

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED:02.12.2016
CORAM:
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.687 of 2010

- 1.Vijayalakshmi
- 2.Prabhuram
- 3.Anuradha
- 4.Leela Krishnan
- 5.Minor.Abinaya

rep. By Father & Guardian Leela Krishnan
Lakshmapuram Village,
Kundalapatti Mazara, Pollachi.

...Appellants/Defendants 1
Vs

A.Vadivel

... Respondent/Plaintiff

This appeal is filed under Order 41 Rule 1 r/w Section 96 C.P.C. against the judgment and decree dated 04.11.2009 passed in O.S.No.759 of 2007 on the file of Additional District & Sessions Judge (Fast Track-1) Coimbatore.

For Appellants : Mrs.Chitra Sampath
Senior Counsel for
Mr.R.Govindaraj
For Respondent : Mr.Aditya Karthik
for M/s.N.Anand Venkatesh &
C.Usha

J U D G E M E N T

The defendants who have suffered a decree for specific performance in O.S.No.759 of 2007 on the file of the Additional District & Sessions Judge (Fast Track-1) Coimbatore are the appellants.

2. The said suit was filed by the respondent on the basis of the agreement of sale dated 1.7.2004 entered into between the parties. In and by the said agreement, the defendants had agreed to sell an extent of nine acres and seven cents at the rate of Rs.1,13,000/- per acre. Total consideration worked out to Rs.10,24,910/-. The plaintiff had paid an advance of Rs.50,000/- and time for performance was fixed as three months.

2. It is the case of the plaintiff that he has always been

ready and willing to perform his part of the contract and the defendants sought time on the ground that the first respondent is not well and that court permission for the sale of the share of the minor could not be obtained. The plaintiff claimed that he had sent a notice dated 27.09.2004 to the 2nd defendant alone and the 2nd defendant managed to see that the notice is returned to the sender. Thereafter, on 20.12.2005, the defendants had issued notice through their counsel to the plaintiff stating that the agreement stands cancelled. The plaintiff sent a reply dated 30.12.2006 to the notice dated 20.12.2005 seeking performance of the agreement. The plaintiff claimed that after the receipt of the notice dated 20.12.2005, there was a panchayat and the defendants had agreed to execute the sale deed after obtaining permission from the Court. The defendants sent their reply on 6.1.2007 denying the allegations in the notice dated 30.12.2006. The suit came to be filed on 26.9.2007.

3. On the above pleadings, the plaintiff would contend that he has been ready and willing to perform his part of the contract. It is the defendants who have taken time on one pretext or other and therefore, he is entitled to specific performance.

4. The suit was resisted by the defendants contending that sending of the notice dated 27.09.2004 is false. In any event, no notice was issued to the other parties to the agreement. They would also contend that they had legally cancelled the agreement by their notice dated 20.12.2005 and the plaintiff who had slept over his rights for nearly three years, cannot be favoured with a decree for specific performance. On the above pleadings, learned Trial Judge framed the following issues:

- 1) Whether the claim of the plaintiff that he was always ready and willing to perform his part of the contract and take the sale as per the agreement dated 1.7.2004 is true?
- 2) Whether the parties intended time to be essence of the contract?
- 3) Whether the suit is barred by limitation?
- 4) Whether the plaintiff is entitled to a decree for specific performance?
- 5) To what other relief, is the plaintiff entitled to?

5. The plaintiff was examined as PW1 and Exs.A1 to A14 were marked on his side. The 2nd defendant was examined DW1 and Exs.B1 to B3 were marked.

6. On a consideration of the entire evidence on record, the learned Additional District & Sessions Judge (Fast Track-1) Coimbatore came to the conclusion that time is not the essence of the contract, since the issue relates to the sale of immovable properties. He would also find that the plaintiff has been ready and willing to perform his part of the contract based on the notice dated 27.09.2004.

7. On the above findings, the learned Additional District & Sessions Judge (Fast Track-1) Coimbatore decreed the suit for specific performance.

8. Aggrieved by the said judgement and decree, the defendants have filed the above appeal.

9. I have heard Mrs.Chitra Sampath, learned Senior counsel appearing for the appellants and Mr.Aditya Karthik, learned counsel appearing for the respondent.

10. The following points emerge for determination in the appeal.

1. Whether the conclusion of the Trial Court that the plaintiff has been ready and willing to perform his part of the contract is correct?

2. Whether the plaintiff is entitled to discretionary relief of specific performance, in view of delay in filing the suit?

3. Whether the suit is barred by limitation prescribed under Article 54 of the Limitation Act 1963?

Point Nos. 1 and 2

11. Since both the points are interlinked, I propose to deal with them together.

Certain facts which are not in dispute are as follows:

The agreement of sale dated 1.7.2004; The sale price fixed at Rs.10,24,910/-; the plaintiff has paid only a sum of Rs.50,000/- as advance; and the agreement prescribed a three months' time for its performance.

12. Though the plaintiff would allege that he had sent a notice on 27.9.2004 to the second defendant alone seeking performance and the same was returned unserved, he had not offered any explanation for not sending notices to the other defendants, who are parties to the contract. The learned counsel appearing for the respondent would take me to the said notice to show that the plaintiff has expressed his readiness and willingness to pay the balance amount and take the sale deed. In spite of best efforts, the learned counsel is unable to point out any avement to that effect in the said notice. All that the notice reveals is that the defendants wanted time and the plaintiff is ready to cooperate with them. As already pointed out, the said notice was sent only to the second defendant and not to the others. No explanation has been offered by the plaintiff for not sending notice to other parties to the contract.

13. Apart from the above, the defendants had by their notice dated 20.12.2005, pointed out that the time for performance was fixed as three months and the same expired on 30.9.2004 and since the plaintiff has not come forward to pay the balance sale consideration and take the sale deed within the time

agreed, the agreement has become unenforceable and in the said notice, it has been made clear that the agreement stands cancelled and the advance amount of Rs.50000/- was also forfeited. Even after the receipt of that notice, the plaintiff does not react immediately. He sends another notice on 30.12.2006, almost after a year, making various allegations and claiming that after the receipt of the notice dated 20.12.2005, he had approached the defendants along with Panchayatdars and that all the defendants have agreed to execute the sale deed in favour of the plaintiff after getting permission from the Court.

14. On 6.1.2007 the defendants have sent a reply denying the claim made in the notice dated 30.12.2006 particularly the alleged Panchayat. The plaintiff sent a rejoinder to the said reply on 23.01.2007. The said rejoinder was replied to on 26.2.2007. From the notices dated 20.12.2005, 6.1.2007 and 26.2.2007 issued by the defendants, it is clear that the defendants had claimed that the time is essence of the contract and the plaintiff was never ready and willing to perform his part of the contract and take the sale deed. In spite of three notices, the plaintiff waited nearly for seven months from 26.2.2007 to 26.09.2007 to file the suit. The plaintiff has caused enormous delay at every stage. Though he had chosen to issue notice on 27.9.2004, which was according to him returned unserved, he did not follow up with any other action till the defendants issued a notice nearly after a year and three months on 20.12.2005. After the receipt of the said notice dated 20.12.2005, the plaintiff waited almost a year and 10 days to send a reply on 30.12.2006. From 30.12.2006, the plaintiff waited almost nine months till filing of the suit on 26.9.2007. Thus the total delay on the part of the plaintiff comes to more than three years.

15. Though the plaintiff in his notice dated 30.12.2006 would claim that there was a Panchayat and at the instance of Panchayatdars, the defendants had agreed to execute the sale deed, after obtaining permission from the court, the said plea was given up in the plaint. Therefore, the plaintiff does not have any explanation for the delay between 20.12.2005 and 26.09.2007. It will be useful to refer the judgement of the Hon'ble Supreme Court in Saradamani Kandappan vs. Rajalakshmi reported in 2011 4 CTC 640, wherein the Hon'ble Supreme Court had extracted the principle laid down in K.S.Vidyanadam and others v.Vairavan reported in 1997 1 CTC 628 which reads as follows:

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

(i) The 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) The 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. The 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 that 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 the 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."

In 2015, in Padmakumari and others vs. Dasayyan & ors reported in 2015 8 SCC 695, the Hon'ble Supreme Court has held that the time stipulated in the agreement should be considered and given some importance.

16. This Court had held that the suit being filed within the period of limitation will not alone entitle the plaintiff to the relief of specific performance. The plaintiff should also explain the delay in approaching the Court for being favoured with a decree for specific performance. As already pointed out there is no explanation on the part of the plaintiff, for the delay that had occurred in filing of the suit. Only possible conclusion that could be reached in the given circumstances is that the plaintiff was not ready and willing to perform his part of the contract and therefore, he would not be entitled to the discretionary relief of specific performance.

17. The learned District Judge held that time not being essence of the contract and the plaintiff having approached the court within a period of limitation is entitled to the decree for specific performance. I am unable to agree with the said conclusion of the learned Additional District & Sessions Judge (Fast Track-1) Coimbatore. The plaintiff would claim that since the 5th respondent was a minor and the defendants had not obtained permission for sale of her share in the property from the competent court, he had to wait for some time to seek the relief of specific performance. This explanation was given only after 20.12.2005. Before 20.12.2005, the defendants have made it very clear that the plaintiff had not come forward to take the

sale deed by paying the balance sale consideration within the stipulated period under the agreement.

18. Therefore, I do not think that the plaintiff would save himself by contending that the defendants had failed to get permission under Section 8 of the Hindu Minority and Guardianship Act. In view of the above findings, the plaintiff is not entitled to the relief of specific performance. As such the judgement and decree in O.S.No.759 of 2007 on the file of Additional District & Sessions Judge (Fast Track-1) Coimbatore will have to be set aside and are accordingly set aside.

19. In fine, the appeal is allowed setting aside the judgement and decree in O.S.No.759 of 2007 on the file of Additional District & Sessions Judge (Fast Track-1) Coimbatore. However, there shall be no order in the appeal, Considering the fact that the plaintiff had not even prayed for refund of advance in the suit, I have no other option but to dismiss the suit in O.S.No.759 of 2007 on the file of Additional District & Sessions Judge (Fast Track-1) Coimbatore. Consequently the connected M.P.No.1 of 2010 and M.P.No.1 of 2012 are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vk

To
The Additional District &
Sessions Judge (Fast Track-1)
Coimbatore.

+1 cc to M/s.N.Anand Venkatesh Advocate sr 71431
+1 cc ot M/s.R.Govindaraj Advocate sr 71756

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