

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.02.2022

CORAM

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

S.A.No.798 of 2011

and

M.P. No.1 of 2011

1. Muthuvelan

2. Singaravelan

3. Subbulakshmi

...Appellants

Vs.

S. Ramesh

... Respondent

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 20.11.2010 passed in A.S. No.2 of 2010 and cross appeal, on the file of the Principal Subordinate Court, Nagapattinam, reversing the decree and judgment dated 15.10.2009 passed in O.S. No.114 of 2007, on the file of the District Munsif Court, Nagapattinam.

For Appellants : Mr.S. Sounthar

For Respondent : Mr.R. Subramanian
for Mr.B. Ravi.

JUDGMENT

The appellants are the defendants in O.S. No.114 of 2007 on the file of the District Munsif, Nagapattinam. The respondent/plaintiff filed the said suit for specific performance of contract dated 14.11.2003 or in the alternative direct the defendants to pay a sum of Rs.42,266/- together with interest @ 12% per annum for the advance amount of Rs.30,000/- received by the defendants.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3.The brief facts of the case of the plaintiff is as follows:

There was an agreement of sale dated 14.11.2003 (Ex.A1) between the plaintiff and the defendants in which the latter agreed to sell the suit property for Rs.73,875/- at the rate of 125 per kuzhi (unit of measurement) and an advance amount of Rs.30,000/- was paid to the defendants. It was also agreed upon that the defendants would liquidate their loan against this property with the Land Development Bank and the balance sale consideration would be paid within 5 months from the date of agreement and in case of default of any of the parties, Rs.3,000/- was payable by the defaulting party. The plaintiff was ready with the balance sale consideration and the amount for purchase of stamp duty for execution of the sale deed, was made to wait by the defendant who dragged the matter. When many attempts to bring in the defendants for executing the sale deed went in vain, the plaintiff issued a legal notice dated 26.12.2005 (Ex.A2) and again another legal notice on 19.03.2007 (Ex.A3) after which the defendants gave a reply dated 09.04.2007 (Ex.A4) clearly refusing to execute the sale deed by stating that they were no more interested to sell the suit property. Hence the suit for specific performance of contract.

4. The suit was resisted by the defendants on the following grounds.

- 1) The defendants admitted the sale agreement dated 14.11.2003 (Ex.A1). However according to them, the plaintiff had trespassed into the suit property and put up a brick kiln and making substantial money by selling the bricks.
- 2) The plaintiff excavated sand in the suit property thereby committing act of waste.
- 3) The first defendant lodged a complaint with the Thittacherry Police Station on 07.10.2005 against the plaintiff.
- 4) The defendants also filed O.S. No.336/2005 before the District Munsif Court, Nagapattinam for an injunction and for damages against the plaintiff. An order of temporary injunction was also granted in favour of the plaintiff.
- 5) An Advocate Commissioner was appointed to assess the damage caused by the plaintiff in the suit property and the Advocate Commissioner also filed his report.
- 6) The defendants sent a suitable reply dated 30.01.2006 for the notice dated 26.12.2005 (Ex.A2) issued by the plaintiff. But the plaintiff issued the same notice on 19.03.2007 (Ex.A3) and the defendants sent a reply on 09.04.2007 (Ex.A4). After a long gap, the plaintiff had

filed the suit.

- 7) Since the plaintiff had trespassed into the suit property and also caused extensive damage, he is not entitled to an equitable relief of specific performance.

The defendants, therefore, prayed for the dismissal of the suit.

5. The trial court framed the following issues:

- 1) Whether the plaintiff is entitled for the relief of specific performance as prayed for?
- 2) Whether the plaintiff is entitled for the alternative relief as prayed for?
- 3) To what other relief and order as to costs?

6. In the trial court, the plaintiff examined himself and one another witness and marked Ex.A1 to Ex.A4. The second defendant examined himself and marked Ex.B1.

7. After full contest, the learned District Munsif dismissed the suit with regard to the prayer for specific performance of contract. However, the trial court directed the defendants to pay the suit amount of Rs.42,266/- and the advance amount of Rs.30,000/- together with interest at the rate of 6% per annum from the date of plaint to the plaintiff. The trial court observed that the plaintiff did not take any concrete steps to complete the sale though he has claimed in his averments that he was ready and willing to perform his part of the contract and that only the defendants were dilly dallying. This was because the plaintiff had already occupied the suit property and was enjoying the benefits and therefore was not entitled to the relief of specific performance. However the trial court had ruled that since both the parties admitted the payment of advance of Rs.30,000/-, it has to be returned to the plaintiff along with interest.

8. Aggrieved over the same, the plaintiff filed an appeal in A.S. No.2/2010 and the defendants filed cross appeal. The first appellate court, after analysing the evidence on record decreed the suit filed by the plaintiff vide its decree and judgment dated 20.11.2010 and directed the defendants to execute the sale deed in favour of the plaintiff within a period of three months. According to the first appellate court, in order to punish the plaintiff for a criminal liability the defendants cannot avoid a civil liability. It was also observed that the defendants refused to complete the contract only

because the plaintiff trespassed into the suit property and humiliated the first defendant by beating him up for which criminal action was initiated by the first defendant. It was therefore concluded by the first appellate court that the sale agreement was intact and the time was not the essence of the contract and that it would be unfair not to allow the main relief of specific performance to the plaintiff. The first appellate court therefore set aside the decree and judgment of the trial court.

9. Now the present second appeal is filed on the following substantial questions of law:

- 1) Whether the lower appellate court is justified in granting a decree for specific performance when the plaintiff failed to prove his readiness and willingness by explaining the long gap of nearly 3 years from the date of expiry of time stipulated for performance of contract and actual filing of suit?
- 2) Whether the plaintiff who committed act of waste in the subject matter of suit agreement by illegally trespassing into the same by violating terms of agreement is entitled to invoke the equitable remedy of specific performance of said agreement?"

10. Mr.S.Sounthar, learned counsel for the appellants contended that when the plaintiff trespassed into the suit property and put up a brick kiln and also committed acts of waste by excavating sand, the plaintiff cannot seek for an equitable relief of specific performance of contract. It was also contended by him that the time provided for in the sale agreement was 5 months from the date of sale agreement and the plaintiff did not take any concrete steps to complete the sale since he had encroached upon the suit property and started earning putting the land into effective use by brick kiln and extraction of sand. According to the learned counsel for the appellant, the onus of proving the readiness and willingness to complete the contract was definitely with the plaintiff and it can easily be seen that, from the date of sale agreement i.e. 14.11.2003 till 19.03.2007, when a second legal notice was issued, the plaintiff did not perform his part of the contract. It is also his contention that when the defendants had rescinded the contract vide their letter dated 30.01.2006 (Ex.B1) the plaintiff did not seek for a declaration that recession of the contract was bad in law.

11. Per contra Mr. R. Subramanian, learned counsel for the respondent highlighted that the loan with the Land Development Bank was liquidated only after two years from the date of the sale agreement and only thereafter the question of paying the balance amount arose. Though time limit of 5 months was stipulated in the agreement the plaintiff himself was not abiding by the dead line and even otherwise the time is not the essence of a contract as far as immovable properties are concerned. In the instant case, the loan against the property was to be liquidated first in order to make the property encumbrance free. He would therefore contend that the observation of the first appellate court was in accordance with law.

12. This is a unique case where suit for specific performance has been filed by the plaintiff subsequent to his act of trespass and commission of act of waste in the suit property. Prior to this, the plaintiff had entered into an agreement dated 14.11.2003 (Ex.A1) to purchase the suit property from the defendant. The suit property was already mortgaged with the Land Development Bank and therefore it was agreed upon by both the parties that the loan would be liquidated first and then the balance sale consideration would be payable within 5 months from the date of agreement. An amount of Rs.30,000/- was paid as an advance by the plaintiff. However, it is evidenced that the plaintiff unauthorisedly by force entered into the suit property and constructed a brick kiln. Besides this he also excavated sand from the suit property thereby earning through the sale of bricks and sand which was objected to by the first defendant. This resulted in the plaintiff humiliating the first defendant and the first defendant approached a civil court seeking damages for the act of the plaintiff. This dispute caused the rift between the two parties in which the defendants became stubborn not to go ahead with the sale. They also issued a notice (Ex.B1) rescinding the contract. Subsequently, the plaintiff made an attempt to get the property registered in his name by issuing a legal notice (Ex.A3) to the defendant.

13. It is admitted by both the parties that the suit for permanent injunction and damages filed by the defendants was decreed in favour of the defendants. This is clearly in favour of the defendants and goes to show the highhanded attitude of the plaintiff who took law into his hand instead of abiding by the terms of the agreement. Notably, another clause of the sale agreement was that the defaulter should pay Rs.3,000/- to the other party. The trial court rightly observed that the plaintiff was not entitled to the specific performance of contract on the ground that he was found guilty of encroaching

the suit property and also making money out of it without taking any efforts to complete his part of the contract. Infact it can be seen that the first legal notice was issued only after the episode of the plaintiff trespassing into the suit property and carrying on with his activity of production and sale of bricks and sale of sand. Therefore, the plaintiff has not approached the court with clean hands.

14. On the other hand, the defendants had cleared the loan with Land Development Bank as promised by them to facilitate the balance payment of sale consideration and consequent sale registration. Though it is claimed by the plaintiff that there was an inordinate delay on the part of the defendants to clear the dues with the Land Development Bank, there is no evidence to show that the plaintiff either reminded of the contract or insisted for early liquidation to proceed further. The plaintiff after paying Rs.30,000/- as advance appears to have suddenly started trespassing into the suit property instead of complying with the legal clauses. Even assuming that there was a delay in the defendants playing their part of the contract on time, he (plaintiff) ought to have proved his readiness and willingness to go ahead, which he has failed to substantiate. Though the default clause is there, there is no specific provision for return of the advance amount. Act of waste is one which would impair the value and utility of the property. In the instant case, the suit property contained substantial quantity of sand which was exploited by the plaintiff with impunity and no regard for the law. This apart, the usage of the suit property for brick kiln has also resulted in wastage of the natural resources by which the plaintiff had made money which he is not entitled to. Moreover specific performance is an equitable relief granted by the courts to enforce the contractual obligations between the parties. The person who claims equity must come to court with clean hands. He has suppressed the fact that he unauthorisedly entered into the suit property leading to complications. He has also suppressed the contents of the reply notice sent by the defendants in his plaint. Therefore when illegal means have been adopted by the plaintiff and committed act of waste in the suit property, he is not entitled for specific performance of contract or in the alternative for refund of advance amount. The illegality of his act definitely invites forfeiture of his advance and his prayer for specific performance is far fetched. Therefore I conclude that the decision of the first appellate Court is to be set aside in whole and that of the trial Court is partly allowed to the effect that the appellants/defendants need not return the advance amount received by them.

15. In the result,

- i. the second appeal is allowed. No costs. Consequently connected miscellaneous petition is closed.
- ii. the decree and judgment dated 20.11.2010 passed by the Principal Subordinate Judge, Nagapattinam, in A.S. No.2 of 2010 and cross appeal, is set aside.
- iii. the decree and judgment dated 15.10.2009 passed by the District Munsif, Nagapattinam, in O.S. No.114 of 2007, is partly allowed to the effect that the appellants/defendants need not return the advance amount received by them.
- iv. The suit in O.S. No. 114 of 2007, on the file of the District Munsif Court, Nagapattinam, is dismissed with costs.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

bga

To

1. The Principal Subordinate Court,
Nagapattinam.
2. The District Munsif Court,
Nagapattinam.
3. The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.S.Sounthar, Advocate, S.R.No.10939

+1cc to Mr.R.Subramanian, Advocate, S.R.No.11008

S.A.No .798 of 2011

SSV(CO)

SU(07/04/2022)