

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2020

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.392 of 2018
and
C.M.P.No.10170 of 2018

Pon Gunasekaran

...Appellant/Plaintiff

Vs.

M.Danarajan @ Daniel

...Respondent/Defendant

Prayer: Appeal Suit filed under Section 96 Read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree dated 29.08.2017 made in O.S.No.44 of 2013 on the file of the II Additional District, Thiruvallur at Poonamallee.

For Appellant : Mr.V.S.Sivasundaram

For Respondent : Mr.V.Nithyanandam

JUDGMENT

The appeal suit is directed against the judgment and decree dated 29.08.2017 made in O.S.No.44 of 2013.

2. The plaintiff is the appellant before this Court and the suit for Specific Performance was filed, based on the suit sale agreement dated 12.02.2010.

3.The facts in nutshell as narrated in the plaint are that the plaintiff and the defendant entered into the agreement for sale on 23.02.2007 regarding sale of a property for a consideration of Rs.20,00,000/- (Rupees Twenty Lakhs only). The plaintiff states that he paid an advance amount of Rs.12,00,000/- (Rupees Twelve Lakhs only) on various dates through cheques and by cash. On 23.02.2007, the defendant received a sum of Rs.2,00,000/- as cash and a sum of Rs.3,00,000/- by way of Cheque. On 21.05.2007, the defendant received a sum of Rs.1,50,000/-. On 27.06.2007, a sum of Rs.1,00,000/- and on 06.07.2007, a sum of Rs.50,000/- and on 12.07.2007, a sum of Rs.2,50,000/-. The defendant made endorsements, acknowledging all these advance amounts on various dates in the agreement dated 23.02.2007 itself. Subsequently, the defendant received another sum of Rs.1,50,000/- and

altogether a total advance amount of Rs.12,00,000/- was paid by the plaintiff to the defendant.

4. The learned counsel for the appellant made a submission that the appellant/plaintiff was always ready and willing to perform his portion of the contract and the defendant was evading execution of sale and the time limit fixed in the agreement had also lapsed. The learned counsel for the appellant made a submission that the trial Court rejected the relief of Specific Performance, despite the fact that a subsequent agreement was entered into between the plaintiff and the defendant on 12.02.2010. The subsequent agreement dated 12.02.2010 was executed in view of the fact that the appellant/plaintiff had already paid an advance amount of Rs.12,00,000/- and with reference to the said amount, the respondent/defendant agreed to sell a portion of another property, which is lesser extent in Survey No.129. The learned counsel for the appellant brought to the notice of this Court that the first sale agreement dated 23.02.2007 was executed in respect of another property in new Survey No.128/2. However, the second sale agreement dated 12.02.2010 was executed with reference to Survey No.129, which is of lesser extent, approximately measuring 1,200 Sq.ft. The second sale agreement was entered into between the parties on account of the fact that the first sale agreement was not executed and further, the advance amount of Rs.12,00,000/- was acknowledged by the respondent/defendant and in lieu of the said advance amount, the defendant agreed and entered into a subsequent sale agreement dated 12.02.2010 regarding sale of another property belonged to him with lesser extent of land.

5. The complaint of the appellant/plaintiff is even that second sale agreement was not honored by the respondent/defendant nor he repaid the advance amount and thereafter, the appellant/plaintiff was constrained to institute a suit for Specific Performance.

6. The defendants filed a written statement, stating that the suit itself is not maintainable in view of the fact that the agreement to sale dated 12.02.2010 is not an agreement to sell the property as claimed by the plaintiff. The defendant is of an opinion that the property mentioned in the first suit sale agreement is different one and in respect of the further agreement dated 12.02.2010, the property is not connected with the first sale agreement. In paragraph 2 of the written statement, the respondent/defendant has contended that the plaintiff has no right to make any claim against the defendant and the agreement to sale is in respect of money transaction has could be evidence on reading of the agreement to sale dated 12.02.2010. It is further stated that the defendant is entitled

to redeem or have a right to pay back Rs.12,00,000/- to the plaintiff to cancel the agreement and the defendant agreed that an advance amount of Rs.8,50,000/- was returned to the appellant/plaintiff and he was willing to repay the balance advance amount of Rs.3,50,000/- to the appellant/plaintiff. The respondent/defendant has disputed the advance amount itself. Though the respondent /defendant admitted the fact that he received the advance amount of Rs.12,00,000/-, he has stated in the written statement that a sum of Rs.8,50,000/- was repaid to the appellant/plaintiff and the balance amount of Rs.3,50,000/- alone is to be repaid.

7. The trial Court framed the issues as to whether the plaintiff is entitled to the relief of Specific Performance and injunction against alienation; whether the plaintiff was ever ready and willing to perform his part of contract; whether the suit sale against is true, genuine and binding the defendants and to what relief.

8. On the side of the plaintiff, PW1 was examined and 6 documents were marked. On the side of the defendant, two witnesses were examined and 6 documents were marked. With reference to the issues 2 & 3, the trial Court arrived a findings that the agreement of the year 2007 was not executed and subsequently, another agreement was entered into between the plaintiff and the defendant on 12.02.2010. In the subsequent agreement, it was agreed that the balance amount is to be settled within a period of 45 days and it was contended that the plaintiff was ready and willing to execute his part of the contract within the period stipulated in the agreement. However, the trial Court arrived a conclusion that the subsequent sale agreements dated 12.02.2010 is not legally valid and therefore, the said agreement would not be binding on the respondent/defendant.

9. In view of the findings arrived with reference to Issue Nos.2 & 3, the trial Court decided the other issues against the appellant/plaintiff and rejected the relief of Specific Performance.

10. The learned counsel appearing on behalf of the appellant mainly contended that the trial Court has not considered any of the documents as well as the evidences placed by the parties before the trial Court. The suit sale agreement initially signed between the parties is with reference to an immovable property to an extent of 8,720 sq.ft comprised in Old Survey No.128, New Survey No.128/2 at Noombal Village, Ambathur Taluk for a sale consideration of Rs.20,00,000/-. The appellant/plaintiff had paid an advance amount of Rs.12,00,000/- on various dates and all such payments were duly acknowledged by the defendants and

he signed the receipts. However, the subsequent sale agreement dated 12.02.2010 is an independent sale agreement agreed between the parties to sell another property belonged to the respondent/defendant to a lesser extent of about 1200 sq.ft and the Survey Numbers are also different. The trial Court has confused the description of these two properties and arrived a conclusion that the plaintiff is not entitled for the relief of Specific Performance as there was a subsequent agreement. Such a decision taken is not in consonance with the evidences and the second agreement was entered into between the parties, in view of the fact that the respondent/defendant had already received a sum of Rs.12,00,000/- towards advance on various dates. In view of the fact that the parties have agreed, not to proceed with the sale in respect of the original sale agreement dated 23.02.2007, the parties have agreed to execute the sale in respect of another property by entering into a sale agreement on 12.02.2010. This intention of the parties though proved before the trial Court, the trial Court has not considered all these aspects. The learned counsel appearing on behalf of the appellant further states that in such cases, the trial Court ought to have directed the respondent/defendant to repay the advance amount, even such a relief has not been granted.

11. With reference to the defense taken by the respondent/defendant, the written statements reveals that the defendant had received a sum of Rs.12,00,000/- and to cancel the agreement, he has to pay back the said Rs.12,00,000/- to the appellant/plaintiff. Thus, the written statement reveals that the respondent/defendant had received a sum of Rs.12,00,000/- towards advance regarding the sale of an immovable property described in the sale agreement. However, the defendant has stated that he has repaid a sum of Rs.8,50,000/- on various dates in the presence of witnesses namely Mr.Kumar and Mr.S.Saravanan.

12. It is pertinent to note that the defendant during the trial, had not examined either Mr.Kumar or Mr.S.Saravanan. Further, the defendant has not produced any document to establish regarding the return of the said amount of Rs.8,50,000/-. In other words, the respondent/defendant has not produced any document to prove that he had refunded the advance amount of Rs.8,50,000/-. The trial Court also has not recorded any finding in this regard. Though the learned counsel for the respondent/defendant made a submission that the said amount is paid by way of cash and for that, the respondent/defendant is having a Statement of Accounts, this Court is of the considered opinion that the Statement of Accounts in the name of the respondent/defendant is of no avail. In respect of refund of advance amount, the respondent/defendant has to prove that the amount repaid is acknowledged by the appellant/plaintiff and

through some evidences, it is to be established. In the absence of any proof to establish that the respondent/defendant had repaid the advance amount, then the Courts are bound to take into consideration the statement made in the written statement that the respondent/defendant had received the advance amount of Rs.12,00,000/-. With reference to the statements in the written statements that he has repaid the amount of Rs.8,50,000/-, the same has not been established nor be proved through any other document.

13. Perusal of the findings of the trial Court, this Court is of the considered opinion that there is no details with reference to two sale agreements with reference to two different properties. Undoubtedly, the suit was instituted seeking Specific Performance based on the second agreement dated 12.02.2010. However, the transactions between the appellant as well as the respondent flows from the initiation of sale agreement dated 23.02.2007. Thus, the 1st sale agreement is to be considered by the trial Court and the second sale agreement flowed from and out of the first sale agreement dated 23.02.2007 as the transaction between the parties reveal that they have agreed to settle the disputes by way of executing second sale agreement on 12.02.2010 for sale of smaller portion of the land situated in other Survey Number.

14. In fact, the first sale agreement dated 23.02.2007 was signed between the parties for sale of a larger extent of land and an advance amount of Rs.12,00,000/- was paid by the appellant to the respondent. In view of the fact that the first sale agreement was not executed between the parties, thereafter the parties have agreed to execute the sale deed in respect of a smaller portion of the land and accordingly, signed the second sale agreement on 12.02.2010. The sale consideration for the second sale agreement is for a sum of Rs.12,00,000/-. Reading of the first sale agreement as well as the second sale agreement reveals that the understanding between the parties are that in lieu of the advance amount of Rs.12,00,000/- paid, the respondent/defendant agreed to execute a sale deed in respect of the smaller extent of land belonged to him. However, even that sale agreement was not honored by executing a sale deed in favour of the appellant/plaintiff and therefore, the appellant was constrained to institute a suit for Specific Performance.

15. The trial Court has not distinguished the two transactions flows from and out of the first sale agreement dated 23.02.2007. This apart, the intention of the parties and execution of the second sale agreement dated 12.02.2010 was also not discussed by the trial Court in its finding.

16. This Court is of the considered opinion that though the trial Court has not considered all these aspects and rejected the relief of Specific Performance, this Court is not inclined to consider the relief of Specific Performance in favour of the appellant in view of efflux of time. Many years passed, the first sale agreement was dated 23.02.2007. The second sale agreement was dated 12.02.2010. The value of the property escalated as of now and it would be inequitable in the event of granting the relief of Specific Performance and the defendant/respondent would be prejudiced in view of the escalation of market price with reference to the suit mentioned property. The suit mentioned property situated in the sub-urban areas of Chennai City, more specifically, in Thiruvallur District and under these circumstances, this Court is not inclined to consider the grant of relief of Specific Performance, at this length of time.

17. However, the fact remains that the appellant has proved his case that he had paid an advance amount of Rs.12,00,000/- from and out of the total sale consideration of Rs.20,00,000/-. The respondent/defendant had not proved that he had repaid the advance amount of Rs.8,50,000/- as stated in the written statement. In the absence of any proof, the statement made by the respondent/defendant cannot be accepted. Thus, for all purposes, it is to be construed that the appellant/plaintiff has paid an advance amount of Rs.12,00,000/- to the respondent/defendant.

18. The learned counsel for the respondent raised an objection that the plaintiff has not sought for any relief regarding the refund of advance amount.

19. Reading of the plaint also reveals that no alternate relief prayed for refund of advance amount with interest. Though such a prayer had not been prayed for, this Court has to consider the refund of advance as a consequential relief under the General Relief clause.

20. The alternate relief of return of advance in a suit for specific performance is a consequential relief and therefore, the same need not be construed as a different relief. Once the relief of specific performance is rejected, then the refund of advance amount shall be consequential as no parties to the suit can be allowed to have an unjust enrichment. In other words, the dismissal of the relief of suit for specific performance, cannot stand in the way of granting the alternate relief to refund the advance amount with reasonable interest. The question arises in the absence of any such relief sought for in the plaint, whether the Court can grant the relief or not. This Court is of the

considered opinion that the alternate relief to refund the advance amount is to be construed as a general relief, as such a relief is consequential to the rejection of the relief of specific performance. In the event of not considering the alternate relief under the umbrella of general relief, then one of the party to the civil suit would be prejudiced and the other party will get an unjust enrichment.

21. Keeping in mind, the prejudice likely to be caused to one of the parties in the event of not granting the alternate relief of refund of advance amount, this Court has to adopt a pragmatic approach and constructive interpretation with reference to the Code of Civil Procedure.

22. Order VII, Rule 7 of the Code of Civil Procedure enumerates that "every Plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement".

23. The spirit of Order VII, Rule 7 of the Code of Civil Procedure is to be considered in the general format of the plaint. In the relief column, the plaintiffs used to pray for "grant such other relief or reliefs as the Hon'ble Court may deem fit and proper in the circumstances and thus render justice". Such a relief is to be construed as a general relief sought for in the plaint, the facts and circumstances and the equity to be considered in the interest of justice and the general relief is to be molded, so as to grant the alternate relief of refund of advance amount in the event of rejecting the relief of specific performance by the Courts.

24. Order XLI, Rule 33 of the Code of Civil Procedure enumerates that "the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection". Therefore, the Trial Court granted the general relief by molding the prayer for grant of the relief of refund of advance amount with interest in the event of rejection of the relief of specific performance and the Appellate Court by invoking Order XLI, Rule 33 also grant the similar relief in respect of the appeals preferred against the judgment and decree of the Trial Court. In either of the

circumstances, both the Trial Court as well as the Appellate Court are empowered to grant the consequential relief of return of advance amount in the event of rejection of the relief of specific performance on the basis of the principles of equity. Therefore, there is no impediment either for the Trial Court or for the Appellate Court to grant the alternate relief of refund of advance amount to either of the parties to the civil suit or an appeal in the event of rejecting the relief of specific performance in a suit or in an appeal suit.

25. Consequently, the judgment and decree dated 29.08.2017 passed in O.S.No.44/2013 is confirmed and A.S.No.392 of 2018 stands dismissed. No costs. Connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Kak

To

The II Additional District Judge,
Thiruvallur.

Copy to

The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.V.S.Sivasundaram, Advocate sr 17006.

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A.S.No.392 of 2018

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