

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 27.11.2020	Pronounced on: 01.12.2020
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CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.815 of 2007

G.Madavan

.. Appellant

/versus/

1.L.Koteeswaran

2.Venkatarama Chettiar

3.Janakiraman Chettiar

.. Respondents

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.23 of 2001 dated 06.07.2005 on the file of the Principal District Court, Chengalpattu, confirming the Judgment and Decree of the trial Court in O.S.No.63 of 199 on the file of the Subordinate Judge, Thiruvallur dated 16.11.2000.

For Appellant : Mr.K.R.Arun Shabari

For Respondents : Mr.P.K.Harinath Babu for
Mr.P.Muthukumarasamy for R1

: No appearance for R2 & R3

J U D G M E N T

(The case has been heard through Vedio Conference)

This Second Appeal is filed by the plaintiff, against the concurrent finding of the Courts below.

2. The suit is for specific performance based on the agreement dated 12.01.1991. Alleging on receipt of Rs.1,000/- as advance as against the total sale consideration of Rs.53,580/-, the defendant handed over the possession of the suit property granting three months time to pay the balance sale consideration and get the sale deed registered. Additional relief of delivery of possession sought, in case Court comes to the conclusion the possession of the suit property not given to the plaintiff under the suit sale agreement. According to the plaintiff, he was always ready and willing to perform his contract. He was ready with the balance sale consideration kept deposited in his savings bank account and informed the defendant through notice dated 30.03.1991 to come to the Registrar office and execute the sale deed. Meanwhile, coming to know that the first defendant in collusion with the other defendants trying to create encumbrance and dispossess the plaintiff from the suit property, suit in O.S.No.198 of 1991 on the file of

District Munsif Court at Thiruvallur filed for injunction. Thereafter the suit O.S.No.62 of 1991 on the file of Sub-Court at Thiruvallur for the relief of specific performance and possession filed.

3. The first defendant contested the case pleading prior to the execution of the suit sale agreement dated 12.01.1991 with the plaintiff on compulsion, the defendant entered into a sale agreement with the second defendant on 26.11.1990 in respect of the suit property for a sale consideration of Rs.50,000/- and initial advance of Rs.5,000/- received on 26.11.1990 and further advance of Rs.5,000/- received on 05.01.1991. One year time was fixed for completion of the contract. Knowing this the plaintiff compelled to execute agreement in his favour offering higher price and will take care of the earlier agreement. Possession was not given to the plaintiff. As per the terms of the agreement with the plaintiff, in case of breach by the buyer/ plaintiff, the buyer will forfeit the advance amount. In case of breach by the vendor/defendant, the plaintiff is entitled to recover double the advance money ie Rs.2,000/-. Therefore as per the terms of agreement, the plaintiff has no cause of action to sustain the suit.

4. The second defendant filed statement pleading that his agreement is prior in point of time. He has advanced a sum of Rs.10,000/- in two instalments. As per the agreement, the sale price of the suit property fixed at Rs.50,581/- and possession handed over to him. The time for payment of balance sale consideration was fixed till 25.11.1991. Meanwhile to cheat the second defendant from enforcing the agreement, the first defendant in collusion with the plaintiff has created an agreement subsequent to his agreement. Questioning the prudence in alleged delivery of possession after receiving a paltry advance of Rs.1,000/- as against the sale consideration of Rs.53,580/- and the act of filing bare injunction suit on 02.04.1991 without reserving right to file the subsequent suit for specific performance when the cause of action for this suit was very much available for the plaintiff when the prior suit was presented 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 as per the agreement dated 12.01.1991?
2. Whether the plaintiff is entitled for permanent injunction against the defendant?

3. Whether the possession was delivered to the plaintiff on the date of agreement?

4. Whether the agreement was entered on false representations?

5. To what other relief the plaintiff is entitled for?

4 witnesses and 4 exhibits were relied by the plaintiff. 4 witnesses and 6 exhibits were relied by the defendants.

6. The trial Court from the recital Ex.A-1 sale agreement and from the deposition of witness to the agreement Mr. Shanmugam (PW-2) held that the possession was delivered to the plaintiff at the time of executing the sale agreement. The contradictions in the recital and the deposition of PW-2 makes his presence during the execution of Ex.A-1 doubtful. The recital of the Ex.A-1, has taken away the right of enforcing the agreement in case of breach. As per the terms of the agreement, in case vendor commits breach, the buyer the plaintiff can only seek for twice the advance amount. Further, the trial Court has held that the plaintiff failed to prove his ready and willingness to pay the balance sale consideration within the time prescribed.

7. Aggrieved by the dismissal, the plaintiff preferred A.S.No.23 of 1991 on the file of the Principal District Court, Chengalpattu, later transferred to Fast Track Court V at Tiruvallur. The first appellate Court formulated the point for determination as, “Whether the plaintiff entitled to the discretionary relief of a decree of specific performance” and re-appreciated the evidence. On considering the facts and law held that, the plaintiff has falsely pleaded that possession was given to him as part performance of the contract. From the recital of Ex.A-1, the intention of the plaintiff is clear. There is no clause for specific performance instead only a clause to pay double the advance amount in case of refusal to execute the sale deed. The first appellate Court dismissed the appeal and confirmed the judgment and decree of the trial Court which dismissed the suit for specific performance as devoid of merit.

8. The learned counsel for the appellant put forth his submission in support of the second appeal as under:

a) The execution of the sale agreement Ex.A-1 dated 12.01.1991 is an admitted fact by the first defendant. While so, the Courts below referring a stray

line in PW-2 deposition in contradiction to the Hon'ble Supreme Court observation in *Hemkunwar Bai –vs- Sumer Singh and other (Civil Appeal 8827/2011)*, that the witnesses to the document need not necessarily know the content of the document, disbelieved the genuineness of Ex.A-1.

b) The appellant was always ready and willing to pay the balance sale consideration to the defendant and get the contract completed. The appellant in person and through mediators approached the defendant for executing the sale deed after receiving the balance sale consideration. The defendant tactfully avoided the execution. Hence after depositing the sale consideration in the bank account, the defendant was informed through legal notice Ex.B-2 to come and execute the sale deed. The receipt of the legal notice Ex.B-2 not denied by the first defendant. However the trial Court for the sole reason, that the plaintiff has not filed the acknowledgement of receipt of this notice by the defendants, has erroneously refused to take Ex.B-2 into consideration as proof of ready and willingness prior to the expiry of agreement period.

c) The Courts below erred in holding that the plaintiff was not in possession of the suit property. Even assuming that he was not in possession of the property, the factum of possession is not relevant to decide the entitlement of

specific performance relief. The test of ready and willingness not properly applied by the Courts below.

d) After the amendment to the Specific Relief Act in 2018, the relief of specific performance is a statutory relief and not a discretionary relief. The Hon'ble Supreme Court in **B.Santhoshamma –vs- D.Sarala** has held that the Court are now obliged to enforce the specific performance of a contract, subject to the provisions of sub-section (2) of Section 11, section 14 and section 16 of the Specific Relief Act. After the amendment which has substituted the word 'may' with the word 'shall' in section 10, the relief of specific performance is no longer a discretionary relief.

e) Relying upon the judgment of the Calcutta High Court rendered in **Church of North India –vs- Rt. Rev Ashoke Biswas**: Reported in **2019 SCC online 3872**, the learned counsel for the appellant submitted that, the effect of the amendment to the specific relief act is from the date of passing the decree and the amended provision is to be applied to the pending suit. The appeal being the continuation of the appeal, the benefit of the amendment to section 10 of the Specific Act has to be extended to the plaintiff and having proved the agreement ready and willingness, the relief of specific performance has to be granted.

9. Referring *Kasmir Singh –vs- Harnam Singh* reported in *AIR 2008 SC 1749*, the learned counsel submitted that the general rule is that High Court will not interfere with concurrent findings of the Courts below is not an absolute rule. In exceptional circumstances when the Courts below ignore material evidence or based its finding on erroneous inference or apply the law erroneously or base its decision without evidence and where there is total dearth of evidence, the High Court has to interfere. This case fall under the exception category for the High Court to interfere.

10. Per contra, the learned counsel for the first respondent submitted that, the plaintiff did not come to Court with clean hands or with a cause of action to agitate. The terms of the contract which relied by the appellant does not give him any cause of action to file a suit for specific performance. Beside, when he filed the suit for bare injunction before the Munsif Court in O.S.No.198 of 1991 without seeking for specific performance, he had forgone the right of specific performance, whatever little right he had. There was no occasion to give possession of the suit property to the appellant. The appellant and his witnesses were not sure about the person in possession of the suit property. The possession

was never given to the plaintiff and Courts below have rightly held that the appellant has falsely pleaded about the possession. There is no substantial question of law in this second appeal and to be dismissed.

11. This can have no different view on the legal prepositions laid by the Courts and referred by the counsel for the appellant. In the instant case, the appellant had lost his suit for specific performance mainly because the recital of the sale agreement. Ex.A-1 is the sale agreement entered between the appellant and the first respondent on 12.01.1991. The total extent of the property covered under the agreement is 5 acres 64 cents. The sale price fixed at Rs.95/- per cent. Out of the sale consideration of Rs.53,580/- on the date of agreement the purchaser / appellant has paid Rs.1,000/- and for payment of balance sale consideration three months time fixed. In the sale agreement it is explicitly agreed by the parties:

i) In case the purchaser fail to pay the balance sale consideration and get the sale deed executed within the time prescribed (11.04.1991) , then he has to forfeit the advance money ie Rs.1,000/-.

ii) In case within the time prescribed the vendor refuse to receive the

balance sale consideration and execute the deed, then he has to pay back the purchaser double the advance money.

12. By the above said clause, the parties have implicitly agreed to forego their right to enforce the contract in case the other party not incline to sell or purchase as the case may be. In alternate they have specified the liquidated damage in case of breach.

13. In addition to this reason, the appellant plea of delivery of possession as part performance of the agreement is neither reflected in the agreement nor proved through reliable evidence. His plea that after taking an advance of Rs.1,000/- for a property worth Rs.53,580/- possession was given to him was viewed in suspicion, when not supported by evidence. The contra plea of the first respondent that the said agreement was extracted from him to square up the matter with the 2nd respondent, who is the prior agreement holder had gained relevancy and significance. The contention of the learned counsel for the appellant that possession is inconsequential in a suit for specific performance will be a correct and acceptable statement, if only had the appellant not pleaded that the

possession was given to him at the time of agreement as part performance and sought for injunction after resorting to a civil suit for bare injunction and allowed it to be dismissed for default after six years.

14. Therefore, this Court finds no substantial question of law worth formulating under section 100 CPC. As a result, the Second Appeal is dismissed. No order as to costs.

01.12.2020

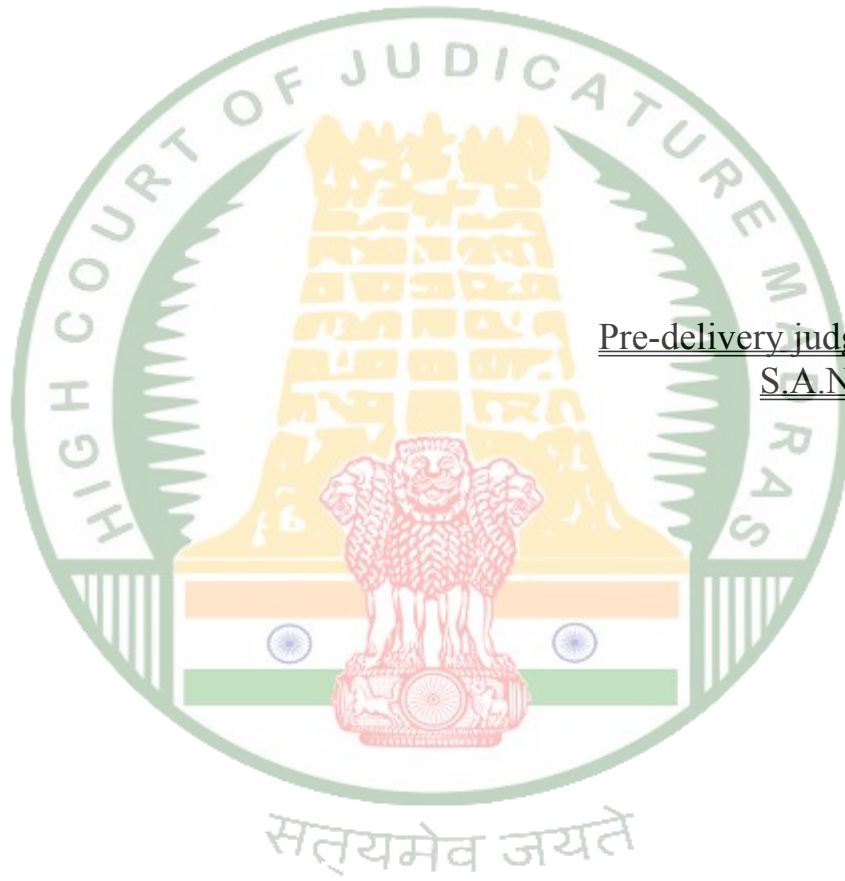
Index:yes/no
Speaking order/non speaking order
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To:

- 1.The Principal District Court, Chengalpattu.
- 2.TheSubordinate Judge, Thiruvallur.

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Dr.G.Jayachandran,J.
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Pre-delivery judgment made in
S.A.No.815 of 2007

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