

In the High Court of Judicature at Madras

Dated: 08.06.2016

Coram

The Honourable Mr.JUSTICE K.RAVICHANDRABAABU

Second Appeal No.608 of 2015

M.Johnson Appellant/Plaintiff

Vs.

E.Pushpavalli Respondent/Defendant

Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 20.07.2011 of I Additional District Judge, Coimbatore made in A.S.No.124 of 2009 confirming the judgment and decree dated 27.07.2009 made in O.S.No.793 of 2006 by the III Additional Subordinate Judge, Coimbatore.

For Appellant : Ms.N.Valliamma
for Mr.M.Christopher

For Respondent : Mr.N.Anand Venkatesh

J U D G M E N T

The appellant is the plaintiff in a suit for specific performance of an agreement of sale. The case of the plaintiff is that the defendant agreed to sell the suit property for a total consideration of Rs.1,00,000/- and received a sum of Rs.50,000/- as advance and executed the suit agreement on 18.06.2003. It is his further case that even though he prepared the draft sale deed and sent it to the defendant in the month of September 2003 itself, for the defendant to perform his part of the contract within the time stipulated in the agreement, the defendant did not come forward to perform his part of the contract. The plaintiff sent suit notice on 06.07.2004 calling upon the defendant to receive the balance sale consideration and to execute the sale deed. The defendant sent a reply on 16.07.2004 disputing his liability to perform his part of the contract by stating that the time fixed under the agreement for the parties to perform the contract, namely six months, has

already expired. After receipt of the said notice, the plaintiff filed the suit on 15.12.2006.

2. The contention of the defendant is that in the agreement entered between the parties it was specifically agreed that the time was the essence of the contract and therefore, the plaintiff having not performed his part of the contract within the time stipulated, namely, six months, the defendant cannot be compelled to execute the sale deed.

3. The Trial Court, upon considering the rival pleadings of the parties and the evidence let in by them and appreciation of facts and circumstances, dismissed the suit on the ground that the time is the essence of the contract and the plaintiff has not proved his readiness and willingness all throughout the proceedings commencing from the date of the agreement till the date of filing of the suit. The appeal filed before the lower Appellate Court also came to be dismissed by confirming the findings rendered by the trial Court. Aggrieved against the concurrent findings of both the Courts below, the plaintiff has filed the present Appeal and the same is posted before me at the adjourned admission stage.

4. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent and perused the materials placed before this Court.

5. It is the contention of the learned counsel for the appellant that when the Courts below have come to the conclusion that the suit was filed within the period of limitation, they ought not to have dismissed the suit especially when the plaintiff has shown his readiness and willingness by issuing a notice to perform his part of the contract. She further submitted that even before issuance of such notice, the conduct of the plaintiff in sending the draft sale deed to the defendant within three months from the date of the agreement would show that the plaintiff was ready and willing to perform his part of the contract always. Therefore, she submitted that the mere delay in filing the suit from the date of receipt of the reply notice itself cannot be put against the plaintiff to deny the relief.

6. Per contra, learned counsel for the respondent contended that the time is the essence of contract and the agreement clearly speaks about the same. Thus, he contended that the very conduct of the plaintiff in sending the notice itself on 06.07.2004 nearly after one year from the date of the agreement and filing the suit thereafter on 15.12.2006 which again was after 2 1/2 years from the date of receipt of the reply notice would show that the plaintiff was not ready and willing to

perform his part of the contract within the stipulated time. Learned counsel further contended that since the terms of the agreement also contemplated that the advance paid by the plaintiff would be forfeited if the agreement holder did not complete the sale transaction within the time stipulated, the plaintiff is not entitled to the relief of refund also. He further contended that even otherwise, the plaintiff has not sought for any such alternate relief for refund of the amount. In support of his submissions on the question of readiness and willingness, the learned counsel for the respondent relied on the decision of this Court reported in 2007(1) CTC 243 (Ramalingam G, v. T.Vijayarangam).

7. Upon hearing the learned counsel appearing on both sides and on considering the entire facts and circumstances of the case and the decisions of the Courts below, this Court is of the view that the appellant/ plaintiff has not made out a case for entertaining this Second Appeal, as no substantial question of law arises for consideration.

8. In a suit for specific performance of an agreement of sale, the following are the necessary factors to be pleaded and proved by the plaintiff:

(a) that there is a valid agreement entered into between the parties in respect of the suit property; (b) that the plaintiff is always ready and willing to perform his part of the contract, whereas the defendant is not doing so within the time prescribed for completion of the transaction; (c) that the suit is filed within the period of limitation; and (d) that there is no inordinate or unexplained delay in filing the suit from the date of expiry of the time prescribed under the agreement for the purpose of completion of contract, even though, the suit is filed within the period of limitation. The inordinate or unexplained delay referred to above, though may not be relevant for the purpose of deciding the question of limitation in filing the suit, however, the same would be very much relevant for the purpose of deciding the issue as to whether the plaintiff is always ready and willing to perform his part of the contract from the date of the agreement till the date of filing the suit.

9. In this case, it is true that the suit was filed within the period of limitation. At the same time, the undisputed fact is that six months time was shown as the maximum time limit in the agreement for the parties to perform their respective obligation under the contract and thus, it is evident that time is the essence of the contract. It is not the case of the plaintiff that the defendant by his own conduct altered the terms of the contract to presume that the time was not the essence of

contract. On the other hand, it is contended that the defendant was evasive. Even though an attempt is made by the plaintiff to contend that though a draft sale deed was sent in the month of September 2003 to the defendant, it is seen that such contention was not proved before the Courts below by adducing any evidence and thus, such contention of the plaintiff was not accepted by the courts below. Therefore, the only evidence available to show the readiness and willingness by the plaintiff is the suit notice dated 06.07.2004 which was admittedly sent after one year from the date of the agreement. Therefore, nothing is there on record or evidence to show that the plaintiff was ready and willing to perform his part of the contract not only within the stipulated period and also thereafter. In fact, the notice sent by the plaintiff was immediately replied by the defendant under Ex.A5 on 16.07.2004, denying his liability. Therefore, the very filing of the suit on 15.12.2006 i.e., after 2 1/2 years from the date of receipt of the said reply notice would show that the plaintiff was not at all ready and willing to perform his part of the contract and on the other hand, he slept over the matter beyond the time limit fixed in the agreement. At this juncture, it is to be noted that the readiness and willingness on the part of the plaintiff in performing his part of the contract would consist of several actions at different point of time commencing from the date of the agreement. One of such action showing such readiness and willingness would be the filing of the suit itself within the shortest time immediately after the denial by the other side. In other words, the bonafide of readiness and willingness must be evident apparently from every action of the plaintiff after the agreement. At the same time, it should not be mistaken as if this Court holds that not filing the suit immediately after the denial even though limitation period has not expired, has to be construed as fatal to the case of the plaintiff. If there is a long time gap between such denial and filing of the suit and the same is properly explained with convincing reasons, the Court can always decide such issue based on the facts and circumstances of each case. It is well settled that in a suit for specific performance, the bounden duty of the plaintiff is to prove that he is ready and willing to perform his part of the contract all throughout the proceedings commencing from the date of agreement till the date of the decree and such readiness and willingness must be specifically pleaded and established by adducing evidence and not by making mere pleading alone. In this case, even by way of pleading, the plaintiff has not stated as to why there was a delay of one year in issuing the suit notice and further delay of 2 1/2 years in filing the suit. Therefore, I find that the Courts below have rightly rejected the case of the plaintiff and dismissed the suit, more particularly, when the relief of specific performance is the discretionary one. At this juncture, it is relevant to note the decision of

this Court reported in 2007 (1) CTC 243 (Ramalingam,G. vs. T.Vijayarangam) wherein at paragraph Nos.19 and 20, it has been observed as follows:

19. Even assuming that the plaintiff had enough means to complete the sale transaction that itself is not sufficient unless the plaintiff established that he was ready and willing to pay the balance sale consideration and complete the sale transaction right from the date of the execution till the date of decree. As laid down by the Apex Court, the plaintiff has not proved his continuous readiness and willingness at all stages from the date of agreement till the date of hearing of the suit.

20. The learned counsel for the appellant is unable to point out any infirmity in the reasonings of the Courts below in arriving at the finding that the plaintiff has not proved his continuous readiness and willingness at all stages i.e., from the date of agreement till the date of hearing of the Suit as laid down in the case of Thimmaiah and Others v. Ningamma and another 2000(7) SCC 409 and M.Nagar Kesavan Nadar v. Narayanan Nadar Kunjan Nadar, 2000 (10) SCC 244. When the findings of the Courts below are based on evidence available on record and when the findings are not perverse, this Court while exercising power under Section 100 of the Code of Civil Procedure cannot interfere with the concurrent findings of the Courts below. As rightly pointed out by the learned counsel for the respondent no substantial question of law stands raised. Accordingly, since no substantial question of law has arisen for consideration in the above Second Appeal and the same is dismissed. But however considering the relationship of the parties there will be no order as to costs.

Thus, considering all these facts and circumstances, I do not find any question of law, muchless substantial one arises for

consideration even to entertain this Appeal. Accordingly, the Second Appeal fails and the same is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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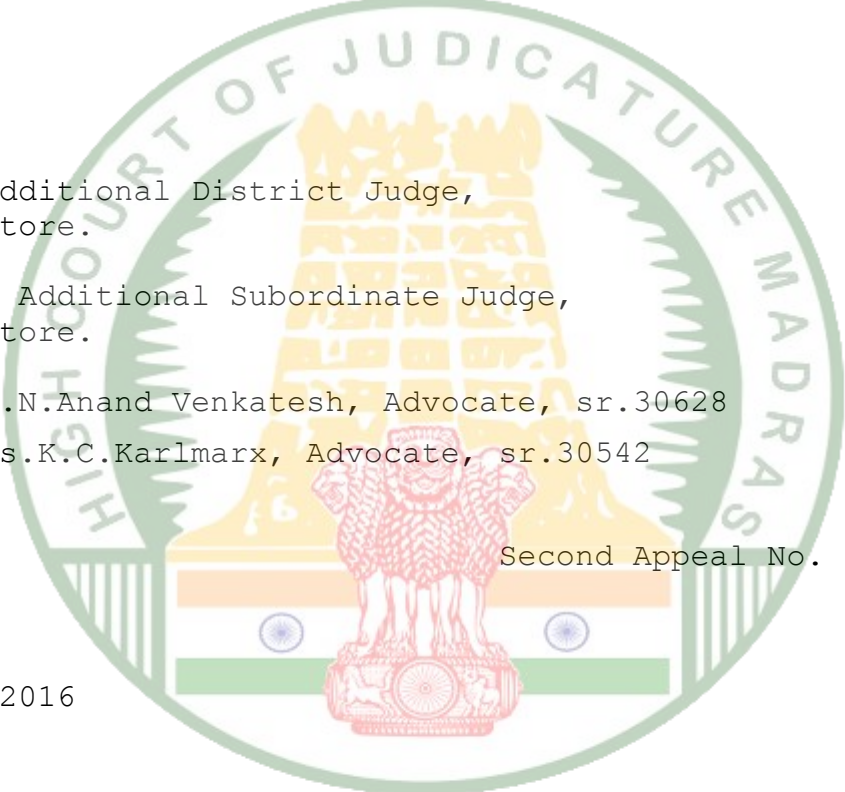
1. The I Additional District Judge,
Coimbatore.
2. The III Additional Subordinate Judge,
Coimbatore.

1 cc to Mr.N.Anand Venkatesh, Advocate, sr.30628

1 cc to M/s.K.C.Karlmarx, Advocate, sr.30542

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