

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 18.01.2024

Pronounced on: 31.01.2024

CORAM :

THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.644 of 2017

and CMP. Nos.15915, 17181 & 18269 of 2017

1. V.Gopinathan

2.V.Shivasridharan

...Appellants

Vs.

R.Devendran

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 21.04.2017 in A.S. No.01 of 2015 on the file of the District Judge, District Court No.II, Kancheepuram reversing the judgment and decree passed in O.S. No.143 of 2007 dated 26.09.2012 on the file of the Subordinate Judge, Kancheepuram.

For Appellants : Mr.V.Srikanth

For Respondent : Mr.K.M.Balaji



JUDGMENT

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The plaintiffs in a suit for specific performance having succeeded before the Trial Court and the defendant having successfully challenged the judgment and decree of the Trial court before the First Appellate Court, are the appellants before me.

2. The parties are described as per their litigative status before the Trial Court.

3. The material facts that are necessary for deciding the present Second Appeal are as hereunder:

The plaintiffs, claimed under an agreement of sale dated 21.09.2005 under which the plaintiffs had agreed to purchase the suit property from the defendant for a total sale consideration of Rs.3,75,000/- and on the same day an advance of Rs.2,50,000/- was also paid, leaving a balance of only Rs.1,25,000/-. The execution of sale deed was contemplated within a period of three months. The



plaintiffs issued a pre-suit notice on 22.07.2006 and in response to the same, the defendant issued a reply notice on 04.08.2006. Alleging that the defendant did not come forward to honour his commitments under the said agreement of sale and that the plaintiffs were ready and willing to perform their contractual obligations, the suit came to be filed.

4. The defendant filed a written statement, wherein he has stated that the suit property as described by the plaintiffs were never agreed to be sold by the defendant and that defendant had only agreed to sell to the plaintiffs, the property, 10' East to West and North to South and that the same was also subject to securing title from one Deivasigamani to an extent of 10' x 18'. The defendant further stated that the plaintiffs were not ready and willing to perform their part of the contract and sought for dismissal of the suit.

5. Before the Trial Court, the 2nd plaintiff examined himself as



P.W.1 and marked exhibits Ex.A1 to A7. On the side of the defendant, the defendant examined himself as D.W.1 and one of the witnesses to the agreement of sale as D.W.2 and marked exhibits Ex.B1 to B7 on his side.

6. The Trial Court, after analysing the oral and documentary evidence adduced by the parties before it, found that the plaintiffs were entitled to the relief of specific performance in respect of the schedule mentioned property and decreed the suit.

7. The defendant preferred an appeal in A.S.No.1 of 2015 and the First Appellate Court, found that the plaintiffs were not ready and willing to perform their contract and reversed the findings of the Trial Court. Aggrieved by the said reversal finding, the plaintiffs have preferred the above Second Appeal.

8. On 15.09.2017, the above Second Appeal was admitted on



the following substantial question of law:

“ (i) Whether time can be held to be the essence of an agreement for the sale of immovable property when no particular date for the performance of the agreement is provided therein?

ii) In the light of the decision rendered by the Hon'ble Supreme Court, in the case of Madina Begum and another Vs. Shiv Murti Prasad Pandey and Ors, reported in (2016) 5 SCC 322, the plaintiffs were entitled to the relief.”

9. I have heard Mr.V.Srikanth, learned counsel for the Appellants/plaintiffs and Mr.K.M.Balaji, learned counsel for the respondent/defendant.

10. The learned counsel for the appellants/plaintiffs would attack the judgment of the First Appellate Court on the grounds that the First Appellate Court has failed to follow the dictum laid down by the Hon'ble Supreme Court as well as this court in several cases pertaining to relief of specific performance and that the Trial Court having found the plaintiffs to be ready and willing on proper



appreciation of the pleadings and evidence, had rightly decreed the suit. However, according to the learned counsel for the appellants/plaintiffs, the First Appellate Court, without appreciating the oral and documentary evidence and arguments advanced by the counsel for the plaintiffs, set aside the findings of the Trial Court, on an erroneous consideration. The learned counsel for the appellants would further state that the plaintiffs and the defendant were neighbours and further the findings of the First Appellate Court that one of the plaintiffs have not signed the agreement was totally unsustainable in the eye of law and in this regard, he would contend that when the agreement contained a nominee clause, even assuming that only one of the plaintiffs had signed the agreement as a purchaser, it would not be fatal to the case of the plaintiffs in seeking enforcement of the said agreement of sale.

11. Per contra, learned counsel for the respondent would support the findings of the First Appellate Court, non suiting the plaintiffs on



the ground that one of the plaintiffs was not a signatory to the said agreement of sale.

12. In this connection, I have gone through the unregistered agreement of sale. I find that the agreement does contain a period within which the sale transaction had to be completed. The agreement also contains a nominee clause where the defendant has agreed to convey the property in favour of the plaintiffs or their nominees. Though the agreement of sale refers to both the plaintiffs, admittedly, one of the plaintiffs has not chosen to sign the agreement of sale. The First Appellate Court court has come to a conclusion that since the first plaintiff had not signed the agreement and no reasons were also stated for the same, he could not have joined the second plaintiff in filing the suit and ultimately held that the suit was bad for misjoinder of the first plaintiff.

13. I am unable to agree with the said finding of the First



Appellate Court for more than one reason. Firstly, the agreement clearly mentions that the defendant has agreed to sell the property in favour of both the plaintiffs. Merely, because the first plaintiff had not signed the agreement of sale, especially when there was a nominee clause agreed upon between the parties, and secondly the defendant was conscious of the names of the purchasers and admitted to the execution of the said sale agreement. Therefore, the fact that the 1st plaintiff did not sign the sale agreement cannot be a ground to throw out the 1st plaintiff, disentitling him from seeking the relief of specific performance only on a technical ground that he was not a signatory to the suit agreement of sale.

14. With regard to time being the essence of the contract, eventhough the first substantial question of law had been framed revolving this, I have found from the agreement of sale that the parties have clearly agreed upon a time within which the sale transaction was to be concluded and this in the light of the same, the first substantial



question of law does not even arise for consideration.

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15. The next issue that requires consideration is as to whether the plaintiffs have been ready and willing to perform their obligations under the agreement of sale. In this regard, I have gone through the pleadings, oral and documentary evidence let in by the parties. Admittedly, the suit sale agreement is dated 21.09.2005 and the parties had agreed even under the said sale agreement, that the sale transaction should be completed on or before 20.12.2005. However, the first notice issued by the plaintiffs was only on 22.07.2006 vide Ex.A6, a clear six months after the lapse of the time agreed upon between the parties. Though a reply was given by the defendant, even on 04.08.2006, the plaintiffs did not choose to file a suit for more than a year and the suit was laid before the Trial Court only on 17.08.2007.

16. The learned counsel for the appellants would contend that since the defendant had agreed to acquire title from the neighbouring



owner, Deivasigamani and the parties were only neighbours, the plaintiffs were waiting for the defendant to get title from Deivasigamani. According to the learned counsel for the appellants, even as on date, the defendant has not been able to get title from Deivasigamani and therefore the delay cannot be held to be fatal to the case of the plaintiffs. He would further contend that major portion of the sale consideration was paid and even the defendant, in his cross examination had admitted that the plaintiffs were men of means and therefore lack of readiness and willingness could not have been put against the plaintiffs.

17. Per contra, learned counsel for the defendant would state that the defendant, right from the inception has questioned the identity of the property to be sold to the plaintiffs and further the plaintiffs have not let in any satisfactory evidence to explain the inordinate delay in firstly issuing the notice seeking performance and secondly, despite a reply notice in August 2006, the plaintiffs had chosen to



institute the suit only in August 2007, a clear one year later. Further, he would also state that the question of the defendant acquiring title from another neighbour, Deivasigamani was immaterial to the plaintiffs in getting a sale deed as agreed to between the parties and therefore the learned counsel for the respondent/defendant prays for dismissal of the Second Appeal.

18. Sec.16 of the Specific Relief Act, 1963 raises a personal bar to the plaintiffs who approach the Court and seek specific performance of an agreement of sale. Thus, the plaintiffs would become entitled to the equitable and discretionary relief of specific performance only when they satisfy the mandate of Sec.16 (c) of the Specific Relief Act, 1963.

19. In the instant case, it is clear that the plaintiffs have not explained as to why, despite having paid Rs.2,50,000/- in advance,



they did not offer to pay the balance sale consideration of Rs.1,25,000/-within the agreed period of three months. The conduct of the plaintiff, ought to be blemishes to entitle them to the relief of specific performance. However, on the facts of present case, it is clear that even after the expiry of the time agreed upon between the parties, the plaintiffs remained silent for seven months and only thereafter they choose to issue the pre-suit notice in Ex.A6. The defendant had promptly issued a reply notice on 04.08.2006 vide Ex.A7 and atleast at that point of time the plaintiffs ought to have woken up and approached or rushed to court. However, the plaintiffs took their own sweet time and chose to come before the court only on 17.08.2007. Further, even the balance sale consideration of Rs.1,25,000/- has been admittedly deposited only pending the suit, though before the decree. Thus, the plaintiffs have clearly exhibited a careless attitude and the same goes a long way to only exhibit a lack of readiness and willingness on their part to conclude the sale transaction. I am unable to agree with the submissions of the learned counsel for the appellants



that the appellants were waiting for the defendant to procure title in respect of 10' x 18' from one, Mr.Deivasigamani and therefore when there is an encumbrance and the same was not cleared, the plaintiffs choosing to wait until August 2007 cannot be held against him. Even in the pre-suit notice dated 22.07.2006, the plaintiffs have not contemplated any encumbrance to be cleared by the defendant. The notice simplicitor states that the plaintiffs have been ready and willing to pay the balance sale consideration and the defendant has been evading their demands for completion of the sale transaction. In Ex.A7 reply notice, the defendant has stated that the properties sought to be purchased by the plaintiffs was not the property agreed to be sold by the defendant and that the plaintiffs were not showing any interest in concluding the transaction, the agreement had been rescinded due to the laches on the part of the plaintiffs and that the defendant was willing to return the advance amount. Despite such a stand taken by the defendant in the reply notice, the plaintiffs did not chose to file the suit immediately. Therefore, it is a clear case where



the plaintiffs, by their own conduct, have disintitled themselves for the equitable relief of specific performance. The findings of the First Appellate Court are sound and proper and do not require any interference.

20. In so far as the second substantial question of law also, it is only revolving the date fixed for specific performance of the contract. The said question also does not arise in the instant case as parties have specifically agreed to complete the sale transaction by 20.12.2005. Thus, both the substantial question of law are only stated to be rejected.

21. Though the plaintiffs have paid an advance of Rs.2,50,000/- which is admitted by the defendant, the plaintiffs have not chosen to seek any alternate relief for refund of the said amount. I find that the defendant has right through viz., namely even in the earliest



correspondence Ex.A7-reply notice has expressed his willingness to return the advance amount. He has also reiterated the same in his pleadings and evidence. Thus, considering the fact that the defendant has had the benefit of the sum of Rs.2,50,000/- belonging to the plaintiffs for close to two decades now and in view of the defendant expressly offering to return the same to the plaintiffs, I direct the defendant to refund the said sum of Rs.2,50,000/- together with interest at 9% per annum, within a period of four months from the date of receipt of a copy of this judgment. There shall be a decree in this regard alone, though the relief of specific performance is not being granted to the appellants/plaintiffs.

22. In fine, the Second Appeal is partly allowed. The judgment of the First Appellate Court in A.S.No.01 of 2015 dated 21.04.2017 on the file of the District Judge, District Court No.II, Kancheepuram in so far as the specific performance relief is confirmed. However, the respondent/defendant is hereby directed to return the sum of



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Rs.2,50,000/-, together with the interest at 9% per annum, from September 2005 till date of payment, not later than four months from the date of receipt of a copy of this judgment. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

31.01.2024

Index : Yes/No

Internet : Yes/No

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To

1. The District Judge, District Court No.II, Kancheepuram.
2. The Subordinate Judge, Kancheepuram.

P.B.BALAJI, J.

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Pre-delivery Judgment in
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