

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.01.2019

Pronounced on : 25.01.2019

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

S.A.No.915 of 2000

1.Arumugam(Deceased)

2.S.Ramya

... Appellant(Plaintiff)

2nd appellant brought on record as LR of the deceased sole appellant vide order of court dated 04.01.2018 made in CMP.No.16165 to 16167 of 2017 in S.A.No.915 of 2000

Vs

1.Chamundia Pillai(Died)

2.Subramania Pillai

3.Thaga Pillai

4.Periasamy

5.Thavai Ammal

6.Minor Srinath

7.Minor Srikanth

.... Respondents(Defendants)

RR6 & 7 impleaded vide order of court dated 18.09.2018 made in CMP.No.3804 of 2018 in S.A.No.915 of 2000

PRAYER: The Second Appeal filed under Section 100 of CPC, against the judgment and decree of the Principal District Court, Villupuram in A.S.No.1 of 1997 dated 07.09.1998 reversing the judgment and decree of the District Munsif Court, Kallakurichi, in O.S.No.47 of 1996 dated 19.11.1996.

For Appellant : Mr.T.Murugamanickam, Senior Advocate

For Ms.Zeenath Begum

For RR2 to 4 : Mrs.Mythili Suresh

For Saravabhauman Associates

For R5

: No appearance

JUDGEMENT

The plaintiff in O.S.No.47 of 1996 on the file of the District Munsif Court, Kallakurichi, is the appellant herein.

2.O.S.No.47 of 1996 had been originally filed as O.S.No.124 of 1991 before the Sub Court, Virudhachalam. It had been transferred and renumbered as O.S.No.171 of 1994 in Sub Court, Villupuram. It was thereafter again transferred and renumbered as O.S.No.47 of 1996, on the file of the Principal District Munsif, Kallakurichi. The suit was filed seeking specific performance of an agreement of sale. By judgment and decree dated 19.11.1996, O.S.No.47 of 1996 was decreed. Thereafter, the defendants filed A.S.No.1 of 1997 before the District Court, Villupuram. By judgment and decree dated 07.09.1988, the learned Principal District Judge, Villupuram, allowed the appeal and set aside the judgment of the Trial Court.

3.Challenging the judgment and decree in A.S.No.1 of 1997, the plaintiff had filed the present Second Appeal. The Second Appeal had been admitted on 21.07.2000, on the following two substantial questions of law:-

1.In a suit for specific performance, when there is evidence, that , the plaintiff was possessed of sufficient funds, is it necessary that the balance sale price due under the agreement of sale should be deposited in a specific account prior to suit?

2.When the defendants have not let in any evidence to prove the rise in price of the suit property, could the general rise in real estate be put against the plaintiff?

4.Pending the appeal, the plaintiff died and his daughter was brought on record as second appellant. The first respondent/defendant also died. His sons were already on record. However, the 5th respondent, his wife was brought on record. Thereafter, by order of Court dated 18.09.2018, the 6th and 7th respondents were also brought on record.

O.S.No.47 of 1996(The Principal District Munsif Court, Kallakurichi):-

5.As stated above, the suit was originally filed as O.S.No.124 of 1991 before the Subordinate Court, Virudhachalam, and thereafter, transferred to Subordinate Court, Villupuram and renumbered as O.S.No.171 of 1994 and again transferred to the Principal District Munsif Court, Kallakurichi and again renumbered as O.S.No.47 of 1996.

6.The plaintiff Arumugam, had filed the suit against four defendants Chamundia Pillai and his two sons Subramania Pillai

and Thaaga Pillai and also against Periyasamy, 4th defendant with whom the first, second and third defendants had also entered into an agreement of sale. The suit property was land measuring 2.86 acres together with the well and motor pumpsets with right to use the common pathway for ingress and egress at Karadichithur Village, Vadakanathal, Kallakurichi. It was stated that the defendants also owned other lands in S.No.114/1C measuring 4.82 acres and in S.No.113/3, measuring 1.35 acres and a house at Door No.54, Chellampattu Village.

7.It was stated that on 25.10.1989, the defendants had agreed to sell the property mentioned in the suit schedule for valuable consideration of Rs.1,77,320/- and a Registered Agreement of sale was entered into between the parties. The plaintiff paid an advance of Rs.40,000/-. The sale deed was to be executed on or before 25.01.1990 on payment of the balance sale consideration of Rs.1,37,320/-. It was stated that the plaintiff was always ready and willing to perform his part of the agreement. However, the defendants delayed the transaction being concluded. The plaintiff issued an Advocate notice dated 11.01.1990. There were several exchange of notices. The plaintiff expressed eagerness to purchase the property. However, first, second and third defendants, on 07.02.1991, entered into an agreement with respect to the suit schedule property with the fourth defendant. He had been impleaded to avoid multiplicity of proceedings. The suit was therefore filed seeking a decree for specific performance of the agreement of sale and a direction against the first, second and third defendants to execute the sale deed and for possession of the suit property.

8.The first defendant filed a written statement and the second and third defendants adopted the same. In the written statement, it was stated that the plaintiff was never ready and willing to perform his part of the agreement. He was not possessed of the balance sale consideration of Rs.1,37,320/- and the amount required for purchase of stamp papers and for registration fees which came to Rs.22,991/-. It was stated that the plaintiff had issued a notice on 11.01.1990 which was replied on 14.01.1990 expressing the willingness of the first, second and third defendants to receive the balance sale consideration and complete the sale transaction.

9.However, the plaintiff issued another notice dated 26.01.1990. The defendants sent a reply dated 29.01.1990, again agreeing to execute sale deed if the plaintiff paid the balance sale consideration. Then the first defendant issued a notice dated 14.02.1990 calling upon the plaintiff to complete the sale transaction on or before 21.02.1990. The plaintiff evaded to receive the notice and the notice was returned 'unserved'. Therefore the first defendant issued another notice dated 19.03.1990, terminating the agreement. The plaintiff issued a reply notice dated 23.03.1990. The first, second and third

defendants claimed they were always ready to execute the sale deed since, they were in need of funds to discharge their debts. They issued another notice to the counsel for the plaintiff on 27.03.1990 calling upon the plaintiff to complete the sale transaction and pay the balance sale consideration in the house of the Advocate, at any time on or before 30.03.1990.

10.It was claimed by the first defendant, that he went to the house of the Advocate two or three times but the plaintiff did not turn up. The plaintiff then sent a reply dated 02.04.1990, stating that he would not be available till 14.04.1990 and the sale transaction can be completed after 14.04.1990. The first defendant informed the plaintiff by the notice dated 27.03.1990 that extension of time beyond 30.03.1990 cannot be granted. It was stated that the agreement had been terminated and the plaintiff had forfeited his rights under the agreement and consequently, the suit for specific performance has to be dismissed.

11.It is also stated that the first defendant had entered into a fresh Registered Agreement of sale with the 4th defendant on 07.02.1991. The 4th defendant had agreed to complete the transaction on or before 09.06.1991. Just before that date, on 03.05.1991, the suit had been filed only to extract money from the defendants. It was stated that the plaintiff was never ready and willing and that therefore the suit should be dismissed.

12.The fourth defendant filed a written statement stating that the plaintiff was not entitled to enforce the agreement since the time fixed under the agreement had expired by 25.01.1990. It was also stated that the fourth defendant had entered into a registered agreement of sale dated 07.02.1991 with the first to third defendants for purchase of the suit property and that he was bonafide purchaser. He sought dismissal of the suit.

13.On the basis of the above pleadings, the learned District Munsif, Kallakurichi, framed necessary issues and invited the parties to let in oral and documentary evidence. During trial, the plaintiff Arumugam, examined himself as PW1 and examined another witness Arunachalam as PW2. The first defendant Chamundia Pillai, examined himself as DW1. The plaintiff marked Exs.A1 to A17. Ex.A1 was the agreement dated 25.10.1989. Exs.A2 -A7 were the exchange of notices between the parties. Exs.A10-A15 were the fixed deposit receipts in the name of the plaintiff. On the side of the defendants Exs.B1-B6 were marked. Ex.B2 dated 14.02.1990 was the notice issued to the plaintiff by the defendants. Ex.B3 was the returned cover. Ex.B4 dated 19.03.1990 is another notice issued by the defendants. Ex.B5 was the acknowledgment card. Ex.B6 was the reply dated 27.03.1990 issued by the defendants to the plaintiff.

14. On the basis of the oral and documentary evidence, the learned Principal District Munsif, found that the agreement had been proved. It was also found that the plaintiff was ready and willing to purchase the property. These were established by Exs.A10-A15 which were fixed deposit receipts in the name of the plaintiff. Further, the plaintiff had issued notices which had been marked as Exs.A2-A7 along with the replies which would show that the plaintiff was always interested in purchasing the property. It was also found that the plaintiff was in Sub-Registrar office on 24.01.1990 and to evidence that, Ex.A17 was marked. It was specifically found that the plaintiff had established the ingredients required to seek specific performance and consequently, the suit was decreed.

A.S.No.1 of 1997 (The Principal District Court, Villupuram):-

15. The defendants then filed an appeal. The plaintiff filed a cross objection regarding non-grant of costs. The learned Principal District Judge, reappraised the evidence and framed points for consideration. The learned District Judge found that the fixed deposit receipts produced as Exs.A10-A15 were all subsequent to the suit. It was also found that the plaintiff was not willing to purchase the property. He was also not ready to purchase the property. It was specifically found that the plaintiff had been protracting the payment of balance sale consideration and had only been issuing notices more as a formality. It was also found that the plaintiff had not given prior notice before waiting in the Sub-Registrar office. It was also found that there has been substantial increase in the value of the property. It was finally observed that the Court should exercise its discretion and on balancing the relative hardships, the Principal District Judge, thought it fit to allow the appeal and set aside the order of the Trial Court and thereby dismissed the suit.

S.A.No.915 of 2002:

16. Challenging the Judgment of the Principal District Court, Villupuram, in A.S.No.1 of 1997 dated 07.09.1998, reversing the judgment and decree dated 19.11.1996 in O.S.No.47 of 1996 on the file of the District Munsif Court, Kallakurichi, the plaintiff Arumugam, filed the present Second Appeal.

17. As stated above, the Second Appeal had been admitted on 21.07.2000, on the following two substantial questions of law:-

1. In a suit for specific performance, when there is evidence, that, the plaintiff was possessed of sufficient funds, is it necessary that the balance

sale price due under the agreement of sale should be deposited in a specific account prior to suit?

2. When the defendants have not let in any evidence to prove the rise in price of the suit property, could the general rise in real estate be put against the plaintiff?

18. Pending the appeal, the plaintiff Arumugam died and his daughter, S. Ramya, had been brought on record as second appellant. Pending the appeal the first defendant Chamundia Pillai also died. His two sons were already on record as second and third respondents. His wife was brought on record as the 5th respondent. Two other respondents, minor Srinath and minor Srikanth who were the grandsons of the deceased son of the first defendant were also brought on record as 6th and 7th respondents. For the sake of convenience the parties will be referred as plaintiff and defendants.

19. The plaintiff Arumugam had instituted the suit seeking specific performance of an agreement of sale dated 25.10.1989 and also for possession of the suit property. The suit property belonged to the defendants who owned lands in S.No.114/1C to an extent of 4.82 acres and in S.No.113/3 to an extent of 1.35 acres and also a terraced house at Door No.54, Chellampattu Village, Kallakurichi. It is the case of the plaintiff, that on 25.10.1989, the defendants had agreed to sell the suit property to the plaintiff for a total consideration of Rs.1,77,320/-. The plaintiff paid an advance of Rs.40,000/-. The sale deed was to be executed on or before 25.01.1990 by paying the balance sale consideration. On 11.01.1990, an Advocate notice Ex.A2 was issued to the defendants. This was replied the counsel by the defendants by Ex.A3 dated 14.01.1990. In the reply, it was stated that the defendants were ready to execute the sale deed but that the plaintiff was not ready to pay the balance amount and perform his part of the agreement. To this reply notice, the plaintiff replied by Ex.A4 dated 26.01.1990. It was informed that the plaintiff was waiting in the Sub-Registrar office on 23.01.1990, 24.01.1990 and 25.01.1990 with the balance sale consideration and it was stated that the plaintiff was always ready and willing to perform his part of the agreement. The counsel for the defendants replied to this notice by Ex.A5 dated 29.01.1990. It was stated that the defendants were not informed to come over to the Sub-Registrar office. It was again reiterated that the defendants were ready to execute the sale deed on receipt of the payment of balance sale consideration. This was replied by the plaintiff by Ex.A6 dated 23.03.1990. It was stated that the plaintiff was ready and willing to pay the balance sale consideration. Another notice dated 02.04.1990 was

issued on behalf of the plaintiff wherein, however, extension of time was sought. This was necessitated because the defendants had stated that the agreement should be honoured on or before 31.03.1990. Ex.B2 is a notice dated 14.02.1990 issued on behalf of the defendants by their counsel to the plaintiff, wherein, it was specifically stated that the plaintiff should come forward to perform his part of the agreement on or before 21.02.1990. The notice returned unserved. Ex.B3 is the returned cover. Ex.B4, dated 19.03.1990 is another notice written on behalf of defendants, wherein, it was stated that since Ex.B2, notice was returned deliberately, the agreement was cancelled.

20. The sequence of events reveal that both sides kept writing notices without actually coming forward either to pay the balance amount or to execute the sale deed. After execution of Ex.A1 agreement, no actual progress was made for payment of additional advance amount by the plaintiff. It is to be noted that the suit was filed only on 03.05.1991, more than one year after the date on which the agreement was cancelled by the defendants.

21. The learned First Appellate Court Judge, specifically found that the plaintiff had not give any reason for the delay in payment of the balance sale consideration. It is trite to point out, that one who wants to seek specific performance must be ready and willing from the date of execution of the agreement till the date of final execution of the sale deed.

22. It is the contention of the learned senior counsel for the plaintiff, that the plaintiff had produced Exs.A10-A15 to show that he was ready with the balance sale consideration. However, a careful perusal of the said documents, reveal that Ex.A10 fixed deposit for a sum of Rs.10,000/- was dated 17.09.1992, which is subsequent to the date of institution of the suit. Ex.A11 is again a fixed deposit for a sum of Rs.1,09,656/- but which was again dated 29.08.1996, nearly five years after the date of institution of the suit. Ex.A12 is another fixed deposit dated 21.08.1992, for a sum of Rs.75,000/- which was also after the date of institution of the suit. Ex.A13 dated 30.05.1992 is for a sum of Rs.50,000/- which was also after the date of institution of the suit. Ex.A14 dated 05.09.1992, was for a sum of Rs.51,000/-. This was also after the date of institution of the suit. The plaintiff had not produced any document to show that he was ready and willing to partake with the balance sale consideration atleast on the date of filing the suit. It is the further contention of the learned senior counsel for the plaintiff, that the plaintiff was always ready and willing with sufficient funds to purchase the property. It was pointed out that the plaintiff was actually waiting in the Sub-Registrar office on 23.01.1990, 24.01.1990

and 25.01.1990. The plaintiff marked Ex.A17 which is a document registered in the Sub-Registrar office on 24.01.1990 and in which the plaintiff had signed as a witness. However, the plaintiff had not produced any document to show that he had put the defendants on notice prior to waiting in the Sub-Registrar office. The plaintiff had issued notices after notices, but had not issued the notice prior to waiting in the Sub-Registrar office. The plaintiff's claim of readiness and willingness sound hollow.

23.The first substantial question of law is whether in a suit for specific performance when there is evidence when the plaintiff was possessed of sufficient funds, is it necessary that the balance sale consideration should be deposited in a specific account prior to the suit. It is not necessary that the plaintiff should deposit the amount in any specific account. However, the plaintiff has got to establish that he was always ready and willing to purchase the suit property from the date of execution of the agreement. In this case, the plaintiff had issued notices seeking specific performance and stated that he was ready and also willing to purchase the suit property. But, the fixed deposit receipts are dated after the institution of the suit which signify that the plaintiff had not produced any document to show that he was possessed of funds on the date of institution of the suit. I hold that there is no necessity for the plaintiff to deposit the amount in separate bank account, but also hold that in this case, the plaintiff had not proved possession of sufficient funds from the date of execution of the agreement of sale.

24.The second substantial question of law was with respect to the consideration to be shown relating to the general rise in the value of the property by efflux of time. It is seen in this case that the defendants have specifically expressed their intention to execute the sale deed. However, the plaintiff had not come forward to pay the balance sale consideration. The increase in the value assumes significance owing to this fact.

25.In 2019 SCC online SC 12 (Kamal Kumar vs Premlata Joshi), the Honourable Supreme Court held as follows:

"10. It is a settled principle of law that the grant of relief of specific performance is a discretionary and equitable relief. The material questions, which are required to be gone into for grant of the relief of specific performance, are First, whether there exists a valid and concluded contract between the parties for sale/purchase of

the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds."

On application of the dictum laid down in the above judgment, it is seen that in the present case, there existed a valid contract between the plaintiff and defendants for sale/purchase of the suit property. However, the plaintiff had not established that he was willing to perform his part of the agreement. He had produced fixed deposit receipts to show availability of funds. However, they are all dated subsequent to the institution of the suit. Notices had been issued calling upon the defendants to come forward to execute the sale deed. Even though the defendants have stated that they are also willing to execute sale deed, there has been no meeting point between the plaintiff and defendants. It was for the plaintiff to pay the balance sale consideration and the documents reveal he had protracted to do so.

26. It will have to be next examined whether it will be equitable to grant the relief of specific performance to the plaintiff in relation to the suit property and whether it will cause hardship to the defendants. In this case, that I hold that the plaintiff is entitled only for the relief of refund of advance amount paid and not for the relief of the specific performance. This is in view of the fact that the plaintiff has to take the responsibility for not paying the balance sale consideration. Much right has accrued to the defendants and consequently, ends of justice would imply refund of advance amount paid would be just. The plaintiff had paid an advance

amount of Rs.40,000/- under the agreement dated 25.10.1989. Though the plaintiff expressed readiness and willingness he had not actually come forward to pay the balance amount.

27. Consequently, in the interest of justice, I hold that the plaintiff would be entitled for the refund by the defendants jointly and severally of the advance amount of Rs.40,000/- together with the interest @ 12% per annum from 25.10.1989 till the date of payment. I hold that this would meet the ends of justice, since the first defendant had also cancelled the agreement even before the plaintiff had instituted the suit. The suit was instituted more than one year after that date and explanation has not been given for the same.

28. In view of the above reasons, I hold that the Second Appeal has to be partly allowed. The judgment and decree of the First Appellate Court is modified and it is held that the plaintiff is entitled for refund by the defendants jointly and severally of the advance amount of Rs.40,000/- together with the interest @ 12% per annum from 25.10.1989, till the date of payment. The appellant is also entitled for costs.

Sd/-
Asst. Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

1. The Principal District Court, Villupuram.
2. The District Munsif Court, Kallakurichi.
3. The Section Officer, VR Section,
Madras High Court.

+1 cc to M/s. Zeenath Begum Advocate sr6304

+1 cc to M/s. Sarvabhauman Advocate sr6242

S.A.No.915 of 2000

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