IN THE HIGH COURT OF JUDICATURE OF MADRAS

Reserved on: 05.02.2020

Delivered on: 07.02.2020

Coram:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

S.A.No.1388 of 2011
and
M.P.No.1 of 2011

Devaki ... Appellant/Plaintiff

vs.

1.K.Kavitha
2.S.Ramamurthy ... Respondents/Defendants

Second Appeal is filed under Section 100 of CPC against the judgement and decree dated 07.02.2011 passed by the Additional District Judge, Fast Track Court No.1, Poonamallee, made in A.S.No.100 of 2008 confirming the judgement and decree dated 30.06.2008 passed by the Sub Court, Poonamallee, made in O.S.No.257 of 2000.

For appellant :: Mr.Prahalat Ravi
for Mr.V.Vijay Shankar
For Respondents:: No appearance

JUDGEMENT

This second appeal is filed by the plaintiff in the suit as against the judgement and decree, dated 07.02.2011, passed by the Additional District Judge, Fast Track Court No.1, Poonamallee, in A.S.No.100 of 2008, confirming the judgement and decree, dated 30.06.2008, passed by the Sub Court, Poonamallee, in O.S.No.257 of 2000, which was one for specific performance.

2.The Appellant herein is the plaintiff and the respondents are the defendants in the suit. The appellant/plaintiff had approached the trial Court and filed O.S.No.257 of 2000, seeking for specific performance of the agreement to sell, dated 10.08.1999, by directing the defendants to execute and register the Sale Deed in her favour in respect of the suit property. According to the plaintiff, she entered into an agreement with the first defendant, who is the Power of Attorney Holder of the of the second defendant, in respect of the suit schedule property.

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3.The Power of Attorney in favour of the first defendant was executed by the second defendant on 15.02.1999, which was registered on the file of the Sub-Registrar Office, Ambattur. As per the said agreement-Ex.A1, dated 10.08.1999, the first defendant agreed to convey the suit schedule property in favour of the plaintiff and the sale consideration was fixed at Rs.1,80,000/-. On the date of execution of the sale agreement (Ex.A1), dated 10.08.1999, the first defendant received a sum of Rs.50,000/- from the plaintiff, towards advance. The time limit fixed for completion of the payment of the entire sale consideration of Rs.1,80,000/- was four months from the date of execution of the sale agreement.

4.According to the plaintiff, although four months time was fixed, time was not the essence of the contract, as per the understanding between the parties. According to her, a further advance of Rs.20,000/- was, in fact, paid on 14.03.2000, which was after the expiry of four months period fixed in the sale agreement dated 10.08.1999. The said payment was also received by the first defendant without any demur. Even otherwise, as per the sale agreement, if either party is not complying with the conditions of the sale agreement, the aggrieved party can approach the competent Court to cancel the agreement.

5.Since despite the readiness and willingness of the plaintiff to complete the sale transaction, the defendants were not willing to come forward to execute the sale deed and therefore, a legal notice was issued on 04.05.2000 and since the notice was refused, a further communication was issued by Certificate of Posting, on 11.05.2000, for which, a reply was sent on behalf of the first defendant, on 24.05.2000 containing false allegations against the plaintiff. Therefore, the plaintiff was constrained to lay a suit for specific performance.

6.The suit was resisted by the first defendant/Power of Attorney stating that the plaintiff had not performed her part of the contract, as per the agreement and the entire sale transaction was not completed within four months from the date of agreement, viz., 10.08.1999. Having failed to comply with her part of the contract, the plaintiff is not entitled to the relief of specific performance. According to the first defendant, from the recitals in the sale agreement-Ex.A1, it is very clear that the time is essence of the contract. According to the first defendant, even before the expiry of the period fixed in the sale agreement, the plaintiff has made her intention clear about the non-performance and unwillingness to complete her part of the contract, as she has not come forward to pay the balance sale consideration.

7.The trial Court, which heard the parties, after perusing the materials placed on record and on appreciation of the evidence, has dismissed the suit. According to the trial Court, the recitals in Ex.A1, the sale agreement, dated

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10.08.1999, would demonstrate the fact that time was the essence of the contract and the time limit was not adhered to by the plaintiff. Therefore, the plaintiff was not entitled to the discretionary relief of specific performance. As against the said judgement and decree, the plaintiff filed A.S.No.100 of 2008, before the Additional District Judge, Fast Track Court-I, Poonamallee.

8.The lower appellate Court, which dealt with the appeal, concurred with the findings of the trial Court and reaffirmed the findings of the trial Court on the aspect of the principle that time is the essence of the contract. Since the time, as per Ex.A1, dated 10.08.1999, had expired in December 1999 and the entire sale consideration was not paid within that date, the plaintiff was not entitled to enforce the sale agreement as against the first defendant. In these circumstances, the lower appellate Court confirmed the judgement and decree of the trial Court. As against that, the present Second Appeal has been filed by the plaintiff.

9.While admitting the Second Appeal, this Court has framed the following Substantial Questions of Law.

> "a)Whether the Courts below are right in holding that the time is essence of the contract under Ex.A1 when the agreement dated 10.08.1999, Ex.A2 notice was issued on 04.05.2000 and the suit was presented on 05.06.2000?
>
> b)Whether the Courts below are right in holding that the time is essence of the contract when it was not specifically made so as contemplated under Section 55 of the Contract Act and the appellant has fulfilled the terms of Section 16(c) of the Specific Relief Act, 1963?"

10.The learned counsel appearing for the appellant/plaintiff would strenuously contend that Ex.A1 did not spell out in explicit terms as to the fact of time is the essence of the contract and in the absence of the same, the Courts below were wrong in construing that time is the essence of the contract, while dismissing the claim of the plaintiff. Moreover, the learned counsel would submit that the trial Court has completely erred in not framing an issue regarding the readiness and willingness of the plaintiff to perform her part of the contract. He would draw the attention of this Court to the issues framed by the trial Court, wherein, it is seen that the trial Court has not framed such issue at all.

11.According to the learned counsel for the appellant/plaintiff, the plaintiff was ever ready and willing to

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perform her part of the contract and in fact, the entire balance sale consideration of Rs.1,80,000/- was deposited in the treasury to the credit of the suit. Unfortunately, the trial Court has completely erred in not framing an issue in that regard and dismissed the suit on erroneous understanding of the rival claims.

12.In this regard the learned counsel would draw the attention of this Court to the decision of this Court in A.S.No.414 of 2007, dated 08.01.2018 (S.Karuppanna Gounder vs. K.Sadayappa Gounder(died) and five others) and he would particularly draw the attention of this Court to Paragraph No.13 of the judgement, which reads as under:

> "13. In the case on hand, the plaintiff had pleaded that he was ready and willing to perform his part of the contract. However, the defendants disputed the said avernment in their written statement stating that it is a false averment. When the averment stated by the plaintiff was denied by the defendants, the trial Court must have framed an issue with regard to readiness and willingness of the plaintiff. In a suit for specific performance, it is mandatory that the plaintiff has to prove his readiness and willingness to perform his part of the contract. In the case on hand, in spite of the fact that the defendants had denied the averment stated in the plaint with regard to readiness and willingness of the plaintiff, the trial Corut erroneously failed to frame an issue with regard to the same. But, without framing an issue with regard to readiness and willingness of the plaintiff, the trial Court decreed the suit for specific performance. Unless the plaintiff proves that he was always ready and willing to perform his part of the contract, a suit for specific performance cannot be decreed. The issue of readiness and willingness is not ancillary and it is one of the main issues that has to be decided in a suit for specific performance. In other words, if the plaintiff fails to prove that he was ready and willing to perform his part of the contract, the suit for specific performance cannot be decreed. Since this is one of the main issues that has to be decided in a suit for specific performance, the provisions of Order 41 Rule 25 of CPC cannot be applied. Only if the trial Court frame an issue with regard to readiness and willingness, the

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parties will be in a position to let in evidence to prove or disprove the said issue. The trial Court should have framed an issue with regard to readiness and willingness and decided the suit in accordance with law."

14.In the above case, the learned Judge of this Court has held that the issue of readiness and willingness is not ancillary and it is one of the main issues to be decided in the suit for specific performance. Unfortunately, both the Courts below have completely misdirected in overlooking such absence of issue being framed either before the trial Court or before the lower appellate Court. Therefore,the learned counsel would submit that the entire judgement and decree of both the Courts below warrant interference by this Court, as the same are invalid and unsustainable.

15.Although notice has been issued to the respondents/defendants and their names also printed in the cause list, there is no appearance on their behalf.

16.This Court considered the submissions of the learned counsel for the appellant/plaintiff and also perused the materials and pleadings placed on record.

17.As rightly contended by the learned counsel for the appellant/plaintiff that in the absence of specific recitals in the agreement that time is the essence of the contract, both the Courts below have erred in dismissing the claim of the plaintiff only on the ground that time is the essence of the contract and therefore, the plaintiff was not entitled to the relief of specific performance. The trial Court ought to have framed a specific issue in regard to the readiness and willingness of the plaintiff in performing her part of the contract and the evidence ought to have been taken on such issue. Unfortunately, the trial Court has not framed such issue specifically, as could be seen from the judgement of the trial Court.

18.The decision cited on behalf of the appellant by the learned counsel would squarely apply to the present case for the reason that the issue of readiness and willingness on the part of the plaintiff is very much essential to be framed, in order to appreciate the claim of the plaintiff for specific performance. In fact, the learned counsel for the appellant would emphasize that there was a specific clause in the agreement that if there is any breach of the terms of the agreement, the aggrieved party can approach the Court and in the absence of any action by the defendants in instituting any proceedings in the Court for cancellation of the sale agreement, both the Courts below have erred in construing that the time was essence of the contract. In any event, this Court finds that the absence of framing of issue as to the readiness and willingness of the plaintiff, in the facts and circumstances of

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the case, has resulted in non-application and misapplication of mind on the part of both the Courts below. In fact, the lower appellate Court ought to have seen this fatal error committed by the trial Court, but the lower appellate Court also unfortunately overlooked the crucial aspect and concurred with the findings of the trial Court.

19.During the course of arguments, it was revealed that the suit property had also been sold to the third party, however, that party is not before this Court. The learned counsel for the appellant/plaintiff would submit that the party, who has purchased the suit property pending litigation, had consciously taken the risk of buying the property pendente lite and he need not be heard by this Court. In any event, this Court is not inclined to go into those issues, as this Court proposes to dispose of the Second Appeal as under.

20.In view of the above narrative, the Second Appeal is remanded back to the trial Court, viz., Sub Court, Poonamallee, for framing a specific issue in regard to the readiness and willingness on the part of the plaintiff to execute the terms of the sale agreement, dated 10.08.1999, which was marked as Ex.A1 before the trial Court. The trial Court shall frame such issue and allow the parties to let in additional evidence and also mark any documents in support of their contention. The trial Court is directed to pass a fresh judgement on reconsideration of the evidence and further materials placed on record, if any, in pursuance of the additional issues framed by it.

21.The trial Court is also directed to complete the said exercise and pass a judgement and decree within a period of six months from the date the Second Appeal stands remanded back to its file. The plaintiff is at liberty to implead any subsequent purchaser of the property before the trial Court, if so advised.

22.The Second Appeal is disposed of accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

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Sub Assistant Registrar

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To

1.The Additional District Judge,
Fast Track Court No.1, Poonamallee

2.The Subordinate Judge,
Sub Court,
Poonamallee

Copy To

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

+1cc to Mr.V.Vijay Shankar, Advocate, S.R.No. 9768

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