

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment : 28.01.2020	Date of Pronouncing Judgment : 17 .03.2020
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C O R A M

The Hon'ble Mr.Justice M.M.Sundresh
and
The Hon'ble Mr.Justice Krishnan Ramasamy

A.S.No.367 of 2014

V.Suresh Kumar ...Appellant/Plaintiff

Vs.

1. A. Ramasamy
2. C. Selvarathakrishnan ... Respondents/defendants

This Memorandum of Grounds of Regular Appeal is filed against the judgment and decree of the learned II Additional District Judge, Salem, dated 23.07.2013, in O.S.No.14 of 2010.

For Appellant : Mr.T.M.Hariharan
For Respondent-1 : Mr.Manishankar,
Senior Counsel for
Mr. R.Bala Ramesh
For Respondent-2 : Mr.C.Jagadish

Judgment

Krishnan Ramasamy, J.,

The plaintiff in O.S.No.14 of 2010, on the file of the II Additional District Court, Salem, is the appellant herein.

2. Originally, the appellant/plaintiff filed the suit for specific performance of contract or in the alternative for refund of the advance money of Rs.10,00,000/- with interest at 18% p.a. and for costs.

3. The case of the plaintiff in gist is that, there was an agreement of sale entered into between himself and the first defendant on 23.12.2007 in respect of the suit property, bearing Plot Nos.6 to 10, comprised in R.S.No.43/4A part in Killiyur

Village, Yercaud Taluk at the rate of Rs.275/- per sq.ft. At the time of entering into the said agreement, the plaintiff paid a sum of Rs.5,00,000/- to the first defendant as advance. Thereafter, on 20.02.2009, the plaintiff further paid a sum of Rs.5,00,000/-. As per the agreement, the first defendant has to execute the sale deed in respect of the aforesaid property within 90 days from the date of entering into the sale agreement. However, the first defendant has been postponing the execution on the grounds that he has to level the ground, provide culvert and drainage and has to plant trees. Finally, when the plaintiff demanded the first defendant to execute the sale deed, the first defendant demanded more money. Therefore, the plaintiff issued a legal notice, Ex.A.2, dated 30.11.2009, requesting the first defendant to fix a date for the execution of the sale deed. The first defendant caused a reply, dated 14.12.2009, Ex.A.4 raising false allegations. Hence, the plaintiff instituted the present suit.

3.1 During the pendency of the suit, the plaintiff also filed an application for impleading the second defendant as well as to incorporate para No.4 (a) in the plaint. According to the plaintiff, the first defendant entered into a sale deed for plot Nos.6 to 10 on 11.09.2009 with the second defendant. This sale is subsequent to the sale deed, dated 23.12.2007. Since the sale deed executed by the first defendant in favour of the second defendant is illegal, the second defendant is bound to execute the sale deed in favour of the plaintiff. Hence, the plaintiff filed application for impleading the second defendant.

4. The first defendant filed written statement admitting the sale agreement entered into between himself and the plaintiff, dated 23.12.2007 and receipt of advance amount of Rs.5,00,000/- on 23.12.2007, and a sum of Rs.5,00,000/- on 20.02.2009. However, it is the case of the first defendant that, even though time limit for executing the sale deed is 90 days as per Ex.A.1, and the plaintiff paid advance amount, the plaintiff was not ready and willing to pay the entire sale consideration. As per the sale agreement, dated 23.12.2007, the total sale consideration will come around Rs.33,00,000/-. Whereas, the plaintiff has paid Rs.10,00,000/- only.

4.1 Further, it is averred by the first defendant that even assuming, if the first defendant is not ready to execute the sale deed, the plaintiff has to take steps to file the suit by depositing the entire sale consideration before the Court for execution of the sale agreement. However, the plaintiff has not complied with the terms stated in the agreement, as he has not filed any suit and deposited the entire Court fee. Hence, the plaintiff has not even proved his readiness and willingness to perform his part of the contract.

4.2 In fact, the plaintiff approached the first defendant for return of the money and expressed his readiness not to proceed further with the sale agreement, and therefore, the first defendant spent lots of money for for developing the properties by way of levelling the ground, providing culvert and drainage and planting trees. After making such developments, the plaintiff issued pre suit notice on 30.11.2009 to execute the sale deed. After the plaintiff expressed his unwillingness to perform the contract, the first defendant sold plot Nos.6 to 10 to the second defendant on 11.09.2009. At the time of the selling the property to the second defendant, the plaintiff was aware of the fact, but, he has not impleaded the second defendant and made him a party in the suit when filing the suit, and only during the pendency of the suit, the plaintiff filed application for impleadment. Therefore, he averred that the suit instituted by the plaintiff is totally vexatious and is liable to be dismissed.

5. The second defendant filed written statement, inter alia, denying the truth and validity of the agreement of sale entered into between the plaintiff and the first defendant and prayed for dismissal of the suit.

6. Before the Court below, the plaintiff examined himself as P.W.1 and marked 21 documents as Exs.A1- A21. On the side of the defendants, defendants 1 and 2 examined themselves as D.W.1 and D.W.4 respectively besides examining two other witnesses as D.W.2 and D.W.3 and marked 12 documents as Exs.B.1- B.12.

7. The Court below, after perusing all the documents, both oral and documentary framed the following issues:-

i) Whether the plaintiff is ready and willing to perform the part of contract?

ii) Whether time is essence of the suit sale agreement?

iii) Whether the plaintiff is entitled to the decree of specific performance?

iv) Whether the plaintiff is entitled to get back the advance money?

v) To what relief, the plaintiff is entitled to?

8. With regard to the first issue, viz., Whether the plaintiff is ready and willing to perform his part of contract/sale agreement is concerned, the Court below found that

there was uncertainty in identification of the property and the plaintiff was not ready and willing to make payment and subsequent payment made was also not in accordance with provisions of the Specific Relief Act. At the time of sending the pre suit notice, Commissioner was appointed by the Court below. Subsequent to the filing of the Commissioner's report, stating about the changes in the boundaries, as alleged by the plaintiff, he has filed an application to implead the second defendant and incorporate para No.4 A in the plaint and therefore, the Court below has come to the conclusion that the plaintiff has changed his mind. Hence, the Court below held that the plaintiff was not ready and willing to perform his part of the contract and decided the first issue against the plaintiff.

8.1 As far as the second issue is concerned, Whether time is essence of the suit sale agreement, the Court below held that time is not essence of the contract as far as immovable property is concerned, unless, there is a contract to the contrary. In the present case, the Court below held that time is not essence of the contract/Ex.A.1, since payment has been made by the plaintiff beyond the period of 90 days and the first defendant also received the payment made after the expiry of 90 days period, and accordingly, answered Issue No.2.

8.2 As far as the third issue is concerned with regard to entitlement of decree for specific performance, since the Court below has decided the first issue with regard to readiness and willingness of the plaintiff against him, came to the conclusion that relief of specific performance cannot be granted.

8.3 So far as the fourth issue is concerned, Whether the plaintiff is entitled to get back the advance money, the Court below, while rejecting the relief of granting specific performance held that the plaintiff is entitled for alternative relief for return of the money, and directed the first defendant to return the money received by the first defendant to the plaintiff along with 18% interest.

9. Aggrieved over the judgment and decree, the present Appeal has been preferred.

10. The learned counsel appearing for the appellant/plaintiff has submitted that the Court below has dismissed the suit only on the ground that the suit properties are not identified as per the Commissioner's report. With regard to the identification of the property, the Court below has not framed any specific issue relating to it, and without framing separate issue, has held that the appellant/plaintiff failed to prove identification of the suit property by relying upon the

Commissioner's report. The learned counsel further contended that the first respondent, in his written statement, dated 14.06.2010, not even denied the identity of the suit properties. On the other hand, he has specifically pleaded that the appellant/plaintiff sought for return of the advance money after the first defendant spent lots of money to develop the suit properties. The learned counsel further submitted that, even in the additional written statement filed, the first defendant sticks to the above said plea, except, denying the plans attached to Ex.A.1.

10.1 According to the learned counsel for the appellant, the suit properties have been identified by both the parties. In fact, the appellant/plaintiff during examination clearly deposed that the sites agreed to be sold to him are comprised in 'W' portion and the first defendant also admits that the portion agreed to be conveyed to the appellant/plaintiff is out of 24,000 sq.ft. situated to the north of the east-west road in the Commissioner's plan, marked 'W' portion. The Mason of the first defendant who was examined as D.W.2 also admitted that the first defendant agreed to convey 12,000 sq.ft. to the plaintiff situate on the west of the north south road. The deposition of the contractor of the first defendant, who was examined as D.W.3 also corroborates the same. D.W.4, the subsequent purchaser also conceded that the suit properties are situated immediate west adjacent to the North South Road, however, denied the plans attached to Ex.A.1 as incorrect. D.W.4 also deposed that he has not purchased any property adjacent to the north south road. Therefore, the learned counsel contended that the identity of the property has been clearly established by the appellant/plaintiff, but, the Court below has wrongly come to the conclusion that the appellant/plaintiff failed to prove identity of the suit properties and therefore, the suit requires to be dismissed.

10.2 The learned counsel would further contend that though the plans in Ex.A.1, was not signed by the first respondent/first defendant, the other pages of Ex.A.1 were signed by the first respondent/first defendant. Further, he contended that Ex.A.2/notice, the appellant/plaintiff has referred to plot Nos.6 to 10 and the same was not denied by the first defendant in Ex.A.4/reply. The learned counsel further contended that on a bare perusal of the schedules in Ex.A.1/agreement of sale would reveal that the properties to the North of Plot No.1 in Ex.A.1 and the properties to the west of the agreement belong to the first defendant. Therefore, the learned counsel contended that the findings of the Court below that the appellant/plaintiff has not identified the suit properties since the properties mentioned in the suit schedule measuring 400 is not matching with the Commissioner's report,

which states the property to be measuring only about 303 sq.ft, as per Ex.P.1 is not correct.

10.3 The learned counsel further contended that the second respondent has been set up by the first respondent to defeat the claim of the appellant/plaintiff. The first respondent entered into Ex.A.1/Sale agreement to sell the properties at Rs.275/- per sq.ft and when he was examined as D.W.1, he deposed that he spent Rs.300 per sq.ft. to improve the properties. However, the fact remains that he sold to the second respondent at Rs.100/- per sq.ft. Therefore, the learned counsel contended that the claim of the first respondent that he spent Rs.300/- per sq.ft to develop the suit properties is totally false and that the second respondent is not a bona fide purchaser and has been set up by the first respondent to defeat the claim of the appellant/plaintiff but the Court below has completely erred in negating the claim of the appellant on the ground that the second respondent was impleaded as purchaser of a portion of the suit properties, especially, when it is not shown that as to what extent of the property, he has purchased. In fact, D.W.4 also in his deposition stated that he has not purchased any property adjacent to the north south road. The learned counsel further contended that the second respondent in his written statement pleaded that there is no identity of the suit properties with the properties purchased by him. Above all, the first respondent/first defendant himself has stated that the property sold to the second respondent is a different property. Therefore, the learned counsel contended that when the appellant/plaintiff and the first respondent/first defendant have identified the properties and when the first respondent/first defendant in his written statement does not plead that the suit properties are not available, but, averred that he improved the suit properties, the relief of specific performance cannot be denied on the ground that the property sold by the first respondent to the second respondent is a different property. Thus, the learned counsel prayed for allowing the Appeal. In support of his case, the learned counsel relied upon the following decisions:-

i) 2003 (2) S.C.C. 330 in the case of Pratibha Singh and another Vs. Shanti Devi Prasad and another;

ii) 2011 (11) S.C.C. 786 in the case of Kalyan Singh Chouhan Vs. C.P.Joshi;

iii) 2015 (9) S.C.C. 755 in the case of Nandkishore Lalbhai Mehta Vs. New Ero Fabrics Pvt. Ltd.

11. On the other hand, the learned Senior counsel for the first respondent would contend that the first respondent admitted the fact that he entered into agreement of sale with the appellant/plaintiff on 23.07.2013 and also receipt of Rs.5,00,000/- towards advance. He would contend that time fixed for execution of the sale agreement is 90 days. Even though 90 days elapsed, the appellant/plaintiff has not shown any readiness and willingness to perform his part of the contract/sale. Subsequently, when he made payment of Rs.5,00,000/- on 20.02.2009. it was agreed between the parties that the sale deed shall be executed within three month after making entire payment.

11. 1 Further, the learned Senior counsel contended that even within the said of three months' time, the appellant/plaintiff never expressed or produced any evidence, which would show that he was ready and willing to execute the sale deed, and it was expressed through a third person that the appellant/plaintiff was not willing to purchase the property, and therefore, he sought for return of the money. Since the appellant/plaintiff expressed his unwillingness to purchase the property, the first respondent/first defendant spent huge money for developing the suit property by levelling the ground, providing culvert and drainage and planting trees and only thereafter, he executed the sale deed in favour the second respondent/second defendant. Only after development of the property and after execution of the sale deed, the appellant/plaintiff with a mala fide intention issued pre suit notice, dated 30.11.2009, for which, the first respondent/first defendant also gave proper reply, dated 14.12.2009. Even after filing of the suit, the appellant/plaintiff has changed his mind and filed an application to implead the second defendant/subsequent purchaser as one of the parties and to incorporate para No.4 A in the plaint. Further, in the Commissioner's report also, the measurement of the property was stated to be only 303 sq.ft instead of 400 sq.ft as per Ex.A.1 and 80 to 82 of east west as against 60' east west as per Ex.A.1/agreement of sale.

11.2 Therefore, the learned Senior counsel contended that there are huge discrepancies in the properties mentioned in the suit schedule and the Commissioner's report. Since the appellant/plaintiff has not proved his readiness and willingness and also failed to establish the identification of the suit property, it was only under these facts and circumstances of the case, the Court below had categorically held that the appellant/plaintiff was not ready and willing to purchase the property and refused the grant the relief of specific performance as prayed for by the appellant/plaintiff. Though the Court below has held that time was not essence of the contract

as far as immovable property is concerned, since the appellant/plaintiff was not ready and willing to perform the contract/sale agreement, the Court below refused to grant the relief of specific performance and it has granted the alternative relief for return of the advance money with interest at 18% from the date of the plaint till the date of realization. Further, in the agreement/ExA.1, it has been clearly stated that if the first defendant is not willing to execute the sale deed, the appellant/plaintiff has to take steps to file the suit by depositing the entire sale consideration, however, no such sale consideration has been paid by the appellant/plaintiff to prove his readiness and willingness. Therefore, the learned counsel contended that the appellant/plaintiff is not entitled for any relief and the Court below rightly dismissed the suit and hence, the present appeal is liable to be dismissed.

12. The learned counsel for the second respondent also adopted the submission made by the learned Senior Counsel for the first respondent and prayed for dismissal of the Appeal.

13. We have heard the learned counsel for the appellant and the learned Senior Counsel for the first respondent and learned counsel for the second respondent and perused the materials available on records. The points that arise for consideration in the present Appeal are as follows:-

i) Whether the findings rendered by the Court below with regard to Issue Nos.i) to iii) are correct?

ii) Whether the Court below was right in granting the alternative relief ?

Point No.1 :-

14. As admitted by both the parties, there was an agreement of sale entered into between the appellant/plaintiff and the first respondent/first defendant, dated 23.12.2007, wherein, the first respondent/first defendant agreed to sell the properties for a sum of Rs.33,00,000/-, measuring an extent of 12,000 sq.ft. in Plot Nos.6 to 10, comprised in R.S.No.43/4A part in Killiyur Village, Yercaud Taluk. The appellant/plaintiff also agreed to purchase the five plots at the rate of Rs.275/- per sq.ft. and at the time of entering into the agreement, Rs.5,00,000/- was paid by the appellant/plaintiff towards advance to the first defendant. By virtue of the said agreement, both the parties agreed to execute the sale deed within 90 days from the date of entering into the agreement. However, 90 days expired on 23.03.2008 and the appellant/plaintiff never showed his readiness and willingness to purchase the property. In a suit for specific performance, readiness and willingness is an important factor. Unless and

until, the readiness and willingness is not proved, certainly, the relief of specific performance cannot be granted. In the present case, within 90 days, the appellant/plaintiff ought to have shown his readiness to perform his part of the agreement. However, even beyond the period of 90 days, the appellant/plaintiff paid a sum of Rs.5,00,000/-on 20.02.2009. The subsequent payment was received by the first respondent/first defendant as well. In this context, we would like to point out that, merely because, the first respondent/first defendant received the part of the sale consideration even after the expiry of the time limit stated in the agreement/Ex.A.1, that by itself, will not give any right to the appellant/plaintiff to seek for the execution of the sale deed beyond the period of 90 days on the ground that time is not essence of the contract. The Court below though came to the conclusion that time is not essence of the contract since the appellant/plaintiff paid balance sale consideration after the expiry of 90 days specified in the agreement and the first defendant also received, however, rightly denied to grant the relief of specific performance.

14.1 In a suit for specific performance, it is for the appellant/plaintiff to prove his readiness and willingness to perform his part of the contract. But, there is no iota of evidence to show that the appellant/plaintiff was ready and willing to perform his contract. At the time, when the agreement was entered into between the appellant/plaintiff and first respondent/first defendant, the appellant/plaintiff paid Rs.5,00,000/- towards advance and after the expiry of 90 days specified in the agreement, he made payment for balance sale consideration, which would clearly prove that he was not ready and willing to pay the entire amount. Even assuming that there was no agreement to pay the entire amount, after the expiry of 90 days, he has made part payment. The moment, when the appellant made part payment after the expiry of 90 days, it is clear that the appellant/plaintiff was not ready and willing to perform the contract with the entire sale consideration even after the expiry of 90 days. The part payment made by the appellant to the first respondent/first defendant after the expiry of 90 days period would show that the appellant/plaintiff was not in a position to pay the entire sale consideration. As stated above, in a suit for specific performance, it is for the appellant/plaintiff to prove always his readiness and willingness to perform the contract until the time of filing the suit. But making part payment after the expiry of 90 days would only show that the appellant/plaintiff was not in a position to make the entire payment and ultimately, lacks the requirement of readiness and willingness to make payment throughout the contract period until the filing of the suit, which is a foremost requirement in a suit for specific

performance. This aspect was not dealt with by the Court below. On this ground alone, the suit filed for specific performance of agreement of sale by appellant/plaintiff is liable to be dismissed. However, the Court below apart from finding that the appellant/plaintiff was not willing to perform the part of the agreement, found that the appellant/plaintiff was not able to prove identity of the property.

14.2 In the agreement of sale, the extent of the property was mentioned as 12,000 sq.ft. whereas, in the Commissioner's report, the extent of property is stated to be 303 sq.ft. as against 400' as per Ex.A.1 and 80 to 82 of east west as against 60' east west as per Ex.A.1/agreement of sale. Therefore, there is huge variation in the measurement of the property and the appellant/plaintiff also not able to prove identity of the property. The appellant/plaintiff also filed an application to implead the second defendant on the ground that the first defendant sold the suit properties to the second respondent/second defendant and also sought for incorporation of para No.4 A in the plaint. Even the plot sold to the second respondent/second defendant is to an extent of 13059 sq.ft., whereas, the properties described in Ex.A.1, is 12,000 sq.ft. Therefore, it is clear that even the extent of properties stated to have been sold by the first respondent/first defendant to the second respondent/second defendant are entirely different from what they have agreed as per the agreement. Hence, the Court below has rightly held that the appellant/ plaintiff failed to prove the identity of the property. Therefore, we do not find any infirmity in the findings of the Court below with regard to the first issue relating to readiness and willingness of the appellant/plaintiff to perform his contract holding that the appellant/plaintiff was not ready and willing to perform the contract.

14.3 Further, with regard to the second issue, the Court below held that time was not essence of the contract since the appellant/plaintiff paid part of the sale consideration beyond the period of 90 days as agreed in the agreement and the first respondent/first defendant also received the said amount. No doubt, in the present case, the appellant/plaintiff paid the money and the first respondent/first defendant received the same. Therefore, we concur with the findings of the Court below that time is not essence of the contract in the present case.

14.4 In a suit for specific performance even if both the parties agreed, it is for the appellant/plaintiff to prove his readiness and willingness to execute the contract, and it should be proved each and every day. While answering Point No.i) with regard to Issue No.i) we held that the

appellant/plaintiff has not proved his readiness and willingness to execute the contract until the filing of the suit. Further, the moment, the appellant/plaintiff has made part of the sale consideration after the expiry of 90 days period, that per se would show that the appellant/plaintiff was not in a position to pay the entire sale consideration as agreed between the parties until the filing of the suit. Since the appellant/plaintiff was not ready and willing and was not able to prove his readiness until the filing of the suit, though the Court below has come to the conclusion that time is not essence of the contract, rightly denied to grant the relief of specific performance. Therefore, we concur with the findings of the Court below with regard to the second and third issues.

Point No.ii)

14.5 So far as the findings of the Court below with regard to the fourth issue, pertaining to the grant of alternative relief for refund of the money is concerned, as the Court below found that the appellant/plaintiff was not entitled for the relief of specific performance, the Court below granted alternative relief of refund of the part of the sale consideration paid to the first respondent/first defendant. We do not find any perversity in the same. In fact, we also concurred with the findings of the Court below and held that the appellant/plaintiff was not entitled for the relief of specific performance. Therefore, we do not find any infirmity in the judgment and decree passed by the Court below. Accordingly, the judgment and decree passed by the Court below to the extent that the appellant/plaintiff is entitled to the refund of the amount paid by him with interest at 18% stands confirmed.

14.6 Insofar as the case laws relied upon by the learned counsel for the appellant is concerned, the same are not applicable to the facts of the case on hand.

15. In the result, the First Appeal stands dismissed. No costs.

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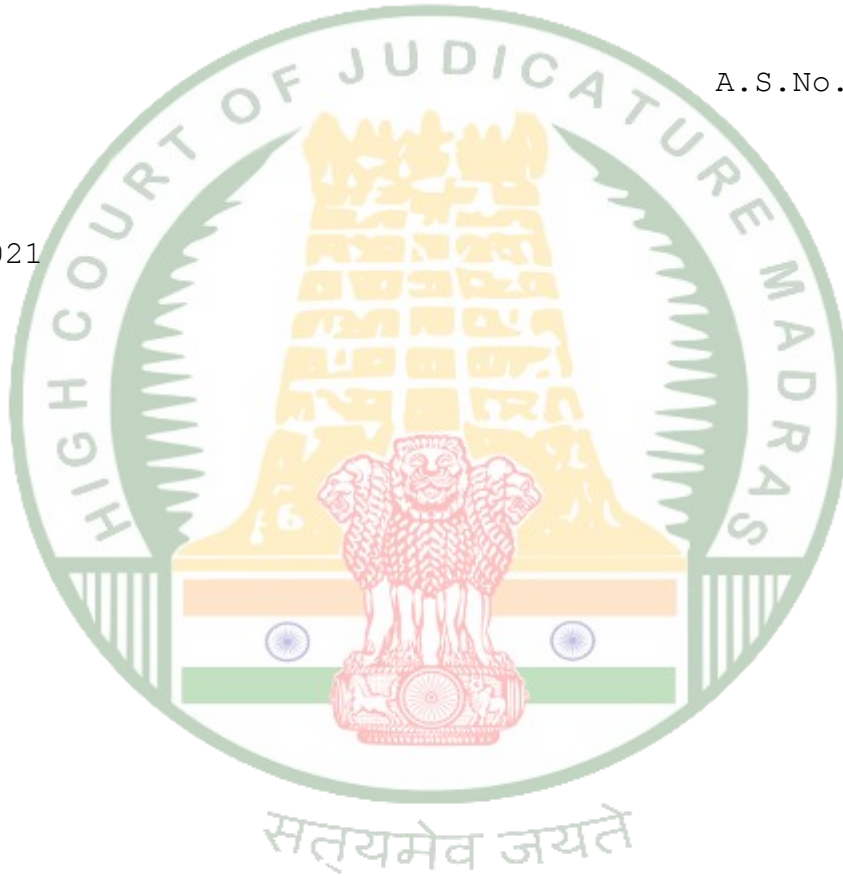
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