

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.11.2016

PRONOUNCED ON : 15.11.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.135 of 2011
& M.P.No.1 of 2011

V.Rajavel

... Appellant

Vs.

1.Thangamani

2.Jothy

3.Ravi

4.Gnanasekar

5.M.Rajeswari

... Respondents

Prayer:- This Memorandum of Second Appeal is filed under Section 100 of Civil Procedure Code against the Judgment and decree dated 17.03.2010 passed in A.S.No.18 of 2008 on the file of the Principal Subordinate Court, Sankari reversing the judgment and decree dated 30.06.2008 passed in O.S.No.263 of 2004 on the file of the District Munsiff Court, Sankari(O.S.No.78 of 2003- Sub Court, Sankari).

For Appellant : Mr.N.Manokaran

For RR1 to 4 : Mrs.Hema Sampath,
and for R5 Senior Counsel for

M/s.S.Venkateswaran &
Ms.R.Meenal

for

J U D G M E N T

Challenge in this Second appeal is made by the plaintiff against the judgment and decree dated 17.03.2010 passed in

A.S.No.18 of 2008 on the file of the Principal Subordinate Court, Sankari, reversing the judgment and decree dated 30.06.2008 passed in O.S.No.263 of 2004 on the file of the District Munsif Court, Sankari(O.S.No.78 of 2003- Sub Court, Sankari).

2.Suit for specific performance and permanent injunction.

3.The case of the plaintiff in brief is as follows:

The suit property belonged to the defendants 1 to 4. The defendants 1 to 4 and the plaintiff entered into a Sale Agreement dated 05.03.2003 in respect of the sale of the suit property and the sale price was fixed @ Rs.87,000/- and the plaintiff agreed and paid Rs.10,000/- to the defendants 1 to 4 on the date of sale agreement and the plaintiff agreed to pay the balance within 100 days from the date of the sale agreement. In the event of failure of the plaintiff to pay the balance and take the sale deed, the plaintiff has to forfeit the advance amount paid and in the event of failure by the defendants to receive the balance amount and executed the sale deed the plaintiff is at liberty to deposit the balance in the appropriate court and take the sale deed. Despite the above understanding between the parties and though the

plaintiff on his part was always ready and willing to perform his part of contract and also sent several letters expressing his readiness and willingness to perform his part of the contract, the defendants failed to perform their part of contract. The plaintiff therefore, issued a lawyers notice on 26.06.2003, expressing his willingness and readiness to take the sale deed in his favour and also requested the defendants to be present before Sub Registrar Office, Magudanchavady on 30.06.2003 and the defendants have received the said notice and sent a telegram stating that the sale agreement dated 05.03.2003 stood expired due to the default by the plaintiff and the above case of the defendants is not true. But the defendants with a view to defeat the rights of the plaintiff joined hands and also sold the property to the fifth defendant and hence the fifth defendant has been impleaded as a party to the suit. Hence, the suit.

4.The case of the defendants 1 to 4 in brief is as follows:

The suit is not maintainable either in law or in facts. It is admitted that the agreement of sale has been entered into between the parties containing the terms and conditions stipulated in the sale agreement. As per the terms and conditions of the sale

agreement, the parties agreed that time should be the essence of the contract as the defendants entered into the sale agreement as they were in dire need of money for the medical expenses for the operation of the first defendant. The plaintiff has no bonafide intention to perform his part of the contract. The defendants are always ready to perform their part of the contract of receiving the balance sale consideration and executed the sale deed. However, the plaintiff did not turn as per the agreement of sale and therefore, the defendants caused a telegram sent through the third defendant to the plaintiff and subsequently after the receipt of the telegram, the plaintiff issued a legal notice containing false particulars. As the plaintiff failed to perform his part of the contract, the defendants were constrained to execute a sale deed in favour of the fifth defendant as the amount was very much needed by the defendants. The defendants never committed any breach of contract. The suit has no cause of action and liable to be dismissed.

5.The case of the fifth defendant in brief is as follows:

The suit is not maintainable either in law or in facts. The fifth defendant is not aware of the understanding about the sale

agreement between the plaintiff and the defendants 1 to 4. The fifth defendant is a bonafide purchaser of the suit property for value without any notice of the suit sale agreement. The fifth defendant purchased the suit property from the defendants 1 to 4 on 26.06.2003, after verification of the encumbrance in respect of the suit property and therefore, the plaintiff's suit, after the sale deed in favour of the fifth defendant is not maintainable. Hence, the suit is liable to be dismissed.

6.In support of the plaintiff's case, PW1 has been examined. Ex.A1 to 8 were marked. On the side of the defendants, DW1 and 2 were examined. Ex.B1 to B8 were marked. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial Court was pleased to decree the suit in respect of the specific performance relief sought for by the plaintiff. Aggrieved over the same, the fifth defendant preferred the first Appeal. The first Appellate Court on a reappraisal of the evidence was pleased to allow the Appeal and dismissed the suit of the plaintiff. Challenging the same the present Second appeal has been preferred by the plaintiff.

7.The Second appeal was admitted and the following

substantial questions of law are formulated for consideration in this Second appeal.

(i)Whether the first Appellate Court is correct in law in dismissing the suit on the ground that the plaintiff was not ready and willing to perform his part of the contract especially when the prompt action taken by the plaintiff for the period between the date of the sale agreement and the date of the suit would overwhelmingly prove his readiness and willingness throughout?

(ii)Whether the first Appellate Court has committed an error in law in dismissing the suit holding that the time is the essence of the contract by ignoring the well settled law that in transactions of sale of immovable properties, time is not the essence of the contract?

(iii)Whether the first Appellate Court was justified in ignoring Ex.A1, when the intention to sell and execution was categorically admitted by the defendants 1 to 4?

8.The suit is laid for Specific performance. The execution and the terms and conditions of the Sale Agreement marked as Ex.A1, are not disputed. It could therefore be seen that the main point that has to be decided in this Second Appeal is as to whether the plaintiff was ready and willing to perform his part of the contract as stipulated in the sale agreement Ex.A1. A perusal of the terms

of the sale agreement would go to disclose that the parties have fixed a specific time limit for completing the sale transaction. The sale agreement was entered into on 05.03.2003. On the date of the sale agreement, the plaintiff paid the advance amount of Rs.10,000/- out of the sale price fixed @ Rs.87,000/-. The parties have agreed that the balance amount has to be paid within 100 days from the date of sale agreement.

9. Further as per the terms and conditions of the sale agreement in the event of failure of the plaintiff to pay the balance amount within the stipulated time and take the sale deed, he has to forfeit the advance amount. Further, in the event of failure of the defendants to receive the balance amount and execute the sale deed, it could be seen that the plaintiff is at liberty to deposit the balance amount before the appropriate court and take the sale deed as per law.

10. Though the plaintiff has pleaded that he has been always ready and willing to pay the balance sale consideration within the time stipulated in the sale agreement and in this connection has sent several letters to the defendants expressing his readiness and willingness to perform his part of contract, it could be seen that

the plaintiff has produced only the lawyer's notice issued on 26.06.2003, to establish his willingness and readiness to complete the sale consideration by paying the balance amount as stipulated in the agreement. As found earlier, the parties have agreed that the sale should be completed within 100 days from the date of the sale agreement.

11.As per the memorandum of grounds of Appeal, it could be seen that the time fixed to complete the contract expired on 13.06.2003. Now according to the plaintiff, even prior to the same, he has been always ready and willing to pay the balance sale consideration and in this connection has orally and also through several letters informed the dependents 1 to 4 about his readiness and willingness to perform his part of contract. Though such a plea has been taken by the plaintiff in the plaint, to establish the same, other than the *ipse dixit* testimony of the plaintiff examined as PW1, no other evidence is forthcoming on the side of the plaintiff. If really as alleged by the plaintiff he had intimated the defendants 1 to 4 about his readiness and willingness through several letters prior to the expiry of time fixed to complete the contract, he would have caused the production of the same to sustain his case. If he had made oral

demands to the defendants 1 to 4 directing them to receive the balance sale consideration in the presence of mediators or others he would have examined the individual persons to prove the same. On the other hand he has caused the legal notice with reference to the same for the first time only on 26.06.2003 i.e., much after the time fixed to complete the contract, which as seen earlier has expired on 13.06.2003.

12.In this connection, a reference to the evidence of the plaintiff examined as PW1 would be useful. PW1, during his cross examination has admitted that the terms and conditions stipulated in the sale agreement are written only as per his direction and he has further admitted that in case the contract is not completed within 100 days, the parties have agreed that the sale agreement would be invalid and also admitted that he has not filed any document to establish that he was ready and willing to pay the balance sale consideration before the expiry of 100 days stipulated in the sale agreement.

13.Therefore, it could be seen that the plaintiff is well aware of the time limit prescribed in the sale agreement. Now, on a reading of the sale agreement marked as Ex.A1, it would also go

to show that only for meeting out the urgent family expenses, the defendants 1 to 4 have agreed to sell the suit properties to the plaintiff and accordingly, it could be seen that they have fixed the time limit of 100 days for completing the contract. Now according to the defendants for meeting out the expenses required for performing the operation of the first defendant, they had entered into the sale agreement with the plaintiff. Therefore, it could be seen as the defendants 1 to 4 were in urgent and dire need of amount for performing the medical operation of the first defendant, they have chosen to sell the suit properties to the plaintiff with the understanding that the plaintiff should complete the sale within 100 days by paying the remaining the sale consideration.

14.It could therefore be seen from the terms and conditions stipulated in the agreement, the parties have asserted and understood that the time should be the essence of the contract. However, as pointed out, in as much as the plaintiff did not come forward to pay the balance sale consideration within the time stipulated in the sale agreement, Ex.A1, it could be seen that in as much as the defendants were in dire need of the amount for their necessity, caused a telegram sent through the third defendant to

the plaintiff on 25.06.2003, terminating the sale agreement and the copy of the telegram has been marked as Ex.B2. The plaintiff in his evidence has admitted that the defendants have caused a telegram to be sent to him on 25.06.2003.

15. Therefore, it could be seen that in the normal course of events the plaintiff would have received the said telegram on the same day or on the next date. The plaintiff's legal notice was sent on 26.06.2003, which has been marked as Ex.A2. It could therefore be seen that as argued by the learned counsel for the defendants only on receipt of the telegram sent on behalf of the defendants through the third defendant knowing fully well that the defendants have terminated the contract, the plaintiff has taken steps to issue a legal notice through his Advocate on 26.06.2003.

16. In this connection, the plaintiff has admitted that he has issued the legal notice only after the expiry of the time limit specified in the sale agreement i.e., he has caused the legal notice to be issued 12 days after the expiry of the time limit. For the delay, the plaintiff now blames the defendants 1 to 4. When the parties are conscious about the time limit fixed in the agreement, when as per the case of the plaintiff, if he has been always ready

and willing to perform his part of the contract, if he is inclined to purchase the suit property and if he is possessed of sufficient funds as now pleaded nothing prevented the plaintiff from directing the defendants to receive the balance sale consideration well before the time limit specified in the sale agreement.

17. On the other hand, for the first time he has sent a legal notice much after the time limit specified in the sale agreement. Even prior to the same on the previous date, the defendants 1 to 4 have issued the telegram to the plaintiff terminating the contract. As found earlier, the receipt of the telegram has not been disputed by the plaintiff. Therefore, it only probablize the case of the defendants that only on coming to know that the defendants 1 to 4 have terminated the sale agreement, it could be seen that the plaintiff has taken steps thereafter, to issue a legal notice on 26.06.2006 to the defendants 1 to 4. The plaintiff would state that in his legal notice that he had informed the defendant that he would be waiting in the Sub Registrar Office for completing the sale transaction. However, during the cross examination, it has been admitted by the plaintiff that he did not go to the sub Registrar Office on 30.06.2003 as pleaded by him.

18.It could therefore be seen that the plaintiff in order to surmount the termination of the agreement made by the defendants under the telegram has falsely pleaded in the legal notice that he would be present in the Sub Registrar Office on 30.06.2003 to complete the sale transaction. Now, it is argued by the learned counsel for the plaintiff that in as much as the defendants 1 to 4 have alienated the suit property to the fifth defendant on 26.06.2003, as no purpose would be achieved by going to the Sub Registrar Office thereafter, it is stated that the plaintiff did not go to sub Registrar Office on 30.06.2003.

19.It could therefore be seen that only after the receipt of the telegram that the defendants 1 to 4 have terminated his contract, the plaintiff has set up a false notice to be sent expressing his readiness and willingness through his lawyer and also made a false plea that he would be available at the Sub Registrar Office on 30.06.2003..

20.Further to establish his readiness and willingness to perform his part of the contract as per the recitals found in Ex.A1, if within the time allowed under the sale agreement, the defendants 1 to 4 have not come forward to complete the sale

transaction as now pleaded by the plaintiff, nothing prevented him from instituting appropriate civil case against the defendants 1 to 4 and also take steps to deposit the balance sale consideration in the court as stipulated in the contract. On the other hand as discussed above, the plaintiff has sent a legal notice much later after the expiry of the time limit prescribed under the sale agreement. Even prior to the same it was found that the defendants 1 to 4 have terminated the contract by sending a telegram to the plaintiff. The receipt of which, has not been controverted by the plaintiff. The factum of the failure of the plaintiff to take steps to deposit the balance sale consideration into the court and simultaneously take appropriate proceedings against the defendants 1 to 4 as put up in the agreement would also be an indication to show that the plaintiff was not ready and willing to perform his part of the contract and had no inclination to perform his part of the contract and accordingly, it could be seen that the laches in his conduct would establish that he has adopted hide and seek policy towards the defendants in the execution of the sale agreement.

21. In the light of the above discussions, it could be seen that the plaintiff has falsely pleaded that he was always ready and willing to perform his part of the contract within the stipulated

time. On the other hand, the discussion made above on the basis of the evidence adduced by the parties concerned would go to show that even though the plaintiff was aware and sure about the intention of the parties that time should be the essence of the contract, despite the same did not evince interest to pay the balance sale consideration within the time allotted and fixed under the agreement and after the defendants 1 to 4 had terminated his contract, sent the legal notice on 26.06.2003, making a false claim as if he has been always ready and willing to perform his part of the contract. It was found that the defendants entered into the contract with the plaintiff on account of their dire need for meeting out their urgent family expenses. Accordingly, 100 days was stipulated as the time limit for completing a transaction. Since the plaintiff did not come forward to perform his part of the contract within the time allotted and fixed, the defendants thereafter, could be seen to have terminated the contract under Ex.B2 and on the next day itself in order to meet out their urgent family expenses alienated the suit property to the fifth defendant for a valid sale consideration under Ex.A8.

22.It could therefore be seen that the plaintiff was also put on notice about the sale of the suit property to the fifth defendant

by the telegram Ex.B2 dated 25.06.2003 and the legal notice marked as Ex.B3 dated 02.07.2003. It is only thereafter, the plaintiff has laid the present suit for specific performance and permanent injunction and the suit has been laid by the plaintiff on 02.07.2003. It could therefore be seen on the date of the suit the plaintiff is well aware that the defendants 1 to 4 had alienated the suit property to the fifth defendant.

23. In such circumstances, it could be seen that the relief sought for by the plaintiff in the suit for permanent injunction has become infructuous even on the date of the suit. Now according to the fifth defendant he is a bonafide purchaser for value without notice. Now the evidence adduced would go to show that the fifth defendant after verification of the encumbrance of the suit property had ventured to purchase the same from the defendants 1 to 4 and the evidence of DW2 with reference to the same remains unassailable despite cross examination. Nothing has been elicited during the cross examination of DW2 to disbelieve his evidence with reference to the bonafide purchase of the suit property for value by the fifth defendant without notice. It could therefore be seen that the fifth defendant has established that she is a bonafide purchaser for value without notice. Merely because the

fifth defendant happens to be the tenant of the suit property would not by itself lead to the conclusion that she is aware of the sale agreement entered into between the plaintiff and the defendants 1 to 4 on 05.03.2003.

24. Therefore, as rightly found by the first Appellate Court, it could be seen that the fifth defendant is a bonafide purchaser for value without notice of the sale agreement, the plaintiff has not established his readiness and willingness to perform the sale transaction within the time stipulated, the plaintiff and the defendants 1 to 4 have entered into the sale agreement only with an intention of keeping the time as the essence of the contract and accordingly, they have prescribed 100 days for completing the sale transaction.

25. It is found that the defendants 1 to 4 entered into the sale agreement with the plaintiff to meet out their urgent family expenses, particularly, the operation expenses of the first defendant. The terms and conditions of the sale agreement are incorporated as directed by the plaintiff. The plaintiff has no proof that within the time allotted, he has been ready and willing to pay the balance sale consideration. Only after the time stipulated in the

agreement had expired, the plaintiff caused the legal notice. Even prior to the same, the defendants 1 to 4 sent a telegram to the plaintiff terminating the contract. It was found that only after the receipt of the telegram, the plaintiff has caused a legal notice to be sent falsely expressing his readiness and willingness to perform his contract on 26.03.2003. On the same day the defendants 1 to 4 had alienated the suit property to the fifth defendant. The plaintiff is aware of the same and this could be seen from the contents of the telegram and also the reply notice marked in this case. Despite the same, it could be seen that the plaintiff has come forward with the relief of permanent injunction in the suit.

26. That apart, it could also be seen that the plaintiff without seeking a prayer for setting aside the sale deed executed in favour of the defendants, has laid the suit simplicitor for specific performance.

27. In this connection, the learned counsel for the defendants in support of their case, as to when the time is the essence of performance of the contract, has placed reliance upon the decision reported in **2011(12) SCC 18(Saradamani Kandappan Vs. S.Rajalakshmi)** and a perusal of the above said

decision would go to show that as adumbrated therein, when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract. This is found to be as per Section 55 of the Indian Contract Act.

28. Therefore it could be seen that as discussed above when the parties knew very well the time should be the essence of the contract in question and despite the plaintiff knowing fully well of the same has not performed his contract and also not established his readiness and willingness to perform his part of the contract, it could be seen that the contract has become terminable on the part of the defendants 1 to 4.

29. Accordingly, the defendants having terminated the same under Ex.B2, it could be seen that the plaintiff's prayer for the discretionary relief of specific performance cannot be granted in his favour. Further, as contended by the learned counsel for the defendants that the contract in favour of the plaintiff having been

terminated well before the issuance of the legal notice and also the suit property having been alienated to the fifth defendant and the fifth defendant is found to be a bonafide purchaser for value without notice, as per the decision reported in **(2013) 15 SCC 27 (I.S.Sikandar(dead) by LRS Vs. K.Subramani and Others)**, in the absence of any prayer seeking declaratory relief that the termination of the agreement is bad in law and hence the suit for specific performance is not maintainable.

30.Considering the facts and circumstances of the case as rightly argued by the learned counsel for the defendants, the decisions relied upon by the learned counsel for the plaintiff reported in **2011 (1) MWN (Civil) 70 (M.Jayakumar Vs. Minor Geetha & 5 Others) & 2014(11) SCC 605 (Biswanath Ghosh Vs. Gobinda Ghosh)** would not be applicable to the facts and circumstances of the present case.

31.In the light of the above discussions, I hold that the plaintiff has failed to establish that any substantial question of law is involved in this Second Appeal. I therefore, conclude that the Second Appeal is devoid of merits and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

15.11.2016

Index: Yes/No
Internet:Yes/No

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To

1.The Sub Court,
Sankari.

2.The District Munsif Court,
sankari.

T.RAVINDRAN.J.,
Dn

S.A.No.135 of 2011

15.11.2016