

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved :10.11.2020
Pronounced on :19.11.2020

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1315 of 2009
and
M.P.No.1 of 2009

1.Kuppan
2.Palaniammal

... Appellants/Defendants

/versus/

Muthusamy

..Respondent /Plaintiff

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 29.08.2008 made in A.S.No.18 of 2008 on the file of the Principal Sub-Court of Gobichettipalaym, Erode District in reversing the well considered judgment and decree dated 20.12.2007 made in O.S.No.435 of 2004 on the file of District Munsif Court at Sathyamangalam, Erode District.

For Appellants :Mr.T.Murugamanikam,
Senior Counsel for
Mr.Ma.P.Thangavel

For Respondent :Mr.R.T.Doraisamy

J U D G M E N T

(The case has been heard through Video Conferencing)

The second appeal is filed by the plaintiff, being aggrieved by the judgment and decree of the first appellate Court, reversing the judgment and decree of the trial Court by allowing the suit for Specific Performance.

2.The brief facts of the case are as below:-

As per the plaint, the plaintiff and the 1st defendant entered into a sale agreement on 10/07/2001 in respect of the suit schedule property to an extent of 2.50 acres agricultural land in S.Nos.130/5 and 139/1 at Sungakarampalayam Village, Bhavanisagar Panchayat Union, Sathyamangalam Taluk. As per the sale agreement, the sale consideration was fixed as Rs.55,000/- and advance of Rs.35,000/- received by defendants. 15 months time was fixed for completion of contract. In the said sale

agreement, the parties have specifically agreed that if the purchaser fails to pay the balance sale consideration of Rs.20,000/- within the period of 15 months, the money advanced will be forfeited. Contrarily, if the vendor refuse to execute the sale deed, despite the purchaser is ready to pay the balance sale consideration, the purchaser will have the right of enforcing the agreement through the Court.

3. Within 15 months time the agreement not got concluded. The purchaser/plaintiff issued a notice dated 31.01.2003 to the vendor/defendant calling upon him to execute the sale deed expressing his ready and willingness to perform his part of agreement to pay the balance amount. The notice was received by the vendor/1st defendant on the next day and he caused reply notice dated 03.02.2003 refuting the agreement stating that time was essence of the agreement, since the purchaser has failed to pay the balance amount within the time prescribed, he has forfeited the advance money and also the right to enforce the agreement.

4. The suit presented but before it was taken on file, the vendor had settled the suit property in favour of his wife the 2nd defendant, through a registered settlement deed dated 10.03.2003. Therefore, the suit was subsequently amended to the effect to declare the said settlement deed as null and void and to enforce the agreement dated 10.07.2001.

5. The first defendant admitting the agreement and receipt of the advance money Rs.35,000/- pleaded that before the expiry of the time prescribed for performance, on the failure of the plaintiff/purchaser to pay the balance amount, the agreement had come to end. At the end of the 15th month, the advance given by the purchaser/plaintiff got forfeited as per the terms of the agreement and his right to enforce the agreement got lapsed. There is cause of action for the suit.

6. Based on the pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for relief of Specific Performance?

2. Whether the plaintiff is entitled for a decree of declaration that the settlement deed executed by the first defendant in favour of the 2nd defendant on 10.03.2003 as null and void?

3. Whether the suit is barred by limitation?

4. What other relief the plaintiff is entitled to?

7. The Trial Court, after considering Article 54 of the Limitation Act and Section 16(c) of the Specific Relief Act and taking into consideration the facts pleaded and proved, held that the parties have specifically prescribed the time for

completing the agreement and the forfeiture clause indicates that the time was essence of the agreement. There is no evidence to show that the plaintiff before expiry of the period expressed his ready and willingness to perform his part of agreement. Hence, the suit is barred by limitation. Further, having held that the agreement cannot be enforced, the settlement deed executed by the first defendant in favour of the 2nd defendant cannot be declared as void.

8. Aggrieved by the dismissal of the suit, the plaintiff has preferred the appeal A.S.No.18/2008 on the file of the Principal Sub Court, Gobichettipalayam.

8. The first appellate Court, considering the evidence of PW-1 and PW-2 accepted the case of the plaintiff that the plaintiff/purchaser was ready and willing to perform his part of contract. He on several occasions orally requested the first defendant to execute the sale deed but the 1st defendant evaded the execution of the sale deed on some pretext or other. Pointing out that the vendor/1st defendant had not repudiated the agreement immediately on expiry of 15 months period. Hence, the plea of limitation and time as essence of the agreement not sustainable. Having not issued any notice to the purchaser/plaintiff, soon after expiry of 15 months, the defendants cannot plead that that sale agreement is barred by limitation on the premise that the time is essence of the sale agreement. Having held so, the first appellate Court also declared the settlement deed executed by the 1st defendant in favour of the 2nd defendant after institution of the suit is a collusive transaction. Hence, declared it as invalid. Against the said reversing judgment, the defendants are before this Court by way of the second appeal.

9. The learned Senior Counsel appearing for the appellants would submit that when the parties have expressly agreed to complete the contract of sale within a time of 15 months and also in writing had set out the consequence that on failure of either party, time fixed in the agreement should be taken as essence of the agreement. Therefore, no expressed notice required to repudiate the contract. Contrarily, if the purchaser was truly ready and willing to perform his part, he should have expressed his ready and willingness within the time prescribed or at least immediately after the time prescribed, not after 3 months of expiry of time fixed. Therefore, under Section 16(c) of the Specific Relief Act, the plaintiff/purchaser have no right to enforce the agreement.

10. Further, the learned Senior Counsel appearing for the appellants would submit that nowhere the plaintiff/purchaser by his conduct established his ready and willingness to perform his part of agreement with the given time. Even after expiry of

period prescribed to perform the agreement, he waited for 3 more months to cause legal notice and thereafter, instituted the suit which was returned for some defect and meanwhile, he had also instituted money suit against the vendor in O.S.No.113 of 2003 before the District Munsif Court, Sathyamangalam. The learned Senior Counsel appearing for the appellants would also submit that the ready and willing of the purchaser has to be inferred from the conduct. In this case, the conduct of the purchaser clearly indicates that he was not ready and willing to complete his part of the agreement in time. Hence, the well considered judgment of the trial Court has to be restored by allowing the second appeal.

11.The learned counsel appearing for the respondent would submit that the subject suit property is an agricultural land and time was not essence of the agreement. Through PW-2 the respondent has established that the purchaser requested the vendor to measure the land and complete the sale. He evaded and delayed the measurement of the property. As a consequence, the notice for performing the agreement was issued and suit has been instituted. The limitation prescribed under the Article 54 of the Limitation Act, is 3 years from the date of refusal or from the date of fixed for completion of agreement. Since the suit was filed well within the limitation, the finding of the trial Court is erroneous, which was rightly set aside by the first appellate Court and therefore, sought for dismissal of the second appeal.

12.Heard the learned Senior Counsel appearing for the appellants and the learned counsel appearing for the respondent. Records perused.

13.The admitted facts in this case is that the agreement for sale was entered between the parties on 10.07.2001 with 15 months period for completion of the agreement. Out of Rs.55,000/- fixed as sale consideration, Rs.35,000/- received by the vendor and balance of Rs.20,000/- was due. The purchaser has caused notice calling upon the vendor to receive the balance sale consideration and to execute the sale deed. This notice was issued on 30.01.2003 for which the vendor has replied that the agreement has become unenforceable since time for performance was essence of the agreement.

14.Second 16(c) of the Specific Relief Act reads as below:

16. Personal bars to relief-

Specific Performance of a contract cannot be enforced in favour of a person-

a)

b)

c) who fails to aver* and prove that he has performed or has always been ready and

willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendants.'

(the word 'aver' deleted by amendment w.e.f 1-10-2018. Since the suit is laid prior to the amendment, the legal and factual position as on the date of cause of action is under consideration)

15.As far as the facts of the case is concerned, the trial Court has erred in highly relying upon Section 16(c) of the Specific Relief Act, which speaks about forfeiture of advance money, if not completed within the 15 months period, ignoring Article 54 of the Limitation Act. The conduct of the purchaser/plaintiff that he was ready and willing to perform his part of the agreement is spoken through PW-2 and through the pre-suit notice marked as Ex.A2. The property being an agricultural land, in the absence of evidence that the time prescribed in the agreement was essence of the agreement, mere recital is not sufficient to hold time is essence of the agreement. It is settled principle long back by the Supreme Court that, the Fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract (Gomathinayagam Pillai -vs- Palanisami Nadar: 1967 SC 1005). The intention to treat the time as essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not of the essence of the contract. (Govind Prasad -vs- Hari Dutt: 1977 (SCR) 877).

16.It is a fact that, when the period specified for completion of contract expired on 09.10.2002, the plaintiff/purchaser had not given any explanation for not causing notice and institute the suit immediately. The non-completion of agreement within 15 months time agreed and the delay of 3 months to cause notice expressing ready and willingness and calling upon the vendor to come and complete the contract perhaps has lead to an inference that the plaintiff had no intention to get his contract completed within the time agreed. The term 'ready and willing' has to be inferred through the conduct. The delay of 3 months to cause notice even after expiry of 15 months period prescribed under the agreement and institution of a parallel suit for recovery of money against the vendor had weighed the mind of the trial Court to dismiss the suit.

17. It is pertinent to refer the judgment of the Hon'ble Supreme Court in Madhukar Nivrutti Jagtap & others v. Smt.Pramilabai Chandulal Parandekar reported in 2020-3-LW-693

para 13.2, which reads as below:

"13.2 The question as to whether the plaintiff seeking specific performance has been ready and willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case. The requirement is not that the plaintiff should continuously approach the defendant with payment or make incessant requests for performance. For the relief of specific performance which is essentially a species of equity but has got statutory recognition in terms of the Specific Relief Act, 1963 (Its forerunner being the Specific Relief Act, 1877) the plaintiff must be found standing with the contract and the plaintiff's conduct should not be carrying any such blameworthiness so as to be considered inequitable. The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the plaintiff in particular."

In this case the Apex Court has explained that when the suit for specific performance is filed within the time of limitation, delay cannot be put against the plaintiff.

18. In *Mademsetty Satyanarayana v. G. Yelloji Rao and others* reported in AIR 1965 Supreme Court 1405, at paragraph 7, the Apex court has held that,

"Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems English and Indian qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere

delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; it is beyond time, the suit will be dismissed as barred by time: in either case, no question of equity arises."

19. In the above Judgment, the Hon'ble Supreme Court has referred a Division Bench judgment of Madras High Court, which is worth referring, hence extracted below:-

"In *Chamarti Suryaprakasarayudu v. Arardhi Lakshminarasimha*, 26 Mad LJ 518 at pp. 521, 523 : (AIR 1914 Mad 162 at pp. 463, 464), a Division Bench of the Madras High Court rightly pointed that delay by itself was not a ground for refusing to give a decree in a suit for specific performance. Sadasiva Aiyar, J., observed :

"I think that it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part."

Seshagiri Aiyar, J., said much to the same effect, thus :

"There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the legislature has not intended that mere laches should be one of the grounds for refusing specific performance."

20. Therefore, the forfeiture clause and delay in causing notice before institution of suit cannot take away the right of the agreement holder seeking enforcement of contract, when he had come forward with a plea that he was ready and willing to perform his part of contract and it was the vendor, who had delayed the process. To substantiate his plea, he has also examined PW-2. In the absence of contra evidence to the PW-2 evidence, the case of the plaintiff is more probable.

21. Therefore, the judgment of the first appellate Court

reversing the judgment of the trial Court by allowing the suit for specific performance based on facts requires no interference. Since this Court finds no Substantial Question of Law involved in this matter, the judgment and decree of the first appellant Court is confirmed. As a result, the Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

Ari

To:

- 1.The Principal Subordinate Judge,
Gobichettipalayam, Erode District.
- 2.The District Munsif Court,
Sathyamangalam, Erode District.

Copy To

The Section Officer,
V.R. Section, High Court,
Madras.

+1cc to Mr.Ma.P.Thangavel, Advocate, S.R.No. 37330

S.A.No.1315 of 2009
and
M.P.No.1 of 2009

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