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Court : Chennai

Decided On : Feb-03-2017

Judge : T. Ravindran

Appeal No. : S.A.No. 592 of 2011 & M.P.No. 1 of 2011

Appellant : Devaraji

Respondent : R. Lakshmikantham

Judgement :

(Prayer: Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 20.12.2010 made in A.S.No.3 of 2009 on the file of the Principal District Judge, Chengalpattu, confirming judgment and decree dated 12.09.2008 made in O.S.No.9 of 2005 on the file of Sub Judge, Maduranthagam.)

1. Challenge in this second appeal is made by the defendant against the judgment and decree dated 20.12.2010 made in A.S.No.3 of 2009 on the file of the Principal District Court, Chengalpattu, confirming the judgment and decree dated 12.09.2008 made in O.S.No.9 of 2005 on the file of the Subordinate Court, Madhuranthagam.

2. The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal.

Whether the judgment and decree of the Courts below in decreeing the suit filed by the plaintiff are based upon the perverse findings and also misdirected against the evidence on record?

3. The suit has been laid by the plaintiff for specific performance, possession and permanent injunction.

4. The suit for specific performance is based upon the agreement of sale dated 22.09.2002, which has been marked as Ex.A1. Though the defendant, in the written statement, has taken a plea that the defendant did not intend to sell the suit property in favour of the plaintiff under Ex.A1 and that Ex.A1 had come into existence in connection with the loan obtained by the defendant from the plaintiff, as regards the above defence, it has been admitted by the counsel for the defendant that he is not making any submissions with reference to the same. However, according to the counsel for the defendant, the plaintiff has not established that she has been ready and willing to perform her part of the contract as per the terms of the sale agreement Ex.A1 and in such view of the matter, the relief of specific performance being the discretionary relief should not be granted in favour of the plaintiff. In Ex.A1, the sale price is fixed at Rs.3,65,000/-.

5. On the other hand, it is the contention of the plaintiff's counsel that the plaintiff has always been ready and willing to perform her part of the contract as per Ex.A1 and only, on account of the delaying tactics adopted by the defendant in not coming forward to complete the sale transaction, the plaintiff had been necessitated to institute the suit against the defendant. A perusal of the sale agreement marked as Ex.A1 would go to show that the parties have agreed that the balance sale consideration should be paid to the defendant within three months from the date of the sale agreement. It is not in dispute that under Ex.A1, the defendant has received a sum of Rs.5,000/- on the date of the sale agreement. Further, as per the recitals found in Ex.A1, it is noted that the plaintiff should further make a payment of Rs.60,000/- to the defendant on or before 10.10.2002. However, it is the case of the plaintiff that the sum of Rs.60,000/- was paid to the defendant only on 14.10.2002. Be that as it may, it is found that the receipt of Rs.60,000/- from the plaintiff has not been disputed by the defendant. The point to

be noted is that as per Ex.A1, sale agreement, the plaintiff has not made the payment of Rs.60,000/- within the time stipulated in the agreement.

6. As seen from the evidence of the plaintiff examined as PW1 and her husband examined as PW2, it could be seen that the parties are aware that the time is essence of the sale agreement. Even in the proof affidavit, PW1 has stated that the sale transaction is to be completed within 90 days from the date of the execution of the sale agreement on fulfillment of the terms and condition mentioned therein. Similarly, PW2 also during his cross examination has admitted the time limit stipulated under Ex.A1, expires on 22.12.2002. A perusal of the terms of the sale agreement would go to show that it is only the plaintiff, who has to discharge the loan obtained by the defendant and get the original documents pertaining to the suit properties. The role of the defendant is that he should be ready to execute the sale deed in respect of the suit properties free from encumbrance. Therefore, cumulatively, we will have to see whether the plaintiff has been ready and willing to perform her part of the contract as contemplated under Ex.A1.

7. Inasmuch as the defendant has raised a plea that the plaintiff has not been ready and willing to perform her part of the contract as per the stipulations found in Ex.A1, the plaintiff has to adduce acceptable and reliable evidence to show that right from the date of the execution of Ex.A1 till the date of the filing of the suit and thereafter, even till the date of the decree, she had been ready and has always been willing to perform her part of the contract. When it is found that the period stipulated in Ex.A1 expires on 22.12.2002, it has to be seen whether prior to 22.12.2002, the plaintiff had been ready to complete the sale transaction. The plaintiff relies upon Exs.A2 to 8 to show that she had been ready and willing to perform her part of the contract. Now, according to the plaintiff examined as PW1 and her husband as PW2, even prior to the issuance of Ex.A2 notice, which is sent on 18.12.2002, they had been approaching the plaintiff through their watchman to complete the sale transaction. The same has not been admitted by the defendant. Therefore, according to the plaintiff and her husband PW2, only through their watchman, they had been approaching the defendant to complete the sale transaction. If that be so, the plaintiff should have averred in the plaint that they

had been approaching the defendant through their watchman for completing the sale transaction. The details of the so called watchman and the dates on which he had approached the defendant having not been given in the plaint, even during the course of evidence, though PW1 and PW2 had claimed that they have been approaching the defendant, through their watchman, the details of the watchman, particularly, his name and as to on what dates, they had sent him to approach the defendant etc., are not forthcoming. Therefore, it could be seen that without any basis or foundation, PW1 and PW2 had deposed that prior to 18.12.2002, they had been approaching the defendant through their watchman to complete the sale transaction. Therefore, that aspect of their evidence, without any support, cannot be accepted in any manner.

8. The time limit of Ex.A1 expires on 22.12.2002. Therefore, just four days prior to the same, it appears the plaintiff has moved her little finger to complete the sale transaction by sending a notice, which has been marked as Ex.A2. It has not been established by the plaintiff that Ex.A2 had been duly served on the defendant. On the other hand, even as per the case of the plaintiff, the notice cover sent to the defendant had been returned, which has been marked as Ex.A3. A perusal of Exs.A2 and A3, the evidence of PWs1 and 2 would go to show that the enquiries about the availability of the defendant had been made by the concerned postman only on 23.12.2002. However, it is an admitted fact that Ex.A2 notice had not been served on the defendant and accordingly, the notice cover had been returned. It is the case of the defendant that he had not been served with any notice marked as Ex.A2. When such is the defence of the defendant, the plaintiff should have endeavoured to examine the concerned postman to evidence that he had made due enquiries and despite the service of the notice on the defendant, the defendant had deliberately refused to receive the same. However, with reference to the above aspect of the matter, no evidence is forthcoming. Now, according to the plaintiff, on the next date i.e. 19.12.2002, she had sent a telegram to the defendant as regards the completion of the sale transaction. Admittedly, there is no material forthcoming on the part of the plaintiff that the said telegram had been received by the defendant. Therefore, Ex.A4 would not in any manner advance the case of the plaintiff. On the same day, i.e. 19.12.2002, it is the case of the plaintiff that she had sent another notice through her lawyer to the defendant calling upon

him to complete the sale transaction marked as Ex.A5. Admittedly, Ex.A5 notice has not been served on the defendant. The returned cover has been marked as Ex.A6. The plaintiff's husband examined as PW2 has admitted that it is correct to state that Ex.A5 notice had not been received by the defendant. Therefore, it could be seen that Exs.A2 and A5 notices and the telegram Ex.A3 had not been duly served on the defendant. Now, according to the plaintiff, she had been always ready and willing to perform her part of the contract. Pursuant to return of the cover marked as Ex.A6, it has not been explained by the plaintiff as to what are the further steps taken by her to complete the sale transaction, pursuant to Ex.A1. According to the case of the plaintiff, she had sent another notice through her lawyer to the defendant on 07.07.2003, which has been marked as Ex.A7. Therefore, it could be seen that right from 19.12.2002 till 07.07.2003, there is no material forthcoming on the part of the plaintiff to establish that she had been always ready and willing to perform her part of the contract and thereby, complete the sale transaction. It is found that as Ex.A5 notice had not been received by the defendant, it could be seen that the plaintiff had sent a copy of the notice dated 19.12.2002 i.e. Ex.A5 along with Ex.A7 notice. Therefore, it is evident that the defendant does not have any knowledge about Exs.A2 to A6. In such circumstance, the case of the plaintiff that the defendant has been evading or avoiding the completion of the sale transaction even after the issuance of Exs.A2, 4 and 5 as such cannot be readily accepted.

9. The legal notice sent by the plaintiff marked as Ex.A7 is found to have been received by the defendant. The acknowledgment card has been marked as Ex.A8. Therefore, it could be seen that for the first time as to the readiness and willingness on the part of the plaintiff to complete the sale transaction, the defendant is made aware of the same only through the notice marked as Ex.A7, which is dated 07.07.2003. It is therefore clear that only after the expiry of the time stipulated under Ex.A1, the defendant is put on notice by the plaintiff about the readiness and willingess on her part to complete the sale transaction. Now, according to the plaintiff, the defendant had not responded to Ex.A7. Admittedly, the defendant had not sent any reply to Ex.A7. It is therefore patentthat inasmuch as Ex.A7 had been acknowledged by the defendant and thereafter, as he had not responded to the same either by sending a reply notice or approaching the

plaintiff, the normal conduct that would have been expected of from the plaintiff would be to proceed further as a prudent person and take appropriate steps to complete the sale transaction pursuant to Ex.A1. However, even after the same, the plaintiff has not evinced any interest to take immediate steps to complete the sale transaction. On the other hand, it appears that the defendant had approached the legal services authority complaining that the plaintiff has attempted to disturb his possession in respect of the suit property. Accordingly, it appears that Ex.A9 notice dated 06.01.2005 had been sent by the Legal Service Authority, Madhuranthagam to the plaintiff and to the same, the plaintiff has responded by sending a reply dated 17.01.2005 which has been marked as Ex.A10. It is therefore clear that till Ex.A9 notice, the plaintiff has not shown her readiness and willingness to complete the sale transaction even after the defendant had not cared to respond to Ex.A7. It is therefore obvious from the acknowledgment of the notice marked as Ex.A7 by the defendant under Ex.A8, the plaintiff has not shown or established her readiness and willingness to perform her part of the contract and thereby, complete the sale transaction. Even thereafter, the plaintiff had kept mum and only 17.01.2005 she had responded to the legal Services Authority notice under Ex.A10.

10. Thereafter, it is found that the suit has come to be laid by the plaintiff on 11.02.2005. Therefore, it could be seen that long after the period stipulated in the agreement to complete the sale transaction, the plaintiff has laid the suit seeking the discretionary relief of specific performance only on 11.02.2005. Therefore, it is found that no concrete material is available on the part of the plaintiff as to she had been ready and willing to perform her part of the contract from the date of the agreement i.e. 22.09.2002 till the date of the filing of the suit. As adverted to earlier, Exs.A2 to 6 do not advance the case of the plaintiff inasmuch admittedly the notices and the telegram sent under the same have not been received by the defendant. Only the notice sent on 07.07.2003, marked as Ex.A7 had been received by the defendant. Even thereafter, till the date of the filing of the suit, the plaintiff has not moved her little finger to perform her part of the contract under Ex.A1 and complete the sale transaction. It has not been explained by the plaintiff as to why she should wait till 11.02.2005 to lay the suit for specific performance, after coming to know that the defendant had not responded to the notice sent by

her marked as Ex.A7. This would only go to show that inasmuch as the plaintiff had not been ready and willing to perform her part of the contract, it could be seen that the plaintiff had not evinced interest to lay the suit immediately even after the receipt of Ex.A8 acknowledgment card from the defendant. On the other hand, nearly two years thereafter, she had laid the suit seeking the relief of specific performance. For the said period of two years, there is nill material on the part of the plaintiff to show that she had been ready and willing to perform her part of the contract.

11. Now, according to the defendant, the suit properties are valued at Rs.10,00,000/- even on the date of the sale agreement and therefore, according to him, he had not intended to convey the suit properties to the plaintiff under Ex.A1 for Rs.3,65,000/-. The plaintiff examined as PW1 during cross examination has admitted the suit properties are of the value of Rs.10,00,000/-. However, immediately, she has retracted her above statement. Be that as it may, even as per the evidence of PW2, the plaintiff's husband, it could be seen that the value of the sale transaction had been reduced after negotiation from 6,00,000/-. The above factor also would indicate as to whether at all the defendant would have agreed to enter into a sale transaction with the plaintiff in respect of the suit properties for a sum of Rs.3,65,000/-. Considering the case of the respective parties, it is unnecessary to dwell on that issue any further. It is also to be noted that no material as such has also been placed by the defendant to evidence that the suit property are worth Rs.10,00,000/- on the date of the sale agreement.

12. It is however contended by the plaintiff's counsel that considering the means and financial capacity of the plaintiff, which is also established by the documents marked as Exs.A12 to 14, the Court should hold that the plaintiff had always been ready and willing to perform her part of the contract and only on account of the delay tactics of the defendant, the sale transaction could not be carried through. At the most from Exs.A13 to 14, we could only infer that the plaintiff is possessed of adequate funds. However, the mere possession of adequate means by itself would not lead to the conclusion that the plaintiff has always been ready and willing to perform her part of the contract pursuant to the sale agreement in question from the inception till the culmination of the trial proceedings. As discussed above,

when it is found that the plaintiff has not proved her readiness and willingness to complete the sale transaction by placing acceptable and reliable materials and on the other hand, when it is found that only after the time stipulated in the sale agreement, the plaintiff had issued a notice which had come to be acknowledged by the defendant and even thereafter, the plaintiff having not moved her little finger for more than 2 years to complete the sale transaction and on the other hand, having come forward with the suit only on 11.02.2005 would only go to indicate her non inclination to complete the sale transaction in the wake of the agreement of sale. Therefore, merely on the basis of the Exs.A12 to 14, we cannot accept the plaintiff's case that she had been from the inception ready and willing to perform her part of the contract to complete the sale transaction and that it is only the defendant, who is at fault.

13. It is further argued by the plaintiff's counsel that after the institution of the suit, the plaintiff has deposited the balance sale consideration in the court. However, as rightly argued by the defendant's counsel, the isolated fact, of deposting the balance sale consideration after the institution of the suit by itself would not establish that the plaintiff had been always ready and willing to perform her part of the contract and complete the sale transaction right from the date of the agreement till the culmination of the case as outlined in the various decisions of the apex court and the High Courts. Therefore, the above aspect of the matter would not enure to the benefit of the plaintiff to uphold that she had been always ready and willing to perform her part of the contract throughout i.e. from the date of the agreement till the date of the hearing of the suit and the passing of the decree.

14. However, the cardinal requirement that has to be established by the plaintiff is that she should be always ready and willing to perform her part of the contract to complete the sale transaction. On the other hand, the discussions above made would only go to show that the plaintiff had not been ready and willing to perform her part of the contract and thereby complete the sale transaction. On the other hand, the plaintiff, without any basis or foundation, had thrown the blame on the defendant as if despite the receipt of Exs.A2 and 5 notices and Ex.A3 telegram, he had been evading to complete the sale transaction. However, when the fact remains that the above said notices and telegram had not been received by the

defendant, the question of the defendant evading the sale transaction cannot be countenanced. Only under Ex.A7, the defendant had been put on notice about the readiness and willingness on the part of the plaintiff to complete the sale transaction i.e. after 07.07.2003. Even therefore on finding that the defendant has not favourably responded to the same, the plaintiff had kept mum and two years thereafter, she had come forward with the suit to seek the relief of specific performance. As to why the plaintiff had remained inactive in not getting the sale transaction completed for the above said two years has not been explained by the plaintiff. If really, the plaintiff had been ready and willing to perform her part of the contract, there is no reason as to why she had not come forward with the suit of specific performance immediately after knowing that the defendant had not responded to Ex.A7. Therefore, the above facts seen cumulatively as discussed above would only indicate that the plaintiff had not been ready and willing to perform her part of the contract under Ex.A11 and complete the sale transaction.

15. In such view of the matter, the courts below have completely erred in holding that the plaintiff has been ready and willing to perform her part of the contract and thereby erred in granting the relief of specific performance in favour of the plaintiff.

16. In the light of the above discussions, the judgment and decree of the courts below in granting the relief of specific performance are found to be misdirected against the evidence on record and also based upon the perverse findings. Therefore, the judgment and decree of the courts below are liable to be set aside. Accordingly, the substantial question of law formulated for consideration in this second appeal is answered against the plaintiff and in favour of the defendant.

17. The counsel for the defendant in support of the his contentions relied upon the following authorities reported in 2008 (5) CTC 428 (M.Ranganathan Vs. M.Thulasi Naicker (Deceased) and eight others), 2015 STPL 3968 SC (Nanjappan Vs. Ramasamy and Anr), 1997 STPL 2021 SC (K.S.Vidyanadam and others Vs. Vairavan), 2015 STPL 4458 SC (Padmakumari and Ors. Vs. Dasayyan and Ors.) and 2009 (4) CTC 842 (Shanthi Kawarbai and three others Vs. Sushila). Per contra, the counsel for the plaintiff in support of his contentions relied upon the authorities reported in 2000 (1) MLJ SCC 49 (Syed Destagir Vs.

T.R.Gopalakrishna Setty), (2000) 3 M.L.J. 147 (SC) (A.Abdul Rashid Khan (Dead) and others Vs. P.A.K.A.Shahul Hamid and others), CDJ 2005 SC 694 (Aniglase Yohannan Vs. Ramlatha and Others), 1999 (1) M.L.J. Madras page 20 (Ramakrishnan Vs. Subbiah), 2014 (6) CTC 88 (K.Prakash Vs. B.R.Sampath Kumar), 2014 (6) CTC 319 (Zarina Siddiqui Vs. A.Ramalingam alias R.Amarnathan), (2012) 5 Supreme Court Cases 712 (Narinderjit Singh Vs. North Star Estate Promoters Limited), CDJ 2008 SC 1604 (Silvey and Others Vs. Arun Varghese and Another), CDJ 2001 SC 415 (V.Pechimuthu Vs. Gowrammal and (2006) 3 M.L.J. 131 (SC) Mst. Sugani Vs. Rameshwar Das and Another). The principles of law adumbrated in the above decisions are taken into consideration and followed, as applicable to the facts and circumstances of the case at hand.

In conclusion, the judgment and decree of the courts below are set aside and the suit laid by the plaintiff is dismissed. Accoridngly the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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