



A.S.No.4 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 09.11.2022

Judgment Pronounced on : **15.11.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.4 of 2016
and C.M.P.No.158 of 2016

S.K.Muthugavi .. Appellant

Versus

1. K.Banumathi

2. The Sub-Registrar,
Kundrathur, Chennai. .. Respondents

Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code to set aside the judgment and decree, dated 13.08.2015 made in O.S.No.119 of 2012 on the file of learned Additional District Judge-II, Poonamallee and consequently, decree the suit by granting the relief of specific performance by directing the first respondent to execute the sale deed with respect to the suit schedule property in favour of the appellant.

For Appellant : Mr.M.R.Thangavel
for Mr.S.Sathyaraj

For Respondents : Mr.R.Sankarasubbu, for R1



WEB COPY



A.S.No.4 of 2016

: Mr.T.Chandrasekaran,
Spl. Government Pleader for R2

JUDGMENT

A. The Appeal Suit :

This Appeal Suit is filed against the judgment and decree, dated 13.08.2015 in O.S.No.119 of 2012, in and by which, in the suit filed by the plaintiff for specific performance, return of advance amount of Rs.4,70,000/- alone has been ordered. Praying that the specific performance should have been ordered, the plaintiff has filed the present appeal suit.

B. The Plaint :

2. The case of the plaintiff is that the defendant is the owner of property measuring 1500 Sq.ft located at Mariammam Kovil Street, Goparasanallur, Kattupakam. The first defendant, through mediator, offered the same for sale and parties agreed for total sale consideration of Rs.15,50,000/-. The first defendant had mortgaged her property to one *Batham Chand* and she requested the plaintiff to part with an advance amount of Rs.2,70,000/- to redeem the suit property so as to sell the same to the plaintiff. The defendant also assured that she will vacate the house and hand it over to the plaintiff. On 26.04.2012, the plaintiff parted away with the said sum of Rs.2,70,000/- and also entered into a sale agreement on



A.S.No.4 of 2016

WEB COPY

26.04.2012. The first defendant also redeemed the suit property by a receipt, dated 26.04.2012 which was duly registered at the office of the Sub-Registrar, Kundrathur. The defendants also handed over the original documents to the plaintiff. The first defendant promised the plaintiff that she will execute the sale deed on 25.06.2012. As per the sale agreement, the balance sale consideration of Rs.12,80,000/- has to be paid within two months from the date of the sale agreement. On 03.05.2012, upon sudden request of the first defendant, the plaintiff again paid a sum of Rs.2,00,000/- and the transaction was duly endorsed on the reverse of the sale agreement.

3. On 22.06.2012, when the plaintiff visited the suit schedule property, he was shocked to know that the first defendant had not vacated the suit property as promised by her. However, she convinced the plaintiff that she will vacate the house as soon as possible. Therefore, the plaintiff handed over the two cheques, dated 23.06.2012 each for Rs.2,50,000/- to the first defendant and the said transaction was also duly endorsed on the reverse of the sale agreement. However, on the same day, the first defendant came to the plaintiff's house and returned the two cheques and conveyed that the first defendant is not willing to execute the sale deed as



A.S.No.4 of 2016

per the sale agreement and she also lodged a Police complaint on 25.06.2012. When the Police, after investigation, advised both the parties to approach Civil Court, the defendant again lodged a Police complaint against the plaintiff with the Assistant Commissioner of Police, Poonamallee on 30.08.2012. Therefore, the plaintiff filed the suit for specific performance and for permanent injunction on 05.09.2012.

4. Along with the suit, even though no averments are made in the plaint, a legal notice, issued by the first defendant on 25.07.2012 and a legal notice, issued by the plaintiff on 03.08.2012, were produced. In the plaint, in the schedule of the property the suit property is mentioned as a piece of house site to an extent of 1500 Sq.ft with a built up superstructure in 3900 Sq.ft.

C. The Written Statement :

5. The first defendant filed a written statement on 06.03.2013, in which the entire transactions were totally denied, describing the sale agreement as a forged one. However, in the month of August, 2013, after filing change of vakalath, through a different learned Counsel, the defendant filed an additional written statement changing her stand admitting the



A.S.No.4 of 2016

WEB COPY

execution of the sale agreement and the additional advance amount while denying handing over of the cheques for Rs.5,00,000/- as on 23.06.2012. It is the case of the first defendant that the plaintiff was not ready and willing to perform his part of the contract. The first defendant had only first issued the legal notice on 25.07.2012. The first defendant specifically pleaded that the suit agreement is only for the vacant site while the suit is filed for the superstructure also. There was an oral understanding between the plaintiff and the first defendant that the plaintiff had to pay an additional sum of Rs.2,00,000/- over and above the sale consideration of Rs.15,50,000/- in respect of the superstructure which the plaintiff has not come forward and he has also not whispered about the same in the plaint and therefore, prayed for dismissal of the suit.

D. The Issues :

6. On the strength of the said pleadings, the Trial Court framed three issues as hereunder:-

(i) Whether the plaintiff is entitled for specific performance?

(ii) Whether the plaintiff is entitled for permanent injunction?

(iii) To what relief?



A.S.No.4 of 2016

WEB COPY

E. The Evidence :

7. On the said issues, the plaintiff examined himself as P.W.1 and one *Subramanian* was examined as P.W.2. *Exs.A-1* to *A-9* were marked on behalf of the plaintiff. The first defendant examined herself as D.W.1 and *Exs.B-1* to *B-30* were marked on behalf of the defendants.

F. The Findings of the Trial Court :

8. Thereafter, the Trial Court took up the matter for consideration and by a judgment, dated 13.08.2015, found that when the suit agreement was in respect of vacant plot, the plaintiff is asking for a superstructure in the suit schedule property and in view of the difference in the schedule in the agreement and schedule to the suit and in the absence of proper description as to what superstructure was present in the suit property, the Trial Court found that the objection of the defendants, in this regard, as acceptable. Considering the question of readiness and willingness, the Trial Court found that it is the first defendant who had issued a notice and even after issuing reply notice, the plaintiff has not deposited the balance sale consideration in the suit. Even though the plaintiff had stated that within the time he had



A.S.No.4 of 2016

WEB COPY

handed over further consideration of Rs.5,00,000/- by way of two cheques and when it is mentioned in the reply notice by the plaintiff that the first defendant had returned the cheques back to the plaintiff, the further case of the plaintiff that he had again returned the said cheques to the first defendant is artificial and the plaintiff had not produced those two cheques before the Court. The plaintiff has also not demonstrated before the Court that he had the money ready in his account. Immediately after the expiry of the time limit, the plaintiff did not issue any notice requiring the first defendant to come and execute the sale deed. Therefore, the Trial Court held that the plaintiff was not ready and willing to perform his part of the contract and the Trial Court, from the various exhibits relating to the payment of house tax etc., produced by the defendants, found that the first defendant was residing in the suit property for over thirty years after building the house. In view thereof, the Trial Court refused the relief of specific performance and ordered the advance amount of Rs.4,70,000/- to be deposited by the first defendant within one month from the date of the decree.

G. The Submissions :



A.S.No.4 of 2016

WEB COPY

9. Heard *Mr.M.R.Thangavel*, learned Counsel for the appellant and *Mr.R.Sankarasubbu*, learned Counsel for the first respondent and *Mr.T.Chandrasekaran*, learned Special Government Pleader for the second respondent.

10. *Mr.M.R.Thangavel*, learned Counsel for the appellant, taking this Court through the pleadings and affidavit, would submit that in this case, the written statement of the first defendant was that of a total denial. However, she turned the tables by filing an additional written statement now admitting the transactions. Time is not the essence of the contract. On 23.06.2012, the plaintiff had handed over two cheques, for which, there is an endorsement on the reverse of the sale agreement itself and when the signature was not pleaded to be forged, then the same is binding on the first defendant and therefore, the plaintiff, having acted within 60 days, was also ready and willing to perform his part of the contract. Immediately, upon expiry of 60 days, the first defendant gave a Police complaint and also a legal notice. In the month of August, 2012, the plaintiff sent a reply notice and immediately the suit was filed. Before the Trial Court, a lodgement schedule was filed for depositing of the balance amount. Therefore, the



A.S.No.4 of 2016

plaintiff was always ready and willing to perform his part of the contract and thus, the Trial Court ought to have decreed the suit for the relief of specific performance.

11. The learned Counsel also relied upon the judgment of this Court in *Lakshmi Ammal and Ors. Vs. Gejaraj (Died) and Ors.*¹, more specifically relying upon paragraph Nos.18 and 20 of the said judgment to contend that when the plaintiff paid the substantial amount of sale consideration, nothing more to be proved for establishing his readiness and willingness to perform the contract. The learned Counsel also relied upon the judgment of the Hon'ble Supreme Court of India in *P.Ramasubbamma Vs. V.Vijayalakshmi and Ors.*², more specifically paragraph Nos.5.6, 5.7 and 5.8 to contend that when the plaintiff has proved the agreement and his readiness and willingness, specific performance should normally be the remedy which should be granted and not the return of the advance amount.

12. Opposing the above said submissions, *Mr.R.Sankarasubbu*, learned Counsel for the first defendant, would submit that in this case, the

¹ CDJ 2022 MHC 2172

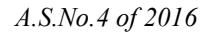
² CDJ 2022 SC 425



A.S.No.4 of 2016

WEB COPY

first defendant belongs to a lower strata of the society and on an erroneous advice by a learned Counsel, written statement with incorrect particulars was filed and realising the mistake, the first defendant had thereafter engaged another Counsel and filed a proper additional written statement. The learned Counsel would submit that in this case, the sale agreement mentions only the vacant site. But, however, the suit is filed also for the superstructure. There was a separate agreement for superstructure which was not revealed by the plaintiff. Therefore, when the schedule to the suit agreement and the suit schedule are at variance, the Trial Court rightly took the same into consideration for denying the relief of specific performance. He would further contend that the plaintiff did not come forward to pay the balance sale consideration and execute the sale deed within the time limit prescribed. The plaintiff failed to prove his readiness and willingness by depositing the balance sale consideration or by producing his bank account to verify that he had the money on the relevant date. It is the defendant who had caused the legal notice. Therefore, the Trial Court also correctly found that the plaintiff was not ready and willing and decreed the suit granting return of the advance amount to the first defendant. Only because of the Covid-19 situation and other difficulties, the first defendant could not





A.S.No.4 of 2016

WEB COPY

25.06.2012, three days prior to the same, he visited the suit property to ensure whether the first defendant had vacated the house so that the balance part of the contract can be performed within a period of 60 days. As a matter of fact, on the very next day i.e., on 23.06.2012, he pleads that he handed over the two cheques totally for Rs.5,00,000/- to the first defendant and the first defendant also is said to have returned the said cheques on the said date i.e., on 23.06.2012. Immediately, upon the expiry of 60 days, the first defendant is said to have given a Police complaint and also a legal notice was issued on the first defendant stating that within the time, the plaintiff did not come forward to complete the same. Thus, it is clear that as regards the immovable property, normally the factum as to whether the time is the essence of the contract or not has to be made out by reading the contract and taking into account the attendant circumstances thereto. In this case, a perusal of the suit contract and the conduct of the parties clearly show that there is a categorical agreement about the deadline of 60 days. In view thereof, I hold that the time is the essence of the contract.

J. Question No.2 :



A.S.No.4 of 2016

WEB COPY

15. In this case, **Ex.A-3** sale agreement reads simply as if it is an agreement of sale of a vacant plot ad-measuring 1500 Sq.ft. The covenants in the agreement and also in the schedule in the agreement clearly mentions the property as vacant plot. In the teeth of the agreement, it is the case of the plaintiff in the plaint that the defendant was residing in the suit property and that she agreed to vacate the house within a period of two months. Unfortunately, the said recitals are not found and are totally missing in **Ex.A-3**. Adding further confusion, in the plaint schedule, it describes as if there is a superstructure of 3900 Sq.ft in the suit schedule property. The same is an obvious language mistake, which can be rectified at any stage. But it is the categorical case of the plaintiff that there is a superstructure in the suit property. If that be so, it is the case of the defendant is that the superstructure is covered by a separate oral agreement with further consideration of Rs.2,00,000/-. But the defendant had taken two contradictory stands in the two written statements and she cannot plead ignorance or mistake of the learned Counsel in that regard and therefore, the case of the first defendant has to be rejected in entirety. But, even taking the case of the plaintiff on an *ex parte* basis, when the description of the property in the plaint and the suit sale agreement are different, that in the



A.S.No.4 of 2016

WEB COPY

plaint, the entire transaction is described as if it is a house ground and premises and that the first defendant had to vacate and deliver the possession and while the sale agreement reads as a simple sale of vacant land, the discrepancy goes to the root of the matter. Whether there was *consensus ad idem* at all between the parties as to what is being purchased and sold itself becomes questionable. In that view of the matter, even though the description in the schedule of the property is only a language mistake, still when it is the case of the plaintiff that his suit is for specific performance of the suit property which is for both plot and the house, then the description of the suit property as a mere plot alone in the agreement will render the case of the plaintiff's case inequitable so as to grant the prayer of specific performance. Hence, I answer the question accordingly against the plaintiff and in favour of the first defendant.

K. Question No.3 :

16. As it has been found supra that time is the essence of the contract, it is the case of the plaintiff that within a period of 60 days, the plaintiff visited the suit property on 22.06.2012 and was shocked to find that the first defendant did not vacate the property and she demanded further sum of



A.S.No.4 of 2016

WEB COPY

Rs.5,00,000/-. In this regard, the signature is there on the reverse of the agreement for receipt of the cheques. But, however, in the endorsement, normally there will be covenant to expedite vacating the house or extending the time limit. But in this case, there is no extension of time for performance of the contract. When the plaintiff was shocked to see the first defendant not having vacated the house and he still parts with the further sale consideration of Rs.5,00,000/- by way of two cheques, the normal behaviour expected is to insist a right that atleast with further specific period of 30 days or two months, the first defendant will vacate and hand over the property. But, on the other hand, it is the plaintiff's own case that on the same date, the first defendant came and returned the cheques. Even thereupon the plaintiff did not take any action whatsoever. In fact, even the legal notice was first caused only by the first defendant. Further, the plaintiff is not able to produce the two cheques which were alleged to have been given by him and the case of the plaintiff that he again returned it to the first defendant, on the face of it, is unbelievable. The first defendant who had come to the plaintiff's house and returned the cheques, would not have again received the same and if the plaintiff had sent them through



A.S.No.4 of 2016

WEB COPY

registered post, the plaintiff would have stated so and produced the proof in respect thereof. Therefore, this further makes the plaintiff's case doubtful.

17. This apart, though a lodgement schedule has been filed for deposit of balance amount, the plaintiff did not file an interim application in respect thereof. Though in all circumstances it is not necessary for the plaintiff to deposit a balance sale consideration upfront, the plaintiff can pay the balance sale consideration even after the decree and filing of the lodgement schedule alone without any supporting application again shows the reluctant part of the plaintiff. In view of the above, I hold that the plaintiff was not ready and willing to perform his part of the contract within the 60 days as stipulated in the contract. Accordingly, I answer the question in favour of the defendants and against the plaintiff.

L. Question No.4 :

18. In view of the above findings that the plaintiff was not entitled for specific performance, it goes without saying that the first defendant is liable to return the entire advance amount of Rs.4,70,000/- received by her. The Trial Court had also ordered the same. But, however, even though the Trial



A.S.No.4 of 2016

WEB COPY

Court had ordered that the first defendant should deposit the amount within one month, there was no further clause in the decree in case of default. As a matter of fact, the first defendant had redeemed the property from the plaintiff's money. She has also obtained the further advance of Rs.2,00,000/-. Therefore, the Trial Court ought to have ordered interest thereon. Two other factors were against the first defendant. The first defendant's conduct in first filing a written statement denying the entire transaction was high-handed. The first defendant also was not fair while repudiating the contract in not attempting to return the sale consideration. She also did not take any steps to deposit the advance amount back into the Court. Even after the judgment of the Trial Court, till date, the advance amount is not deposited. Therefore, while ordering the return of the advance amount, the Trial Court ought to have exercised its discretion and ought to have awarded the interest. Therefore taking into account that part of the money was used to redeem the property and the market rate for the transactions like the instant one, I hold that the first defendant is liable to refund the advance amount with interest at the rate of 9% per annum from the date of receipt of the respective amount till the date of deposit.



A.S.No.4 of 2016

WEB COPY

19. This apart, the plaintiff has also filed the title deeds handed over to him as *Exs.A-1, A-4 and A-5* and the first defendant can obtain the return thereof directly from the Court. The plaintiff cannot be further relegated to the filing of Execution Petition for even getting back the said advance amount. Therefore, appropriate default clause in the decree is necessary so that the plaintiff atleast gets his advance amount along with the interest back atleast within one month from the date of receipt of the copy of the order. In view thereof, the rate of interest as fixed for the advance amount will be 9% and if the same is not deposited into the Court within a period of one month from today, the rate of interest shall be 18% per annum. In this regard, it is useful to extract Section 30 of the Specific Relief Act :

" 30. Court may require parties rescinding to do equity.—On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require."

20. The suit is of the year 2012 and the decree to refund the advance amount was granted in the year 2016 and even after 6 years of the decree, the amount is not deposited. Therefore, while permitting the defendant to rescind the contract, it is essential the default clause in respect of the



A.S.No.4 of 2016

payment of interest is added to the decree so as to justice between parties.

Accordingly, the plaintiff will be entitled to the relief of return of the advance amount with further interest as stated above.

21. Courts have also to take into consideration that the litigants need to realise their substantial reliefs and not a mere decree on paper alone. When delays are occurring for such long number of years (in this case 10 years), Courts have to devise methods by which it has to hasten the process also for post-decree realisation. The litigants are expected to comply with the decree of Court and the purpose of Execution Petition was only to remove the difficulties in matters of implementing the orders and it is not a birth right of Judgment Debtors. Therefore, so as to keep pace with changing times, the Civil Courts have to adopt such methods so as to ensure the Decree Holder realise the fruits of the decree at the earliest without further loss of time and therefore, such default clauses can be employed. The type of default clause which may be included in a decree should not be illegal as the Hon'ble Supreme Court of India has held that a default clause for specific performance in a decree for return of advance amount will be illegal in law. But, however, order of payment of a higher rate of interest is



A.S.No.4 of 2016

WEB COPY

not illegal and in the facts and circumstances of the case, especially considering the stand of the first defendant, the conduct of the first defendant before the suit and pending the suit and post-decree has been taken into account by this Court and I hold that the plaintiff is entitled to a higher rate of interest in case of the default of the first defendant.

M. Answers to the Issues :

22. In view of my above findings to the questions, I answer issue Nos.1 and 2, framed by the Trial Court, that the plaintiff is not entitled to the relief of specific performance and permanent injunction. I answer issue No.3, in the Original Suit, that the plaintiff will be entitled for return of advance amount along with the rate of interest as stated above, which is further stated in the decretal order herein after mentioned in the next paragraph.

N. The Result:

23. In the result, A.S.No.4 of 2016 is partly allowed as follows:-

(i) The judgment and decree of the learned Additional District Judge-II, Poonamallee, dated 13.08.2015 in O.S.No.119 of 2012 is confirmed



A.S.No.4 of 2016

inasmuch as it refuses the relief of specific performance and permanent injunction;

(ii) Inasmuch as the decree for return of the advance amount of Rs.4,70,000/- is concerned, it is modified as the first defendant is directed to return the advance amount of Rs.4,70,000/- with further interest at the rate of 9% per annum from the date of receipt of the advance amount till the date of deposit, which is to be deposited within one month from today. There will be no further extension of time for deposit of the amount;

(iii) The first defendant, if fails to deposit the aforesaid sum of Rs.4,70,000/- along with interest at the rate of 9% per annum within above mentioned period of one month, the plaintiff will be entitled to recover the said advance amount of Rs.4,70,000/- along with interest at the rate of 18% per annum from the date on which the amounts were paid till the date of realisation;

(iv) Upon deposit/realisation of the advance amount, the first defendant will be entitled for the original title deeds of the suit property marked on behalf of the plaintiff as exhibits in the suit;

(v) Upon such deposit of the advance amount along with accrued interest, the same shall be paid out to the plaintiff without further insisting



A.S.No.4 of 2016

upon any formal application of payment out by verification of the identity
alone;

(vi) However, there shall be no order as to costs;

(vii) Consequently, connected miscellaneous petition is closed.

15.11.2022

Index : yes
Speaking order
grs

To

1. The Additional District Judge-II,
Poonamallee.
2. The Sub-Registrar,
Kundrathur, Chennai.
3. The Section Officer,
V.R.Section,
High Court of Madras.



WEB COPY



A.S.No.4 of 2016

D.BHARATHA CHAKRAVARTHY, J.,

grs

Pre-Delivery Judgment in

A.S.No.4 of 2016
and C.M.P.No.158 of 2016

15.11.2022