

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[RESERVED ON : 11.06.2019]

[PRONOUNCED ON : 26.09.2019]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1359 of 1999

A.Jailani Ammal
Represented by her
Power of Attorney
K.N.E. Mohammed Hussain ... Appellant/ Plaintiff
[Cause title of the appellant is accepted
vide CMP No.13811 of 1999, dated
19.08.1999]

.. Vs ..

1. Shabia Beevi (Died)
2. R.Mohammed Ismail

[R-1 died. R.2 is recorded as L.R. of
the deceased R.1 viz., Shabia Beevi
vide order of this Court dated
09.04.2019 made in S.A.No.1359 of
1999. as per Memo dated 09.04.2019 is
recorded.]

... Respondents/Defendants

Prayer : Appeal is filed under Section 100 of the Civil
Procedure Code against the judgment and decree dated
06.10.1998 passed in A.S.No.78 of 1998 on the file of the
learned Principal District Judge, Chengalpattu, reversing the
judgment and decree dated 29.10.1997 passed in O.S.No.352 of
1989 on the file of the learned Subordinate Judge, Poonamalle.

For Appellant : Mrs.V.Srimathi

For R-1 : Died

For R-2 : Mr.N.A.Nissor Ahmed

JUDGMENT

The plaintiff in O.S.No.352 of 1989 is the appellant
herein challenging the judgment and decree dated 06.10.1998
passed by the learned Principal District Judge, Chengalpattu,
in A.S.No.78 of 1998, reversing the judgment and decree dated
29.10.1997 passed by the learned Subordinate Judge,
Poonamalle, in O.S.No.352 of 1989.

2. The case of the appellant/plaintiff, in brief, is as follows:-

[i] The defendants in the suit in O.S.No.352 of 1989 have agreed to sell the suit property to the plaintiff or her nominee for a sum of Rs.1,12,000/- on 28.08.1985 and have received advance of Rs.16,500/- on the same day itself. Thereafter, on 11.12.1985, the defendants have received a further sum of Rs.10,000/- and on various dates, they have received a sum of Rs.12,500/- towards sale consideration. Thus, out of the total sale price of Rs.1,12,000/-, the plaintiff had paid a total sum of Rs.39,000/- to the defendants. The defendants have to prove their clear title by producing title deeds, encumbrance certificate and other connected documents. The plaintiff was always ready and willing to perform her part of the contract, which could not pursue due to the breach of contract committed by the defendants. From the date of sale agreement, the plaintiff has been in peaceful possession and enjoyment of the suit property, in her own right and the plaintiff is constrained to file the suit in O.S.No.352 of 1989 for specific performance.

[ii] The defendants/house owner filed written statement resisting the claim of the specific performance inter alia alleging that it is true that the defendants have entered into an agreement with the plaintiff on 28.08.1985 to convey the suit property for Rs.1,12,000/- and in pursuance of the said agreement, the defendants have received a total sum of Rs.39,000/- as advance. The plaintiff is occupying the property as a tenant under the defendants from the year 1975 onwards and therefore, she is aware of the title of the defendants and after satisfying herself regarding the title to the suit property, she entered into an agreement with the defendants. After the agreement of sale, the plaintiff has continued to occupy the suit property only as a tenant. Therefore, the character or possession of the suit property is not changed by the sale agreement.

[iii] The defendants were badly in need of funds. Since there was a proposal to take Haj pilgrims, the plaintiff was not ready and willing to perform her part of the contract and she did not pay the balance amount, since she had no sufficient money to complete the sale transaction. Because of the default committed by the plaintiff, the defendants could not make a trip as planned. At the time of the agreement, it was agreed that the transaction should be completed within a short reasonable time but the plaintiff was never ready to fulfill her part of the contract and hence, the defendants have approached the plaintiff several times and requested her to complete the transaction but she failed to complete the transaction. The suit is barred by time. At this distance of time, if the agreement is enforced in favour of a person, who had committed many latches, it will cause hardship to the

[iv] On the above pleadings, the parties went for trial before the lower Court. The Lower Court, after analysing the evidence adduced on behalf of the parties and applying the question of law, has come to the conclusion that there was no breach of contract on the part of the plaintiff, which follows the plaintiff is entitled to a decree for specific performance, thereby, decreed the suit. Aggrieved by the judgment and decree of the lower Court, the defendants questioned the same in the appeal.

[v] On consideration of both oral and documentary evidence, the Lower Appellate Court has held that the plaintiff has not entered into the witness box to depose about her ready and willingness to perform her part of the contract. It is further held that P.W.1, the General Power of Attorney for the plaintiff cannot depose over and above what is not stated in the plaint. In other words, the version of P.W.1 is found to be without any pleadings and held that the plaintiff is not ready and willing to perform her part of terms of the agreement and in view of the escalation of the price, it is held that the plaintiff is not entitled to decree of specific performance of the suit sale agreement and allowed the appeal thereby, dismissed the suit in O.S.No.352 of 1989 and hence, the unsuccessful plaintiff has preferred the above said Second Appeal.

3. At the time of admission, the following substantial questions of law were framed for consideration:

"1) Whether an power of attorney agent can depose about readiness and willingness in suit based on an agreement of sale or whether it is imperative that the agreement holder alone can speak about readiness and willingness? To what extent can the evidence of the power of attorney agent in this regard be taken into consideration on a suit for specific performance?

2) Whether increase in market value would be a deciding factor to determine and negate the relief sought pursuant to an agreement of sale entered into between the two parties and whether the court can give a finding as to what is the adequate consideration for a property?"

4. Heard both sides and perused the records.

5. Since the first respondent died, the second respondent brought on record as legal representative of the first respondent. The memo dated 09.04.2019 filed by the appellant to that effect is recorded.

6. Learned counsel appearing for the appellant/plaintiff made submissions in support of the substantial questions of law while the learned counsel appearing for the respondents/defendants made submissions in support of the judgment of the Lower Appellate Court.

7. This Court perused the document Ex.A.3-suit sale agreement entered into between the plaintiff and the defendants on 28.08.1985. Under the said agreement, the defendants have agreed to sell the suit property to the plaintiff for a sum of Rs.1,12,000/- and on the date of the agreement, an advance of Rs.16,500/- was paid. Thereafter, on 11.12.1985, a sum of Rs.10,000/- was paid towards the sale consideration. Thereafter, on several dates, it appears that further amounts totalling to a sum of Rs.39,000/- was paid towards sale consideration.

8. It is seen from the Lower Court records that though the agreement was entered into between the parties on 28.08.1985, till 09.03.1988, the plaintiff has not taken any positive steps to take the sale deed and therefore, the defendants have issued a notice on 09.03.1988, as seen from Ex.A.1. For this notice, the plaintiff has issued a reply on 28.03.1988, as proved under Ex.A.4. Even after the exchange of notices between the parties, the sale agreement failed to blossom as sale deed, resulting a suit for specific performance. As the submission of the dates and events, it is significant to state that the suit sale agreement-Ex.A.3 was entered into between the parties on 28.08.1985 and the defendants had issued notice rescinding the agreement of contract under Ex.A.1 dated 09.03.1988, for which, Ex.A.4-Reply notice was given by the plaintiff.

9. It remains to be stated that even after exchange of notice under Ex.A.1, wherein, the defendants/owner of the property have stated that the sale transaction has to be completed on or before 31.08.1988, the plaint has been filed before the Court on 28.08.1985 i.e., more than after 1 1/2 years also assumes significance.

10. In this case, the execution of the sale agreement and payment of sale consideration in part are all admitted. Therefore, it is prayed by the learned counsel appearing for the appellant/plaintiff that the agreement holder, namely, the plaintiff, was always ready and willing to perform her part of the contract and hence, the decree for specific performance granted by the lower Court has to be confirmed.

11. Learned counsel appearing for the respondents/defendants has submitted that the appellant/plaintiff was not ready and willing to perform her part of the contract; that the plaintiff has not come to Court with clean hands, whereas she had come to Court with unclean

hands which are unfit to receive the equitable relief from the Court; that by the lapse of time, the value of the property had risen so much and in that circumstances, if the specific performance is enforced, the defendants will be put to great loss and hardships, on the other hand, the plaintiff will gain unfair advantage which should be prevented and that the plaintiff has not been examined in this case, to prove her readiness and willingness to perform her part of the contract.

12. When there is no time limit fixed, as laid down by the Courts, the specific performance should be performed within the reasonable time. Law permits to file a suit, within three years from the date of passing of a decree for specific performance. Therefore, as such it cannot be held that the suit is barred by time or time was intended as essence of the contract. In this case, the defendants have issued notice, at the first instance on 09.03.1988, directing the plaintiff to take sale deed on or before 31.03.1988 informing, failing which they will sell the property to other person from 01.04.1988.

13. Thus, this Court finds that there is a total lackness on the part of the appellant/plaintiff in approaching the Court, though no time limit has been fixed for the performance of the agreement. However, as observed earlier, the sale has to be completed within a reasonable period of time and even after issuance of Ex.A.1-notice to rescind the agreement of sale by the defendants, for the reasons best known, the plaintiff has remained silent for more than 18 months also goes against the plaintiff. Furthermore, the plaintiff has not entered into the witness box and she had filed the plaint and the suit was originally decreed ex-parte wherein she came and deposed before the Court in support of her claim. Consequently, ex-parte decree has been passed and she had deposited the balance of sale consideration. Thereafter, after setting aside the ex-parte decree in favour of the plaintiff, fresh trial has been commenced. In that, it appears that the plaintiff had executed Ex.A.2-General Power of Attorney asking the agent to depose on her behalf. Once, the defendants were set ex-parte and at that time, the plaintiff was examined as a witness, it is also not the case of the plaintiff that the entire transaction was looked after by her sister's husband, who has been examined as P.W.1 holding power under Ex.A.2. Even after the execution of the power deed, the plaintiff is represented by herself alone and not through the power agent. In the plaint, it is not pleaded that P.W.1 went to the defendants demanding them to execute the sale deed, tendering the balance of sale consideration etc., It is also not the case in the plaint that P.W.1 demanded the original title deed before the execution of the sale deed. It is not even put to D.W.1 that P.W.1 had approached the defendants with money requesting them to execute the sale deed, after receiving the balance of sale consideration.

14. Thus, this Court finds that the evidence of P.W.1, general Power of Attorney agent of the plaintiff, appears to be without any pleading.

15. Learned counsel appearing for the appellant/plaintiff would contend that the plaintiff being a Muslim woman, she cannot compel to give evidence and as such, she has appointed P.W.1 as her power agent to depose on her behalf. Therefore, the adverse inference drawn by the Lower Appellate Court that the plaintiff has not entered into the witness box to depose cannot be sustained. This Court has given its anxious consideration to the said submission of the learned counsel for the appellant/plaintiff. However, on the conduct of the parties, it is seen that the plaintiff went to Poonamallee to sign in the plaint which is not her native place and she also deposed as P.W.1 in the ex-parte proceedings. She came to the Court and deposed in general terms and therefore, the said ground appears to be only a ruse to excuse and to found fault with the judgment of the Lower Appellate Court. Further, the evidence as such deposed by P.W.1, the general power of attorney is appears to be without any pleadings.

16. In the decision reported in 1993 (II) M.L.J. page 464 [S.K.M. Mohamed Amanuliah represented by his power agent A.Ali Akbar Aziz Vs. T.C.S.Ramanan Pandian and others], this Court has held as follows:-

"In the absence of any valid explanation for the plaintiff's non-examination, the Court is entitled to draw an adverse inference i.e., she was not ready and willing to perform her part of the contract and that is why she had avoided the box and also failed to subject herself for the cross-examination."

17. Further, in the decision reported in 1998 (I) Law Weekly page 49 [Thirunavukkarasu Vs. Mariyayee Ammal and two others], this Court has observed as follows:-

"Failure of plaintiff to get into box and give evidence, examining the power of attorney agent (father) of the plaintiff, held the evidence of P.W.1 was vague and could not be believed and the non-examination of plaintiff is fatal regarding proof of readiness and willingness".

18. Thus, this Court is of the considered view that in view of the settled law on the above proposition and also taking note of the factual situation on the above factual matrix of this case viz., that during the first round of trial, the plaintiff came and deposed before the Court and in

the second round of trial, after setting aside the ex-parte decree, she had appointed an agent under Ex.A.2 and thereafter, her agent had deposed as P.W.1 and when that being the case, the finding rendered by the Lower Appellate Court that the plaintiff having not entered into the witness box has drawn an adverse inference which is quite right and it cannot be found fault with. Besides even the evidence of P.W.1 found to be fall short of ready and willingness as contemplated under Section 16(3) of the Specific Relief Act and the Lower Appellate Court has rightly held that the plaintiff has not satisfied the ready and willingness to perform her part of the contract and further held that she has not produced the original sale deeds before completion of the sale transaction which is also found to be fault on the ground that the plaintiff is none other than the tenant of the defendants owner, for a long number of years in the suit property.

19. Furthermore, as per the recital in Ex.A.3-suit sale agreement, the original deeds have to be produced only at the time of the registration and not in between and furthermore, as stated by the defendants, they have received the advance of money for the purpose of visiting Haj and hence, the Lower Appellate Court is quite right in holding that the plaintiff has not demonstrated that she is ready and willing to perform her part of the contract and further, even after issuance of Ex.A.1-legal notice by the defendants to rescind the contract, the plaintiff has not taken any steps to complete the sale transaction also goes against her and hence, on the above factual ground, this Court holds that P.W.1 being the power of attorney cannot let in evidence over and above the pleadings and to the limited extent as to the pleadings as to the ready and willingness on the part of the plaintiff.

20. To that limited extent, the substantial question of Law No.1 is answered in negative against the appellant/plaintiff and in view of the fact that the plaintiff has failed to demonstrate her readiness and willingness which is essential criteria for the enforcement of the agreement being not satisfied, this Court is of the considered view that the plaintiff is not entitled for the relief of specific performance of the suit sale agreement and consequently, the substantial question of Law No.2 does not arise for consideration and hence, the Second Appeal is devoid of merits and the same is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Chengalpattu.

2. The Subordinate Judge,
Poonamalle.

+1cc to Mr.N.A.Nissor Ahmed, Advocate SR.No.83006

+1cc to Mr.V.Raghavachari, Advocate SR.No.82524

S.A.No.1359 of 1999

RSI (CO)
GMY (20/12/2019)



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