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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON 16.02.2022

PRONOUNCING ORDERS ON 18.02.2022

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

SA No.441 of 2016
in CMP No.7531 of 2016

Prabakaran ..Appellant/Defendant

Vs.

Geetha ...Respondent/Plaintiff

Prayer : Second Appeal filed under section 100 of the Code of Civil Procedure against the judgment and decree of Sub Court, Kallakurichi dated 30.11.2012 made in A.S.No.14 of 2012 confirming the judgement and decree of Principal District Munsif, Kallakurichi dated 23.11.2011 made in O.S.No.393 / 2009.

For Appellant : Mr.S.Sounthar

For Respondent : Mr.V.Manohar

JUDGMENT

The defendant is the appellant in this Second Appeal.

2.The respondent/plaintiff filed a suit for specific performance based on the agreement of sale dated 18.5.2007.

3. The case of the plaintiff is that the defendant is the owner of the suit property and she entered into an agreement of sale with the defendant on 18.5.2007. A sum of Rs.60,000/- was fixed as the sale consideration and the plaintiff paid an advance amount of Rs.50,000/- on the date of the agreement. The further case of the plaintiff is that the balance sale consideration of Rs.10,000/- must be paid to the defendant within a period of 2 years and on receipt of the same, the defendant has to execute a sale deed in favour of the plaintiff.



4. It is stated that the plaintiff started approaching the family manager of the defendant one month prior to the expiry of 2 years as fixed in the agreement and was informing that she is ready and willing to pay the balance sale consideration. The defendant was not coming forward to execute the sale deed after receiving the balance sale consideration. Hence, a legal notice was issued on 4.7.2009 to the defendant, calling upon the defendant to receive the balance sale consideration and execute the sale deed in favour of the plaintiff. Since the defendant did not act upon the legal notice, the suit came to be filed on 15.7.2009 seeking for the relief of specific performance.

5. The defendant filed a written statement and took a stand that the plaintiff did not come forward to pay the balance sale consideration within 2 years that was fixed in the sale agreement and hence, the plaintiff is not entitled for the relief of specific performance. The defendant also volunteered to repay back the advance amount of Rs.50,000/- received from the plaintiff.

6. Both the Courts below on appreciation of oral and documentary evidence, found that the plaintiff has made out a case and granted the relief of specific performance in favour of the plaintiff. The defendant aggrieved by the same, has preferred this Second Appeal.

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

a) Whether the Courts below committed a Legal error in construing that the time fixed in the suit agreement is not essence of the contract over looking the availability of forfeiture clause ?

b) Whether the plaintiff who failed to prove her readiness and willingness to pay the balance sale consideration before expiry of time stipulated in the agreement is entitled to specific performance of this contract?

8. The learned counsel for the appellant submitted that the time was the essence of the contract since the



agreement itself fixed a time limit of 2 years for the plaintiff to pay the balance sale consideration and get the sale deed executed in her favour. This time limit expired on 17.5.2009. Only after the expiry of the period, the plaintiff took the first step of issuing a notice on 4.7.2009 and even without waiting for a reply from the defendant, rushed to the Court and filed the suit on 15.7.2009. Therefore according to the learned counsel for the appellant, the plaintiff was not ready and willing to perform her part of the contract.

9. The learned counsel for the appellant further submitted that both the Courts below allowed the suit only on the ground that the defendant did not give a reply for the legal notice and hence, adverse inference was drawn against the defendant. Yet another ground that was put against the defendant was that the sale agreement had a forfeiture clause if the plaintiff fails to perform her part of the contract within the stipulated time and whereas, there was no such stipulation that imposed any penalty against the defendant if he does not come forward to perform his part of the contract. The learned counsel submitted that both the grounds that were put against the defendant are unsustainable. The learned counsel submitted that there was hardly any time to give a reply notice since the suit was filed within 11 days from the date of the legal notice. Therefore, adverse inference cannot be taken against the defendant on this ground. The learned counsel further submitted that both the Courts below did not properly appreciate the terms of the agreement which specifically provided that if the defendant fails to perform his part of the contract, it will be left open to the plaintiff to deposit the balance amount in the Court and institute a suit for specific performance and in which case, the litigation expenses must be incurred by the defendant. This clause according to the learned counsel for the appellant is in the nature of a penalty if the defendant does not perform his part of the contract.

10. The learned counsel for the appellant further submitted that the plaintiff is not entitled for the decree of specific performance since the legal notice itself was issued after the prescribed period of 2 years and that by itself disentitles the plaintiff from seeking for the equitable relief of specific performance. The learned counsel submitted that the balance amount of Rs.10,000/- was deposited by the plaintiff only after the decree was passed by the Trial Court. This itself will show that the plaintiff was not ready and willing to perform her part of the contract.



11. Per contra, the learned counsel for the respondent submitted that the plaintiff approached the defendant to pay the balance sale consideration one month prior to the expiry of the 2 year period and requested for the execution of the sale deed. However, the defendant did not come forward to receive the balance amount and execute the sale deed in favour of the plaintiff. This aspect has been considered by both the Courts below and both the Courts have properly appreciated the oral and documentary evidence and decreed the suit. The learned counsel concluded his arguments by submitting that there is no perversity in the findings of both the Courts below and hence, the present Second Appeal deserved to be dismissed.

12. This Court has carefully considered the submissions made on either side and the materials available on record. This Court has also carefully gone through the findings of both the Courts below.

13. It is now a settled law that readiness and willingness on the part of the plaintiff must be continuous at all stages right from the date of agreement, till the decree is passed in the suit. Readiness is generally relatable to the financial position of the purchaser and willingness is relatable to the frame of mind of the purchaser. This Court does not want to burden this judgment by citing and extracting from all earlier judgments since the law is well settled.

14. The above settled law has to be applied to the facts of the present case. There is no dispute that the defendant is the owner of the property. There is also no dispute that the parties entered into an agreement of sale on 18.5.2007 and this document was marked as Ex. A1. A careful reading of this agreement brings out the following:

a) The total sale consideration was fixed at Rs.60,000/-.

b) The plaintiff paid a sum of Rs.50,000/- to the defendant on the date of the agreement.

c) The plaintiff has to prepare the sale deed and call upon the defendant and pay the balance sale consideration of Rs.10,000/- within a period of 2 years from the date of the agreement.



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d) If the defendant fails to come forward and execute the sale deed, the plaintiff can file a suit for specific performance and deposit the balance sale consideration in the Court and in which event the defendant will be liable to incur the entire legal expenses.

e) If the plaintiff fails to perform her part of the contract within the stipulated period of 2 years, the advance amount paid by her will stand forfeited.

15. In the present case, the 2 year period expired on 17.5.2009. The case of the plaintiff is that she approached the defendant one month prior to the expiry of 2 year and offered to pay the balance sale consideration and requested the defendant to execute the sale deed. Since the defendant was not coming forward to receive the balance sale consideration and execute the Sale deed, a legal notice was issued on 4.7.2009, which was marked as Ex. A2. The suit came to be filed on 15.7.2009.

16. Both the Courts below took adverse inference against the defendant for not giving a reply to the legal notice. In the considered view of this Court, the suit was filed within 11 days from the date of issuance of the legal notice and there was hardly anytime for the defendant to respond to the legal notice. That apart according to the defendant, there was no need to respond to the legal notice since the 2 years period already expired on 17.5.2009 and the legal notice was issued only on 4.7.2009. Both the Courts below unnecessarily gave undue importance for the non-issuance of reply by the defendant for the legal notice. Whether the defendant gives a reply or not, the Courts below ought to have independently considered the readiness and willingness on the part of the plaintiff which is mandatory in a suit for specific performance.

17. In the same way, the forfeiture clause in the sale agreement seems to have caused concern to both the Courts below. This Court does not understand as to how a forfeiture clause in an agreement will have anything to do while deciding a suit for specific performance. After all, the terms of the agreement are agreed between the parties and the Court has to merely give effect to the same, unless it is unconscionable. The agreement specifically provided the effect of default for both the parties. Insofar as the plaintiff is concerned, the advance amount paid by her, will be forfeited. Insofar as the defendant is concerned, the plaintiff can go ahead and file a suit and



deposit the balance sale consideration and the defendant was made liable to pay for the legal expenses incurred by the plaintiff. When there is so much of clarity in the agreement, both the Courts below unnecessarily got bogged down with the forfeiture clause.

18. On a careful reading of the evidence, except for the ipsi dixit of the plaintiff that she approached the defendant one month prior to the expiry of the period of 2 years, there is no other material available to show that the plaintiff took effective steps to perform her part of the contract.

19. It is an admitted case that the plaintiff had paid a sum of Rs.50,000/- at the time of entering into the agreement. The balance amount that was payable by the plaintiff was only Rs.10,000/-. Admittedly, the possession was not given to the plaintiff. For some reasons, the parties chose to fix a 2 year period for the completion of the transaction. If really the plaintiff was ready and willing to perform her part of the contract, a legal notice ought to have been issued prior to the expiry of 2 years by expressing her intention to pay the balance sale consideration and must have prepared the sale deed and kept it ready for registration. It is quite curious that the legal notice came to be issued after the expiry of 2 years on 4.7.2009 and the plaintiff thereafter rushed to the Court and filed the suit on 15.7.2009. This is not the conduct expected of a prudent man who is really ready and willing to perform his part of the contract. While appreciating the evidence, the Court has to look at it from the angle of a prudent man and see if the conduct of the plaintiff is believable. Even assuming that the plaintiff approached the defendant one month prior to the expiry of the 2 years period, there is absolutely no explanation as to why the plaintiff waited till 4.7.2009 to issue the legal notice. These aspects have not been properly considered by both the Courts below and both the Courts below seems to have focused more on the defendant than bestowing their attention on the plaintiff to see if she was really ready and willing to perform her part of the contract.

20. There is yet another vital fact that has been failed to be noticed by both the Courts below. The agreement specifically provided that the plaintiff will deposit the balance sale consideration even at the time of filing the suit. However, the balance sale consideration was deposited only after the judgment and decree was passed in the suit on 23.11.2011. This clearly shows that there was no readiness and willingness on the part of the plaintiff right till the decree was passed.



The relief of specific performance is an equitable remedy and hence, the party has to necessarily show readiness and willingness in performing his part of the contract from the date of the agreement till the passing of the decree in the suit. On the facts of the present case, this Court finds that the plaintiff did not prove her readiness and willingness due to the following reasons:-

a) The first positive step taken by the plaintiff was when the legal notice dated 4.7.2009 was issued to the defendant and this was well beyond the period of 2 years fixed under the agreement and

b) The plaintiff did not take any steps to deposit the balance sale consideration immediately after filing the suit and waited for more than 2 years till the decree was passed on 23.11.2011.

21. Insofar as the first substantial question of law is concerned, this court holds that time is the essence of the contract and the plaintiff failed to perform her part of the contract within the stipulated time.

22. Insofar as the second substantial question of law is concerned, the plaintiff failed to prove her readiness and willingness to pay the balance sale consideration and hence she is not entitled for the relief of specific performance.

23. Thus, both the substantial questions of law are answered in favour of the appellant.

24. The appellant had categorically expressed his intention to repay back the advance amount even at the time of filing the written statement. In view of the same, this Court is inclined to direct the appellant to refund the advance amount to the plaintiff with interest. This alternative relief has to be granted to the plaintiff in view of the stand taken by the defendant in the written statement and in view of the fact that the plaintiff had succeeded before both the Courts below and it took nearly five years for this Court to dispose of this Second Appeal.



25. In the result, the judgments and decrees passed by both the Courts below are hereby set aside. There shall be a direction to the appellant to pay the sum of Rs.50,000/- along with interest at the rate of 9% from 18.5.2007 till the date of actual payment to the plaintiff. Till this payment is made to the plaintiff, there shall be a charge on the suit property. The Second Appeal is allowed in the above terms. Consequently, the connected miscellaneous petition is closed. No Costs.

Sd/-
Assistant Registrar (CS-I)

//True copy//

Sub Assistant Registrar

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To

1.The Sub Court,
Kallakurichi.

2.The Principal District Munsif,
Kallakurichi.

Copy To:-

The Section Officer
VR Section, High Court
Madras.

+1cc to Mr.S.Sounthar, Advocate SR.No.10938

+1cc to Mr.V.Manohar, Advocate SR.No.10871

SA No.441 of 2016

PA (CO)
GMY (21/03/2022)