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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.01.2022

PRONOUNCED ON : 22.02.2022

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.863 of 2019
and
C.M.P.No.17972 of 2019

G.V.Jayanthi ... Appellant/Plaintiff

Vs.

J.K.Mohan ... Respondent/Defendant

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree in A.S.No.38 of 2017, on the file of the Principal District Judge, Namakkal, dated 18.03.2019 in confirming the judgment and decree in O.S.No.130 of 2008 on the file of the Sub Court, Namakkal, dated 07.07.2017.

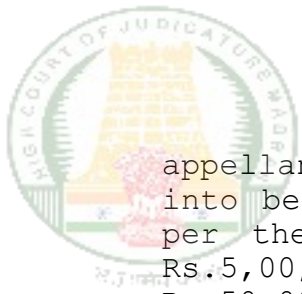
For Appellant : Mr.V.Srimathi

For Respondent : Mr.S.Saravanan

JUDGMENT

This Second Appeal is filed against the judgment of the Principal District Judge, Namakkal District in A.S.No.38 of 2017, confirming the judgment of the Sub Judge, Namakkal in O.S.No.130 of 2019.

2. The appellant filed the suit for specific performance of the contract on the basis of the sale agreement dated 24.12.2007. The case of the appellant is that the suit properties were allotted to the respondent in a partition on 18.12.1997. Thereafter, the respondent was in possession and enjoyment of the suit properties. The respondent, in order to meet his urgent family expenses and educational expenses of his son, decided to sell the suit properties to the



appellant/plaintiff. Accordingly, a sale agreement was entered into between the appellant and the respondent on 24.12.2007. As per the sale agreement, the sale consideration was fixed at Rs.5,00,000/-. On the date of sale agreement i.e., 24.12.2007, Rs.50,000/- was paid as advance by the appellant. The balance amount of Rs.4,50,000/- has to be paid on or before 15.05.2008 for executing the sale deed.

3. When the appellant demanded the respondent to execute the sale deed, the respondent failed to execute the sale deed. The appellant came to know that the respondent by enhancing the sale consideration, tried to sell the properties to third parties for higher amount. The appellant met the respondent on 21.05.2008 along with his father and requested the respondent to execute the sale deed by receiving the balance sale consideration. The appellant and her father went to the Sub Registrar's office, Erumapatti, for executing the sale deed, but the respondent failed to execute the same. Therefore, a legal notice was issued on 27.05.2008 as a reminder to the respondent for the execution of the sale deed. The respondent sent a reply on 03.06.2008 refusing to execute the sale deed. Therefore, the present suit is filed.

4. The respondent's son is an Engineer and the respondent wanted his son to pursue his education in a foreign country, hence, he required money for meeting the expenses of further higher studies of his son. Therefore, he agreed to sell the suit properties to the appellant for an amount of Rs.5,00,000/- and a sale agreement was entered into on 24.12.2007. The respondent admitted that the appellant paid an advance amount of Rs.50,000/- and as per the agreement, the balance sale consideration ought to have been paid on or before 15.05.2008. However, the appellant failed to pay the balance sale consideration within the said period of time. The respondent approached the appellant several times and requested her to pay the balance sale consideration to execute the sale deed. He could not get money for his son's educational expenses in the foreign country. The appellant has stated that she has no money available with her, and hence he failed to execute the sale deed and told that only after six months, she would execute the sale deed. Since the appellant failed to pay the balance sale consideration, the respondent was not able to send his son to foreign Country for his higher studies. The respondent also suffered a loss of Rs.2,50,000/- in his efforts for sending his son to higher studies in a foreign country. The appellant was not willing to perform the terms of the contract and to pay the balance sale consideration and therefore, the appellant is not entitled for the specific performance of the contract. It is claimed in the additional written statement that the suit properties are joint family properties. But the sale agreement



was executed without impleading respondent's son and therefore, the suit is not maintainable.

5. A reply statement has been filed by the appellant stating that the sale agreement was executed by the respondent as a "Karthi" of the joint family properties and therefore, it cannot be said that the suit is bad for non-joinder of necessary parties.

6. On the basis of the aforesaid pleadings, the trial Court framed the following issues:-

(i) Whether the plaintiff was always ready and willing to perform his part of the contract.

(ii) Whether the plaintiff is entitled for the relief of specific performance of contract.

(iii) Whether the claim that the suit property is a joint family property, is true and correct.

(iv) To what other relief the plaintiff is entitled to?

7. PW1 to PW3 were examined before the trial Court and Ex.A1 was marked on the side of the appellant. DW1 & DW2 were examined, but no exhibits were marked on the side of the respondent/defendant.

8. On considering the oral and documentary evidence, the trial Court found that from the terms and conditions of the sale agreement, it could be seen that "time" was considered as an essence of the contract. However, the appellant has not shown her readiness and willingness within the contract period and she has not produced any material to show that she was ready to pay the balance sale consideration of Rs.4,50,000/- within the time stipulated in the agreement. Therefore, the trial Court found that the appellant has not established that she was ready to pay Rs.4,50,000/- within the time stipulated and therefore, the suit for specific performance was dismissed. In the appeal filed by the appellant, the learned Principal District Judge has also concurred with the findings of the trial Court and confirmed that the appellant has no proof to show as to whether she was ready and willing to perform the contract within the stipulated time and dismissed the appeal. Therefore, the appellant is before this Court by way of Second Appeal.

9. At the time of admission of the Second Appeal, the



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following substantial questions of law were framed.

"(1) Whether the Courts below ought not to have taken into consideration of the plaintiff's conduct prior and subsequent to the filing of suit along with other attending circumstances?

(2) Whether the Courts below ought to have inferred from the facts and circumstances to show that the plaintiff was always ready and willing to perform her part of the contract?

(3) When the defendant has specifically admitted the receipt of an advance amount based on the suit contract under such circumstances, the Courts below ought to have ordered for the refund of the advance amount?

(4) Whether the Courts below are justified in holding that the plaintiff has no capacity to pay the money as offered when the evidence of D.W.2 clearly speaks of the resources held by the plaintiff?"

10. The learned counsel for the appellant/plaintiff would submit that the appellant was always ready and willing to perform her part of the contract and the respondent was not willing to perform his part of the contract, i.e., execution of sale deed. Appellant had made several efforts, before issuing notice, requesting the respondent to execute the sale deed after receiving the balance sale consideration. In fact, the appellant and her son were waiting at the Registrar Office for executing the sale deed by the respondent, but he failed to come. Thereafter, the appellant issued the legal notice. It is stated in the legal notice that appellant is ready and willing to perform her part of the contract and she is ready to deposit the balance sale consideration in the Court. On the other hand, the respondent is not willing to receive the balance sale consideration and execute the sale deed. The claim that the respondent requested the appellant to pay the balance sale consideration, is not correct. The respondent has not issued any legal notice in this regard and he has not chosen to return the advance amount received from the appellant. Without considering all these aspects, both the Courts have wrongly dismissed the suit. Therefore, the learned counsel for the appellant prayed for setting aside the judgment of the Courts below and to allow this second appeal.

11. In response to that, the learned counsel for the respondent submitted that the respondent entered into a sale agreement with the appellant only to meet the educational



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expenses of his son in a foreign country and to meet the urgent family expenses. The sale agreement further stipulates that the sale has to be completed on or before 15.05.2008 and the appellant has to pay the balance sale consideration on or before 15.05.2008 and complete the sale. If either of the party fails to perform her part of the contract, consequences of the failure, is specifically mentioned in the sale agreement. In case, the appellant fails to pay the balance sale consideration within the stipulated time, she would forfeit the advance amount paid. It was specifically made clear that "time" is the essence of the contract. Appellant was not ready to pay the balance sale consideration of Rs.4,50,000/- within the time and complete the sale consideration, and claimed that she had no money with her. The appellant made the statement that she came to the Sub Registrar's Office to execute the sale deed. It is not true, since it is not mentioned in Ex.A2. Therefore, it is clear that this averment is not true and the same is made only for the purpose of the suit. Only due to failure and non willingness on the part of the appellant to pay the balance sale consideration and complete the sale transaction within the stipulated time, both the Courts rightly dismissed the suit. The learned counsel for the respondent prays for confirming the judgment of the Courts below and dismiss the Second Appeal.

12. This Court Considered the rival submissions of parties and perused materials available on record.

13. It is seen from the pleadings and the submissions made by the learned counsel for the parties, that the execution of sale agreement between the appellant and the respondent is not disputed and the receipt of advance of Rs.50,000/- by the respondent is also not disputed. The appellant claimed that she was always ready and willing to perform her part of the contract by paying the balance sale consideration for execution of the sale deed. Whereas it is the case of the respondent that the respondent entered into sale agreement only for fulfilling his urgent family expenses and the expenses relating to his son's educational expenses in a foreign country. Performance on the basis of the sale agreement ought to have been done on or before 15.05.2008. Despite the request of the respondent to pay the balance sale consideration, appellant was not ready to pay the balance sale consideration and complete the sale within the stipulated time and therefore, the respondent was not able to send his son to the foreign country for further education and he suffered a loss.

14. It is seen that though the appellant claims that she was ready and willing to perform her part of the contract, on a perusal of the available records and materials, it is clear that no evidence was produced by the appellant to show that she had



any source to pay the balance sale consideration and complete the sale before 15.05.2008. She claimed that on 25.05.2008, she met the respondent in his house with her father and asked him to come to Sub Registrar Office for execution of sale deed and that was accepted by the respondent. The notice demanding the execution of sale deed was given on 27.05.2008 and in this notice, there is no mention about the appellant meeting the respondent with her father with a request to come to Sub Registrar Office for executing the sale deed. Further, there is no evidence produced to show that appellant was always ready and willing to perform her part of the contract from the date of execution of sale agreement, till the completion of agreement period on 15.05.2008. It is pertinent to note that in Ex.A1 sale agreement, it is specifically mentioned that the balance sale consideration has to be paid on or before 15.05.2008. In case of failure to perform appellant's part of the contract, she has to forfeit the advance amount. It is clear that the time for the performance of the contract was specifically mentioned in Ex.A1 sale agreement. Therefore, it is required on the part of the appellant to be always ready and willing to perform her part from the date of execution of sale agreement.

15. It is seen from the evidence of PW1, that the sale has to be completed on or before 15.05.2008. If the sale was not completed on or before 15.05.2008 by paying the balance sale consideration, she would have to forfeit the advance amount. Though she stated that she requested the respondent to execute the sale deed, there is no evidence in support of her claim. The appellant further claimed that she had jewels worth of Rs.4,00,000/- and she was ready to pay the balance sale consideration. However, there is no evidence to show that the jewels were available with her and she had money ready in her hand. Thus, it is clear that the appellant has not proved that she had sufficient money for paying the balance sale consideration and she was always ready and willing to perform her part of the contract from the date of entering into sale agreement.

16. Learned counsel for the appellant contended that though the respondent claimed that he had requested the appellant to pay the balance sale consideration and get the sale executed, he did not produce any evidence before the Court in this regard. He has not sent any notice in this regard. Therefore, the claim of the respondent is unbelievable. The respondent has not filed any suit and this suit is filed only by the appellant. Hence, it is for the appellant to establish her case. Though it is not specifically stated in the sale agreement by the respondent that he agreed to sell suit properties to meet the educational expenses of his son in a foreign country, it is mentioned that he wanted to sell his suit properties to meet the urgent and



necessary family expenses and to settle some loans. However, it is stated in the plaint that the respondent came forward to sell the properties to meet necessary and urgent family expenses and meet his son's educational expenses and the same was stated so in the written statement filed by the respondent. Thus, it is clear that the respondent came forward to sell the properties to the appellant to meet the urgent and necessary family expenses and for his son's educational expenses etc. As already said, time for the performance of the contract was specifically, mentioned in the sale agreement. But the appellant was not always ready and willing to perform her part of the contract by paying the balance sale consideration from the date of execution of sale agreement. Due to which, the respondent had to suffer i.e., the respondent's son was not able to pursue his further education in a foreign country.

17. Though there is a condition, in the sale agreement that in case the appellant fails to pay the balance sale consideration within the time stipulated, the advance amount will have to be forfeited, this Court is of the considered view that the respondent has to be directed to pay the advance amount of Rs.50,000/- received from the appellant with interest 12% per annum from date of sale agreement till date of decree and thereafter at the rate of 6% p.a till the date of realisation.

18. Both the Courts rightly found that the appellant was not ready and willing to perform her part of the contract and therefore, she is not entitled for the relief of specific performance. This Court finds no reason to interfere with the judgment of the First Appellate Court, confirming the judgment of the trial Court.

19. The Courts below have rightly taken into consideration the conduct of the appellant, that she failed to prove that she was willing to perform her part of contract. Both the Courts rightly considered the plea on the basis of the evidence on record and found that the appellant did not prove that she has the capacity to pay the balance sale consideration. This Court, now found that appellant is entitled for refund of advance amount. Thus, the substantial questions of law 1 to 4 are answered.

20. In Fine, this Court confirms the judgment and decree of the Principal District Court, Namakkal District in A.S.No.38 of 2017, confirming the judgment of the Sub Judge, Namakkal in O.S.No.130 of 2019, with a modification that the appellant is entitled to seek refund of Rs.50,000/- from the respondent with interest at 12% p.a from the date of sale agreement till date of decree and thereafter at 6% p.a till the date of realisation.



21. In the result, this Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Sub Court,
Namakkal.
2. The Principal District Court,
Namakkal.

Copy to:

The Section Officer,
VR Section,
High Court of Madras.

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.11305

+1cc to Mr.S.Saravanan, Advocate, S.R.No.12229

S.A.No.863 of 2019

SVI (CO)
SU(04/04/2022)