



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.02.2022

Pronounced on : 25.02.2022

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Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

Appeal Suit No.321 of 2013
& C.M.P.No.2320 of 2020

1. P.Krishnamurthy (Deceased)
2. K.Vasanth,
3. K.Ravi Shankar,
4. K.Ramesh, ... Appellants

Appellants 2 to 4 brought on record as LRs of the deceased 1st appellant vide order of Court dated 21.06.2017 by NKKJ made in M.P.No.1 of 2014 in A.S.No.321 of 2013
/versus/

V.Balasubramaniya Iyer ... Respondent/Plaintiff

Prayer:- This Appeal Suit is filed under Section 96 of the Code of Civil Procedure, read with order 44 Rule 1 of C.P.C., to set aside the decree and Judgment in O.S.No.26 of 2010 on the file of the Learned District and Sessions Judge, Thiruvavur, dated 05.12.2012.

For Appellants : Mr.V.Raghupathi

For Respondent : Mr.R.Muruga Bharathi

J U D G M E N T

This First Appeal is directed against the judgment and decree of the Trial court passed in the suit for specific performance. The aggrieved defendant is before this Court as appellant.

2. The appellant assails the Trial Court judgment on the ground that though the time was essence of the contract, the Trial Court erred in allowing the suit for specific performance in spite of the plaintiff's failure to prove his ready and willingness within the time prescribed and latches in instituting the suit.

3. According to the appellant, in the suit agreement



within 2 months. The plaintiff/respondent paid only a part consideration of Rs.6,00,000/- and failed to pay the balance consideration within two months, hence the defendant/appellant caused notice on 06/10/2008 calling upon the plaintiff/respondent to fulfil his part of contract. The plaintiff/respondent failed to pay the balance consideration. After lapse of 2 years and 10 months from the date of agreement the plaintiff/respondent instituted the suit on 21/12/2010 as if, he was always ready and willing to perform his part of contract. The Court below without proper appreciation of law and facts allowed the suit which is an erroneous conclusion. Hence, the appeal is filed to set aside the judgment and decree dated 05/12/2012 passed in O.S.No.26/2010 on the file of District Court, Tiruvarur.

4. The facts relevant for consideration:

The suit agreement dated 09/02/2008 is an unregistered sale agreement in respect of two pieces of land one measuring 20-2/3 cents and another 0.01 cent where a structure with compound wall existed. Under the terms of the contract, which is marked as Ex.A-1, the parties have agreed for:-

a). Receipt of Rs.6,00,000/- as advance by the vendor towards part sale consideration.

b). Within one month from the date of agreement, the vendor at his costs to demolish the old building in the 1 cent of land except the compound wall on the southern side and other amenities like electricity services and bore well.

c) Soon after the demolition of the old building and levelling the field, the land to be measured with the assistance of Taluk Surveyor to ascertain the extend for patta land available and for that extend, the vendee to pay the balance sale consideration at the rate of Rs.30,000/- per kuzhi (approximately 576 sq.ft ; 3.02 kuzhi = one cent) within a period of two months.

5. The vendor, who is the appellant herein, had caused notice (Ex.A-2) dated 06/10/2008 through his lawyer to the vendee, who is the respondent herein. In the said notice, the vendor has alleged that he agreed to sell the property meet his urgent financial need with specific understanding that the vendee will pay the balance sale consideration within two months and get the sale deed registered. The time was essence of the contract. Though the vendor has completed his part of contract and ready to execute the sale deed, the vendee evading to perform his part namely pay the balance sale



consideration. The breach has caused mental agony and failure to honour his committed with the third party with whom the vendor has entered into a purchase agreement. The vendee was called upon to pay the balance sale consideration within 10 days from the date of receipt of the notice, failing which the agreement will stand cancelled and the advance money will be forfeited.

6. Ex.A-3 is the reply notice of the vendee. In the reply notice the averments made in the notice Ex.A-2 are denied and repudiated. Highlighting the fact that the agreement Ex.A-1 is a reciprocal contract and the vendor who agreed to demolish the old building in second item property within one month failed to demolish the building in time and in the manner expected. The vendor took 6 months to demolish and contrary to the agreement the electrical motor was damaged and removed. The land was not properly levelled. No attempt made by the vendor to get the property measured by Taluk Surveyor. While demolishing the old building, the vendor has obliterated the canal owned by PWD and that has invited objection from PWD. Further, the vendor has suppressed the fact that on the date of agreement, the suit property was subjected to court auction sale. The vendor has discharged the decree amount with the money advanced by the vendee and thereafter cared not to perform his part of contract as promised under the agreement dated 09/02/2008. Though time of two months mentioned as time to complete the contract, the time was not the essence of the contract and the delay was only due to the non performance of the vendor's part of contract. The vendee is always ready and willing to pay the balance sale consideration provided the vendor clears all the debris in the land and arrange for Taluk Surveyor for measure the land to fix the balance sale consideration.

7. This reply notice marked as Ex.A-3 is dated 11/10/2008. The vendor has received this notice on 21/10/2008 as per the postal endorsement found in the acknowledgement card is marked as Ex.A-4. Meanwhile, one Mr.Singaravelu claiming right over the property placed a public notice in the local daily on 11/01/2009 and the copy of the public notice is marked as Ex.A.5. The vendee on his part after causing notice (Ex.A-6) to the vendor on 20/01/2009, also placed a public notice Ex.A-7, in the daily 03/02/2009 informing the general public about his agreement with the B.Krishnamoorthy (the vendor-appellant herein) dated 09/02/2008 and though he is ready to pay the balance consideration and complete the contract, due to certain non compliance of reciprocal promise by the vendor the contract remains incomplete and the general public are warned not to deal with the property.



8. The plaintiff has pleaded that since the defendant failed to cooperate for measuring the land with the assistance of Taluk Surveyor, he on his own efforts arranged for measuring the land and found its extend is only 15 cents which is equal to 45 kuzhi and when the defendant was requested to receive the balance amount as per measurement and execute the deed he protracted on various pretest.

9. The contention raised by the defendant in his written statement is that time was essence of the contract and period for completion of contract was fixed as two months. There was no necessity to measure the land since the extend shown in the deed was verified by the plaintiff before entering into the agreement and found to be correct and only on such satisfaction the agreement was entered upon. The old building was demolished as per the terms of the agreement still the plaintiff did not come forward to pay the balance amount and get the sale deed executed which lead to issuance of notice dated 06.10.2008 granting 10 days time to the plaintiff to perform the contract. Even then, the plaintiff was not ready to complete the contract and therefore, the suit is liable to be dismissed.

10. The Trial Court had framed the following issues:-

(i). Whether the plea that time is not essential for the sale agreement dated 09.02.2008 as stated by the plaintiff is true?

(ii). Whether the plaintiff is always ready and willing to get the sale as per the sale agreement?

(iii). Whether the defendant failed to take action for execution of sale as per the terms of the sale agreement?

(iv). Whether the plaintiff is entitled to the relief of Specific Performance of sale agreement?

(v). Whether the plaintiff failed to perform the specific performance of sale agreement as per notice of the defendant dated 06.10.2008?

(vi). Whether it is valid that the defendant cancelled the sale agreement as per the notice dated 15.04.2009?

(vii). Whether the plaintiff is entitled to the additional relief?



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(viii). Whether the interest claimed by the plaintiff is correct?

(ix). To what relief the plaintiff is entitled?

11. Before the trial Court, the plaintiff has mounted the witness box and marked 13 exhibits. The defendant has cross examined P.W.1 but had not chosen to let any evidence on his behalf.

12. In the cross examination, it has been specifically confronted by the defendant that the measurement of the land under sale agreement is not 15 cents as contended by him and he admits that, he did not measure the land by Officials with the help of Survey Department and he has not mentioned in his plaint that he measure the suit land and found only 15 cents of land available. According to the plaintiff, two months time prescribed for completion of contract shall commence only from the date of demolishing the old building and not from the date of the contract.

13. Whereas, the case of the defendant as found from the cross examination of P.W.1 is that, he in terms of the agreement had demolished the building worth several lakhs and kept vacant for the plaintiff to pay the balance consideration and get it registered within a period of two months as agreed under the agreement (Ex.A.1). But, in spite of performing the reciprocal contract of demolishing the old building, the plaintiff had not paid the balance sale consideration within the time prescribed and therefore, the plaintiff is not entitled for any equitable relief.

14. The trial Court, on considering the rival submissions allowed the suit directing the plaintiff to deposit the balance sale consideration as per the measurement mentioned in the plaintiff, within a period of two months and on such deposit, the defendant shall receive the money and execute the sale deed. Failing which, the Officials of the Court will execute the sale deed in favour of the plaintiff. The defendant has also directed to hand over the possession of the suit property to the plaintiff, hence the present appeal is filed.

Point for determination:-

Whether the Trial Court has properly interpreted the terms of the suit agreement marked as Ex.A.1 to arrive at



conclusion regarding ready and willingness?

15. On perusing the decree of the lower Court, it is found that the trial Court has heavily relied upon the fact that the appellant has not informed the respondent (vendee) about the exact date on which the old building was demolished and kept vacant. Only through Ex.A.2 dated 06.10.2008, there is some inference about the demolition of the old building. While so, the limitation to perform the contract will commence only from that date. Hence time is not essence of the contract, the suit filed on 21.12.2010 is not hit by latches.

16. The learned counsel appearing for the appellant would submit that the terms of the agreement as found in Ex.A.1 is clear as crystal that the vendor should demolish the building within one month and vendee should pay the balance sale consideration and complete the contract within a period of two months from the date of the agreement i.e., by 08.04.2008. The terms of the agreement also clearly say that the measurement of land must be done at the expenses of the vendee in the presence of the vendor. Hence, the learned counsel for the appellant would contend that, in the cross examination, the plaintiff admits that, he did not measured the land with the help of the Departmental Surveyor and measurement was not done in the present of the defendant, therefore the conclusion of the trial Court that the suit agreement is for 15 cents of land = 45 Kuzhi and price for 45 kuzhi should be paid at the rate of Rs.30,000/- per Kuzhi, is per se, illegal and liable to be set aside.

17. Per contra, the Learned Counsel appearing for the respondent would submit that the appellants herein though filed the written statement had not adduced any evidence to support his case. Whereas, the plaintiff had filed 13 documents which includes copy of notice and deposit receipts. Further, there are documents to show that the defendant, who had received an advance of Rs.6,00,000/-, discharged the money decree to clear the suit property from encumbrance. Therefore, the decree of the Trial Court has to be confirmed.

18. Ex.A.1 suit agreement contains a clause that as soon as the old building is demolished and site is cleared and levelled, the vendee has to arrange for measuring the land in the presence of the vendor and measurement should be done by Taluk Surveyor. The consideration will be paid only to the extend of land for which patta could be obtained. The vendee has agreed to carry out this act at his costs.

19. The vendor as plaintiff had projected before the Court that though the agreement mentions the extend of land in



S.No.96/1 is approximately 20-2/3 cents and in S.No.97/10 is approximately 1 cent on actual measurement extend of land available is only 15 cents and therefore, he is liable to pay consideration only for 15 cents = 45 Kuzhi at the rate of Rs.30,000/- per Kuzhi. In the cross examination, the plaintiff admits that the suit measurement was not done by Officials on payment of requisite fees and it was arranged by him privately and it was not done in the present of the vendor. Therefore, it is improper to force the landlord to sell his land, based on the measurement made behind his back.

20. Furthermore, in the suit for specific performance which is an equitable relief, the plaintiff should come forward with clean hands even if the time is not essence of the contract. The vendor, on his part has demolished the old building as agreed and same has also been informed to the vendor through Ex.A.2 notice. While so, there is no acceptable reason for the plaintiff to delay the payment any further and even if his contention made in the reply notice (Ex.A.3) that the land was not properly levelled and certain structure which should not have been demolished being demolished, the plaintiff ought to have immediately repudiated the contract or attempted to enforce the contract or atleast should have arranged for measurement of the land by Taluk Surveyor and intimated to the vendor. Instead, he had waited for nearly 2 years to file the suit for specific performance.

21. The plaintiff wants to purchase the property for lesser value by alleging that the extend available is lesser than what mentioned in the agreement and he is ready to pay costs only for the lesser extend. Had the measurement been done in the presence of the vendor, then the plea of the plaintiff would have been accepted. Since the measurement done behind the back of the appellant and said measurement is nearly 1/4th less than the extend mentioned in the deed. It is to be held that the subject agreement due to ambiguity not fit for enforcing specifically.

22. The Trial Court has ignored the fact that, as per the sale agreement (Ex.A.1), it was the responsibility of the plaintiff to measure the land once the building is demolished and get vacant. Even this interpretation is very liberal interpretation because the agreement consists of two pieces of land. An agricultural land and a land and building. The measurement of the land where the old building stood alone needs demolition and levelled. The other land available free for measuring soon after the agreement. The plaintiff had not taken steps to measure the land officially till the institution of the suit and even thereafter. He had fix the extend of land on his own and force the landlord to sell the land as per his measurement. The equitable relief of specific performance cannot be misused in this manner.



23. Therefore, this Court is of the view that decree of the Trial Court is liable to be set aside. For the reason that, there was no consensus ad idem (meeting of minds) between the contracting parties in respect of the extend of the suit land. Hence, the decree of the trial Court allowing the suit is set aside. In the result, the judgment and decree of the Trial Court passed in O.S.No.26 of 2010 is hereby set aside.

24. The respondent herein has already parted away the sum of Rs.6,00,000/- as advance. On reciprocal contract, the appellant had demolished his old building, which stood in the S.No.97/10, responsibility of the plaintiff to complete his part of contract deliberately omitted without any reason acceptable. Hence, the Appeal Suit is Allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VI)

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Sub Assistant Registrar

bsm

To,

1.The District and Sesions Judge,
District Court,Thiruvavarur.

Copy to:

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

+2 ccs to Mr.V.Raghupathi, Advocate Sr.NO. 12601

+1 cc to Mr. R.Muruga Bharathi, Advocate Sr.NO. 12624

Appeal Suit No.321 of 2013
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NRJK(CO)

A.SK(27/04/2022)