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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON:02.03.2022

PRONOUNCING ORDERS ON:04.03.2022

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

Second Appeal No.683 of 2013

Krishnamoorthy

...Appellant/Plaintiff

..Vs..

1.K.Shanmugasundaram

2.Pappayammal (died)

...Respondents/Defendants 1 & 2

[RR2 died, as per memo RR1 & Appellant are
LR's of the R2 vide
order dated 01.03.2022 made
in SA.683/2013.

* memo recorded

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 04.04.2013 made in A.S.No.113 of 2012 on the file of the Principal District Court, Erode reversed the judgment and decree dated 02.03.2012 made in O.S.No.84 of 2005 on the file of the First Additional Sub Court, Erode.

For Appellant : Mr.N.Manokaran

For Respondents : Mr.V.S.Kesavan
for R1

Mr.B.Singaravelu
for R2

JUDGMENT

The plaintiff is the appellant in this Second Appeal.



2.The plaintiff filed the suit seeking for the relief of specific performance and for permanent injunction or in the alternative, for refund of the advance amount that was paid pursuant to the agreement of sale dated 26.08.2004 and to create a charge over the suit property till the payment of the amount with interest, against the defendant.

3.The case of the plaintiff is that the defendant is the absolute owner of the suit property and that he offered to sell the suit property to the plaintiff. After negotiation, they entered into an agreement of sale on 26.08.2004 (Ex.A1). As per the agreement, the total sale consideration was fixed as Rs.2,60,000/-. The plaintiff paid a sum of Rs.50,000/- as advance at the time of the agreement and subsequently paid a sum of Rs.75,000/- on 15.9.2004. Thus the plaintiff paid a sum of Rs. 1,25,000/- out of the total sale consideration of Rs.2,60,000/- and the balance amount that was payable was a sum of Rs. 1,35,000/-. As per the agreement, the balance sale consideration must be paid and the Sale Deed must be executed on or before the end of Tamil Thai 2005 which in terms of the English Calendar falls on 12.02.2005.

4. The further case of the plaintiff is that he was always ready and willing to perform his part of the contract and on several occasions, the balance amount was tendered and defendant was requested to execute the Sale Deed. However, the defendant was evading the execution of the Sale Deed. Hence, there was exchange of notices between the parties. Ultimately, the specific performance suit came to be filed against the defendant.

5.The defendant filed a written statement. Almost all the facts were admitted and the only area of controversy was with regard to the properties getting partitioned before the actual Sale Deed is executed in favour of the plaintiff. The defendant also questioned the readiness and willingness on the part of the plaintiff to perform his part of the contract. The defendant also made an averment to the effect that a suit for partition has already been filed in O.S. No. 197 of 2005 and only after the final decree is passed in this suit, the defendant will be able to execute a Sale Deed in terms of the agreement, in favour of the plaintiff.

6.The Trial Court on appreciation of oral and documentary evidence and after considering the facts and circumstances of the case, decreed the suit in favour of the plaintiff and



directed the defendant to register the Sale Deed in favour of the plaintiff after receiving the balance sale consideration. A further direction was issued to the plaintiff to deposit the remaining sale consideration of Rs.1,35,000/- within two weeks.

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7. Aggrieved by the Judgment and Decree of the Trial Court, the defendant filed an appeal in A.S. No. 113 of 2012. The Appellate Court on re-appreciation of the oral and documentary evidence and after considering the findings of the Trial Court found that the plaintiff was not entitled for the decree of specific performance and accordingly granted the alternate relief of refund of the advance amount with interest. Aggrieved by the same, the plaintiff has filed this Second Appeal.

8. This Court heard Mr.N.Manokaran, learned counsel for the appellant, Mr.V.S.Kesavan, learned counsel for R1 and Mr.B.Singaravelu, learned counsel for R2. This Court also carefully went through the materials available on record and the findings of both the Courts below.

9. This Court framed the following substantial questions of law :

a) Whether the first appellate court was right in relying upon Section 28(1) of the Specific Relief Act, 1963 and finding that the appellant was not ready and willing to perform his part of contract, even without such a plea being raised in the appeal or any specific application being filed on the side of the defendants?

b) Whether the first appellate court should have given an opportunity to the appellant to deposit the balance sale consideration before coming to the conclusion that the appellant was not ready and willing to perform his part of the contract?

10. The area of controversy that is involved in the present appeal is within a narrow compass. There is no dispute with regard to the fact that the 1st defendant is the brother of the plaintiff. He executed a sale agreement in favour of the plaintiff which was marked as Ex.A1 and received a sum of Rs.1,25,000/- out of the total sale consideration of Rs.2,60,000/-. It is also not in dispute that both the parties agreed to complete the transaction on or before the Tamil Thai



2005 i.e. 12.02.2005. Even for the legal notice that was issued by the plaintiff and marked as Ex.A2, the 1st defendant gave a reply notice marked as Ex.A4 wherein, he has stated that he is always ready and willing to perform his part of the contract only after the partition of the properties by metes and bounds. Thus the 1st defendant was not receiving the balance consideration and executing the Sale Deed in favour of the plaintiff only on the ground that the properties must be partitioned. The 1st defendant also filed a suit for partition in O.S. No. 197 of 2005 and the pleadings in the said suit was also marked as exhibits B1 and B2. The endorsement that was made in the sale agreement also made it clear that the sale will be completed immediately after the partition of the remaining properties.

11.Both the Courts below on appreciation of the oral and documentary evidence, came to a categoric conclusion that the plaintiff was ready and willing to perform his part of the contract. Even the Appellate Court concurred with the findings of the Trial Court on this aspect and the only ground on which the Appellate Court denied the relief of specific performance to the plaintiff was the inaction on the part of the plaintiff to deposit the balance sale consideration within the time stipulated by the Trial Court. For appreciation, the relevant findings of the Appellate Court is extracted hereunder:

“Even though the facts in this case show that the plaintiff has shown his ready and willingness before the filling of the suit, during the pendency of the suit, or after the decree he has not shown his ready and willingness to purchase the property by depositing the balance sale consideration. It is further to be noted that the lower court in its judgment and decree, has directed the plaintiff to deposit the balance sale consideration within two weeks before the lower court from the date of judgment and decree. But on perusal of the entire records of the lower court, the amount has not been deposited before the lower court as ordered by the court within the time. Though the trial court retains the power to enlarge the time for depositing the amount by giving extension of time, the plaintiff has not even filed any such application before the lower court for extension



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of time for depositing the balance sale consideration as per the judgment and decree of the trial court. The plaintiff ought to have deposited the amount on or before 16.03.2012. But, no such application filed for extension of time or for filing the lodgment schedule before the trial court within the above period by the plaintiff. This fact clearly indicate the lack of readiness and willingness on the part of the plaintiff. It is further to be noted that without seeking any extension of time to deposit the remaining sale consideration as ordered by the lower court, the plaintiff has just filed the lodgment schedule on 15.3.2012 and in fact the lower court has issued the challan on 15.3.2012 enabling the plaintiff to deposit the amount in the court. In spite of the receipt of the challan No.710 on 15.3.2012 till date the amount has not been deposited and the challan has not been filed into court. The amount has not even brought to the court deposit. These facts also clearly show that the plaintiff having obtained the decree has violated the judgment and decree of the trial court, directing the plaintiff to deposit the amount within 15 days. The readiness virtually means the capacity to pay the sale price and the willingness is mental attitude. While purchasing the property or performing the contract, when one of elements are absent on the part of the plaintiff, even after the decree granted in favour of the plaintiff, plaintiff is not entitled to discretionary relief of specific performance. Since decree for specific performance is in the nature of preliminary decree and the conduct of the decree holder clearly exhibit the unwillingness and incapacity to pay the remaining sale consideration within the time ordered by the court. The discretionary relief is granted in favour for the plaintiff by the trial court should not be extended to the plaintiff when he has violated the very order of the trial court by failure to deposit the amount, within the period of time stipulated. As already pointed out, no application whatever filed by the plaintiff for seeking extension of time to pay the balance amount. Though the lower



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court has issued the challan and permitted the plaintiff to deposit the amount, even after expiry of period, without any application on the part of the plaintiff, the plaintiff has not deposited the amount from the date of issuance of the challan namely on 15.3.2012 till date. Therefore, this court is of the view that the plaintiff having violated the court order and also not deposited the amount, is not entitled to the discretionary relief even though he as shown his ready and willingness at the earlier point of time before filing the suit. Further, after filling the suit and after passing the decree, he has not even shown his ready and willingness."

12.The learned counsel for the appellant submitted that the Lower Appellate Court ought not to have invoked Section 28 of the Specific Relief Act,1963 (hereinafter referred to as "the Act") without a specific ground to that effect being taken in the grounds of appeal and without even formulating the same as a point for determination in the appeal. The learned counsel submitted that the said provision was invoked suo motu at the time of deciding the appeal without putting the plaintiff on notice.

13.The learned counsel for the appellant in order to substantiate his submissions, relied upon the following judgments:

i)K. Kalpana Saraswathi v. P. S. Somasundaram Chettiar reported in 1980 (1) SCC 630.

ii) Sardar Mohar Singh vs. Mangilal reported in 1997 (9) SCC 217.

iii)Kumar Dharendra Mullick&ors v. Tivoli Park Apartments (P) Ltd reported in 2005 (9) SCC 262.

iv) Bhupinder Kumar v. Angrej Singh reported in 2009 (8) SCC 766.

v)B.V. Gururaj v. M.R. Rathindran&anr reported in 2010 (2) CTC 21.

vi) K.Biju&anr v. NabeesaBeevi&ors reported in 2015 SCC ONLINE KER 3785



vii) Sughar Singh Vs. Hari Singh (Dead) through L.Rs. and Ors. reported in MANU/SC/0985/2021

14. The learned counsel for the respondents submitted that the plaintiff must show his readiness and willingness till the actual execution of the Sale Deed and in the absence of the same, the Court can always exercise its discretion and deny the equitable relief of specific performance. The learned counsel further submitted that the defendant showed his readiness and willingness by filing a suit for partition and a preliminary decree has been passed in this suit on 17.07.2018. Therefore, in the absence of readiness and willingness on the part of the plaintiff, even assuming that Section 28 of the Act may not apply, Section 16 (c) of the Act, will always operate till the execution of the Sale Deed. The learned counsel in order to substantiate his submissions relied upon the following judgments:

i) P. R. Yelumalai Vs. N. M. Ravi reported in 2015 (2) CTC 559.

ii) Kamal Kumar Vs. Premlata Joshi & others reported in 2019 (1) CTC 686.

iii) Esakkiammal Vs. Nambikonar (died) and others reported in 2021 (4) CTC 819.

15. In the present case, the defendants at the time of filing the appeal did not raise any ground pertaining to Section 28 of the Act. Order XLI Rule 2 of CPC., specifically mandates the appellant to raise all the grounds in the Memorandum of Appeal. This mandate is issued in order to ensure that the other side is not taken by surprise and the other side gets sufficient opportunity to contest every ground taken in the appeal. It is now a settled law that the parties to the proceedings cannot travel beyond the pleadings. This will equally apply in an appeal filed under Section 96 of CPC., wherein, the appellant should not be permitted to travel beyond the grounds taken in the appeal without seeking the leave of the Court. It is therefore obvious that the appellant did not have an opportunity to face this ground and put forth his objections.

16. Order XLI Rule 31 of CPC., specifically mandates the Appellate Court to frame the points for determination. This requirement has been held to be mandatory in a catena of decisions rendered by the Hon'ble Supreme Court. Only if such



points for consideration is determined, both the parties will be able to make their submissions on those points. In the present case, the Appellate Court did not formulate Section 28 of the Act, as one of the points for determination. The Lower Appellate Court suo motu took this provision and dealt with the same and rendered a finding against the appellant. This obviously has taken the appellant by surprise and such a procedure should not have been adopted by the lower Appellate Court.

17. In the present case, the Trial Court while passing the decree directed the plaintiff to deposit the remaining sale price of Rs.1,35,000/- in two weeks. The last date fell on 16.03.2012 and the plaintiff was expected to deposit the balance sale consideration within this time. Accordingly, the lodgement schedule was filed by the plaintiff on 15.03.2012 and the challan was also issued by the Trial Court on 15.03.2012. The plaintiff did not deposit the amount even after receiving the challan. This has been taken as a ground by the Lower Appellate Court to invoke Section 28 of the Act.

18. For proper appreciation, Section 28 (1) of the Act, is extracted hereunder:

“(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.”

19. The decree for specific performance is in the nature of a preliminary decree. Both the parties have reciprocal rights and obligations flowing out of the decree. The decree may fix the time limit for performance and in some cases may also provide for the consequence for non-performance within the time limit or the decree may even be silent on this aspect.

20. The decree enforces specific performance of the contract. The contract between the parties is thus not extinguished by



passing of a decree for specific performance and it subsists despite the decree. Section 28 (1) of the Act, makes it clear that the Court does not become a functus officio after the grant of the decree for specific performance and it retains its power and jurisdiction to deal with the decree till the Sale Deed is executed.

21. The Court has been given the power to extend the time to pay the amount and while taking into consideration the delay that is sought to be condoned by the plaintiff, the Court does not adjudge the same like an application under Section 5 of the Limitation Act, where each day's delay must be explained. The Court is given the discretion to extend the time and the provision therefore seeks to provide complete relief to both the parties in terms of the decree for specific performance.

22. The power and jurisdiction granted under Section 28 (1) of the Act, enables the Court to extend the period for payment of the purchase money if it has not been paid within the period allowed by the decree. It also enables the judgment debtor to seek for rescinding the contract for non-compliance of the directions given in the decree and while considering this application, the Court is given the discretion to rescind the contract or in an appropriate case to even extend the time for paying the purchase money.

23. It should also be borne in mind that appeal is a continuation of the original proceedings and the power of the Court to extend the time for depositing the amount can be exercised even in the appellate stage by the Court.

24. In the considered view of this Court, the Appellate Court, after deciding the appeal on merits, could have called upon the plaintiff to deposit the balance sale consideration by fixing a time limit. This would have at least given an opportunity to the plaintiff to fulfil his obligation. The non-payment of the balance sale consideration within the time period fixed by the Trial Court does not amount to abandonment of the contract and consequent rescinding of the same. The real test must be to see if the conduct of the plaintiff will amount to a positive refusal to complete his part of the contract. There must be an element of wilful negligence on the part of the plaintiff before a Court proceeds to invoke Section 28 of the Act and rescind the contract.



25.The Lower Appellate Court ought not to have invoked Section 28 (1) of the Act, on the facts of the present case. This is more so since the plaintiff has been put to prejudice even without affording him an opportunity. Hence, this Court holds that the invocation of Section 28(1) of the Act, by the Lower Appellate Court is unsustainable. The substantial questions of law are answered accordingly in favour of the appellant.

26.In view of the above finding, this Court is inclined to grant the decree of specific performance in favour of the plaintiff. The plaintiff and the 1st defendant are brothers and the 1st defendant has already taken steps to partition the properties and a preliminary decree had already been passed in the year 2018. The agreement is of the year 2004 and nearly 18 years have gone by before the proceedings ultimately culminated in this Second Appeal. The Hon'ble Supreme Court in a catena of decisions has categorically held that the Court while decreeing the suit can enhance the sale price after taking into consideration the long lapse of time and the pendency of the proceedings. Useful reference can be made to the judgment of the Hon'ble Supreme Court in K. Prakash v. B. R. Sampath Kumar reported in 2015 1 SCC 597.

27.This Court wants to strike a balance between the parties and ensure that the defendants receive a reasonable sale price for the property while executing the sale deed in favour of the plaintiff at this length of time. Accordingly, this Court is inclined to take into consideration the escalation of price that has taken place for the suit property. It was brought to the notice of this Court that the present value of the property if it is taken as an agricultural land, is hovering around Rs.15,00,000/- per acre. This Court also ascertained that the suit properties are now situated in a prime locality and many properties in and around the suit property has been converted into house Plots and the going rate of these Plots is Rs.670/- per sq.ft. If this is taken into consideration, the rate of the suit property will reach astronomical levels. It may not be proper for this Court to undertake this exercise since the suit property was dealt with only as an agricultural land and not as a house plot. This Court deems it fit to fix the sale price at Rs.12,00,000/-. The plaintiff has already paid a sum of Rs.1,25,000/-. This Court having enhanced the sale price,



directs the plaintiff to pay the balance sale consideration of Rs.10,75,000/- within a period of two months from today.

28. In the result, the Second Appeal is allowed and the judgment and decree of the Lower Appellate Court is set aside. There shall be a decree in the following terms:

a) The plaintiff is directed to deposit the remaining sale consideration of Rs.10,75,000/- within a period of two months from today and ;

b) There shall be a direction to the 1st defendant to execute a registered Sale Deed in favour of the plaintiff with respect to the suit properties after receiving the balance sale consideration.

Considering the facts and circumstances of the case and the relationship between the parties, there shall be no order as to cost.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

KP
To

1.The Principal District Judge,
Erode.

2.The I Additional Subordinate Judge,
Erode.

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

+1cc to M/s.N.Manokaran, Advocate Sr.14876
+1cc to M/s.V.S.Kesavan, Advocate Sr.14359

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