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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.11.2021

DELIVERED ON : 09.12.2021

CORAM :

THE HONOURABLE MR.JUSTICE R. PONGIAPPAN

S.A.No.202 of 2010

and

M.P.No.1 of 2010

N.Parimala ...Appellant / Appellant / Defendant

Vs.

S.Lalitha ...Respondent / Respondent / Plaintiff

Prayer : This Second Appeal is filed under Section 100 of C.P.C. against the Judgment and Decree in A.S.No.11 of 2008 on the file of Principal District Judge, Krishnagiri dated 22.07.2009 in confirming the judgment and decree in O.S.No.186 of 2003 on the file of Principal Subordinate Judge, Krishnagiri dated 01.08.2007.

For Appellant : Mrs.R.Sripriya
for Mr.V.Raghavachari

For Respondent : Mr.J.Hariharan
for Mr.V.Nicholas

J U D G M E N T

Challenging the concurrent findings made in O.S.No.186 of 2003 on the file of Principal Subordinate Judge, Krishnagiri and in A.S.No.11 of 2008 on the file of Principal District Judge, Krishnagiri, the appellant, who is the defendant in O.S.No.186 of 2003 has preferred this second appeal.

2. The respondent in this appeal filed a suit before the learned Principal Subordinate Judge, Krishnagiri in O.S.No.186 of 2003, seeking the relief of specific performance directing the defendant to execute the sale deed and to deliver the possession of the suit schedule property. Alternatively, he prayed to direct the defendant to return a sum of Rs.54,600/- with subsequent interest, which was paid in advance during the time of entering into the sale agreement.



3. By Judgment and Decree dated 01.08.2007, the trial Court decreed the suit and directed the defendant to execute a sale deed after receiving balance sale consideration. Challenging the same, the defendant preferred an appeal before the learned Principal District Judge, Krishnagiri, wherein, the learned Principal District Judge, by judgment and decree dated 22.07.2009 dismissed the appeal and confirmed the Judgment and Decree passed by the trial Court. Being unsatisfied with the findings arrived at by the Courts below, the defendant in the suit is before this Court with the present second appeal.

4. For the sake of convenience, hereinafter the parties are called as per their litigative status before the Trial Court.

5. The case of the plaintiff is as follows:

(i) The suit property originally belonged to the defendant. The plaintiff and the defendant entered into an agreement of sale on 23.02.2003. The defendant agreed to sell the suit property to the plaintiff for a sum of Rs.2,70,000/- (Rupees Two lakhs Seventy thousand only) and received a sum of Rs.50,000/- as advance. The plaintiff agreed to pay the balance sale consideration of Rs.2,20,000/- (Rupees Two lakhs and Twenty thousand only) within a period of three months from the date of agreement. The defendant also agreed to discharge all the encumbrances over the suit property.

(ii) At the time of execution of the agreement of sale, the suit property is under mortgage in Krishnagiri Urban Co-operative Bank Limited, Krishnagiri for a sum of Rs.50,000/-. The defendant has agreed to discharge the same within a period of three months. The defendant has already availed loans from various persons and agreed to discharge those loans also. The defendant has approached the plaintiff in the month of April, 2003 and requested the plaintiff to pay a sum of Rs.30,000/- to discharge usufructuary mortgage and the plaintiff had paid the same. In respect of the said payment, the defendant made endorsement in the agreement. The plaintiff is ready and willing to perform her part of contract and issued a legal notice on 21.05.2003, whereas, the defendant is not ready to perform her part of contract. Hence, the suit has been filed for the relief of specific performance.

6. The case of the defendant is as follows:

The story put forth by the plaintiff in respect of the agreement of sale are all false. The true fact is that, when at the time the defendant was in financial crisis, to settle the same, she requested the plaintiff to give a sum of Rs.1,00,000/- as loan and agreed to re-pay the same with the interest at the rate of 36% per annum. The defendant had signed in the forms and in the agreement. Hence, the transaction was only a money transaction and not for selling the schedule mentioned property



to the plaintiff. There was no necessity to the defendant for selling the suit schedule property. It is incorrect to state that the plaintiff has approached the defendant with the balance sale amount for getting the sale deed registered and the defendant has been simply postponing the sale transaction. It is not correct to state that the defendant is taking serious steps to sell the suit property to third party with a view to defraud the plaintiff. Hence, the suit filed by the plaintiff is liable to be dismissed.

7. Based on the above pleadings, the trial Court framed necessary issues and tried the suit. On the side of the plaintiff, the plaintiff herself examined as P.W.1 and marked seven documents as Ex.A1 to Ex.A7. On the side of the defendant, three witnesses were examined as D.W.1 to D.W.3 and six documents were marked as Ex.B1 to Ex.B6.

8. Having considered the materials placed before him, the learned Principal Subordinate Judge, Krishnagiri came to the conclusion that the plaintiff is entitled to the relief of specific performance and directed the defendant to execute the sale deed within a period of three months immediately after receipt of the balance sale consideration. In the appeal preferred by the defendant, the learned Principal District Judge, Krishnagiri confirmed the finding arrived at by the trial Court and dismissed the appeal.

9. Feeling aggrieved over the same, the defendant is before this Court with the present second appeal. At the time of admission, the Court had formulated the following substantial questions of law:

(a) Whether the Courts below are justified in decreeing the suit for specific performance of contract, in the absence of proof of readiness and willingness?

(b) Are the Courts below are justified in shifting the burden on the appellant/defendant, when the onus rest on the plaintiff?

(c) Are the Courts below justified in decreeing the suit for specific performance against the defendants, when her title to the property is lost by virtue of the sale executed in favour of a third party?

(d) Are the Courts below justified in passing decrees without due application of the provisions of Section 10 and 16 of the Specific Relief Act?

10. The learned counsel for the appellant challenges the finding arrived at by the Courts below on two grounds viz.,



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(i) Without framing an issue with regard to the readiness and willingness, which is mandatory requirement under Section 16(c) of Specific Relief Act, the suit has been disposed.

(ii) even after knowing the fact that the suit schedule property was sold out to third party that too after dismissing a petition filed by the subsequent purchaser, the Courts below concluded the suit in favour of the plaintiff and the said decision followed by the Courts below are incorrect.

11. Countering the submission made by the learned counsel appearing for the appellant, Mr.J.Hariharan, learned counsel appearing for the respondent submitted that though the trial Court has not framed an issue in respect to readiness and willingness while at the time of answering the other issue, the trial Court had given a finding with regard to readiness and willingness. Since the defendant disputed the execution of the agreement, there is no necessity for framing an issue with regard to the same. Further the learned counsel submitted that under Order 41 Rule 25 of C.P.C., this Court can frame an issue and refer the same for trial, to the trial Court and the judgment and decree passed by the trial Court may not be set aside till such time. He would further contend that even after knowing the fact that the petition filed by the subsequent purchaser under Order 1 Rule 10 of C.P.C. was dismissed by the Court below, the aggrieved party has not filed any revision and therefore, it cannot be said that non impleading of subsequent purchaser would be fatal to the case of prosecution.

12. In support of his contentions, the learned counsel for the appellant relied upon the judgment in 2005(1) LW 472 [Murugesu Naicker (Died) and 3 others v. Govindaraja Nattar and another] wherein, this Court, in paragraph No.8 held as follows:

"8. Learned counsel for the appellant/D.1 has forcibly contended that the trial Court ought to have framed the prime issue on the Readiness and Willingness of the plaintiffs and the failure to frame that issue vitiates the Judgments of the Courts below. Contending that there had been no pleading and proof on the issue of Readiness and Willingness by the plaintiffs, the trial Court without framing the prime issue has not properly appreciated the evidence. It is further submitted that in the First Appellate Court also on the question of Readiness and Willingness, no point was framed which vitiates the concurrent findings of the Courts below. Drawing the attention of the Court to Exs.A2 to A5, it is submitted



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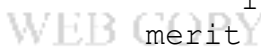
that when the case of the plaintiffs on payment of Rs.2,001/- under Exs.A2 to A5 had been disbelieved, the trial Court ought not to have granted the decree for Specific Performance exercising the discretion. In support of his contention, the learned counsel for the appellant/D1 has relied upon (2002) 8 Supreme Court Cases 146, A.I.R. 1971 ANDHRA PRADESH 279, 2003-3 - L.W. 479 and A.I.R. 1983 Madras 169 = (1983) 96 L.W.88."

13. Here is the case, throughout the trial and before the First Appellate Court the defendant has adopted a consistent stand denying the genuineness of Ex.A1, as the same was executed for the loan transaction. It is clear from the following averments in para 7 of the written statement filed by the defendant:

" The defendant was in financial crisis to settle some old debts and wants a loan of Rs.1 lakh from the plaintiff, who in turn was agreed to pay the loan amount and interest was fixed at 36% (Rs.3.00 per hundred per month) and the defendant had agreed and signed in the forms and in agreement. So the transaction was a money transaction for interest only and not for selling the schedule mentioned property to the plaintiff. So, there was no necessity to sell the only house of the defendant to the plaintiff and the plaintiff never approached the defendant with the balance sale amount for getting the sale deed registered and the defendant has been simply postponing the sale transaction."

14. In the said circumstances, the trial Court framed the main contentious issues alone without framing any issue specifically in respect of readiness and willingness.

15. Though the defendant has not raised a specific plea of readiness and willingness of the plaintiff, duty is cast upon the Court to raise the issue of readiness and willingness. On behalf of the appellant/defendant, it is the main contention that non-framing of the issue with regard to the readiness and willingness vitiates the findings of the Courts below. Clause (c) of Section 16 of Specific Relief Act provides that a person seeking Specific Performance of the contract, must file a suit, wherein, he must aver and prove that he has performed or has been ready and willing to perform the essential terms of the contract, which are to be performed by him. Even if there is lack of pleading on this point, it is the duty of the Court to satisfy itself on the twin mandatory requirements of pleading and proof. It is contended that there is no proper pleading and



16. The above contention raised by the defendant does not merit acceptance. As noted earlier, in the light of the denial of Ex.A1 (Sale Agreement) and the defence plea set forth that the suit has been filed in the premature stage, no issue of readiness and willingness was framed. In fact, the defendant has not raised this point even before the First Appellate Court. No doubt, even if no defence had been raised on the point of readiness and willingness, the Court is called upon to determine the point. From the pleadings and the evidence adduced, this Court finds that it is not as if there is a complete lack of pleading.

"8. The plaintiff was always ready and willing to perform her part of the contract even now she is ready and willing to perform her part of the contract by paying the veyance deed at her cost, but the defendant is evading to complete the transaction."

19. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the trial Court had decreed the suit and also given a finding that the plaintiff was ready and willing to perform her part of contract. No doubt, the said finding was given by the trial Court without framing an issue with regard to the readiness and willingness of the plaintiff. Under Section 16 (c) of the Specific Relief Act, the plaintiff should plead and prove her readiness and willingness to perform her part of the contract, which is the mandatory requirement under the Act. Accordingly, the trial Court erroneously failed to frame an issue with regard to the same.

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other hand, the defendant examined the subsequent purchaser as D.W.3 on her side and marked the sale agreement stands in her favour, however he has not produced the sale deed dated 26.07.2006. It is true that the trial Court injuncted the plaintiff not to execute the sale deed between 10.04.2006 to 23.03.2007. In the said circumstances though the alleged sale deed is executed on 26.07.2006, it is for the trial Court to find out whether the sale was effected within the knowledge of the defendant or not. Further, it is necessary to find out whether the subsequent purchase made is a bonafide one or not.

21. Though the alleged act committed by the defendant is against the Judgment reported in A.I.R. 2001 Mad 313 (Velayudham vs. Perumal and another) and 2005 (2) CTC 227 (Devalsab (Dead) by LRs. vs. Ibrahimsab F.Karajagi and another) after citing the reason that there is no evidence in respect of the transaction made between the defendant and D.W.3 and dismissing the petition, is not fair upon the trial Court. This court does not understand the real issue involved in this case. Therefore considering the facts and circumstances of the case, it would be appropriate to remit the matter to the trial Court for fresh consideration after impleading D.W.3 as a party to the proceedings and after framing an issue with regard to the readiness and willingness having by the plaintiff.

22. In these circumstances, the judgment and decree of the trial Court are set aside. The suit in O.S.No.186 of 2003 is remitted to the Principal Subordinate Court, Krishnagiri for framing an issue with regard to readiness and willingness of the plaintiff and to implead D.W.3 as a party to the proceedings. Thereupon, the trial Court is directed to decide the said issue on merits and in accordance with law, after giving opportunities to both sides for letting in oral and documentary evidences in support of their respective cases. The learned Principal Subordinate Judge, Krishnagiri is directed to dispose of the suit on merits and in accordance with law within a period of three months from the date of receipt of a copy of this judgment.

With these observations, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-II)

// True Copy //

Sub Assistant Registrar

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To:

1.The Principal District Judge,
Krishnagiri.

2.The Principal Subordinate Judge,
Krishnagiri.

Copy To

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

(With a direction to send back the Original
records along with a Copy of this Judgment to
the Principal Subordinate Judge, Krishnagiri
within a period of 10 days from the date of
receipt of copy of this Judgment)

+1cc to M/s.V.Nicholas, Advocate Sr.No.65461

+1cc to M/s.V.Raghavachari, Advocate Sr.No.65118

S.A.No.202 of 2010

BP (CO)
RVM(26/05/2022)