



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.03.2022

CORAM:

THE HONOURABLE MS.JUSTICE R.N.MANJULA

A.S.(MD)No.102 of 2019

1.Indirani

2.T.N.Prabhakar

Appellants/Plaintiffs

Vs.

1.S.Parthiban

2.Mrs.P.Jaya

Respondents/Defendants

PRAYER: Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the decree and judgment passed by the III Additional District Judge, Tiruchirappalli, in O.S.No.75 of 2011, dated 16.12.2014.

For Appellants

: Mr.K.P.Thiyagarajan

For Respondents

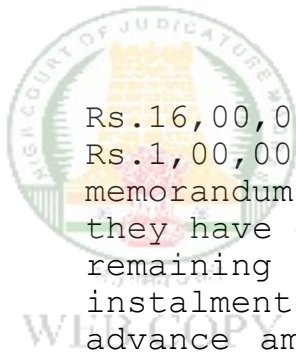
: Mr.S.Vinod Sathya Lazar

J U D G M E N T

This Appeal Suit has been preferred challenging the judgment of the learned III Additional District Judge, Trichy, dated 16.12.2014 made in O.S.No.75 of 2011.

2.The plaintiffs are the appellants herein. The suit has been filed for the relief of specific performance, in pursuance of the sale agreement, dated 24.09.2008, entered between the plaintiffs and the first defendant, in respect of 'B' Schedule property. The facts of the case would go like this:-

3.The first defendant is a flat promoter. The plaintiffs are the residents of Flats described under 'A' schedule property; the said flat forms part of 'T' Block of the Housing Unit, Uraiyur; the first defendant attempted to purchase all the flats in the said block and reconstruct the same into new flats and sell it to old flat owners and others; in this connection, he entered into a memorandum of understanding with the first defendant on 15.07.2007; according to the memorandum of understanding, the Flat, in which, the first defendant was living was sold to the first defendant for a sum of Rs.13,00,000/-; out of which, Rs.4,00,000/- was received by the plaintiffs on the date when the memorandum of understanding was entered; remaining Rs.9,00,000/- was received on the date of execution of the sale deed (Ex.A.5), in favour of the first defendant; as per the memorandum of understanding, the cost for the new flat, which is described in 'B' schedule property is fixed as Rs.16,00,000/-; the understanding was that the said amount of

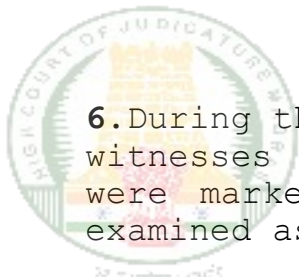


Rs.16,00,000/- should be paid in three instalments, excluding Rs.1,00,000/-, an advance amount, which had been paid on the date of memorandum of understanding itself; according to the plaintiffs, they have given a cheque for Rs.1,00,000/- as advance amount and the remaining amount of Rs.15,00,000/- should be paid in three instalments; the first instalment of Rs.6,00,000/-, excluding the advance amount should be paid at the time when the Flat promoter executes the sale deed, in respect of the undivided share of the land, in favour of the plaintiffs and the second instalment of Rs.6,00,000/- should be paid after the completion of the first floor concrete and the remaining third instalment should be paid at the time the first defendant hands over the possession of the flat; as agreed, the first defendant did not come forward to execute the sale deed, in respect of the undivided share of the land, in respect of the flat; even thereafter also, the plaintiffs were not communicated about the development of the flat construction and it was not possible for the plaintiffs to pay the amount as agreed and get the flat registered in their favour; at the time of executing Ex.A1, memorandum of understanding, it was also agreed that the first defendant should give a sum of Rs.12,00,000/- as caution deposit, which is refundable, after the completion of flat construction. Since the first defendant had failed to execute the sale deed, after receiving the amount as specified in Ex.A1, the plaintiffs filed a suit for specific performance.

4.The first defendant had filed the written statement and the same was adopted by the second defendant as well. The first defendant contested the suit by stating that the plaintiffs did not perform their part of contract, as per the memorandum of understanding and the sale agreement; all the owners of the block have acted in accordance with the terms of the contract and got their flats; since the plaintiffs have not come forward to pay the sale amount and got the flat registered in their favour, the flat was sold to some other person; the defendant has filed the suit for recovery of money of Rs.12,00,000/- from the plaintiffs and according to the agreement, the said amount is liable to be refunded to him; since the plaintiffs were not ready and willing to perform their part of contract, the suit does not deserve any merit and hence, it has to be dismissed.

5.On the basis of the above pleadings, the learned trial Judge has framed the following issues:-

- i. Whether the plaintiff is entitled to specific performance relief as per the sale agreement dated, 24.09.2008, in respect of 'B' schedule property?
- ii. Whether the plaintiff is entitled to permanent injunction in respect of 'B' schedule properties?
- iii. To what other reliefs?



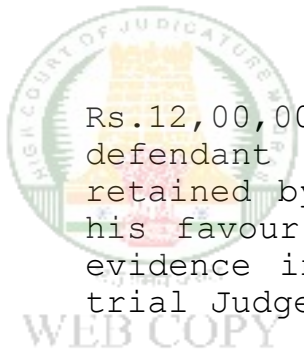
6. During the course of the trial, on the side of the plaintiffs, two witnesses have been examined as PW.1 and PW.2 and Ex.A1 to Ex.A8 were marked. On the side of the defendant, three witnesses were examined as DW 1 to DW 3 and Ex.B1 to Ex.B 19 were marked.

7. It is pertinent to mention that the first defendant has also filed a suit in O.S.No.112 of 2011 for refund of caution deposit of Rs.12,00,000/- (Rupees Twelve Lakhs Only) paid to the appellants/plaintiffs. Both the suits were tried together in a common trial and evidence was let-in in O.S.No.75 of 2011. A common judgment was passed, in which, O.S.No.75 of 2011 filed by the appellants was dismissed and other suit filed for refund of security deposit amount of Rs.12,00,000/- (Rupees Twelve Lakhs Only) was decreed. However, the plaintiffs have preferred the present appeal challenging the result of O.S.No.75 of 2011 alone.

8. At the conclusion of the trial, the learned trial Judge dismissed the suit with cost. Aggrieved over the same, the plaintiffs have preferred this Appeal Suit.

9. The learned counsel for the appellants/plaintiffs submitted that the respondents/defendants did not deny the memorandum of understanding and the sale agreement; when an advance amount of Rs.1,00,000/- was paid by the plaintiffs, as per the terms of agreement, the plaintiffs were never informed about the progress of the construction and no demand was raised by the first defendant to pay the respective instalments as agreed between the parties; the appellants/plaintiffs are always ready and willing to refund the deposit of Rs.12,00,000/-, which has been paid to them, at the time when the memorandum of understanding was entered between the parties; though the appellants/plaintiffs were always ready and willing to perform their part of contract, it was on the default of the respondents, sale could not be completed; being the erstwhile flat owners, the appellants got the right of preference and that has been admitted by the defendants themselves through their conduct by entering into memorandum of understanding and other documents in this connection; because of the failure on the part of the defendants, the appellants are homeless and the defendants are bound to execute the sale deed after receiving sale consideration from the plaintiffs; the learned trial Judge without appreciating the facts and evidence in a proper perspective, had chosen to dismiss the suit.

10. The learned counsel for the respondent submits that the other flat owners had paid the sale proceeds in accordance with the agreement and got their flats registered in their favour; only these appellants were indifferent and they did not come forward to pay the instalments in time and they also retained the deposit paid by the first defendant; the suit itself has been a counter-blast for the demand made by the first defendant to refund the deposit amount of



Rs.12,00,000/-; in fact, a separate suit has been filed by the first defendant for recovery of caution deposit of Rs.12,00,000/-, retained by the appellants/plaintiffs and that has been decreed in his favour; the learned trial Judge has appreciated the facts and evidence in a correct perspective and the judgment of the learned trial Judge does not warrant any interference.

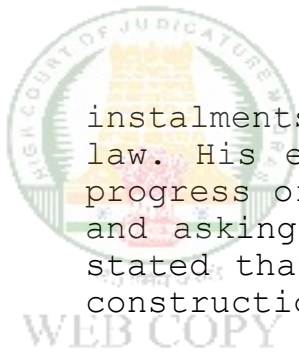
11.On the basis of the rival submissions made by either side counsel, I feel that the following point for consideration shall be relevant for the purpose of disposal of this Appeal Suit:

Whether the appellants/plaintiffs were all along ready and willing to perform their part of contract, as per Ex.A2 & Ex.A5?

12.The fact that the appellants/plaintiffs were the owners of 'A' schedule property is not denied. As per the memorandum of understanding/Ex.A2, the flat was sold in favour of the first defendant by virtue of sale deed, Ex.A4. There is no dispute in this regard. Having received the entire sale consideration for the flat, as the old flat owner, he had entered into a sale agreement with the flat promoter by entering into a fresh sale agreement Ex.A5, dated 25.09.2008. It is also not in dispute that the sale price for new flats in 'B' schedule properties was fixed at Rs.16,00,000/-. Ex.A5 sale agreement itself would show that a sum of Rs.1,00,000/- has been paid by way of cheque as an advance amount. Leaving the above said Rs.1,00,000/-, balance sale consideration would be Rs.15,00,000/- payable by the appellants to the first defendant.

13.The appellants have also admitted the receipt of Rs.12,00,000/- from the first defendant towards deposit, which is liable to be refunded at the completion of construction of the flats and after the flat is handed over to the appellants/plaintiffs. The evidence of PW.1 would show that he was also invited for the building initiation ceremony and he was given with a new building plan, which comprises four floors. According to Ex.A5 and Ex.A2, the first instalment amount of Rs.5,00,000/- should be paid at the time when the respondents executed the sale deed, in favour of the appellants in respect of the Undivided Share (UDS) of the lands. The appellants have stated that they asked the first defendant that he should come forward and execute the sale deed, in respect of UDS. His evidence would reveal that he is aware of the completion of the first floor. He has stated that the construction upto the first floor was completed after one year from the date of pooja.

14.Knowing about the completion of the first floor, the appellants/plaintiffs ought to have demanded the respondents to receive the amount and execute the sale deed in respect of UDS in his favour. But the evidence would reveal that excepting his oral request he has not taken any serious action to get the sale deed registered in his favour. Neither he tendered the remaining

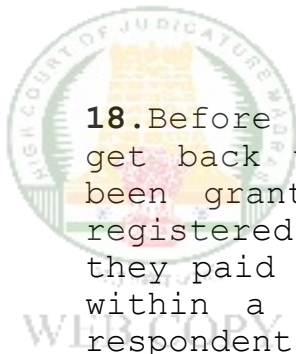


instalments to the respondent/first defendant in the manner known to law. His evidence would also show that he had knowledge about the progress of the construction. He stated that he was repeatedly going and asking the defendant that he should receive the amount. He has stated that he was continuing to do so until the completion of the construction.

15. Though time is not essence of contract, the conduct of parties is important in order to see whether the parties were ready and willing to perform their respective part of contract. Except the oral request made by the appellants to the respondents, they did not take any constructive steps to send the amount meant for the respective instalment to the flat promoter or to file any legal proceedings for the purpose of making the first respondent to act in terms of contract. If the memorandum of understanding of sale agreement was executed between the parties, it is obligatory on the part of the appellants to pay the amount due. Though the appellants had knowledge about the progress of the construction, they did not take any other steps to pay the amount as per the terms. Even during the cross-examination, at one point, the plaintiffs denied the very entitlement of the first defendant to get back his deposit of Rs.12,00,000/-. Having waited for two years, the appellants sent the first legal notice, dated 15.04.2011. Though notice was received by the respondent, he did not choose to send any reply.

16. During the course of argument, the learned counsel for the appellants submitted that the appellants are ready to return the amount of Rs.12,00,000/- paid towards security deposit to the first defendant, if the first defendant execute the sale deed in favour of the flat allotted to him as per Ex.A5. It is further submitted that the flat allotted to these appellants was sold in favour of the second respondent, who is none other than the wife of the first defendant. Though the conduct of the appellant/plaintiff is not upto mark, the conduct of the respondent is also not fair.

17. Despite he had purchased the land from the old residents of the building and promoted the Flats, he did not choose to get the concrete options from the erstwhile owners as to whether they continue to have the interest of getting their flats registered in their favour or drop their interest once for all. As how the appellants/plaintiffs, the respondents also was silent and they did not invite the appellants/plaintiffs to tender amount by informing them about the stage of the construction. Even though the advance amount of Rs.1,00,000/- was paid by the appellants/plaintiffs by way of cheque, it was not realized by the respondents/defendants for the reasons best known to them. Though it might be possible that the respondents would have inferred interest on the part of the appellants in due course, nothing would have been prevented them from putting a cheque for collection and have the interest of the appellants also on board.



18.Before holding that the respondents/defendants are entitled to get back their security deposit, an opportunity should have also been granted to the appellants/plaintiffs to get the sale deed registered in their favour in respect of a flat allotted to them, if they paid the entire balance sale consideration along with interest within a prescribed time. However, the learned counsel for the respondents/defendants submitted that the third party interest has already been created subsequent to the decree and the flat is no longer available with the first defendant.

19.It is submitted by the learned counsel for the appellants/plaintiffs that they have preferred another appeal along with a petition to condone the delay and challenged the decree passed in favour of the first respondent for refund of deposit of Rs.12,00,000/- (Rupees Twelve Lakhs only) in O.S.No.112 of 2011. So, it is open to him to raise his contentions for entitlement if any, in terms of equity, in the said appeal.

With these observations, this Appeal Suit is dismissed and the judgment of the learned III Additional District Judge, Tiruchirappalli, in O.S.No.75 of 2011, dated 16.12.2014 is hereby confirmed. No costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

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Sub Assistant Registrar(CS)

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To

1.The III Additional District Judge, Tiruchirappalli.

2.The Record Keeper,

Vernacular Section,

Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.VINOD SATHYA LAZAR, Advocate (SR-12386[F] dated 16/03/2022)

+1 CC to M/s.K.P.THIYAGARAJAN, Advocate (SR-12640[F] dated 17/03/2022)

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