
(2008) 12 MAD CK 0348
In the Madras High Court
Case No : A.S. No. 907 of 1995

Mrs. M. Lalitha

APPELLANT

Vs

Nachmmai Achi @ Gandhimathi Achi and Others

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Specific Relief Act, 1963 — Section 16

Citation : (2008) 12 MAD CK 0348

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : S. Srinivasaragavan, for the Appellant; AR.L. Sundaresan for AL. Gandhimathi, for R3 to R5 and R. Subramanian, for R2, for the Respondent

Final Decision : Allowed

Judgement

A.C. Arumugaperumal Adityan, J.—This appeal has been preferred against the decree and Judgment in O.S. No. 93 of 1992 on the file of the Subordinate Judge, Devakottai. The unsuccessful plaintiff is the appellant herein.

2. The short facts in the plaint relevant for the purpose of deciding this appeal are as follows:

It was represented by the defendants 1 and 2 that the plaint schedule property belonged to the father of the 1st defendant and grand-father of the 2nd defendant and that after his death it belonged to his wife Meenakshi Achi, the 1st defendant and the late Alamelu mother of the 2nd defendant. After the demise of Alamelu (mother of the 2nd defendant) there was a family arrangement between the 2nd defendant, her brother Ramu and their father Subbiah Chettiar, whereby the 2nd defendant had become entitled to the entire 1/3rd interest of her mother the late Alamelu. It was further represented that Meenakshi Achi, the mother of the 1st defendant, had executed registered settlement deeds on 21.4.1965 to each of the defendants 1 and 2 respectively in respect of 1/6th share and that defendants 1 and 2 were absolutely entitled to the property and they were in

possession and enjoyment of the same. On the representation made by the defendants 1 & 2, the plaintiff entered into an agreement of sale with the defendants 1 & 2 on 26.2.1989 with the following terms:

(a) that the sale consideration is Rs. 1,96,040/- out of which the defendants 1 and 2 received Rs. 75,000/- as advance (ie., Rs. 50,000/- by draft of Indian Bank, Karaikudi and Rs. 25,000/- in cash)

(b) that the defendants 1 and 2 should execute and register a sale deed at the cost of the plaintiff either to her or to her nominees and give possession of the property within a period of 3 months without any encumbrance or obstruction and receive the balance of the sale consideration and hand over the original deeds, pattas, receipts etc.

The said agreement was typed in duplicate signed by the parties and each is having one duplicate. At the time of the agreement the defendants 1 and 2 also promised to get a power, or consent letter from the father of the 2nd defendant her brother, before the sale deed is executed by way of abundant caution. Both the parties considered that the time is not essence of the contract. Another sum of Rs. 50,000/- was paid towards the agreement on 8.4.1989 which was endorsed by the defendants 1 and 2 on document No. 1. On 22.11.1989 a sum of Rs. 25,000/- was paid and it was also endorsed by the 1st defendant on document No. 1. A sum of Rs. 30,100/- was also paid by Karaikudi Canara Bank cheque on 11.4.1990. Thus a total sum of Rs. 1,80,100/- has been paid towards the said agreement. In the mean while the defendants 1 and 2 gave a xerox copy of special power of attorney from the father of the 2nd defendant, Settlement deeds, the cowle deed and some xerox copies and true copies of documents. They promised to get a power or consent letter from the 2nd defendant's brother and execute the sale deed and get the balance of sale consideration. As there was delay on the part of the defendants 1 and 2 to get such a power or consent letter they were postponing the execution of the sale deed. The plaintiff has always been ready and willing to perform and abide by the contract. While so, the defendants 1 and 2, who are bound to perform their part of the contract evidently with ulterior motives and with the fraudulent intention caused a lawyer's notice dated 3.7.1992 cancelling the said agreement. The said notice was received by the plaintiff's husband RM. Muthappan on behalf of the plaintiff on 4.7.1992 at 12.00 noon. It was falsely stated in the said notice that the plaintiff had paid only Rs. 1,63,300/-, but as against the payment of Rs. 1,80,100/- the plaintiff is ready and willing to pay the balance of sale consideration. A Banker cheque for Rs. 1,62,000/- was also enclosed along with the letter sent by the defendants 1 & 2. The plaintiff's husband had received the said notice and sent a reply on 6.7.1992 to D1 & D2. A public notice was also published in "Dina Malar" on 4.7.1992 by the defendants 1 and 2 through their Advocate as if the contract has been cancelled with effect from 26.5.1992. The husband of the plaintiff has also caused a notice by publication in "Dina Malar" on 8.7.1992 repudiating the contents of the public notice published in "Dina Malar"

on 4.7.1992. The defendants 1 and 2 are not entitled to cancel the contract unilaterally and the method and the manner in which it had been done is fraudulent and not legal. Defendants 3 to 5 are the subsequent purchasers of the plaint schedule property from D1 and D2. They are not bona fide purchasers for the value. Hence, the suit for specific performance of the contract.

3. The defendants 1 and 2 in their joint written statement would contend that the time was considered to be the essence of the contract by the parties concerned. Even after the expiry of three months it is pertinent to note that the plaintiff did not call upon to execute and register the sale deed in respect of the property. The plaintiff never demanded the execution of the registered sale deed and she was not ready and willing to perform her part. The plaintiff has no intention to get the sale deed executed. On the other hand, these defendants were ever ready and willing to perform their part towards the sale agreement and they were waiting for the plaintiff to receive the balance of sale consideration and they were also ready to execute a registered sale deed of the property after receiving the balance of sale consideration. On 8.4.1989 the plaintiff has paid only Rs. 50,000/- as part payment towards the sale agreement and till the expiry of three months, the plaintiff did not pay any other amount. In fact, she had no intention nor source to pay the entire balance towards the sale agreement. After the expiry of three months the plaintiff approached these defendants stating as though she was suffering and unable to pay the entire sale consideration due to some financial crisis. Hence, she requested these defendants to receive the further part payment of Rs. 8,200/- on 22.11.1989 and the plaintiff promised to get the sale deed registered within further 6 months from that date. These defendants refused to receive the said part payment, since the time of the sale agreement has already expired. But the plaintiff at the most requested and promised these defendants that she would not commit any default in payment of balance of sale consideration and on good faith and also on humanitarian grounds, these defendants believed the version of the plaintiff and received Rs. 8,200/- without prejudice to their contention. In spite of repeated requests and demands, the plaintiff was evading the payment of balance of sale consideration. Again, on 11.4.1990 the plaintiff paid another sum of Rs. 30,100/- as part payment towards the sale agreement. These defendants received the amount, advising the plaintiff that she should complete the registered sale deed within 6 months from 22.11.1989 as promised by her. The plaintiff again promised to pay the entire balance within the stipulated period. Totally, these defendants received Rs. 1,63,300/- and except that, these defendants did not receive any amount from the plaintiff. The plaintiff had no intention to purchase the property nor she was willing and ready to purchase the property. These defendants through the mediator viz., Mr. Muthian, S/o. Rm. Al.Ramanathan Chettiar of Kottaiyur, informed the plaintiff to get the sale deed executed after paying the entire balance of sale consideration. These defendants have not received Rs. 1,80,100/- towards sale consideration as alleged in the plaint. In fact Power Deed of Subbiah Chettiar, viz., the father of the 2nd defendant was previously obtained even on

24.2.1989 itself. On 22.11.1989, the plaintiff at the time of part payment of Rs. 8,200/- requested these defendants to get a consent letter from the brother of the 2nd defendant. Only at that time, these defendants agreed to get the consent letter and as per that, on 17.1.1990, a consent letter was obtained from Ramu @ Ramanathan viz., the brother of the 2nd defendant. There was no delay on the part of these defendants to get the consent letter from the father and brother of the 2nd defendant. The plaintiff wantonly delayed the payment of balance of sale consideration for more than two years that is why these defendants issued lawyer's notice on 2.7.1992 enclosing a banker's cheque for Rs. 1,62,000/- excluding Rs. 1,300/- towards the expenses, informing that the sale agreement was cancelled. Further a paper publication was also issued in "Dina Malar" in this regard. Since the plaintiff was not ready and willing to perform her part of the contract, she is not entitled to the relief asked for in the plaint. Hence, the suit is liable to be dismissed.

4. The defendants 3 to 5 in their joint written statement would contend that they are the bone fide purchasers of the suit property for a valuable sale consideration. The defendants 1 and 2 also informed these defendant about the cancellation of the previous sale agreement. On the ground of non performance of the part of the contract by the plaintiff, the previous sale agreement between the plaintiff and the defendants 1 & 2 was already cancelled by the defendants 1 & 2 before executing the sale deed in respect of the plaint schedule property in favour of D3 to D5. Hence, the suit as against these defendants is liable to be dismissed.

5. On the above pleadings the learned trial Judge has framed 4 issues for trial. Before the learned trial Judge P.W.1 was examined and Ex.A.1 to Ex.A.14 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B.1 to Ex.B.6 were marked. On the documentary and oral evidence, the learned trial Judge has come to a conclusion that the plaintiff has failed to perform his part of the contract, has held that the plaintiff is not entitled to the relief of specific performance of contract, dismissed the suit with costs, which necessitated the plaintiff to approach this Court by way of this appeal.

6. The points for determination in this appeal are as follows:

(1) Whether the plaintiff has failed to perform his part of the contract as per the terms of Ex.A.1-sale agreement dated 26.2.1989?

(2) Whether the dismissal of the suit without making any provision for the plaintiff to get back the advance amount of Rs. 1,80,100/- paid by the plaintiff towards part of the sale consideration as per Ex.A.2 & A.3 endorsement in Ex.A.1-sale agreement by the learned trial Judge is sustainable?

(3) Whether the decree and Judgment of the learned trial Judge in O.S. No. 93 of 1992 on the file of the Court of Subordinate Judge, Devakottai, is liable to be set aside for the reasons stated in the memorandum of appeal?

7. Point Nos. 1 & 2:- Ex.A.1 is the sale agreement between the plaintiff and D1 & D2 dated 26.2.1989. The price fixed by the plaintiff and D1 & D2 under Ex.A.1 for the sale of the plaint schedule property was Rs. 1,96,040/- and on the date of sale agreement itself a sum of Rs. 75,000/- was paid by the plaintiff to D1 & D2 (by way of Demand Draft Rs. 50,000/- and by way of cash Rs. 25,000/-) The time stipulated for the performance of the contract under Ex.A.1 was three months from the date of Ex.A.1, which expired on 25.5.1989. But Ex.A.2 endorsement in Ex.A.1 shows that D1 & D2 have received another sum of Rs. 50,000/- on 8.4.1989 towards part payment of sale consideration and on 22.11.1989 the first defendant had received Rs. 25,000/- from the plaintiff as per Ex.A.3 endorsement in Ex.A.1. The fact that the first defendant had received Rs. 25,000/- even after the expiry of the time stipulated under Ex.A.1 ie., on 22.11.1989 itself will go to show that the time was not considered as essence of performing the contract by the parties to the contract. It is the case of the plaintiff that apart from the payments made under Ex.A.1 to Ex.A.3 he has also paid a sum of Rs. 30,100/- on 11.4.1990 by way of Canara Bank cheque. D.W.1 (D1) in her deposition in the chief-examination itself has admitted that apart from the payment under Ex.A.1 to Ex.A.3 the plaintiff has also paid Rs. 30,100/- by way of Canara Bank Cheque and that the said cheque was also realized. But she would say that the defendants 1 & 2 were always ready and willing to perform their part of the contract and they were ready to execute the sale deed. But the plaintiff was never ready and willing to perform her part of the contract, which necessitated the defendants to issue a notice under Ex.A.9 cancelling the agreement itself stating that the plaintiff has failed to perform her part of the contract. Along with Ex.A.9 the defendants had also enclosed a banker's cheque for Rs. 1,62,000/-. The learned Counsel for the appellant would contend that the defendants 1 & 2 are not competent to cancel Ex.A.1-agreement unilaterally under Ex.A.9-suit notice. There is absolutely no material placed before the trial Court to show that after the payment of sale consideration under Ex.A.1 to Ex.A.3 and also by way of a cheque to the tune of Rs. 30,100/-, as admitted by D.W.1, the plaintiff has not issued any notice stating that she was always ready and willing to perform her part of the contract, demanding the defendants 1 & 2 to execute the sale deed in terms of Ex.A.1-sale agreement. According to D.W.1, she had handed over even the document relating to the suit property even in the year 1990 and after issuance of the notice Ex.A.9 they have sold the property to D3 to D5 under the original of Ex.B.3. As per Section 16(c) of the Specific Relief Act, 1963, once the plaintiff has failed to prove that she was always ready and willing to perform her part of the contract, she cannot ask for a decree for specific performance of the contract that too the said sale agreement was cancelled by the defendants under Ex.A.9. Section 16 of the Specific Relief Act, 1963, reads as follows:

Personal bars of relief Specific performance of a contract cannot be enforced in favour of a person-

(a) who would not be entitled to recover compensation for its breach; or

(b) who has been incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant-

Explanation- For the purpose of Clause (c)-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Having failed to issue a notice informing the defendants 1 and 2 to show that she was always ready and willing to perform her part of the contract in terms of Ex.A.1-sale deed, it is not open to the plaintiff to file a suit for specific performance that too the said agreement was cancelled by the defendants under Ex.A.9. The learned Counsel appearing for the appellant during the course of his argument would contend that 3/4th of the sale consideration was already paid by the plaintiff, but the learned trial Judge has dismissed the suit in toto without giving an equitable remedy for return of the part of the sale consideration paid by her, which amounts to Rs. 1,80,100/-. The learned Counsel for the appellant relying on 2008(4) CTC 494 (Fathima Majeed v. Subhapratha Ravikumar), would contend that even though there is no alternative relief asked for in the plaint for return of the part of the sale consideration paid by the plaintiff, the Court is competent to grant such a relief under equity. The exact observation in the above said raito runs as follows:

It is true, the plaintiff has not asked for any alternative relief of recovery of money. Though it was not asked for, since it is for the relief of specific performance, on the ground of equity, the Court can order so.

The learned Counsel for the plaintiff/appellant would contend that she is entitled for 12% interest for the amount to be refunded by the defendants under the suit. As far as the interest is concerned Section 34 of CPC will govern, under which the reasonable future interest will be only 6%. Under such circumstances, I am of the view that the plaintiff is entitle to the refund of Rs. 1,80,100/- with 6% interest from the date of decree till the date of realisation. Point Nos. 1 and 2 are answered accordingly.

8. Point No. 3: In view of my findings and discussion in the earlier paragraphs, I hold on Point No. 3 that the decree and Judgment of the learned trial Judge is liable to be allowed with a modification.

9. In fine, the appeal is allowed with the following modification in the decree and Judgment of the learned trial Judge in O.S. No. 93 of 1992 on the file of the Court of Subordinate Judge, Devakottai:- The appellant/plaintiff is entitled to the refund of Rs. 1,80,100/- (Rupees One Lakh Eighty Thousand and one hundred) only, with 6% interest from the date of decree (i.e., from today) till the date of realisation. In other respects the decree and judgment of the learned trial Judge is confirmed. No costs. Time for payment one month from this date.