

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 10.11.2016

Judgment pronounced on : 16.11.2016

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

S.A.No.216 of 2010

and

M.P.No.1 of 2010 and CMP.No.9747 of 2016

G.Raju

.. Appellant

Versus

V.Saraswathi Ammal

.. Respondent

Prayer: Petition filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree as made in A.S.No.22 of 2006 dated 30.07.2008 on the file of the Additional District Judge, Fast Track Court No.1, Poonamallee reversing the judgment and decree made in O.S.No.427 of 1991 dated 02.09.2005 on the file of the Sub Court, Poonamallee.

For Petitioner : Mr.S.V.Jayaraman

For Respondent : Mr.A.N.Viswanatha Rao

JUDGMENT

The suit for specific performance filed by the respondent herein was allowed by the Trial Court and the same has been confirmed by the first Appellate Court. Aggrieved by that, the defendant in the suit has preferred this appeal on the ground that the Courts below have failed to appreciate the terms of agreement, where the time was essence of the contract and the plaintiff was not ready and willing to perform his contract within the time prescribed. The Courts below however, failed to appreciate the fact that there was inordinate delay in causing pre-suit notice and also unexplained delay in filing the suit even after denial of performing the contract by the appellants. On this score, arguments was advanced by the learned counsel for the appellant, which was countered by the learned counsel appearing for the respondent on the ground that having accepted Rs.1,00,000/- out of total consideration of Rs.1,20,000/-, the appellant herein evaded execution of the sale deed. Therefore, after causing notice, suit has been filed and in pursuance of

the decree passed by the Trial Court, the balance sale consideration has been deposited. Therefore, there is no reason to interfere the well considered judgments of the Courts below.

2. The admitted fact of the case is that Mr.G.Raju, who is the appellant herein entered into a sale agreement with Saraswathi Ammal, who is the respondent herein in respect of the property morefully explained in the suit schedule for sale consideration of Rs.1,20,000/-. The said sale agreement is dated 04.02.1990 and the same is marked as Ex.A1. On the date of agreement, the plaintiff Saraswathi Ammal has paid Rs.5,000/- towards sale consideration. One of the sale condition was that the balance sale consideration of Rs.1,15,000/- should be paid within three months from the date of execution of the sale agreement. Pursuant to this agreement, the respondent has paid Rs.80,000/- on 22.03.1990 and the same is exhibited as Ex.A2. Later, on 27.05.1990, the respondent has paid Rs.15,000/- and promised to pay the balance Rs.20,000/- before the Registrar at the time of registration. These facts are not denied and accepted by both the parties.

3. The prime contention of the appellant is that, while the terms of agreement specify the time for performance of the contract as three months, on its expiry by 03.05.1990, the respondent/plaintiff has lost right of seeking specific performance. More so, when he has expressed his inability to pay the balance consideration by seeking time after the lapse of three months period prescribed in the agreement. The plaintiff caused the suit notice only on 04.01.1991 and thereafter took eight more months to file the present suit for specific performance. Even at the time of filing the suit, he did not deposit the balance sale consideration to prove his readiness. Only after the ex-parte decree in the year 2002, the balance sale consideration of Rs.20,000/- was paid by the respondent/plaintiff. This is enough to show that he has not expressly proved his readiness and willingness, which is the mandatory condition for getting an equitable relief of specific performance.

4. Per contra, the learned counsel for the respondent/plaintiff sought the attention of this Court in respect of Ex.A3, wherein his payment of Rs.15,000/- made belatedly after the three months time prescribed was accepted by the vendor.

5. Further, the learned counsel for the respondent submitted that the conduct of the parties are essential to infer whether time is essence of the contract or not. The very conduct of

accepting Rs.15,000/- after the time prescribed in the agreement washes away the contention of the vendor that time was essence of the contract.

6. On his part, the learned counsel appearing for the appellant referring the reported judgements in 2016(6) CTC 58, 2007(1)CTC 243, 2016(4) CTC 470 and 2016(2) TNLJ 629 submitted that the contract time has been prescribed for completing the contract and it was essence of the contract. While so, the plaintiff has failed to perform his part of contract within the time prescribed and failed to prove the readiness and willingness from the date of agreement till the day of filing the suit is not entitled for the relief of specific performance. However, both the Courts have failed to look into the aspects in proper perspective and has allowed the suit filed for specific performance without any explanation for not approaching the Court within reasonable time.

7. The Courts below had gone into the facts of the case and in the light of evidence let in by the parties had concurrently found that time was not essence of the contract in this case. The prima facie evidence relied by the courts to hold so is Ex.A3. This is a payment of part sale consideration after the expiry of three months period prescribed in the original contract. There is no reference of time to complete the contract in Ex.A3 except the promise of the purchaser to pay the balance amount at the time of registration.

8. At this juncture, it is to point out that pending appeal, the counsel for the appellant has taken out an application CMP.No.9747 of 2016 to receive additional document namely the letter written by the plaintiff to the defendants. This letter dated 22.05.1990 is written by Mr.K.Venkataraman, husband of respondent-Saraswathi Ammal to Mr.Raju Naidu, the appellant herein. The Counsel for the appellant submits that based on this letter, the vendor/Appellant received Rs.15,000/- vide Ex.A3 and this has been specifically mentioned in the written statement that it is just because the vendor has received part sale consideration after the expiry of time prescribed it will not enure any right on the purchaser to delay his performance of contract beyond the time prescribed in the agreement. The counsel for the respondent has no objection in receiving this documents as evidence on behalf of the defendant. He does not dispute the content of the letter, but, points out that the vendor was put to notice through this letter that there is some delay in paying the balance sale consideration due to non-payment of money by his vendee and as soon as he gets his land registered, he will immediately pay the balance and get the sale deed registered. Only on accepting the content of the letter, Mr.Raju Naidu, the appellant herein has come over to the

respondent's house and received the balance of Rs.15,000/-. While so, there is no point in agitating that the time is essence of the contract. Since, the respondent has no objection in receiving this additional document and both the parties consent to mark this document without letting in any oral evidence, CMP.No.9747 of 2016 is allowed and this exhibit is accepted as Ex.B1.

9. As pointed out earlier, though in Ex.A1-agreement, three months time has been prescribed for time for performing the contract, the vendor, who is the appellant has accepted Rs.15,000/- which is the part sale consideration made beyond the time prescribed. He has neither repudiated the contract nor sought for specific performance even after the plaintiff issued the suit notice on 04.01.1991. No doubt, there is a delay of eight months in causing notice after the last payment and another eight months in filing the suit for specific performance, but a contract is a result of offer and acceptance. If either of the parties is of the opinion that the terms of the contract is either breached or not performed within the time agreed, it is open under the law to approach the Court for appropriate remedy.

10. In this case, the plaintiff-the agreement holder has approached the Court after issuing notice to the vendor. Till the filing of the written statement, the vendor has not repudiated the contract, which he could have done by invoking Clause-IV of the sale agreement which says that, if the purchaser fails to tender the balance amount within three months, he will lose the advance amount of Rs.5,000/-. If the vendor fails to execute the sale deed within three months period, he can seek for compulsory registration.

11. The case of the appellant is that, based on a sale agreement Ex.A1, he entered into an agreement with one Mr.Ramaraja Nadar. Since the respondent failed to perform his part of contract, he was not able to complete the contract with Mr.Ramaraja Nadar. But, there was no evidence to this effect. Furthermore, if it is true, then the appellant herein should have fairly retained Rs.5,000/- which he is entitled to forfeit for breach of contract and should have returned back the balance of Rs.95,000/- which he has received towards the sale consideration. The appellant has not done so. Therefore, the conduct of the appellant, who has received Rs.15,000/- on 25.07.1990 based on the letter Ex.B1 beyond the three months period prescribed and his failure to invoke Clause-IV of the agreement which deals with breach of promise by either of the party, there is no reason to hold that time is essence of this contract.

12. The second limb of the argument put forth by the learned counsel for the appellant is that the plaintiff has failed to approach the court for specific performance within reasonable time . Inaction on his part to seek the equitable remedy immediately after the implicit knowledge of refusal to perform contract will, disentitle him to seek the relief of specific performance.

13. No doubt, both the Courts below have not take note of the fact, though till January 1991, the plaintiff has not explained why he has not tendered the balance amount and sought for execution of sale. Further, the plaintiff has not explained why he did not file the suit for specific performance immediately after causing of the pre-suit notice in the month of January 1991. He has taken as many as nine months to file the suit for specific performance. From the record, it appears that the suit for specific performance was presented before the Trial Court on 02.09.1991. In this connection, the learned counsel for the appellant points out that in Ex.B1, the husband of the plaintiff has stated in his letter dated 22.05.1990, that he has entered into an agreement with some third party and he is delaying the payment and therefore, he could not pay the sale consideration in full. He is ready to pay Rs.15,000/- on 26.05.1990 and the balance sale consideration will be made immediately after his sale of land with third party gets completed.

14. According to the counsel for the appellant, only based on this letter, the appellant went to the respondent's house and received Rs.15,000/- towards the part sale consideration. The inability to pay the full sale consideration by the plaintiff is well established through this letter and therefore, the plaintiff was not ready to perform the contract on 22.05.1990 and thereafter is well proved.

15. In this context, it is relevant to see Ex.A6, which is dated 07.02.1990. It is the certificate copy of the sale agreement executed by Mrs.Saraswathi Ammal in favour of one Mr.Subburayan. The Courts below have relied upon this exhibit to hold that the plaintiff had enough money to perform his contract. Infact, the Appellate Court has observed that, the plaintiff through Ex.A.6 has sold his property at Balaji Nagar to one Mr.Subburayan for Rs.1,90,000/- on 07.02.1990 and he had enough money to perform the contract under Ex.A.1 for Rs.1,20,000/-.

16. If, really the respondent had Rs.1,90,000/- in his hand on 07.02.1990, the date on which the Ex.A.6 was executed, then there is no necessity for him to write the letter on 22.05.1990 stating that he is expecting to complete the sale transaction of

his property and on such completion of the sale, he will pay the balance sale consideration and get it registered. Though, this may give an impression that the plaintiff was not having sufficient money on expiry of three months and has made some false statement for delay payment, since the appellant has accepted the plea and received the part consideration of Rs.15,000/- without any murmur and have not sought for the balance sale consideration or return the part sale consideration retaining the advance of Rs.5,000/- as per Clause-IV of the agreement (Ex.A1) clearly indicates that there is a acquiescence on the part of the appellant and it is too late for him to refuse the performance of his part of contract.

17. In this regard, the interpretation of Section 16(3) of the Specific Performance Act 1963 requires consideration. The Courts have on number of times has analysed these two terms 'ready and willingness' on different context and has summarised how these two terms should be understand and applied to the facts of the case in hand. In one such case, the Hon'ble High Court in Kadali Venu Sankar Vs. Pydikondala Lakshmi, 2016(4) CTC 470 has observed as follows:

"20. A deep appreciation of the intention of the legislation and the thorough study of the intricacies of those two words used in the said provision would certainly go to show that both are not one and the same and they have been inserted to convey their own independent and distinct meaning, differentiating one from the other. If both would convey the same meaning, there is no need for the Legislatures to coin the language of the said provision in such a manner. At this juncture, it is to be noted that the language used in a provision of law is to be applied as it indicates and is intended upon. An interpretation of a provision of law has to be made only to enlighten the scope of the provision based on the intention of its Legislature and not to deviate or subtract or substitute such scope, intention and ambit.

21. Thus by keeping the above principle in mind, if we look at the words "readiness" and "willingness", the intention of the legislation in coining the language in such a way will come to light. What is "readiness"? Undoubtedly, it is nothing but to indicate the financial capacity of the Agreement holder to fulfil his obligation under the contract. In other words, the word "readiness" would sound like jingling of coins! No doubt, he does not require to

physically do so and it is enough if he pleads and establishes that he was and is capable of make such sound at all the times. Thus, by doing so, the Agreement holder satisfies one part of his obligation or requirement under Section 16(c). But is that sufficient to hold that he is also willing to perform his part of the contract in the absence of specific pleading to that effect? At this juncture, it is very curcial to note one aspect. An Agreement holder, after entering into the Agreement, at any time later, may change his mind and give up the contract for so may reasons, even though he is financially sound to fulfil his part of the contract. Therefore, his readiness pleaded and established by his financial capacity alone is not sufficient, unless it is also pleaded and proved that he is willing to put such readiness into action to complete the transaction within the time stipulated. Unless such intention of the Agreement holder is also pleaded with material averments and proved, it cannot be said that the Plaintiff has satisfied the requirement of Section 16(c) in its strict sense. The 'readiness' and 'willingness' being both sides of a coin, should co-exist and survive throughout commencing from the date of Agreement till the Decree is passed. If "readiness" is the "cart carrying the coins", the "willingness" is the "horse", dragging the cart to its destination. Needless to say, a cart loaded with coins is useless, unless there is a horse to carry it. Equally, existence of an healthy horse is also not sufficient, unless there is a cart loaded with coins for the horse to carry."

18. The purchaser need not keep the money in his bag and jingle the coins before the vendor, as observed by the Apex Court while discussing about the readiness of a party. In this case, there can be no doubt that the purchaser has been willing to purchase the property and that is the reason why he has written the letter Ex.B1 and has also caused notice and thereafter filed the suit. In the suit, he has pleaded that, he is ready to deposit the balance sale consideration of Rs.20,000/-, which is less than 20% of the entire sale consideration.

19. Initially, the appellant herein has not contested the suit and allowed it to become exparte. In pursuant to the ex-parte decree, the respondent has deposited the balance sale consideration on 24.09.2002. Therefore, there is no room to doubt the plaintiff's readiness after lapse of fourteen years. Morefully, when both the Courts have held that the plaintiff was ready and willing to perform his contract throughout. For the aforesaid reasons, this Court finds no ground to interfere the findings of the Courts below.

20. In the light of the aforesaid reasons, the Second Appeal is dismissed. The judgment and decree of the first appellate court and the trial Court, are confirmed. No Costs throughout. Consequently, the connected M.P.No.1 of 2008 is also closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Sub Judge, Poonamallee.

2.The Additional District Judge,
Fast Track Court No.1, Poonamallee.

+ 2 ccs to Mr.A.N. Viswanatha Rao, Advocate Sr.66256

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S.A.No.216 of 2010
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