



A.S.(MD)No.55 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

<i>Judgment Reserved On</i>	<i>Judgment Pronounced On</i>
18.07.2024	26.09.2024

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

A.S.(MD)No.55 of 2024
and
C.M.P.(MD)Nos.3739 and 3741 of 2024

1.Felix Samuvel
2.Yebal Fedrick

...Appellants

--Vs--

1. Ayyadurai
2.Gnanam Paulraj
3.Selvaraj Devasundaram
4.Richard Pearson
5.Merlin Sivliya
6.Mefal Katherin

...Respondents

PRAYER: Appeal Suit filed under order 41 Rule 1 read with Section 96 of Civil Procedure Code, against the decree and judgment passed in O.S.No.9 of 2019, on the file of the Additional District Judge (FTC), Tenkasi, dated 08.06.2023.

For Appellants : Mr.R.Vignesh
For R1 : Mr.A.Hajamohideen
For R3 to R5 : No Appearance



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JUDGMENT

The First Appeal in A.S.(MD)No.55 of 2024 is filed against the Judgment and Decree, dated 08.06.2023, in O.S.No.9 of 2019 on the file of the Additional District Judge (FTC), Tenkasi.

2. The plaintiff in the suit is the 1st respondent herein, the 1st defendant in the suit is the 2nd respondent herein, 2nd and 4th defendants are the appellants herein, 5 to 8 defendants are the 3 to 6 respondents. The 3rd defendant died during pendency of the suit and the defendants 5 to 7 were impleaded as defendants. For the sake of convenience, the parties shall be referred as plaintiff and defendants as per the ranking in the suit.

3. The suit is filed by the plaintiff for of specific performance based on the sale agreement dated 21.09.2015. The brief facts as stated in the plaint is that originally the schedule of property belonged to one Paulraj, the husband of 1st defendant, father of 2 to 4 defendants. Pending suit, the 3rd defendant died and his legal heirs are impleaded as 5 to 8 defendants.. The plaintiff and the husband of 1st defendant and father of defendants 2 to 4 namely Paulraj had entered into a registered sale agreement dated 21.09.2015 in Doc. No.3243 / 2009 relating to the schedule of property. The sale amount was fixed at Rs.20,00,000/- and an advance



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amount of Rs.18,00,000/- was paid and agreed to complete the sale before 20.01.2016. The said Paulraj stated that in order to lay the access road, the nearby land is necessary and to purchase the same, again the plaintiff paid an amount of Rs.1,50,000/- and the same is on 19.02.2017. As per the said sale agreement the plaintiff was ready and willing to perform his part of contract, but the said Paulraj did not come to complete his part of the contract stating that the road issue. Thereafter the plaintiff requested the said Paulraj to execute sale deed after receiving the balance sale consideration of Rs.50,000/-. But the said Paulraj delayed by stating one reason or the other. The plaintiff issued registered Legal Notice to the said Paulraj on 24.10.2017, but he did not receive the same. But the plaintiff repeated requested the said Paulraj to complete the sale. In the meanwhile, the said Paulraj died on 31.10.2018 leaving the defendants 1 to 4 as his legal heirs. Thereafter the plaintiff approached the legal heirs several times and informed about the sale agreement and requested them to complete the same. But the legal heirs also were not coming forward to complete the sale based on the sale agreement. Hence the plaintiff had filed the suit in O.S.No.9/2019 on 18.01.2019 against the defendants for specific performance on the basis of sale agreement dated 21.09.2015 and was ready to deposit the balance sale consideration of Rs.50,000/- in the Court.



4. The 4th defendant had filed the written statement and the same was adopted by the 1st defendant and 6 to 8 defendants. The defendants had stated that the suit property belongs to their Paulraj. The alleged sale agreement was executed as security for the loan transaction. The 2nd defendant had borrowed loan from the plaintiff on 21.09.2015 and for the said loan, the alleged sale agreement was obtained. There was no necessity to sell the suit property by the father. The burden of repaying the loan amount to the plaintiff is on the 2nd defendant alone who went abroad. The value of the suit property is Rs.80,00,000/-, but in the plaint it is stated that the sale agreement was entered for Rs.20,00,000/- only, which would indicate that the alleged sale agreement is executed for security purpose.

5. The plaintiff had examined himself as PW1, Mr.Esakki Raja was examined as PW2. Mr.Abel Fedrick the 4th defendant was examined himself as DW1. The plaintiff had marked Ex.A1 to A6 and the defendants had marked Ex.B1 and B2.

The Trial Court had framed the following issues:

(i)Whether the Sale Agreement dated 21.09.2015 was executed as a security for the loan?

(ii)Whether the Plaintiff was ready and willing to purchase the scheduled property?



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(iii) Whether the Plaintiff is entitled to get the relief of Specific Performance of Contract?

(iv) To what other reliefs the Plaintiff is entitled for?

After perusing the pleadings, evidence and deposition the Trial Court had allowed the suit. Aggrieved over the same the present First Appeal is filed by the 2nd and 4th defendants raising various grounds.

6. The facts are that the plaintiff Ayyadurai had entered into sale agreement dated 21.09.2015 with the said Paulraj, but the said Paulraj had failed to execute sale deed. The plaintiff was always ready and willing. The sale was agreed for Rs. 20,00,000/-, the plaintiff had paid Rs.18,00,000/-, then paid Rs.1,50,000/- and the balance of Rs.50,000/- is payable. The plaintiff had paid the substantial amount and is ready to pay the balance amount. However, the said Paulraj failed to execute sale deed, then the said Paulraj died, his legal heirs failed to execute the sale and hence the suit. The defendants deny the execution of sale agreement and contended the 2nd defendant Felix Samuvel had obtained loan and the alleged sale agreement was for the security of the said loan. Based on the aforesaid facts and the grounds raised in the appeal, the following points for consideration are framed in the present First Appeal:



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- (i) Whether the plaintiff had proved his readiness and willingness and whether the time is essence of the contract?
- (ii) Whether the suit is filed belatedly and hence there is no readiness and willingness?
- (iii) Whether the suit is filed within limitation?
- (iv) Whether the alleged sale agreement was executed as security for loan transaction?
- (v) Whether the burden to prove is on the defendant to prove that the execution of sale agreement is for the purpose of security for the loan transaction?
- (vi) Whether the burden of proof is on the plaintiff to prove his case for the relief of specific performance?

7. The primary contention of the defendant is that the plaintiff was not ready and willing to perform the contract and hence the plaintiff is not entitled to the relief of specific performance and further the time is essence of the contract. The alleged sale agreement marked as Ex.A1 was executed on 21.09.2015 and as per the said sale agreement the parties ought to have execute the sale deed on or



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before 20.01.2016. The plaintiff had issued suit notice on 24.10.2017. The plaintiff had not taken any steps from 20.01.2016 to perform his part of the contract until the suit notice dated 24.10.2017, which indicates that the plaintiff is not ready and willing to perform his part of the contract within the stipulated time of 20.01.2016. The plaintiff ought to prove that he is ready and willing to perform his part of the contract, except the suit notice dated 20.10.2017 the plaintiff had not produced any evidence to prove that he is ready and willing to perform his part of the contract within the stipulated time.

8. The plaintiff tried to impress upon the Court that the plaintiff had disbursed another payment of Rs.1,50,000/- on 19.02.2017 marked as Ex.A2 and the said Paulraj had executed receipt for the same and hence the same ought to be taken into consideration that the plaintiff is ready and willing to perform his part of the contract. This Court had held the said amount is not paid for the alleged sale agreement in the later paragraphs. For arguments sake, even if the plaintiff's payment of Rs.1,50,000/- on 19.02.2017 is accepted, the plaintiff after knowing the attitude of the appellants had not filed the suit at the earliest and the delay was not explained by the plaintiff. The plaintiff had not explained the delay from 20.01.2016 (the date agreed to perform the contract) to 19.02.2017 (date of second payment) nearly one year one month. Also, had not explained the delay



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from 19.02.2017 (date of second payment) to 20.10.2017 (date of suit notice) nearly eight months. Also had not explained the delay from 20.10.2017 (date of suit notice) to 18.01.2019 (date of filing of suit). Especially the delay from date of suit notice to date of filing the suit is approximately 15 months and the plaintiff had not explained the said delay. The Courts have repeatedly held if the suit is not filed within reasonable time and there is delay in filing then the same would clearly prove that the plaintiff is not ready and willing to perform the contract. This Court in the case of **Lourdhu Mary and other Vs. B.Arokiya Mary** reported in **2014-4 LW 247** had held as under:

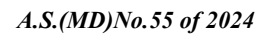
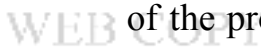
“35.In this case also, as stated supra, even in the year 2003, the plaintiff was aware about stand taken by the appellants, she did not care to file a suit immediately and no explanation was given by the plaintiff for filing the suit after 22 months and therefore, even accepting the case of the plaintiff that Ex.A2 agreement of sale was valid and Ex.A3 receipt was executed by the third defendant and an advance of Rs.8,50,000/- was utilized for the discharge of various debts incurred by the third defendant, having regard to the unexplained delay in filing the suit after knowing the attitude of the appellants, the plaintiff is not entitled to the discretionary relief of specific performance and I hold that the plaintiff was not ready and willing to perform her part of contract and the plaintiff was also not entitled to the relief of specific performance and answered the Point Nos.5 and 6 in favour of the appellants and against the first respondent/plaintiff.”

In the case of **K.S.Vidyanadam and others Vs. Vairavan** reported in **1997 (1) CTC 628 (SC)** it has been held as under:

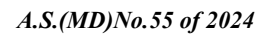


“10.It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the Court by both Sections 10 and 20. As held by a Constitution Bench of this court in Chand Rani v. Kamal Rani (SCC p. 528, para 25) "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident)?: (1) From the express terms of the contract; (2) from the nature of the property; and(3) from the surrounding circumstances, for example, the object of making the contract.”

In the said K.S.Vidyanadam’s case (supra), the facts involved was that six months period was specified in the sale agreement therein for completion of the sale transaction and on expiry of such period, the plaintiff had waited for more than 2 ½ years for issuing the notice. Even though it was held therein that time was not the essence of the contract, the plaintiff must perform his part of the contract,



9. Further, the plaintiff had relied on Ex.A2 payment of Rs.1,50,000/- on 19.02.2017 and submitted that the contract is mutually extended by the said payment. On perusal of the said receipt, the contents of the receipt states that the said payment was paid for purchase of additional land since there is no access road to the suit land. The original contract between the parties is to sell 40 cents of land for Rs.20,00,000/- and Rs.18,00,000/- is paid. The balance of Rs. 2,00,000/- ought to be paid for the said 40 cents of land. In such circumstances, if additional land ought to be purchased to lay road, then additional amount over and above Rs.20,00,000/- ought to be fixed and not within the original agreed amount of Rs.20,00,000/-. Therefore the alleged payment in the alleged receipt in Ex.A2, cannot be taken as payment for original contract but it is payment for purchase of additional land for laying road and it ought to be considered as separate contract. Since the plaintiff had not come forward to pay the balance



Therefore, the points for consideration (i) and (ii) are held against the plaintiff and the suit is liable to be dismissed.

“The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.”

The above Article states if date is fixed, then the period begins to run is from the date fixed for the performance. In the present case the sale agreement states that the plaintiff ought to pay the balance amount on or before 20.01.2016 and register the sale deed. Which means the time begins from the date of the contract i.e. 21.09.2015 and the upper time limit fixed is 20.01.2016 for performance of the



contract. If the sale is not executed on or before 20.01.2016, then the refusal is from 20.01.2016, then the time begins from 20.01.2016. Then the suit ought to be filed on or before 19.01.2019. The suit is filed just one day before i.e. 18.01.2019. Therefore, the suit is filed within limitation of three years period. And, the point for consideration (iii) is held against the defendants and the said plea of the defendants on limitation is rejected.

11. The next points for consideration stated in (iv) and (v) is whether the alleged sale agreement was executed as security for loan transaction and whether the burden to prove is on the defendant to prove that the execution of sale agreement is for the purpose of security for the loan transaction? It is settled principle that the person pleading a contention ought to prove the same. In the present case the defendants are pleading that the alleged sale agreement was executed as security for loan transaction and applying the said settled principle then the defendants ought to prove the same. However, the crucial question would be whether it is necessary to prove the same to grant the relief of specific performance to the plaintiff, then the answer is “no and not necessary”. The burden of proving specific performance is independent of burden of proving loan transaction and the burden fixed on the plaintiff to prove specific performance would not depend on the burden fixed on the defendant to prove loan transaction.



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In short, the burden of the plaintiff cannot be set off on the defendants. The initial burden is on the plaintiff to prove that the alleged sale agreement was executed for the purpose of the selling the property. In the present case even though the defendants had admitted the execution of the sale agreement but denied it has been executed with an intention to sell the property. When the said execution is denied and defended by the defendants by pleading loan transaction, then the defendants ought to prove that the alleged transaction is for loan transaction. Now-a-days the prevailing practice is to execute sale agreement for loan transaction and this Court is taking judicial notice of the same. Having taken judicial notice, this Court perused the documents filed by the defendants, wherein the defendants had filed guideline value and encumbrance certificate as Ex.B1 and B2. The same is marked to prove the market value of the property is over and above Rs.80,00,000/-. When the value of the property is more than Rs. 80,00,000/-, the alleged sale agreement states as Rs.20,00,000/-, no prudent man would sell the valuable property for a lesser value that too three times lesser than the original value. Further the defendants stated that the money was borrowed by the 2nd defendant and not by the father. Hence the alleged sale agreement is only for loan transaction. And the points for consideration (iv) and (v) are answered in favour of the defendants and against the plaintiff.



12. Further even if the same is not for loan transaction and even if the alleged sale agreement is genuine, the plaintiff had to prove his case for the relief of specific performance. In the present case as already held supra that the plaintiff had not explained the delay of more than 15 months for filing the suit and consequently there is no readiness and willingness on the part of the plaintiff and hence the discretionary relief of specific performance cannot be granted to the plaintiff. Hence the point for consideration (vi) is held against the plaintiff.

13. It is pertinent to state herein the Trial Court had completely dealt with the plea of the defendants and granted the relief of specific performance to the plaintiff, thereby the Trial Court had shifted the burden on the defendants to prove that the alleged sale agreement for granting the relief of specific performance to the plaintiff. It is settled law that the plaintiff who is seeking the relief of specific performance ought to prove the same and he had to stand on his own legs. Especially the readiness and willingness on the part of the plaintiff ought to be analyzed independent of the defendants' plea, but the Trial Court had failed to do so. But the Trial Court had taken the "loan transaction" plea of the defendant and had held that the defendants had not submitted any evidence to prove the same is loan transaction and had granted the relief of specific performance to the plaintiff, thereby the Trial Court had completely misdirected itself. Hence the judgment of



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the Trial Court is perverse and the same is liable to be set aside. Even though the plaintiff has not sought any alternative prayer, this Court is inclined to grant the refund, because the amount is huge. Further, the defendants have agreed to refund the amount. For the sake of justice, this refund is granted to the plaintiff. Therefore, the defendants are directed to deposit Rs.18,00,000/- with 6% interest per annum from the date of suit, ie., 18.01.2019, less the sum already deposited, if any, before Trial Court within a period of three months from the date of receipt of a copy of this judgment. On such deposit, the plaintiff is permitted to withdraw the same. If the defendants fail to deposit within three months, the plaintiff is at liberty to recover the same by filing execution petition.

14. For the reasons stated supra, the judgment and decree dated 08.06.2023 passed in O.S.No.9 of 2019 on the file of the Additional District Judge (FTC), Tenkasi, is set aside and the First Appeal is allowed. No costs. Consequently, connected Civil Miscellaneous Petitions are closed.

26.09.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes

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S.SRIMATHY, J.

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To

1. Additional District Judge (FTC),
Tenkasi.
2. The Section Officer,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.

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