



A.S.No.1071 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	08.07.2022
Pronounced on	17.08.2022

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

A.S.No.1071 of 2019

C.Jayanthi ... Appellant

Vs.

M.Saravanan ... Respondent

Prayer :- First Appeal filed under Section 96 read with Order XLI Rule 1 of Civil Procedure Code, praying to set aside the Judgement and Decree dated 12.04.2018 made in OS.No.43 of 2010 on file of the District Court, Thiruvannmalai.

For Appellant : Mr.J.Lenin

For Respondent : Mr.M.E.Raniselvam

JUDGEMENT

This Appeal suit has been preferred by the defendant / appellant challenging the judgement and decree dated 12.04.2018 passed by the learned District Judge, Thiruvannamlai, made in OS.No.43 2010.



2. The suit was filed by the respondent/plaintiff for the relief of specific performance.

3. Brief facts of the case, as revealed in the plaint and the written statement, are as hereunder:

(i) The defendant, her husband and her father-in-law Mr.N.S Subramanian were the tenants at Door No.10/3, Manakula Vinayagar Street, Thiruvannamalai; the defendant purchased the suit property under a registered sale deed dated 07.02.2007 under document No.340 of 2007 with the money arranged by her father in-law; the defendant was in possession of the vacant site from the date of purchase; since the defendant's father-in-law incurred various debts, he issued two post dated cheques to third parties including one Mr.S.Shankara Vadevelu (Ex-counsellor), for a sum of Rs.6,50,000/- each. Since the cheques were dishonoured, the defendant's father-in-law was forced to face criminal action; in order to escape from the pressure, the defendant and her husband offered to sell the suit property to the plaintiff for a sum of Rs.15,00,000/- and a sale agreement was entered into between the plaintiff and the defendant on 03.07.2009; as per the sale agreement, the sale price



was fixed at Rs.15 lakhs; the plaintiff paid Rs.14,00,000/- on the date of the sale agreement and that was also acknowledged by the defendant in the agreement itself; the plaintiff agreed to pay the balance sale consideration of Rs.1 lakh within a period of one year; the suit agreement of sale was arranged by the father-in-law of the defendant; time is not the essence of the contract; with the partial sale consideration received from the plaintiff, the financial liabilities of the defendant's father-in-law were also discharged; the plaintiff was always ready and willing to perform his part of the contract; despite the plaintiff demanded the defendant on various occasions to come and execute the sale deed, the defendant did not come forward to do so; whenever the plaintiff insisted the defendant, she told that the original title deeds were in the bank locker and the key was in the custody of her husband, who was in the States; since the defendant did not perform her part of the contract, the plaintiff has come forward with the suit for specific performance.

(ii) Written statement in brief:

The defendant has filed a written statement by contending that they were never the tenants at the house mentioned by the plaintiff at Manakula Vinayagar Street, Thiruvannalamai; it is also false to state that the defendant's



father-in-law issued two cheques in favour of the said Mr.S.Shankara Vadivelu and they were bounced due to insufficient funds; the defendant purchased the suit property with the help of one Mr.N.S.Subramanian; the father's name of the defendant's husband is Mr.P.D.Nithiyantham and not Mr.N.S.Subramanian as stated by the plaintiff; the said Mr.N.S.Subramanian has acted only as a guardian to the defendant's husband Mr.Selvadurai and his brother Mr.Sreenivas; the said Mr.N.S.Subramanian had borrowed Rs.7,50,000/- from one Mr.Susilkumar of Tiruvannamalai by showing the stranger's property as his property and gave 3 cheques and the same were dishonoured; further, the said Mr.N.S.Subramanian had entered into a sale agreement with one Mr.Ravichandiran in respect of the properties belonging to a third person by name Mr.Narayanasamy Iyer; in this regard, a complaint was also given by Mr.Ravichandiran; the sale agreement was not executed by the defendant and it was a fabricated document; the defendant never received any money from the plaintiff; and hence, the suit should be dismissed.

4. On the basis of the pleadings, the learned Trial Judge has framed the following issues:



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“1. Whether the suit agreement is forged as pleaded by the defendant?

2. Whether the plaintiff is forged as pleaded by the defendant?

3. To what other relief the plaintiff is entitled?”

5. During the course of trial, the plaintiff himself was examined as PW.1. One Mr.C.Kannan who was the attestor of the sale agreement was examined as PW.2 and Ex.A1 to Ex.A5 were marked. No witness was examined and no documents were marked on the side of the defendant.

6. After conclusion of the trial and on considering the materials available on record, the learned Trial Judge has decreed the suit as prayed for. Aggrieved over that, the defendant has preferred this Appeal.

7. Heard the arguments of the learned counsel for the appellant and the learned counsel for the respondent and perused the materials available on record.

8. The sum and substance of the arguments made by Mr.J.Lenin, learned counsel for the appellant is as hereunder:



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(i)The learned Trial Judge has failed to notice the discrepancies in describing the name of defendant's father-in-law; since the name of the defendant's father-in-law is Mr.P.D.Nithiyanantham; the defendant did not accept the sale agreement; the applications filed by the appellant seeking to (i) reopen the suit and (ii) appoint an advocate commissioner and to send the disputed signature to the opinion of the forensic expert were dismissed by the Court below with the observation that a duty is cast upon the plaintiff to prove the genuineness of the sale agreement; though the plaintiff, who was examined as PW.1, has stated in his evidence that he had paid a total sum of Rs.13,00,000/- (Rs.6,50,000/- twice) to the defendant's father in law, the said stand was not taken in the plaint; despite the sale agreement was unregistered, the plaintiff has stated that it is a registered agreement; the said contradiction in the evidence of the plaintiff would only show that the case of the plaintiff is a concocted story; it is unnatural that a buyer, who had paid Rs.14 lakhs, had agreed to wait for one year for paying the meagre balance; no issues were framed by the Trial Court with regard to readiness and willingness on the part of the plaintiff; the plaintiff has not given any legal notice before filing the suit; the suit was filed exactly on the next day of the expiry of the time limit in the sale agreement.



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(ii) A total payment of Rs.13,00,000/- was made on two different occasions in order to reduce the financial pressure faced by the defendant's family; to prove the same, the respondent/plaintiff has produced the dishonoured cheques executed by the father-in-law of the defendant in favour of the said Mr.S.Shankar Vadivelu, who was ex-councillor and who had initiated criminal action against the defendant's father-in-law due to dishonour of the two cheques issued to him for a value of Rs.6,50,000/-each.

(iii) It is admitted by the defendant in his written statement itself that Mr.N.S.Subramanian is the foster father of her husband. So, the fact remains that Mr.N.S.Subramanian is not a stranger to the family, but is closely associated with the defendant's husband by being his guardian. In that capacity, Mr.N.S.Subramanian would have been known as the foster father of the defendant's husband. Hence, the submission is that Mr.N.S.Subramanian is the only guardian of the defendant's husband and his brother. The facts about Ex.A3 and A4 have got no relevance to the facts of the case. The defendant has stated that the executor of the cheques namely Mr.N.S.Subramanian is not the father-in-law of the defendant and the name of



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her father-in-law is Mr.P.D.Nithiyantham and so, the claim of the plaintiff is not true. The learned Trial Judge did not appreciate the conduct of the parties before granting the equitable and discretionary relief of specific performance and hence, it should be set aside.

9. Per contra, Ms.M.E.Raniselvam, learned counsel for the respondent submitted that despite the respondent was always ready and willing to perform his part of the contract and informed the same to the defendant and her father-in-law, they did not come forward to execute the sale Deed; the fact that the defendant's father-in-law got loan from various persons and issued cheques, which were dishonoured later, was also proved; the appellant did not come forward to examine herself as a witness in order to substantiate her defence; the respondent/plaintiff proved that the equity lies in his favour and hence, the learned trial Judge has rightly granted the relief of specific performance.

10. Points for consideration:

1) Whether the plaintiff was ready and willing to perform his part of contract? and



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II) Whether the decree for specific performance passed by the learned trial Judge is fair, proper and legal?

11. The fact that the suit property is the property belonged to the defendant is not denied. The plaintiff claims that on 03.07.2009, the defendant had entered a sale agreement with him in order to sell the suit property for a sum of Rs.15,00,000/- and also received the advance amount of Rs.14,00,000/-. The sale agreement is marked as Ex.A2. The avernments in Ex.A2 would show that the time for executing the sale deed is one year. Though more than 90% of the sale consideration has been paid at the time when the sale agreement was entered into, a long duration of one year was taken to pay a negligible balance of Rs.1,00,000/- so as to get the sale deed registered.

12. The appellant/defendant had denied her signature in Ex.A2 sale agreement. She had also filed applications in I.A.Nos.35 & 36 of 2016 to (i) reopen the suit and (ii) to appoint an advocate commissioner and send the disputed signature in Ex.A2 sale agreement for comparison by a handwriting expert with her admitted signatures and give his opinion. But, the said



applications were dismissed by the Court below on 26.10.2016. The appellant/defendant has challenged the said orders of dismissal by preferring Civil Revision Petitions in CRP.Nos.27 & 28 of 2017 before this Court. The said Civil Revision Petitions were also dismissed by a common order dated 02.03.2018, with an observation that it is the plaintiff, who has got the burden to prove the genuineness of the sale agreement.

13. It is not a case where the defendant had accepted the execution of the sale agreement. The defendant had denied her very signature in Ex.A2 and the efforts taken by her to send the same for getting an expert opinion _ also have gone in vain. However, the plaintiff had only chosen to examine the attester of Ex.A2 as PW.2 in order to prove that the appellant had executed Ex.A2 sale agreement. The learned Trial Judge has accepted the execution of the sale agreement as proved with the evidence of the attesting witness.

14. The appellant/defendant did not choose to subject herself for examination by the Court below. The Court below has framed a specific issue about the execution of the sale agreement and accepted it as proved with the evidence of the attesting witness. When the appellant denies her signature in



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the sale agreement and her disputed signature was also not sent for examination by a handwriting expert, at least, the Court below could have examined her signature in the sale agreement by comparing it with her admitted signatures. Such a bare eye examination is permitted under Section 73 of the Indian Evidence Act, 1872. But, the learned Trial Judge did not choose to invoke the above said provision in order to strengthen his finding that the sale agreement was executed by the defendant. However, the plaintiff has examined the attesting witness as PW.2 in order to prove the execution of the sale agreement.

15. During the cross examination of PW.1, he has stated that a sum of Rs.13,00,000/- (Rs.6,50,000/-each) was paid as advance by two instalments on 10.06.2008 and 20.06.2008. According to the respondent/plaintiff, Rs.13,00,000/- was paid by him even prior to the date of the agreement and he has paid Rs.1 lakh on the date of the agreement. But, the recital in Ex.A2 sale agreement did not mention about the manner, in which, the alleged payment of Rs.14 lakhs was made to the defendant. There is no specific mention about the date and time in the sale agreement. It is stated in generalised terms that the appellant has received a total sum of Rs.14 lakhs



on various dates.

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16. The respondent/plaintiff has stated that he came to know from the defendant that her father-in-law was under the pressure of facing criminal actions due to the dishonoured cheques given by him and hence, he was obliged to settle those dues by making payments at the rate of Rs.6,50,000/- each on two occasions. When it is alleged that the sale agreement was executed subsequent to those payments, it would be quite natural for anyone like the plaintiff to get some documents in proof of those payments. But, the respondent/plaintiff did not produce any proof in respect of the above said payments. However, the fact remains that in the sale agreement, the details of payments were mentioned and the same were considered as advance. When the respondent/plaintiff had proved before the Court below through the attesting witness that the sale agreement was executed by the appellant, the appellant ought to have insisted the Court below to examine her disputed signature by comparing it with her admitted signatures. Having paid a hefty sum, the plaintiff had taken one year to pay another sum of Rs.1,00,000/- out of the total sale consideration of Rs.15,00,000/- .That also has caused doubt about the intention of the parties in executing the sale agreement.



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17. Since the respondent/plaintiff has discharged his initial burden of proving the sale agreement Ex.A2, the burden to rebut the same would get shifted to the appellant. The appellant, who has alleged that the sale agreement is a concocted one, ought to have entered into the witness box to rebut the evidence of the plaintiff. Even if such a rebuttal proof is not available from the direct evidence of the defendant's documents, it could have been sufficient if the cross examination of the plaintiff and other witnesses had probalilized the defence. In the case on hand from the cross examination of the plaintiff's witnesses no rebutted circumstance is established. So, the natural corollary would be that the genuineness of Ex.A2 sale agreement is proved.

18. The learned trial Judge, before choosing to grant the relief of specific performance, has not framed any issues about the readiness and willingness on the part of the plaintiff. Admittedly, the sale agreement was executed on 03.07.2009 and the time for executing the sale deed was agreed to be one year. Just because the time is agreed as one year, it doesl not mean



that the respondent/plaintiff should wait for one year and make payment of rest of the sale price of Rs.1,00,000/- or after the expiry of one year.

19. It is understandable that at the conclusion of a sale deal, the buyer would have been in demand for money and he would have thought it fit to bargain time to make the balance payment. But, the plaintiff has chosen to file the suit only after expiry of the time mentioned in the agreement. Though time is not the essence of the contract, the readiness and willingness of the plaintiff in purchasing the property within the agreed time limit should be proved to get the relief of specific performance.

20. The respondent/plaintiff has stated that he had sent oral communications to the defendant and her father-in-law. But, no evidence was produced to show the same. Had Ex.A2 been a serious sale agreement and the plaintiff was very much serious in getting the sale deed executed in his favour within the time limit prescribed, he would have been impelled to send written request of demand to the defendant and made her to register the sale deed after making the payment of balance sale consideration. Further, the unnatural time of one year granted to pay the balance sale consideration



creates a doubt about the intention of the parties in executing the sale deed.

Though the respondent/plaintiff can take the advantage of proving the genuinenesses of the sale agreement, in the absence of any evidence on the side of the defendant, the learned Trial Judge did not make any elaborate appreciation on this aspect nor rendered a correct finding as to the readiness and willingness of the respondent/plaintiff. The evidence on record and the surrounding circumstances of the case would only show that the sale agreement executed by the defendant was not with any serious intention of executing it, but was under certain pressure. Though the defendant had denied her signature, the same has been proved through the evidence of the attesting witness.

21. The relief of specific performance is an equitable remedy. Hence, the plaintiff has a duty to prove that he was all along ready and willing to perform his part of the contract even within the one year time and only because of the lapse on the part of the defendant, the contract could not be completed. In order to substantiate the readiness and willingness on the part of the plaintiff, no document or no evidence is produced. The one and only statement of the plaintiff is that he was making oral demands to the defendant



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and her father-in-law to receive the balance sale consideration and execute the sale deed in his favour. He had not chosen to send any legal notice before filing the suit. Having waited for whole of the year, the plaintiff has filed the suit on the expiry of the time limit. The conduct of the plaintiff would not show that he was always ready and willing to perform the contract. **Point No.1 is answered accordingly.**

22. Even though the sale agreement is proved to be true and a major part of the sale consideration, as stated in the sale agreement, is also proved to have been received by the defendant and the capability of the plaintiff to pay the balance also is not denied, the plaintiff had failed to prove his willingness. However, that will not preclude the plaintiff to get the alternate remedy of refund of advance money paid by him. It is a fit case where the learned Trial Judge ought to have granted him the alternate relief of refund of the advance money. The rule of equity has to be applied equally to both the parties based on their respective conduct. The learned Trial Judge has failed to do that exercise before granting the relief of specific performance. Hence, the judgement and decree of the trial Court is liable to be modified. The point No.2 is answered accordingly.



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In the result, the Appeal is **partly allowed**. The Judgement and Decree dated 12.04.2018 made in OS.No.43 of 2010 on file of the District Court, Thiruvannmalai, is **modified** to the extent that the respondent/plaintiff is entitled to get the decree for refund of the advance money of Rs. 14,00,000/- together with interest at the rate of 7.5% per annum from the date of sale agreement till the date of decree and thereafter at the rate of 6% till the date of realisation and with cost. The defendant/ appellant shall refund the entire amount to the plaintiff/respondent within a period of four weeks from the date of receipt of copy of this judgement. No costs.

17.08.2022

Index : Yes/No
Internet : Yes/No
Speaking/ Non Speaking.
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R.N.MANJULA, J.

jrs

To

The District Court, Thiruvannmalai.

Pre-delivery Judgement in
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