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A.S.(MD)No.81 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 31.07.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

A.S.(MD)No.81 of 2018

and

C.M.P.(MD)No.4477 of 2018

Devakumaran

...Appellant

Vs.

1.A.S.Maniyam (Died)

2.A.S.Malliga

3.S.Raja Arunachalam

4.A.Usha Malathi

5.R.Jeya Chitra

6.S.Tamil Selvi

7.M.Indira Priyadarshini

...Respondents

(Respondents 2 to 7 are brought on record as LRs of the deceased sole respondent, vide Court order, dated 09.02.2024, made in C.M.P.(MD)No.16721 of 2023 in A.S.(MD)No.81 of 2018)

PRAYER: This Appeal Suit filed under Section 96 of C.P.C., against the decree and judgment, dated 30.01.2018, made in O.S.No.11 of 2008 on the file of III Additional District Judge, Tirunelveli.

For Appellant : Mr.S.Rajasekar

For R2 to 7 : Mr.T.Lenin Kumar

R1 : Died



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JUDGMENT

The plaintiff is the appellant herein. The suit is filed for specific performance. After perusing the documents and the pleadings, the Trial Court had dismissed the suit. Aggrieved over the same, the present appeal is preferred by the plaintiff.

2. The date of sale agreement is 05.04.2003 and the time fixed to conclude the contract is one year. But the parties have not concluded the contract. The plaintiff had not taken any steps to show his readiness and willingness to conclude the contract within a period of one year which would lapse on 04.04.2004. But a suit notice was issued on 05.11.2005, which is more than one year seven months from 04.04.2004 (the date which the parties have agreed to conclude the contract). After the issuance of suit notice the plaintiff had not filed the suit within reasonable time, but had filed the suit on 04.06.2007 which is again after one year seven months. The time line would clearly show that the plaintiff is not ready to conclude the contract and also not inclined to prosecute the case.

3. The contention of the plaintiff is that even though the agreement was entered into on 05.04.2003, subsequently, he had made payment of Rs.5,00,000/- on



25.03.2004, Rs.5,00,000/- on 04.05.2005, Rs.2,00,000/- on 20.05.2004 and Rs. 5,00,000/- on 04.06.2004. Hence, the period of limitation would start from the last payment. But the contention of the defendant is that he had never ever entered into any sale agreement with the plaintiff and he has not received any advance amount. The defendant had denied even the signature affixed in the alleged sale agreement. The specific case of the defendant is that he has not received the suit notice as well and had denied the signature affixed in the acknowledgment card.

4. After hearing the rival submissions this Court is of the considered opinion that the contention of the plaintiff that he had made payment subsequent to the agreement cannot be accepted, when the defendant denies any such payments. When there is denial by the respondent, then the burden of proof is more on the plaintiff. The plaintiff claims all the aforesaid payments are cash payments, but there is no such endorsement in the alleged sale agreement. It is a usual practice to make endorsement on the back side of the agreement and no such endorsement is available in the alleged sale agreement. Therefore, this Court is of the considered opinion that there is no proof for the alleged payments.

5. Further, it is seen that the alleged agreement was entered into on



05.04.2003, the suit notice was issued on 05.11.2005 and the plaintiff had not taken effective steps to file the suit immediately but had filed the suit on 04.06.2007. Since this Court has already held that the alleged payment dated 25.03.2004, 04.05.2005, 20.05.2004 and 04.06.2004 are not proved, hence the alleged payment would not save the limitation period. In such circumstances the period of limitation starts from the date of alleged sale agreement dated 05.04.2003 and the period of three years was over on 04.04.2006. And the suit is barred by limitation.

6. Further, in the present case, the time is essence of the contract, since in the alleged agreement the parties have agreed to complete the contract within a period of one year, which lapsed on 04.04.2004, but the suit notice was issued on 05.11.2005. This would indicate that the time is essence of the contract, the plaintiff was not inclined to complete the contract and also not inclined to prosecute the case.

7. As far as the advance amount is concerned, the plaintiff submitted that he had taken two demand drafts to the tune of Rs.45,000/- each and had paid Rs. 10,000/- as cash. But the plaintiff has not proved that the said amount was received by the defendant, since the contention of the defendant is that he had not received the said amount. When the defendant had denied receiving any amount, then it is



incumbent on the plaintiff to prove the same. The plaintiff cannot simply rely on the Demand Draft but the plaintiff ought to prove that the Demand Draft was issued to the defendant and the defendant had encashed the amount. Even though the Bank was produced as a witness, the Bank had simply stated that the records stated thereunder were old records and they had already destroyed the same. Hence there is no evidence to prove that the Demand Draft was encashed. Therefore, this Court is of the considered opinion that the plaintiff had not proved that the advance amount was paid to the defendant through demand drafts. Hence, the alternative prayer to return the advance amount is declined.

8. Therefore, this Court is of the considered opinion that the plaintiff has not made out any legally sustainable grounds to entertain this appeal. Hence, this appeal suit is liable to be dismissed.

9. The Learned Counsel appearing for the plaintiff submitted that he had deposited the balance amount in the Court to complete the contract. The plaintiff is entitled to withdraw the amount which was deposited before the Trial Court.



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10. With the above said observations, the appeal suit is dismissed. No costs.

Consequently, connected miscellaneous petition is closed.

31.07.2024

NCC : Yes / No

Index : Yes / No

Internet : Yes

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To

1.III Additional District Judge, Tirunelveli.

2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.,

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