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A.S.No.110 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.09.2023

CORAM:

THE HONOURABLE MRS. JUSTICE T.V. THAMILSELVI

Appeal Suit No.110 of 2017

P.S. Tamilselvan

.. Appellant

Versus

P.S. Kamala

..Respondent

Appeal suit filed under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, prayed to set aside the Judgement and Decree made in O.S.No.685 of 2012, on the file of III Additional District and Sessions Court, Coimbatore, dated 29.11.2016.

For Appellant : Mr. C. Veeraraghavan

For Respondent : Mr. Mukunth, Senior Advocate
for M/s. Sarvabhaunam Associates

J U D G M E N T

The plaintiff in O.S. No. 685 of 2012 on the file of the learned III Additional District and Sessions Judge, Coimbatore has come forward with this appeal.



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2. Heard, Mr. C. Veeraraghavan, learned counsel for the appellant and Mr. Mukunth, learned Senior Counsel for M/s.Sarvabhaunam Associates for the respondent and perused the materials available on record.

3. For the purpose of convenience, the parties herein are referred to as they are ranked in the suit.

4. The plaintiff has filed the suit in O.S. No. 685 of 2012 seeking direction to the defendant/respondent herein to execute the sale deed with respect to the property described as C Schedule in the plaint, in his favour or in the alternative, to direct the defendant to pay Rs.11 lakhs with interest at the rate of 12 % per annum from the date of suit till the date of realization.

5. The defendant herein is none other than the sister of the plaintiff. According to the plaintiff, certain properties which were in enjoyment in common by the family consisting of the plaintiff and his father/ P. Sethuramalingam were partitioned among the plaintiff, his father and other family members and the same was reduced into writing by means of an agreement dated 24.05.1993. As per the said agreement, the B Schedule



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building thereof, while the A Schedule was allotted to his father with the constructed building thereon. According to the plaintiff, as per an oral understanding between him and his father, the plaintiff had put up a terraced building in property allotted to his father i.e. A-Schedule. That apart, the plaintiff had put up asbestos shed partly in the property allotted to him viz., B Schedule and also partly in the property allotted to his father i.e., A Schedule. Such construction, according to the plaintiff, was made by occupying the common pathway provided to the aforesaid properties at a cost of Rs.16,00,000/-, out of which his father contributed Rs.5 lakhs. Subsequently, the plaintiff had let out the property to tenants and the income therefrom was shared jointly by the plaintiff and his father. While so, due to misunderstanding in the nature of enjoyment of the properties, the plaintiff entered into an agreement with his father on 10.10.2000, as per which, the plaintiff is entitled to sell the construction together with proportionate ground area to third party and out of sale proceeds, his father is entitled for a sum of Rs.5 lakhs which he paid towards the building cost, besides, a sum of Rs.1,10,000/- for each cent on the ground portion, where the building was constructed in his property. The said constructed area of terrace building and shed area are described as C-Schedule in the plaint. The Plaintiff further submits that it was also agreed that the case filed and pending against Pollachi Municipality in



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and thereafter, the plaintiff is entitled to the entire rent of the buildings mentioned above, till they were sold to third party and he shall pay Rs.5,600/- per month till the sale. The plaintiff further agreed to settle the advance amount received from the tenants at the time of sale of the property. According to the plaintiff, there was no time limit fixed for sale of the property in the agreement entered into between him and his father on 10.10.2000.

6. According to the plaintiff, his father filed a suit in O.S. No. 318 of 2002, before the learned Subordinate Judge, Pollachi towards arrears of monthly amount payable by the plaintiff, which was calculated at Rs.95,200/- and for a direction to the plaintiff to pay the said amount. During the pendency of the suit, the plaintiff settled the said arrears and therefore the suit was dismissed as settled out of Court. While so, on 07.11.2004 the father of the plaintiff died and till the date of his death, he was receiving the rent of Rs.5,600/- from the plaintiff. During his life time, his father executed a Will dated 09.12.1999 in favour of his wife/Seethalakshmi, who in turn executed a settlement deed in favour of her daughter/defendant on 20.04.2005. After demise of his father, his mother and sister received the rent from the plaintiff. At this stage, instead of selling the property to third party, the plaintiff himself expressed his readiness on 21.01.2012 to purchase the property and to get the



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therefore demanded the defendant to execute the sale deed in his favour, but she refused, hence the Plaintiff issued a legal notice dated 07.06.2012 calling upon the defendant to execute the sale deed. However, a reply dated 16.07.2012 by the defendant with untenable statements, hence, the plaintiff filed the suit.

7. The defendant admitted the relationship, as well as the division of the property but she totally denied the alleged agreement between her father and the plaintiff nor she accepted that his father received rent till his demise. According to the defendant, during his life time, his father put up construction in the A-Scheduled property and the plaintiff enjoyed the same and with an intention to grab the property the plaintiff has made a false claim, over the C-Scheduled property. As on date the C Schedule property is having huge market value but the plaintiff, by paying lesser amount, intends to grab the property, therefore she denied the claim of the plaintiff *inter alia* to dismiss the suit.

8. Before the trial Court on the side of the plaintiff P.W1 & P.W.2 were examined and Ex.A1 to A.25 were marked. On the side of the defendant D.W1 was examined and Ex.B1 was marked. Considering the oral and documentary evidence the trial Judge framed seven issues, which are as follows:



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"i. Whether the plaintiff and his father Sethuramalingam entered in to an agreement dated 10.10.2000 in respect of the plaint "C" Schedule property as claimed by the plaintiff?

ii. Whether the time is not the essence of the agreement dated 10.10.2000 said to have been entered into between the plaintiff and his father Sethuramalingam?

iii. Whether the defendant is bound by the Agreement dated 10.10.2000 said to have been entered into between the plaintiff and Sethuramalingam?

iv. Whether, on 21.01.2012, the defendant agreed to abide by the agreement dated 10.10.2000 said to have been entered into between the plaintiff and his father Sethuramalingam?

v. Whether the plaintiff is entitled for the relief of Specific performance of the agreement dated 10.10.2000 against the defendant?

vi. Whether the plaintiff is entitled for the alternative relief against the defendant for payment of Rs.11,00,000/- with interest at 12% per annum as claimed in the suit?

vii. Whether the suit is within the period of limitation?

viii For what other reliefs the plaintiff is entitled to?"

9. Considering the evidence, the learned trial Judge concluded that the sale agreement was executed between the plaintiff and his father and that time



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and willingness to perform his part of the contract. Nearly after 12 years from the date of death of his father, he has come forward the suit with inordinate delay. The trial court also found that the defendant has not established that he has paid the rent to the defendant till filing of the suit, thereby concluded that the plaintiff is not entitled for the relief. Accordingly, the trial court dismissed the suit on 29.11.2016, confiscating the alternative remedy. Aggrieved over the said findings the appellant has preferred this appeal.

10. The learned counsel for the appellant argued that though the trial Court accepted the sale agreement between the plaintiff and his father, erroneously denied the relief of specific performance as such the decree and judgment of the trial court is totally unfair and it is liable to be set aside. Further he submitted that the time is not the essence of the agreement and the conduct of the parties would clearly reveals that the time was never treated as essence of the contract. Though the trial Court partly agreed that time is not the essence of the contract, it was held that the plaintiff had filed the suit with an inordinate delay and approached the Court, as such it is totally misconception of law. Further he contended that the trial Court failed to take note of the fact that the plaintiff promptly performed his obligation by paying the rent regularly to his father but the defendant after the death of his father refused to receive



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the learned trial Judge. Further he submits that the trial Court failed to grant even the alternative relief to direct the defendant to pay the sum of Rs.11 lakhs with interest especially when the plaintiff had stepped into the shoes of his father. Hence, he prayed to set aside the judgment and decree of the learned trial Judge.

11. Opposing the contention of the counsel for the appellant, the learned Senior counsel for the respondent/defendant submits that even assuming that the agreement is true, the plaintiff has not taken steps to identify the purchasers, in order to sell the C-Scheduled property for a long time. Even after the death of her father in the year 2004, he has not taken any steps to sell the property nor he tendered the rent promptly to the defendant. As pointed out by the trial court, nearly after 12 years of death of his father, the plaintiff approached the Court for the relief of specific performance and therefore it was rightly rejected by the learned trial Judge on the ground of delay. Accordingly, the learned Senior counsel prayed to dismiss the appeal as devoid of merits.

12. Points for consideration are as follows:

(i) Whether the agreement was entered between the plaintiff and his father is true and valid?



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(ii) Whether the plaintiff is entitled for the relief of specific performance or denial of the alternative remedy by the trial Court is acceptable or not?

13. Considering both sides submissions, the facts reveals that the plaintiff and the defendant are the son and daughter of P. Sethuramalingam and there was a division of the family properties in which, A-Schedule property was allotted to the father, B-Schedule allotted to the plaintiff. These facts are admitted by the plaintiff as well as defendant. According to the plaintiff after the said division of the property, with the consent of his father, he had put up construction in the share allotted to his father (A-Schedule) by including a portion of his property (B-Schedule) and such construction is morefully described as C-Schedule in the plaint. Thereafter the C Schedule property was let out to tenants. It is also admitted that for the purpose of such construction, the plaintiff spent Rs.16 lakhs out of which Rs.5 lakhs was paid by his father. Subsequently, an agreement dated 10.10.2000 came to be executed between the plaintiff and his father and as per the terms of the agreement, the plaintiff has to identify 3rd party to sell the same and out of the sale proceeds, his father is entitled to deduct the construction cost of Rs.5 lakhs and remaining amount is payable to the plaintiff. The said agreement was totally denied by



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before the trial Court, the plaintiff has produced the copy of the plaint in O.S.

No. 76 of 2004, on the file of Subordinate Court, Pollachi in which the agreement was marked as Ex.A.23, for claiming arrears of rent from the plaintiff. On a perusal of the said plaint, the father of the plaintiff admits the sale agreement dated 10.10.2000 and claimed rental arrears from the plaintiff. So the father of the defendant himself admits the sale agreement in that suit. Such an admission by the father of the plaintiff in the earlier suit is the best evidence, thereby the learned trial Judge rightly concluded that the sale agreement was entered into between the parties on 10.10.2000 which need no interference by this Court. Accordingly, the learned trial Judge is right in deciding the first issue in favour of the plaintiff.

14. The plaintiff approached the Court for specific performance. The trial court refused to grant a decree for specific performance on the ground of delay. The burden is on the plaintiff to prove that he was always ready and willing to perform his part of the contract. Admittedly as per the terms of the agreement dated 10.10.2000, no specific time was fixed to sell the property. At the same time, there is no evidence on the side of the plaintiff to show that he took steps to sell the property during the life time of his father viz., before 2004. So the trial Court rightly concluded that there is no evidence to decide as



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cast upon the plaintiff to prove that he was ready and willing to perform his part of the contract. As rightly pointed out by the trial court as well as the learned Senior counsel for the respondent, the suit was filed after 12 years from the date of death of his father. But there was no reason offered on the side of the plaintiff for such delay. During the cross-examination, the plaintiff admits that he has not identified the purchasers, as per the terms of the agreement dated 10.10.2000, during the life time of his father. Even after the death of his father in the year 2004 near for about 8 years the plaintiff has not taken steps to enforce the terms of the agreement. On the other hand the plaintiff enjoyed the property by collecting the rent. In fact, the plaintiff pleaded that he paid the rent to the defendant after demise of his father, but the same was denied. Here again, the plaintiff has not adduced any evidence to show that he paid the rent to the defendant. Therefore the trial judge rightly concluded that the plaintiff failed to establish that he paid the rent to the defendant till the date of filing of the suit, which needs no interference by this Court.

15. Though the agreement dated 10.10.2000 is valid one, the plaintiff has not established that he was ready and willing to perform his part of contract nor offered any reason for the said inordinate delay of 12 years.

Therefore, the learned trial Judge has rightly concluded that the plaintiff is not entitled for the relief of specific performance which needs no interference.



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16. With regard to alternative relief, the learned trial Judge held that the plaintiff has not approached the Court within three years and thereby denied the relief of refund of amount prayed for. As per the terms of the agreement, the plaintiff has paid construction cost of Rs.11 lakhs and his father paid Rs.5 lakhs. The terms of agreement was admitted by his father during his life time in the earlier suit in OS No. 3187 of 2022 filed by him. So, the plaintiff proved that he contributed a sum of Rs.11 lakhs for the construction. But, at the same time, the fact reveals that till filing of the suit he has not proved that he paid monthly rent of Rs.5,600/- to the defendant or to his mother. So all these years he enjoyed property by receiving the rent. In such circumstances, the learned trial Judge ought to have granted the alternative relief, but denied the same as such it is unfair and liable to be set aside. Accordingly, the findings of the trial Court, with regard to the refusal to grant the alternative relief is hereby set aside. Therefore, defendant is directed to pay a sum of Rs.11 lakhs, no interest is awarded for the reason that all these years plaintiff enjoyed the property by receiving the rent entirely without sharing to the defendant.

17. In the result, the appeal suit is partly allowed and the findings of the Court below is set aside in so far as it relates to the refusal to grant the



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sum of Rs.11 lakhs alone. In all other respects, the decree and judgment of the trial court is confirmed, with costs. The defendant is directed to pay to the plaintiff the sum of Rs.11 lakhs alone within three months from the date of receipt of a copy of this judgment.

19.09.2023

Index : Yes/No

Speaking Order: Yes/No

Neutral Citation: Yes/No

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To,

1. The III Additional District and Sessions Judge,
Coimbatore.
2. The Section Officer, VR-Section,
High Court of Madras, Chennai.



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T.V.THAMILSELVI,J.

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