BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.08.2024

Pronounced on : 30.08.2024

CORAM

JUSTICE N. SESHASAYEE
and
JUSTICE P.VADAMALAI

A.S.(MD) No.12 of 2013
and M.P.(MD) No.1 of 2013
and
Cross Objection (MD) No.30 of 2022

A.S.(MD).No12 of 2012:

M.Duraipandi ... Appellant / Plaintiff

Vs

K.Pandian ... Respondent / Defendant

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code against the judgment and decree of the IV Additional District Court, Madurai dated 27.11.2012 made in O.S.No.1 of 2009

For Appellant	:	Mr.S.Manohar
For Respondent	:	Ms.R.Muthu Srinithi for Mr.V.Ramakrishnan

Cross Objection (MD) No. 30 of 2022:

K.Pandian ... Cross Objector/Respondent

Vs

M.Duraipandi ... Respondent / Appellant

Prayer: Cross Objection filed under under Order 41 Rule 22 of Civil Procedure Code to set aside the judgment and decree dated 27.11.2012 passed in O.S.No.1 of 2009 on the file of the IV Additional District Court, Madurai, directing the defendant to pay the cost of the suit to the plaintiff.

For Cross Objector	:Ms.R.Muthu Srinithi for Mr.V.Ramakrishnan
For Respondent	:Mr.S.Manohar

COMMON JUDGMENT

(Judgment of the Court was delivered by N.SESHASAYEE, J.)

The plaintiff in O.S.No.1 of 2009 on the file of the IV Additional District Court, Madurai, which he had filed for a specific performance of a contract for the sale of immovable property, dated 06.06.2007, has now come forward with this appeal challenging the decree of the trial Court dismissing the suit. For narrative convenience, the parties would be referred to by their rank before the trial court.

The Pleadings

2. The case of the plaintiff:

a) The suit property belongs to the defendant. On 06.06.2007, he entered into a sale agreement with the plaintiff for the sale of the suit property for a total sale consideration of Rs.27.30 lakhs. Under the agreement, he had paid Rs.5 lakhs as advance amount. Two days later, to be precise, on 08.06.2007, the plaintiff had paid another Rs.1.0 lakh towards part of sale consideration. The agreement stipulated six months time for performance of the contract.

b) Within about five months from the date of the agreement, the plaintiff issued a suit notice dated 28.11.2007, requiring the defendant to perform his part of the contractual obligations. This was replied to by the defendant vide reply notice dated 05.12.2007, in which, he had taken a plea that the sale agreement in question was executed by him for securing a loan. Eventually the suit was laid on 19.12.2008.

c) In his written statement, the defendant had reiterated the same line of defence which he had earlier taken in his reply notice and he had also taken an alternative plea that the sale agreement in question is a fabrication. He took yet another line of defence on bar of suit under Order 2 Rule 2 of C.P.C., since the plaintiff had instituted a suit for bare injunction prior to the institution of the present suit for specific performance. He also introduced another fact which relates to a sale agreement which the defendant had executed as regards the southern 28 cents in the same survey field of which the suit property is the northern 22 cents.

3. The dispute went to trial and the trial Court has framed appropriate issues. During trial, the plaintiff examined himself as P.W.1 and he had produced Exs.A1 to A9, of which, Ex.A1 is the sale agreement in question, Exs.A2 and A4 respectively are the suit notice and the reply notice. Exs.A6 and A7 relate to the suit which the plaintiff has laid for permanent injunction prior to the institution of the present suit. The plaintiff also examined both the attesting witnesses to Exs.A1 as P.Ws.2 and 3. Besides, he also examined an independent witness as P.W.4. For the defendant, he examined himself as D.W.1 and produced Exs.B1 and B2.

4. On appreciating the evidence, the trial Court chose to dismiss the suit, but imposed a cost of Rs.2.0 lakhs on the defendant. Its line of reasoning is:

a) that the present suit is not hit by Order 2 Rule 2 of C.P.C, since the earlier suit was for bare injunction and the same was not even taken on record. In other words, only the plaint for injunction was filed and the same was returned and no suit was laid before any civil Court to take cognizance of.

b) On the issue whether Ex.A1 was a fabricated document, the trial Court rejected the same and decided it in favour of the plaintiff, however, the suit was dismissed on the ground that the plaintiff was not ready and willing to perform his part of the contract since he had laid the suit about a year after Ex.A4 reply notice.

As stated earlier, despite dismissing the suit, the trial Court chose to impose a cost of Rs.2.0 lakhs on the defendant. The learned District Judge reasoned that since the plaintiff had not prayed for an alternate relief of refund of advance amount, at least the cost of Rs.2.0 lakhs would be ameliorative. While the plaintiff appealed against the decree, the defendant had preferred a cross-objection vis-a-vis challenging both the findings that Ex.A1 was genuine and also the cost imposed on him.

5. Points for consideration

1. Whether Ext.A1 is genuine or was it executed to secure a loan?
2. Is not the plaintiff ready and willing to perform his part of he contract?
3. Was the trial court's order imposing a cost on the defendant is legally sustainable?

6. The learned counsel for the plaintiff/appellant made the following submissions:

a) The trial Court having found that Ex.A1 is genuine, failed to note that the plaintiff had conveyed his readiness and willingness to perform his part of the contract even within the six months time stipulated for performance of mutual contractual obligations when he issued Ex.A2 suit notice, dated 28.11.2007. But for the fact that the defendant refused to perform his part of the contract and committed breach of the contract, the suit itself would not have been laid. Readiness and willingness need to be inferred not with reference to the date of institution of the suit but with reference to the purchaser communicating his intent to perform his part of the contractual obligation. When parties enter into an agreement, they will be in expectation of its performance and not in expectation of a litigation. Indeed, in between, the plaintiff had been pursuing another suit which he had laid for bare injunction against the defendant, which was not taken on record by the court, which he eventually gave up. Therefore, the trial Court was significantly in error in holding that the plaintiff was not ready to perform his part of the contract. Further, this finding of the trial Court is premised on the belief that the time is of the essence of the contract and there is nothing in Ex.A1 agreement indicating that the six months time stipulated therein was of the essence of the contract. At any rate, the presumption that the time is of the essence of the contract may not apply to immovable property, especially when the plaintiff had communicated his intention to perform his part of the contract well within the time stipulated in Ex.A1 for his performance.

b) In this context, on the date when the agreement was entered into, the defendant had some issues vis-a-vis quarrying of sand in his property and was involved in some proceedings before the District Revenue Officer concerned under the provisions of the Tamil Nadu Mines and Minerals Act, 1957 and the agreement stipulated that the defendant should clear this issue. Even today, this issue is not clear. But, the plaintiff has always shown his willingness to purchase the property despite the outstanding issue vis-a-vis allegation of illicit quarrying of sand. The learned counsel submitted that the defendant shall not be permitted to take advantage of his failure to clear the same as a defence for his failure to perform his part of the contract.

7. Per contra, Ms.R.Muthu Srinithi for Mr.V.Ramakrishnan made the following submissions for the respondent/defendant:

(a) The core contention of the defendant is that there never was a sale agreement such as Ext.A1 with all the terms incorporated therein. While the defendant has merely admitted the signature in Ext.A1, he did not admit that the document was a duly filled up document and that he had affixed his signature after becoming aware of its contents. The burden is, therefore, on the plaintiff to establish that Ext.A1 was a duly filled up document with all its terms, before the defendant signed it;

(b) While the plaintiff has examined the attesting witnesses to Ext.A1 as well as Ext.A8 endorsement made therein, yet it cannot be considered as conclusive for they are essentially self-serving. The improbability that Ext.A1 could not have been executed with the kind of terms that it discloses can now be established through certain circumstances that surrounds Ext.A1:

(i) Ex.A1 has stipulated six months time for the parties to perform their mutual contractual obligation, and it also recites that this six months time was provided essentially because there were some proceedings pertaining to the suit property that was pending before the Revenue Divisional Officer and it is the case of the plaintiff that these proceedings were not complete within the six months time. It is in this backdrop, plaintiff issued Ext.A2 suit notice dated 28.11.2007. If the only reason for incorporating the time for performance in Ext.A1 was there even prior to issuance of Ext.A2 notice, it would have been disclosed in the suit notice. However, the suit notice is silent on this aspect. This implies that there was never a clause such as the one that is found in Ext.A1. If this clause was not there on the date of Ext.A2, it necessarily implies that Ext.A1 could not have been a duly filled up document on the date it was said to have been executed by the defendant;

(ii) The next circumstance that renders the contention of the plaintiff improbable is that the defendant had sold the southern 28 cents through the plaintiff for which purpose, he had entered into Ext.A9 sale agreement dated 13.04.2006. The sale price fixed under this sale agreement is Rs.35,000/- per cent. Following this, the defendant had executed a power of attorney in favour of the plaintiff and on the strength of the power, he had sold the property covered under Ext.A9 (southern 28 cents) to third parties at Rs.65,000/- per cent. Now Ext.A1 is said to have been executed more than a year later, and it covers the northern 22 cents in the same survey field and the sale consideration is fixed at Rs.21,000/- per cent, which would be improbable since in the ordinary course of human nature, no person would agree to sell his property for a value lower than the value for which he had sold another portion of the same property a year ago.

(c) Even if Ext.A1 is presumed to be genuine, still, the plaintiff has not established that he was ready and willing to perform his part of the contract within the time stipulated. The reasons are:

i. Sec.16(c) of the Specific Relief Act 1963 mandates that a suitor, who seeks specific enforcement of contract, should plea and prove that he/she is ready and willing to perform his/her part of the contract. This is also procedurally mandated in Order VI Rule 3 of Form 47 of Appendix 'A' to the Code of Civil Procedure. Order VI Rule 3 provides, when the form prescribed in Appendix A might be adopted in a plaint. In Appendix A of the Code, Forms of plaints in various genre of litigations are provided, and the relevant form of plaint relating to a suit for specific performance is in Form 47 and this form requires that "*the plaintiff has been and still is ready and willing specifically to perform the agreement at his part of which the defendant as had notice*." But the plaintiff has not pleaded his readiness and willingness to perform his part of the contract, let alone proving it. Reliance was placed on the ratio in ***Padmakumari and others Vs Dasayyan and others*** [(2015)8 SCC 695]. The legal mandate being what it is, this plaintiff has not even chosen to plead that he is ready and willing to perform his part of the contract.

ii. Turning to prove the readiness and willingness, the plaintiff again lacks far behind. According to the plaintiff, on 22.11.2007, the defendant had orally conveyed his intent not to perform the contractual obligations which the plaintiff has been unilaterally insisting, and few days later, on 28.11.2007 to be precise, the plaintiff issued a suit notice, which was responded with Ext.A4 reply notice dated 05.12.2007. Therefore, on the receipt of Ext.A4 reply notice, the plaintiff has been categorically informed that the defendant is in no mood to perform Ext.A1 contract for the grounds he had alleged. Yet, he would not institute a suit for specific performance immediately. On the other hand, he laid a suit for injunction seeking to restrain the defendant from alienating the suit properties to third parties, but in his Ext.A6 order, the Principal District Munsif has rejected the plaint with a direction that the plaintiff might seek the other efficacious remedy. Still the plaintiff would not instituted the suit for specific performance, and waited for another year and laid the suit only on 19.12.2008. The inference that could be drawn from the conduct of the plaintiff is that by going for a suit for bare injunction and after freezing the defendant's power of alienation, the plaintiff wants to gain time for mobilizing the funds for performance.

Summing up her argument, the learned counsel submitted that civil litigations are decided based on rule of preponderance of probabilities and hence, the plaintiff has to establish a stronger probability of his case. This apart, specific performance is a relief in equity and is discretionary and hence, even if there is an element of suspicion in the case of plaintiff, then the Court must refuse the relief. Reliance was placed on ***U.N.Krishnamurthy Vs A.M.Krishnamurthy*** [2023 (11) SCC 775]; ; ***Saradhamani Kandappan Vs S.Rajalakshmi and others*** [2011 (12) SCC 18]; ***K.S.Vidyanadam and others Vs Vairavan*** [1997 (3) SCC 1] and ***Ethirajulu Naidu Vs K.R.Chinnikrishnan Chettiar*** [1975 (88) LW 265].

8. In reply, the learned counsel for the appellant submitted :

(a) the contention of the respondent based on certain impression that the reason for stipulating the time as fixed in Ext.A1 could be a concoction is belied by the fact that along with Ext.A1, two notices issued by the Revenue Divisional Officer and Commissioner of Mines and Minerals to the defendant are enclosed. These notices were not issued to the plaintiff but to the defendant and it could not have found its way into Ext.A1 without the defendant sharing the same with the plaintiff. These statutory authorities had levied penalty of Rs.3,06,976/- on the defendant and this precisely is a reason why the sale consideration for the suit property is fixed at a lower rate than the rate fixed under Ext.A9;

(b) The defendant's conduct too is not consistent with the ordinary course of human conduct inasmuch as he had not approached the police, when he believed that Ext.A1 was a forged and fabricated document. As far as the proceedings pending before the Revenue Divisional Officer is concerned, D.W.1 flatly denies the same in his cross-examination whereas the documents appended to Ext.A1 states the contra.

(c) So far as the absence of pleading as required under Section 16(c) of the Specific Relief Act is concerned, while it is true the expressions, '*readiness and willingness*' are not there in the plaint, but, the same could be gathered from Paragraphs 7 and 8 of the plaint.

9. The arguments advanced by both sides are carefully examined. And the duel essentially is an extension, if not the repetition of the contentions which the parties have shared before the trial Court. But the most impressive of them is the contention of the defendant that the plaintiff has not pleaded that he is willing to perform his part of the contractual obligations which is not only required under Section 16(c) of the Specific Relief Act, but also procedurally required in Form-47 Appendix 'A' read with Order VI Rule 3 of CPC. The learned counsel for the plaintiff/appellant concedes that there is no repetition of Section 16(c) in the plaint, yet, the plaintiff had communicated it in his own way that he is ready and willing to perform his part of the contract in paragraph No.7 of the plaint, which reads as below :

> *"7. It is further submitted that after sometime of the execution of the sale agreement, the defendant attitude started changing slowly. The plaintiff personally approached the defendant in order to pay the balance sale of consideration and to fix up the date of sale to be executed, the defendant was evading to do so by saying some pretext or other."*

For the plaintiff to succeed in a suit for specific performance, he has to establish that he has been continuously ready and willing to perform his part of the contract not on specific days or dates, but from the time the contract came into existence between them for performance till the suit is decided.

Therefore, if Ex.A1 is taken as genuine, still he has to establish that he is ready and willing to perform his part of the contract from the time which the contract stipulates for performing the plaintiff's part and on every successive date. This aspect of the law is taken care of in paragraph No.7 of the plaint. To state it differently, while it is not always mandatory that the plaintiff in a suit for specific performance should literally lift and reproduce the very statutory statements in Sec.16(c) of the Specific Relief Act, still, it is necessary that the pleadings should more than convey this idea, but this is absent in this case.

10. The only ground on which the plaintiff losts in his suit, is his inability to establish his readiness and willingness to perform his part of contract. Lack of pleadings apart, even the plaintiff has not established the same, except the statement his counsel has repeatedly made. Here this Court heard a very novel argument from the counsel for the defendant. She argued that the earlier suit for bare injunction which the plaintiff had laid (but not taken on record by trial Court) restraining the defendant from alienating the property is essentially intended to gain time for him to mobilise funds. This is absolutely an out of box thinking and it would have very easily paled into insignificance, if only the plaintiff had established his wherewithal or that he possessed the sale consideration for performing his part of the contract. Since the plaintiff has not demonstrated that he is ready with the balance sale consideration, the argument of the defendant that the suit for bare injunction was attempted only to gain time to mobilise funds, can gain merit serious consideration.

11. Without getting into the various authorities cited by either sides, as the law on the subject is more firmly settled and also since every case of specific performance has to be decided on the factual basis of each particular case, this Court has little hesitation to hold that the decision of the learned District Judge in dismissing the suit is the most appropriate decision that could be taken in this case. Necessarily, the appeal is liable to be dismissed.

12. Turning to the task which the learned District Judge has imposed on the

defendant is concerned, which is the subject matter of cross-objection, it has to be held that the same is not legally sustainable. The maxim is '*cost follows the event'*. In other words, the cost is paid by the one who loses the suit and not by the one who succeeded it. In the instant case, the decree is in favour of the defendant and he cannot be made to pay the random cost of Rs. 2.0 lakhs to the plaintiff. Under Section 35A of CPC, even exemplary costs cannot exist more than Rs.3,000/-. The next alternate option is Section 95 of CPC but there damages should have been sought. But this provision does not have any application to the present case.

13. To conclude, the appeal is dismissed and the cross-objection is allowed. The judgment and decree of the learned IV Additional District Judge, Madurai in O.S.No.1 of 2009 is confirmed to the extent as his decision to dismiss the suit and overruled where it imposes cost on the defendant. No costs. Consequently, connected miscellaneous petition is closed.

(N.S.S., J.) (P.V.M.,J.)
30.08.2024

Index : Yes / No
Neutral Citation : Yes / No
Speaking order / Non-speaking order
PM/RR/ds

To

1. The I V Additional District Court
   Madurai.

2.The Section Officer
VR Section
Madurai Bench of Madras High Court.
Madurai.

N. SESHASAYEE, J.
and
P.VADAMALAI, J.

RR

Pre-delivery Judgment in
A.S.(MD) No.12 of 2023
and Cross Objection.(MD) No.30 of 2022

30.08.2024