



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.03.2022

Pronounced on : 09.06.2022

CORAM

THE HONOURABLE MRS.JUSTICE **R.THARANI**

S.A. (MD)No.645 of 2016

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1 VANI @ KALAIVANI ... Appellant/1st Respondent/Plaintiff

Vs

1 MARKKANDAN ...1st Respondent/2nd Respondent/1st Defendant

2 SANGEETHA ...2nd Respondent/Appellant/2nd Defendant

PRAYER :-

This Second Appeal is filed under Section 100 of the Code of Civil Procedure to allow the Second Appeal setting aside the judgment and decree of Additional District Court, Pudukottai in A.S.No.25 of 2011 dated 09.06.2016 reversing the judgment and decree of Sub-Court, Pudukottai in O.S.No.86 of 2005 dated 04.03.2010.

For Appellants : Mr.N.Balakrishnan
For R1 : No appearance
For R2 : Mr.K.Balasundharam

JUDGMENT

This appeal is filed against the order in A.S.No.25 of 2011 on the file of the Additional District Court, Pudukkottai, reversing the judgment and decree in O.S.No.86 of 2005, on the file of the Subordinate Court, Pudukkottai. The appellant is the plaintiff in the suit. Respondents are the defendants 1 and 2 in the suit. The original suit was filed for the prayer of specific performance.

2.A brief substance of the plaint is as follows:

The suit property was purchased by the first defendant through a registered sale deed dated 12.03.1987. Out of the total extend of 32 cents, the suit property is the Eastern side 10 cents. On 10.12.2002, the plaintiff and the first defendant entered into a sale agreement with regard to the suit property. The sale price was fixed as Rs.1,80,000/-. The plaintiff paid a sum of Rs.50,000/- towards advance. The plaintiff was ready and willing to purchase the property. But the first defendant delayed the execution of sale deed. On 19.03.2005, the plaintiff took steps to survey the land. But the second defendant prevented the land being measured. When the plaintiff verified with the Sub Registrar Office, he came to know that a sale deed dated 08.01.2003 in respect of the suit scheduled property, was executed by the first defendant, his sister Ambika and the son of the said Ambika, in favour of the second



defendant. Except, the first defendant, other executors are not the owners of the property.

3. On 04.11.1988, the first defendant has executed a sale deed in respect of the property with an extent 11 2/3 cents on the western side, in favour of one Natarajan who is the husband of Ambika. The sale deed dated 08.01.2003, was executed, giving an impression as if the sale deed dated 04.11.1988 is relating to the suit property.

4. The second defendant is well aware that the first defendant has executed a sale agreement in favour of the plaintiff. One week after the execution of the sale agreement, the first defendant has stated that the second defendant is offering a higher price. The plaintiff advised the second defendant not to purchase the property and the second defendant promised the plaintiff that she will not purchase the property.

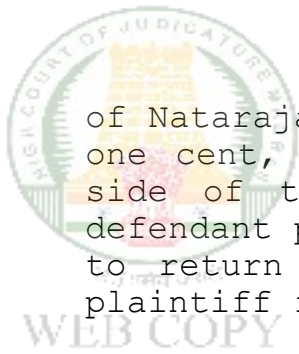
5. The time limit for the sale agreement is two months and the time ends on 10.02.2003. Before the completion of the two months, the second defendant purchased the property from the first defendant on 08.01.2003 which is not valid. The defendants executed the sale deed. Though, they are fully aware of the earlier sale agreement that was entered between the plaintiff and the first defendant, hence, the defendants 1 and 2 are bound to execute the sale deed in favour of the plaintiff.

6. The written statement filed on the side of the first defendant is as follows:

(a) The first defendant purchased 32 cents of land including the suit property from one Shaithra Samshath Rafiya on 12.03.1987. Eastern portion of 10 cents is the suit property. The first defendant was enjoying 10 1/3 cents on the western side and the first defendant executed a sale agreement in favour of Shanmuganathan on 22.03.2001. To set aside the sale agreement and for emergent expenses, the first defendant tried to sell the property to the plaintiff.

(b) On 10.12.2002, the plaintiff paid sum of Rs.50,000/- as advance and promised to pay the balance in a week. But in the sale agreement, two months time was mentioned as the time for execution of the sale. When the first defendant approached the plaintiff, for the balance amount, he informed the first defendant that he is not ready to pay the balance amount and advised the first defendant to sell the property to anybody else and return back the advance amount.

(c) The first defendant sold the suit property on 08.01.2003 to the second defendant for his emergent necessities. Before the execution of the sale deed, the first defendant cancelled the sale



of Natarajan, namely Ambikapathi, Vijayakumar and Senthilkumar, sold one cent, out of the total extent of 11 2/3 cents in the western side of the suit property to the second defendant. The first defendant paid Rs.50,000/- to the plaintiff. The plaintiff promised to return the sale agreement after the sale. Subsequently, the plaintiff filed the suit.

7. A brief substance of the written statement filed by the second defendant is as follows:

In S.No.54/17, in a total extent of 40 cents, eastern 8 cents belong to one Thamilarasan. The western 32 cents belong to the first defendant. Out of the 32 cents, the first defendant sold 11 2/3 cents to Natarajan on 04.11.1988. After the death of Natarajan his wife and son are the owners of the western side 11 2/3 cents. The second defendant purchased the 10 cents from the first defendant and one cent from the legal representative of Natarajan through a sale deed dated 08.01.2003 and the second defendant is in possession of the property. The second defendant is a bonafide purchaser for valuable consideration. The first defendant executed a sale agreement in favour of one Shanmuganathan with regard to 10 1/3 cents, on the western side of the suit property. When a prior sale agreement was there, the plaintiff is alleged to have entered into another unregistered agreement in favour of the plaintiff and the said unregistered agreement is not valid. The second defendant is in possession of 11 cents of land and the suit is to be dismissed.

8. On the above pleadings, the trial Court framed the following issues:

- 1) whether the plaintiff is entitled for specific performance?
- 2) whether the sale agreement is fraudulent?
- 3) what are the reliefs available to the parties?

9. Two witnesses were examined and six documents were marked on the side of the plaintiff. Two witnesses were examined and one document was marked on the side of the defendants. The trial Court passed a preliminary decree in favour of the plaintiff.

10. The second defendant filed an Appeal Suit in A.S.No.25 of 2011 on the file of the Additional and Sessions Court, Pudukkottai, on the following grounds:

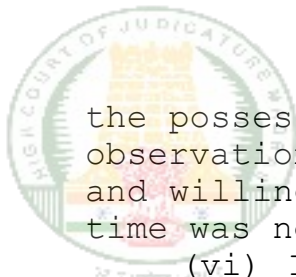
i) the trial Court failed to consider the evidences and documents in the proper perspective.

(ii) The trial Court failed to consider Section 53(a) of the Transfer of Properties Act

(iii) failed to consider that the plaintiff ought to have proved that he was ready and willing to perform his part of the contract.

(iv) The trial Court failed to consider that the second defendant is a bonafide purchaser for valuable consideration and he is in possession of the property.

(v) The trial Court failed to consider that the said agreement is an unregistered one and the plaintiff did not inform the second defendant of the sale of the property. There was no pleading that



the possession is with the plaintiff but the trial Court had made an observation that possession is with the plaintiff. The readiness and willingness of the plaintiff to purchase the property within the time was not mentioned in the pleadings.

(vi) In the plaint, it was stated that the plaintiff was aware of the intention of the second defendant to purchase the land even then he has not taken any action and only after 2 1/2 years, has come forward with the suit. The trial Court failed to consider that there was a registered sale agreement in favour of one Shanmuganathan, which is prior to the alleged unregistered sale agreement. The trial Court failed to consider that the second defendant purchased the property after the cancellation of the prior registered sale agreement.

11.The Additional grounds of First Appeal filed by the second defendant is as follows:

The readiness sand willingness of the plaintiff was not mentioned in the plaint but the trial Court has made an observation that the plaintiff was ready and willing to perform his part of the contract from the date of agreement. The trial Court failed to consider that one week after the date of sale agreement, the plaintiff was aware of the intention of the first respondent to execute a sale in favour of the second defendant, but even then, the plaintiff has not taken any steps to purchase the property from the first defendant.

12.On the above said grounds of appeal, the first appellate Court framed the following issues:

i)whether Ex.A1 was created by the plaintiff and the first defendant in the motive to grab the property?

ii)whether the appellant is a bonafide purchaser for valuable consideration ?

iii) whether the property is in possession of the plaintiff and the second defendant?

iv)whether the plaintiff proved that he was ready and willing to perform his part of the contract?

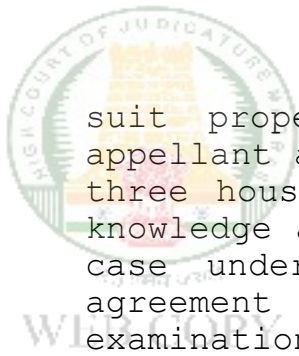
v)whether the preliminary decree passed by the trial Court is valid?

vi)whether the plaintiff is entitled for any other relief?

13.Before the First Appellate Court, the second defendant was recalled and Ex.B2 to B4 were marked. One Sivaraman, brother of the second defendant was examined as D.W.3. Ex.B5 was marked. The first Appellate Court set aside the preliminary decree of the trial Court, and has directed the first defendant to return Rs.50,000/- to the plaintiff along with Rs.10,000/- as compensation.

14.Against the order of the First Appellate Court, the second appeal was filed by the plaintiff on the following grounds:

<https://hcservices.ehcs.gov.in/hcservices> The first respondent has admitted the execution of Ex.A1. The



suit property is adjoining the house of the appellant. The appellant and the second respondent are residing in the same street, three houses away from each other. The second respondent had the knowledge about the Ex.A1. The second respondent cannot make out a case under Section 19(b) of Specific Relief Act. Ex.A1 sale agreement was proved by the examination of P.W.1 and by the examination of the attesor P.W.2. The second defendant did not take any steps to examine the first defendant. The second respondent purchased the property only with the knowledge about Ex.A1 agreement. The second respondent is not a bonafide purchaser. Though the defendants received notice - Ex.A5, they did not sent any reply. Ex.A1 clearly reveals that suit property has to be measured to fix the sale consideration. Inspite of repeated requests, the first defendant / first respondent herein was postponing the measuring process. Even before the expiry of the two months time stipulated in Ex.A1, the first defendant has executed the sale deed. The first defendant remained ex-parte, but the second respondent did not prefer any complaint against the first respondent, for fabricating Ex.A1.

15. It is further stated that Ex.B5 did not relate to the suit property. it relates to the property purchased by one Sumathi which lies on the further west of the suit property. Ex.B1 Sale deed was executed in a hectic manner.

16.This Second Appeal was admitted on 25.03.2022 on the following Substantial Question of law:

1.Whether the second respondent has made out a case under Section 19(b) of the Specifi Relief Act to non suit the appellant in the face of her failure to issue reply to Ex.A5 notice as well as his failure to initiate criminal proceedings against 1st respondent for having allegedly fabricated Ex.A1 sale agreement as averred in his written statement?

17.On the side of the appellant, it is stated that the first defendant failed to measure the property and before the expiry of the period fixed in the sale agreement, the first defendant executed a sale deed in favour of the second defendant and that the sale deed Ex.A4 dated 08.01.2003 is not valid. The second defendant is not a bonafide purchaser. The house of the second defendant and the first defendant are situated in the same street. There is only three houses in between them and the second defendant is well aware of the sale agreement. A week after the date of sale agreement, they first defendant informed the plaintiff that the second defendant was ready to purchase the property for a higher rate. The plaintiff informed the second defendant regarding the sale agreement. But within 29 days from the date of agreement, the first defendant sold the property to the second defendant. As the first defendant failed to measure the property, the plaintiff tried to measure the property



and plaintiff was prevented by the second defendant. Then only the plaintiff came to know about the sale deed executed by the first defendant in favour of the second defendant. The plaintiff issued legal notice Ex.A5 to the defendants. But the defendants failed to reply the notice, though they were in receipt of the notice.

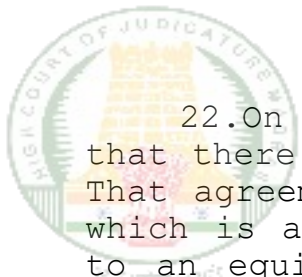
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18.Though the second defendant was aware of the sale agreement, deliberately, the second defendant purchased the property. The first defendant admitted the sale agreement in his written statement. The second defendant did not claim that he was not aware of the sale agreement. He claimed the agreement as forgery. When the first defendant admitted the sale agreement, the case of the second defendant fails. The case of the first defendant is that he received the advance amount and there was an oral agreement to pay the balance within a week. The first defendant did not claim the agreement as forgery. There is a bar to let in oral or documentary evidence against the admissions made in a written document.

19.On the side of the appellant it is further stated that the first defendant was set ex parte. The second defendant failed to examine the first defendant. Both the defendants failed to reply the legal notice. Both the defendants are neighbours and the second defendant is aware of the sale agreement and he is not a bonafide purchaser. When measuring work was not done, within the expiry of agreement period, the lower Appellate Court came to a conclusion that the plaintiff was not ready and willing to perform his part of the contract and failed to consider that within 29 days, the sale was concluded. The first defendant failed to wait upto the expiry of two months.

20.On the side of the respondent it is stated that the agreement was dated 10.12.2002. But the suit was filed only in the year 2005. In the sale agreement - Ex-A1, a period of two months was fixed as the time for payment of the balance amount. In Ex.B5, it was clearly mentioned that the plaintiff's husband received back a portion of the advance amount and he informed the second defendant to deduct Rs.30,000/- from the sale consideration. Only on the basis of Ex.B5, the first Appellate Court has directed the first defendant to return the amount along with Rs.10,000/- towards compensation.

21.On the side of the respondents it is further stated that the appellant failed to prove that he is ready and willing to perform his part of the contract. The plaintiff has not taken any steps to survey the land immediately after entering into the sale agreement. No notice was issued by the plaintiff to the first defendant to measure the property. The steps to measure the land was taken by the plaintiff only after three years, not within the period of two months. Only at the end of the limitation period, the plaintiff has come forward with the suit.



22.On the side of the second respondent it is further stated that there was an earlier registered agreement with a third person. That agreement was not cancelled at the time of execution of Ex.A1 which is an unregistered agreement. The appellant is not entitled to an equitable relief on the basis of an unregistered agreement that too during the pendency of a registered agreement. When time is the essence of the contract, it is the duty of the plaintiff to perform his part of contract within the time limit. The plaintiff has not prove his readiness and willingness within the period of two months from the date of agreement.

23.To substantiate this claim, a judgment of this Court reported in **[2011 (4) CTC 640]** in the case of **Saradamani Kandappan Vs S.Rajalakshmi and others**, held as follows:

20.In this case we find that there is a conscious effort to delink the terms relating to payment of balance price (Clauses 4, 5 and 6) from the term relating to execution of Sale Deed (Clause 7) and making the time essence only in regard to the payment of the balance sale consideration. There is also a clear indication that while time would be the essence of the contract in regard to the terms relating to payment of balance price, time would not be the essence of the contract in regard to the execution of the Sale Deed."

24.On the side of the second respondent it is stated that the appellant has to prove that he was ready from the date of agreement itself.

25.Another judgment of this Court reported in **[2017 (6) CTC 614]** in the case of **Jaswinder Kaur (now deceased) through her L.Rs. and others., Vs Gurmeet Singh and ors.**, held as follows:

" No positive finding had been recorded by the High Court with respect to readiness and willingness of the Plaintiffs merely by making payment of part consideration it could not have inferred. In our opinion, no readiness and willingness could have been inferred even if it is assumed that High Court by aforesaid passing observation intended to hold that hte Plaintiffs were ready to perform their part by making payment of part consideration on 31.01.1990, readiness and willingness has to be seen in the context of the entire Agreement not with respect to portion of Contract. Plaintiffs had stated that they had borrowed the amount but had failed to produce the accounts indicating that in fact money was borrowed as stated by the Plaintiff for effecting the purchase."

26.Another judgment of this Court reported in **[2020(4) CTC 798]** in the case of **V.Suresh Kumar Vs A.Ramasamy and others**, is cited.

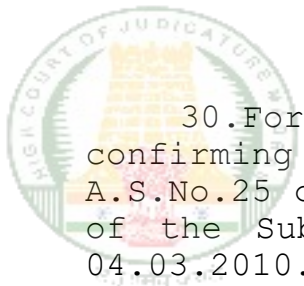


"14.1. In a Suit for Specific Performance, it is for the Appellant/Plaintiff to prove his readiness and willingness to perform his part of the Contract. But, there is no iota of evidence to show that the Appellant/Plaintiff was ready and willing to perform his Contract. At the time, when the Agreement was entered into between the Appellant/Plaintiff and First Respondent / First Defendant, the Appellant/Plaintiff paid Rs.5,00,000 towards Advance and after the expiry of 90 days specified in the Agreement, he made payment for balance Sale consideration, which would clearly prove that he was not ready and willing to pay the entire amount. Even assuming that there was no Agreement to pay the entire amount, after the expiry of 90 days, he has made Part payment. The moment, when the Appellant made part payment after the expiry of 90 days, it is clear that the Appellant/Plaintiff was not ready and willing to perform the Contract with the entire Sale consideration even after the expiry of 90 days."

27.On the side of the second respondent it is further stated that the second respondent is a bonafide purchaser for a valuable consideration. The plaintiff failed even to plea that he was ready and willing to perform his part of the contract and in the above circumstances, a mere failure to reply a notice will not dis-entitle the second respondent from questioning the sale agreement.

28.On the side of the appellant, it is stated that the second respondent failed to reply Ex.A5 notice and the second respondent failed to initiate any Court proceedings against the first respondent for fabricating Ex.A1 and the second respondent failed to make out the case under Section 19(b) of the Specific Relief Act.

29.The plaintiff has to prove the case from Ex.B5, it is clear that the husband of the plaintiff has received a portion of the advance amount and he has directed the second respondent to purchase the land but instructed him to return the balance of the advance amount to the plaintiff. The plaintiff has not pleaded that she was ready and willing to perform her part of the contract. From Ex.B5, it is clear that the second respondent is a bonafide purchaser for valuable consideration. Only after knowing that the plaintiff has no objection in registering the sale deed, the second defendant has purchased the suit property from the first defendant. Hence the second defendant has made out a case under Section 19(b) of Specific Relief Act. Mere failure to issue a reply to the notice is not a ground sufficient enough to decide the case against the second respondent. The question of law raised by the appellant is not sustainable.



30.For the above reasons, this Second appeal is dismissed, confirming the judgment and decree of the first Appellate Court in A.S.No.25 of 2011 dated 09.06.2016 reversing the judgment and decree of the Subordinate Court, Pudukottai in O.S.No.86 of 2005 dated 04.03.2010.

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Assistant Registrar(CS-I)

// True Copy //

/06/2022

Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Additional District Court, Pudukottai.

2.The Subordinate Court, Pudukottai.

3.The Record Clerk, Vernacular Section,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.N.BALAKRISHNAN, Advocate (SR-25328[F] dated 13/06/2022

S.A.(MD)No.645 of 2016
09.06.2022

SJ(CO)

KB(23.06.2022) 9P 6C