

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[RESERVED ON : 27.06.2019]

[PRONOUNCED ON : 16.10.2019]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.1816 of 2001

1. A.Shanmugasundaram (Deceased)
2. S.Annapoornam
3. S.Kannagi
4. R.Kalaiselvi
5. R.Poornima [Minor]
6. R.Sundar [Minor]

... Appellants

[Minor appellants 5 & 6 represented by their mother and natural guardian fourth appellant R.Kalaiselvi]

[Appellants 2 to 6 brought on record as LRs of the deceased sole appellant vide order of this Court dated 04.06.2012 made in C.M.P.Nos.98 to 100 of 2010 in S.A.No.1816 of 2001]

[4th appellant R.Kalaiselvi appointed as guardian of third appellant viz., S.Kannagi vide order of Court dated 19.12.2018 made in C.M.P.No.4763 of 2018 in S.A.No.1816 of 2001]

.. Vs ..

1. M/s.Trident Promoters (P) Ltd.,  
Rep. by R.Vasanthi  
24 Unis Ali Sahib Street,  
Ellis Road, Chennai - 2.

2. P.Bhanumathi

... Respondents

Prayer : Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 29.03.2001 made in A.S.No.301 of 2000 on the file of the learned V Additional Judge, City Civil Court, Chennai, confirming the judgment and decree dated 28.04.2000 made in O.S.No.12651 of 1996 on the file of the learned VI Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.S.C.Sezhiyan  
for Mr.T.Kannan

For Respondents : Mr.E.J.Ayyappan

#### JUDGMENT

The defeated defendant namely, A.Shanmugasundaram, has filed the present second appeal challenging the judgment and decree dated 29.03.2001 passed by the learned V Additional Judge, City Civil Court, Chennai, in A.S.No.301 of 2000, confirming the judgment and decree dated 28.04.2000 passed by the learned VI Assistant Judge, City Civil Court, Chennai, in O.S.No.12651 of 1996.

2. During the pendency of the second appeal, the original defendant namely, A.Shanmugasundaram died and hence, his legal heirs were brought on record as appellants 2 to 6 in the above second appeal.

3. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

4. The respondents herein as plaintiffs have filed a suit in O.S.No.12651 of 1996 before the learned VI Assistant Judge, City Civil Court, Chennai, for specific performance of Ex.A.1-Agreement dated 16.10.1995 calling upon the defendant to execute the Sale Deed in respect of the undivided share in O.S.No.12651 of 1996. The defendant has not executed the sale deed in favour of the second plaintiff and hence, the plaintiffs have filed the said suit in O.S.No.12651 of 1996 before the learned VI Assistant Judge, City Civil Court, Chennai, praying for a decree directing the defendant to specifically perform his part of the contract as per the agreement of sale dated 16.10.1995 and 15.02.1996 and to convey the title of the undivided share of the land in favour of the second plaintiff. The suit was however valued for the purpose of Court fee and jurisdiction only on the basis of Ex.B.6-Agreement and not Ex.A.1-Agreement.

5. The original defendant has resisted the said claim of specific performance inter alia contending that the first plaintiff has not paid the entire sale consideration as alleged by it, nor has the second plaintiff paid the amount as per Ex.B.6-Agreement. Further, there is no averment that the plaintiffs are ready and willing to perform their part of the agreement. Moreover, the plaintiffs have set forth false plea of payment which are not vouched by receipts and the false plea of payment will disentitle them to the discretionary relief of specific performance.

6. Before the trial Court, on behalf of the plaintiffs, one Thiru K.Ragu was examined as P.W.1 and documents Exs.A.1 to A.11 were marked. On behalf of the defendant, the defendant examined himself as D.W.1 and documents Exs.B.1 to B.15 were marked.

7. The Trial Court, after considering both oral and documentary evidence adduced on either side, has held that the agreement between the first plaintiff and the defendant under Ex.A.1 is true, valid and binding upon the defendant and the entire sale consideration has been paid as agreed between the parties and accordingly, decreed the suit. Aggrieved against the said order, the defendant has preferred an appeal in A.S.No.301 of 2000 and the said appeal was dismissed by the learned V Additional Judge, City Civil Court, Chennai, confirming the judgment and decree passed by the trial Court. As against the dismissal of the first appeal, the present second appeal has been preferred by the defendant before this Court.

8. At the time of admitting the above second appeal, the following substantial questions of law were framed for consideration:

(1) Whether the suit as framed is maintainable, claiming relief under the two agreements Exs.A.1 and B.6 which are distinct and separate?

(2) Whether the Court below erred in decreeing the suit in favour of the second plaintiff when she has not alleged or proved her readiness and willingness to perform her part of the contract?

9. Learned counsel appearing for the appellants made submissions in support of the substantial questions of law while the learned counsel appearing for the respondents made submissions in support of the judgment of the Courts below.

10. The original defendant is the owner of the premises bearing Door No.2 (New No.3) 50th Street, Ashok Nagar, Chennai and he had put up a ground floor and is residing there. The first plaintiff entered into an agreement with the defendant on 16.10.1995 under which the first plaintiff undertook to construct flats in the first floor only and that a sum of Rs.8,25,000/- as consideration for transfer of undivided share of the land for the first floor flats. The first plaintiff put up flats in the first floor and one of the flats was conveyed to one Kesavachari. At the instance of the first plaintiff, an agreement of sale was executed between her and the second plaintiff on 15.02.1996 under which the defendant had to convey 13% of the undivided share of land for a total consideration of Rs.1,90,000/-. As per the original

defendant's version, the sale consideration has to be paid in 3 instalments as stated in the agreement. Though the agreement recites payment of Rs.40,000/- on the date of agreement, no payment was made. The second plaintiff also did not make the subsequent payments to be made on 31.03.1996 and on 15.04.1996. Alleging that the first plaintiff has made excess payment over and above the sale consideration and that the excess payment was given to the defendant by way of loan, the plaintiffs demanded execution of the sale deed in the undivided share of the land in favour of the second plaintiff. The defendant sent a reply setting out the facts in detail.

11. On the above pleadings, the learned counsel appearing for the appellants would contend that both the Courts below have failed to see whether the respondents are entitled to the relief under Ex.A.1-Agreement, and Ex.B.6-Agreement and no finding was given on the basis of Ex.B.6-Agreement. However, relief was granted on Ex.A.1-Agreement which is wholly unwarranted. When relief is sought in favour of the second plaintiff on the basis of Ex.B.6-Agreement, unless and until the second plaintiff establishes that she has performed her part of the contract or willing to perform the same, she will not be entitled to claim a decree for specific performance. The Courts below have clearly failed to address this aspect of the case and erroneously held that the first plaintiff has paid the sale consideration, and decreed the suit. Further, the Courts below have failed to see that on the plaintiffs own showing, the first agreement stands superseded by execution of the second agreement and when relief has been claimed on the basis of Ex.B.6-Agreement, the suit cannot be decreed unless and until the second plaintiff complies with the terms of the agreement.

12. This Court has given its anxious consideration to the contentions raised by the learned counsel for the defendant. The schedule of the property is an undivided share of land measuring one ground 1471 sq. ft. in Plot No.C.752, Kodambakkam Pudur, Part - I C R.S.No.183 part of Kodambakkam Village, Madras District bearing Door No.2, 50th Street, Ashok Nagar, Madras - 600 083.

13. On a perusal of Ex.A.1-suit sale agreement, it is seen that the first plaintiff, who is the promoter has entered into a joint venture agreement with the defendant under Ex.A.1-suit sale agreement wherein, the execution of the suit sale agreement between the defendant and the first plaintiff under Ex.A.1 and execution of the agreement between the defendant and the second plaintiff under Ex.B.6, dated 15.02.1996 are admitted. The terms of the agreement therein are also admitted. As per Ex.A.1, the defendant has to execute the sale deed on receipt of Rs.8,25,000/- from the first plaintiff either to himself or to its nominee. As per the plaint averments, the first plaintiff has paid over and

above Rs.8,25,000/- and hence, seeks to execute the sale deed for undivided share by the defendant in favour of the first plaintiff's nominee namely, the second plaintiff. Admittedly, the first plaintiff has completed the building work and one out of two plots constructed in the first floor, as per the terms of the agreement, has been registered in favour of one Ragavachari and the same is not in dispute. Now, the case of the respondents is that since the entire amount due under Ex.A.1-Suit Sale Agreement viz., Rs.8,25,000/- has been paid, the appellants have to execute the sale deed for undivided share as mentioned in the agreement in favour of the nominee of the first plaintiff viz., the second plaintiff.

14. On a perusal of Ex.A.9 and A.11, both the Courts below have concurrently held that the amount fixed as sale consideration under Ex.A.1-suit sale agreement has been duly paid and accordingly, held that the entire amount of sale consideration has been paid. The original defendant as D.W.1 has contended that he issued Ex.B.11-Receipt without date and the same has been disbelieved by both the Courts below. Taking into consideration that the defendant as a practicing lawyer cannot take such a stand knowing the legal consequences and the said finding arrived at by both the Courts below does not suffer from any illegality. As per receipt Ex.A.9 and also the next receipt dated 03.11.1995 under Ex.A.11, the entire amount due under the sale deed appears to have been paid by the first plaintiff and the same has been received by the defendant. In fact, property tax has also been paid by the first plaintiff. Thus, both the Courts below have acted upon Ex.A.6-receipt and A.8-receipt for a sum of Rs.2,00,000/- and the same has been admitted by D.W.1. Taking into consideration the documents i.e., Exs.A.6, A.8, A.9 and A.11, both the Courts below have concurrently held that the amount due under the sale consideration has been paid and by virtue of the terms of the agreement which is not disputed, the defendant is bound to execute the sale deed in favour of the nominee of the first plaintiff viz., the second plaintiff.

15. It remains to be stated that the learned counsel appearing for the appellants/defendants has reiterated the very same argument that the document Ex.A.1-suit sale agreement has been duly cancelled by him by issuance of Ex.B.1-legal notice on 14.03.1996. However, as rightly pointed out by both the Courts below, even after issuance of Ex.B.1, he had received amount on 17.03.1996 and also received a sum of Rs.1,00,000/- on 15.05.1996. Hence, for the reasons assigned above, this Court is unable to uphold the said contention of the learned counsel appearing for the appellants that by virtue of Ex.B.1, Ex.A.1-suit sale agreement was cancelled/rescinded.

16. From the pleadings as well as from the evidence, it is seen that the plaintiffs are seeking the relief of specific performance of Ex.A.1-suit sale agreement viz., sale of the

undivided share of land, while Ex.B.6 is the agreement entered between the parties for promotion, and as per Ex.P.6 promoter agreement, the cost of the building viz., Rs.1,90,000/- and the cost of the undivided share in the land in respect of the first floor plot proposed for the second plaintiff is the part and parcel of Rs.8,25,000/- fixed and arrived between the first plaintiff and the defendant, as per Ex.A.1-sale agreement dated 16.10.1995, and therefore, all the three agreements viz., sale of undivided share of the land, construction in the first floor and the sale of agreement of the flat constructed in the first floor which includes undivided share in the land and the building constructed thereon and all the three agreements are co extensive with each other and in the absence of any variations or mutually destructive clause and they are bound to be mutually in consonance with each other and hence, the suit as framed is maintainable, since Ex.A.1 is a comprehensive agreement of sale between the first plaintiff's building in respect of the 'A' flat, to be constructed in the first floor of his land and the amount of sale consideration fixed under Ex.B.6 is included in Ex.A.1 and as such, by the terms of the agreement under Ex.A.1, the appellants/defendants are bound to execute the sale deed for undivided extent of land for the persons nominated by the first plaintiff viz., the second plaintiff and hence, the first substantial question of law is answered in negation against the appellants/defendants.

17. In view of the finding in the preceding paragraphs, the entire amount has been duly paid as could be seen from the documentary evidence as discussed supra viz., Exs.A.6, A.8, A.9 and A.11. Since entire amount has already been paid by the first plaintiff, the second substantial question of law does not arise for consideration. Therefore, the question of ready and willingness as projected by the appellants/defendants does not arise for consideration.

18. In this view of the matter, both the substantial questions of law are answered in negation against the appellants. The order of the Lower Appellate Court is well considered and well merited which does not warrant any interference by this Court. Accordingly, the Second Appeal is devoid of merits and the same is liable to be dismissed.

19. In the result,

[i] The Second Appeal is dismissed and the judgment and decree dated 29.03.2001 passed by the learned V Additional Judge, City Civil Court, Chennai, in A.S.No.301 of 2000, confirming the judgment and decree dated 28.04.2000 passed by the learned VI Assistant Judge, City Civil Court, Chennai, in O.S.No.12651 of 1996, are confirmed.

[ii] However, there shall be no order as to costs.

Sd/-  
Assistant Registrar(Insp.cell)

//True copy//

Sub Assistant Registrar

Jrl

To

1. V Additional Judge, City Civil Court,  
Chennai.
  2. VI Assistant Judge, City Civil Court,  
Chennai.
  3. The Section Officer, VR Section, High Court, Madras
- +lcc to Mr.E.J.Ayyappan, Advocate SR.No.86736

S.A.No.1816 of 2001

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