



S.A.(MD)No.11 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.08.2024

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.11 of 2016

and

C.M.P.(MD)Nos.175 & 6115 of 2016

Punniyamoorthy

... Appellant / Respondent / Defendant

Vs.

R.Parimala

... Respondent / Appellant / Plaintiff

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the Judgment and decreetal order passed by the learned II Additional District and Sessions Judge, Thanjavur in A.S.No.13 of 2015 dated 02.07.2015 reversing the Judgment and decreetal order passed by the learned Principal Subordinate Judge, Thanjavur in O.S.No.385 of 2010, dated 11.12.2014 and allow the second appeal.

For Appellant : Mr.S.Deenadhayan

For Respondents : Mr.R.Swaminathan
Senior Counsel
for Mr.R.Rajaraman



S.A.(MD)No.11 of 2016

JUDGEMENT

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The defendant in O.S.No.385 of 2010 on the file of the Principal Sub Court, Thanjavur is the appellant in this second appeal. The suit was for specific performance of the agreement dated 06.06.2003 entered into between the parties. The plaintiff examined herself as P.W.1. Five other witnesses were examined on her side. Ex.A1 to Ex.A19 were marked. The defendant examined himself as D.W.1. One Arivudainambi was examined as D.W.2. Ex.B1 to Ex.B23 were marked on his side. After considering the evidence on record, the trial Judge dismissed the suit vide Judgment and decree dated 11.12.2014. Aggrieved by the same, the plaintiff filed A.S.No.13 of 2015 before the second Additional District Judge, Thanjavur. Vide judgment and decree dated 20.07.2015, the decision of the trial Court was reversed and the appeal was allowed as prayed for. Questioning the same, this second appeal came to be filed.

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

“(1) Whether the first appellate court without considering the fact that the plaintiff is not always ready and willing to perform his part of contract, has granted decree of specific performance is sustainable as per Section 16(3) of Specific Relief Act, 1963?



S.A.(MD)No.11 of 2016

(2) Whether mere averments in the plaint with regard to readiness and willingness without substantiating any documentary evidence, would entitle a plaintiff to get decree of specific performance of contract and the findings of the lower appellate court correct on his aspect?"

During the last hearing, the following substantial question of law was additionally framed:-

“3. Whether the plaintiff is entitled to specific performance of items 6 & 7 which do not belong to the defendant / appellant?”

3. The learned counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds. He pointed out that the plaintiff was not at all ready and willing to perform her part of her contract and that the first appellate court had mechanically granted decree as prayed for. He called upon this Court to set aside the impugned Judgment and decree passed by the first appellate Court and restore the decision of the trial court.

4. Per contra, the learned counsel appearing for the respondent submitted that the impugned Judgment and decree do not warrant interference. He pressed for dismissal of the second appeal.

5. I carefully considered the rival contentions and went through the evidence on record.



S.A.(MD)No.11 of 2016

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6. The plaintiff and the defendant entered into sale agreement dated 06.06.2003. The sale consideration was fixed at the rate of Rs.428/- per kuzhi. The sale agreement covered 7 items of the property. Items 1 to 5 measure 2 acres and 72 cents. Items 6 & 7 measure 1 acre and 5 cents. Even though the sale agreement was entered into as early as on 06.06.2003, the suit came to be filed only on 10.11.2010. It is relevant to note here that in the sale agreement, no time was fixed for performance of the contract. Interestingly, when the defendant himself issued notice on 13.07.2009 (Ex.A4), he only called upon the plaintiff to pay the balance amount of Rs.3,50,000/- and take the sale deed. Thus, by his own conduct, the defendant has condoned the delay between 06.06.2003 to 13.07.2009. Even at the time of execution of the sale agreement, the plaintiff had paid a sum of Rs.2,00,000/- as advance amount. According to the plaintiff, even though it has been mentioned that the land covered by the sale agreement measures 3 acres & 77 cents, on ground, what is available is only 3 acres & 62 cents. The plaintiff also pointed out that the property had been usufructuarily mortgaged in favour of one Kumar and that it was the plaintiff who redeemed the mortgage by paying a sum of Rs.1,00,000/-. According to the plaintiff, what remained to be paid was only Rs.1,64,808/-. To this effect, reply was sent on 18.07.2009 (Ex.A5). The



S.A.(MD)No.11 of 2016

defendant chose to issue Ex.A6-notice on 29.05.2010 revoking the sale agreement itself. The suit was laid by the plaintiff for specific performance on 10.11.2010. There is considerable force in the contention of the learned counsel appearing for the plaintiff / respondent that when repudiation took place only in July 2010, the suit having been filed within six months thereafter cannot be said to be either barred by limitation.

7. I carefully went through the evidence of D.W.1. It can be seen therefrom that the defendant was an accused in a murder case and that he had to be away from the village itself. The defendant conceded that the possession of the land had been given to one Kumar for a sum of Rs.1,00,000/-. Though it has not been stated in so many words, I can conclude that it was a usufructuary mortgage. The learned counsel for the respondent would point out that this liability was cleared by the plaintiff and that is why, the sale deed dated 08.02.1992 standing in the name of the defendant is in the custody of the plaintiff. By applying the principle of preponderance of probability, I conclude that the statement of the plaintiff that she had paid a sum of Rs.1,00,000/- to Kumar to clear the mortgage liability stands established. In the sale agreement, the defendant had undertaken that he would negotiate with one Sarathambal who is the owner of items 6 & 7 and get the said property also transferred in



S.A.(MD)No.11 of 2016

favour of the plaintiff. It appears that the defendant could not fulfill that part of the obligation cast on him under the sale agreement. It is probably for this reason agreement could not culminate into sale even though it was executed as early as on 06.06.2003. When the defendant is not able to perform his part of the contract, it is not proper to fault the plaintiff. The plaintiff had paid Rs.2,00,000/- even at the time of executing the sale agreement. Subsequently, she paid a further sum of Rs.1,00,000/- to Kumar to clear the mortgage liability. The first appellate court was justified in coming to the conclusion that the plaintiff was always ready and willing to perform her part of the contract. The trial Court on the other hand had proceeded on the premise that the suit was barred by limitation. In this view of the matter, the substantial questions of law originally framed are answered against the appellant and in favour of the respondent.

8. At the same time, the first appellate court had committed a fundamental error. The sale deed covered 7 items of property. Items 1 to 5 alone stood in the name of the defendant. Items 6 & 7 did not belong to the defendant. Specific performance cannot be sought in respect of the property which did not belong to the defendant. Admittedly, Sarathambal was not made party either to



S.A.(MD)No.11 of 2016

the sale agreement or to the suit. Therefore, the impugned Judgment and decree passed by the first appellate court warrants limited interference. On instructions from the respondent, the learned counsel appearing for her submitted that the respondent will be satisfied with the decree is confined to items 1 to 5 belonging to the defendant and that the defendant can withdraw the entire amount deposited to the credit of the suit. This concession made by the respondent is recorded.

9. In this view of the matter, the additional substantial question of law is answered in favour of the appellant / defendant. The impugned Judgment and decree is accordingly modified. The plaintiff is entitled to specific performance in respect of items 1 to 5 set out in Ex.A1-sale agreement. The appellant / defendant can withdraw the amount deposited by the plaintiff to the credit of O.S.No.385 of 2010 together with accrued interest. The second appeal is partly allowed. No costs. Consequently, connected miscellaneous petitions are closed.

20.08.2024

Index : Yes / No
Internet : Yes/ No
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S.A.(MD)No.11 of 2016

G.R.SWAMINATHAN, J.

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To:

- 1.The II Additional District and Sessions Judge, Thanjavur.
- 2.The Principal Subordinate Judge, Thanjavur.

Copy to:

The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court, Madurai.

S.A.(MD)No.11 of 2016

20.08.2024