



A.S(MD)No.79 of 2012

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Dated: 21.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

A.S(MD)No.79 of 2012

Premila

.. Appellant/ Defendant

Vs.

G.Justus Selvakumar

.. Respondent/Plaintiff

Prayer : This Appeal Suit has been filed under order XLI Rule 1 and Section 96 and 151 of C.P.C., against the judgment and decree in O.S. No.128 of 2010 on the file of the District Judge,Kanyakumari @ Nagercoil dated 11.10.2011.

For Appellant : Mr. A.N.Ramanathan

For Respondent : No appearance

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree passed in O.S. No.128 of 2010 on the file of the District Judge,Kanyakumari @ Nagercoil, wherein the respondent herein has filed a suit for specific performance of contract and the same was decreed. As against the decree and judgment the present appeal has been filed by the defendant.



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2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Trial Court.

3. The averments of the plaint are as follows:

The plaintiff and the defendant entered into an agreement of sale of the plaint schedule property for a sum of Rs.15,50,000/- on 08.09.2009. On the date of sale agreement itself, the defendant received a sum of Rs.6,00,000/- and agreed to complete the sale transaction within six months. The plaintiff was always ready and willing to perform his part of contract by paying the balance sale consideration. The plaintiff approached the defendant several times personally, but she evaded from execution of sale deed by receiving the balance of sale consideration. Further, the plaintiff also approached the defendant through one Karunakaran of Punnarkulam and also one Robin Bodes, S/o. Maria Bright Selvaraj, who was the Vice President of Marungoor Village. But the defendant was not ready and willing to perform her part of contract. The plaintiff issued notice on 11.05.2010, calling up on to fix the date for execution of sale deed within 15 days and the defendant also received the same but sent reply on 17.05.2010 with false allegations. Therefore, the suit was filed for the relief of



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specific performance and for permanent injunction from restraining the defendant from alienating the plaint scheduled property.

4. The brief averments of the written submission are as follows:

The averments made in the plaint para 1 and 2 are admitted. The averments made in para 3 of the plaint are denied as false. The plaintiff is not willing to perform his part of contract as per the sale agreement dated 08.09.2009. The defendant was never ready to perform her part of contract. The period for executing the sale deed is six months but the defendant approached the plaintiff several times but he never turned up. The plaintiff sent legal notice and the defendant received the same and also sent suitable reply. The averment that the defendant was not ready to perform her part of contract is denied as false. The defendant was present in the Edalakkudy Sub Registrar office on 16.04.2010, to execute the sale deed as per the agreement but, the plaintiff did not come there . Therefore, the plaintiff was not ready and willing to perform his part of contract. The defendant is ready to return back the advance amount of Rs.6,00,000/-, therefore, the suit is liable to be dismissed.



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5. Based on the above said pleadings and hearing both sides, the trial Court has framed the following issues:

a) Whether the plaintiff was not ready and willing to perform his part of the contract?

b) Whether the plaintiff is entitled to the relief of specific performance of contract as prayed for?

c) Whether the plaintiff is entitled for permanent injunction as prayed for ?

d) To what relief the plaintiff is entitled to?

6. Before the trial Court on the side of plaintiff, P.W.1 and P.W.2 were examined and documents Ex.A1 to A4 were marked. On the side of the defendant D.W.1 was examined and one document was marked as Ex.B.1.

7. After considering the evidenced adduced on both sides the trial Court decreed the suit for specific performance of contract and dismissed the suit for the relief of permanent injunction. As against the decree and judgment passed in respect of specific performance of contract, the defendant has preferred this appeal on the following grounds.



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Grounds of Appeal

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1) The judgment and decree of the lower court are against law and all probabilities of the case

2)The lower court failed to frame necessary issue regarding the time is essence of contract and no cause of action for the suit

3) the trial Court failed to consider that the plaintiff was not ready and willing to perform his part of contract by paying balance consideration and get the sale deed within six months as per the sale agreement. The trial Court dismissed the suit for the relief of permanent injunction for want of cause of action. Hence it ought to have dismissed the suit for specific performance also.

4) The findings of the trial court, that there is no denial in Ex.A.3 reply notice about the plaintiff's several demand is not correct and in the reply notice dated 17.05.2010, it was stated that my client only approached her for the purpose of sale deed but, whenever my client approached your client he gave evasive reply and not ready to perform his part of contract. The said aspect has not been considered by the trial Court.

5) The trial Court ought to have found that though the sale agreement was executed on 08.09.2009 only specific and definite time of six months was fixed and the plaintiff never did any act to get the sale deed in his favour.



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6)The trial Court failed to consider that the plaintiff has not given any money to get the sale deed by paying balance sale consideration and he only deposed after three months that he had money from the date of decree. The trial Court failed to consider that the evidence of P.W.1 and P.W2 are not acceptable and they are contradictory to each other.

7) The trial Court wrongly placed reliance on the evidence of P.W.2, who is close associate to the plaintiff. P.W.2 is neither attesting witness nor present on the date of agreement. Therefore, he is not a fit person to speak about the readniess and willingness.

8) The trial Court has not given sufficient opportunity to the appellant to adduce oral and documentary evidence and the dismissal of the trial Court are not accordance with law. Therefore, the decree and judgment passed by the trial Court are liable to be set aside .

8. The learned counsel appearing for the appellant/defendant would contend that the respondent /plaintiff and the appellant/defendant entered into agreement and the defendant received advance amount of Rs.6,00,000/- and the sale price was fixed as Rs.15,50,000/- and time was fixed for six months. The respondent/plaintiff was not ready and willing to perform his part of



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contract on the other hand, the appellant/defendant was always ready and willing to perform her part of contract. The respondent/plaintiff has not approached the appellant/defendant to get the sale deed within time but the appellant/defendant approached several times and the plaintiff was not ready to get the sale deed since he has no funds in his hands to purchase the property. Before the trial Court, the appellant/defendant was examined as D.W.1 and she categorically deposed the case but the trial Court without considering the same, decreed the suit based on the evidence of P.W.1 and P.W.2. P.W.2 was examined to prove the readiness and willingness of the respondent /plaintiff but his evidence is unbelievable and the trial Court has decreed the suit without considering the above aspects, hence the appeal is liable to be set aside by allowing this appeal.

9. Despite service of notice none appeared on behalf of the respondent and name was printed in the cause list.

10. This Court has heard the appellant side and perused the documents. Upon hearing the appellant side and perusing the records including the judgment of the trial Court, the points for determination in this appeal are as follows:



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1) Whether the respondent /plaintiff was always ready and willing to perform his part of contract?

2) Whether the respondent/plaintiff is entitled to the decree for specific performance?

3) Whether the decree and judgment passed by the trial Court are sustainable in law and on facts?

4) Whether the appeal is liable to be allowed or not?

5) To what relief the appellant is entitled to?

Point No.1

11. In this case, there is no dispute in respect of execution of agreement and the appellant/defendant also admitted the execution of agreement and receipt of advance of Rs.6,00,000/-. According to the respondent/ plaintiff, he was always ready and willing to perform his part of contract, but the appellant/defendant alone evaded from execution of sale deed. In this context, the respondent /plaintiff was examined as P.W.1 and he has deposed about the readiness and willingness. The P.W.2 was also examined to prove the readiness and willingness of the respondent/plaintiff and he in his evidence stated that, the plaintiff was always ready and willing to perform his part of contract and he only acted as mediator between the respondent/plaintiff and the appellant/defendant and also stated that he approached the appellant/defendant and she



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was requested to execute the sale deed but she evaded from executing sale deed. According to the appellant/defendant she only approached the respondent/plaintiff, within the stipulated time for getting the sale deed but for the reasons best known to him the plaintiff was not ready to get the sale deed in his favour. In this context, it is relevant to refer the evidence of P.W.1. P.W.1 in his cross examination has stated that “ 6 மாத காலத்தில் என்னிடம் பணம் இல்லை என்றும் அதனால் நான் பிரதிவாதியை சந்தித்து விலை எதுவும் எழுதி தருமாறு கேட்கவில்லை என்றால் சரியல்ல. பலமுறை கேட்டிருக்கிறேன் நான் தனிப்பட்ட முறையில் வருமான வரி செலுத்தவில்லை. என்னுடைய கம்பெனி பெயரில் வருமான வரி செலுத்துகிறேன்.அந்த ஆறு மாத காலத்திற்கு நிறுவனத்தின் வங்கி கணக்கில் ரூ. 10 லட்சம் இருந்ததா என்று எனக்கு ஞாபகம் இல்லை” Therefore, from the evidence of P.W.1, he admitted that, he has no any record to prove that he approached the defendant for executing the sale deed within six months period and also he admitted that, he has no record to show that he had sufficient funds to pay the balance of sale consideration. Further the P.W.1 has not stated about the reasons for non issuing notice by expressing willingness to get the sale deed in his favor within six months time fixed in the agreement.

12. Further, on the side of the plaintiff P.W.2 was examined and he deposed that, he along with the plaintiff approached the



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defendant for execution of sale deed by paying the balance sale consideration but, the defendant only evaded from execution of sale deed but the same P.W. 2 during the cross examination admitted that, he has not a relative to the plaintiff and he is not attesting witness in the agreement and he did not know about the period and he did not even remember about the date of agreement. Therefore, the evidence of PW.2 is not sufficient to prove the readiness and willingness of the plaintiff and the plaintiff himself admitted that he has no record to show sufficient funds to pay the the balance amount in his account, hence, the question of approaching the defendant for getting the sale deed by paying the balance sale consideration would not arise. Per contra, the defendant in her evidence stated that, she on 16.04.2010, was waiting before the Sub Registrar Officer to execute sale deed but the plaintiff was not present. To that effect, she also produced Ex.B.1 wherein, she stood as attesting witness in the document registered on the said date, therefore, the plaintiff failed to prove that, he was always ready and willing to preform his part of contract. Thus the point is answered.

Point No. 2

13. This Court in previous point discussed that the respondent/plaintiff was not ready and willing to perform his part of contract. As far as suit for specific performance is concerned, the main



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requirement is that the plaintiff has to prove his readiness and willingness to get the sale deed from the date of agreement till the filing of suit but, in this case the respondent /plaintiff failed to prove his readiness and willingness thereby, he is not entitled to the relief of specific performance of contract. Thus the point is answered.

Point No.3

14. Before the trial Court, the plaintiff has filed suit for specific performance of contract and permanent injunction. The trial Court after hearing both sides dismissed the claim in respect of permanent injunction but based on the evidence adduced by the appellant held that the plaintiff was always ready and willing to perform his part of contract and decreed the suit in respect of relief of specific performance. But the trial Court failed to consider that the respondent /plaintiff not even sent notice within six months time and the notice was issued after expiry of time of contract and also he has not even produced any records to show his financial capacity and he had sufficient funds during the period of agreement for getting sale deed in his favour. Further, the appellant/defendant herself was waiting in the Sub Registrar Office, Edalakudy for executing sale deed in favour of the plaintiff but the plaintiff did not present on that day to get the sale deed in his favour. According to the appellant/defendant, the respondent /plaintiff has no sufficient



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funds thereby, failed to get sale deed in his favour within time.

When the appellant/defendant disputed the capacity of respondent/plaintiff, it is the duty of the respondent /plaintiff to prove that he had sufficient funds to get the sale deed in his favour but his evidence would show that he has not produced documents to prove his financial capacity to get the sale deed, thereby he failed to prove that he had funds for getting the sale deed in his favour. The trial Court without considering the above said aspects decreed the suit in respect of relief of specific performance of contract , thereby the decree and judgment are unsustainable and the same are liable to be set aside.

15. The trial Court correctly declined to grant decree for permanent injunction and the respondent /plaintiff also has not filed either any appeal or cross objection as against the dismissal in respect of relief of permanent injunction. Therefore, the plaintiff is not entitled to relief of specific performance of contract. Thus the point is answered.

Point No.4

16. Inview of the above said discussions, the appeal is deserves to be allowed by setting aside the decree and judgment of



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the trial Court in respect of specific performance and in other aspects the decree of trial Court is confirmed. Thus the point is answered.

Point No.5

17.The plaintiff filed suit for specific performance of contract and this Court already decided that the plaintiff is not entitled for the relief of specific performance. However, the defendant herself admitted that she borrowed advance amount and now she is ready to repay the said amount, thereby as per the admission made by the defendant it is appropriate to direct the defendant to pay the advance amount of Rs.6,00,000/- received by her with interest @ 9% per annum. Though the plaintiff has not sought for the prayer for the relief of return of advance amount under equity and as per the admission made by the defendant, this Court can pass money decree as against the defendant. Thus, the point is answered.

18. In the result, the appeal suit is allowed and the decree and judgment passed in O.S. No.128 of 2010 on the file of the District Judge,Kanyakumari @ Nagercoil are set aside and the suit is O.S. No.128 of 2010 stands dismissed. Money decree is passed in favour of the plaintiff by directing the defendant to pay the advance amount



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of Rs.6,00,000/- with interest @ 9% per annum from the date of agreement till realisation of the amount. Time for payment is two months from the date of judgment. No costs.

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

1. The District Judge, Kanyakumari @ Nagercoil
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL,J.

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