performance and the alternative relief is found to be clearly barred under Order 2 Rule 2 of C.P.C. The abovesaid determination of the trial court does not warrant any interference. I therefore hold that the plaintiff's suit is barred under Order 2 Rule 2 of C.P.C. Accordingly, the Point No.4 is answered.

Point Nos.5 and 6:

14. In the light of the abovesaid discussions, the judgment and decree dated 07.09.2011 passed in O.S.No.33 of 2009 on the file of the District Court, Nagapattinam are confirmed and

resultantly, the First Appeal is dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-  
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

mfa

To

The District Judge,  
District Court,  
Nagapattinam.

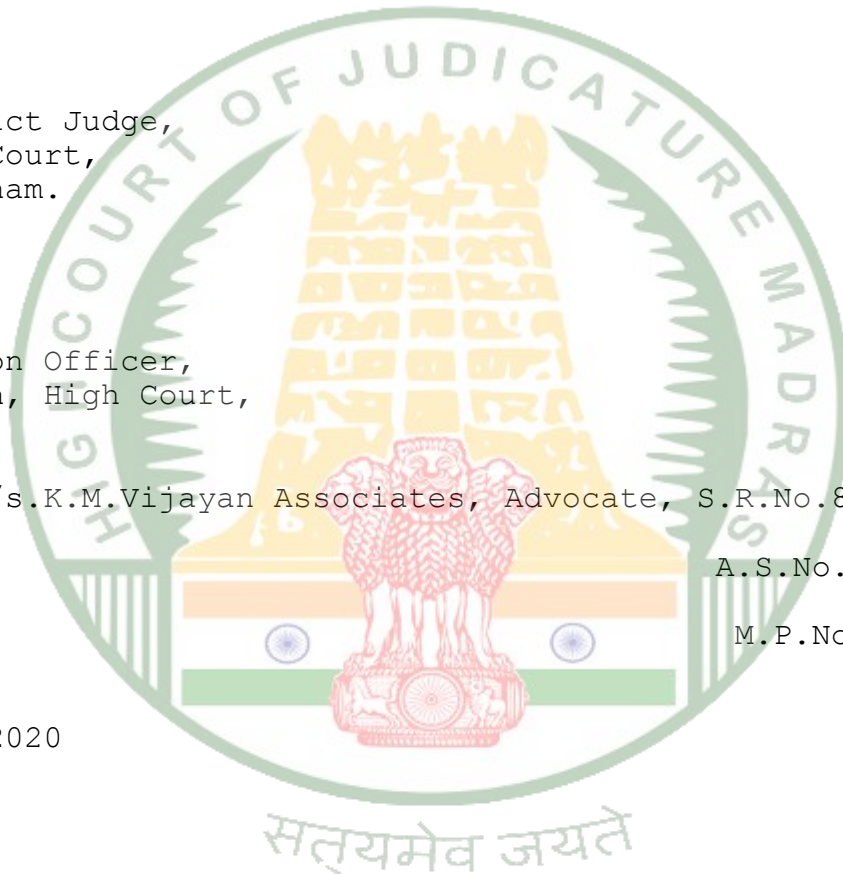
Copy to

The Section Officer,  
VR Section, High Court,  
Chennai.

+1cc to M/s.K.M.Vijayan Associates, Advocate, S.R.No.88467

A.S.No.422 of 2012  
and  
M.P.No.1 of 2012

PPA (CO)  
CS/29/05/2020



WEB COPY