

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date : 22.02.2019

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.7 of 2008 &
M.P.No.1 of 2008

Mrs.E.Padmavathi

...Appellant/1st Respondent/Plaintiff

Vs

1. Mrs.Alamelu Ammal
2. Mr.Kamlakannan
3. Mr.Ethiraj
4. Mr.V.Gopal (deceased)
5. Mrs.Manickammal
6. Mrs.Rani
7. Mr.Kailasam
8. Mrs.Sarasu

Memo dated 07.01.2019 is recorded and 8th respondent substituted vide Order of Court dated 07.01.2019 made in M.P.No.2 of 2012 in S.A.No.7/2008 (NSSJ)

9. Mrs.Mythili
10. Mr.Deva Vivekanandan

(Respondents 5 to 10 brought on record as LRs of the deceased R4 vide Order of Court dated 07.01.2019 in M.P.No.1 of 2012 in S.A.No.7 of 2008 (NSSJ) ... Respondents

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., against the judgment and decree in A.S.No.26 of 2003 dated 28.11.2005 on the file of the Subordinate Judge, Kancheepuram reversing the judgment and decree of the Additional District Munsif, Kancheepuram in O.S.No.1110 of 1996 dated 28.02.2003.

For Appellant : Mr.A Muthukumar

For Respondents : No appearance - R1 to R3

For Respondent 5 to 10: Mr.T.P.Sankaran

JUDGMENT

This Second appeal has been filed as against the reversal judgement of the appellate Court in a suit filed for specific performance.

2. It is the case of the plaintiff that the first defendant has agreed to sell the property for a total sale consideration of Rs.13,500/-. Thereafter, the price has also been accepted by the defendants 1 to 4. Accordingly, an agreement came to be executed on 03.06.1992 and the first defendant has received an advance of Rs.10,000/-. The agreement was executed in a white paper and signed on the revenue stamp by the first defendant and the other defendants have signed as witnesses. On 08.10.1992, the first defendant received another Rs.1,500/- in the presence of witnesses. Thereafter, on 06.10.92, the third defendant received another sum of Rs.2000/-. Only Rs.500/- remains as balance of sale consideration. The plaintiff is always ready and willing to execute the regular sale deed. It is the further contention of the plaintiff that at the time of agreement itself, he was given possession of the property. Thereafter, he came to know that on 30.05.1996, the defendants 1 to 4 have sold the property to the fifth defendant. The fifth defendant is not a bonafide purchaser. Hence, the suit.

3. The defendants 1 to 4 remained exparte.

4. The fifth defendant had filed a written statement inter alia contending that he had purchased the property for a valuable consideration and he has no notice, whatsoever with regard to the alleged agreement. Hence, prayed for dismissal of the suit.

5. The trial Court framed necessary issues. On the side of the plaintiff, P.W.1 to P.W.3 have been examined and Ex.A.1 to A.7 have been marked. On the side of the fifth Defendant, D.W.1 and D.W.2 have been examined. Based on the evidence and materials, the trial Court had decreed the suit in favour of the plaintiff. However, the first appellate Court set aside the decree of the trial Court on the ground that all the defendants have not signed in the agreement and agreement cannot be enforced and further holding that the fifth defendant is a bonafide purchaser. As against which the present Second Appeal has been filed.

6. The learned counsel for the appellant vehemently contended that admittedly, though the defendants 1 to 4 have not signed as executors in the agreement, but the recitals in the agreement makes it clear that they have also agreed to sell the property. Further, the third defendant had also received Rs.1500/- towards sale consideration in the year 1993 and made an endorsement and it is also marked as Ex.A.3. The appellant

was also put in possession of the property in pursuant to the agreement on the date of agreement, i.e., 22.06.1992 and substantial sale consideration has also been paid and only a meager amount of Rs.500/- alone remained to be paid. When that being so, the 5th defendant has purchased the property with notice of the prior agreement. Ex.A.4 document clearly show that the fifth defendant himself had paid the deficit stamp duty. It makes it clear that the fifth defendant has prior knowledge of the agreement. Hence, submitted that the appellant was always ready and willing to perform her part of the contract. Therefore, she had paid substantial amount of sale consideration. The first appellate Court wrongly concluded that the agreement is unenforceable. The evidence adduced on the side of the plaintiff clearly show that the all the defendants have executed the agreement. Hence, submitted that the substantial questions of law raised by her has to be answered in his favour.

7. The learned counsel appearing for the respondent submitted that Ex.A.1 has not been signed by all the defendants. Only the first defendant alone has executed the document. Subsequent payment has also been received on behalf of the first defendant and the same make it clear that the other defendants, who are co-owners of the property, have not executed the document. Therefore, such an agreement cannot be enforced. It is his further contention that readiness and willingness is totally absent on the side of the plaintiff. Merely because the defendants 1 to 4 have remained exparte, the same cannot be a ground to grant a decree of specific performance. Hence, submitted that the first appellate Court is right in dismissing the suit.

8. Heard the learned counsel for the appellant and the learned counsel for the fifth respondent at the admission stage itself and the following substantial questions of law have been framed for consideration in this Second Appeal :

1. Whether Ex.A.1 agreement is proved by the evidence of P.Ws.1 to 3 and also the passing of consideration, whether the learned Subordinate Judge erred in holding that Ex.A.1 is not true or valid in the absence of contra evidence of defendants?

2. Whether the judgment of lower appellate Court is vitiated in holding that Ex.A.1 was executed by first defendant alone and not by defendants 2 to 4 who only signed as witnesses, when the preamble clearly states that the agreement was entered into by the defendants 1 to 4?

3. When the plaintiff has always been ready and willing to perform his part of the agreement, whether the learned Subordinate Judge erred in law in

reversing the decree of the trial Court for specific performance?

4. Whether the Court below erred in not decreeing the suit for the alternative relief of return of the sale consideration paid in as much as defendants 1 to 4 have not contested the plaintiff's claim of payment towards sale consideration under Ex.A.1?

9. The suit has been laid on the basis of Ex.A.1 dated 23.06.1992 executed by the first defendant and others. A careful perusal of Ex.A.1, which is written in a white paper, it is seen that the first defendant had agreed to sell the property. Though the recitals in the agreement shows as if all the defendants agreed to sell the property, the fact remains that only the first defendant has signed as an executor in the above agreement. In Ex.A.1, only a revenue stamp has been affixed. Be that as it may. The defendants 2 to 4 have signed as witnesses and not as executors. If the contention of the learned counsel for the appellant is accepted that all are joint executors, the defendants 2 to 4 would not have signed as witnesses. If the contention of the learned counsel for the appellant is considered that the third defendant had received a part of the sale consideration of Rs.1500/- in the year 1993 as per Ex.A.3, a careful perusal of Ex.A.3 makes it clear that he has received the amount on behalf of the first defendant and that itself makes it clear that the other defendants have not signed as executors, though their signatures also found as witnesses in the document. A knowledge only can be attributed to the defendants 2 to 4 with regard to the execution of Ex.A.1. But the subsequent conduct of the plaintiff that he had paid Rs.1,500/- as per Ex.A.3 to the third defendant makes it clear that they were not actually made executors of the agreement. Even assuming and accepting the evidence of the plaintiff and others examined before the trial Court, all other parties are executors of the document, now the question arise whether the plaintiff is entitled to seek specific performance.

10. In Ex.A.1, absolutely, there is no whisper whatsoever with regard to the time of performance. Similarly, there are no details, whatsoever with regard to the boundaries of the property. It is well settled that when there is no time fixed in the agreement, the limitation to file the suit starts from the date when the defendants have actually shown their intention to refuse the agreement. From that date, three years limitation commences for filing the suit. Now, admittedly, there is no question with regard to limitation. Even if entering of the agreement is accepted as a contract for sale, it has to be analysed whether the plaintiff has shown his readiness and willingness from the inception of the contract. To get an equitable relief of specific performance, the plaintiff has to establish his readiness and willingness from the inception of

the contract. Readiness and willingness is a continuous process. It must be present from the inception of the contract till the contract culminated into a sale deed. The readiness is a capacity to mobilise funds and willingness is the mental attitude. Only when both together is established, one can succeed in a suit for specific performance.

11. It is to be noted that though the contract is dated 23.06.1992, substantial consideration of 10,000/- out of Rs.13,500/- is paid on the date of agreement itself. Thereafter, the plaintiff has remained mere spectator and he has not taken any steps even to verify the nature of the property and to find out the boundaries etc. For the first time in Ex.A.2, he is said to have paid another 1,500/- on 08.10.1992 to the first defendant. Even after such payment, he has not taken any steps to pay the remaining amount of Rs.2000/- immediately. Whereas on 06.10.93, the plaintiff is said to have paid a sum of Rs.1,500/- to the third defendant and the third defendant had received the amount on behalf of the first defendant. Having paid Rs.13,000/-, almost 99% of the sale consideration, still the plaintiff has not taken any steps either to get the property registered in her name nor any other steps to verify the boundaries or demarcate the boundaries, etc. The above facts clearly prove that readiness and willingness is totally absent on the part of the plaintiff.

12. It is curious to note that the suit has been laid only in the year 1996, that too after the fifth defendant had purchased the property. All these facts clearly establish that readiness and willingness is totally absent on the part of the plaintiff. Further, merely because defendants 1 to 4 have been set exparte, it cannot be a ground to grant the relief of specific performance to the plaintiff. It is for the plaintiff to establish her readiness and willingness. Further it is to be noted that Ex.A.1 is written in a piece of paper and the fifth defendant has purchased the property in the year 1996, after four years of the agreement. Unless evidence establishes the fact that the fifth defendant has a notice of the agreement, such purchase cannot be invalidated on the ground that he has notice of the prior agreement. It is further to be noted that merely because under Ex.A.4 endorsement, the fifth defendant appears to have paid the deficit stamp duty, that itself cannot be said that the purchase is not a bonafide one. Since there is no evidence available on record under what circumstances such endorsement was made, merely on the basis of the endorsement, one cannot presume that he had prior notice on the agreement. The plaintiff is all along keeping silent, having paid substantial part of sale consideration, has not taken any steps even to verify the extent of the property and its boundaries. All these facts clearly indicate that she is not ready and

willing from the very inception. It is further to be noted that as already discussed, very execution of the agreement by the defendants has not been established. That being the case, admittedly the other defendants, namely defendants 2 to 4 are co-owners and the first defendant has only executed the agreement. Therefore, such contract is also not enforceable, since the first defendant is only a co-owner of the property. Even at the time of filing of the suit, the plaintiff has not deposited Rs.500/-. Of course, the deposit is not mandatory. Atleast to show her readiness, she ought to have deposited the meager amount, which has not been done so at the time of filing of the suit. All these facts clearly goes against the plaintiff. Hence, the substantial questions of law have been answered against the appellant. However, considering the fact that the appellant has paid Rs.13,000/- and it has also been established not only by Ex.A.1, Ex.A.2 and Ex.A.3 but also through oral evidence, I am of the view that the appellant is entitled to return of the said advance amount.

13. Accordingly, this Second Appeal is dismissed and the judgment and decree of the first appellate Court is confirmed. However, the defendants 1 to 4 shall return the advance amount of Rs.13,000/- to the plaintiff along with interest at the rate of 9% per annum from the date of the agreement till the date of the realisation of the amount. Till such amount is returned, there shall be a charge on the property. Consequently, the connected miscellaneous petition is closed. No cost.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Subordinate Judge, Kancheepuram.
2. The Additional District Munsif, Kancheepuram.

+1cc to Mr.A.Muthukumar, Advocate, S.R.No. 16490
+1cc to Mr.T.P.Sankaran, Advocate, S.R.No. 17445

Second Appeal No.7 of 2008

KJ(CO)
GN(30/09/2019)