

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27-02-2020

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.264 of 2007

Mrs.Chitra Prasad

...Appellant/Plaintiff

Vs

1. Mr.S.Narayanamurthy
2. Mr.Subramanian Iyer
3. Mrs.Venkatalakshmi
4. Mr.Devanarayanan
5. Mr.Harihara Kumar

...Respondents/Defendants

Appeal under Section 96 of the Code of Civil Procedure, 1908, read with Order 41, Rule 1 of the Code of Civil Procedure, 1908 against the judgment and decree made in O.S.No.285 of 2004 on the file of the Additional District Judge, FTC-I, Coimbatore, dated 13/4/2006.

For Appellant : Mr.P.R.Balasubramanian
For Respondents : Mr.S.Jeyaraman, Sr. Counsel
for Mr.R.Agilesh (for R.1)

J U D G M E N T

The appeal suit on hand is directed against the judgment and decree passed in O.S.No.285 of 2004 dated 13.04.2006.

2. The plaintiff is the appellant before this Court and the suit was instituted for specific performance.

3. The facts in nutshell to be considered are that the father of the defendant one Mr.Narayanan Iyer purchased the suit mentioned property through sale deed dated 27.07.1994. Mr.Narayanan Iyer has executed the registered will in favour of his grandson who is the defendant, in respect of the suit property and the said registered will was executed at Madras on 28.02.1992. Mr.Narayanan Iyer died at Chennai on 30.10.1992 and thereafter, the defendant entered into a suit sale agreement with the plaintiff on 21.06.2001, which is marked as Ex-P1. The plaintiff applied for a bank loan which was also sanctioned on

31.07.2001 for a sum of Rs.3,40,000/-. Again Sundaram Home Finance Limited has also sanctioned Rs.3,30,000/- in favour of the plaintiff for the purchase of suit mentioned property on 08.11.2001. On 04.12.2001, tripartite agreement has been prepared for an execution between the plaintiff and defendant and the Allahabad bank for the loan amount of Rs. 3,50,000/-. The contention of the plaintiff was that, he was ready and willing to perform his part of the contract by paying balance sale consideration as the total sale consideration fixed was Rs.7,00,000/- and out of that the plaintiff had paid Rs.1,50,000/- towards advance. The time for completion of contract was fixed between the parties as six months and the property is house property situated at Coimbatore City, measuring near about 2400 sq.ft. with the built up area of 650 sq.ft.

4. The plaintiff states that, though he was ready and willing to perform his part of the contract, the defendant was evading his performance and further he has not produced a copy of the probate enabling the plaintiff to get disbursement of the loan amount which was already sanctioned by the bank. Thus, it is the defendant who committed default by not performing his part of contract and therefore, the plaintiff is entitled to the relief of specific performance. Notice was issued. Reply notice was also issued by the defendant. Thus, the plaintiff was constrained to institute the suit for specific performance.

5. The defendant disputed the contentions raised by the plaintiff and stated that the time for execution of suit sale agreement was fixed as six months and the suit sale agreement was signed between the parties on 27.01.2001. The defendant admitted the fact that he had received an advance amount of Rs.1,50,000/- from the plaintiff and he could not able to produce the probate within the time limit as fixed in the suit sale agreement. In view of the fact that the sale transaction were not materialized, the defendant cancelled the sale agreement on 10.01.2002 and refunded the entire advance amount on Rs.1,50,000/- to the plaintiff. The plaintiff kept the advance amount for about two years and thereafter, he sent back the advance amount to the defendant.

6. The defendant contended that he cancelled the agreement and refunded the advance amount and the said advance amount refunded was sent back by the plaintiff to the defendant and therefore, the plaintiff is not entitled for the relief of specific performance as he had not intended to sell the suit property after completion of the period of six months as per the sale agreement.

7. The Trial Court framed the issues as to whether the suit is barred by limitation , whether the plaintiff is entitled for the relief of specific performance, whether the first defendant is obligated to execute the sale deed without probating the Will, whether the possession of the suit property was handed over to the plaintiff, whether the plaintiff is entitled for the relief of possession, whether the plaintiff is entitled for the alternate relief of Rs.5,00,000/- towards damages, whether the advance amount is to be refunded and to what relief the plaintiff is entitled.

8. The plaintiff examined himself as PW1 and marked Ex-A1 to Ex.A7. On behalf of the defendants, the first defendant was examined as DW1 and one Mr.Venkatesan was examined as DW2. Ex.B1 to Ex.B3 were marked on the side of the defendant. The Trial Court considered the terms and conditions agreed between the parties in the suit sale agreement dated 21.06.2001. It is agreed between the parties to sell the property mentioned in the suit for a total sale consideration of Rs.7,00,000/- and an advance amount of Rs.1,50,000/- was paid to the plaintiff from the defendant. The time limit fixed for execution of the contract was six months from the date of the agreement. Based on the suit sale agreement, the plaintiff also submitted a loan application before the bank and the bankers demanded furnishing of the probate order as the defendant acquired title in the Will executed by his grand father at Chennai. Thus, the Will is to be probated and admittedly, the Will was not probated at the time of the suit sale agreement. Under these circumstances, the plaintiff has stated before the Trial Court that he was ready and willing to perform his part of the contract as his loan was also sanctioned by the bank and he has paid an advance amount of Rs.1,50,000/- and it is the defendant who failed to perform his part of the contract which resulted in non-execution of sale deed with reference to the suit sale agreement.

9. It is brought to the notice of this Court that the plaintiff has performed his part of the contract within the period of three months from the date of suit sale agreement. Therefore in all respect the plaintiff was ready and willing to perform his part of contract by paying the balance sale consideration as agreed between the parties and the defendant could not able to submit the probate so as to acquire the title. The bankers also demanded protection of probate order so as to disburse the loan amount in favour of the plaintiff. Thus, the facts remains that, the sanctioned loan count not be disbursed on account of the non-production of the probate order to be issued by the competent Court. However, the plaintiff could able to establish that the loan application was processed and the loan was sanctioned and it was not disbursed on account of the

fact that the defendant had not produced the probate order enabling bankers to release the loan amount. However, a draft tripartite agreement was kept ready between the bankers as well as the plaintiff and defendant and under these circumstances, it is contended that the plaintiff was ready and willing to perform his part of the contract. The Trial Court considered all these aspects and arrived a conclusion that the plaintiff is not entitled for the relief of specific performance. However, the plaintiff is entitled for the alternate relief of refund of advance amount of Rs.1,50,000/- with interest.

10. The learned counsel appearing on behalf of the appellant mainly contended that the Trial Court committed an error in not appreciating the documents as well as the evidences, produced by the plaintiff. The plaintiff could able to establish that he was always ready and willing to perform his part of the contract. It is the defendant who committed lapses by not producing the required documents and therefore, denial of relief of specific performance by the Trial Court is improper and not in consonance with the legal principles.

11. The learned counsel for the appellant is of the opinion that in a suit for specific performance when the plaintiff could able to establish the readiness and willingness and the receipt of advance also admitted by the defendant and further, the defendant admitted the fact that he had not produced the probate order, then, there is no reason whatsoever to deny the relief of specific performance. In support of the said contention, the learned counsel for the appellant solicited the attention of this Court with reference to the chief examination of PW1 which portrays that the plaintiff had submitted a loan application before the bank and the bankers have raised an objection that the defendant is claiming title through a Will and the said will was executed at Chennai and therefore it is to be probated. A draft tripartite agreement was also kept ready by the plaintiff, but the defendant had not produced the probate order and therefore the bankers could not able to disburse the loan amount which was sanctioned the loan. All these factors were established and even during the cross examination of PW1, the plaintiff in his deposition has stated that he was ready and willing to complete the sale proceedings and the defendant was evading his performance of the contract which resulted in institution a suit for specific performance.

12. The learned Senior counsel appearing on behalf of the respondent disputed the contention raised on behalf of the appellant by stating that admittedly, the suit sale agreement was signed between the parties on 21.06.2001, further it is an admitted fact that a total sale consideration was fixed as Rs.7,00,000/-. It is admitted that Rs.1,50,000/- was paid by way

of advance. However, the plaintiff denied the fact that the suit sale agreement was cancelled by the defendant on 10.01.2002 and the advance amount of Rs.1,50,000/- was also refunded by the defendant in favour of the plaintiff. The learned Senior counsel further contended that the said refunded amount was returned back to the defendant once again by the plaintiff after the lapse of about six months. Therefore, the intention of the defendant not to sell the suit mentioned property was expressed soon after the completion of six months period as agreed by the parties in the suit sale agreement. When the defendant expressed his unwillingness to proceed with the sale and refunded the advance amount after completion of the agreed time limit of six months, then there is no obligation on the part of the defendant to perform his part of the contract and therefore, the Trial Court has rightly rejected the relief of specific performance and ordered for the refund of the advance amount which is in consonance with the legal principles and there is no infirmity as such.

13. The learned Senior Counsel made a submission that the suit sale agreement was signed between the parties on 21.06.2001 and that point of time, the sale consideration was fixed as Rs.7,00,000/-. On account of the efflux of time, the market price of the suit mentioned property escalated to such an extent and now after a lapse of about 19 years, in the event of considering the relief of specific performance, an inequality would be created and the respondent defendant would be greatly prejudiced. It is an admitted fact that the suit mentioned property situates in Coimbatore City and the land measuring one ground (2400 sq.ft. approx.) with the built up area of 650 sq.ft.

14. The Trial Court considered the judgment of the Supreme Court regarding the principles to be followed for grant of the discretionary relief of specific performance. The Trial Court in para 15 of the judgment found that, whether the plaintiff was genuinely ready and willing to settle the balance sale consideration as per the suit sale agreement, the evidences were considered. The Trial Court arrived a finding that the plaintiff has not established through any documents that he was ready to settle the balance sale consideration and in the event of not establishing the fact that the plaintiff is capable of settling the balance sale consideration, the discretionary relief cannot be granted by the Courts.

15. This apart, the Trial Court arrived a conclusion that the Will was probated admittedly, the plaintiff was depending on the bank loan for the settlement of the balance sale consideration. Thus, only on performing the mutual obligations of the parties, it could be possible to complete the sale and not otherwise. Under those circumstances, the Trial

Court arrived a conclusion that it is not preferable to grant the relief of specific performance with these ambiguities and improbabilities and consequently, the grant of alternate relief of refund of advance amount with interest.

16. This Court while considering the complex, facts and circumstances portrayed in the case on hand, the time limit fixed for completion of contract was six months. However, the defendant could not able to probate the Will and handover the same to the plaintiff enabling the plaintiff to get the loan amount disbursed. Under those circumstances, the plaintiff has produced the proof regarding the sanctioning of loan application. However, the disbursement of the loan is subject to the production of the probate order to be handed over by the defendant to the plaintiff. The proposed tripartite agreement is of no avail to the plaintiff as it is only a proposed tripartite agreement which has not been materialized. This being the factum, performance of mutual obligation both by the plaintiff and the defendant was required for the purpose of execution of sale.

17. Under these circumstances, the contention of the defendant that he had cancelled the suit sale agreement on 10.01.2002 is to be considered. The defendant had returned the advance amount which was again sent back to him by the plaintiff within a period of six months. However, the fact remains that the defendant had cancelled the agreement and returned the advance amount.

18. It is brought to the notice of this Court by the learned counsel for the appellant that the cheque sent by the defendant was not realized and the same cheque was sent back to the defendant by the plaintiff. Thus, the plaintiff has not accepted the cancellation unilaterally made by the defendant. However, this Court has to consider whether the cancellation was done unilaterally or by mutual consent. The facts remains that, the defendant issued a letter cancelling the suit sale agreement along with the cheque towards refund of advance amount. Thus, the intention of the defendant in this regard is to be considered. Soon after the defendant realized that he could not able to secure the probate order for the purpose of completion of sale, he sent a cancellation letter cancelling the suit sale agreement along with the cheque refund of advance amount. Thus, the defendant expressed his unwillingness to proceed with the sale agreement and under these circumstances, the Trial Court has not committed any perversity in appreciating the facts as well as the evidences.

19. Suit for specific performance is instituted for the purpose of executing the sale agreement. When there are

ambiguities in the matter of performing the obligations by the respective parties, it is not preferable to grant relief of specific performance. The rights are not created in view of the fact that an existing rights of the parties are only based on the agreement and admittedly, in the present case, the agreement is valid for six months, within a period of six months the parties could not able to execute the contract. Mutual obligations to be performed were not done on account of various facts as stated above. This being the facts and circumstances, the Trial Court has not committed any perversity in arriving a conclusion that the plaintiff is not entitled for the relief of specific performance. This Court is of the considered opinion that the relief of specific performance being the discretionary, Courts are bound to consider all the facts, circumstances, conducts as well as the inequity if any arises in the event of granting relief of specific performance. This Court found the opinion that in the event of granting the relief of specific performance inequity arises then the relief is to be declined.

20. In the present case, the suit sale agreement was signed between the parties on 21.06.2001 and the suit was instituted by the plaintiff in the year 2002 which was numbered by the Trial Court in the year 2004 as O.S.No.285 of 2004 and the said suit was disposed of by the Trial Court on 13.04.2006 and the appeal suit was instituted in the year 2007 and it is taken up for final hearing in February 2020. Almost 19 years lapsed. Admittedly, the market price of the suit property escalated to such a higher extent and the sale consideration agreed between the parties are not comparable with reference to the current market price of the suit property. This apart, the plaintiff also could not able to establish that he was ready to settle the balance sale consideration as on the sale consideration. He was also depending on the loan amount and the loan amount cannot be disbursed unless the probate order is handed over to the bankers. This being the facts and circumstances, this court is of an opinion that now after this length of time, it is not preferable to grant the relief of specific performance and in the event of considering such a relief, an inequity would arise.

21. Even recently, the Hon'ble Supreme Court of India, in the case of Surinder Kaur Vs. Bahadur Singh, reported in (2019) 8 SCC 575, wherein the Hon'ble Supreme Court observed as under:-

"14. A perusal of Section 20 of the Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely because the plaintiff is legally right, the court is not bound to grant him the relief. True it

is, that the court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub-clause (c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the court can refuse to grant such discretionary relief. Explanation (2) to the section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff."

22. The learned Senior Counsel made a submission that the advance amount of Rs.1,50,000/- had already been deposited before the Trial Court. Thus the appellant/plaintiff is permitted to withdraw the said amount with accrued interest by filing an appropriate application before the Trial Court. The appellant/plaintiff is directed to vacate the suit schedule property and handover the vacant possession to the respondent/defendant within a period of four months from the date of receipt of a copy of this judgment.

23. As far as the alternate relief is concerned, the Trial Court has rightly granted the same in view of the fact that even in the case plaintiff is not prayed for an alternate relief, he would be entitled for the relief. However, in the present case, an alternate relief is sought for in the plaint and therefore, the Trial Court has considered the same and granted relief of refund of advance amount with interest. Thus, the said relief granted in favour of the plaintiff is to be confirmed. For all these reasons, this Court is of the considered opinion that the Trial Court has appreciated the facts, documents as well as the evidences placed by the respective parties in a right perspective and in consonance with the legal principles and as such there is no perversity or infirmity. Consequently, the judgment and decree dated 13.04.2006 passed in O.S.No.285 of 2004 is confirmed. Consequently, A.S.No.264 of 2007 stands dismissed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

The Additional District Judge
FTC-I, Coimbatore

+1 CC to Mr.P.R.Balasubramanian, Advocate sr 17228
+1 CC to T.Dhanasekaran, Advocate sr 17274.

A.S.No.264 of 2007

SJ(CO)
SP(21/08/2020)



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