

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.12.2019

Date of Verdict : 09.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1379 of 2005

Parvathi ...Appellant/Plaintiff

Vs.

Venkatarasu ...Respondent/Defendant

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 30.12.2004, in A.S.No.15 of 2004 on the file of the Principal Sub Court, Vridhachalam, confirming the decree and judgment dated 28.07.2003 in O.S.No.303 of 2000 on the file of the II Additional District Munsif Court, Vridhachalam

For Appellant : Mr.R.Sunil Kumar

For Respondent : No Appearance

JUDGMENT

The Second Appeal is directed as against the judgment and decree dated 30.12.2004, in A.S.No.15 of 2004 on the file of the Principal Sub Court, Vridhachalam, confirming the decree and judgment dated 28.07.2003 in O.S.No.303 of 2000 on the file of the II Additional District Munsif Court, Vridhachalam.

2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

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

3.1. The suit is filed for specific performance. The suit property belongs to the defendant. On 11.02.2000, the defendant executed sale agreement for sale in favour of the plaintiff and agreed to sell the suit property admeasuring three cents vacant house plot at the rate of Rs.7,500/- per cent and for a total sale consideration of Rs.22,500/-. On the same day, the defendant also received a sum of Rs.5,000/- as advance. As per the agreement, within a period of three months from the date of sale agreement, the parties concerned have to perform their part of contract on receipt of the balance sale consideration of Rs.17,500/-. There is a

particular clause in the sale agreement that while measuring the suit property if the measurement of the house plot is increased or decreased, proportionately the sale amount has to be fixed and accordingly the sale deed has to be executed. Even after expiry of three months, repeatedly the plaintiff approached the defendant for execution of sale deed on payment of the balance sale consideration. The defendant dragged the issue and did not register any sale deed. Therefore on 23.03.2000, the plaintiff caused legal notice thereby called upon the defendant to be present on 27.03.2000 in the Sub Registrar Office, Virudhachalam and he is ready and willing to pay the balance sale consideration for the execution of the sale deed. After receipt of the same, the defendant sent reply notice dated 25.03.2000 with false allegations. Though the plaintiff was very much present on 27.03.2000 at about 10.00 a.m. to evening at the Office of the Sub Registrar, Virudhachalam, the defendant did not come to the Registrar Office and failed to register the sale deed in favour of the plaintiff. Hence, the suit for specific performance as against the defendant.

4. The defendant filed written statement and resisted the plaintiff's case by stating that the suit property along with the other properties belong to the defendant and he laid out some property into house plots and sold to various persons. Likewise, the remaining property admeasuring four cents on 11.02.2000 executed one unregistered sale agreement in favour of the plaintiff and thereby agreed to sell the property. In the said agreement there is a specific clause that if the measurement is increased or decreased, accordingly the sale has to be done. After the sale agreement while measuring the said property, one cent of the property was excess and as such for that excess land also the defendant demanded sale consideration, whereas the plaintiff caused legal notice on 23.03.2000 and on receipt of the same, the defendant properly replied by the reply notice. The plaintiff at no point of time was ready and willing to perform her part of contract by payment of balance sale consideration of Rs.17,500/- and Rs.7,500/- for the additional one cent of property. The plaintiff did not agree for the same and refused to pay the excess amount and caused legal notice. Further the agreement for sale was entered between them on 11.02.2000 and before expiry of three months, i.e. on 23.03.2000 itself, the plaintiff caused legal notice. In fact, even without completing the three months period of agreement, the plaintiff instituted the suit for specific performance and as such the suit itself is not maintainable one and therefore, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 and P.W.2 were examined and four documents were marked as Ex.A.1 to Ex.A.4. On the side of the defendants D.W.1 to D.W.3 were examined and Ex.B.1 to Ex.B.4 were marked. On considering the

oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.15 of 2004 before the Principal Subordinate Court, Vridhachalam. The first appellate Court also on appreciating the materials placed on records, dismissed the appeal by confirming the judgement and decree passed by the trial Court. Challenging the same, the plaintiff has come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

"a) Whether the forfeiture clause regarding the refund of advance paid in the Agreement, marked as Ex.A1 not enforceable as it formed part of substantial portion of the entire sale consideration?

b) Whether the courts below did not err in finding that the plaintiff had committed breach, failing to see that her readiness and willingness was to be ascertained with reference to the availability of resources to raise the money and not the availability of ready cash itself?"

7. Mr.R.Sunil Kumar, the learned counsel appearing for the plaintiff is present. Though notice was served to the defendant, no one appeared on behalf of the defendant.

8. The learned counsel appearing for the plaintiff reiterated the averments set out in the plaint as well as the written statement.

9. Heard the learned counsel appearing for the plaintiff.

10. This Court considered the rival submission made by the learned counsel for the plaintiff.

11. The plaintiff filed the suit for specific performance on the strength of the sale agreement between the plaintiff and the respondent dated 11.02.2000, which was marked as Ex.A.1. According to the plaintiff, she entered into the sale agreement with the defendant to purchase the suit schedule property admeasuring three cents for the total sale consideration of Rs.22,500/- (each cent Rs.7,500/-) and the time fixed for performing the part of contract is within the period of three months. There is a specific clause in the sale agreement that if the property is excess than the agreement, proportionately the sale consideration has to be paid by the party while executing the sale deed. Though the plaintiff expressed her readiness and willingness to perform her part of contract, the defendant failed to perform his part

of contract and as such the plaintiff caused legal notice on 23.03.2000 to the defendant. On receipt of the same, the defendant also caused reply notice on 25.03.2000. Therefore, the plaintiff instituted the suit for specific performance against the defendant. The specific case of the defendant is that there is a specific condition in the agreement for sale that while measuring the suit property if the extent is excess, accordingly the plaintiff has to pay the sale consideration. Further the plaintiff was never ready and had shown no willingness to perform her part of contract since she had no money to perform her part of contract. Further notice was issued premature one since as per the agreement, three months time was granted for performing the part of contract. But without even completing the three months, the plaintiff caused notice and also instituted suit for specific performance. Therefore, the suit itself is not maintainable.

12 The trial court analysed the evidence on oral and documents and dismissed the suit filed by the plaintiff that as per the agreement, the suit property measures about three cents and after measuring the property accordingly to the plaintiff it was only 2.90 cents and according to the defendant, it was four cents. PW1 deposed that at that time she had no money and she has to pledge her jewels for remaining sale consideration. Therefore, at the time of notice itself, the plaintiff was not ready with the balance sale consideration to perform her part of contract. The first appellate court also confirmed the same and dismissed the suit filed by the plaintiff.

13 Pending appeal, the plaintiff filed an application in IA.No.382 of 2004 to amend the prayer including alternate prayer to return the advance amount with interest. Though the said application was allowed by the first appellate court and found that when the plaintiff was ready and willing to execute her part of contract, she filed the said petition only to get her advance amount with interest. Therefore, she was not ready at any point of time to execute the sale deed by paying the balance sale consideration. But there was no order to return the advance amount which was paid by the plaintiff to the defendant.

14 On receipt of the legal notice dated 23.03.2000, which was marked as Ex.A.2 on 27.03.2000, the defendant was very much present at the Office of the Sub Registrar, Vridhachalam and ready to perform his part of contract as agreed by him. But the plaintiff never present before the Registrar Office, since she had no money at that point of time to pay the balance sale consideration to the defendant. Further the suit is also premature one. The agreement for sale entered between parties on 11.02.2000. Admittedly, time for performing the contract was fixed as within a period of three months. Without even completing three months, the plaintiff caused advocate notice on 23.03.2000. Thereafter

the suit was initiated even before completing three months. Therefore the suit itself is premature one and plaintiff is not entitled to any relief sought for.

15 PW1 categorically deposed that she was not able to pay the balance sale consideration and by her legal notice called upon the defendant to be present before the Registrar Office on 27.03.2000, but she did not visit the Sub Registrar office and never waited for the defendant. She was also not present in the Registrar Office with balance sale consideration. Further it is found that from the reply notice dated 25.03.2000, wherein it is categorically stated that after the agreement, the suit property was measured with the surveyor and found that the measurement is excess by one cent and as such demanded a sum of Rs.30,000/- as sale consideration(per cent at the rate of Rs.7,500/-). The plaintiff was not able to pay the said amount and as such she was never ready and willing to perform her part of contract.

16 Therefore, this Court does not find any valid reason to interfere with the findings rendered by the Courts below as such the Courts below have analyzed the evidences both the documentary and oral in detail, adduced by the parties and by giving cogent reasons and concluded rightly. Accordingly, this court is of the considered opinion that no substantial questions of law are involved in the second appeal. Be that as it may, the substantial questions of law are accordingly answered as against the plaintiff and in favour of the defendant.

17 However, while the first appellate court allowing the interlocutory application in IA.No.382 of 2004 to amend the prayer in the plaint to add the alternate prayer to order for returning the advance amount paid by the plaintiff, finally the first appellate court also dismissed the alternate prayer seeking return of advance amount paid by the plaintiff since when the plaintiff was not ready and willing to perform her part of contract she has to forfeit the amount which was paid as advance.

18 In this regard, it is relevant to rely upon the judgment of the Division Bench of this Court in the case of Fathima Majeed Vs. Subhapratha Ravikumar reported in 2008 (4) CTC 494, wherein it is held that though the plaintiff did not ask for any alternate relief of recovery of money, it is for the relief of specific performance and on the ground of equity the court can order return of advance amount.

19 In the case on hand, though the plaintiff did not ask for any alternate prayer in the specific performance suit, and subsequently in the appeal stage, she filed application in I.A.No.382 of 2004 to amend the prayer in the plaint, and it was also allowed by the first appellate court, but the appellate court dismissed the said prayer also. It is sure that the plaintiff entered into agreement for sale and the defendant also paid a sum of Rs.5,000/- as advance. It is the suit for specific performance and as such on the ground of

equity, the defendant is directed to return the advance amount of Rs.5,000/- with interest at the rate of 7.5 % per annum to the plaintiff within a period of three months from the date of receipt of copy of this order. Consequently, the second appeal is dismissed as against the prayer of specific performance and insofar as the return of advance amount, allowed. No costs.

20. In fine, the Second Appeal stands partly allowed. No order as to costs.

Sd/-
Assistant Registrar (CO)

//True copy//

Sub Assistant Registrar

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To

1. The Principal Subordinate Judge,
Vridhachalam
2. The II Additional District Munsif Court,
Vridhachalam
3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

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S.A.No.1379 of 2005

SR (CO)
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