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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.01.2022

PRONOUNCED ON : 08.02.2022

CORAM :

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

S.A. No.1198 of 2010

and

M.P. No.1 of 2010

Manickavel ... Plaintiff/Respondent/Appellant

versus

Natarajan ... Defendant/Appellant/Respondent

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 11.06.2010 made in A.S.No.6 of 2005 on the file of the Additional District Court (Fast Track Court No.2), Cuddalore, reversing the judgment and decree dated 20.01.2005 made in O.S.No.51 of 2000 on the file of the Sub Court, Panruti.

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

For Respondent : Mr.R.Muralidharan

J U D G M E N T

This Second Appeal is focused as against the judgment and decree dated 11.06.2010 passed in A.S.No.6 of 2005 by the learned Additional District Judge [Fast Track Court No.2], Cuddalore, reversing the judgment and decree dated 20.01.2005 passed in O.S.No.51 of 2000 by the learned Subordinate Judge, Panruti.

2. The suit is for specific performance.

3. For the sake of convenience, hereinafter the parties are referred to, as per their litigative status before the trial Court.



4. The laconic averments made in the plaint, are as follows:

[i] The defendant is the owner of the suit schedule property. He offered to sell the suit schedule property to the plaintiff and the same has been agreed by him. The sale price was fixed at Rs.1,50,000/-. In pursuance of the same, a Sale Agreement came into existence on 01.11.1999. On the date of agreement, the defendant received a sum of Rs.1,36,700/- as an advance and the period of performance was fixed as 6 months.

[ii] As per the agreement, the plaintiff has to pay the balance sale consideration of Rs.13,300/- on or before 30.04.2000 and execute a Sale Deed at his expenses. The plaintiff was ready to perform his part of contract and the defendant fails to perform his part of contract. Soon after the agreement, the plaintiff repeatedly requested the defendant to come and execute the Sale Deed. But the defendant postponed the execution of the Sale Deed by saying lame excuses.

[iii] Thereafter, the defendant issued a notice to the plaintiff dated 23.03.2000 after a long lapse of time, intending a stay of payment of money and returning of the alleged Sale Agreement. But there was no such agreement as mentioned in his notice in December 1999 and that a sum of Rs.1,30,000/- as advance. The alleged agreement dated 20.02.1998 has obtained under coercion, is false. It is also false to state that the plaintiff has obtained another agreement on 17.02.1999. For the notice dated 23.03.2000, the plaintiff had issued a reply dated 25.03.2000, for which, the defendant sent a rejoinder on 30.03.2000 reiterating the notice of demand. Afterwards, the defendant has not performed his part of contract. Hence, the suit.

5. The case of the defendant, as averred in the written statement, is as follows:

[i] The defendant never offered to sell the suit schedule property to the plaintiff at any point of time. There was debtor and creditor relationship alone between the defendant and the plaintiff. The defendant used to borrow amounts from the plaintiff and the plaintiff used to get a promissory note for double the amount as well as an unregistered agreement for sale. On 06.11.1995, the defendant has borrowed Rs.19,000/- from the plaintiff, for which, the plaintiff has taken a promissory note for Rs.38,000/-.

[ii] In the letter dated 20.02.1998, the plaintiff has calculated the interest @ 72% and arrived at Rs.67,000/- including the principal and interest. The defendant has paid Rs.20,000/- on 20.02.1998 and for the remaining balance of Rs.47,000/-, the plaintiff has obtained an unregistered agreement for sale as well as unfilled blank promissory note



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from the defendant. Since the period of execution of Sale Deed nearing expiry, the plaintiff has obtained fresh agreement for sale as well as unfilled blank promissory note from the defendant. The plaintiff has obtained fresh agreement for sale on 17.02.1999 and 12.05.1999 with assurance to return the same on discharge of the balance borrowing amount with interest.

[iii] On 12.03.2000, the defendant met the plaintiff along with Panchayators, with an idea to discharge the borrowing amount. On 17.03.2000, in the presence of Panchayators, the defendant has paid Rs.85,000/- as agreed upon and since it was Friday, the plaintiff instructed the defendant to collect the unregistered agreement for sale as well as the blank promissory note on next day. On 18.03.2000, when the defendant demanded to return back the documents, the plaintiff asked the defendant to come and collect on 19.03.2000. Since the act of the plaintiff created a doubt in the mind of the defendant, on 21.03.2000, the defendant has sent a notice to the plaintiff through which he called upon the plaintiff to return back the original documents. The plaintiff sent a reply notice on 25.03.2000 with full of false and frivolous allegations. In turn, the defendant sent rejoinder on 30.03.2000.

[iv] The suit property values about Rs.3.5 lakhs and the defendant never offered to sell for Rs.1,50,000/-. The entire borrowing has been discharged with the plaintiff on 17.03.2000 in the presence of Panchayators. Hence, the suit filed by the plaintiff do not have any merits and the same is liable to be dismissed.

6. From the above averments, the learned Subordinate Judge, Panruti, framed necessary issues and tried the suit. On the side of the plaintiff, P.W.1 and P.W.2 were examined and marked 4 exhibits as Ex.A.1 to Ex.A.4. Similarly, on the side of the defendant, D.W.1 and D.W.2 were examined and marked 4 exhibits as Ex.B.1 to Ex.B.4.

7. Having considered the materials placed before him, the learned Subordinate Judge, Panruti, by judgment and decree dated 20.01.2005, came to the conclusion that the plaintiff has proved his case and ultimately, granted a decree for specific performance. In the appeal preferred by the defendant in A.S.No.6 of 2005, the learned Additional District Judge [Fast Track Court No.2], Cuddalore, reversed the findings arrived by the trial Court and dismissed the suit.

8. Feeling aggrieved over the findings arrived at by the lower appellate Court, the appellant / plaintiff, is before this Court with the present Second Appeal. The Second Appeal was admitted on file, after formulating the following substantial



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question of law;

"1. Whether section 91 & 92 of Evidence Act is not interdict the defendant from setting up a plea of loan transaction, when Ex.A-1 clearly recites it to be a sale agreement ?

2. Whether the lower appellate court is justified in rejecting the suit for specific performance without determining the readiness and willingness of the plaintiff from the conduct of the parties subsequent to the agreement under Ex.A-1 ?"

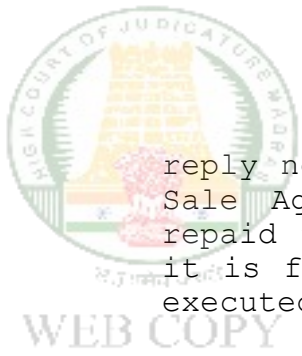
9. Heard Mrs.R.Sripriya, learned counsel for Mr.V.Raghavachari appearing for the appellant and Mr.R.Muralidharan, learned counsel appearing for the respondent and also perused the materials available on record.

10. It is the case of the plaintiff that the suit schedule property belongs to the defendant and with an intend to sell the same, after fixing the sale price at Rs.1,50,000/-, he entered into a Sale Agreement dated 01.11.1999 with him. It is the further case of the plaintiff that before executing the Sale Agreement, the defendant received a sum of Rs.1,36,700/- as an advance, further, the period of performance was fixed as 6 months. Afterwards, on 23.03.2000, with intend to postpone the performance of contract, the defendant issued a notice (Ex.A.2) wherein he denied the execution of Sale Agreement (Ex.A1) dated 01.11.1999. In the said notice, the defendant has stated that the nature of transaction as during the time of repaying the loan already availed from the plaintiff and due to the compulsion, he executed a Sale Agreement.

11. For the said notice dated 23.03.2000, the plaintiff sent a reply notice [Ex.A3] dated 25.03.2000, wherein he denied the allegations levelled by the defendant. However, on 30.03.2000, the defendant sent rejoinder wherein he demanded to return the unfilled pronote alleging that the same was already handed over to the plaintiff.

12. As regards the defendant, it is his case due to the money transaction while at the time of repaying the part of the loan availed from him, the plaintiff pressurised him and obtained the Sale Agreement. In otherwise, the Sale Agreement [Ex.A.1] was executed not with an intention to sell the schedule mentioned property.

13. In this occasion, it is the submission made by the learned counsel for the appellant / plaintiff that, in the



reply notice sent by the defendant, he has stated that the suit Sale Agreement was executed by him during the time when he repaid the part of the loan amount to the plaintiff. Therefore, it is for the defendant to prove his case as the Sale Agreement executed by the defendant relates to the loan transaction.

14. It is true since the defendant has asserted his case as the suit Sale Agreement is executed not for selling the schedule of property, under Section 101 of Indian Evidence Act, it is for him to prove his stand. In this regard, while at the time of giving evidence as D.W.1, the defendant has produced the copy of the pronote dated 06.11.1995 as Ex.B.1. The contents of the said document is evident that on 06.11.1995, the defendant herein after executing the said pronote in favour of the plaintiff availed Rs.38,000/- as a loan from the plaintiff. Though the said document is in the nature to prove that the plaintiff and the defendant is having the loan transaction, since the present Sale Agreement was executed after 4 years from the date of pronote, it cannot be said that the Sale Agreement is having some connection with the loan availed by the defendant on 06.11.1995.

15. Though one Ramar, as P.W.2 gave evidence in support of the plaintiff's case, there is no specific material to show that there was a Panchayat held wherein it was agreed by either side that the defendant has to pay Rs.85,000/- alone as a loan. It is the case of the defendant that the plaintiff obtained unregistered Sale Agreement as well as the unfilled pronote repeatedly at the time of availing the loan. If really, the said stand taken by the defendant is true one before the trial Court, it is for him to issue notice to the plaintiff to produce the same.

16. Here, it is a case, without taking any efforts for producing the alleged unregistered Sale Agreement and unfilled pronote by the plaintiff as alleged contending that the plaintiff is having the habit of obtaining the Sale Agreement for the loan availed by the defendant, cannot be accepted.

17. Therefore, in whole, in view of the discussions stated above, I am of the considered opinion that the defendant has not proved the fact that the Sale Agreement was executed towards the loan transaction.

18. It is the further contention of the appellant / plaintiff that after the receipt of the notice issued by the plaintiff, the defendant has not fixed a date and due to the same, he failed to perform his part of contract and therefore, it would be necessary to direct the defendant to execute the Sale Deed, after the receipt of the balance consideration.



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19. In this regard, he referred the judgment of this Court in A.M.ADHIL BADUSHA vs. SUCHARITHA ANAND reported in (2012) 8 MLJ 177 wherein it has held as follows;

"31. Indubitably and indisputably, obviously and axiomatically, Exhibit A-1, the agreement to sell emerged on 3.7.2006 stipulating six months period for performance, which expired on 3.1.2007. However, Exhibit A-1 would indicate and exemplify that even before the expiry of such period, notice was sent admittedly by the plaintiff to the defendants and in such a case, that would clearly evince and evidence, express and expatiate, portray and project that there was no laches on the part of the plaintiff in seeking specific performance. Over and above that he issued second notice also. The same inertia in responding to the first notice by the defendants followed suit and the conduct of the defendants is deplorable. However, the plaintiff's conduct in appropriately sending notices before the filing the suit, bespeaks and betokens the genuineness and the interest of the plaintiff in getting the sale executed in his favour."

20. Applying the principles set out in the above referred judgment, herein also, after the receipt of the letter sent by the defendant, on 25.03.2000, the plaintiff sent a notice to the defendant wherein he requested the defendant for executing the Sale Deed.

21. In this occasion, it would be necessary to see the judgment of our Hon'ble Supreme Court in the case of J.P.BUILDERS AND ANOTHER vs. A.RAMADAS RAO AND ANOTHER reported in (2011) 1 SCC 429, wherein it was observed as follows:

"27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

22. Accordingly, in view of the above referred judgment, though it was pleaded or not pleaded, it is necessary



on the part of the Court to verify whether the plaintiff, throughout the relevant point of time, had readiness and willingness to perform his part of the contract.

23. For deciding the said factor, it would be necessary to see the notice sent by the plaintiff's advocate on 25.03.2000, which was marked as Ex.A.3. In the said notice, at paragraph no.4, it was stated that the defendant has to fix the date for the execution of the Sale Deed. It shows that the plaintiff is not having any interest in performing his part of contract. If really the plaintiff is ready and willing to perform his part of contract, it is for him to fix the date and after fixing the date, he has to request the defendant to come forward for executing the Sale Deed. Therefore, the sentence narrated in the said notice would clearly show that the plaintiff, is not interested in performing his contract during the relevant point of time.

24. It is true that mere fixation of time within which the contract was to be performed, did not make the stipulation as to the time as the essence of the contract. But, in a given case, the Court has to read along with the other provisions of the contract and also look into all other circumstances attendant.

25. In the present case, it will be clear that before filing the suit, the plaintiff has not sent any notice to the defendant for the receipt of balance consideration and for the execution of the Sale Deed. Being the agreement holder, it is for him to fix the date for execution, but shifted the duty on the shoulder of the defendant, which will show that he has kept quite without any action. More than that, he has not shown the relevant materials to prove that he is having the sufficient money for paying the balance sale consideration.

26. In this occasion, it is necessary to see the judgment of our Hon'ble Apex Court in HIS HOLINESS ACHARYA SWAMIGANESH vs. SHRI SITA RAM THAPAR reported in 1996 AIR 2095 wherein it has held as follows;

"There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration."



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27. Here, it is a case, while at the time of giving evidence as P.W.1, the plaintiff has stated in his cross examination as during the time of entering into the Sale Agreement, he was having only Rs.10,000/- He gave further evidence as only after the receipt of the amount from his father-in-law, he paid the same to the defendant and entered into the Sale Agreement. The said evidence given by the plaintiff is sufficient to hold that the plaintiff, is not a wealthy person. Therefore, it would be necessary to know whether the plaintiff is having the sufficient means to pay the balance consideration. But, here, it is a case, in order to prove that he is having the sufficient means, the plaintiff has not shown any specific evidence as he is having sufficient money to complete his part of contract.

28. In this occasion, it is necessary and useful to see the judgment of this Court in S.RAJALAKSHMI & OTHERS vs. SARADAMANI KANDAPPAN AND ANOTHER reported in 2011 (4) CTC 640 wherein it has held as follows;

"where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and non-readiness."

29. Herein also, after sending the reply notice dated 25.03.2000 till filing of the suit on 28.04.2000, within the agreed period, the plaintiff has not taken steps to complete the same.

30. Another one aspect, which is necessary to be decided in this appeal is that in the Sale Agreement [Ex.A.1], it was stated that the Sale Agreement was executed by the defendant on behalf of himself and on behalf of his children. It shows that the suit schedule property is not the absolute property of the defendant. In this regard, it is not the case of the plaintiff that the defendant is the absolute owner of the suit schedule property.

31. In general, if a person wants to sell the property which belongs to the minor necessarily he has to obtain permission from the local District Court. All are aware executing the Sale Deed for the minor's property, is void. Therefore, in this aspect also, if the prayer sought out by the plaintiff is considered in his favour, it would cause prejudice to the children of the defendant.



32. In this occasion, it would be necessary to see the judgment of this Court in the case of MUNUSAMY vs. NAVA PILLAI reported in CDJ 2008 MHC 666 wherein it has held as follows;

"The relief under Specific performance is a discretionary relief and even if a doubt arises about the genuineness of the agreement of sale between the parties, the relief could be refused to be granted. The relief of specific performance could be granted only if it is a clear case of agreement of sale between the parties, which is pleaded and established by some acceptable evidence."

33. Accordingly, the circumstances appears in and around the case of the plaintiff shows that he has not approached this Court with clean hands. Therefore, being the reason that the relief under specific performance is a discretionary one, the relief cannot be granted in favour of the plaintiff. Hence, in view of the above, the substantial questions of law, are all answered as above.

34. In fine, the Second Appeal is dismissed. The judgment and decree dated 11.06.2010 passed in A.S.No.6 of 2005 by the learned Additional District Judge [Fast Track Court No.2], Cuddalore, is hereby confirmed. Consequently, connected Miscellaneous Petition is closed. However, there is no order as to costs.

Sd/-

Assistant Registrar (CS-VII)

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Sub Assistant Registrar

sri

To

1. The Additional District Judge
[Fast Track Court No.2], Cuddalore.
2. The Subordinate Judge,
Panruti.

+1cc to M/s.R.Muralidharan, Advocate, S.R.No.8402

S.A. No.1198 of 2010
and M.P. No.1 of 2010

AD(CO)
SU(05/04/2022)