



SA(MD)No.38 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 15.06.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.38 of 2011

M.Paulraj (Died)

1.Kamaladevi

2.Suganya

3.Prasad

.. Appellants/Respondents 3-5/
LRs of the Plaintiff

Vs

1. I.S.Kumar Muthuram

.. 1st Respondent/ Appellant/
1st Defendant

2. Kalivaradan

.. 2nd Respondent/2nd Respondent/
2nd Defendant

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 27.11.2008 passed in A.S.No.100 of 2008 on the file of the Principal District Judge, Tiruchirappalli, reversing the judgment and decree dated 07.01.2008 passed in O.S.No.640 of 1995 on the file of the I Additional Sub-ordinate Judge, Tiruchirappalli.

For Appellant : Mr.J.Anandhavalli
For Respondents : Mr.P.Thiyagarajan for R1
Mr.K.Govindarajan for R2



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JUDGMENT

The legal heirs of the plaintiff in a suit for specific performance in O.S.No.640 of 1995 on the file of the I Additional Sub-Court, Thiruchirappali, are the appellants herein. The suit was decreed by the trial Court, but the same was reversed by the First Appellate Court in A.S.No.100 of 2008.

2. For narrative convenience, the parties are referred to by their rank before the trial Court.

3. The brief facts are as follows:

(a) The suit property belonged to the defendants, who admittedly entered into Ext.A.1-unregistered sale agreement, dated 13.05.1994 with the plaintiff. The total sale consideration was fixed at Rs. 2,39,062/-. The plaintiff had paid Rs.100/- as advance under the document and a week later, he paid Rs.20,000/- as additional advance. The time for performance was fixed at three months. The suit property is in the possession of tenants under the first defendant and



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the term in the sale agreement stipulated that the vendor (first defendant) deliver the vacant possession on the date of registration of the sale deed.

(b) Be that as it may, the plaintiff came to know that the first defendant/vendor was afoot to sell the suit property to strangers and hence, he laid O.S.No.1733 of 1994 for bare injunction to restrain the first defendant from alienating the property. Initially, the trial Court granted an order of injunction, and later vacated it. Subsequently, the first defendant had sold the property to the second defendant. Promptly, the plaintiff laid the present suit in O.S.No.640 of 1995 for specific performance.

(c) In the written statement filed by the first defendant, he had taken up two defences; (i) that the plaintiff is not ready and willing to perform his part of the contract, and (ii) that time is essence of the contract.

(d) The plaintiff also laid another suit in O.S.No.1253 of 2003 against



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the first defendant herein and one Ramasami for bare injunction.

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4.1. Both the aforesaid suits were jointly tried. Before the trial Court, the plaintiff examined himself as P.W.1 and the first defendant examined himself as D.W.1. For the plaintiff, he had filed Ext.A.1 to Ext. A6, of which, Ext.A1 is the sale agreement. It is also seen from the judgment of the trial Court that the Court has admitted certain reports of the Commissioner filed in some other suit in O.S.No. 1733 of 1994 and marked them as Ext.C1 and Ext.C2, but without examining the Commissioner.

4.2. Both the suits were disposed of by a common judgment of the I Additional Subordinate Court, Tiruchirappalli, dated 07.01.2008. In particular, the trial court decreed the suit for specific performance. The first defendant to the suit preferred a first appeal in A.S.100/2008 before the Principal District Court, Tiruchirapalli and here the plaintiff faced a reversal in fortune when the first appellate court allowed the appeal and dismissed the suit. It may be stated that during the pendency of the first appeal, the plaintiff died and his legal representatives defended the appeal.



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5.1. The line of reasoning of the first appellate court is that the suit for specific performance was hit by Order II Rule 2 CPC as it was preceded by a suit for bare injunction on a cause of action founded on the very same Ext.A-1 agreement; and that the plaintiff had not established his readiness and willingness to perform his part of the contract.

5.2. Now, aggrieved by the decree of the first appellate court, the legal representatives of the plaintiff had preferred this appeal. It is reminded that the appeal arises only out of O.S.640/1995 laid for specific performance, and this court is not concerned with the other suit in O.S. No.1253 of 2003 that came to be tried along with it.

6.1. This appeal was admitted on 11.02.2011 for considering the following substantial questions of law:

“i. Whether the first appellate court had committed an error in non-suiting the appellant/plaintiff on the basis of Order 2 Rule 2 of Civil Procedure Code and thereby reversing the decree passed by the trial court without even framing a point for consideration in this regard?

ii. Whether the bar under Order 2 Rule 2 of Civil Procedure Code



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will be attracted when the former suit for a limited relief and the subsequent suit for a larger relief have been jointly tried and disposed of by a common judgment?

iii. Whether the first appellate court has erroneously reversed the finding of the trial court regarding the readiness and willingness on the part of the appellant herein/plaintiff and rendered a perverse finding in this regard against the appellant herein/plaintiff?

iv. Whether the first appellate court has committed an error in law in not considering the question of refund of the advance amount on arriving at a conclusion that the appellant herein/plaintiff was not entitled to the relief of specific performance and not affording an opportunity to the appellant herein/plaintiff to amend the prayer seeking the relief of refund of advance amount?”

6.2. It may have to be mentioned on 10.06.2022, this Court framed the following substantial questions of law as it was given the impression that no substantial questions were framed:

“i) Whether the lower Appellate Court was right in holding that the suit for specific performance is barred under Order 2 Rule 2 C.P.C without any pleading by the defendant?

ii) Whether the lower Appellate Court was right in holding that the



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against alienation of the property, wherein the trial Court had observed that if at all the plaintiff need to have remedy, he should file a suit for specific performance.

- So far as the findings on perceived lack of readiness and willingness on the part of the plaintiff to perform his part of the contract is concerned, the Appellate Court overlooked Ext.A.5, bank passbook of the plaintiff. It is true that the passbook does not show that the plaintiff had requisite funds as on the date of agreement, but then Ext.A.5 also shows that subsequently the plaintiff had enough funds in the account. After all the purchaser of a property need not jingle the coins before the Court, and his ability or capacity to mobilise the funds itself can be reckoned for evaluating his readiness and willingness to perform his part of the contract.

8. The learned counsel for the first defendant / first respondent relied on the authority of the Hon'ble Supreme Court in ***Shenbagam and others vs. K.K.Rathinavel*** [2022 (2) Supreme 415] and laid considerable emphasis on paragraph No.36 thereof, which reads:

36. True enough, generally speaking, time is not of the essence in an agreement for the sale of immovable property. In deciding whether to



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grant the remedy of specific performance, specifically in suits relating to sale of immovable property, the Courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would undoubtedly have escalated. Given the blemished conduct of the respondent-plaintiff in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract.....”

9. The scenario presented in this case is no different from one involved in the suit in ***Shenbagam case***. Hence, this Court does not want to interfere with the findings of the First Appellate Court. Substantial question of law No.3 is answered against the appellant. So far as the substantial question of law No.1 and 2 are concerned, the suit in O.S.No.1733 of 1994 itself was tried along with the present suit for specific performance, and rendering a finding on this question may not be necessary since the court has already held against the appellant in the all critical substantial question No.3. So far as substantial question No.4 is concerned, no argument was advanced by the counsel.



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10. In conclusion, this Court does not find any reason to interfere with the findings of the first appellate Court. Hence, this Second Appeal is dismissed. No costs.

15.06.2022

Internet: Yes/No

Index: Yes/No

rmk/ssb/abr

N.SESHASAYEE, J.

ssb/abr

To

1.Principal District Court, Tiruchirappalli,

2.I Additional Sub-ordinate Court, Tiruchirappalli.

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