

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.11.2016

PRONOUNCED ON: 20.12.2016

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.400 of 2007

Nagarathinam

...Appellant/Defendant

..Vs..

S.Jaya

..Respondent/Plaintiff

Prayer: Appeal filed Under Section 96 and Order XLI Rule 1 CPC, First Appeal against the Judgment and Decree dated 26.02.2007 made in O.S.No.643 of 2004 on the file of Additional District cum Sessions Court (Fast Track Court No.2), Coimbatore.

For Appellant : M/s.V.Srikanth
for K.Elango

For Respondent : Mr.N.Manokaran

JUDGMENT

The defendant who suffered a decree for Specific Performance in O.S.No.643 of 2004 on the file of the Additional District Court, Coimbatore is the appellant. The suit was filed originally as O.S.No.946 of 1997 on the file of the Sub Court Coimbatore was subsequently transferred to the Additional District Court and re-numbered as above.

2.The case of the plaintiff is that the defendant had entered into an agreement of sale on 16.07.1997. Under the said agreement, the defendant had agreed to sell the suit property for a total consideration of Rs.5,40,000/- (Five Lakhs forty thousand only) and an advance of Rs.2,00,000/- (Rupees Two lakhs only) was paid on the date of the execution of the agreement. A period of three months was fixed for performance of the contract. The defendant did not come forward to execute the sale deed. The plaintiff came to know that a money claim was pending and that there was an attachment before the judgment over the suit property in the suit relating to the money claim. The plaintiff had issued a legal notice seeking Specific

Performance on 27.09.1997 which was replied to with false averments on 01.10.1997. The suit came to be filed on 15.10.1997 seeking Specific Performance.

3.The defendant resisted the suit contending as follows:- The execution of the agreement and receipt of Rs.2,00,000/- (Rupees two lakhs only) as an advance was admitted. The defendant would deny the claim of the plaintiff that she was ready and willing to perform her part of the contract. According to the defendant, though the defendant was ready and willing to perform his part of the contract, the plaintiff would claim that the attachment has to be cleared before the execution of the sale deed. It is also contended by the defendant that the litigation relating to the money claim is false and it has been filed only to harass the defendant with ulterior motives. The defendant would also point out that even in the reply notice dated 01.10.1997, it has been very clearly stated that a sum of Rs.40,000/- (Rupees Forty thousand only) could be kept as a deposit by the plaintiff, in order to satisfy the said money claim. The defendant had further contended that the husband of the plaintiff along with 2 others came to the defendants' house at about 8 P.M. on 08.10.1997 and threatened the defendant to execute the sale deed. On a consideration of the above pleadings, the learned Additional District Judge (Fast Track Court II Coimbatore) frame the following issues:

- 1.Whether the plaintiff is entitled to Specific Performance as prayed for?
- 2.Whether the suit is barred by limitation?
- 3.Whether the suit is bad for non joinder of necessary parties?
- 4.To what other relief is the plaintiff entitled to?

4.The plaintiff examined herself as PW-1 and also examined her husband Siva as PW-2. Ex.A-1 to A-18 were marked. The defendant examined herself as DW-1 and Ex.B-1 to B-3 were marked. On consideration of the oral and documentary evidence, the learned Trial Judge came to the conclusion that the plaintiff has been ready and willing to perform her part of the contract and it is the defendant who had suppressed the existence of an order of attachment in O.S.No.1636 of 1994. Since the execution of the agreement and the receipt of the advance was admitted, the Trial Court held that the plaintiff would be entitled to the relief of Specific Performance. The Trial Court are also found that the suit was filed within three months period fixed under the agreement and as such there is no question of suit being barred by limitation. As a result of the aforesaid findings, the learned Trial Judge decreed a suit as prayed for.

5. Aggrieved by the said judgment and decree of defendant has preferred the above appeal. The following points emerge for determination in this appeal.

1. Whether the plaintiff had established that she has been ready and willing to perform her part of the contract?

2. Whether the defendant is guilty of suppression of facts, and her conduct is such, that it would materially affect the exercise of discretion while considering the plea of Specific Performance?

6. Heard Mr.V.Srikanth, learned counsel appearing for appellant and Mr.N.Manokaran, learned counsel appearing for respondent. Mr.V.Srikanth, learned counsel appearing for appellant would contend that the plaintiff has filed the suit only because she was not ready and willing to perform her part of the contract. He would also invite my attention to Ex.A-1 agreement and contend that the said agreement covers only the land and does not include the building that was existing at the time of agreement. Contending that the agreement cannot be enforced and as much as it does not cover the entire property. The learned counsel would stress that a suit for Specific Performance on the basis of flawed agreement cannot be decreed.

7. Mr.V.Srikanth, learned counsel would take me through the oral evidence of the parties wherein PW-1 had admitted that the defendant had requested the plaintiff to deposit a sum of Rs.40,000/- (Rupees Forty thousand only) in Nationalised Bank and pay the balance of sale consideration to her and take the sale deed. He would also point out that PW-2 namely, the husband of the plaintiff had in his cross examination admitted that the agreement includes the house. Relying upon the evidence of PW-1 wherein, she would admit that the house was in existence on the date of the agreement and the agreement was for the land and building, and laying considerable stress on the evidence of PW-1 wherein, she had admitted that the agreement does not include the house property, the learned counsel would submit that the suit filed by the plaintiff, seeking sale of a different property, then what was agreed to be sold cannot be decreed. The learned counsel for the plaintiff would also draw my attention to the evidence of PW-1 wherein, she had stated as follows:

“கிரயம் செய்வதற்கு வசதி இல்லை என்றும் ரூ.4,00,000/- ரொக்கம் இருந்தது என்பதைக் காட்ட ஆவணம் தாக்கல் செய்துள்ளேனா என்றால் அந்த நேரத்தில் ரொக்கம் இல்லை.”

8.Relying upon the above said evidence, the learned counsel would contend that the plaintiff was not ready and willing to perform her part of the contract as envisaged under Section 16(c) of the Specific Relief Act. Per contra, Mr.N.Manokaran, learned counsel appearing for respondent would contend that the conduct of the defendant in suppressing the existence of the attachment order should be taken into account by the Court, while considering the question of readiness and willingness on the part of the plaintiff. As regards, the existence or otherwise building in the suit property at the time of the agreement, the learned counsel would draw my attention to the cross examination of DW-1 wherein, she had deposed as follows:

“கிரயத் தொகை ரூ.5,40,000/- தாவாச் சொத்திலுள்ள வீட்டையம் சேர்த்துதான் என்றால் ஆமாம்.”

9.He would also rely upon the evidence in cross examination of DW-1, wherein, she had deposed that there was a Electro Plating Workshop in the suit property at the time of the agreement and that the 3 H.P. Electricity connection was obtained for the said purpose. The learned counsel would also rely upon the deposition of DW-1, wherein DW-1 has admitted that she had not disclosed the existence of the attachment order at the time of entering into the agreement. Contending that the plaintiff has established that she has been ready and willing to preform her part of the contract continuously and she was forced to approach the court only because of the attachment order which was suppressed by the defendant.

10.Mr.V.Srikanth, learned counsel appearing for the appellant would rely upon the judgment of the Hon'ble Supreme Court in N.P.Thirugnanam (Dead) by Lrs -vs- Dr.R.Jagan Mohan Rao and Others reported in (1995) 5 SCC and would contend that the Supreme Court had said that in order to be entitled to the relief of Specific Performance, the plaintiff should prove continuous readiness and willingness from the date of the agreement till the date of execution of the sale deed. If the plaintiff fails to aver and prove the same, the plaintiff must fail. Relying upon the above observations, the learned counsel would contend that the very object of the plaintiff in filing the suit, when the defendant had not refused to execute the sale deed, is to avoid payment of the balance sale consideration immediately. It should be pointed out at this juncture that such a plea was not taken in the written statement filed before the Trail Court.

11.The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in H.P.Pyarejan -vs- Dasappa (dead) by Lrs.and Others reported in (2006) 2 SCC 496

and invited me to the observations of the Hon'ble Supreme Court particularly in para 13 of the said judgment which reads as follows:-

"....13.The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief."

12.The learned counsel would contend that the fact that PW-1 has deposed in her cross examination that she did not have cash of Rs.4,00,000/- (Rupees Four lakhs only) on the date of the filing of the suit would disentitle her from seeking Specific Performance.

13.Mr.V.Srikanth, learned counsel would also rely upon the judgment of the Hon'ble Supreme Court Padmakumari and Others -vs- Dasayyan and others reported in 2015 (8) SCC 695 and K.Nanjappa (Dead) By legal Representatives -vs- R.A.Hameed alias Ameersab (Dead) by legal representatives and another reported in 2016 (1) SCC 762 to claim that if the absence of readiness and willingness on the part of the plaintiff as well as the conduct of the plaintiff is taken into account the same would disentitle her from claiming the relief of Specific Performance. The counsel would also refer to the judgment of this Court in Kadali Venu Sankar -vs- Pydikondala Lakshmi reported in 2016 (4) CTC 470 for the same proposition.

14.Mr.N.Manokaran, learned counsel appearing for the respondent would submit that there is no question of the plaintiff being not ready and willing to perform her part of the contract. Mr.N.Manokaran would draw my attention to the material dates namely, the date of the agreement i.e., 16.07.1997, the date of demand i.e., 27.09.1997, the date of the reply i.e., 01.10.1997 and the date of filing of the suit i.e., 15.10.1997 and would contend that the plaintiff has done all that she could do before filing the suit and had also filed the suit within the three months time fixed under the agreement. Therefore, there is no question of the plaintiff being not ready and willing to perform her part of the contract.

15.Relying upon Explanation 1 to Section 16 of the

Specific Relief Act, the learned counsel would contend that there was no need for plaintiff to produce cash or offer to deposit the balance of sale consideration, while filing the suit for Specific Performance. The learned counsel would contend that the claim of the defendant that such non deposit would disentitle the plaintiff from seeking Specific Performance cannot be countenanced. Even though the agreement provides that in the event of failure on the part of the defendant, the plaintiff would be entitled to deposit the balance of sale consideration into Court and seek Specific Performance, according to Mr.N.Manokaran the same should be considered only as an enabling provision and not as a pre-condition. He would also point out that the defendant did not raise any plea based on the said Clause in the agreement before the Trial Court.

16.Relying upon the judgment of the Division Bench Of Delhi High Court in Bal Krishan Gupta and another -vs- Vikas Aggarwal and another reported in 2014 (142) AIC 337, Mr.N.Manokaran, learned counsel would contend that a direction to deposit the balance sale consideration should not be made routinely as a pre-condition for grant of relief. He would also submit that the division Bench has pointed out that law does not require the plaintiff seeking Specific Performance to deposit the balance of sale consideration into Court at the time of the filing of the suit. Mr.N.Manokaran, would also rely upon the judgment of the Supreme Court Zarina Siddiqui -vs- A.Ramalingam alias R.Amarnathan reported in (2015) (1) SCC P.705 wherein Hon'ble Supreme Court had held that the conduct of the defendant should also be considered while exercising the discretion under the Specific Relief Act.

17.Mr.N.Manokaran draws support from the observations of the Hon'ble Supreme Court in the above said judgment would contend that the fact that the defendant had suppressed the existence of an order of attachment before judgment at the time of the entering into the agreement cannot be allowed to avoid performance. The plaintiff was forced to move the Court, because of the non disclosure of the attachment order. In support of the above submissions, the learned counsel would also rely upon the judgment of Supreme Court in Silvey and Others -vs- Arun Varghese and Another reported in 2008 (11) SCC P45 wherein the Hon'ble Supreme Court had pointed out that the conduct of the defendant should also be taken into account while decreeing or denying Specific Performance.

18. To buttress his submissions regarding pre deposit of balance of sale consideration. Mr.N.Manokaran, would rely upon the judgment of Supreme Court in Coromandel Indag Products Private Limited -vs- Garuda Chit and Trading Company Private Limited and Another reported in (2011) 8 SCC 601 wherein the Supreme Court had again pointed out that it is not essential for

the plaintiff to actually tender the money to the defendant or to deposit into Court, such money unless otherwise directed by the Court. I have considered the rival submissions and contentions of the learned counsel on either side. As regards the absence of the building in the description of the property in Ex.A.1 agreement, I find from the evidence of the parties that there was consensus-ad-idem regarding the subject matter of the sale both PW-1, and DW-1, deposed that the price was fixed for the property including the building. PW-1 in her re-examination had stated that the building was not included in the agreement, because the same was said to be in a decapitated condition. DW-1 in her cross examination specifically admitted that the sale price was fixed only for the land with the building. Therefore, I do not think that the absence of the building in the description of the property would really matter as the parties knew what was the subject matter of the agreement and there was no dispute relating to the subject matter of the agreement between the parties. Regarding the plea that the plaintiff as PW-1 in fact admitted that she did not have cash of Rs.4,00,000/- (Rupees Four lakhs only) and the same even if true would not dis-entitle plaintiff from claiming the relief of specific performance if she is able to show that she is capable of raising funds. The evidence of the plaintiff regarding her ability to raise funds has not been seriously challenged.

19.The other situation pointed out by Mr.V.Srikanth to attack the readiness and willingness on the part of the plaintiff is that inspite of request having been made to the plaintiff to deposit a sum of Rs.40,000/-(Rupees Forty thousand only) in a Nationalised Bank, in order to satisfy any decree that could be passed in the money suit that was pending at that time and to pay the balance to the defendant and take the sale deed. The plaintiff has not come forward to adopt such a course.

20.According to the learned counsel, this conduct of the plaintiff would show that she was not ready and willing to pay the balance of sale consideration. I am afraid that such a plea cannot be countenanced. Because there was a subsisting order of an attachment which would prevent any sale and even in the reply notice, the defendant had only claimed that she would deposit the sum of Rs.40,000/- (Rupees Forty thousand only) in a nationalised Bank as a measure of security which in my opinion cannot be put against the plaintiff. As could be seen from the evidence of defendant of DW-1, she had introduced several new facts which were not pleaded. A careful reading of the evidence of the the defendant as DW-1 would show that she was making a conscious effort to somehow defeat the claim of the plaintiff. She had introduced several new facts, in her cross examination, which were not pleaded in the written statement or set out in her chief examination affidavit. This infact, leads

me to believe that the defendant has not come with clean hands and is guilty of suppression of material facts.

21. In view of the above discussion, I am constrained answer both the points raised against the appellant and the plaintiff/respondent has established that she has been ready and willing to perform her part of the contract and that she is also entitled to the discretionary relief of Specific Performance.

22. Mr. V. Srikanth, learned counsel for the appellant would contend that the agreement was entered into in the year 1997 and it is almost 20 years now. Therefore, the escalation of prices should be taken into account and the plaintiff should be directed to pay an increased consideration, if the judgment and decree of the Trial court is confirmed. While it is true that this Court as well as the Hon'ble Supreme Court pointed out that raise in prices during the pendency of the proceedings cannot be a ground to deny the relief of Specific Performance, the Hon'ble Supreme Court in several cases had taken note of the escalation of prices and had compensated the defendant by increasing the sale price. In K. Prakash -vs- B.R. Sampath Kumar reported in (2015) 1 (SCC) 597 the Hon'ble Supreme Court had in fact enhanced the sale price by rupees nine lakhs i.e., from 16 lakhs to 25 lakhs taking note of the pendency of the proceedings for a long-time.

23. It is seen from the records that the plaintiff/respondent had filed an Execution Petition No.7 of 2012 and pursuant to the same, the IV th Additional District Judge, Coimbatore as executed a sale deed on 08.03.2013. From the stamp duty collected for the said sale deed, I find that the registration department has valued the property at about 30 lakhs in the year 2013. The sale consideration fixed in the agreement was Rs.5,40,000/-. Apparently, there has been a five times increase in the value of the property. The plaintiff has paid an advance of Rs.2 lakhs as a natural corollary, the advance paid by the plaintiff should also be enhanced by five times which works out to Rs.10 lakhs. Still there will be a gap of about 20 lakhs.

24. Mr. N. Manokaran, learned counsel would point out that after recent increase of the guideline value the same cannot be taken as a safe indicator of the market value of the property. The plaintiff has deposited the balance of sale consideration namely the sum of Rs.3,40,000/- (Rupees Three lakhs forty thousand only) on 25.04.2007 before the Trial Court. Therefore, the plaintiff cannot be said to be totally at fault or in other words she cannot be required to pay up the difference in the value of the property. If the amount

deposited by the plaintiff in 2007 namely Rs.3,40,000/- (Rupees Three lakhs forty thousand only) is taken to have appreciated by 100% as of today it works out to Rs.6,80,000/- (Rupees Six lakhs eighty thousand only). The defendant has had the benefit of the sum of Rs.2,00,000/- (Rupees two lakhs only) paid by the plaintiff at the time of the agreement for merely 20 years. Bearing in mind the above circumstances, I deem it fit to direct the plaintiff/respondent to pay further sum of Rs.5,00,000/- (Rupees five lakhs only) as an additional consideration taking into account, the escalation in value of the property during the pendency of the proceedings. I am conscious of the fact that Court should not venture to substitute the agreement of the parties. At the same time, the present proceeding being one for Specific Performance wherein an element of discretion is involved the above conclusion of mine to direct the respondent/plaintiff to pay a further sum of Rs.5,00,000/- (Rupees Five lakhs only) to the appellant/defendant can only be taken a mitigating factor, even though I have found the appellant/defendant to be at fault and she had by her conduct forced to the plaintiff to approach the Court for Specific Performance, I have also taken into account, the fact that the appeal was dismissed for default and restored after a long delay. The sum of Rs.5,00,000/- (Rupees Five lakhs only) which is to be paid as additional consideration should be paid or deposited in the Court within a period of 8 weeks from today. Upon such payment, the plaintiff will be entitled to execute the decree for possession. Taking note of the circumstances of the case, I direct the parties to bear their own costs in the appeal.

25. In view of the forgoing discussion, the appeal is partly allowed and the judgment and decree of the Trial Court will stand modified as follows: The plaintiff will be entitled to a decree for Specific Performance of the agreement dated 16.07.1997. The plaintiff shall pay a further sum of Rs.5,00,000/- (Rupees Five lakhs only) to the defendant as additional consideration taking note of the escalation in prices of the property during the pendency of the proceedings. In other aspects the judgment and decree of the Trial court are confirmed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

KP

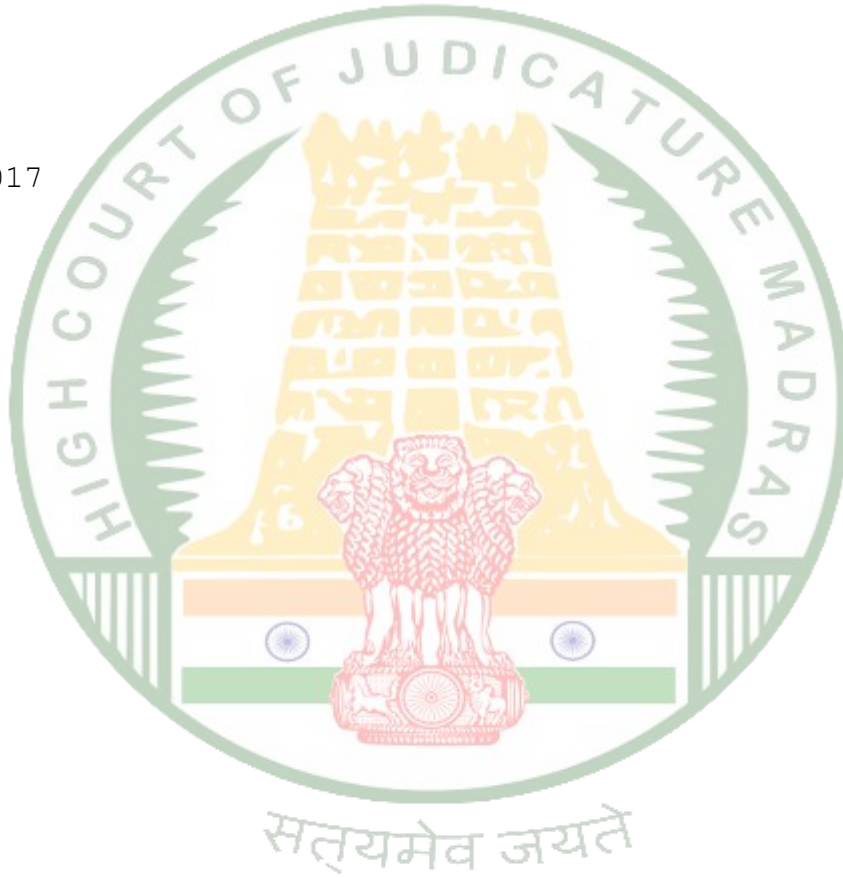
To
The Additional District Judge,
Sessions Court, (Fast Track Court No.2), Coimbatore.

+1 cc to M/s.N.Manokaran Advocate sr 74649

+1 cc to Mr.K.Elango Advocate sr nos.74649, 74243

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