

Reserved on : 25.02.2019
Pronounced on : 28.02.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM :

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Second Appeal No.1170 of 2010 &
M.P.No.1 of 2010

Bhuvana

...Appellant/Plaintiff

Vs

1. A.H.Bheeman (deceased) ...1st Respondent/Defendant
2. Shanti
3. Renuka
4. Naresh (Minor) ...Respondents 2 to 4
rep. by his mother Shanthi

(Respondents 2 to 4 brought on record as LRs of the deceased sole respondent vide Order of Court dated 09.02.2018 made in CMP.Nos.14614 & 14615 of 2017)

Prayer:- Second Appeal has been filed under Section 100 of C.P.C. Read with Order 43 Rule 1 of C.P.C., against the judgment and decree, dated 10.06.2010 in A.S.No.12 of 2009 on the file of the District Judge and Appellate Authority, Nilgiris at Udagamandalam reversing and setting aside the findings rendered in the decree and judgment dated 29.04.2009 in O.S.No.109 of 2006 on the file of the Subordinate Judge of Nilgiris at Udagamandalam.

For Appellant : Mr.Balan Haridas

For Respondents: Mr.M.L.Ramesh
for M/s.G.Kumudh Jhabakh

JUDGMENT

Aggrieved over the judgment of the first appellate Court in allowing the appeal suit by setting aside the decree and judgment of the trial Court granting specific performance of the agreement dated 21.05.2004, the present Second Appeal came to be filed.

2. The parties are arrayed as per their own ranking before the trial Court.

3. The brief facts of the plaintiff case is as follows:-

The suit property has been originally leased to the plaintiff's brother Prabhu Peter on 22.01.2003. Thereafter, the defendant offered to sell the suit property, consisting of one acre, in favour of the plaintiff for a total sale consideration of Rs.one lakh, at the rate of Rs.1000/- per cent and entered into an agreement on 21.05.2004 and received a sum of Rs.25,000/- as an advance by cheque dated 19.05.2004. The time for making remaining sale consideration is six months. It is also agreed between the parties that the defendant should measure the land and produce the sketch and title deeds, encumbrance certificate etc. Subsequently, the plaintiff has paid a sum of Rs.20,000/- on 08.08.2004 and Rs.15,000/- on 10.09.2005 by cash towards the sale consideration. Thereby, the plaintiff paid total sale consideration of Rs.60,000/-. As per the agreement, the defendant measured the property. After measurement, it was found that only 70 cents is available. Therefore, the plaintiff has to pay only Rs.70,000/- as full sale consideration. Since, the plaintiff had already paid Rs.60,000/-, the balance sale consideration remains to be paid is only Rs.10,000/-. The plaintiff is prepared to pay the balance sale consideration. However, the defendant did not produce the title deeds despite several requests made by the plaintiff. In the meanwhile, the defendant made an attempt to sell the property to third parties. Hence, the plaintiff issued legal notice dated 15.06.2006. After the receipt of the said notice, the defendant personally requested the plaintiff that he would execute the sale deed within three months. But, he did not do so. Hence, the suit.

4. Denying the sale agreement, it is the contention of the defendant that he has neither seen the plaintiff nor entered into a sale agreement. He has entered into a lease agreement dated 22.01.2003 with one Prabhu Peter, who is son of Peter Masilamani, who is known to the father of the defendant. The defendant who was owning vehicle bearing registration No.TN - 45 - 3080 was seized by the finance company and to redeem that vehicle, the defendant had approached the said Peter Masilamani and he had given a loan of Rs.25,000/- and obtained his signature in blank stamp papers and blank green sheets affixed with revenue stamps for security purpose for the amount given to the defendant. The alleged receipts for payment of amount on 08.08.2004 and 10.09.2005 were also denied by the defendant. Those receipts are fabricated. He had not agreed to measure the property and to produce the title deeds. Hence, disputed the sale agreement and prayed for dismissal of the suit.

5. The trial Court framed the following issues :-

1. Whether the plaintiff is entitled for the relief of Specific Performance based on the sale agreement dated 21.05.2004?

2. Whether the plaintiff is entitled for vacant possession of the suit property?

3. To what relief the plaintiff is entitled?

6. On the side of the plaintiff, P.W.1 to P.4 were examined and Ex.A.1 to A6 were marked. On the side of the defendant, D.W.1 and D.W.2 were examined. The trial Court has decreed the suit for specific performance. However, the first appellate Court set aside the decree of the trial Court for specific performance. However, decreed the suit for alternative relief for the return of advance with interest at the rate of 18% per annum from the date of agreement till the date of decree and thereafter at the rate of 6% per annum. As against which the present appeal has been filed.

7. The Second Appeal has been admitted on the following substantial questions of law :

1. Whether the lower appellate Court is justified in dismissing the suit on the ground that the plaintiff did not enter into the box to disprove the contentions of the defendant, when the documents Ex.A.1 to Ex.A.3 in the background of evidence of P.W.1 would establish the case of the plaintiff?

2. Whether the findings of the first appellate Court is vitiated by failure to appreciate the relevant materials on record and also by non application of the correct principles of law?

8. The learned counsel for the appellant submitted that the first appellate Court has dismissed the suit for specific performance merely on the ground that the plaintiff has not entered into the box. Admittedly, her father has been examined as P.W.1. The authorisation letter given to P.W.1 is not disputed by the defendant. Therefore, the first appellate Court dismissing the suit on that ground is not valid according to law. P.W.2 and P.W.3 have been examined to prove the subsequent sale consideration. The above evidence and documents clearly establish that the plaintiff has sent a legal notice as early as on 15.06.2006 and no reply has been sent by the defendant. The plaintiff is always ready and willing to purchase the property. The first appellate Court dismissed the suit for specific performance on the ground that the plaintiff has not been examined before the trial Court. As the father of the plaintiff is aware of the facts, he has deposed before the trial Court and

the first appellate Court dismissing the suit is not based on proper appreciation of evidence. In support of his contentions, he relied upon the judgment in Nanjammal (died) and noter Vs. Palaniammal reported in 1993 (2) LW. Page 25.

9. Whereas, the learned counsel appearing for the respondent submitted that the plaintiff was never ready and willing to purchase the property. The agreement itself clearly stipulates that the contract shall be completed with a period of 6 months from the date of execution of the agreement. Further one of the conditions stipulated in the contract is that the plaintiff has to pay the lease amount to one Prabhu to retrieve the possession of the land. But, no evidence, whatsoever, is available on record to show that the plaintiff was ever ready to pay back the lease amount. Infact, the lessee was inducted on the basis of a registered lease agreement and the lease is for a period of 10 years. Entering into this agreement clearly probalilise the defence case that Ex.A.1 is not a sale agreement and it is a result of a loan transaction entered between the plaintiff's father namely P.W.1 and the defendant. At any event, readiness and willingness is totally absent on the part of the plaintiff. Legal notice was sent for the first time on 15.06.2006. No pleading in the plaint as to the readiness and willingness for payment of balance sale consideration and extension of time by the defendant. It is his further contention that the readiness and willingness is the state of mind of the plaintiff. It has to be proved by her and not by some other witness. She has purposely evaded to come to the Court to withstand the cross examination. Therefore, the readiness and willingness cannot be inferred in this case. The first appellate Court has thoroughly analysed the readiness and willingness aspect and has come to the correct conclusion and the judgment of the first appellate Court is well balanced and does not require any interference. He also relied upon the judgment in Man Kaur (1) by LR. Vs Hartar Singh Sangha reported in 2010 (6) CTC 652.

10. Heard the learned counsel for the appellant and the learned counsel for the respondents and perused the entire materials available on record.

11. The suit has been laid to enforce the contract dated 21.05.2004. The agreement is exhibited as Ex.A.1. Ex.A.1 when carefully seen, it appears that the parties have entered into an agreement for sale of one acre of land situated in S.No.286 of Kallatty locality in Hullathi village in Nilgiris for a total sale consideration of one lakhs, i.e., Rs.1000/- per cent. It appears that on the date of agreement, a sum of Rs.25,000/- was paid by way of cheque.

12. Whereas, it is the contention of the defendant that the suit property has already been leased for 10 years by a

registered lease deed in favour of the plaintiff's brother, namely Prabu Peter and the plaintiff had no connection with the plaintiff at any point of time. He has signed only in a blank paper at the time of availing the loan from the plaintiff's father to redeem the vehicle, which was seized by the finance company. However, the trial Court considered the evidence of P.Ws.3 and 4 and has come to the conclusion that the agreement is not a result of a loan transaction. P.W.3 and 4 have spoken about the execution of the agreement by the defendant. From the evidence of P.Ws.2 and 3, the trial Court found that the agreement is validly executed by the defendant. Therefore, this Court does not find any infirmity in the conclusion of the Courts below as to the execution of the agreement Ex.A.1 by the defendant.

13. Now in the above background, it has to be analysed whether the plaintiff is entitled for specific performance and whether she was always ready and willing to perform her part of the contract and whether Ex.A.1 is enforceable. On a perusal of Ex.A.1, it is seen that one acre of land is agreed to be sold for a sum of Rs.one lakh and that there is a specific covenant to measure the property and the purchaser shall pay the amount at the rate of Rs.1000/- per cent. One of the terms agreed between the parties in the agreement is that the sale shall be completed within 6 months from the date of the agreement. It is also agreed in the agreement that he would refund the lease amount already received from the Prabu Peter, namely the brother of the plaintiff calculating the refundable lease amount from the date of such termination and taking possession of the land and to the expiry of the lease period or less, the purchaser being the sister of the said Prabu Peter is entitled to deduct from the balance consideration and pay to her brother directly and the same will be deducted from the sale consideration by the vendor. The above terms agreed between the parties make it clear that the lease is for a period of 10 years and the vendor has to refund the lease amount received from the brother of the plaintiff. In the event, he has not taken any steps, the purchaser, namely, the plaintiff, is entitled to deduct from the sale consideration and pay to the lessee and that amount will be deducted from the balance sale consideration payable to the vendor, namely, the defendant herein. This term has been agreed between the parties.

14. Admittedly, the property has already been leased for a period of 10 years. That being the position, the plaintiff, who seek the relief of specific performance ought to have taken steps either to pay the amount to his brother and to deduct the amount or should have compelled the defendant to refund the lease amount to his brother. But the entire pleadings and evidence adduced on the side of the plaintiff is silent about this specific condition. Though specific time has been agreed

between the parties to complete the sale within 6 months, the receipts Ex.A.2 and Ex.A.3 indicate that subsequently, the defendant has received a further sum of Rs.20,000/- on 08.08.2004 and Rs.15,000/- on 10.09.2005. These receipts clearly indicate that the agreed specific time is not intended as an essence of contract. But at the same time, the plaintiff ought to have taken some steps to enforce the contract within a reasonable time. Having pleaded that even after payment of balance sale consideration on 08.08.2004 and 10.09.2005, she has to pay Rs.10,000/- as remaining sale consideration till 15.06.2006, the date on which the legal notice sent to the defendant she had remained silent.

15. In a suit for specific performance, readiness and willingness is sine qua non on the part of the plaintiff to get an equitable relief. The readiness and willingness should be present from the date of agreement till the contract culminated into a sale deed. The plaintiff must establish her readiness and willingness. Readiness is the capacity to mobilize funds and willingness is the mental attitude or intention. Only when both ingredients go together and established by the plaintiff, she can get an equitable relief of specific performance. It has to be noted that the receipts Ex.A.2 and Ex.A.3 shows that the parties never intended time as an essence of the contract. Therefore, the conduct of the plaintiff makes it clear that she was neither ready nor willing to purchase the property. For the first time, she has issued a legal notice on 15.06.2006. It is further to be noted that even during the pendency of the suit, the remaining sale consideration has not been paid by her. It is not brought to the notice of this Court after judgment of the trial Court, whether such amount has been deposited in Court or not. These facts cannot be ignored altogether.

16. Yet another factor which disentitles the plaintiff for specific performance is that the suit has been filed to enforce the contract for sale of one acre of land. It is the case of the plaintiff that the defendant had measured the property and it is found that only 70 cents are available. Therefore, according to the plaintiff she has reduced the sale consideration as per the actual extent available. Therefore, according to the plaintiff she has to pay only Rs.70,000/- towards the sale consideration. Whereas in the contract itself one of the condition is that the property of one acre should be sold for a sum of Rs.one lakh. The contract specifically entered for enforcing the contract in respect of one acre of the land. But the suit has been filed to enforce the contract only to an extent of 70 cents. It is useful to refer to Section 12 of the Specific Relief Act, which is extracted hereunder :-

Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided

in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money, he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), 1[pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part. Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it

if a portion of its subject matter existing at the date of the contract has ceased to exist at the time of its performance."

17. The above section makes it clear that the part of the contract cannot be enforced. Only if the plaintiff has agreed the sale consideration for the whole of the contract and also she relinquishes all claims to the performance of the remaining part of the contract as per Clause 1 and 2 of sub section 3 of the Section 12 of the Specific Relief Act, part of the contract can be enforced. Absolutely, there is no pleading whatsoever in the entire plaint with regard to the relinquishments of all claims to the performance. Only when conditions set out in Clause 1 and 2 of subclause 3 of Section 12 is fulfilled, the plaintiff is entitled to the relief of specific performance to enforce the part of the contract. Absolutely, there is no pleadings in the plaint to enforce a part of the contract by pleading of relinquishment etc. Further, it is not the case of the plaintiff that she had paid the entire sale consideration as agreed between the parties in the agreement Ex.A.1. The plaintiff sought to enforce a part of the contract by reducing the sale consideration as agreed between the parties. Therefore, the plaintiff is certainly not entitled to enforce the part of the contract. What is sought to be enforced is Ex.A.1. But in the schedule of the property she sought decree only in respect of 70 cents, only a part of the contract agreed between the parties. On the above ground, certainly, the plaintiff is not entitled to the relief of specific performance.

18. It is further to be noted that the plaintiff has not appeared before the Court to withstand the cross examination. Only her father was examined as P.W.1 on the basis of the authorization letter Ex.A.6. Ex.A.6 is a letter simply authorizing her father to give evidence on her behalf. Therefore, P.W.1 was examined. As rightly contended by the learned counsel for the respondent, the readiness and willingness has to be established by the plaintiff with regard to what are the steps taken by her and whether she has performed her part of the contract as agreed in Ex.A.1. Only the plaintiff is competent to speak about the same out of her personal knowledge. P.W.2, brother of the plaintiff has also not spoken anything about the extension of time under Ex.A.2 and Ex.A.3. Similarly, P.W.3 in his evidence has stated that under Ex.A.2 a sum of Rs.20,000/- was paid only by P.W.1., the father of the plaintiff. P.W.3 in his evidence has also stated that at the time of Ex.A.3, the plaintiff is not at all present. Whereas it is the case of the plaintiff that she had paid a sum of Rs.20,000/- on 08.08.2004 and Rs.15,000/- on 10.09.2005 in

cash. The evidence of P.W.4 clearly show that the plaintiff was not present at the relevant point of time.

19. In the judgment in Man Kaur (D) by LRs. Vs. Hartar Singh Sangha reported in 2010 (6) CTC 652, the Honourable Supreme Court has held that

"To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned."

20. From the above, it is very clear that the readiness and willingness refer to the state of mind and conduct of the purchaser and also his capacity of preparedness on the other. Therefore, it is the obligation of the plaintiff to enter into the witness box and give evidence. The plaintiff cannot delegate others to depose on her behalf to prove readiness and willingness. The above judgment squarely applies to the facts in the present case.

21. It is for the plaintiff to establish the readiness and willingness from the very inception of the contract. In the above judgment, the Honourable Supreme Court has also held that even the power of attorney holder has no personal knowledge and he cannot be examined in the place of the principal to give evidence. It is not the case of the plaintiff in her pleadings

that the agreement was entered in the presence of her father P.W.1 and he is acquainted with the facts of the case. Therefore, on the basis of mere authorization, it cannot be said that P.W.1 has knowledge about Ex.A.1. When the plaintiff has failed to examine herself to prove her readiness and willingness and her failure to explain the delay in sending the legal notice and also filing the suit, this Court, on the basis of the evidence of her father cannot come to the conclusion that she has proved the readiness and willingness.

22. The learned counsel for the appellant has produced the judgment in Nanjammal (died) and another Vs. Palaniammal reported in 1993 (2) L.W. 206. In the above judgment, the Division Bench of this Court disbelieved the contention of the defendant that the agreement is a loan transaction. In this case also, the first appellate Court and this Court has found that the agreement is not a result of loan transaction. Therefore, the judgment relied on the side of the appellant will not serve any purpose to the appellant. But at the same time, as discussed above, the readiness and willingness has not been established by the plaintiff. The first appellate Court has analysed the entire aspects. The suit has been filed not only to enforce the agreement but also for delivery of vacant possession of the suit property. The possession of the property is admittedly with P.W.2 on the basis of the registered lease agreement in his favour. The lease, as per the registered lease deed was to expire only on 22.01.2013 and the interest has been created in favour of the lessee. Such being the position, seeking relief of delivery of possession in a suit for specific performance is also not maintainable. Absolutely, there is no evidence available on record to show that she has compelled the defendant to procure the property from the lessee namely the brother of the plaintiff and to validate the title of the plaintiff. Despite there is a specific clause in the agreement with regard to refund of the amount, there is no evidence available on record to show that the plaintiff has in fact had made any attempts to compel the defendant to refund the lease amount to P.W.2. Therefore, the above conduct of the plaintiff clearly in fact prove that the plaintiff was not at all ready and willing from the inception of the contract. Hence, I am of the view that the first appellate Court has rightly dismissed the suit for specific performance granting alternative relief for return of the advance amount interest at the rate of 18% per annum from the date of agreement till the date of decree and thereafter, at the rate of 6% per annum and the judgment of the first appellate Court does not suffer from any illegality or infirmity. Accordingly, the substantial questions of law are answered against the appellant.

23. Accordingly, this Second Appeal is dismissed and the judgment and decree of the first appellate Court is confirmed. Consequently, the connected miscellaneous petition is closed. No cost.

vrc

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

To

1. The District Judge and Appellate Authority,
Nilgiris @ Udagamandalam.

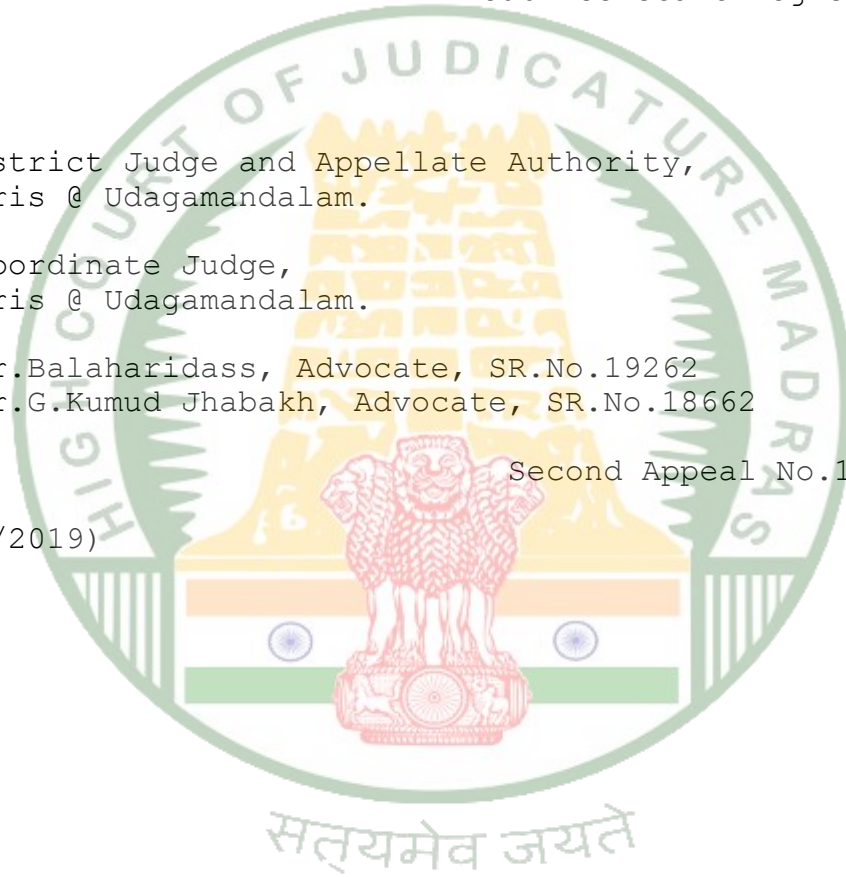
2. The Subordinate Judge,
Nilgiris @ Udagamandalam.

+1cc to Mr. Balaharidass, Advocate, SR.No.19262

+1cc to Mr. G. Kumud Jhabakh, Advocate, SR.No.18662

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Kak (24/07/2019)



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