

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21.07.2015

CORAM:

THE HONOURABLE MS.JUSTICE R.MALA

Appeal Suit No.968 of 2004

Judgment reserved on 09.07.2015	Judgment pronounced on 21.07.2015
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S.Udayasankar .. Appellant/1st Defendant

Vs

1.R.Kothandapani ... 1st Respondent/Plaintiff

2.Sivakami

3.Umayal

4.Mekala

.. 2 to 4 Respondents/
Defendants 2 to 4

Prayer: This Appeal Suit (First Appeal) has been preferred under Section 96 of C.P.C., against the judgment and decree dated 30.09.2003 made in O.S.No.76 of 1997 on the file of the Additional Sub-Court, Gobichettipalayam.

For Appellant : Mr.A.K.Kumaraswamy

For R1 : Mr.S.Parthasarathy senior counsel
for Mr.V.Bharathidasan

For R2 to R4 : Mr.N.S.Sivaprakash

JUDGMENT

This Appeal Suit arises out of the judgment and decree dated 30.09.2003 made in O.S.No.76 of 1997 on the file of the Additional Sub-Court, Gobichettipalayam.

2.The averments made in the plaint are as follows:

(i)On 29.01.1990, the defendants entered into a sale agreement with the plaintiff and agreed to sell the property at Rs.7,50,000/- per acre. The time for performance of the contract was fixed as 1 year. The plaintiff has paid Rs.50,000/- as an advance and subsequently, he paid some amounts which was endorsed on the agreement itself.

(ii)The first defendant admitted the total advance amount paid and received as Rs.5,95,000/-. The plaintiff is always ready and willing to perform his part of contract. Since the defendants are postponing the execution of sale deed, the plaintiff issued telegram on 22.07.1996. Later he came to know that on 28.06.1993, the first defendant sold specific acres 0.33 out of 1.50 acres, which was agreed to be sold to plaintiff, to one Balasubramanian. At present, only 1.17 acres is available for sale. Since the defendants are not ready and willing to perform their part of contract, the plaintiff filed the suit for a direction to the first defendant to execute the sale deed covering suit property in favour of the plaintiff on receipt of sum of Rs.2,82,500/- and to pay the costs of the suit or in the alternative, to direct the first defendant to pay the plaintiff a sum of Rs.5,95,000/- with future interest and costs. Therefore, he prayed for decree.

3.The gist and essence of the written statement filed by the 1st defendant, which is adopted by the defendants 2 to 4, are as follows:-

(i)The defendants admitted the execution of the agreement dated 29.01.1990 and also admit the receipt of a total sum of Rs.3,30,000/-. The signature under the endorsement dated 27.07.1993 is forged one. The land covered by the agreement was never delivered to the plaintiff and the defendants are in possession and enjoyment of the same. The plaintiff himself helped the defendants to dispose of the suit property so that he could get back his advance amount. Under such circumstances, the first defendant sold 0.33 acres out of 1.50 acres to one Balasubramanian on 28.06.1993.

(ii)This defendant also expressed his readiness to return Rs.3,30,000/- to the plaintiff, when the suit agreement was cancelled by the plaintiff in May 1993. A Panchayat was convened and this defendant paid Rs.2,50,000/- to the plaintiff. The plaintiff has no right to split the agreement and seek specific performance in respect of 1.17 acres only, since total extent is 1.50 acres. He ought to have impleaded vendee Balasubramanian. Therefore, they prayed for dismissal of the suit.

4.The trial Court, after considering the averments both in the plaint and the written statement and arguments of both the counsel, has framed three issues and considering the oral evidence of P.W.1, P.W.2, D.W.1 and D.W.2 and documentary evidence of Exs.A1 to A15 and B1 to B6, decreed the suit as prayed for in the plaint, against which, 1st defendant/appellant has preferred this appeal.

5.After hearing the arguments of both sides counsel, the following points for consideration are framed:

1.Whether the time is essence of contract?
2.Whether the suit is barred by time?
3.Whether the plaintiff is not entitled to decree of specific performance since he has not complied with the conditions imposed in Ex.A1 sale agreement?

4.Whether the trial Court is right in granting decree of specific performance to the plaintiff?

5.To what relief, the appellant/1st defendant is entitled to?

6.Learned counsel for the appellant submits that as per Ex.A1 sale agreement, total extent is 1.50 acres, but the plaintiff/first respondent has filed the suit only in respect of 1.17 acres, which is not maintainable. He further submits that the plaintiff/first respondent was well aware of the fact that one Balasubramanian has purchased 0.33 acres out of 1.50 acres, but he failed to implead him as party to the suit. The alleged last endorsement under Ex.A7 is not true and genuine and the evidence of P.W.2 is not an admissible evidence. Even the alleged last endorsement under Ex.A7 was taken into consideration, it was made on 27.07.1993, but the suit was filed in the year 1997, so the suit is barred by limitation. It is further submitted that once there was a specific clause in Ex.A1 for deposit of balance sale consideration before the Court at the time of filing the suit, the first respondent/plaintiff ought to have filed the suit after depositing the amount, but he has not complied with that condition. Hence, he has not entitled to decree of specific performance. The above aspects were not considered by the trial Court, therefore he prayed for allowing the appeal. To substantiate his arguments, he relied upon the following decisions:

- (i)1997 (1) CTC 360 (Seeni Ammal v. Veerayee Ammal);
- (ii)(2011) 4 LW 97 (Saradamani Kandappan v. S.Rajalakshmi and others);
- (iii)2012 (1) MWN (civil) 339 SC(Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates Private Limited and another);
- (iv)2003 (2) CTC 109 (Manjunath Anandappa urf Shivappa Hanasi v. Tammanasa and others);
- (v)1997 (2) CTC 417 (Amirtham v. Subbian and three others);
- (vi)1999 (1) CTC 409 (V.S.Palanichamy Chettiar Firm v. C.Alagappan);
- (vii)2010 (2) MLJ 253 (R.Rajaram and another v. T.R.Maheswaran);
- (viii)2014 (4) CTC 330 (P.Samiappan and another v. Rukmani (died) and others);
- (ix)2009 (8) MLJ 693 (SC) (A.K.Lakshmipathy (dead) and others v. Rai Saheb Pannalal H.Lahoti Charitable Trust and others);

7.Resisting the same, learned senior counsel for the first respondent/plaintiff submits that entire clauses of the sale agreement Ex.A1 did not emphasise the time is the essence of the

contract. P.W.2 scribe was examined to prove that Ex.A7 is true and genuine. The trial Court considered all the aspects in proper perspective and rightly granted decree of specific performance. To substantiate his arguments, he relied upon the decision of this Court reported in 2011 (3) MWN (civil) 559 (Adilingam and another v. Narayanan and others) and submits that no necessity for depositing the amount at the time of filing the suit. After passing of the decree, the amount would be deposited before the Court.

8.Heard the learned counsel appearing for the respondents 2 to 4/defendants 2 to 4.

9.Considered the rival submissions made on both sides and perused the oral and documentary evidence and the materials available on record.

Point No.1:

10.The first respondent as a plaintiff filed a suit for specific performance stating that he entered into a sale agreement with the defendants on 29.01.1990, sale price was fixed at Rs.7,50,000/- per acre, the total extent is 1.50 acres, total sale consideration is Rs.11,00,000/- and time for completion of sale is fixed as one year. The plaintiff/first respondent has paid Rs.50,000/- as an advance and subsequently, he paid some amounts to the defendants as per Exs.A2 to A6/endorsements. As per Ex.A7, the plaintiff has paid Rs.2,65,000/- to the defendants on 27.07.1993, for which, the first defendant/appellant made his signature and thereafter, the plaintiff/first respondent has not paid any amount. On 22.07.1996, the plaintiff/first respondent has issued telegrams under Exs.A9 to A12 to the defendants 1 to 4 calling upon them to execute the sale deed. Since the defendants are not ready and willing to execute the sale deed, the plaintiff/first respondent has filed the suit for specific performance or alternatively for refunding the amount of Rs.5,95,000/- paid by him.

11.As per Ex.A1/sale agreement dated 29.01.1990, the time for performance of contract was fixed as one year and the plaintiff/first respondent has paid Rs.50,000/- as an advance. As per Ex.A2, Rs.50,000/- has been paid by the plaintiff/first respondent on 10.02.1990. As per Ex.A3, Rs.60,000/- has been paid by the plaintiff on 17.02.1991 and time for payment was extended to six months. As per Ex.A4, on 18.09.1991, the time for payment was extended to eight months without making any payment. As per Ex.A5, Rs.80,000/- has been paid on 24.03.1992 and time was extended to one more year. As per Ex.A6, Rs.90,000/- has been paid on 22.03.1993 and time was extended to one more year. So the total amount paid by the plaintiff/first respondent was Rs.3,30,000/-. As per Ex.A7/endorsement dated 27.07.1993, it is alleged that the plaintiff/first respondent has paid Rs.2,65,000/-, for which, the first defendant/appellant has made

his signature. Totally, the plaintiff/first respondent has paid Rs.5,95,000/- and time has not been extended.

12. According to the first defendant/appellant, his signature in endorsement under Ex.A7 is forged one. On perusal of Ex.A1, it reveals that name of the scribe has been mentioned and he put his signature. Whereas in Ex.A5, scribe name has not been mentioned. In Ex.A6, neither the name of scribe nor the name of attestor has been mentioned. In Ex.A7 also, signature of scribe and his name were not found.

13. It is seen from the records that one Shanmugam, who was the scribe, was examined as P.W.2. He deposed that he is an author of Ex.A5. But there is no evidence to show that Ex.A5 was written by P.W.2. In Ex.A7 also, it was not mentioned that who is the scribe. Under such circumstances, since P.W.2 is the document writer, he may very well know that his name, address should be mentioned along with his signature and name and signature of the witnesses should also be made on the endorsement. Under such circumstances, the trial Court has erroneously come to the conclusion that Ex.A7 has been proved in accordance with law.

14. P.W.2 in his cross-examination fairly conceded that he knows the procedure for document writing. He deposed that he has written Exs.A5 to A7. As per Ex.A7 dated 27.07.1993, the plaintiff/first respondent has given Rs.2,65,000/- to the first defendant/appellant, for which, the appellant alleged to be made his signature and that endorsement was written by P.W.2. After writing the document, even it is registered or not, the scribe should sign and write his name, registration number, address. Even though P.W.2 knows very well, he has not made the same in Exs.A5 to A7. Furthermore, it is pertinent to note that Exs.A5 and A6 were admitted by the appellant/first defendant. Except Ex.A7, in all the endorsements, name of the attestors were mentioned. So it is the duty of the plaintiff/first respondent to prove that Ex.A7 was written by P.W.2. But there is no evidence was produced by him to show that Ex.A7 was written by P.W.2. So I am of the view, evidence of P.W.2 is not reliable and hence, it is discarded. The first respondent/plaintiff has not proved that Ex.A7 is true and genuine.

15. According to Ex.A6, Rs.90,000/- was paid by the plaintiff/first respondent to the first defendant/appellant on 22.03.1993 and time has been extended to one more year.

16. Now this Court has to see whether the time is essence of contract? At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the appellant/first defendant in respect of time is essence of contract:

(i) In (2011) 4 LW 97 (Saradamani Kandappan v. S.Rajalakshmi and others), in para-27, it is held as follows:

"27. A correct perspective relating to the question whether time is not of the essence of the contract in contracts relating to immovable property, is given by this court in K.S. Vidyanadam and Others vs. Vairavan - (1997) 3 SCC 1 (by Jeevan Reddy J. who incidentally was a member of the Constitution Bench in Chand Rani). This Court observed:

"It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect.

In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fuelled by large scale migration of people from rural areas to urban centres 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." (emphasis supplied)

Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may."

(ii) In 2012 (1) MWN (civil) 339 (Citadel Fine Pharmaceuticals v. Ramaniyam Real Estates Private Limited and another), it was held that the Court to take judicial notice of the fact that in City of Chennai price of real estate is constantly escalating and clear intention of parties as stipulated from agreement was to treat time as essence of contract.

(iii) In 2003 (2) CTC 109 (Manjunath Anandappa urf Shivappa Hanasi v. Tammanasa and others), in para-30, it is held that plaintiff filed suit for specific performance six years after entering into agreement of sale and that too after vendor had sold property to third party. Party seeking specific performance ought to approach Court within reasonable time even if time is not essence of contract. Plaintiff is not entitled to discretionary relief of specific performance in view of long lapse of time.

17. It is well settled dictum of the Apex Court that time is not essence of contract and to prove whether the time is essence of contract, conduct of both the parties to be considered. On going through the documents under Exs.A1 to A6, it is clear that both the parties are very particular about time is essence of contract. Because time is extended periodically as per Exs.A3 to A6. As per Ex.A4, on 18.09.1991, it was endorsed that without paying any amount, time has been extended for eight months. It shows the intention of both the parties is time is essence of contract. So I am of the view, time is essence of contract. Point No.1 is answered accordingly.

Point No.2:

18. Learned counsel for the appellant/first defendant submits that as per Article 54 of the Limitation Act, the suit ought to have filed within three years from the date of Ex.A6 (i.e.) 22.03.1993. As per Ex.A6, one year time has been extended, so the plaintiff/first respondent ought to have filed the suit within three years from 22.03.1993 (i.e.) on or before 21.03.1996.

19. Per contra, learned counsel for the first respondent/plaintiff submits that as per Ex.A7, no time has been extended. So the suit is not barred by time.

20. Admittedly, as per Article 54 of the Limitation Act, "the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused, the period of limitation is three years". So the suit has to be filed within three years from the date of Ex.A6 (i.e.) 22.03.1993. It is to be noted that time for completion of sale is extended for one more year as per Ex.A6. So the plaintiff/first respondent ought to have filed the suit on or before 22.03.1997. Admittedly, he filed the suit on 17.04.1997, after three years from the time extended as per Ex.A6. Therefore, the suit is barred by limitation. Point No.2 is answered accordingly.

Point Nos.3 to 5:

21. Now this Court has to be considered the intention of the parties? This Court has already held that time is essence of contract in point No.1. In Ex.A1 sale agreement, it was specifically

mentioned that if the party Nos.1 to 4 has refused to execute the sale deed and made delay to execute the sale deed, the fifth party can file the suit for appropriate remedy after depositing the amount due to the parties 1 to 4 before the concerned Court.

22.Learned counsel for the appellant/first defendant has mainly focussed upon the above condition and submits that the plaintiff/first respondent has not complied with, so he is not entitled to decree of specific performance.

23.It is true, the plaintiff/first respondent has not deposited the amount before the Court as per the condition in Ex.A1. Now this Court has to decide whether the condition is debarred the plaintiff/first respondent to get the decree of specific performance? At this juncture, it is appropriate to consider the following decisions relied upon by the learned counsel for the appellant/first defendant:

(i) In 2010 (2) MLJ 253 (R.Rajaram and another v. T.R.Maheswaran), wherein it was held that not only should there be an averment in the plaint that the plaintiff was ready and willing to perform his part of the contract but surrounding circumstances must also indicate that the readiness and willingness continued from the date of contract till hearing the suit. It should be taken into consideration to hold whether time is essence of contract or not. Para-31, 36 and 44 are extracted hereunder:

"31. Remedy of specific performance is an equitable remedy. In order to obtain such discretionary relief, plaintiff has to come to the Court with clean hands. Entire facts of the case have to be pleaded. There should be no attempt on the part of the plaintiff to conceal the facts. As a condition precedent for obtaining a decree of specific performance, the plaintiff should comply with all the mandatory conditions as incorporated in the sale agreement. When the sale agreement stipulates a pre-condition so as to enable the plaintiff to obtain a decree of specific performance, the said condition has to be complied with in its letter and spirit. There should be no attempt on the part of the plaintiff to mislead the Court. Whether it be favourable or unfavourable, plaintiff was expected to disclose the entire details of the transaction. The conduct of the plaintiff should be trustworthy. The course of conduct adopted by the plaintiff should be fair and any suppression of material particulars would be treated as unfair, which would dis-entitle him from obtaining the equitable remedy of specific performance.

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36. It is true that in ordinary circumstances payment of the balance sale consideration was not a pre condition for filing a suit for specific performance. However, in cases like the present one, when such a condition was incorporated at the instance of both the parties, such conditions would be binding on the parties. The Court is bound to examine such mandatory conditions when it has to decide as to whether the purchaser should be given equitable relief of specific performance. The conditions regarding payment of balance sale consideration for initiating action for specific performance was incorporated only to ensure that the plaintiff was having the balance amount with him and it was not an offer in paper to pay the balance sale consideration. In fact, the very cause of action for filing a suit for specific performance would arise only on account of the failure of the vendor to register the document in spite of tendering the balance amount and preparing the document in stamp papers. Therefore, the deposit of balance sale consideration was an essential term of contract. The plaintiff was well aware of the importance of the said condition and it was only on account of the said reason he has made an averment in the plaint that he has applied for lodgment schedule to deposit the balance sale consideration in Court. In fact, he has also applied for issuance of a lodgment schedule and the Court was pleased to issue chalan on 27.06.1991 itself so as to enable the plaintiff to deposit the balance sale consideration. However, there was no follow up action on the part of the plaintiff to deposit the amount. The amount was deposited only on 07.04.1995 and that too in pursuance of the direction as contained in the Judgment and Decree dated 05.04.1995. In fact, the factum of preferring an application for issuance of lodgment schedule was taken as a pointer to show the bona fides of the plaintiff. Thrust of the argument of the learned counsel for the plaintiff before the trial Court was also relating to the readiness and willingness on the basis of notice, telegram and the application for lodgment schedule to deposit the amount. The learned Trial Judge without verifying as to whether the amount was deposited in pursuance of such application for lodgment schedule was carried away by the arguments of the learned counsel for the plaintiff and the factum of issuance of lodgment schedule was also taken as a ground to come to a conclusion that the plaintiff was always ready and willing to perform his part of the contract.

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Legal principles on specific performance :-

44. In N.P.Thirugnanam vs. R.Jagan Mohan Rao (Dr), (1995) 5 SCC 115, the legal position with respect to the discretionary relief of specific performance was indicated by the Supreme Court thus

:-

"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 Section 20 of the Specific Relief Act, 1963 (for short the Act). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 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. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his 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."

(ii) In 2014 (4) CTC 330 (P.Samiappan and another v. Rukmani (died) and others), it was held that as per the conditions in Ex.A1, before approaching the Court, the plaintiff has to deposit the amount

before the Court and proceed to file the suit. But the plaintiff has not deposited the amount, so he is not entitled to specific performance. In para-22, it is held as follows:

"22. Despite agreeing to a specific condition that the plaintiffs have to deposit the entire amount or entire sale consideration before the Court and proceed to file the suit, the plaintiffs have conveniently given a go-by to the same. Learned counsel for the defendants also pointed out that the plaintiffs have not deposited the sale consideration as agreed in the agreement. But, by way of reply, learned counsel for the plaintiffs submitted that though it is mentioned in the agreement to deposit the balance of sale consideration before proceeding to Court, it is not mandatory to deposit excepting by direction of the Court. Having agreed to deposit the money as per the pre-condition and having failed to do so, at least, in my considered opinion, the plaintiffs in all fairness, ought to have mentioned the same in the plaint. The plaintiffs have deliberately failed to do so and in view of such omissions, it could be concluded that the plaintiffs have not come to Court with true set of facts."

(iii) In 2009 (8) MLJ 693 (SC) (A.K.Lakshmipathy (dead) and others v. Rai Saheb Pannalal H.Lahoti Charitable Trust and others), it was held that there is admittedly contract for sale which clearly lays down terms and conditions to govern sale transaction. Whether respondent is ready and willing to perform his part of contract. In order to show that appellants were all ready and willing to perform their part of obligation to complete agreement was to bear remaining amount of contract and then agitate matter for specific performance.

24. Learned senior counsel appearing for the first respondent/plaintiff relied upon the decision of this Court reported in 2011 (3) MWN (civil) 559 (Adilingam and another v. Narayanan and others) and submits that no necessity for depositing the amount at the time of filing the suit. After passing of the decree, he deposited the amount before the Court. Para-12 and 15 are extracted hereunder:

"12. ... Therefore, the wordings in both the agreements are different and in the agreement which was the subject matter of the judgment reported in (2010) 2 MLJ 253 (R.Rajram v. T.R.Maheswaran), the agreement holder was directed to deposit the amount in court and file the suit for specific performance. In the circumstances, the learned Judge held that the condition was prescribed under the agreement of sale

and that condition was not complied with and therefore, the agreement holder is not entitled to the relief of specific performance. . . .

15. Therefore, as per the explanation to section 16 (2) of the Specific Relief Act, the plaintiff/first respondent is not obliged to deposit the amount before filing the suit for specific performance and this aspect was not properly appreciated by the learned Judge in the judgment reported in (2010) 2 MLJ 253 (R.Rajram v. T.R.Maheswaran). Therefore, the failure to deposit the amount before the court before filing the suit for specific performance will not disentitle the first respondent from claiming the suit for specific performance and the condition stated in the agreement of sale cannot be enforced in a suit for specific performance as section 16(c) and the explanation attached to that section does not require the person to deposit the amount before filing the suit for specific performance. Hence, the first respondent has not committed any breach and the first substantial question law is answered against the appellant and in favour of the first respondent."

In para-14 of the above decision, it was specifically mentioned about Section 16(c) of the Specific Relief Act, where a contract involves payment of the 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. So it is appropriate to extract Explanations 1 and 2 of Section 16(c), which are as follows:

"16(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."

25. Learned counsel for the first respondent/plaintiff mainly focussed upon the decision of this Court reported in 2011 (3) MWN (civil) 559 (Adilingam and another v. Narayanan and others) and submits that agreement holder shall deposit the amount before the

Court and treat the agreement of sale as sale deed and apply for compulsory registration. In para-12 of the judgment, it was specifically stated that the wordings in both the agreements are different and in the agreement which was the subject matter of the judgment reported in (2010) 2 MLJ 253 (Rajaram v. T.R.Maheswaran, is entirely different. In para-14, it was stated that it is the well known proposition that no one can enter into an agreement against the statute. When the statute does not prescribe or does not compel a person to deposit the balance sale consideration before filing a suit for specific performance, even though there is a clause in the agreement of sale that the party, who applies for specific performance, has to deposit the amount in court, there is no necessity on the part of the party to deposit the amount and if he is capable of proving that he has got the means to pay the balance sale consideration, that is sufficient and there is no necessity on the part of the plaintiff, who files the suit for specific performance, to deposit the amount.

26. Under the aforesaid circumstances, I am deferred with the findings rendered by the learned single Judge in the judgment reported in 2011 (3) MWN (civil) 559 (Adilingam and another v. Narayanan and others). Because intention of the parties are important to decide whether time is essence of contract and to decide the readiness and willingness to perform part of contract. As per the above decision, agreement holder shall deposit the amount before the Court and treat the agreement of sale as sale deed and apply for compulsory registration. In the case on hand, in Ex.A1 sale agreement, there was a specific clause that the plaintiff has to deposit the amount before the Court before filing suit. In such circumstances, the above decision is not applicable to the facts of the present case. Now the Apex Court held that because of rise in price, time is essence of contract has to be considered in immovable property. As per the Contract Act, the condition imposed has to be complied with.

27. As per the decision of this Court reported in 2014 (4) CTC 330 (P.Samiappan and another v. Rukmani (died) and others), in para-22, it was specifically held that having agreed to deposit the money as per the pre-condition and having failed to do so, at least, in my considered opinion, the plaintiffs in all fairness, ought to have mentioned the same in the plaint. The plaintiff may also very well file an application before the trial Court at the time of filing the suit to deposit the amount. But he kept quite all along. Under such circumstances, I am accepting the findings rendered in the above decision. If there is a specific condition in the sale agreement to deposit the amount into the Court before filing the suit, the plaintiff/first respondent ought to have deposited the amount before filing the suit for specific performance and thereafter, this Court will presume that he is ready and willing to perform his part of contract. It is admitted by the plaintiff/first respondent that he

deposited the balance sale consideration only after passing of decree of specific performance. Once the plaintiff/first respondent has prayed for discretionary relief of specific performance, he must come to the Court with clean hands.

28.As per Section 16 of the Specific Relief Act, the plaintiff's readiness and willingness must be in accordance with the terms and conditions of the contract. One of the conditions is that once the plaintiff has come forward with the suit for specific performance, he has to deposit the entire sale consideration and he ought to have complied with the condition.

29.It is not necessary for the buyer to go about jingling money to demonstrate his capacity to pay the purchase price. When a time is fixed for performance, buyer need not show that he had command of ready money even before that date during the time of the contract. That would render meaningless the fixing of a date for performance. Once the defendant is not ready and willing to perform his part of contract, there was a condition that the plaintiff himself deposit the money before the Court.

30.The terms of a contract performable by the plaintiff are of two kinds:

(1) Those that have to be performed before the other side can be called upon to fulfil his promise;

(2) Others that may have to be subsequently performed. The actual performance or readiness to perform the former and an offer to perform the latter should be stated in the plaint. This is the requirement of Section 16. The use of the words that the plaintiff 'was ready' is not decisive that he is not ready. In the case of *mofussil pleadings* some latitude must be given. In *Keddar Lal v. Harilal, Vivian Bose, J.*, observes : "I would be slow to throw out a claim on a mere technicality of pleadings when the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the plaint may be worded".

31.Readiness of the buyer to perform the contract includes financial capacity to pay the stipulated price. The question of willingness turns upon his conduct. The purchaser need not produce money to show his readiness. The difference between readiness and willingness was explained at length by the Allahabad High Court in *Bijai Bahadur v. Shri Shiv Kumar, Mittal, J.*, observes : "Readiness and Willingness are sometimes treated as synonymous but there is a clear cut distinction between the two. While willingness is merely a mental process, 'readiness' has something to do with translating that will into action and is preceded by necessary preparation for being in a position to be ready. In short readiness must be said to be the total equipment of a person who is willing to do a thing before he actually does it. "

32.A buyer who under the contract is required to pay the price within a certain period, and fails so to pay is not entitled to specific performance. Deposit of the price in Court is a manifestation of readiness and willingness to perform the contract. Plaintiff must prove that he had capacity to pay sale money but not necessary to show that he should always carry sale money with him from date of suit till date of decree.

33.As per the dictum of the Apex Court reported in AIR 1999 SC 3029 (Syed Dasthagir v. T.R.Gopalakrishna Setty), in para-11, it is held as follows:

"11.Section 16(c) of the Specific Relief Act, 1963 is quoted hereunder :-

"16.Personal bars to relief - Specific performance of a contract cannot be enforced in favour of a person - (a) and (b) xxx xxx xxx

(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 purposes 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.

It is significant that this explanation carves out contract which involves payment of money as a separate class from Section 16(c). Explanation (i) uses the words "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. This speaks in negative term what is not essential for plaintiff to do. This is more in support of plaintiff that he need not tender to the defendant or deposit in Court any money but the plaintiff must (as per explanation (ii) at least aver his performance or readiness and willingness to perform his part of the contract. This does not mean that unless the Court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. Plaintiff can always tender the amount to the defendant or deposit it in Court, towards performance of his obligation under the contract. Such tender rather exhibits willingness of the plaintiff to perform his part of the obligation. What is 'not essential' only means need not do but does

not mean he cannot do so. Hence, when the plaintiff has tendered the balance amount of Rs.120/- in Court even without Court's order it cannot be construed adversely against the plaintiff under Explanation (i). Hence, we do not find any merit in the submission of the learned counsel for the respondents." (emphasis supplied)

34.It is appropriate to consider the following decisions relied upon by the learned counsel for the appellant:

(i)In 1997 (1) CTC 360 (Seeni Ammal v. Veerayee Ammal), wherein it was held that parties to the suit specifically agreeing to complete contract within stipulated time, time is essence of contract. In para-14, it is held as follows:

"14. Another important feature in this case is that apart from the fact that the plaintiff was not having any money for completion of the sale, she has not taken any steps atleast to deposit the remaining sale consideration into Court at the time of filing of the suit. A perusal of the records show that only on 6.1.1982 i.e., on the date of judgment of the trial Court, she has deposited the balance of sale consideration in the Court. With regard to the above aspect and in the light of Section 16(c) of Specific Relief Act, 1963, I am justified in holding that the plaintiff has not established her case that she was ready and willing to perform her part of the contract even on the date of the filing of the suit."

(ii)In 1997 (2) CTC 417 (Amirtham v. Subbian and three others), wherein it was held that equitable relief of specific performance cannot be granted to the party coming forward with false case and facts. Para-13 is extracted hereunder:

"13.The factum of readiness and willingness to perform the plaintiff's part of the contract has to be judged with reference to the conduct of the parties and attendant circumstances. The facts narrated above will clearly prove that the plaintiff was not ready and willing to perform her part of the contract and that she has not made any demand with the first defendant during the currency period of the said four months to perform her part of the contract. Moreover the plaintiff has come forward with false facts as if she had made a demand during the currency period of the four months, to the first defendant to perform her part of the contract. The Apex Court in the decision

reported in *Lourdu Mari David v. Louis chinnaya Arogiaswamy* AIR 1996 SC 2814, while dealing with the equitable relief of decree for specific performance has held as follows:-

"It is settled law that the party who seeks to avail of the equitable jurisdiction of a court and specific performance being equitable relief, must come to the court with clean hands. In other words the party who makes false allegations does not come with clear hands and is not entitled to the equitable relief."

The above said principle will apply to the facts of the present case also. The facts narrated above will clearly prove that the plaintiff/appellant has not come forward with clean hands, and on that ground this appeal has to be dismissed. "

(iii) In 1999 (1) CTC 409 (*V.S.Palanichamy Chettiar Firm v. C.Alagappan*), wherein it was held that mere filing of suit within period of limitation will not absolve plaintiff from showing his readiness and willingness to perform his part of agreement and any non performance was not due to his fault. Para-16 is extracted hereunder:

"16. The agreement of sale was entered into as far back on February 16, 1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within time granted by the court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years period is prescribed for filing the suit for specific performance of contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court as a matter of course allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial

court and 3 years of its confirmation by the appellate court? It is not the case of the respondent-decree holder that on account of any fault on the part of the vendor-judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the decree-holder-respondents as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the decree holder-respondents and no extension of time be granted to them to comply with the decree."

35.As per Chapter-II of the Indian Contract Act, it deals with "Contract". Ex.A1 sale agreement is neither void nor voidable contract and the same has not been challenged. On considering the present economy, inflation and steep rise in price, there was a specific clause mentioned in Ex.A1 that before approaching the Court, the party must deposit the amount into the Court and then proceed for filing suit. Admittedly, that clause has not been challenged. Until he paid that amount, he cannot take shelter under Section 16(c) of the Specific Relief Act, as there is no necessity for jingling amount. Under such circumstances, I am fully agreed to the findings rendered by the learned single Judges of this Court in 2010 (2) MLJ 253 (R.Rajaram and another v. T.R.Maheswaran) and 2014 (4) CTC 330 (P.Samiappan and another v. Rukmani (died) and others);

36.Considering the aforesaid decision along with the facts of the present case, I am of the view, since there is specific clause in the provision, it is not against statute. As per the above decision in AIR 1999 SC 3029 (Syed Dasthagir v. T.R.Gopalakrishna Setty),, the plaintiff can always tender the amount to the defendant or deposit it in Court, towards performance of his obligation under the contract. Such tender rather exhibits willingness of the plaintiff to perform his part of the obligation. What is 'not essential' only means need not do but does not mean he cannot do so. In such circumstances, I am of the view, the plaintiff/first respondent is not ready and willing to perform his part of contract. Point Nos.3 to 5 are answered accordingly.

37.In view of the answers given to Point Nos.1 to 5, I am of the considered opinion, time is essence of contract and the plaintiff/first respondent is not always ready and willing to perform

his part of contract. The above aspects are not considered by the trial Court. When the plaintiff has filed the suit for specific performance, he must come to the Court with clean hands. But he has not proved that Ex.A7 endorsement dated 27.07.1993 is true and genuine and also not complied with the condition imposed in Ex.A1. Hence, the plaintiff/first respondent is not entitled to the decree of specific performance. However, the first respondent/plaintiff is entitled to refund of amount of Rs.3,30,000/- which was paid by him to the first defendant/appellant with interest at the rate of 6% per annum from the date of filing the suit till the date of realisation. Therefore, the decree and judgment passed by the trial Court are unsustainable and they are hereby set aside.

38.In fine,

- The Appeal Suit is partly allowed.
- The decree and judgment passed by the trial Court in O.S.No.76 of 1997 are hereby set aside.
- The first respondent/plaintiff is entitled to only the refund of Rs.3,30,000/- with interest at the rate of 6% per annum from the date of filing the suit till the date of realisation.
- No costs.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kj
To

1.The Additional Sub-Court, Gobichettipalayam.

2.The Record Keeper
V.R. Section, High Court, Madras.

+1cc to Mr.A.K.Kumarasamy, Advocate, S.R.No.36710
+1cc to Mr.V. Bharathidasan, Advocate, S.R.No.36980

TEJ(CO)
EU(20/08/2015)

Appeal Suit No.968 of 2004