

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2020

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.5 of 2014

1. S.K.Gangatharan
2. S.K.Kannan
3. S.K.Yugaparameswari
4. S.K.Bhavani
5. S.K.Kavitha
6. S.K.Valarmathi
7. Gayathri

8. Minor Navedha
9. Minor Santhi

Appellants 8 and 9 are minors rep. By
their mother and guardian Gayathri

..Appellants/Respondents/LRs of
Deceased plaintiff

Vs.

Mariammal

..Respondent/Appellant/Defendant

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree dated 26.07.2013 in AS No.5 of 2012 on the file of the Principal District Judge at Tiruvallur in reversing the well considered judgment and decree dated 03.02.2011 in OS No.267 of 2010 on the file of the Subordinate Judge at Poonamalle.

For Appellants : Mrs.Priya
for M/s. V.Raghavachari

For Respondent : Mr.Venkatavaradhan
for M/s. C.Uma

J U D G M E N T

The plaintiff in OS No.267 of 2010 who was favoured with the decree for specific performance of the agreement of Sale

dated 25.08.2003, upon reversal of the same in AS No.5 of 2012 on the file of the Principal District Judge, Thiruvallur, has come up with this Second Appeal.

2. The suit was laid by the plaintiff claiming that the defendant entered into an agreement of sale on 25.08.2003, agreeing to sell the suit property to him for a consideration of Rs.9,00,000/- and had received an advance of Rs.1,50,000/-. A period of three months was fixed for performance of the contract. As per the terms of the contract, the defendant had to hand over the original title deeds relating to the property and to vacate the tenants, who are in occupation of the property.

3. According to the plaintiff, since the defendant did not come forward to however her commitments, under the agreement, a notice was issued on 19.11.2003 calling upon the defendant to perform her part of the contract. Since the defendant attempted to alienate the property upon receipt of the notice dated 19.11.2003, the plaintiff was forced to file a suit in OS No.654 of 2004 seeking a decree for permanent injunction restraining the defendant from alienating or encumbering the property. The suit came to be decreed ex-parte on 30.11.2004. Permission to sue for Specific Performance later was reserved and leave was obtained under order II Rule 2 of the Code of Civil Procedure.

4. Claiming that the defendant made her intentions not to perform her part of the contract clear by approaching a political outfit which sent a notice to the plaintiff, requiring him to take part in a proposed Panchayat to be convened by them on 31.03.2005 and thereafter, issued a notice dated 14.03.2006 claiming that the time was the essence of the contract, since the plaintiff had not performed his part of the contract within the time stipulated under the Sale agreement dated 25.08.2003, the same had expired. On the above contentions, the plaintiff sought for a decree for specific performance. It is not in dispute, the plaintiff also deposited the balance of sale consideration before the Trial Court.

5. The suit was resisted by the defendant accepting the agreement and contending that since the plaintiff was not ready and willing to perform his part of the contract within the time stipulated in the agreement, he is not entitled to the relief of specific performance. It was also contended that the defendant had handed over the title deeds within 10 days from the date of the agreement itself and therefore, there is no failure on her part to perform her obligations under the contract. The defendant also filed an additional written statement setting up a plea that the contents of the agreement were prepared by the counsel for the plaintiff and she was not explained about the

contents of the document. She also claimed that she is an illiterate and knowing only to sign her name in tamizh and therefore, the contents of the agreement cannot be put against her. On the above pleadings the parties went to trial.

6. At trial, the plaintiff was examined as P.W.1 and Exhibits A1 to A11 were marked. The defendant did not let in any oral evidence and she was satisfied with marking the Exhibits B1 to B3.

7. The Trial Court upon a consideration of evidence on record concluded that the plaintiff is entitled to a decree for specific performance as he has established the fact that the he is always ready and willing to perform his part of the contract.

On the said finding, the Trial Court decreed the suit as prayed for. Aggrieved the defendant prepared an Appeal in AS No.5 of 2012 on the file of the Principal District Judge, Thiruvallur.

8. The learned Principal District Judge, Thiruvallur, on a re-appreciation of the evidence on record concluded that the plaintiff was not ready and willing to perform his part of the contract. The learned Appellate Judge also pointed out the conduct of the plaintiff and discrepancies in the dates of issuance of various notices that were exchanged between the parties to conclude that the plaintiff had not made any demand prior to the expiry of the period fixed under the contract. Therefore, according to the Lower Appellate Court, the plaintiff is not entitled to a decree for specific performance. On the above conclusions, the Lower Appellate Court allowed the Appeal and dismissed the suit in OS No.267 of 2010. Aggrieved the plaintiff has come up with this Second Appeal.

9. The following questions of law were framed at the time of admission.

(a) Whether the court below was right in holding that the plaintiff was not ready and willing to perform his part of the contract in the light of the requirement under Section 51 of the Contract Act that a promisee need not perform unless a reciprocal promisee performs his part first?

(b) Whether the Lower Appellate Court had erred in its application of the commencement of limitation under Article 54 of the Limitation Act in view of the covenants set out in the agreement of sale?

(c) Whether the lower Appellate Court had erred in holding that the plaintiff was not ready and willing to perform his part of the contract in the light of the evidence on record?

10. I have heard Mrs.Priya, learned counsel appearing for Mr.V.Raghavachari, for the appellants and Mr.Venkatavardhan, learned counsel appearing for M/s.C.Uma, for the respondent.

11. The learned counsel appearing for the appellants would vehemently contend that the Lower Appellate Court was not right in upsetting the well considered judgment of the Trial Court on extraneous reasons. Contending that the plaintiff has made his intentions manifest by issuing a notice well before the expiry of the time fixed under the agreement demanding specific performance and having followed it up with the suit for injunction and by issuance of subsequent notices.

12. The learned counsel would also submit that the contract involves mutual obligations and if the defendant did not comply with her part of the contract, viz. to produce the documents within 10 days time, there was no obligation on the part of the plaintiff to pay the balance of sale consideration. Therefore, according to her, when the contract involves mutual obligations, if one of the parties does not perform his/her obligations the other party need not perform his/her of the obligations.

13. The sum and substance of the contentions of the learned counsel is that the plaintiff in a suit for specific performance where the agreement contains reciprocal promises, can wait till the vendor performs his/her part of the contract, immaterial of the time fixed under the agreement. The learned counsel appearing for the appellant would also contend that the fact that the defendant had not entered the witness box, would show that she is attempting to burke facts and hence an adverse inference should be drawn against her.

14. Contending contra Mr.Venkatavaradhan, learned counsel appearing for the respondent would submit that the plaintiff, having not proved his readiness and willingness throughout, is not entitled to a decree for specific performance. The learned counsel would also point out that the notice said to have been issued on 01.11.2003 has been returned un-served and the said notice has not been produced in the present suit. Only the certified copy of the said notice obtained from the Court in OS No.654 of 2004 was filed as Ex.B2. Similarly, the other notice dated 15.03.2004 was filed as Ex.B3. He would also draw my attention to the allegations in the pliant to the effect that the suit notice was sent on 19.11.2003, and submit that the notice dated 19.11.2003 has been created for the purposes of the suit. He would also point out that there is no acknowledgment or receipt evidencing either the service or sending of the said notice. There is no reference to the said notice in any of the prior correspondence.

15. As regards the notice that was produced in the other suit viz. Ex.B2 dated 01.11.2003 also it is seen from the plaint in OS No.654 of 2004 that the said notice has been returned un-served. It is for the plaintiff, in a suit for specific performance, to establish that he was ready and willing to perform his/her part of the contract within the time stipulated under the contract. Though time cannot said to be the essence of the contract in respect of immovable property, the Hon'ble Supreme Court and this Court have always reiterated that the plaintiff should have expressed his/her willingness or should have shown that he/she has been ready and willing to perform his/her part of the contract within the time stipulated under the agreement. If the two notices dated 01.11.2003 and 19.11.2003 are eschewed from consideration, there is nothing to show that the plaintiff demand specific performance within the time stipulated under the contract.

16. Even the notice dated 2.2.2004 has not been produced in this suit or in the other suit. But there is a reference to the said notice in some of the correspondence. Going by the records available in this suit, the first notice complaining non performance was issued by the defendant through the political outfit viz. Purachi Bharatham, under Ex.A3. A reply has been sent by the counsel for the plaintiff to the said notice. Curiously in the said reply notice there is no reference to the notices issued by the plaintiff either on 01.11.2003 or on 19.11.2003, but a reference is made to the notice issued on 02.02.2004, which has not been produced before the Court earlier and which has not been made part of the present proceeding. Therefore, it could be seen that there has been no demand made by the plaintiff, till the defendant issued a notice under Ex.A9, intimating the plaintiff that he has lost his rights to seek specific performance. The same was replied to under Ex.A10 dated 20.03.2006. Curiously, again, there is no reference to the notices issued during November 2003 in Ex.A10. It is stated that the notice dated 02.02.2004 was issued by the plaintiff and upon receipt of the same, the defendant asked him to pay the balance sale consideration and have the sale deed executed. The above documentary evidence available throws considerable suspicion on the claim of the plaintiff that he was ready and willing to perform his part of the contract. Though it is claimed that a notice was issued on 01.11.2003, the same has been returned un-served. The reasons for the return are not known. A notice dated 19.11.2003 is produced, but it is not known whether it is actually sent or not because not even a postal receipt is produced, leave alone an acknowledgement.

17. The notice said to have been sent on 02.02.2004 has not been produced, therefore it could be seen that there has no

reliable evidence to show that the plaintiff has expressed his readiness and willingness to perform his part of the contract. No doubt, the learned counsel appearing for the appellant would argue that this contract contains reciprocal promises and therefore, unless the defendant complies with her part of the contract, it is not incumbent upon the plaintiff to comply with his part of the contract. She would also rely upon Section 51 of the Contract Act. But law relating to specific performance is a little different. A statutory duty is cast upon the plaintiff who seeks specific performance to prove that he has been ready and willing to perform his part of the contract, dehors the defence taken by the defendant, in view of Section 16 (c) of the Specific Relief Act. If there is absence of readiness and willingness, the same would operate as a personal bar to the plaintiff seeking the relief of specific performance.

18. From the discussion above, it is clear that the plaintiff has not established that he was ready and willing to perform his part of the contract within the time stipulated under the agreement. He chose to sue for an injunction, of course after getting permission of the Court to institute the suit, at later point of time, for specific performance. The injunction suit was filed on 29.04.2004 and the suit for specific performance was filed two years later on 18.04.2006. Of course, the suit has been filed within three years, but in a case where the plaintiff seeks a decree for specific performance, it is not enough for him to show that the suit is within time.

19. I have already concluded that the plaintiff has not shown his readiness and willingness within the stipulated period under the agreement. I therefore, do not see any perversity or legal error in the findings of the Appellate Court to the effect that the plaintiff is not proved that he was ready and willing to perform his part of the contract.

20. In the light of the above, the first question of law relating to reciprocal promises is answered against the appellants and the third question of law relating to readiness and willingness is also answered against the appellants.

21. The second question of law has been suggested and framed on a wrong impression that the Appellate Court has dismissed the suit as having been barred by limitation. The Appellate Court had arrived at the conclusion that the plaintiff was not ready and willing to perform his part of the contract and therefore, he is not entitled to a decree for specific performance. The suit, as such, has not been dismissed on the ground of limitation. Therefore, the second question of law does not arise for consideration in my considered opinion.

22. In view of the answers to the two questions of law framed as above, the Appeal fails and is accordingly dismissed. There will be no order as to costs.

Sd/-

Assistant Registrar (AD I MDU)

//True Copy//

Sub Assistant Registrar

jv

To

1. The Principal District Judge
Tiruvallur
2. The Subordinate Judge,
Poonamalle.
3. The Section Officer,
V.R.Section,
Madras High Court.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No. 21591

+1cc to Mr.C.Uma, Advocate, S.R.No. 22187

S.A.No.5 of 2014

NRL (CO)
GN (01/09/2020)

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