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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.03.2021

C O R A M

THE HON'BLE MR. JUSTICE KRISHNAN RAMASAMY

S.A.No.130 of 2017

and

C.M.P.Nos.2653 & 9124 of 2017

1.Durairaji

2.Muthamizhiselvi

... Appellants/Appellants/Defendants

Vs.

Nadarajan

Rep by power Agent

Selvi W/o.Nadarajan

... Respondent/Respondents/Plaintiff

Prayer:Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 02.09.2013 made in A.S.No.18 of 2012 on the file of the Subordinate Judge, Kallakurichi confirming the judgment and decree dated 21.11.2011 made in O.S.No.420 of 2009 on the file of the Principal District Munsif, Kallakurichi.

For Appellants : Mr.N.Ramesh

For Respondent : Mr.N.Suresh
for Mr.P.Rajavel

JUDGEMENT

This Second Appeal has been filed to set aside the judgment and decree dated 02.09.2013 made in A.S.No.18 of 2012 on the file of the Subordinate Judge, Kallakurichi confirming the judgment and decree dated 21.11.2011 made in O.S.No.420 of 2009 on the file of the Principal District Munsif, Kallakurichi.

2.The appellants herein are the defendants in the suit. The respondent herein is the plaintiff in the suit.

3.The suit was filed for specific performance. The plaintiff and the 1st defendant are brothers.

4.According to the plaintiff, the 1st defendant has agreed to sell the suit schedule property for a consideration of Rs.47,500/-. Accordingly the 1st defendant received a



consideration of Rs.37,000/- as advance from the plaintiff and executed a registered agreement of sale on 01.03.2007. The 2nd defendant is the daughter of the 1st defendant, who was minor at the time execution of the sale agreement. As per the sale agreement, the balance sale consideration of Rs.10,500/- has to be paid on or before 02.03.2009. The plaintiff had appointed his wife as Power of Attorney as he has to go frequently for the Foreign Country for employment purpose. The plaintiff was ready and willing to pay the balance sale consideration throughout the period of sale agreement. But, the defendants took time whenever the plaintiff approached him for executing the sale deed and consequently, the 1st defendant has not kept his promise, therefore the plaintiff issued the legal notice on 04.07.2009, which was marked as Ex.A2. The legal notice was returned as unserved and the returned cover was marked as Ex.A3. Hence, without any option the plaintiff filed the suit for specific performance.

5.The case of the 1st defendant was that he has executed the sale agreement on 01.03.2007 at the request of the plaintiff, as a security for the hand loan. The 1st defendant used to get hand loan from his brother/the plaintiff from time to time for which, the plaintiff requested to provide security for the repayment of loan. Therefore, the sale agreement was executed. According to the 1st defendant he received a sum of Rs.12,000/- on 08.08.2005, Rs.5,000 on 17.01.2006, Rs.3,000/- on 15.07.2007, Rs.10,000/- on 19.07.2007 from the plaintiff as hand loan. Except the above averment, the defendant has denied all other averments in his written statement. The plaintiff by taking advantage over the delay in discharging the hand loan, has fraudulently filed the suit to grab the property. The defendants are away from the village, therefore, the legal notice could not be received and reply was not given. The defendants are ready to settle the hand loan. Therefore, he submitted that there was no cause of action for filing the suit and the same is liable to be dismissed.

6.Before the Trial Court, the plaintiff himself examined as P.W.1 and were marked Exs.A1 to A3. On the defence side, the 1st defendant examined as D.W.1 and no documents were marked.

7.The Trial Court framed four issues and the four issues were answered in favour of the plaintiff and ultimately held that there was a valid registered sale agreement entered between the plaintiff and the defendants. The contention of the defendant that he has obtained only a hand loan from the plaintiff was rejected by the Trial Court by relying on the exhibits. Therefore, the Trial Court passed the judgment and decree stating that the plaintiff is entitled for decree as prayed for.



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8. Aggrieved by the said judgment passed by the Trial Court on 21.11.2011 in O.S.No.420 of 2009, the appellant herein filed an appeal in A.S.No.18 of 2012. After hearing both the parties, the First Appellate Court held that there is a legally valid sale agreement executed by the defendants in favour of the plaintiff for the sale of the suit schedule property on 01.03.2007. Once again, the contention of the defendants that the amount was borrowed as hand loan from the plaintiff, was rejected by the First Appellate Court. The First Appellate Court heavily relied on Ex.A2 and held that the plaintiff was ready and willing to pay the balance consideration as per the sale agreement and upheld the judgment of the Trial Court. Subsequent to the dismissal of the appeal, the Execution Petition was filed and sale deed was executed in favour of the plaintiff on 13.08.2016 by the District Munsif, Kallakurichi, pending the present Second Appeal in S.A.No.130 of 2017. Aggrieved by the judgment and decree passed by the First Appellate Court, the present Second Appeal has been filed. However, at the time of execution of the sale deed the present Second Appeal was not numbered.

9. When the matter came up for hearing on 04.02.2021, this Court admitted the Second Appeal on the following Substantial Question of Law:

"Whether the judgment and decree of the Trial Court as well as the Appellate Court is perverse due to the reason of failure to give findings on the aspect of readiness and willingness of the plaintiff?"

10. Mr. N. Ramesh, learned counsel for the appellants/defendants submitted that the present appeal has been filed challenging the judgment and decree dated 02.09.2013 passed by the First Appellate Court in A.S.No.18 of 2012. The suit was filed by the respondent/plaintiff for specific performance of the contract. He further submitted that the defendants have executed the sale agreement in favour of the plaintiff on 01.03.2007 towards the security for the hand loan. The plaintiff and the 1st defendant are brothers, therefore, the 1st defendant used to borrow hand loans from the plaintiff. Due to the frequency of the transaction, the plaintiff insisted to execute the sale agreement as a security for the repayment of loan. Therefore, the 1st defendant executed the sale agreement as a security for the hand loans. In order to prove the contention, the 1st defendant stated that on various dates he has borrowed money from the plaintiff as hand loan as narrated above in Paragraph No.5. Even some of the transaction appears prior and subsequent to the execution of the sale agreement. However, the plaintiff filed the suit for specific performance to execute



the sale deed.

11. The learned counsel for the appellants further submitted that the plaintiff's contention was that he paid a sum of Rs.37,000/- as advance for executing the sale deed and two years time limit fixed for the payment of balance consideration of Rs.10,500/-. The person who paid a sum of Rs.37,000/- to purchase the land will not wait to pay the balance consideration of Rs.10,500/- for another two years. From this, the Court can construe that the agreement was not entered for sale of the property but as a security for the repayment of the loan. The two years time was granted only for the purpose of repayment of loan and not for the purpose of execution of sale deed after the receipt of Rs.10,500/-.

12. He further submitted that even assuming that the agreement was executed for the sale of the property. The plaintiff is liable to prove his ready and willingness throughout the period of two years, fixed for the balance payment of Rs.10,500/-. He was not ready and willing to pay the balance sale consideration on or before 02.03.2009 as stated in the agreement for sale. On the other hand, he issued the legal notice through Ex.A2 on 04.07.2009 expressing his willingness to pay the balance sale consideration of Rs.10,500/- and requested the defendant to execute the sale deed which is subsequent to the expiry of the agreement period. Therefore, the plaintiff has failed to prove his readiness and willingness to perform the contract.

13. Further, in terms of Section 16(c) of the Specific Relief Act, 1963, (hereinafter also referred to as 'the Act') the plaintiff has to prove his readiness and willingness to pay the balance consideration of Rs.10,500/- throughout the period of agreement. These aspects were not considered by both the Court below. Therefore, the learned counsel submitted that the judgment and decree passed by both the Courts below is perverse and vitiated for the failure to consider the plaintiff's readiness and willingness to perform the contract in terms of 16 (c) of the Act. Hence, prayed to allow the appeal.

14. Per contra, Mr.N.Suresh, learned counsel for the respondent/plaintiff strongly opposed the contention of the learned counsel for the appellant. He submitted that as far as the execution of the sale agreement is concerned, it is admitted by both the parties. The plaintiff has categorically stated in the plaint at Paragraph No.3, that throughout the period of agreement and after the period of agreement he was ready and willing to pay the balance consideration of Rs.10,500/- to the defendants and only at the request of the defendants the execution of sale deed was postponed from time to time. The



defendants sought time for execution of sale deed whenever the plaintiff approached him. Even after the completion of two years period, at the instance of the defendants only the plaintiff granted time for the execution of the sale deed. However, the defendants failed to execute the sale deed. Thus, the plaintiff sent a legal notice on 04.07.2009, expressing his ready and willingness to pay the balance sale consideration of Rs.10,500/- and called upon the defendant to execute the sale deed. The said notice was returned deliberately and returned cover was also marked as Ex.A3. Therefore, without any other option he has filed the present suit for specific performance. The Court below after hearing both side arguments decreed the suit and the First Appellate Court also upheld the judgment of the Trial Court.

15.The learned counsel further submitted that in the present case at the Paragraph No.3 of the plaint, the plaintiff has stated that he is ready and willing to pay the balance consideration throughout the period and for the said averment the defendant has not made any specific denial, which clearly shows that the fault is on the part of the defendants. When the facts which are averred by the plaintiff in the plaint are not denied by the defendants specifically, the same need not be proved by letting in evidence. He further submitted that both the Trial Court as well as the First Appellate Court have not framed any issue with regard to the ready and willingness to perform the contract between the parties in terms of Section 16 (c) of the Act, due to the reason of admission on the part of the defendants. Therefore, he contended that the facts which were admitted need not be proved. In this regard he referred Order VIII Rule 4 and 5 C.P.C, by referring the said order he submitted that every allegation of the fact in the plaint needs to be specifically denied. Further he referred Order 14 Rule 1 C.P.C and submitted that there is no need for framing the issue on all the facts admitted, the issue has to be framed only on the disputed facts and that alone needs to be proved.

16.Further, he contended that by virtue of the recent amendments to the Specific Relief Act, the scope of Section 10 that the power of the Court to grant the discretionary relief on the suit for specific performance is restricted.

17.In support of his contention he referred the following citations:

(i) Jaspal Kaur Cheema & Another Versus M/s.Industrial Trade Links & Others reported in CDJ 2017 SC 747.

(ii) Thirugnanasambandam Versus Kannan & others reported in CDJ 2018 MHC 5909.

18.By referring the above judgments, the learned counsel



submitted that the defendants are required to deny or dispute the statements made in the plaint categorically in the written statement, as evasive denial would amount to an admission of the averments made in the plaint in terms of Order 8 Rule 5 C.P.C.

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19. To support his contention that since the sale agreement was not disputed by the defendants, they are bound to execute the Sale Deed, he has referred the following judgments:

(i) Shanmugasundaram Versus A.K. Sivajeyam & Others reported in CDJ 2019 MHC 3123.

(ii) M. Mohansundaram Versus K. Kandasamy & Another reported in CDJ 2019 MHC 4025.

(iii) K. Santhi Versus N.A. Chinnappan reported in CDJ 2019 MHC 4200.

(iv) Lakshmi Versus Sundari reported in CDJ 2020 MHC 642.

20. Therefore, he submitted that there is no merits in the present appeal. Both the Trial Court as well as the First Appellate Court have elaborately considered the facts on merit and they have categorically come to the conclusion that there was a valid sale agreement and the plaintiff was ready and willing to pay the balance amount and the same was communicated to the defendants by virtue of Ex.B2. Therefore, such a well considered judgment need not be interfered with and prayed for dismissal of the appeal.

21. In reply, the learned counsel for the appellants submitted that the defendants have denied all the averments in the plaint specifically at Paragraph Nos. 1 and 2 of the written statement. Therefore, there was clear cut denial on the part of the defendants with regard to the plaint averments. Even assuming that there was no denial, the plaintiff cannot take the defendant's weakness in his favour. The averments in the plaint need to be proved by the plaintiff by virtue of the oral and documentary evidences. In this regard, he relied on the judgment of the Hon'ble Supreme Court in the case of Mehboob-Ur-Rehman (Dead) Through Lrs. Versus Ahsanul Ghani reported in CDJ 2019 SC 171 and submitted that mere want of objection for the averments by the defendants in the written statement is hardly of any effect or consequence. Therefore, he submitted that in the specific performance suit, it is for the plaintiff to prove his part of performance of contract by evidence. The essential requirement of Section 16 (c) of the Act has not been accomplished in the present case. The said aspect was completely undecided by both the Courts below and no issues were framed with regard to the readiness and willingness as required by Section 16(c) of the Act. Hence, he submitted that the judgment and decree passed by the Courts below is liable to be set aside.



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24. In a suit for specific performance, as per Section 16(c) of the Specific Relief Act, the plaintiff has to prove his readiness and willingness to get a decree in his favour. For better appreciation, Section 16(c) of the Specific Relief Act is extracted hereunder:

It is not necessary that entire amount of consideration should be kept ready by the plaintiff to show his readiness and willingness to perform contract:"

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entirety of the pleadings as also by the evidences brought on records. Therefore, a requirement of necessary averment in the plaint that has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by the plaintiff, essentially needs to be proved independently by letting evidences, therefore, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. The plaintiff has to prove his averment in the plaint through oral and documentary evidences and he cannot be allowed to take any advantages or the reasons of non-availability of specific denial in the written statement.

26. In the present case, the respondent/plaintiff made a submission that there was an averment in the plaint about the readiness and willingness, since the appellants/defendants failed to specifically deny the above said averment, it will amount to admission of the averments in the plaint by the appellants/defendants. Whereas, on the perusal of the written statement filed by the appellants/defendants, in paragraph No. 1 and 2, it appears that they have denied all the averment in the plaint. Consequently, in the written statement the appellants/defendants took a stand that the agreement was entered only as the security for the hand loan received from the respondent/plaintiff, which clearly amounts to the denial of ready and willingness averred in the plaint. In case, if the defendants accepted the sale agreement was made with an intention to sell the property and subsequently denied on the ground that the plaintiff was not ready and willing, the specific denial would arise. Whereas, in the present case, the appellants/defendants states that the agreement was entered only for the purpose of the security for providing loan and the said stand itself amounts to denial for the averment in Paragraph No.3.

27. Even assuming that the contention of the plaintiff that there was no specific denial on the part of the defendants in the written statement with regard to the averment at paragraph No.3 of the plaint in connection with the readiness and willingness, the plaintiff has to prove his ready and willingness by oral and documentary evidences and the same was not proved in the manner known to law. The plaintiff cannot take advantage on the weakness of the defendants. Thus, this Court is unable to find any substance in the stand taken by the plaintiff that the defendant has not made any specific denial in the written statement. When the plaintiff laid the suit for specific performance, it is the duty of the plaintiff to prove his ready and willingness in terms of Section 16 (c) of the Specific Relief act and it is a mandatory requirement to be complied in a suit for specific performance.



28.The Courts below have not even framed any issue with regard to the ready and willingness to prove the contract on the part of the plaintiff. In terms of Section 16(c) of the Specific Relief Act, it is a mandatory requirement. When the Act mandates to prove certain things, it is the duty of the Court to frame the issue, and decide the same, without framing the issue the Court cannot decree the suit in favour of the plaintiff, in a suit for specific performance of contract.

29.The available facts, oral and documentary evidences are sufficient to prove the readiness and willingness of the plaintiff in terms of 103 of the Code of Civil Procedure, thus this Court examined the aspect of ready and willingness of the plaintiff to pay the balance sale consideration. There is no iota of evidence which would prove that the plaintiff was ready and willing to pay the balance consideration over the period of two years as stated in the agreement. In the present case, the legal notice was issued after four months from the date of expiry of two years period provided in sale agreement for the execution of the sale deed. The said legal notice dated 04.07.2009 was marked as Ex.A2. Apart from the said legal notice, throughout the period of sale agreement and even after the expiry of the sale agreement and upto the date of legal notice, there is no evidence which would prove the ready and willingness on the part of the plaintiff to perform the contract. Though he has merely averred in the plaint, the said averments were not proved by letting the oral and documentary evidence. Thus, there is no difficulty for this Court to come to the conclusion that the plaintiff has failed to prove his readiness and willingness in terms of provision of 16(c) of the Specific Relief Act.

30.Further, two years time was granted for the payment of balance consideration of Rs.10,500/-. When a person was able to pay a sum of Rs.37,000/- as advance, there is no need for him to take another two years to pay the balance consideration of Rs.10,500/-, which is also to be noted. No prudent man will take two years time to execute the sale deed. The reason for taking two years time was not explained properly and there was no discussion in this aspect by both the Courts below. Under such circumstances, this Court is of the view that, the two years time provided in the sale agreement was granted for the repayment of the hand loan alone but not for the execution of sale deed. Such presumption is possible under Section 114 of the Indian Evidence Act, 1872, owing to the existence of the available facts in the present case.

31.With regard to the specific denial in the written statement, the learned counsel for the respondent/plaintiff referred various judgment. In all those judgments, the principle



laid down by the Court is acceptable but the principle laid down by the Hon'ble Apex Court in the case of Mehboob-Ur-Rehman (Dead) Through Lrs. Versus Ahsanul Ghani reported in CDJ 2019 SC 171, will squarely applicable for the present case.

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32.The plaintiff cannot take a stand that merely for want of objection in the written statement which is hardly any effect or consequence, without the plaintiff prove his case by letting evidences and he cannot be allowed to take advantages in the defects in the written statement. It is the duty of the plaintiff to prove the averments in the plaint through his own evidences.

33.The learned counsel for the respondent also produced the case laws and submitted that, when the execution of the sale agreement was admitted by both the parties, the plaintiff is entitle to demand for execution of the sale deed. But the said case laws will not be applicable for the fact of the present case.

34.In view of the above finding, this court is of the view that the plaintiff is not entitled for the relief of specific performance. Therefore the judgment and decree of the Courts below is liable to be set aside.

35.The learned counsel for the appellants/defendants admitted the fact that a sum of Rs.37,000/- was received by the appellants/defendants from the plaintiff. Therefore, while rejecting the plaintiff's case for specific performance, by applying the principle of equity, it would be appropriate to direct the appellants to pay the advance amount of Rs.37,000/- along with 9% interest from the date of filing the suit till the date of payment to the plaintiff.

36.Accordingly, the judgment and decree passed by both the Courts below is set aside. In the result, the Second Appeal is allowed with the following directions:

(i) The appellants/defendants are directed to return the advance amount of Rs.37,000/- along with 9% interest from the date of suit till the date of payment within the period of three months from the date of receipt of the copy of this judgment.

(ii) The sale deed executed by the District Munsif, Kallakurichi is set aside.

37.The connected miscellaneous petition is closed. No costs.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

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To:

1. The Subordinate Judge,
Kallakurichi.
2. The Principal District Munsif,
Kallakurichi.

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

+1cc to Mr.N.Ramesh, Advocate, S.R.No.19514
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S.A.No.130 of 2017
and C.M.P.Nos.2653 & 9124 of 2017

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