

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 05.11.2019	Delivered on 14.11.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.822 of 2019
and CMP No.16741 of 2019

M.Mani ..Appellant/Respondent/Petitioner

vs.

1. Suriakala
W/o.Late Ramadayalan

2. Ms.Vishnupriya

3. Ms.Ishwarya .. Respondents/Appellants/Defendants 2 to 4

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree of the learned II Additional Judge, Chidambaram in A.S.No.61 of 2017 dated 14.09.2018 by reversing the Judgment and Decree in OS No.23 of 2011 dated 22.09.2017 on the file of the Sub-Court, Chidambaram.

For Appellant : Mr.J.Ram
for Mr. P.Gopalan
Ms.Vishnupriya
Second Respondent

For Respondents: Second Respondent-Party in person
R1 : Ms.R.Suriyakala
R2 : Ms.Vishnupriya
Party in person Appellant

J U D G E M E N T

The plaintiff in OS No.23 of 2011, who was favoured with a decree for specific performance by the Trial Court upon its reversal by the first Appellate Court, has come up with this Second Appeal.

2. According to the plaintiff, the deceased first defendant Ramadayalan, entered into an agreement of sale agreeing to convey 11 ½ cents of land in Survey No.193/2 of Dhandaswaranallur Village, Chidambaram Taluk, Cuddalore District, for a consideration of Rs.6,00,000/- on 29.01.2010.

3. According to the plaintiff, he paid an advance of Rs.2,00,000/- on the date of the agreement and three months time was fixed for the performance of the agreement. The plaintiff would further contend that one Meerabai filed a caveat, in respect of 17 cents of land in Survey No.193/2 against the deceased first defendant Ramadayalan and the plaintiff himself. On the filing of the Caveat, the plaintiff had required the deceased first defendant to discharge the encumbrance before conveying the suit property as per the agreement dated 29.01.2010.

4. The first defendant who took time sent a notice on 11.10.2010, claiming that he had entered into an unregistered agreement of sale for conveying 11½ cents for a consideration of Rs.12,53,000/- and had received Rs.2,00,000/- as advance. It was also claimed in the said notice that there was another unregistered agreement for conveyance of 2½ cents of land in the same Survey number for a consideration of Rs.2,72,500/-. Since the plaintiff was not ready and willing to perform his part of the contract, the first defendant claimed in the said notice that he has lost the right to seek specific performance. The said notice was replied to by the plaintiff on 20.10.2010 denying the existence of the unregistered agreements referred to in the notice dated 11.10.2010. The plaintiff claimed that he is ready and willing to perform his part of the contract as per the registered agreement dated 29.01.2010 and pay the balance of sale consideration of Rs.4,00,000/-. The plaintiff was forced to sue for specific performance, inasmuch as, the deceased first defendant did not come forward to execute the Sale Deed despite demands.

5. The suit was resisted by the deceased first defendant contending that actually three agreements were entered into on 29.01.2010, the details of the agreements as set out in the written statement are as follows:

1. A Registered agreement for a consideration of Rs.6,00,000/- with recital for payment of advance of Rs.2,00,000/- with respect to 11½ cents land in S.No.193/2.
2. An unregistered agreement for a consideration of Rs.12,53,500/- on the same day with reference to the same

11 ½ cents of land covered by a registered agreement dated 29.01.2010.

3. An unregistered agreement agreeing to convey an extent of 2½ cents for a consideration of Rs.2,72,500/-.

6. The deceased first defendant also claimed that the registered agreement was entered into for a lesser consideration, since the plaintiff who is a Real Estate dealer wanted to save on the stamp duty. It was also contended that the plaintiff while retaining the originals of all the three agreements of Sale and handed over only Xerox copies of the same to the first defendant. The first defendant also claimed that the plaintiff was never ready and willing to perform his part of the contract, pointing out that the period fixed for performance of the contract ended on 29.04.2010 and the plaintiff did not make a demand for performance of the contract till 11.10.2010 namely, the date of issuance of Ex.A2 notice by the first defendant. On the above contention, the first defendant sought for dismissal of the suit.

7. Pending suit, the first defendant died on 29.12.2013 and his wife and two daughters were brought on record as his legal representatives as defendants 2 to 4.

8. At trial, the plaintiff examined himself as P.W.1 and examined one Anandan, who is an attester to the agreement dated 29.01.2010, as P.W.2. Ex.A1 to A8 were marked. The defendants did not let in any oral evidence and they were content with marking Ex.B1 a copy of the information received under the Right to Information Act, from the office of the District Registrar, Chidambaram. Relying upon the fact that Ex.B1 disclosed that the plaintiff had purchased three stamp papers on the same day, the defendants highlighted the possibility of there being three agreements between the parties on 29.01.2010.

9. The Trial Court framed necessary issues and concluded that the case of the defendants that there were three agreements has not been established. The Trial Court also found that Ex.A1 agreement being a registered instrument will have precedence over the so called unregistered agreements entered into on the same day. The Trial Court also faulted the defendants for not letting in any evidence and not producing even the Xerox copies of the unregistered agreements. The Trial Court also concluded

that the plaintiff was always ready and willing to perform his part of the contract. On the above said findings, the Trial Court decreed the suit. Aggrieved defendants 2 to 4 preferred an Appeal in AS No.61 of 2017.

10. Pending Appeal the defendants 2 to 4 filed an Application in IA No.119 of 2018 seeking permission to produce the unregistered agreements dated 29.01.2010 and the copies of the legal notice.

11. The Lower Appellate Court on reconsideration of evidence concluded that though the agreement dated 29.01.2010 is true and valid, the plaintiff was never ready and willing to perform his part of the contract. In coming to the said conclusion, the Lower Appellate Court relied upon the conduct of the plaintiff in not making a demand for performance of the contract within the stipulated time under the agreement Ex.A1. The Lower Appellate Court also took note of the fact that Ex.A1 provides for consequences for non compliance within a time limited under it. The Lower Appellate Court found that the inaction on the part of the plaintiff from the date of the agreement till 11.10.2010, namely, the date on which, the first defendant issued a Ex.A2 notice would show that the plaintiff was not ready and willing to perform his part of the contract.

12. The Lower Appellate Court considered the documents, namely, Sale Deeds Ex.A5 to A8 that were filed by the plaintiff to show that he has got means to pay the balance of sale consideration and take a sale deed. The Lower Appellate Court, however, found that mere establishment of means to pay the balance of sale consideration by itself would not demonstrate readiness and willingness. The Lower Appellate Court also relied upon the judgment of the Hon'ble Supreme Court in Padmakumari and Ors. V. Dasayyan and others, reported in 2015 (6) CTC 545, and the judgment of this Court in Babulal Tater & Other v. Harakh Chand J.Golecha & Others, reported in 2017 (4) LW 700. The Lower Appellate Court also pointed out that the pleadings of the plaintiff do not satisfy the requirement of Order VI Rule 3 of the Code of Civil Procedure.

13. On the aforesaid findings, the Lower Appellate Court concluded that the plaintiff is not entitled to specific performance. Therefore, the Lower Appellate Court allowed the Appeal and dismissed the suit. The Lower Appellate Court also dismissed IA No.119 of 2018 on the ground that the appellants/petitioners have not satisfied the requirements of

Order XLVII Rule 27 of the Code of Civil Procedure, which enables them to produce additional evidence in the Appellate Court. Aggrieved the plaintiff is on Second Appeal.

14. The following questions of law were framed by this Court for consideration on this Appeal:

a) Whether the learned Judge is right in reversing the well considered judgment and decree of the trial Court, when admittedly, the trial Court has exercised discretion in granting the relief of specific performance?

b) Whether the learned Judge is right in not advertng to the recital found in Ex.A1 dated 29.01.2010 that in the event or any encumbrance/dispute during the subsistence of the contract, the encumbrance is to be cleared before completing the sale transaction?

c) Having observed that time is not the essence of the contract with regard to sale of immovable property, whether the learned Judge is right in holding that the appellant was not ready and willing to purchase the suit property?

d) Whether the learned judge is right in advertng to the fact that to show his readiness and willingness to purchase the suit property, the appellant did not come forward to deposit the balance sale consideration amount into court?

e) Whether the learned Judge erred in not advertng to the law settled reported in 2011 (3) Madras Weekly Notes 559 and also in the recent decision reported in 2019 (1) MWN 108 that the deposit of balance sale consideration into Court is not contemplated under Section 16(c) of the Specific Relief Act?

f) Whether the learned Judge is right in not advertng to the fact that mere allegation in the plaint with regard to readiness and willingness will not be sufficient to prove his claim?

15. I have heard Mr.J.Ram, learned counsel appearing for Mr.P.Gopalan, for the appellant and the second respondent appearing in person.

16. Mr.J.Ram, learned counsel appearing for the appellant while elaborating on the questions of law would submit that the

Lower Appellate Court was in error in concluding that the plaintiff was not ready and willing to perform his part of the contract. Pointing out that the Caveat was filed by Ms.Meerabai on 11.03.2010, under Ex.A4 claiming a right over the entirety of the property would show that there was some encumbrance over the property and under the terms of the agreement dated 29.01.2010, the deceased first defendant was obliged to clear the encumbrances before the Sale Deed was executed. He would also further submit that having found that the time was not essence of the contract, the Lower Appellate Court ought not have dismissed the suit on the ground that the plaintiff was not ready and willing to performance his part of the contract.

17. The learned counsel would further argue that the Lower Appellate Court erred in faulting the plaintiff for not depositing the balance of sale consideration into Court when this Court and the Hon'ble Supreme Court have repeatedly held that deposit of balance of sale consideration is not a must in a suit for specific performance to prove readiness and willingness.

18. Contending contra, the third respondent appearing in person would submit that the time fixed under the agreement was three months which ended on 29.04.2010. Though it is alleged that caveat was served on 11.03.2010 by Meera Bai, the plaintiff did not move its little finger towards in the direction of performing his part of the contract till 11.10.2010, when the deceased first defendant issued a notice. Only in the reply dated 20.10.2010, did the plaintiff make a demand for performance of the registered agreement of sale dated 29.01.2010 marked as Ex.A1. The silence on the part of the plaintiff from the date of the agreement till 20.10.2010, i.e. the date of the reply notice would demonstrate his unwillingness or absence of readiness and willingness on his part to pay the balance of sale consideration and take the Sale Deed. She would also further contend that the fact that the plaintiff had purchased three stamp papers on 29.01.2010 would probalise their case that there were three agreements.

19. I have considered the rival submissions.

20. The agreement dated 29.01.2010 fixes a period of three months for payment of balance of sale consideration and for execution of sale deed. The plaintiff has not made a demand for performance within the three months period fixed under the agreement. Though a caveat was served on him at the instance of Meerabai on 11.03.2010, even thereafter till 20.10.2010, when he

issued a reply notice under Ex.A3, he did not demand performance of the contract. The plaintiff is a trader in Real Estate as has been admitted by him in his cross-examination. Therefore, he ought to have exhibited his readiness and willingness throughout the period from the date of the agreement till the date of the filing of the suit.

21. As rightly pointed out by the Lower Appellate Court, despite the notice dated 11.10.2010, the plaintiff came to Court only on 25.02.2011 i.e. nearly four months after the issuance of Ex.A2 notice. Though time was not essence of the contract, the Hon'ble Supreme Court in Saradamani Kandappan v. Rajalakshmi and others, reported in 2011 (4) LW 97, has held that the plaintiff in a suit for specific performance must prove that he was always ready and willing to perform his part of the contract right from the date of the agreement till date of filing of the suit. The same view has been reiterated by the Hon'ble Supreme Court in Padmakumari and Ors. V. Dasayyan and others, reported in 2015 (6) CTC 545.

22. The Lower Appellate Court has rightly pointed out that there is no explanation on the part of the plaintiff for his silence or his inaction for the period of almost 10 months from 29.01.2010 till 20.10.2010, namely, the date of Ex.A3 reply notice. Even after issuance of the reply notice under Ex.A3, the plaintiff chose to wait for four months to file a suit on 25.02.2011. This inaction on the part of the plaintiff would definitely have a bearing on his entitlement to the discretionary relief of specific performance. Of course the Hon'ble Supreme Court has in R.Lakshmikantham v. Devaraji, reported in (2019) 8 SCC 62, held that merely because the plaintiff delayed the filing of the suit after accrual of cause of action, he cannot be non suited on the ground of readiness and willingness. The said preposition of law is not in dispute, but the requirement of law that the plaintiff in a suit for specific performance should demonstrate his readiness and willingness from the date of the contract till date of filing of the suit is well settled.

23. As rightly pointed out by the Lower Appellate Court, the plaintiff has not proved that he was always ready and willing to perform his part of the contract. A mere allegation in the plaint cannot be a substitute for actual readiness and willingness. Nothing prevented to the plaintiff from demanding execution of Sale Deed within the time fixed under the agreement. Looking at the overall circumstances and the fact that Ex.A1 agreement prescribes the consequences of failure to

perform within the time fixed, I am of the considered opinion, that unless the plaintiff explains his inaction for nearly a year from the date of the agreement till date of the filing of the suit, he cannot be favoured with the decree for specific performance. Filing of a caveat alone cannot, in my considered opinion, amount to creation of an encumbrance over the property which would justify inaction on the part of the plaintiff.

24. The Lower Appellate Court has considered the evidence on record and has come to the factual conclusion that the plaintiff was not ready and willing to perform his part of the contract. I have been taken through the evidence by the learned counsel for the appellant and I am not able to conclude that the factual conclusion reached by the Lower Appellate Court is either perverse or improbable. Once I find that the factual conclusion reached by the Lower Appellate Court is probable or plausible, I do not think that I can interfere with the said conclusion sitting in a Second Appeal even if another view is possible. The Lower Appellate Court being a final Court of fact has appreciated the evidence and has come to a particular conclusion based on the evidence. It has also given its reasons for not agreeing with the conclusions reached by the Trial Court.

25. In view of the above,

(i) the questions of law a, b, c and f are answered against the appellant to the effect that the filing of the caveat alone cannot amount to create an encumbrance over the property and the Lower Appellate Court was right in reversing the judgment of the Trial Court on the ground that the plaintiff was not ready and willing to perform his part of the contract.

(ii) The questions of law (d) and (e) are answered to the effect that the plaintiff in a suit for specific performance is not required to deposit the balance of sale consideration in order to prove his readiness and willingness. This however, would not alter the result of the Appeal, inasmuch as, the Lower Appellate Court has concluded that the plaintiff has not proved his readiness and willingness on other grounds also and non deposit of sale consideration is not the only ground on which the Lower Appellate Court has non suited the plaintiff.

26. In view of the answers to the questions of law, the Second Appeal fails and is accordingly dismissed. However, there will be no order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-V)

//True copy//

Sub Assistant Registrar

jv

To

1. The II Additional Judge,
Chidambaram.

2. The Sub Judge,
Chidambaram.

Copy To : The Section Officer,
V.R.Section,
High Court of Madras.

+1cc to Mr.P.Gopalan, Advocate SR.No.94798

+4cc to Ms.R.Suriyakala, Advocate SR.No.91439, 94408

S.A.No.822 of 2019
and CMP No.16741 of 2019

RJI (CO)
GMY (03/12/2019)

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