



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.04.2022

CORAM:

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD) No.560 of 2010

Thiyagarajan

.. Appellant/3rd Respondent/
3rd Plaintiff

-vs-

1.Krishnamoorthy

.. Respondent/Appellant/
Defendant

Kaliyaperumal (Died)

2.Lakshmi

..Respondent/2nd Respondent/
2nd Plaintiff

Prayer :- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree in A.S.No.65 of 2007 on the file of the Principal Subordinate Judge, Thanjavur dated 09.12.2009 filed against the judgment and decree passed in O.S.No.139 of 2003 on the file of the District Munsif, Thiruvaiyaru dated 28.03.2007.

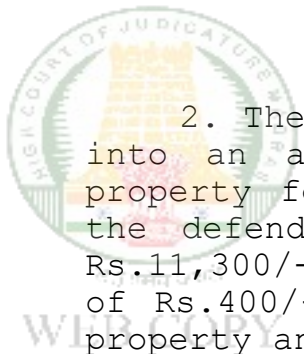
For Appellant : Mr.V.Chandrasekar

For R1 : Mr.S.Prabhu

For R2 : No appearance

JUDGMENT

The 3rd plaintiff in O.S.No.139 of 2003 on the file of the District Munsif Court, Thiruvaiyaru is the appellant in this second appeal. The suit was one for specific performance. The suit was originally filed by one Kaliyaperumal and his sister Lakshmi for directing the defendant to execute a sale deed conveying the suit property in favour of the 1st plaintiff. During the pendency of the suit, Kaliyaperumal passed away and the appellant herein got impleaded as the 3rd plaintiff in his capacity as his legal heir.



2. The case of the plaintiffs is that the defendant had entered into an agreement with the 1st plaintiff for selling the suit property for a sale consideration of Rs.23,700/-. On 28.02.1990, the defendant received a sum of Rs.12,000/- and further sum of Rs.11,300/- on 18.07.1991. What remained to be paid was only a sum of Rs.400/-. The 1st plaintiff was put in possession of the suit property and original title deed pertaining to the suit property was also given to the 1st plaintiff. No time limit was set out in the agreement. In the year 2000, the defendant tried to interfere with the plaintiffs' possession. Hence the plaintiffs filed an injunction suit in O.S.No.49 of 2000 on the file of the District Munsif, Papanasam. The same was dismissed on the ground that it was not maintainable. Thereafter, the present suit for specific performance was instituted. The defendant filed writ statement controverting the plaint averments. Based on the divergent pleadings, issues were framed. The 1st plaintiff examined himself as P.W.1 and three other witnesses were examined on the side of the plaintiffs. Ex.A1 to Ex.A8 were marked. The defendant examined himself as D.W.1 and the Sub Registrar, Thiruvaiyaru was examined as D.W.2. After considering the evidence on record, by judgment and decree dated 28.03.2007, the trial court decreed the suit as prayed for. Aggrieved by the same, the defendant filed A.S.No.65 of 2007 before the Principal Subordinate Court, Thanjavur. By the impugned judgment and decree dated 09.12.2009, the first appellate court reversed the decision of the trial court as regards the grant of specific performance. It however granted the alternate relief of refund of Rs.23,300/- with interest at the rate of 6% from the date of suit till the date of realization. Challenging the same, this second appeal came to be filed.

3. The second appeal was admitted on 05.07.2010 on the following substantial questions of law:-

"(i) Whether the judgment and decree of the first appellate court could be sustained on the mere ground of delay in filing the suit for specific performance that too when such plea has not been raised in the written statement?

(ii) Whether the first appellate court is right in exercising the discretion in favour of the defendant in the absence of plea of waiver of abandonment?

(iii) Whether the first appellate court is right in denying the right of specific performance on the ground of delay when the conduct of the appellant implying waiver or abandonment which prejudice the first respondent are totally absent?"

4. The learned counsel appearing for the appellant reiterated the issues set out in the memorandum of grounds and called upon



this Court to answer the substantial questions of law in favour of the appellant and set aside the impugned judgment and decree and restore the decision of the trial court.

5. Per contra, the learned counsel appearing for the 1st respondent submitted that the impugned judgment and decree do not call for any interference.

6. The learned counsel for the 1st respondent raised primarily two contentions viz.,

(i) the suit is hopelessly barred by limitation. Even according to the appellant, the suit agreement is dated 28.02.1990 and 18.07.1991. The suit in question was filed in the year 2003. Even though the defendant denied the genuineness of the agreement, the fact remains that even according to the 1st plaintiff, there was interference with his possession on 03.05.2000. This date can be taken as the date of breach or repudiation of the suit agreement. Therefore, the suit for specific performance ought to have been filed on or before the expiry of three years. But, in this case, the suit was filed only on 24.09.2003. It is clearly barred by limitation.

(ii) As per Section 16(c) of the Specific Relief Act, 1963 (hereinafter referred to as "the Act" for brevity) the 1st plaintiff must aver and prove continuous readiness and willingness to perform his part of the contract. Though the statute has been amended, even now, the plaintiff is called upon to prove his continuous readiness and willingness. In this case, a mere look at the deposition of P.W.2 would show that the 1st plaintiff was never ready and willing to conclude the transaction. Therefore, the requirement of Section 16(c) of the Act has not at all been fulfilled in this case. The learned counsel pointed out that it is only for these twin reasons, the first appellate court interfered with the decision of the trial court.

7. The learned counsel for the 1st respondent relied on the decision reported in **2003-2-L.W. 98 [Suryagandhi vs. Lourduswamy]** and an unreported decision rendered on 20.01.2017 in S.A.(MD) No.511 of 2011. The learned counsel pointed out that the factual matrix obtaining in S.A.(MD) No.511 of 2011 comes astonishingly close to the case on facts. He also added that since the plaintiffs had earlier filed an injunction suit and lost the same and since they did not get any leave for withdrawal with liberty to file fresh suit, the present suit for specific performance is squarely barred under Order II Rule 2 of Civil Procedure Code (hereinafter referred to as "CPC" for brevity). He also would add that the relief of specific performance is essentially a discretionary remedy. Here is a case where the plaintiffs had moved the court a full 12 years after the agreement was originally entered into. According to him, such a person does not deserve any indulgence at the hands of this Court. He called upon this Court to confirm the decision of the



first appellate court and dismiss the second appeal.

8. I carefully considered the rival contentions and went through the evidence on record. Of course, the defendant had impeached the genuineness of the suit agreement both in these proceedings as well as in the previous suit proceedings. But, the 1st plaintiff by examining himself and the attestors had discharged the onus cast on him to prove the suit agreement. If according to the defendant, the signatures attributed to him in Ex.A1 and Ex.A2 are forged, he ought to have taken steps for referring the disputed signatures for the opinion of the handwriting expert. No such step was taken by the defendant. In any event, the trial court had categorically given a finding that the suit agreement had been proved. It is true that the first appellate court interfered with the decision of the trial court and denied the relief of specific performance, but the first appellate court by ordering refund of the advance amount of Rs.23,300/- had also endorsed the finding of the trial court that the suit agreement is a genuine one and that the 1st plaintiff has proved the same. The defendant cannot invoke Order XLI Rule 22 of Civil Procedure Code to attack the said finding in this second appeal, because the defendant had partly lost the suit. He had suffered a decree. Therefore, without filing cross appeal, he cannot impeach the finding of the courts below regarding genuineness of Ex.A1 and Ex.A2. I therefore, have to proceed on the footing that the suit agreement has been proved by the appellant. The issue as to whether the present suit is hit by Order II Rule 2 CPC need not detain me in view of the decision of the Hon'ble Supreme Court in the case of ***Inbasegaran and another vs. S.Natarajan (Dead) thr. LRs*** reported in ***(2015) 11 SCC 12***. The Hon'ble Supreme Court in the said decision had held that the suit for injunction came to be filed, since the defendant had threatened to dispossess the plaintiffs from the suit property. Therefore, the cause of action for filing the injunction suit and the cause of action for filing the suit for specific performance are different and hence, Order II Rule 2 CPC is inapplicable. The earlier decision of the Hon'ble Supreme Court in ***(2013) 1 SCC 625 [Virgo Industries (Eng.) (P) Ltd. vs. Venturetech Solutions P. Ltd.]*** is distinguishable on facts. Respectfully following the later decision in ***Inbasegaran*** (supra), I hold that the present suit proceedings are not hit by Order II Rule 2 CPC.

9. The next question that arises for consideration is whether the suit can be said to be hit by limitation. Article 54 of the Limitation Act, 1963 states that three years is the limitation period for filing suit for specific performance of a contract and that time would begin to run from the date fixed for the performance or if no such date is fixed when the plaintiff has notice that performance is refused. In this case, I went through Ex.A2. In Ex.A2, it has been mentioned that no time limit has been fixed.



Therefore, the limitation would run when the plaintiff has notice that the performance is refused. The learned counsel for the respondent would want me to compute the limitation from 03.05.2000, which has been mentioned as the cause of action for filing of the suit. The attempt of the defendant to dispossess the plaintiffs cannot be taken as the date when the defendant refused to perform the contract. On the other hand, in the written statement filed in the injunction suit, the defendant had rebutted the very existence of the suit agreement. Therefore, it is only the date of written statement, which can be taken as the starting point for computing the limitation. The written statement in the injunction suit was filed in October, 2000. The present suit for specific performance was filed in September, 2003 itself. Therefore, the suit on hand cannot be said to be hit by limitation.

10. The next question that arises is whether the 1st plaintiff has fulfilled the requirement of readiness and willingness. Here is a case where the total sale consideration was fixed at Rs.23,700/-. The 1st plaintiff had paid a sum of Rs.23,400/-. The first appellate court also had directed the defendant to refund this amount with interest from the date of the filing of the suit. Thus, the 1st plaintiff had almost completely fulfilled his part of the contract. There was very little on his side to do. It is also a case where the defendant had put the 1st plaintiff in possession of the suit property. By marking Ex.A5, the 1st plaintiff had also proved that he is in possession of the property. The original title deed in respect of the suit property is also with the 1st plaintiff. It is true that almost on similar facts, a learned Judge of this Court denied the relief of specific performance in S.A.(MD) No.511 of 2011. But, then in paragraph 38 of the said judgment, the learned Judge had opined that the plaintiff had not come to the Court with true facts and therefore, was not entitled for discretionary relief. Section 16(c) of the Act says that the plaintiff must aver and prove that he was continuously ready and willing to perform essential terms of the contract. In this case, the essential terms of the contract had already been performed by the plaintiff. Therefore, I answer the substantial questions of law in favour of the appellant. The judgment and decree of the first appellate court are set aside. The decision of the trial court is restored. The second appeal is allowed. No costs.

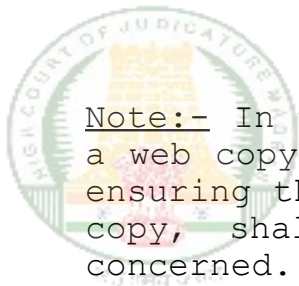
Sd/-

Assistant Registrar (CS-II)

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/ /2022

Sub Assistant Registrar(CS)



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To
1.The Principal Subordinate Judge,
Thanjavur.

2.The District Munsif,
Thiruvaiyaru.

Copy to

The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.V. CHANDRASEKAR, Advocate (SR-22120[F] dated
28/04/2022)

+1 CC to M/s.V.K.VIJAYARAGAVAN, Advocate (SR-22213[F] dated
28/04/2022)

S.A. (MD) No.560 of 2010
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