



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.02.2022

CORAM

THE HONOURABLE MS.JUSTICE R.N.MANJULA

A.S. (MD) .No.5 of 2017

Ragamathnisha

.. Appellant/Plaintiff

Vs.

1.J.Govindarajan

2.J.Prabhakaran

.. Respondents/Defendants

Prayer : This Appeal Suit is filed under Section 96 of the Civil Procedure Code, to set aside the judgment and decree dated 12.04.2016 made in O.S.No.56 of 2013 on the file of the 1st Additional District Judge (PCR), Trichy and decree the suit in toto.

For Appellant

: Mr.Raguvaran Gopala

For R1

: Mr.S.Sarvagan Prabhu

for Mr.D.Selvaraj

For R2

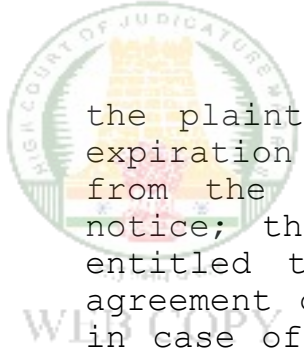
: No appearance

J U D G M E N T

This Appeal Suit is preferred challenging the judgment and decree of the learned 1st Additional District Judge (PCR), Trichy, dated 12.04.2016 made in O.S.No.56 of 2013.

2.The suit has been filed for the relief of specific performance based on the sale agreement entered into between the plaintiff and the defendants in respect of the suit property on 21.10.2012; the appellant was the plaintiff before the trial Court; the sale agreement is said to have been executed between the plaintiff and defendants on 21.10.2012 in respect of the suit property for a sale consideration of Rs.10,50,000/-; the earnest money of Rs.2,00,000 has been paid to the defendants on the day of the sale agreement and three months time was agreed to pay the balance sale consideration of Rs.8,50,000/- and get the sale deed executed; despite the plaintiff was ready and willing to perform her part of contract by giving the balance sale consideration of Rs.8,50,000/-, the defendants did not come forward to execute the sale deed; after causing legal notices exchanged between the parties, the plaintiff has filed a suit for specific performance; she also sought the alternate relief of refund of earnest money of Rs.2,00,000/- with interest at the rate of 24% and costs.

3.The defendants have not denied the execution of the sale agreement dated 21.10.2012; however, they stated that the plaintiff was never ready and willing to pay the balance sale consideration as agreed;



the plaintiff issued a legal notice to the defendants after the expiration of three months; only after receiving the legal notice from the defendants, the plaintiff has chosen to send a legal notice; the conduct of the plaintiff would show that she is not entitled to the relief of specific performance; since the sale agreement contains the forfeiture clause to lose the earnest money in case of failure to tender the balance sale consideration within the prescribed time, the plaintiff is not entitled to the alternate relief of refund of the advance amount of Rs.2,00,000/- with interest and costs.

4. Based on the pleadings of the respective parties, the learned trial Judge has framed the following issues:-

1. Whether the plaintiff is entitled for specific performance of sale agreement dated 21.10.2012 as prayed for or in the alternative whether the plaintiff is entitled for refund of Rs.2,00,000/- with interest as prayed for?

2. To what other reliefs?

5. During the course of the trial, on the side of the plaintiff, three witnesses were examined as P.W.1 to P.W.3 and Ex.A1 to Ex.A6 were marked. On the side of the defendants, one witness was examined as D.W.1 and one document has been marked as Ex.B1.

6. At the conclusion of the trial on considering the evidence available on record, the learned trial Judge dismissed the suit in entirety. Aggrieved over the same, the plaintiff has preferred this Appeal Suit.

7. Heard Mr. Raguvanan Gopalan, learned counsel appearing for the appellant and Mr. S. Sarvagan Prabhu, learned counsel appearing for the first respondent.

8. The learned counsel for the appellant/plaintiff submitted that the learned trial Judge has misinterpreted the notice sent by the defendants subsequent to the notice of the plaintiff, as the notice was sent in the caveat filed by him; despite the name of the counsel, who has filed the caveat are seen different in Ex.A6 envelope of the notice, the learned trial Judge had misdirected himself and rendered a wrong finding; though the agreement period is agreed at three months, there is no express clause in the agreement that the time is an essence of contract; the plaintiff has always been ready and willing to perform her part of contract, but the same was not properly appreciated by the trial Court; just in order to invoke the forfeiture clause in an unscrupulous manner, the first defendant had executed the release deed in favour of the second defendant and thereafter, he had executed the settlement deed in favour of his wife and the same was admitted by D.W.1 himself in his evidence; the learned trial Judge has omitted to appreciate the conduct of the defendants also; since the relief of specific performance is an equitable relief, the Court has got a duty to properly weigh the balance of equity; hence, the appeal has to be



allowed.

9.The learned counsel for the first respondent submitted that the learned trial Judge has rightly held that the plaintiff managed to show the notice of the caveat cover as the notice sent by the defendants; the appellant/plaintiff has not proved her readiness and willingness and that is the reason why, the suit was dismissed; since the agreement has the forfeiture clause, it is right for the trial Judge to hold that the plaintiff, who had not come forward to tender the balance sale consideration, is not entitled to get the refund of the same; since the judgment of the trial Court does not suffer from any factual or legal infirmity, the appeal should be dismissed.

10.Considering the rival submissions of the parties, it appears to this Court that the following points for consideration are relevant to decide this Appeal Suit:

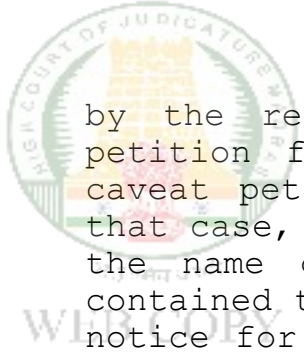
(i) Whether the learned trial Judge is right in dismissing the suit in entirety on the basis of the evidence available on record?

(ii) Whether the appeal has to be allowed?

11.The fact that on 21.10.2012 the appellant and the respondents had entered into the sale agreement between themselves in respect of the suit property, for the sale consideration of Rs.10,50,000/-, was not denied. The sale agreement is produced as Ex.A1 and as per the sale agreement, the time for executing the contract is three months. The agreement also contains the forfeiture clause that the appellant / plaintiff would lose the earnest money, if she fails to tender the balance sale consideration of Rs.8,50,000/- within the agreed time limit of three months and get the sale deed executed. According to the appellant, she was always ready and willing to perform his part of contract. There is no disagreement about the fact that on the day of executing Ex.A1 sale agreement, an advance amount of Rs.2,00,000/- was received by the defendants from the plaintiff.

12.The appellant has stated that she has sent a legal notice on 19.02.2013 by calling upon the respondents to receive the balance sale consideration and execute the sale deed. According to the respondents/defendants, they had sent a legal notice first on 18.02.2013 and only after receiving the same, the appellant has chosen to send her Ex.A2 legal notice. The notice of the respondents (Ex.A5) is dated 18.02.2013 and it was sent through their counsel 'Mr.R.Bharathiraja'. The said counsel is located at Madurai and he had sent Ex.A5 notice. The learned counsel for the appellant submitted that despite Ex.A5 notice had the date 18.02.2013, it was dispatched only on 27.02.2013.

13.The learned trial Judge has made an observation that the envelope Ex.A6 ought to have contained notice sent in caveat petition filed

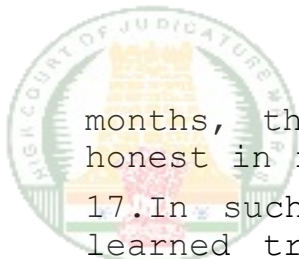


by the respondents / defendants. But on perusal of the caveat petition filed by the respondents (Ex.A4), it is seen that the caveat petition was filed through one Advocate V.Varadharajan. In that case, the notice cover of the caveat should have also contained the name of Advocate Mr.Varadharajan. But Ex.A6 notice envelope contained the name of Bharathiraja, Advocate, who had sent the legal notice for the respondents. So it is stated by the learned counsel for the appellant that the respondents had printed the date of notice as 18.02.2013, but it had been actually despatched on 27.02.2013. So the appellant has claimed in all probabilities that she has sent the legal notice prior to the respondents' legal notice.

14.Even if it is taken to be true that the appellant's legal notice Ex.A2 was sent prior to the respondents' legal notice, the fact remains that there is no evidence tendered on the side of the appellant that the appellant had been ready within the agreed period of three months or she had attempted to pay the balance sale consideration of Rs.8,50,000/- to the respondents/defendants within that times. Admittedly the date of the agreement is 21.10.2012 and the three months period expired on 21.01.2013. The notice has been sent nearly after one month subsequent to the expiry of three months period. Though in Ex.A1 sale agreement, it is not mentioned that the time is essence of contract, it has to be established by the appellant that on what justifiable ground the time was extended beyond three months or whether there was any understanding between the parties for extending the period beyond three months. Neither the respondents/defendants had sent any communication or notice to the appellant immediately after the expiry of three months that her earnest money would be forfeited due to her failure to perform her part of contract.

15.The appellant's witness P.W.3, has stated that he is known to both the plaintiff and the defendants and he has attested his signature as a witness for the sale agreement. The appellant has stated that subsequent to the sale agreement, she had sent messages through P.W.3 that the respondents should receive the balance sale consideration but the respondents sought three months further time. But P.W.3 has not stated any of these facts in his evidence.

16.However, it is submitted by the learned counsel for the appellant that the conduct of the respondents/defendants should also be shown to be honest and *bona fide* in order to allow them to forfeit the earnest money paid by the appellant/plaintiff. It is correct that one who expects equity should do equity. But it is seen from the evidence of D.W.1 that just in order to forfeit the earnest money of the appellant, they had executed a release deed between themselves. The fact is also admitted by the D.W.1 and he has stated that subsequent to the exchange he has executed the settlement deed in favour of his wife. As how the conduct of the plaintiff does not show her readiness and willingness to pay the balance sale consideration of Rs.8,50,000/- within the agreed time limit of three



months, the conduct of the respondents also does not seem to be honest in forfeiting the advance amount.

17.In such circumstances, it would have been appropriate if the learned trial Judge had granted the relief of refund of earnest money with interest and costs instead of dismissing the suit in toto. But the learned trial Judge had desired to grant the relief of refund of advance amount by taking serious note of the forfeiture clause found in the agreement, but ignoring the conduct of the respondents/defendants. So in all fairness, I feel that the appellant/plaintiff is entitled to get the alternate relief of refund of advance amount with interest and costs, instead of the relief of specific performance. I feel that this could serve equity and ends of justice. Thus the point Nos.1 and 2 are answered accordingly.

18.In the result, this Appeal is partly allowed and the judgment and decree passed in O.S.No.56 of 2013 on the file of the 1st Additional District Judge (PCR), Trichy, dated 12.04.2016, is modified to the effect that the suit is decreed in respect of the alternate relief of refund of advance of amount Rs.2,00,000/- along with interest at the rate of 7.5% and costs. With regard to the relief of specific performance, the appeal is dismissed.

Sd/-

Assistant Registrar (Cs-II)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

cp

To

1.The 1st Additional District Judge (PCR),
Trichy.

2.The Section Office,
VR Section,
Madurai Bench of Madras High Court,Madurai.

+1 CC to M/s.K.PRABHAKAR, Advocate (SR-7319[F] dated 21/02/2022)

A.S. (MD) .No.5 of 2017

18.02.2022

SP(CO)

KB(30.03.2022) 5P 5C