



A.S(MD)No.93 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.93 of 2013

and

M.P(MD)No.1 of 2013

1) M.Sam Sahabtheen

2) S.Ameedhu Sulthan

... Appellants/Defendants

vs.

Pakkir Bawa

... Respondent/Plaintiff

Appeal Suit filed under Section 96 of the Code of Civil Procedure,
against the judgment and decree dated 29.07.2011 made in O.S.No.59
of 2007 on the file of the Principal District Court, Tirunelveli.

For Appellants : Mr.V.Meenakshi Sundaram
for Mr.D.Nallathambi

For Respondent : Mr.M.P.Senthil for Mr.T.Lenin Kumar



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JUDGMENT

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The respondent as a plaintiff filed a suit in O.S.No.59 of 2007 on the file of the Principal District Court, Tirunelveli, against the appellants/defendants for the relief of specific performance and permanent injunction. After recording the plaintiff's side evidence, the trial Court decreed the suit by judgment and decree dated 29.07.2011. Aggrieved by the same, the defendants as appellants have filed this appeal.

2. Brief facts in the plaint are as follows:-

The suit property jointly belonged to the defendants as per the registered sale deed dated 05.02.2003. The plaintiff entered into an agreement with the defendants on 01.05.2007 to purchase the suit property for a valuable consideration of Rs.13,75,000/-. On the date of sale agreement, the defendants received advance of Rs.10,000/- from the plaintiff. The time for execution of the sale deed was fixed as ten days. Since the 1st defendant had to leave the native place to go to other places, he made arrangements to execute the sale deed through his wife/2nd defendant. According to the plaintiff, he was ready and



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willing to perform his part of contract, whereas, on 04.05.2007, the 2nd defendant informed the plaintiff that they have not obtained permission for the building constructed in the upstairs and after obtaining permission, they will execute the sale deed. Moreover, she demanded Rs.5 lakhs towards the sale consideration and therefore, the plaintiff paid Rs.2,65,000/- to the 2nd defendant as cash, for which, she gave a receipt. The plaintiff also gave a cheque for Rs.2,65,000/- and the 2nd defendant informed that she will give receipt after realising the cheque amount from the bank. Subsequently, on 11.05.2007, the plaintiff demanded the defendants to execute the sale deed, for which, the 2nd defendant demanded a further sum of Rs.3,00,000/- and she further stated that on receipt of the said sum, she will hand over all the original documents of the suit property to the plaintiff. Hence, the plaintiff gave Rs.3,00,000/-, for which, the 2nd defendant gave a receipt. While the 2nd defendant handed over the original documents of the suit property to the plaintiff, she also handed over the possession of the suit property with an instruction that he should make the maintenance work in the suit property. The plaintiff spent Rs.1,00,000/- for laying cement floor and electrical work and from 01.06.2007, he was residing and enjoying the



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suit property. Thereafter, on 29.05.2007, the 2nd defendant demanded further amount stating that after return of her husband, the sale deed will be executed. Hence, the plaintiff gave Rs.4,00,000/- to the 2nd defendant, for which, she also gave a receipt. Subsequently, when the plaintiff approached the 2nd defendant to execute the sale deed after receiving the balance consideration of Rs.1,35,000/-, the 2nd defendant refused and demanded additional amount of Rs.3,00,000/-. Thereafter, the defendants were not willing to execute the sale deed and stated that they are going to sell the suit property to third parties. The defendants also threatened the plaintiff to vacate from the suit property with the help of police. Hence, the suit.

3. Brief averments in the written statement are as follows:-

The defendants admitted the sale agreement dated 01.05.2007, receipt of advance of Rs.10,000/- and the cheque payment of Rs.2,65,000/-. Since the 1st defendant had to go to abroad, the time for executing the sale deed was fixed as 10 days. According to the defendants, except the advance of Rs.10,000/- and the cheque payment of Rs.2,65,000/- towards the portion of the sale consideration, the



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receipts for payments stated to have been made on various dates to the 2nd defendant in the presence of the witnesses, were created by the plaintiff as if the 2nd defendant issued those receipts, only with an intention to grab the suit property from the 2nd defendant. The possession of the suit property was never given to the plaintiff by the 2nd defendant, whereas, taking advantage of the absence of her husband/the 1st defendant, the plaintiff, by deceitful means, obtained key of the suit property from the 2nd defendant for maintenance work. Thus, the suit is liable to be dismissed.

4. Based on the pleadings, the trial Court framed the following issues:-

1. Whether the plaintiff was ready and willing to perform his part of the agreement?
2. Whether the plaintiff has paid Rs.12,40,000/- on various dates as part payment towards the sale consideration?
3. Whether the plaintiff has obtained possession of the suit property by deceitful means?
4. Whether the plaintiff is entitled to the relief of specific



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performance as prayed for?

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5. Whether the plaintiff is entitled for the relief of permanent injunction as sought for?

6. What reliefs the plaintiff is entitled to?

5. In order to substantiate the case, on the side of the plaintiff, 2 witnesses were examined as PW1 and PW2 and 19 documents were marked as Exs.A1 to A19. On the side of the defendants, no witness was examined and no document was marked.

6. The trial Court considering the pleadings, oral and documentary evidence, decreed the suit by judgment and decree dated 29.07.2011. Challenging the same, the defendants have filed this appeal.

7. The learned counsel for the appellants would submit that the trial Court ought not to have decided the suit on merits when there is no evidence much less the substantial portion of evidence on the side of the appellants, which is against the law. Though the time in the sale agreement was fixed as ten days, since the 1st appellant had to go to



abroad, the respondent was not ready and willing to pay the balance sale consideration within the said stipulated time. Further, when the appellants also in their written statement have specifically pleaded time is the essence of contract, the trial Court failed to frame the said issue. Further, the payment of the amount mentioned in the acknowledgements has not been proved.

8. The learned counsel for the appellants would further submit that except the initial advance amount and a cheque for Rs.2,65,000/- relating to a portion of the sale consideration which was encashed subsequently, the appellants did not receive any amount. The payment receipts dated 04.05.2007, 11.05.2007 and 29.05.2007 namely, Exs.A2 to A4 are concocted and created documents, and therefore, the appellants filed I.A.No.94/2010 for comparison of the signatures which was allowed. Though the expert opinion received and the appellants also filed the objections, neither the opinion of the expert was marked nor the appellants' objection was taken into consideration by the trial Court. The trial Court also has not discussed any thing about the signatures and the expert opinion.



9. It is further submitted that the witness to Ex.A1 is a stock witness and he has only created the acknowledgements. According to the learned counsel, the amount mentioned in the acknowledgements has not been received by the appellants. Further, the trial Court ought not to have relied upon the evidence of PW1 and PW2 when they have not been cross examined by the appellants and the respondent had not issued any notice calling upon the appellants to execute the sale deed pursuant to Ex.A1 and before filing the suit for specific performance which itself would prove that the respondent has not proved his readiness and willingness throughout. The materials placed on record are not sufficient to decide the suit on merits. Therefore, the learned counsel would submit that the judgment and decree of the trial Court is liable to be set aside and the suit be remanded to the trial Court for fresh disposal after considering the evidence to be let in by the appellants.

10. The learned counsel for the respondent would submit that it is a suit for specific performance. As observed by the trial Court, despite sufficient time, the appellants had not utilised the opportunity and was purposefully evading from the suit proceedings. Though the appellants



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participated in the suit proceedings till the examination of PW1, they failed to appear subsequently. Though the appellants took up an application for comparison of signatures and the opinion also received, since it was not favour to them, they filed objections which clearly shows that the admitted signatures in Ex.A1 and the disputed signatures in the acknowledgements are one and the same and that would prove that the appellants received the major portion of the sale consideration, except the balance consideration Rs.1,35,000/- and even that amount was also deposited by the respondent before the trial Court. Thus, the respondent has proved the genuineness of his claim for the relief of specific performance. Since the relief of specific performance is discretionary in nature, the conduct of the parties should be taken into consideration. Having received the major portion of the sale consideration, the appellants moved an application for comparison of the signatures and even after they failed in getting expert opinion in their favour, the appellants made objections to the expert opinion and wantonly not participated in the trial and allowed the suit to be disposed on merits without letting in any evidence and also now filed the present appeal. Such conduct of the appellants itself does not reflect bonafide and the



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trial Court considering the conduct of the appellants, despite sufficient opportunities, rightly decreed the suit on merits. Thus, he prayed for dismissal of the appeal.

11. Heard both sides and perused the records.

12. Admittedly, the respondent filed the suit for specific performance against the appellants. The sale agreement dated 01.05.2007, the period of ten days fixed therein for execution of the sale deed, receipt of advance amount of Rs.10,000/- on the date of sale agreement and the receipt of a portion of the sale consideration at Rs. 2,65,000/- are not in dispute. According to the appellants, the respondent failed to perform his part of contract within the stipulated period of ten days. According to the respondent, he paid the entire sale consideration except Rs.1,35,000/- which was also deposited before the trial Court.

13. The core question raised in this case is, whether the respondent was ready and willing to perform his part of contract.



Admittedly, in this case, there is no suit notice sent to the appellants demanding them to execute the sale deed, but however, even within a short period, the respondent filed the suit. According to the respondent, he was always ready and willing to perform his part of contract, whereas it is only the appellants evaded to execute the sale deed. Admittedly, in this case, on completion of pleadings and framing of issues, trial had started. On the side of the respondent, PW1 was examined on three occasions. Though the appellants started cross examination of PW1, subsequently they sought time for some reasons. After giving opportunity to the appellants, the trial Court closed the evidence of PW1 and posted the suit for further evidence. Thereafter, PW2 was examined in chief, but there was no cross examination by the appellants. Subsequently, the plaintiff's side evidence was closed. When the suit was posted for the examination of the defendants' side witnesses, the appellants neither recalled the plaintiff's side witnesses for cross examination nor produced their side witnesses. Therefore, the trial Court closed the defendants' side evidence and posted the suit for arguments. On two occasions, the suit was adjourned for arguments. Despite several opportunities, the appellants failed to utilise the same and



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therefore, the trial Court decided the suit on the basis of the available materials. Till the pronouncing of the judgment, the appellants had not come forward to file any application either for re-open the case and recall the witnesses or soon after the pronouncement of the judgment, under Order 9 Rule 13, whereas, the appellants have filed this appeal invoking Section 96 CPC.

14. Though the appellants filed I.A.No.94/2010 for comparison of the signatures and to get expert opinion, despite the receipt of the expert opinion report and the objections thereto filed by the appellants, the trial Court did not consider the same. The trial Court could have marked the opinion of the expert as court document and could have considered the objections of the appellants and then given a finding on the same. Without giving any finding on those aspects, the trial Court merely decreed the suit. Therefore, under these circumstances, this Court feels that there is a lack of materials to decide the suit on merits. However, in the interest of justice, in order to give an opportunity to the parties to lead all the full-fledged evidence before the trial Court, this Court is of the opinion that it is a fit case to remand the suit to the trial Court for fresh disposal, on terms.



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15. Accordingly, the judgment and decree dated 29.07.2011 made in O.S.No.59 of 2007 on the file of the Principal District Court, Tirunelveli, shall stand set aside, subject to payment of Rs.1,00,000/- (Rupees One Lakh only) to the credit of this appeal on or before 28.07.2022, failing which, the appeal shall stand dismissed automatically without further reference to this Court. On compliance of the said direction, on remand, the trial Court is directed to permit the appellants to recall the plaintiff's side witnesses for cross examination, if they choose to do so, and if they want to lead any evidence, they can also lead their evidence and thereafter, the trial Court shall decide the suit in accordance with law. It is stated that the respondent is in possession of the suit property and the trial Court also granted injunction till the disposal of the suit. Thereafter, during the pendency of this appeal also, the respondent was enjoying the benefit of injunction. Therefore, the counsel for the respondent submits that the said injunction may be extended till the disposal of the suit.

16. In view of the said submission, since the suit is remanded for fresh disposal, the order of injunction granted by the trial Court earlier shall be continued till the disposal of the suit afresh.



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17. Post the appeal on 29.07.2022 for reporting compliance.

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18.07.2022

Index : Yes / No

Internet : Yes

Issue judgment copy on 22.07.2022

To

The Principal District Judge,
Tirunelveli.



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P.VELMURUGAN, J.

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JUDGMENT MADE IN
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