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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2022

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.NO.873 OF 2019
AND
C.M.P.NO.26698 OF 2019

K.Sankar ...Appellant / Plaintiff

vs

M.Rose Mary ...Respondent / Defendant

Prayer: Appeal Suit filed under Section 96 read with Order 41 Rule 1 of C.P.C. against the judgment and decree dated 22.07.2019 passed in O.S. No.37 of 2018 on the file of the III Additional District Judge, Vellore at Thirupathur.

For Appellant : Mrs.Rita Chandrasekar for
Mr.Jayesh B.Dolia

For Respondent : Mr.M.R.Thangavel

JUDGMENT

[Judgment of this Court was delivered by T.RAJA, J.]

This appeal has been brought up before us by the unsuccessful appellant/plaintiff, challenging the correctness of the judgment and decree dated 22.07.2019 passed by the III Additional District Judge, Vellore at Thirupathur in O.S. No.37 of 2018.

2.Learned counsel appearing for the appellant submitted that when the plaintiff/appellant has filed a suit in O.S. No.37 of 2018 seeking a decree for specific performance of contract in respect of the sale agreement dated 20.08.2015, the Trial Court has not accepted his case. Since the suit property belonged to the defendant respondent as per the Settlement Deed dated 11.05.2009 bearing Document No.3967 of 2009, the plaintiff/appellant entered into an agreement of sale dated 20.08.2015, marked as Ex.A1, for a total sum of Rs.57,90,000/-, paying Rs.1,00,000/- as an advance amount and fixing 11 months time for the execution of the sale deed. Thereafter, the



defendant/respondent received a sum of Rs.4,00,000/- on 05.09.2015. Subsequently, on 03.12.2015, the defendant's son William Johnson Franq also received a sum of Rs.20,000/- and again on 14.12.2015, the defendant received a sum of Rs.1,05,000/- from the plaintiff/appellant and once again on 25.12.2015, the defendant's son received a sum of Rs.25,000/- from the plaintiff/appellant and again on 16.01.2016, the defendant's another son Lawrence Alexander also received a sum of Rs.1,00,000/- from the plaintiff/appellant and as such, the defendant/respondent and his sons received a sum of Rs.7,50,000/- as advance in the presence of the witnesses and endorsed the same in sale agreement dated 20.08.2015. When the matter stands as above, the plaintiff/appellant was always ready to perform his part of the contract, whereas, the defendant conveniently evaded from co-operating with the plaintiff/appellant for executing the sale deed, after receiving the balance sale consideration. Therefore, the plaintiff/appellant has filed a suit on 26.09.2018 seeking a decree for specific performance of the sale agreement dated 20.08.2015.

3.Learned counsel appearing for the respondent submitted that opposing the above averments and the prayer, a detailed written statement was filed by the defendant/respondent on 09.01.2019 raising several objections. Firstly, the defendant/respondent denied the execution of the sale agreement. Secondly, it was pleaded by the defendant/respondent that since the suit property belonged to the defendant/respondent, it is the own case of the plaintiff/appellant that he has been making payment of Rs.1,00,000/-, Rs.4,00,000/-, Rs.20,000/-, Rs.1,05,000/-, Rs.25,000/- and Rs.1,00,000/- to the defendant and his sons on piecemeal basis showing it as Loan Transaction. Thirdly, the alleged sale agreement never fixed the outer time limit, calling upon the defendant/respondent to come forward to receive the balance sale consideration and to execute the sale deed. Fourthly, if the contention of the plaintiff/appellant is accepted for the sake of arguments, the plaintiff/appellant ought to have issued a pre-suit notice expressing clearly and categorically the readiness and willingness to purchase the suit property on making the balance sale consideration at the hands of the defendant/respondent before the expiry of three years from the date of sale agreement, which is a pre-condition for filing the suit for specific performance under Section 16(c) of the Specific Relief Act. When it is the specific case of the appellant that 11 months' time was fixed for execution of the sale deed, the plaintiff/appellant ought to have issued the pre-suit notice to the defendant/respondent expressing his readiness and willingness to purchase the suit property by depositing the balance sale consideration within three years from the date of sale agreement. But, the legal notice, which was marked as Ex.A2, was issued to the defendant/respondent only on



16.08.2018, after three years from the date of the sale agreement dated 20.08.2015. Therefore, for not issuing the pre-suit notice within the prescribed time, which is a pre-condition for filing the suit and not filing the suit within the three years time from the date of the sale agreement dated 20.08.2015, the Trial Court, while dismissing the suit, has made an observation that the sale agreement dated 20.08.2015 is not a true since the same was executed as security for loan as alleged by the defendant with regard to Issue Nos.1 and 2 and that the suit was filed on 26.09.2018 within three years from the Ex.A1/sale agreement dated 20.08.2015 plus 11 months and the same is not barred by limitation, though the suit was not filed within three years time from the date of execution of the sale agreement dated 20.08.2015. Moreover, since the plaintiff/appellant has not deposited the balance sale consideration within the reasonable time, the same was rightly observed by the Trial Court holding against the plaintiff/appellant that at no point of time, the plaintiff/appellant was ready and willing to execute his part of the contract. Therefore, looking the case from any angle, the findings and conclusion reached by the Trial Court holding against the plaintiff appellant that he has miserably failed to establish the readiness and willingness, do not call for any interference by this Court.

4. On the basis of the above pleadings and written statement filed by the plaintiff/appellant and defendant/respondent, the Trial Court, had framed the following issues:

- '1. Whether the suit sale agreement dated 20.08.2015 is true, valid and binding on the defendant?
2. Whether the suit sale agreement dated 20.08.2015 was executed as security for loan as alleged by the defendant?
3. Whether the endorsement made in the suit agreement of sale is true one?
4. Whether the suit is barred by limitation?
5. Whether the plaintiff is ready and willing to perform his part of contract?
6. Whether the plaintiff is entitled to the relief of Specific Performance of Contract?
7. To what other relief the plaintiff is entitled to?

5. In view of the above submissions and counter submissions, we frame the following two issues:

- i) Whether a suit for specific performance of the contract is legally maintainable without issuing pre-suit notice to the defendant?
- ii) Whether the appellant has shown readiness and willingness by issuing pre-suit notice before filing the suit for specific performance as per Section 16(c) of the Specific Relief Act?



iii) Whether the suit filed on 26.09.2018 is barred by limitation as pleaded by the defendant.

6. Issue Nos.1 and 2 :The plaintiff/appellant has entered into a sale agreement with the defendant/respondent on 20.08.2015 in respect of the suit property, belonging to the defendant/respondent by virtue of the Settlement Deed dated 11.05.2009, executed by Arumainathan and others in favour of one Rose Mary, the defendant/respondent for a sale consideration of Rs.57,90,000/-. However, a sum of Rs.1,00,000/- was firstly paid by the plaintiff/appellant to the defendant/respondent as an advance amount and 11 months' time was fixed for execution of the sale deed and as per the sale agreement, at the time of execution of the sale deed, the defendant/ respondent has to measure the suit property and a sum of Rs.30,000/- was fixed as sale price for 1 cent. Thereafter, the pleadings filed by the parties would show that the defendant/ respondent along with her sons have obtained totally Rs.7,50,000/- from the plaintiff/appellant, namely, Rs.4,00,000 on 05.09.2015 for necessary expenses, Rs.20,000/- on 03.12.2015, Rs.1,05,000/- on 14.12.2015, Rs.25,000 on 25.12.2015, Rs.1,00,000/- on 16.12.2016 at their request. When the sale agreement dated 20.08.2015 specifically indicates that 11 months time has been fixed for the execution of the sale deed, which comes to an end on 20.07.2016, there was no pre-suit notice issued by the plaintiff/appellant expressing his readiness. As the sale agreement dated 20.08.2015 has been executed between the parties, fixing 11 months time for execution of the sale deed and the same had expired on 20.07.2016, for the first time, the plaintiff appellant, admittedly, issued the legal notice, marked as Ex.A2, only on 16.08.2018. Therefore, the Trial Court, in our considered opinion, rightly came to the conclusion that the pre-suit notice, which is a sine qua non for filing the suit for specific performance, has not been issued by the plaintiff/appellant within the prescribed time that shows that there was no readiness and willingness expressed by the plaintiff/ appellant, hence, the suit for specific performance will not be maintainable in law.

7. In this context, it is relevant to extract Section 16 (c) of the Specific Relief Act 1963 as under:

16. Personal bars to relief

Specific performance of a contract cannot be enforced in favour of a person.

(c) [who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation: For the purposes of clause (c),



.....
(ii) the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.

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A cursory reading of Section 16(c) shows that specific performance of a contract cannot be enforced in favour of a person, who fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract, which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation ii also speaks clearly that the plaintiff must prove performance of or readiness and willingness to perform, the contract according to its true construction. Therefore, when the readiness and willingness to perform the contract is sine qua non, in the present case, as we have already indicated that the defendant/respondent has repeatedly denied the execution of the sale agreement, which has not mentioned even the deadline for execution of the sale deed because the 11 months time was subsequently inserted, nonetheless the parties should come forward to execute the sale deed within 11 months time that expired on 20.07.2016 and that the plaintiff/appellant, admittedly, in this case, has issued the legal notice/Ex.A2 dated 16.08.2018, nearly after three years from the date of the sale agreement dated 20.08.2015, hence, the contention made by the appellant that he was ready and willing to perform his part of contract cannot be accepted. Therefore, the Issue Nos.1 and 2 are answered against the appellant holding that without issuing the pre-suit notice expressing readiness and willingness to perform his part of contract, no suit for specific performance can be filed.

8.Coming to the third issue, namely, whether the suit filed on 26.09.2018 is barred by limitation as pleaded by the defendant, it has to be seen that the suit has not been filed within three years time from the date of the sale agreement. When the sale agreement has been executed between the plaintiff/appellant and the defendant/ respondent on 20.08.2015, which is an un-registered one, a suit for specific performance should have been filed within a period of three years from the date of execution of the sale agreement. Moreover, it may be mentioned herein that the three years period will emerge from the date when the parties have given fresh cause of action by issuing pre-suit notice and sending the reply notice denying the claim made in the pre suit notice. In the present case, when the sale agreement dated 20.08.2015 fixing 11 months' time for execution of sale deed, came to an end on 20.07.2016, the pre-suit notice ought to have been issued before the expiry of that 11 months time, but the same has been issued only on 16.08.2018. Firstly, Ex.A1 is an unregistered sale agreement dated



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20.8.2015. Even though the said unregistered sale agreement was filed, the last page of Ex.A1 sale agreement is the xerox copy of the first page of the sale agreement containing Exs.A8 & A10 and the same is not the original document, therefore, in our considered opinion, the trial Court has rightly come to the conclusion that the said document cannot be treated as genuine. Secondly, the plaintiff pleaded that he paid not only to the defendant, but also to his sons different amounts on various dates, namely, a sum of Rs.4,00,000/- to the defendant on 5.9.2015; a sum of Rs.20,000/- to the defendant's son William Johnson Franq on 3.12.2015; a sum of Rs.1,05,000/- to the defendant on 14.12.2015; a sum of Rs.25,000/- to the defendant's son on 25.12.2015; a sum of Rs.1,00,000/- to the defendant's another son Lawrence Alexander on 16.1.2016, thus, totalling to Rs.6,50,000/- excluding the advance of Rs.1,00,000/-. The amounts said to have been received by the sons of the defendant under Exs.A8, A10 & A11 cannot be treated as further advance amounts, for the reason that the said payments are not supported by any consent letters given by the defendant. Moreover, when different amounts have been received by the sons of the defendant, that cannot be taken as part of the sale consideration. On the other hand, it shows that the suit sale agreement-Ex.A1 dated 20.8.2015 was executed as security for the loan.

9. Further, it is a well settled legal position that the relief of specific performance of an agreement is equitable, discretionary and governed by the principles of the Specific Relief Act, 1963 and the discretion also is to be exercised in accordance with the judicial principles. The Hon'ble Apex Court in B.Santoshamma and others v. D.Sarala and others, Manu/SC/0698/2020 has held thus:-

"67. The relief of specific performance of an agreement, was at all material times, equitable, discretionary relief, governed by the provisions of the Specific Relief Act, 1963, hereinafter referred to as S.R.A. Even though the power of the Court to direct specific performance of an agreement may have been discretionary, such power could not be arbitrary. The discretion had necessarily to be exercised in accordance with sound and reasonable judicial principles."

As the above observation candidly speaks that even the relief of specific performance of an agreement is an equitable and discretionary remedy subject to the satisfaction of sound and reasonable judicial principles, in the case on hand, the plaintiff has not complied with the basic requirement for issuing the pre suit notice, therefore, the appeal fails. Hence,



in our considered opinion, the suit filed by the plaintiff/appellant for specific performance is barred by limitation whereas the learned trial court gave a finding that the suit was filed within time which we cannot accept. Therefore, the third issue is answered against the plaintiff/appellant.

10. Nonetheless, as the parties have admitted the payment of aforementioned amount, we are inclined to give a direction to the defendant/ respondent to repay the same to the plaintiff/appellant. Accordingly, this appeals stands dismissed and the defendant/respondent is directed to pay back Rs.7,50,000/- with interest at the rate of 12% per annum from the date of plaint till the date of judgment and at the rate of 6% per annum from the date of judgment till the date of realisation within a period of four weeks from the date of receipt of a copy of this order. Consequently, C.M.P. No.26698 of 2019 stands closed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

// True Copy //

Sub Assistant Registrar

vga

To

1.The III Additional District Judge,
Vellore at Thirupathur.

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

+1cc to Mr.C.Anbu, Advocate, Sr.No.5741

A.S. No.873 of 2019 and C.M.P. No.26698 of 2019

SSD(CO)
RVM(30/03/2022)