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S.A.No.1050 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2024

CORAM:

THE HON'BLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.1050 of 2013

V.Sekar

... Appellant

Vs.

1.V.Sampath

2.Rajeswari

... Respondents

PRAYER: Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 28.01.2013 in A.S.No.29 of 2011 on the file of the learned Principal District Judge, Tiruvallur reversing the decree and judgment dated 17.09.2010 in O.S.No.18 of 2007 on the file of the Subordinate Judge, Poonamallee.

For Appellants : Mr.R.Ravi

For Respondents : Mr.B.Dineshkumar

JUDGMENT

The present second appeal arises against the judgement and decree of the court of Principal District Judge at Tiruvallur in A.S.No.29 of 2011 dated 28.01.2013 in reversing the judgment and decree of the court of Subordinate Judge, Poonamallee in O.S.No.18 of 2007 dated 17.09.2010.



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2. For the sake of convenience, the parties will be referred to as their ranks in the suit.

3. The plaintiff is the appellant. The suit is one for specific performance of an agreement of sale dated 10.12.2006. As per the plaintiff's statement, the suit schedule mentioned property was agreed to be sold for a sum of Rs.4,55,000/- and on the date of agreement i.e., on 10.12.2006, the plaintiff had paid a sum of Rs.10,000/- leaving aside a balance of Rs.4,45,000/- to be paid within a period of two months. According to the plaintiff, the agreement granted two months time to pay the balance amount and get the sale deed executed. Since the first defendant did not execute a sale deed, despite the plaintiff's attempt, he issued suit notice on 03.02.2007. The first defendant issued reply on 12.02.2007 in an evasive manner. While not denying the agreement in its full, the defendants had stated in their reply that "agreement was not properly constituted". Since the agreement was denied, a specific performance suit was presented on 26.02.2007.

4. On service of summons, the first defendant filed a written statement, more or less sticking to the stand he had given in his reply notice. Pending the trial, the suit was dismissed for default and therefore, the first defendant/V.Sampath alienated the property by way of Settlement deed in



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favour of his wife Rajeswari. Since the settlement deed came into force pending the litigation, Rajeswari was impleaded as a party to the suit.

5. On the basis of these averments, the parties went to trial. The plaintiff examined himself as PW1 and marked Ex.P1 to Ex.P4. On the side of the plaintiff, apart from himself, one further witness namely an attesting witness was examined as PW2. The first defendant examined himself as DW1 and did not mark any document.

6. On the basis of the pleadings and evidence, the learned trial judge decreed the suit as prayed for. Aggrieved by the same, the defendants appealed before the lower appellate court in A.S.No.29 of 2011 which as stated above came to be allowed by dismissing the suit, against which the present second appeal.

7. The second appeal was admitted on the following substantial questions of law:

“1. Whether the lower appellate court was correct in holding that Ex.A1 was not executed, the defendant having admitted his signatures in Ex.A1?

2. Whether the lower appellate court was correct in shifting the burden of proving Ex.A1 in spite of the defendant's admission of his signatures in Ex.A1?”



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8. I heard Mr.R.Ravi for the appellant and Mr.B.Dineshkumar for the respondents.

9. I have gone through the records. In particular Ex.A1, Ex.A2 and the oral evidence of the parties.

10. In a suit for specific performance, as per Section 16(c) of the Specific Relief Act, it is a duty of the plaintiff to “aver and prove” that he was ready and willing from the date of the agreement till the date of presentation of the plaint and thereafter. There is no dispute in this particular case as to the necessary averments that have been found in the pre-suit notice as well as in the plaint.

11. However, on a careful perusal of the records, I am unable to find any evidence that has been let in by the plaintiff in order to substantiate that he had sufficient funds in order to convert the sale agreement into a sale deed from the date of transaction till the date of the decree. In fact, the evidence of PW1 goes against him. The necessary evidence of PW1 is extracted hereunder:

“ ரூ. 4,45,000த்தை வைப்பீடு செய்ய இது நான் வரை
நடவடிக்கை எடுக்கவில்லை. அது என கைவசம் உள்ளது. பணத்தை —



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செலுத்துவதற்கு எனக்கு தகுதி உள்ளது என்பதற்கு ஆதாரம் தாக்கல் செய்யவில்லை.

12. This statement shows that the plaintiff had not given any evidence before the Court in order to substantiate that he possessed the funds. I pointed out to Mr.R.Ravi that it is not necessary in a suit for specific performance to either deposit the entire amount in the court or for the plaintiff to jingle the coins before the court to prove that he was ready and willing. However, there must be some evidence before the Court in order for the court to satisfy that the plaintiff has not only made the necessary averments in the plaint but has substantiated the necessary averments by way of some evidence to prove about his financial capacity. The aforesaid extract would show that the plaintiff has unfortunately failed to adduce any evidence.

13. Mr.R.Ravi would contend that it is not necessary on the part of the plaintiff to prove that he was ready and willing, since the defendant has denied the document nor had he called upon the plaintiff to substantiate his financial capacity. He would state that in the light of the pleadings as well as the averment in the suit notice, I should presume that he is ready and willing and had a financial capacity.



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14. As per the unamended Section 16 of the Specific Relief Act, the court cannot decree a suit for specific performance in favour of a person who fails to aver and prove that he had performed or had always been ready and willing to perform, the essential terms of the contract which have to be performed by him. The essential term of the contract in the present case is that he should have paid a sum of Rs.4,45,000/- within a period of two months from the date of agreement. While the averments do exist as pointed out by Mr.R.Ravi, unfortunately the proof thereof is lacking. For the mere fact that the defendant did not deny the readiness and willingness, the personal bar under Section 16 is not dispensed with.

15. Finding himself in this difficulty, Mr.R.Ravi would rely upon the recent judgment of the Supreme Court in ***Basavaraj vs. Padmavathi & Another in Civil Appeal No.8962 and 8963 of 2022 dated 05.01.2023*** to argue that the Supreme Court has held that it is not necessary for a party to substantiate his claim of readiness and willingness.

16. A careful perusal of paragraph 6 of the said judgment shows that the plaintiff in that case had positively stated that he had the funds and the defendant in that case did not choose to cross examine the plaintiff in that regard. Apart from that, the two witnesses examined by the plaintiff, in that



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case, had positively stated that the plaintiff had sufficient funds and offered the same to the defendant. Yet, the defendant had again failed to cross examine the witnesses on this crucial aspect.

17. It is too well settled that where on the crucial aspect of a case, there is a lack of cross examination, the said statement amounts to admission. Paragraph 6 of the said judgment is sufficient to distinguish the facts in that particular case as to one which is presently before me.

18. Immediately Mr.R.Ravi would refer to the judgment of the Supreme Court in *P.D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649* in order to state that if the defendant has not performed his part of the contract, the readiness and willingness on the part of the plaintiff is unnecessary to be proved. My reading of this Supreme Court Judgment does not lead me to the conclusion which Mr.R.Ravi wants me to arrive at.

19. On the contrary it was a case where the plaintiff and the defendant entered into an agreement and it was one of the terms of the agreement that the defendant would discharge the mortgage and make the property clear of any encumbrance before executing the sale deed. Paragraph 23 of the said judgment makes it very clear that the defendant in that case did not redeem the mortgage and produce the original documents and therefore, the courts held the question of plaintiff's readiness and willingness need not be gone into.



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20. In this particular case, it is admitted by both sides that there was no encumbrance over the property and still the plaintiff has not furnished his proof of readiness and willingness. Since the plaintiff has failed to prove his financial capacity as required under Section 16, the personal bar operates and therefore, I am not in a position to agree with Mr.R.Ravi and grant the relief that he wants.

21. The plaintiff claims that he has deposited the amount into the credit of the suit in O.S.No.18 of 2007 on the file of the learned Subordinate Judge, Poonamallee. The plaintiff will be entitled to withdraw the amount deposited together with any interest, that might have been accrued, in case the amount has been in the bank deposit.

22. In fine, for the reasons stated above, the second appeal is dismissed. The judgment and decree of the learned Principal District Judge, Tiruvallur in A.S.No.29 of 2011 dated 28.01.2013 in reversing the judgment and decree of the learned Subordinate Judge, at Poonamallee dated 17.09.2010 stands confirmed. Costs throughout.

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Index : Yes/No

Speaking order/Non-speaking order

Neutral Citation : Yes/No



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- To
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 - 2.The Subordinate Judge, Poonamallee



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V.LAKSHMINARAYANAN, J.

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