

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27-01-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.705 of 2017
And
C.M.P.No.22528 of 2017

Mrs.N.Jaya ... Appellant/Plaintiff

vs.

1.Mr.V.Neelaraman

2.The Manager,
Indian Overseas Bank,
Adambakkam Branch,
Karuneegar Street,
Adambakkam,
Chennai-600 088.

... Respondents/Defendants

Appeal Suit is preferred under Section 96 of the Code of Civil Procedure read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree dated 24.07.2017 passed in O.S.No.166 of 2011 on the file of the learned Principal District Judge, Kancheepuram District at Chengalpattu.

For Appellant : Mr.S.D.Venkateswaran

For Respondent No.1 : Mr.M.Nandhakumar

For Respondent No.2 : No Appearance

J U D G M E N T

The present appeal suit is filed against the judgment and decree dated 24.07.2017 passed by the learned Principal District Judge, Kancheepuram District at Chengalpattu in O.S.No.166 of 2011.

2. The plaintiff in the suit is the appellant in the appeal suit and the defendants in the suit are the respondents in the appeal suit.

3. The suit was instituted by the appellant/plaintiff for specific performance of the contract, directing the first respondent/first defendant to execute and register the Sale Deed in favour of the appellant/plaintiff for Rs.10,71,000/- in respect of the suit property and after receiving the balance sale consideration as per the Sale Agreement dated 23.01.2005.

4. The first respondent/first defendant is the owner of the suit schedule mentioned property comprised in Survey No.95/2 measuring an extent of 2,100 sq. ft. together with superstructure. The first respondent/first defendant executed a written receipt cum Agreement of Sale on 23.01.2005 in favour of the appellant/plaintiff, agreeing to sell the suit property for a total sale consideration of Rs.10,71,000/-.

5. At the time of execution of the Sale Agreement, the first respondent/first defendant received an advance of Rs.50,000/- and on 26.05.2005, he received a sum of Rs.4,20,000/-, in total, he received a sum of Rs.4,70,000/- as advance. The payment of advance was endorsed on the rear page of the agreement itself. Time for performance was not intended or made the essence of the contract.

6. The first respondent/first defendant handed over the xerox copies of the title deeds to the appellant/plaintiff. The appellant/ plaintiff was always ready and willing to perform her part of the contract as per the said Sale Agreement. But the first respondent/first defendant evaded to perform his part of contract. Thus, the first respondent/first defendant with an intention to create a lien over the suit property and availed loan to the tune of Rs.14,00,000/- by depositing of the original title deeds with the second respondent/ second defendant on 08.06.2007.

7. The appellant/plaintiff came to know the facts and got the certified copy of the deed for deposit of title deeds executed by the first respondent/first defendant. The second respondent/second defendant knowing fully well that the first respondent/first defendant entered into an Agreement of Sale with the appellant/plaintiff, had sanctioned loan by accepting deposit of title deeds of the suit property from the first respondent/first defendant.

8. The appellant/plaintiff issued a legal notice to the second respondent/second defendant on 10.05.2011 to cancel the loan amount borrowed by the first respondent/first defendant by deposit of title deeds for which the second respondent/second defendant sent a reply on 08.06.2011. Subsequently, after exchange of notice and reply, suit was instituted.

9. The first respondent/first defendant filed the written statement stating that he is the owner of the suit property as per the Settlement Deed dated 31.03.2004. He decided to sell the suit property to the husband of the appellant/plaintiff through a Real Estate Broker Mr.T.Anburaj. The sale consideration was fixed at Rs.10,70,000/- and the advance amount of Rs.50,000/- was also agreed.

10. The first respondent/first defendant wanted the receipt in his wife's name. The first respondent/first defendant issued a receipt on 24.01.2005, agreeing to sell the suit property for the consideration and in the receipt, it has been stated that the registration be completed within one month by paying the balance sale consideration.

11. It is contended that first respondent/first defendant is always ready to complete the transaction. The time is the essence of the contract. The husband of the appellant/plaintiff Mr.Nagarajan was not ready and willing to perform his part of the contract. The first respondent/first defendant came to know that Mr.Nagarajan was looking for a prospective buyer with an intention to sell the suit property for higher price. He sent a reply notice to the appellant/plaintiff. Thus, the suit is liable to be rejected.

12. The Trial Court framed the following issues for consideration:-

"(1) Whether the plaintiff is entitled for the relief of specific performance ?

(2) Whether the plaintiff is ready and willing to perform her part of the contract ?

(3) Whether the time is the essence of the contract ?

(4) Whether the suit is in time ?

(5) To what relief the parties are entitled to ?"

13. The appellant/plaintiff examined herself as PW-1, the husband of the appellant/plaintiff was examined as PW-2 and the

Real Estate Broker Mr.T.Anburaj was examined as PW-3. On the side of the appellant/plaintiff, Exs.A-1 to A-8 were marked as documents. On the side of the defendants, the first defendant was examined as DW-1 and on the side of the defendants, Ex.B-1 was marked as a document.

14. With reference to issue No.3, the Trial Court made a finding that "whoever be the scribe of the said sentence, inclusion of the sentence at the time of execution of agreement is admitted by PW-1 herself. PW-2 also in his cross-examination, admitted as '12.04.2005க்குள் கிரயம் முடித்துக் கொள்ள வேண்டும் என்று உள்ளது". PW-2 is the husband of the appellant/plaintiff. PW-3, as an independent witness, says that he had no knowledge about 12.04.2005 as deadline for performance. The evidence of PWs-1 and 2 and the documents would go to show that the time has been specifically fixed for performance. The evidence of PW-3 is of no serious consequence and accordingly, the issue regarding time is the essence of the contract was decided in favour of the first respondent/first defendant.

15. With reference to issue Nos.1, 2 and 4, the Trial Court, in clear terms held in paragraph-10 of its judgment and the same reads as under:-

"Apart from that the suit agreement was dated 24.01.2005 as evidenced by the date mentioned below the signature of plaintiff's husband. The stamp paper was purchased on 23.01.2005. The date of execution of agreement, the receipt of Rs.50,000/- and receipt of Rs.4,20,000/- is not disputed by the first defendant. On the other hand, he contends that the plaintiff alone failed to perform her part of the contract. He intended to sell the property to meet his urgent family expenses. Since the sale has not been concluded, he made some arrangement of funds to some other source, the agreement becomes unenforceable. In this case, the suit was filed only in the year 2011 specifically on 19.09.2011. The agreement is in the year 2005. The suit has been filed after 6 years. Prima facie the suit is not in time. As per Article 54 of the Limitation Act, "time for specific performance is three years from the date fixed for performance or if no such date is fixed when the plaintiff has notice that the performance is refused".

As per agreement, the date fixed for performance is 12.04.2005. From 12.04.2005, if you add three years, the suit

ought to have been filed on or before 12.04.2008. As already held this Court is of the view that the time is the essence of the contract. Ex.A-2 is the notice given on 08.08.2005. Again another notice was issued by the plaintiff on 25.09.2008. Both demanding for execution of the Sale Deed. Ex.A-4 is the reply notice dated 05.11.2008. In that reply notice, it has been categorically averred that the agreement is unenforceable and barred by Limitation. Why the plaintiff waited even after the said reply is not properly explained. Again in the year 2011, the plaintiff had chosen to send notice to the first defendant and the second defendant Indian Overseas Bank in order to create a fresh cause of action. Even for the notice Ex.A-2 dated 08.08.2005, there was a reply by the first defendant on 17.08.2005 that has not been pleaded and produced by the plaintiff. On the other hand, it was filed by the first defendant as Ex.B-1. Even in the said notice, it has been specifically stated that a sum of Rs.4,20,000/- was received on 03.04.2005, that also supports the case of the first defendant as if the second payment of Rs.4,20,000/- was made on 03.04.2005 not on 26.05.2005. So there is no extension of time by consent by the first defendant as pleaded by the plaintiff. Even in the year 2005 itself, there was a specific denial for specific performance. Under such circumstance, even if we conclude that the time can be reckoned from the date of refusal, it should be from August 2005. So viewing from any angle, the suit ought to have been filed in the year 2008 itself. So, the suit is hopelessly barred by limitation. Now in order to save the limitation in the evidence, the plaintiff trying to adduce evidence as if her son was hospitalised and due to the unforeseen circumstances, she was not able to complete the sale within three years. That cannot be a ground for extending the limitation for specific performance. Even the medical documents Ex.A-8 is of the year 2008 onwards. The agreement ought to have been concluded in the year 2005 itself. So the explanation offered for delay is not acceptable on facts, legally such a plea is

not permitted. Under such circumstances, this Court finds that the plaintiff is not entitled to the relief of specific performance as prayed for by her and thus answers these issues 1,2 and 4 against the plaintiff."

16. With reference to the above findings, the Trial Court arrived a conclusion that the suit is barred by limitation as the same was not filed within the period of three years. However, the Trial Court granted the alternate relief of refund of advance with interest.

17. This Court is of the considered opinion that the suit was instituted after the period of limitation and the said factum was established before the Trial Court with reference to the documents as well as the evidences.

18. Considering the case for the alternate relief of refund of advance amount is proper and there is no perversity or otherwise. Even in case, where the suit is filed after the period of limitation, in the interest of justice, the parties must be granted the alternate relief of refund of advance amount on the ground of equity. Thus, the Trial Court has arrived a conclusion in consonance with the legal principles settled and based on the documents and the evidences produced by the respective parties.

19. Under these circumstances, this Court is not inclined to interfere with the judgment and decree dated 24.07.2017 passed by the learned Principal District Judge, Kancheepuram District at Chengalpattu in O.S.No.166 of 2011.

20. It is brought to the notice of this Court that pursuant to the interim order passed by this Court, the refund of advance amount deposited by the appellant/plaintiff in the credit of O.S.No.166 of 2011 was subsequently deposited in a Nationalised Bank in reinvestment scheme. Thus, the appellant/plaintiff is permitted to withdraw the said deposited amount with accrued interest by filing appropriate application.

21. Accordingly, the judgment and decree dated 24.07.2017 passed by the learned Principal District Judge, Kancheepuram District at Chengalpattu in O.S.No.166 of 2011 is confirmed. Consequently, the present appeal suit stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Svn

To

1.The Principal District Judge,
Kancheepuram District at
Chengalpattu.

Copy to:

The Section Officer,VR Section, High Court,Madras.

+1cc to Mr.S.D.venkateswaran , Advocate SR.No. 5852

+2ccs to Mr.S.V.Vijay Prashanth , Advocate SR.No. 6311

A.S.No.705 of 2017

A.SK(04/12/2020)



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