



WEB COPY



SA.No.1329 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.11.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1329 of 2007

and

M.P.No.1 of 2007

Lakshmi

... Appellant

- Vs -

Kannan

... Respondent

Second Appeal is filed under Section 100 of the Civil Procedure Code against the Judgment and decree dated 10.01.2007 made in A.S.No.193 of 2006 on the file of the Principal District Court, Salem-reversing the Judgment and decree dated 10.10.2005 made in O.S.No.1839 of 2004 on the file of II Additional District Munsif Court, Salem.

For Appellant : Mr. T. Murugamanikkam (Senior counsel)
For Respondent : No appearance



SA.No.1329 of 2007

WEB COPY

JUDGMENT

The instant second appeal has been filed at the instance of the plaintiff.

2. According to the plaintiff she entered into a sale agreement with the defendant on 27.05.1992, agreeing to purchase the suit property for a total sale consideration of Rs.50,000/-. In pursuance of the said agreement an advance of Rs.30,000/- was paid, and the balance of Rs.20,000/- was agreed to be paid after the respondent discharge the mortgage of the suit property with Salem, Central Co-operative Bank. This plaintiff submits that, he has been ready and willing to perform his part of contract. However, the defendant failed to discharge the mortgage debt. Hence, he issued a notice dated 22.05.1995 to the defendant expressing the plaintiff's readiness and willingness to perform her part of contract. Hence, the plaintiff prayed the relief of specific performance.

3. The said suit was resisted by the defendant by contending that the suit agreement was executed as a security for a loan of Rs.23,000/- borrowed from the plaintiff. Hence, prays to dismiss the suit.



SA.No.1329 of 2007

WEB COPY

4. Before the Trial Court two witnessess were examined as P.W.1 and P.W.2. On behalf of the defendant four witnesses were examined as D.W.1 to D.W.4. On behalf of the plaintiff six documents have been marked as Ex.A1 to A6. On behalf of the defendant two documents have been marked as Ex.B1 and B.2

5. The Trial Court after gone into various aspects has ultimately found that the Ex.A1/Sale Agreement is a registered one and therefore, it is genuine. It was also further found that the defendant failed to prove his case of loan transaction and has ultimately decreed the suit. Aggrieved with the same when the defendant preferred an appeal, the First Appellate Court though held that Ex.A1/Sale Agreement was duly executed by the defendant, have found the plaintiff has not proved the readiness and willingness as there was long delay in issuance of notice as well as filing of the suit. Thus, in view of the such long delay there is a possibility of price raise and ultimately declined to exercise the discretion to grant specific performance. However, granted the alternate relief of refund of advance. Aggrieved with the same the plaintiff is before this Court by way of this second appeal.



SA.No.1329 of 2007

WEB COPY

6. While admitting this second appeal this Court has framed following substantial questions of law:

(1) When the trial Court has not framed any issue whether the plaintiff was ready and willing to perform her part of the contract, since, the parties went to trial on the question whether the suit agreement was only a security for a loan, then whether the appellate Court can raise a point for consideration on this issue in appeal?

(2) Whether the relief of specific performance can be denied by the appellate Court on the ground of a rise in price of the property on the date of decree of the trial Court?

7. The learned senior counsel appearing on behalf of the appellant would vehemently contend that when there is a specific finding that the Ex.A1/Sale Agreement is true and valid, then the Court below is bound to enforce the same. The learned counsel would also further contend that when there is no specific issue as to the readiness and willingness, then the First Appellate Court cannot render any new finding on the absence of readiness and willingness. It is also the further submissions of the learned senior counsel that when the defendant did not raise any pleading as to the price raise, the finding of price raise recorded by the First Appellate Court for



SA.No.1329 of 2007

rejecting the specific performance is contrary to the settled principles of law.

WEB COPY

8. There is no representation on behalf of the respondents.

9. I have given my anxious consideration upon the submission made by the learned Senior Counsel for the appellant.

10. The learned senior counsel by relying upon the Judgment of this Court reported in **2005(1) Law Weekly 472 in the case of Murugesha Naicker and 3 others Vs. Govindaraja Nattar and another in S.A.No.107 of 1994**, reported in **2002-1 CTC 334 in the case of V. Udayakumar and others Vs. Navaneethammal and 5 others in L.P.A.No.206 of 2001** would contend that when there is no issue for readiness and willingness, the Court cannot render any finding on this aspect. In this regard the learned Senior Counsel would submit that here the case put fourth by the defendant is on a loan transaction. Therefore, when the loan transaction is not established naturally the suit for specific performance is to be decreed.



SA.No.1329 of 2007

WEB COPY

11. But, this Court while looking at the plaint there was a long delay in filing the suit for specific performance. According to the plaintiff's case suit agreement was dated 27.05.1992 and the time for performance has been fixed as 3 years. Therefore, according to the plaint averment, the last date for performance of the sale agreement was 26.05.1995. In spite of such facts and having long duration of three years for performance, the plaintiff has issued notice calling upon the defendant to execute the sale deed only on 22.05.1995 almost on the verge of the third year.

12. Though the plaint contains the averments in respect of the ready and willingness, the readiness and willingness could also been inferred through the conduct of the parties. Here the conduct of the plaintiff would go counter to his case put forth in the plaint. Though he has been contending that he was ready and willing, the long absence of issuing pre-suit notice that too at the verge of three years period, and filing the suit in the year 1997 namely almost 20 months from the date of last date of performance period would indicate the absence of readiness and willingness of the plaintiff.

13. The First Appellate Court has elaborately gone into all these



SA.No.1329 of 2007

aspects. At this juncture the learned senior counsel would submit that the defendant agreed to discharge the loan with the Salem, Central Co-operative Bank, whereas, they failed to discharge the said loan. Therefore, the delay cannot be found fault against the plaintiff. But, this Court is not in a position to accept the submissions made by the learned senior counsel in view of the ruling reported in **(2010) 10 Supreme Court cases 512** in the case of **Man Kaur(Dead) by Lrs Vs Hartar Singh Sangha** and the relevant portion is extracted hereunder:

“40. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in Section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred



WEB COPY



SA.No.1329 of 2007

from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of the plaintiff is something which need not be proved , if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10,00,000/- and earnest money of Rs.1,00,000/- was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15,00,000/-. In such a case there is a clear breach by the defendant. But in that case, if the plaintiff did not have the balance Rs.9,00,000/- (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract had to be



WEB COPY



SA.No.1329 of 2007

performed, the plaintiff will not be entitled to specific performance, even if he proves breach by the defendant, as he was not “ready and willing” to perform his obligations.”

14. Therefore, even assuming that the defendant has committed a breach, when the plaintiff failed to prove that she was always ready and willing to perform the essential terms of the contract, there cannot be a relief for specific performance in her favour. The learned Senior Counsel would also submit that the denial of specific performance on the ground of price raise is contrary to the ruling reported in ***(2012) 5 Supreme Court Cases 712 in the case of Narinderjit Singh Vs North Star Estate Promoters Limited in Civil appeals No.4307 of 2012 with 4306 of 2012.***

15. The First Appellate Court has taken cognizance of the long delay caused by the plaintiff. At the first instance in issuing notice and in second instance in filing the suit. Only in that context the First Appellate Court by relying the Supreme Court Judgment reported in ***(1997) 3 SCC 1 in the case of K.S.Vidyanadam and others -vs- Vairavan,*** held that the price raise



SA.No.1329 of 2007

WEB COPY

would also be a reason for denying the specific performance. Therefore, this Court could not find any infirmity or perversity over the orders passed by the First Appellate Court. The Order of the First Appellate Court is supported by documents on factual ground and legal basis.

16. Thus, in view of the above discussion all the substantial questions of law are answered in favour of the respondent.

17. In the result this second appeal is dismissed by confirming the order of the First Appellate Court dated 10.01.2007 made in A.S.No.193 of 2006 on the file of the Principal District Court, Salem. No order as to costs. Consequently the connected miscellaneous petition is closed.

27.11.2023

smn
To

1. Principal District Court, Salem
2. II Additional District Munsif Court, Salem.



WEB COPY



SA.No.1329 of 2007

C.KUMARAPPAN, J

smn

S.A.No.1329 of 2007
and
M.P.No.1 of 2007

27.11.2023