IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2015

CORAM

THE HON'BLE Mrs. JUSTICE. S.VIMALA

Civil Suit No.301 of 2007

Duraisingam ... Plaintiff

-vs-

1. Mr. S.R.Jagannathan
2. Mrs. Prema Krishnamurthy ... Defendants

Prayer: Civil Suit filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of the Code of Civil Procedure, 1908, praying for the issuance of: (a) a decree and judgment directing the first respondent to execute and register the sale deed in respect of the schedule properties by specific performance of sale agreement, dated 23.09.2005, between plaintiff and the first defendant failing which the Court may direct the Officer of the Court to execute the sale deed and put the plaintiff in peaceful possession and enjoyment of the suit properties; (b) a permanent injunction restraining the first defendant herein, their men, agents or successors in alienating the suit schedule property to any third parties; (c) to direct the defendants to bear the cost of the suit.

For Plaintiff	:	Mr. V.R.Appaswamee
For D1	:	Mr. R.Gururaj
For D2	:	No Appearance

Judgment reserved on : 27.07.2015

Judgment pronounced on : 27.08.2015

****

<u>J U D G M E N T</u>

<u>Indeed, ***we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown*** - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. .....</u>

<u>[1997 (3) SCC 1 (K.S.Vidyanandam and others v. Vairavan)</u>

"I do not know" - is the answer given by the owner of the property, (D1/D.W.1), when he was asked to comment upon the question as to whether the plaintiff, who is seeking the relief of specific performance of the agreement, was always ready, able and willing to purchase the suit property.

2. Whether this nebulous answer could be construed as amounting to an admission that the plaintiff was ready and willing to perform his part of the contract so far as the agreement is concerned or would it imply that he was not ready and willing.

3. Based upon the sale agreement, dated 23.09.2005, the plaintiff is seeking the relief of specific performance as against the defendants. The first defendant is the owner of the property and the second defendant was the original agreement holder, from whom, the plaintiff has obtained the assignment of the agreement.

4. The suit property is the land and building to an extent of 3600 sq.ft., in Plot No.27, in S.No.443, Velacherry, Chennai – 600 042. The first defendant offered to sell the property in favour of the second defendant and the second defendant accepted to purchase the property for a sale consideration of Rs.66 lakhs.

5. The first and second defendants entered into an agreement on 23.09.2005. The plaintiff was also present at the time of the sale agreement and as such aware of all the terms and conditions of the agreement. ***In fact, the plaintiff is the witness, who has signed in the sale agreement***.

6. The second defendant paid an advance of Rs.3 lakhs on 23.09.2005 and paid a sum of Rs.50,000/- on 20.12.2005 and a sum of Rs.50,000/- on 06.02.2006. The first defendant extended the time for another three months for performance of the contract.

7. The second defendant nominated the plaintiff, as the purchaser, and from the plaintiff, the second defendant received an amount of Rs.4 lakhs, which was the advance paid by her.

8. The plaintiff sent a notice, dated 27.11.2006, demanding copies of title deeds and documents, relating to the suit property. **The first defendant received the notice on 28.11.2006**. Even after the receipt of the notice, the first defendant did not produce the copies of documents and did not send the reply also. As the first defendant was trying to sell the property, the plaintiff was compelled to file the suit.

9. The claim made by the plaintiff has been objected by the first defendant on the following grounds:-

(i) The plaintiff, having deliberately ***suppressed the truth*** and having not approached the Court with clean hands, is not entitled to the discretionary remedy of specific performance.

(ii) There was an urgency to sell the property and therefore, even on 18.09.2005, this defendant received a sum of Rs.3 lakhs as advance and at a later point of time, the sale agreement, dated 23.09.2005, was brought into existence.

(iii) The time is an essence of the contract. The three months time as mentioned in the agreement would indicate that the time is the essence of the contract.

(iv) The second defendant was never ready and willing to perform her part of the contract. Just before the expiry of three months, the second defendant paid a sum of Rs.50,000/-. Though she agreed to perform the contract within a extended period of three months, even that was not done.

(v) Though the second defendant is authorized to assign the agreement in favour of anybody, but that option is available, only so long as the assignment is in time. The second defendant cannot transfer a right which was not even available to her as on date of the assignment, as she has already lost her right before the assignment. The second defendant is deemed to have waived her right under the agreement.

(vi) No-where it is stated that the second defendant was ready and willing to perform her part of the contract. As the second defendant abandoned the contract, the contract stood terminated.

(vii) This defendant offered to return back the advance amount paid, including interest. The second defendant demanded additional two lakhs. When this was protested, the second defendant threatened the plaintiff.

(viii) The conduct of the plaintiff is a tainted one. The plaintiff daringly played a fraud. There were false allegations both in the plaint as well as in the proof affidavit.

(ix) The plaintiff was never ready and willing to perform his part of the contract. Therefore, the suit must be dismissed.

10. The brief averments in the written statement of the second defendant are as follows:-

(i) The second defendant, while accepting the execution of the sale agreement and passing of consideration from her to the first defendant for a sum of Rs.4 lakhs, would submit that she was ready and willing to perform her part of the contract.

(ii) As the agreement provided for assignment of her rights, she assigned her right to purchase the property, in favour of the plaintiff, and intimated the same to the first defendant on 03.08.2006.

(iii) The first defendant was insisting upon further advance amount from the second defendant and he only requested for extension of time, by three months, on account of the fact that there was difference of opinion, between the first defendant and his son, in paying some amount to the first defendant's daughter. **The first defendant requested the second defendant and the witnesses to sign the second sale agreement, dated 23.11.2005, for a sum of Rs.60 lakhs, so that an extra amount of Rs.6 lakhs would be kept out of the knowledge of the first defendant's son. Though the second defendant was reluctant, later on, she signed the second sale agreement, dated 23.11.2005, considering the age and family circumstances of the first defendant. It was the first defendant who was not ready and willing to perform his part of the contract, though the second defendant was ready. Hence, the suit must be dismissed.**

11. Though the second defendant filed the written statement, she did not participate in the trial and her evidence has been closed on 08.03.2012.

12. The following issues are framed for trial:-

1. Whether the sale agreement dated 23.09.2005 is a true and valid document?

2. Whether the nomination under Clause 6 of the agreement is true, valid and enforceable?

3. Whether the plaintiff was ready and willing to perform his part of the obligations?

4. Whether time is essence of the agreement?

5. Whether the suit agreement stood terminated, abandoned and forfeited?

6. Whether the assignment of the agreement of sale by the second defendant to the plaintiff is supported by a valid consideration?

7. Whether the suit agreement suffers from material alteration?

8. Whether the plaintiff is entitled to the equitable relief of specific performance?

9. To what relief, if any, the plaintiff is entitled?

13. The ownership of the property in favour of the first defendant and the existence of the sale agreement between the first defendant and the second defendant is the admitted fact. The assignment of the sale agreement by the second defendant in favour of the plaintiff is challenged as without authority, as it is claimed that the second defendant herself has lost her right to purchase the suit property under the sale agreement. The further issue is with regard to the issue as to whether time could be construed as essence of contract or not? Under such circumstances, the issue to be decided is whether the plaintiff is entitled to the specific performance.

14. The learned counsel for the plaintiff has submitted that the

plaintiff is entitled to the relief of specific performance as the plaintiff has always been ready and willing to perform his part of the contract and that the postponement was only on account of inconvenience suffered by the first defendant, as admitted by the first defendant himself.

14.1. The second contention of the learned counsel for the plaintiff is that, the first defendant did not have the courage to tell that the plaintiff was not ready and willing to purchase the property, but instead he would say that he did not know as to whether the plaintiff and the second defendant were ready and willing to perform their part of the contract; the exact question and answer read as under. The question that was put to D.W.1 during cross-examination:-

"***Q: I put it to you that the plaintiff and the second defendant were always ready, able and willing to purchase the suit property?***

A: I do not know."

14.2 As the answer by the first defendant (D.W.1) would amount to an implied admission that the plaintiff was ready and willing to purchase the property, further proof is not required.

14.3 The third contention is that, as the first defendant had been extending the time of the agreement from time to time, it would be an indication to show that the time is not the essence of the contract and therefore, the plaintiff is entitled to the discretionary relief.

14.4 In support of the said contentions, the learned counsel for the plaintiff relied upon the following decisions:-

i) 1977 (2) SCC 539 (Govind Prasad Chatuvedi vs. hari Dutt Shastri and another);

> "It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immoveable property it will normally be presumed that the time is not the essence of the contract. (vide Gomathinayagam, Pillai & Ors. v. Palaniswami Nadar)(1).

ii) (2008) 4 SCC 464 (Balasaheb Dayandeo Naik vs. Appa Saheb Dattatraya Pawar);

> 10) In Chand Rani (Smt.) (dead) by LRs. Vs. Kamal Rani (Smt.) (dead) by LRs, (1993) 1 SCC 519, a Constitution Bench of this Court has held that in the sale of immoveable property, time is not the essence of the contract. It is worthwhile to refer the following conclusion:
>
> > 19. It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in

> the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

15. The learned counsel for the first defendant would submit that:-

(a) the claim of the plaintiff has to be rejected as the plaintiff failed to prove that he was ready and willing to perform his part of the contract;

(b) neither the plaintiff showed his liquidity in his financial position nor his ability / capacity to raise money to pay the sale consideration;

(c) the sale agreement, even at the time of assignment, was time barred and therefore, the plaintiff cannot make any claim in respect of the time barred agreement;

(d) the time is the essence of the contract and neither the second defendant performed the contract within the time frame nor the plaintiff and hence the plaintiff is not entitled to any relief; (e) the plaintiff is guilty of fraudulent conduct and therefore, he is not entitled to any discretionary relief – the fraud was in respect of in furnishing his correct name to the Court, etc.,

15.1 Contending that, in the case of sale of immovable property, there is no presumption as to time being the essence of the contract and even if initially time is extended, that will not mean that time is not essence of the contract and the case on hand is one that is hit by delay, latches, readiness and willingness, rise in prices, equity and discretion, the learned counsel for the first defendant relied upon the following decisions:-

(i) [1978 TNLJ 62] (VYAPURI GOUNDER Vs. MINOR VIJAYAN):-

> "Though Explanation (i) to clause (c) of Section 16 of the Specific Relief Act, 1963, states that 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, still the very same clause, namely, clause (c) of section 16 states that specific performance of a contract cannot be enforced in favour of a person 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."

(ii) [**AIR 1993** SC **1742**] Chand Rani vs. Kamal Rani):-

".....

24. From an analysis of the above case-law 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,

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....

30. The next question is whether the plaintiff was ready and willing ? The notices which were exchanged between the parties have to be looked into in determining readiness and willingness.....

31.Therefore, even as late as September 24, 1971 the plaintiff was never willing to make the payment of Rs. 98, 000. In this connection, we have already seen the oral evidence. It shows there was no readiness and willingness. We are in agreement with the conclusion of the Division Bench."

(iii) 1993 (1) MLJ 618 (DB) (**The Kancheepuram Kamakshi Amman vs Yamuna Bai And Ors.**):-

"9. We have already referred to the notices issued by the society once a year. ***There is no explanation as to why the society waited for nearly a year after issuing every notice***. Once it was made clear to the society that the defendants would not execute a sale deed as claimed by them, they should have proceeded to enforce specific performance. But, they did not do so. They issued a notice again after a year and filed a suit after expiry of a further year. In the absence of any explanation for this inordinate delay in approaching the court, it can be inferred that the society has waived the performance of contract and abandoned the same. This is a case of unexplained silence and wanton delay and the society cannot escape the consequence of the same by saying that mere delay in seeking specific performance would not disentitle them to get the relief.

> .... In the earlier case, the Division Bench of this Court refused specific performance on two grounds, (1) the plaintiff had given false testimony in the witness box and (2) granting specific performance would be doing injustice to the respondent.

(iv) 1994 (1) LW 321 (DB) : 1994 (2) MLJ 78 (S.S.Chokkalingam v. R.B.S.Mani and five others):-

"24. It is not necessary to refer to the evidence of the respondents as the evidence of the appellant is wholly unsatisfactory. It is clear from what we have stated above that the appellant has never been ready and willing to perform his part of the contract. It is well settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract, vide: H.G. Krishna Reddy and Co. v. M.M. Thimmiah . It is also seen that the appellant has come to court with a false case that no time limit was fixed for completion of the transaction and that he was permitted to pay the amounts in driblets. We have already referred to the letters which show that the appellant himself fixed the time limit and the respondents gracefully agreed for such extensions. ***In spite of such extensions, the appellant failed to perform his part of the contract***. It is also seen that the appellant ha put forward a false case that there was a panchayat. There is no evidence whatever to substantiate that case.

25.......Thus, the appellant is guilty of making a false plea. It is well-known that a person who has come to court with a false case is not entitled to the equitable relief of specific performance, vide: G. chelliah Nadar (died) and four Ors. v. Periasamy Nadarand three Ors. (1993) 2 L.W. 84 and Nallaya Gounder and Anr. v. P. Ramaswami Gounder and three Ors. (1992) 2 L.W. 86.

(v) 1995 (2) MLJ 118 (SC) (N.P.Tirugnanam (Died) by LRs v. Dr. R.Jagan Mohan Rao and Others):-

> "5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Sec.20 of the Specific Relief Act, 1963 (for short, 'the Act'). ***Under Sec.20, the court is not bound to grant the relief just because there was valid agreement of sale***. Sec.16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. ***The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance***. ....

(vi) 1996 (4) SCC 526 (His Holiness Acharya Swami Ganesh Dassji v. Sitaram Thapar):-

> "2. There is a distinction between readiness to perform the contract and willingness to perform the contract. ***By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price***. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There Is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had ever funds, he has to prove his willingness to perform his part of

the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale-deed to the defendant within 7 days of the execution of the agreement, i.e. by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. ***The fact of this case would amply demonstrate that the petitioner/plaintiff was not ready nor had the capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bide for the time which disentitles him as time was of the essence of the contract.***

(vii) 1997 (3) SCC 1 (K.S.Vidyanandam and others v. Vairavan):-

"10. ...As held by a Constitution Bench of this court in Chand Rani v. Kamal Rani, [1993] 1 S.C.C. 519, "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 other words, the court should look at all the relevant circumstances including the time-limits specified in the agreement and determine whether its discretion to grant specific performance should be exercised. .....

11. Sri Sivasubramanium cited the decision of the Madras High Court in Section V. Sankaraninga Nadar v. P.T.S. Ratnaswamy Nadar A.I.R. 1952 Mad. 389 holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if

the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality - and ***the reality is constant and continuous rise in the values of urban properties - fuelled by larger-scale migration of people from rural areas to urban centers and by inflation***. ...... Indeed, ***we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown*** - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. .....

13. In the case before us, it is not mere delay. It is a case of ***total inaction*** on the part of the plaintiff for 2 112 years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff....."

(viii) (2000) 3 MLJ 159 (S.C) (**Ajaib Singh** and **others v.** Smt. **Tulsi Devi):-**

"....plaintiff making averments which are convenient to her without regard for truth and not performing her part of the contract could not get specific performance".

(ix) 2002 (2) L.W.652 (DB) (Valliammal @ Valliatha and two others v. Angammal and four others):-

"8. On appreciation of the oral and documentary evidence, the trial Court found that the plaintiff was not in possession of the A schedule property; and the oil engine pump set was also not installed by the plaintiff. Even though the trial Court found that the plaintiff and the 1st defendant entered into an agreement dated 19.1.1975, pursuant to which the plaintiff made a payment of Rs.6000/- to the 1st defendant, on the date of the agreement, the trial Court disbelieved the payments of Rs.3619.85 under Ex.A4 and Rs.7186/- made under Ex.A5 as claimed by the plaintiff; and further held that the payments made under Ex.A11 to A13 are made on the plaintiffs own accord and not towards the sale consideration and therefore held that Exs.A11 to A13 cannot be relied upon. Accordingly, the trial Court disbelieved the case of the plaintiff; accepted the case of the defendants 2 and 3 that they are bona fide purchasers of the B schedule property; and therefore dismissed the suit.

....

15.1. The execution of the agreement dated 19.1.1975, marked as Ex.A2 , is not disputed before us by either party; nor the payment of Rs.60 00/- made on the date of agreement by the plaintiff. However, the payment of Rs.3619.85 said to have been made under Ex.A4, a sum of Rs.7 186/- made under Ex.A5, as well as payments made vide Ex.A11, A12 and A13 for sum of Rs.3605.15, 9595.20 and 11126.60 on 35.1.1977, 31.1.1977 and 22.2.1977 respectively, were seriously disputed on behalf of the defendants/ appellants herein as the same were not in terms of the agreement dated 19.1.1975.

...

15.3. If that be so, assuming the payments of Rs.3619.85 and Rs.7186 /- were true, we do not find any reason for making such payments by the plaintiff to the 1st defendant when he had accepted to discharge the mortgage loan payable by the 1st defendant to the Land Development Bank, Kangayam. Therefore, we are unable to accept the case of the plaintiff/respondents herein that they made the above payments viz., Rs.3,619.85 and Rs.7,186/- in spite of their obligation to discharge the mortgage debts payable by the 1s t defendant to the Land Development Bank, Kangayam. It is only because of such inordinate delay in discharging the said mortgage debt by the plaintiff, the B Schedule property was brought to sale by the first defendant in favour of defendants 2 and 3 under Ex.A14 dated 21.2.1977, and only one day thereafter, the plaintiff has hassled to discharge the mortgage debt by making a payment of Rs.11,126.60 on 22.2.1977, which fact would evidently prove that the plaintiff was not ready and willing to discharge the mortgage debt payable by the 1st defendant to the Land Development Bank, as per the agreement dated 19.1.1975, and the case of the plaintiff is therefore false and liable to be rejected. The plaintiff, having thus come with a false testimony, is, in our considered opinion, not entitled for the equitable relief as prayed for, as per the ratio laid down in SIRIGINEEDHI SUBBARAYADU Vs. KOPANATHI TATAYYA & OTHERS reported in 1937 MWN 1158, referred supra, which was followed in PACHAIAPPAN & OTHERS Vs. S.P.KOON MARI reported in 1996(2) LAW WEEKLY 1."

(x) 2003 (3) L.W. 479 (DB) (Govindappa Naidu v. C.Sidda Chetty and others):-

"In the said case, it was evident on record that the ***plaintiff has not established his requisite financial capacity to pay the sale consideration within the time stipulated and that the plaintiff has approached the Court only after the sale deed was executed in favour of seventh defendant by D.2 and that plaintiff has been keeping quiet for a long time***. In such circumstances, the Division Bench of the Court held that there is absolutely no evidence to show that plaintiff was ready and willing to perform the contract."

(xi) 2011 (4) LW 97 (SC) (Mrs. Saradamani Kandappan v. Mrs. S.Rajalakshmi and Others):-

"25. ***The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance***. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. ***A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and `non-readiness***'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. *In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality.* As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable.

....

28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S.

Vidyanadam (supra) :

> (i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
>
> (ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was `ready and willing' to perform his part of the contract.
>
> (iii) ***Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also `frown' upon suits which are not filed immediately after the breach/refusal.*** The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. ***The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."***

(xii) 2011 (5) L.W. 30 (SC) (M/s. Citadel Fine Pharmaceuticals v. M/s. Ramaniyam Real Estates P. Ltd., and another):-

> "31. The settled law seems to be that in a case for specific performance of contract relating to immovable property time is not normally of the essence. ***However, this is not an absolute proposition and it has several exceptions.*** .....
>
> 47. ....So from the express terms of the contract and the commercial nature of the transaction and the

surrounding circumstances make it clear that the parties intended time in this case was intended to be of the essence of the contract.

48. Keeping the above principle if we look at the portion of Law in India, it is clear that underSection 9 of the Specific Relief Act, 1963 it is provided as follows:-

> "9. Defences respecting suits for relief based on contract.- Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts."

(xiii) 2012 (4) MLJ 807 (DB) (R.Krishnamurthy v. Vel Jeyakumar and Others):-

> "25. ***The relief of specific performance is an extraordinary equitable remedy that compels a party to execute the terms and conditions of the contract according to the precise terms agreed upon between them or to execute it substantially, so that in the given set of circumstance, complete justice will be done between the parties***. Since, this relief is given exercising the equity jurisdiction, the conduct of the plaintiff should be fair. ***So far as this case is concerned, considering the conduct of the plaintiff and the defendants, interest of parties under the sale agreement, it would not be in the interest of justice to grant the relief of specific performance***. There had been inordinate delay in paying even the advance amount. The plaintiff had chosen to create another dispute on order to purchase time. ***The galloping raise in price with leaps and bounds should also be considered***. Under such circumstances, ***granting of relief of specific performance would put the defendants into undue hardship and put the plaintiff under an unfair advantage and therefore, the grant of specific performance would not be in the interest of justice***. Hence, the refusal of the relief of specific performance by

the trial court is justified."

(xiv) 2012 (6) MLJ 436 (M.M.Yusuf v. R.L.Jadhav (deceased) and others):-

> "... The specific relief is an equitable relief, to be granted on exercising its discretion by the Courts under Section 20 of the Specific Relief Act and the provisions have to be complied with for the grant of such relief."

(xvi) 2007 (1) MLJ 591 (G.Ramalingam v. T.Vijayarangam):-

> "16. Even if for a single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing. In this case, the concurrent finding is that the appellant was not ready to take the sale deed and that is proved by Ex.A-3."

15.2......***Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another; it is a deception to gain by another's loss; it is a cheating intended to get an advantage; a person whose case is based on falsehood has no right to approach the Court and he can be summarily thrown out at any stage of the litigation; a court of equity, it should be remembered must so act as to prevent perpetration of a legal fraud; it is expected to do justice by promotion of honesty and good faith, as far as it ties within its power and a party seeking relief in equity must come to the court with clean hands - are the contentions raised***

by the learned counsel for the first defendant with regard to "Fraud".

15.3. In support of the said contentions, the learned counsel relied upon the decisions reported in **ILR 20 Madras 58 (FB) (Seeni Chettiar v. Santhanathan Chettiar), AIR (38) 1951 SC 16 (Yeshwant v. Walchand), 1994 (1) L.W. 21 (SC) (Chengalvaraya Naidu, etc., v. J.Jagannath, etc.,), AIR 1996 SC 1733 (Municipal Corpn., Delhi v. Kamla Devi), 1997 (2) MLJ 27 (SC) (Panchugopal Barua and Others v. Umesh Chandra Goswami and Others), 1999-2-L.W.87 (Mohan Singh v. Late Amer Singh thro; The LRs), 1998-1-L.W.49 (Thirunavukarasu v. Mariyayee Ammal and 2 others) and 1998-1-L.W.355 (Renuka Devi v. D.Manohara)**.

16. It is the contention of the learned counsel for the plaintiff that time is not the essence of the contract, when the agreement relates to immovable property. Per contra, it is contended that even assuming that time is not the essence of the contract, the plaintiff is expected to perform his part of the contract, within a reasonable point of time.

16.1. It is further contended that in the absence of, a) readiness and willingness on the part of the plaintiff to perform his part of the contract, b) proof of financial capacity of the plaintiff to pay the sale price, c) bonafides on his part in disclosing true facts before the Court, discretionary relief of specific performance should not be granted in favour of the plaintiff.

17. In order to appreciate the contentions raised on both sides, it is necessary to look into the dates and events, as furnished by the learned counsel for the first defendant:-

Date	*Ex.No.*	*Nature of document*	*Page No.*
23.09.2005	Ex.P-1	Agreement of Sale	39
20.12.2005		Rs.50,000/- paid and endorsed – Time extended by three months	41
06.02.2006		Rs.50,000/- paid and endorsed	41
03.08.2006		Authorisation of agreement	41
03.08.2006	Ex.P-2 = D-2a	Letter of D-2 to D-1	45
05.08.2006	Ex.D-3a	Notice by D-1 to D-2	167
16.08.2006		Reply by D-2 to D-1	169
23.08.2006	Ex.D-3b	Rejoinder by D-1 to D-2	171
27.11.2006	Ex.P-3	Notice by plaintiff to D-1	49
23.03.2007		Plaint prepared	
12.04.2007		Plaintiff filed, after caveat period expired A.No.4497/2007 filed. Interim injunction obtained. Vacated	

Date	Ex.No.	Nature of document	Page No.
		on merits, on 07.12.2007. OSA No.124/2008 filed. Dismissed at Admission stage itself, on 27.03.2008. Direction given to list the suit preferably in April 2008.	

18. The original period fixed for performance of the agreement is 3 months. The relevant lines in the sale agreement under Ex.P1 is that the sale shall be completed within 3 months from the date of this agreement. The date of agreement is 23.09.2005. Thereafter, by the consent of both parties, the time has been extended for further period of 3 months on 20.12.2005. This three months time expired on 19.03.2006.

19. There is an endorsement dated 06.02.2006 from which it is evident that a sum of Rs.50,000/- has been paid on 06.02.2006. Thereafter, the 2nd defendant has assigned the agreement in favour of the plaintiff on 03.08.2006. It is to be mentioned that there is no further endorsement for extension of time on and from 06.02.2006. Endorsement did not necessarily would have the effect of extending the period of time. At least, on and from 03.08.2006, whether the plaintiff was diligent enough to get the sale deed executed is the main issue.

20. The plaintiff sent a notice dated 27.11.2006, demanding copies of title deeds and documents, relating to the agreement. The plaintiff has chosen to do so only after three months of his getting the assignment of the agreement. It is not as if the plaintiff had no knowledge regarding the sale agreement and that he got the knowledge only after getting the assignment. In that event, one can expect the plaintiff to take reasonable time in issuing notice. This is a case where the plaintiff himself is a witness under Ex.P1 sale agreement. Therefore, it is well within his knowledge that the period prescribed under the sale agreement is only three months from 23.09.2005. There is no reason as to why there is a delay of three months after getting the assignment of the agreement. Within a reasonable time, the plaintiff has not chosen to complete the sale transaction.

21. This Court, by the conditional order has directed that the suit should be listed for trial during 2008. Despite directions given, the plaintiff has been examined as P.W.1 only on 18.03.2011. The conduct of the plaintiff would only indicate that he should have been interested in dragging on the matter for want of financial capacity to purchase the suit

property. It is not necessary that the plaintiff should have liquid cash ready at all times, but the plaintiff is expected to prove that he got financial capacity to raise money. The plaintiff has not produced any evidence to show that he got the financial capacity to purchase the property. It was brought to the notice of the Court that the plaintiff is a person, doing business in real estate and that he had to take money from the intending purchasers and then he has to pay the vendor. Therefore, the contention that the plaintiff was interested in dragging on the matter and that he was not ready to purchase the property must be true, even though he might have been willing to purchase the property. As already pointed out, readiness and willingness are two different aspects. Therefore, when the plaintiff has not established his readiness to purchase the property, the plaintiff must be non-suited.

22. Even though time is not the essence of the contract, neither the 2nd defendant nor the plaintiff had been ready and willing to purchase the property within a reasonable time from the date of agreement. On this ground also, the case of the plaintiff has to be dismissed.

23. The next contention of the learned counsel for the 1st defendant is that when the enforcement of the contract would bring undue hardship to the defendant and undue advantage to the plaintiff, that contract should not be ordered to be specifically enforced and that this contract is enforced, it would end so and therefore, the suit must be dismissed. It is pointed out that the plaintiff has paid only a sum of Rs.4,00,000/- out of the total sale consideration of Rs.66,00,000/-. Admittedly, the sale price was fixed in the year 2005. One decade is over after the sale agreement. There is sky rocketing increase in prices in immovable properties. At this distant point of time, when there is substantial increase in price, whether it would be equitable to enforce the sale agreement is the issue.

24. Section 20 of the Specific Relief Act is an answer to this issue, which reads as under:

"20. Discretion as to decreeing specific performance.—

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief

merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
(2) The following are cases in which the court may properly exercise discretion not to decree specific performance:—

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or
(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.— The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

> (4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.”

25. From the conduct of the plaintiff pointed out and in view of the galloping price, certainly enforcement of the contract would give unfair advantage to the plaintiff and undue hardship to the 1st defendant. Instead of the plaintiff showing his continuous readiness and willingness to purchase the property, has shown continuous readiness and willingness to protract the proceedings. Even after the Court directing the early listing of the matter, there was no progress in the trial for three years. The suit itself has been filed only on 20.07.2007, even though the plaintiff obtaining assignment of the agreement on 03.08.2006. The case of the plaintiff can be considered leniently provided he has no knowledge regarding the initial terms of the agreement. Having been the witness to the agreement dated 23.09.2015, it is well within his knowledge that the assignment itself was out of time, i.e., at a time when there was no agreement for extension of time for performing the contract. In fact, the Hon'ble Supreme Court has held that in respect of urban properties, where there is tremendous increase in prices, the concept that time is not the essence of the contract in respect of the sale of immovable

property needs relaxation and in fact, the Court has held as under:

(viii) 1997 (3) SCC 1 (K.S.Vidyanandam and others v. Vairavan):-

> "We cannot be oblivious to the reality - and ***the reality is constant and continuous rise in the values of urban properties - fuelled by larger- scale migration of people from rural areas to urban centers and by inflation***. ...... Indeed, ***we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown*** - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. .....
>
> 13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 112 years in clear violation of the term of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff....."

26. Therefore, it is clear that the plaintiff having shown his inaction is not entitled to seek the discretionary relief of specific performance. There is no merit in the suit filed by the plaintiff and the suit is dismissed.

27. When a suit for specific performance is dismissed, then the next question is, whether any other remedy is open to the plaintiff? In

other words, whether he is entitled to refund of the earnest money paid?

28. The agreement is silent about the circumstances under which the plaintiff is liable to forfeit the earnest money paid. When there is a finding that the plaintiff did not prove his readiness and financial capacity to purchase the property, under normal circumstances, this Court would not have ordered return of earnest money paid. However, in the written statement itself, the first defendant has stated that he offered to return the earnest money, but the plaintiff demanded more money.

29. Having regard to the offer made by the first defendant, though long prior to the hearing of the case, still, in order to give a finality to the litigation, this Court feels it appropriate to order the first defendant to return the earnest money. According to both parties, the plaintiff has parted with a sum of Rs.4,00,00/- towards the sale agreement. The first defendant shall pay back Rs.4,00,000/- along with 12% interest from the date of petition till the date of payment within a period one month from the date of receipt of a copy of this judgment.

30. In the result, the suit is dismissed. However, the first defendant shall return a sum of Rs.4,00,000/- along with 12% interest from the date of petition till the date of payment within a period one month from the date of receipt of a copy of this judgment.

27.08.2015

Index: Yes / No
Internet: Yes / No
km/ar

S.VIMALA,J,
km/ar

Pre-Delivery Order in
C.S.No.301 of 2007

27.08.2015