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A.S.No.323 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.06.2023

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE C. KUMARAPPAN

A.S.No.323 of 2013

A.J.Udhuman Ali

... Appellant

Vs.

1.C.Marutha Kutty (died)

2.C.M.Karki

3.M.Nirmala

4.M.Kalpana

5.M.Vidhya

6.M.Aruna

... Respondents

[R1 died, R3 to R6 are brought on record as LRs of deceased R1, viz., C.Marutha Kutty, vide order of Court dated 30.11.2022 made in C.M.P.No.20715 of 2022 in A.S.No.323 of 2013]

Prayer : Appeal Suit filed under Section 96 r/w. Order 41 Rule 1 of Code of Civil Procedure against the judgment and decree dated 08.10.2012 in O.S.No.335 of 2007 on the file of the IV Additional District and Sessions Court, Coimbatore.

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For Appellant : Mr.S.Venkatesh
R1 : Died (steps taken)
For R2 to R6 : Mr.D.Veerasekharan

J U D G M E N T

(Judgment was delivered by **S.S. SUNDAR, J.**)

The Appeal is directed against the judgment and decree, dated 08.10.2012, in O.S.No.335 of 2007 on the file of the IV Additional District and Sessions Court, Coimbatore. The plaintiff in the suit is the appellant in the above Appeal.

2.Brief facts that are set out in the plaint filed by the appellant/plaintiff in O.S.No.335 of 2007 are as follows :

2.1.The suit property was allotted to the 1st defendant as per the family partition dated 31.05.1971.

2.2.On 22.09.2006, the plaintiff and defendants entered into an agreement to sell the suit property for a sum of Rs.95,50,000/- and the total extent of property agreed to be conveyed was 1 Acre in S.No.154 in

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Kavundampalayam Village, Coimbatore North Taluk, Coimbatore. As per the agreement, the defendants have to execute the sale deed within a period of one month. On the date of agreement dated 22.09.2006, the plaintiff paid a sum of Rs.50,00,000/- as advance and the receipt of the said amount was acknowledged by the defendants in the agreement.

2.3.After the agreement, the defendants 1 and 2 executed a sale deed in respect of 67 Cents of land in favour of nominee of plaintiff, by name Sidhi Bowsiya Bibi, on 12.01.2007. With regard to the remaining 33 Cents, the defendants agreed to convey the northern side of 33 Cents.

2.4.As regards 67 Cents, the advance amount was adjusted and the plaintiff was ready and willing to perform his part of the contract by paying the balance amount of Rs.31,51,500/-. However, one Shanmugham, who is a neighbour of suit property, was creating problem by encroaching a portion of the property and the defendants agreed to settle the dispute regarding the said portion and therefore, delay was only on account of the encroachment by a third party. Even after the expiry of period mentioned in the agreement, the plaintiff was urging the defendants to execute the sale deed and the execution was delayed on account of the encroachment by the third party by



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name Shanmugham.

WEB COPY 2.5. Stating that the defendants are trying to sell the property to third parties, the suit came to be filed by the appellant for specific performance of the agreement dated 22.09.2006 and for consequential reliefs.

3. The suit was resisted by the 1st defendant by filing a detailed written statement. The suit was mainly contested on the ground that the plaintiff was never ready and willing to perform his part of the contract by paying the balance. It is contended by the 1st defendant that the plaintiff did not have further money and therefore, he insisted sale in respect of 67 Cents of land in favour of his close relative and that therefore, by execution of sale deed on 12.01.2007 in respect of 67 Cents, the entire agreement had come to an end and therefore, the 1st defendant specifically denied the enforceability of the contract with regard to the balance extent. The case of plaintiff that the property was under the encroachment by one Shanmugham, was specifically denied by the 1st defendant in the written statement. The specific case of 1st defendant in the written statement is that plaintiff was never ready and willing to perform his part of the contract in terms of the agreement and that



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it is only because of the fact that the plaintiff did not have money to pay the balance of sale consideration, there was modification of terms and by execution of sale deed in respect of an extent of 67 Cents by adjusting the advance amount, the original agreement of sale came to an end.

4.Before filing the suit, the plaintiff issued a notice and a reply was sent on behalf of defendants on 12.02.2007. Based on the notice, reply notice, and by considering the pleadings in the plaint and written statement, the trial Court framed the following issues :

- i. Whether the plaintiff is entitled for specific performance to the agreement dated 22.09.2006 as prayed for ?*
- ii. To what relief ?*

5.Before the trial Court, the plaintiff examined himself as P.W.1 and examined one Thangavelu as P.W.2 to prove the transaction. Exs.A1 to A4 were marked on behalf of plaintiff. The 1st defendant was examined as D.W.1. One Thangaraj was examined as D.W.2. On behalf of defendants, Exs.B1 to B4 were marked.



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6.The trial Court, on the basis of evidence of D.W.2, came to the conclusion that the agreement itself was on behalf of one Sheikh Moideen under whom the plaintiff was an employee receiving a small salary of around Rs.10,000/- per month. Based on the evidence of P.W.2, the trial Court came to the conclusion that the plaintiff was not the person who really entered into the agreement, but it was only on behalf of one Sheikh Moideen, the plaintiff entered into an agreement. It is not in dispute that an extent of 67 Cents was sold in favour of wife of Sheikh Moideen under Ex.A2. The evidence of P.W.2 is to the extent that the said Rs.50,00,000/- was paid only by Sheikh Moideen. Therefore, the sale deed in favour of wife of Sheikh Moideen under Ex.A2 was considered by the trial Court to hold that the sale deed under Ex.A2 was by way of settlement to adjust the advance amount already paid under Ex.A1. The trial Court also held that the plaintiff was never ready and willing to perform his part of the contract as no evidence is let in to show the plaintiff's readiness. Having found that the plaintiff was just an employee of Sheikh Moideen, the trial Court held that the plaintiff miserably failed to prove his readiness and willingness as required in law to seek specific performance. Having found that the plaintiff



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was not a man of means, the trial Court also rendered a finding that his plea that he was ready and willing to perform his part of the contract in terms of the agreement cannot be believed. The trial Court rejected the contention of the plaintiff that a portion of property was under encroachment and therefore, there was some delay on the part of defendants to execute the sale deed. The trial Court, from the facts of the case, inferred that the plaintiff had abandoned the contract after execution of sale deed and that he has not produced even a scrap of paper to show his readiness of having money to pay the balance amount and willingness. The trial Court, therefore, dismissed the suit.

7. Aggrieved by the judgment and decree of the trial Court, the above Appeal is preferred by the plaintiff.

8. Learned counsel appearing for the appellant/plaintiff submitted that the lower Court has refused to grant specific performance on the ground that the plaintiff has not come forward to deposit the balance amount, ignoring the law settled by this Court and Hon'ble Supreme Court to the effect that



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the plaintiff need not jingle the coin before Court unless deposit of money is directed by the Court. Learned counsel submitted that Sheikh Moideen is just the uncle of plaintiff and that the trial Court has erroneously believed the story of defendants as if the plaintiff was an employee of Sheikh Moideen and that the sale deed under Ex.A2 is by way of settlement. Learned counsel then pointed out that the conclusion of trial Court that the suit agreement itself was entered into on behalf of Sheikh Moideen, is neither supported by plea nor evidence of defendants. Learned counsel also submitted that the trial Court did not consider the oral and documentary evidence in a proper perspective and erroneously held that the plaintiff was not ready and willing to perform his part of the contract.

9.Considering the nature of pleadings, the issues raised before the trial Court and the arguments advanced by learned counsel appearing for the appellant and the respondents, this Court is of the view that the Appeal has to be disposed of by finding answers to the following points :

- i. *Whether the suit agreement is enforceable by plaintiff ?*
- ii. *Whether the plaintiff was ready and willing to perform his part of the contract ?*



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iii. *Whether the sale deed under Ex.A2 was pursuant to the settlement, as pleaded by the defendants ?*

iv. *Whether the plaintiff is entitled to the equitable relief of specific performance ?*

Point (i) :

10.This Court considered the pleadings and evidence as a whole. The suit agreement is for an extent of 1 Acre and the total consideration is Rs.95,50,000/-. A huge amount of Rs.50,00,000/- was paid under the agreement and the balance payable was to be paid within one month from the date of agreement. It is the evidence of P.W.2 that Sheikh Moideen is the Manager of M/s.Ruby Textiles and he is working under him for the past more than 30 years. He admits that plaintiff is working in Ruby Textiles for about 15 and 20 years. P.W.2 is the person who is examined to prove the actual transaction under Ex.A1. From the entire evidence, it is seen that the sale transaction in respect of the suit property was as per the direction of the owner of Ruby Textiles, by name Sheikh Moideen. P.W.2 admits that the total amount of advance was paid by Sheikh Moideen to the defendants and that only the agreement was executed in favour of plaintiff. It is his specific



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admission that Ex.A1 agreement was only for Sheikh Moideen and his wife.

Even though he denied the suggestion that the suit agreement Ex.A1 is for Sheikh Moideen and his wife, his evidence as a whole would clearly establish that the plaintiff is not a man of means and the whole agreement was only at the instance of Sheikh Moideen for his benefit. The plaintiff (P.W.1), in his evidence, admits that he did not see the title deed, but Sheikh Moideen and his Managers verified the title deed. From the evidence of plaintiff (P.W.1) himself, it is seen that the transaction as recorded under Ex.A1 is not true. This accounts for the sale executed by defendants in favour of wife of Sheikh Moideen in respect of an extent of 67 Cents. It is in the circumstances, this Court can draw an inference that the agreement, as such, is not enforceable by the plaintiff. It is true that there is no pleading. However, Court can see whether the plaintiff is entitled to the relief on the basis of plaintiff's evidence.

Points (ii) and (iii) :



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11. On the readiness and willingness, the plaintiff has admitted that he has not produced any document to show his capacity to mobilize huge amount to be paid towards balance of sale consideration. When the substantial amount of Rs.50,00,000/- is paid by Sheikh Moideen, the plaintiff should come forward to explain the real understanding between the plaintiff and Sheikh Moideen for paying the entire advance amount of Rs.50,00,000/-. P.W.2 admits that plaintiff is only an employee, even though he is also a relative of Sheikh Moideen. The specific case of defendants is that Ex.A2 sale deed was executed by way of settlement and that, by execution of sale deed, the sale agreement was put an end to.

12. The plaintiff has come forward with a story that a portion of property was under the encroachment of one Shanmugham and that therefore, the sale deed could not be executed by defendants. The suit property is a portion of an extent of 3 Acres and odd. At least, it is stated that the properties lie in two different parcels and the extent of 1 Acre to be sold is a part of extent of 1 ½ Acres. The contention of plaintiff that a portion of suit property was encroached by a third party, is specifically



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denied and absolutely, no evidence is let in by plaintiff to prove his story.

When the surrounding circumstances clearly indicate that the suit property is only a portion of larger extent, this Court is unable to accept the case of plaintiff for justifying the delay. The plaintiff did not produce any witness or document regarding encroachment by a third party. The plaintiff has not let in any evidence that he had wherewithal or money that is required to be paid by him as balance of sale consideration within the time stipulated in the agreement. Admittedly, the plaintiff has not come forward to pay the balance within the time stipulated. The contention of plaintiff that time is not an essence of contract is based on the fact that the sale deed under Ex.A2 was executed after the time specified in the agreement. This Court finds that the case of defendants that by execution of sale deed, the suit agreement came to an end, is probable. When the plaintiff's witness P.W.2 admits that the advance amount was paid only by Sheikh Moideen and plaintiff is just an employee of Sheikh Moideen, the *bona fides* of plaintiff and his *ipse dixit* regarding readiness and willingness cannot be believed. Since the plaintiff has failed to prove readiness and willingness as required in law, he is not entitled to seek specific performance. This Court also



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accepted the case of defendants that the defendants have executed Ex.A2 sale deed only by way of settlement by adjusting the advance paid under Ex.A1 agreement.

Point (iv) :

13.In view of the conclusion which we have reached above, this Court is of the view that the plaintiff is not entitled to the discretionary relief of specific performance. The conduct of the plaintiff in suppressing material facts would also be a factor to be considered while granting a decree for specific performance. The trial Court has considered the oral and documentary evidence in a proper perspective and therefore, the findings of the trial Court regarding readiness and willingness cannot be assailed, particularly when the same are supported by circumstances and valid reasons. Therefore, all the points raised in this Appeal are answered against the plaintiff. In view of the conclusions we have reached, we are unable to interfere with the judgment and decree of the trial Court.

14.As a result, **this Appeal is dismissed as devoid of merits.** No



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(S.S.S.R., J.) (C.K., J.)
14.06.2023

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Internet : Yes

Index : Yes / No

To

1.The IV Additional District and Sessions Judge,
Coimbatore.

2.The Section Officer,
VR Section, High Court,
Chennai.

| *with a direction to return*
| *the records to the Court below,*
| *if any, forthwith*

S.S. SUNDAR, J.
and
C.KUMARAPPAN, J.



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