

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 17.10.2016

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.43 of 2012
and M.P.No.2 of 2012

T.Basker

...Petitioner

..Vs..

1. S.Venkatammal
2. P.Narasimhan
3. S.Pramila
4. M.Mahalingam
5. S.Dilli Babu

..Respondents

Prayer: Appeal filed Under Section 96 and Order XVI Rule 1 CPC, to set-aside the Judgment and Decree, dated 22.09.2011 passed in O.S.No.60 of 2008 on the file of Additional District & Sessions Judge, Fast Track Court III, Tiruvellore.

For petitioner : Mr.Parthasarathy
Senior Counsel
for Mr.J.R.K.Bhavanantham

For Respondents
(R-1&2) : Mr.A.R.L.Sundaresan
Senior Counsel
for A.L.Ganthimathi
(R-3) : Mr.Srinath Sridevan
(R-4) : Mr.A.Palaniappan
(R-5) : Mr.A.Lakshminarasimhan

JUDGMENT

The appeal suit is filed against the Judgement and Decree passed in O.S.No.60 of 2008 on the file of the Additional District & Sessions Judge, Fast Track Court-III, Tiruvellore.

2. The suit was filed, seeking the relief of specific performance of agreement of sale, entered into between the plaintiff and defendants 1 and 2 on 12.11.2005. According to the plaintiff, the defendants had agreed to sell an extent of about 4 acres and 4 cents in various survey numbers of Thodukadu Village, Tiruvellore District and Taluk, for a consideration of Rs.2500/- per cent. The total consideration works out to Rs.10,10,000/-.

3. The plaintiff had further contended that, as per the agreement, dated 12.11.2005, the defendants should secure the encumbrance certificate, chitta, and adangal. Upon the production of the above said documents, the sale transaction is to be completed within a week there from. The plaintiff would also claim that the time was not the essence of the contract. Though the agreement Ex.A-1 covers a larger extent of property, namely 6 acres 40 cents, the plaintiff would contend that some of the properties were sold even prior to the agreement and some of the properties were discovered as not belonging to the defendants 1 and 2. Therefore, excluding the same, the plaintiff had filed the

suit, for an extent of 4 acres and 4 cents. The advance paid at the time of agreement was Rs.50,000/- and the plaintiff had issued a notice on 25.01.2006, for an extent of 3 acres 50 cents. The defendants had send a reply on 03.02.2006 stating that, since the time prescribed for performance in the agreement had expired, the plaintiff is not entitled to seek execution of sale deed and they also offered to return the advance amount of Rs.50,000/-.

4. The plaintiff had also issued two other notices dated 03.02.2006 and 06.02.2006 demanding execution of the sale deed, as per the agreement. The said notices did not evoke any response from the defendants. The third defendant is the subsequent purchaser of some of the suit properties and defendants 4 and 5 are the mortgagees of portions of the suit properties.

5. The defendants 1 and 2 contested the suit claiming that they had entered into an agreement with one Nithyananda Prabhu on 07.11.2004, agreeing to sell the suit properties for Rs.3,000/- per cent, and since the said Nithyananda Prabhu was unable to perform his part of the contract, they were pressurised to enter into an agreement with the plaintiff to sell the first three items of properties, totalling to an extent of 1 acre 29 cents.

6. It was also contended that the agreement filed before the Court below

is a forged/fabricated document. The defendants had further contended that the plaintiff himself had created the said document by filing up a printed paper brought with him by incorporating the details of items 1 to 3 only. It is also the case of the defendants that the other extents have been fraudulently inserted by the plaintiff without the knowledge and consent of the defendants. The endorsement relating to deletion of extents of 34 cents in Survey No.159/04 and 1 acre 84 cents in Survey No.173/04 are also denied by the defendants. It was claimed that the said endorsements had been created by forging the signature of the second defendant alone. A plea relating to material alteration of the agreement was also raised. The defendants had also raised the plea of absence of readiness and willingness on the part of the plaintiff to perform his part of the contract. It is also claimed that the suit agreement was entered into, to get over a financial crisis faced by the defendants and due to the failure of the plaintiff to perform his part of the contract within the time contemplated under the agreement, the defendants were forced to borrow from the outsiders and pay back the debts.

7. The third defendant, who is the subsequent purchaser, had claimed that she is the bona fide purchaser of the value without notice of the contract.

8. The fourth defendant has filed a separate written statement claiming

that he has a charge over the property and he has also filed a suit in O.S.No.46 of 2006, seeking recovery of monies due to him under the mortgage.

9. The fifth defendant remained ex-parte before the Trial Court.

10. On the above pleadings, the learned Additional District Judge heard the matter and framed the following issues for determination:-

1) Whether the plaintiff is entitled for specific performance of agreement of sale dated 12.11.2005 as prayed for?

2) Whether the time is the essence of the contract?

3) Whether the plaintiff has proved that he has been ready and willing to perform his part of the contract through out, in order to obtain a relief of specific performance?

4) Whether the 3rd defendant is a bona fide purchaser for value without notice of agreement of sale?

5) To what other relief?

11. Upon consideration of the evidence on record and pleadings, particularly the contradictory stand taken by the plaintiff, the learned Additional District Judge came to the conclusion that the plaintiff is not entitled to any relief and dismissed the suit.

12. I have heard Sri.S.Parthasarathy, learned Senior counsel for Mr.J.R.K.Bhavanantham, learned counsel for the appellant, Shri.AR.L.Sundaresan, learned Senior Counsel for Mrs.A.L.Ganthimathi, learned counsel for the first and second respondents, Mr.Srinath Sridevan, learned counsel appearing for the 3rd respondent, Mr.A.Palaniappan, learned counsel appearing for the 4th respondent and Mr.A.Lakshminarasimhan, learned counsel appearing for the 5th respondent.

13. The following points arises for determination in the above appeal:-

- 1) Whether the plaintiff is entitled to a decree for specific performance?
- 2) Whether the time is the essence of the contract under Ex.A-1?
- 3) Whether the plaintiff has proved that he has been ready and willing to perform his part of the contract through out, in order to obtain a relief of specific performance?
- 4) Whether the conduct of the plaintiff would deny him to get the relief of specific performance?
- 5) Whether the third defendant is a bonafied purchaser for value without notice of the agreement?

Point No.1:

14. Being a plaintiff in a suit for specific performance, it is expected by the plaintiff/appellant to have come to Court with clean hands and to have removed all suspicion that arise on attending circumstances of the execution of Ex.A-1. Upon perusal of the oral evidence and conduct of the plaintiff in coming out with different versions and different demands at various stages, this Court is of the opinion that the plaintiff has miserably failed to establish a fool proof case that would enable him to obtain the discretionary relief of specific performance.

15. Ex.A-1 agreement of sale has been executed for a total extent of 6 acres and 40 cents. Under the same agreement, an extent of 2 acres 18 cents stands excluded by the endorsement signed by the second defendant alone, i.e., the extent of land covered under the agreement comes to 4 acres 22 cents. The plaintiff, while demanding performance of the agreement, by issuing a notice under Ex.A-2 on 25.01.2006, has chosen to claim execution of sale deed for an extent of 3 acres 50 cents only. The said notice was promptly replied to by the defendants 1 and 2, who claim that since the plaintiff had not complied with the contract within the time permitted, he is not entitled to execution of sale deed. By the reply notice, dated 03.02.2006, Ex.A-3, the defendants had offered to return the advance amount of Rs.50,000/- also. The plaintiff issued another notice dated 06.02.2006 under Ex.A-4, wherein, he reiterates the extent of land

covered by the agreement as 3 acres 50 cents. He also adds that the second defendant agreed to discharge the mortgages that were existing and therefore, he sought time. In and by the said letter, dated 06.02.2006, the plaintiff has expressed that he has got the money ready for paying the balance of sale consideration. Since the said letter dated 06.02.2006 did not evoke any desired response, the plaintiff choose to send another letter dated 27.03.2006, wherein he had sought for specific performance of the agreement without mentioning the extent.

8. The learned senior counsel appearing for the appellant would strenuously contend that the conduct of the defendants should also be taken into account and relied upon the decision of the Hon'ble Supreme Court reported in **(2015) 1 Supreme Court Cases 705 (Zarina Siddiqui -v- A.Ramalingam)**.

8.1. There is no quarrel over the said proposition. But, at the same time, it is the conduct of the plaintiff which matters the most when it comes to grant or refusal of the specific performance. The plaintiff takes a different stand in each one of his notices and files a suit, for a totally different extent namely for 4 acres and 4 cents, seeking specific performance.

9. It is further argued by the learned senior counsel for the

appellant/plaintiff that the defendants had not disclosed the encumbrance and that they are liable to discharge the two mortgages dated 29.08.2001 in favour of the fourth defendant, and 30.06.2004 in favour of the fifth defendant.

9.1. It is seen from the records that the plaintiff had in fact obtained an Encumbrance Certificate marked as Ex.A-11 dated 06.01.2006, even before the issuance of 1st notice demanding specific performance on 25.01.2006. Neither in the said notice dated 25.01.2006, nor in the subsequent notices dated 06.02.2006, 27.03.2006 and 19.08.2006 the plaintiff demanded discharge of the encumbrance as a pre-condition for the execution of sale deed.

10. It is also pointed out by the learned senior counsel appearing for the respondents, that the plaintiff in his proof affidavit has sought for execution of sale deed for an extent of 4 acres 22 cents.

10.1. In the oral evidence, particularly, in his cross examination, the plaintiff gave contradicting answers and the answers given by him to various pointed questions during cross examination, read as a whole, would impress the Court that the plaintiff has not come forward with clean hands, so as to enable him to get the discretionary relief of specific performance. Therefore, the point No.1 is answered against the plaintiff.

Point.2:

11. Though it is a settled position of law that the time is not the essence of the contract with reference to agreement for sale of immovable property, whether the parties intended that time should be the essence of the contract would always depend on the facts and circumstances of each case. The suit agreement Ex.A-1 would fix the time limit of one week from the date of production of encumbrance certificate, chitta and adangal. Of course, learned senior counsel for the appellant would contend that defendants 1 and 2 failed to comply with the requirements of the agreement namely, obtaining of encumbrance certificate, chitta and adangal, i.e, the time cannot be construed as the essence of the contract.

12. On the other hand, a perusal of Ex.A-1 itself would show that a copy of the chitta was given to the plaintiff on the date of the agreement itself and it is in evidence that the plaintiff had the said documents with him and he has admitted that the documents given to him. It is also in evidence that the plaintiff himself had, through his brother, applied for and obtained Encumbrance Certificate even prior to the issuance of the suit notice. In the reply letter dated 03.02.2006, the defendants 1 and 2 had categorically stated that they entered into an agreement only because the plaintiff had assured to pay the balance of sale consideration within a week and that in view of his failure to do so, he is not entitled to the execution of sale deed as demanded by him.

13. Though the plaintiff had sent 3 other letters, dated 06.02.2006, 27.03.2006 and 19.08.2006, after the receipt of the reply notice dated 03.02.2006, in none of the said letters, the plaintiff claims that the time is not the essence of the contract. All that he would claim is that, he is ready to take the sale deed for an extent of 3 acres of 50 cents and not 6 acres 40 cents or 4 acres 22 cents. I am, therefore of the considered opinion, that the parties intended the time to be the essence of the contract under Ex.A-1.

Point No.3:-

14. The plaintiff, in order to succeed in a suit for specific performance, has to plead and prove that he was always ready and willing to perform his part of the contract. In the case on hand, the agreement dated 12.11.2005, prescribes the period of one week for payment of balance of consideration and execution of sale deed. Of course, the said one week's time would commence from the date on which the copies of the documents are made available to the plaintiff. In the cross examination of PW-1, the plaintiff would admit that the xerox copies of patta and chitta were given to him on 11.12.2005. He would admit that patta, chitta and adangal were also given to him. That being the case, the period of one week had at least commenced from 11.12.2005. The plaintiff issues a notice on 25.01.2006, demanding execution of sale deed for 3 acres 50 cents. The said notice was replied by the defendants on 03.02.2006 wherein it is made clear that since the plaintiff had failed to perform his part of

the contract within the time allowed, the contract cannot be enforced and he is not entitled to execution of sale deed. After the receipt of the said reply, the plaintiff again sent three letters on 06.02.2006, 27.03.2006 and 19.08.2006 and ultimately, the suit was filed on 28.04.2008, that is clearly after 2 years and 3 months from the date of the 1st notice dated 25.01.2006. Neither in the evidence nor the proof of affidavit filed by the plaintiff, there is an explanation for his silence from 03.02.2006 to 28.04.2008.

15. The learned senior counsel for the appellant would contend that the plaintiff had sent messages on several occasions and requested for the execution of sale deed. Apart from the interested oral testimony, there is no other evidence to corroborate the statements made by him. The learned senior counsel appearing for the respondents would contend that the plaintiff, having kept quiet for more than two years, after the issuance of the first notice, is not entitled to the relief of specific performance. He would also rely upon the judgment of the Hon'ble Supreme Court reported in **2011 (4) CTC 640 (Saradamani Kandappan versus S.Rajalakshmi and others)**. In paragraph 28 of the said judgment, the Hon'ble Supreme Court has extracted the principles laid down in an earlier case in **K.S. Vidyadnam and Others .v. Vairavan, 1997 (1) CTC 628 (SC) : 1997 (3) SCC 1**. The extract reads as follows:-

"Till the issue is considered in an

appropriate case, we can only reiterate what has been suggested in K.S.Vaidyanadam (supra):

(I)courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(II)Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

*(III)**Every Suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown upon suits which are not filed immediately after the breach/refusal.*** The fact that limitation is three

years does not mean a purchaser can wait for 1 or 2 years to file a Suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

[emphasis supplied]"

16. I am of the considered opinion that clause III of the above case, cited supra, would apply to the present case. The plaintiff had knowledge of the fact that the defendants had refused to execute the sale deed as early as on 03.02.2006, when he had received the reply notice. He also admits the receipt of the said reply notice in his subsequent letter dated 06.02.2006. Further, he is satisfied with the writing letters. From 19.08.2006 to the date of filing of the suit, i.e., 28.04.2008, the plaintiff has not even moved his little finger, to seek specific performance. This unexplained delay on the part of the plaintiff in seeking the relief of specific performance compels this Court to come to the conclusion that he has not always been ready and willing to perform his part of the contract, as required under Section 16 of the Specific Relief Act.

Point No.4:-

17. In the light of the conclusions arrived at earlier, I do not think that a decision or a finding is required on the status of the 3rd defendant as to whether she is a subsequent purchaser for the valuable consideration. In fine, the appeal stands dismissed and the judgment and decree of the Trial Court are confirmed. However there will no order as to costs. Consequently, the connected miscellaneous petition is closed.

17.10.2016

Index:yes
Internet:yes
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To
The Additional District & Sessions Judge,
Fast Track Court,Court III,
Tiruvellore.

R. SUBRAMANIAN, J.,

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Judgement in
A.S.No.43 of 2012
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