

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 28.11.2016

Judgment Pronounced : 09.12.2016

Coram

The Honourable Mr.Justice R.SUBRAMANIAN

A.S.No.396 of 2003

1.M.Michaelsamy (Deceased)

2.M.John Francis

3.M.Santiago

4.M.Maria Joseph (Deceased)

5.M.Rosali

6.M.Antony Paulraj

(Appellants 2,3,5 to 7 are LR's of the
4th appellant vide order of this Court
dated 14.11.2016 Vide CMP.Nos.255
to 257 of 2014)

7.Josephine ... Appellants/Defendants 2 to 8

Vs.

1.John Kennedy Pradeep

2.Nirmala Kennady

3.Avila Christina

(R-3 brought on record as LR's of the
deceased first appellant, vide order of
this Court dated 14.11.2016 made in
CMP.No.255 to 257 of 2014)

... Respondents/Plaintiffs 1&2

This Appeal has been filed against the Judgment and
decree dated 20.01.2003 made in O.S.No.1622 of 1995 on the file
of the learned Principal Additional Subordinate Judge,
Coimbatore.

For Appellants : Mr.N.Ishtiaq Ahmed

For respondents : Mrs.M.Chithira Gomathy for
Mr.R.N.Amarnath

J U D G M E N T

The unsuccessful defendants, in O.S.No.1622 of 1995, on the file of the Principal Additional Subordinate Court, Coimbatore, are the appellants.

2. The said suit was filed seeking the relief of specific performance of the agreement of sale dated 19.01.1995. According to the plaintiffs, the first defendant has agreed to sell the suit property to the plaintiffs for a total sale consideration of Rs.3,30,000/- and had received a sum of Rs.75,000/- as advance. A period of six months was fixed for performance and the first defendant had agreed to vacate the tenants in the suit property. In July,1995, the plaintiffs demanded performance, the first defendant had represented that the tenants would vacate during the first week of Tamil month of Ippasi, as the month of Puratasi is considered to be inauspicious. It is claimed by the plaintiffs that the first defendant agreed to execute the sale deed after the tenants vacated. Thereafter, when a demand was made on 24.10.1995 seeking performance of the agreement, the first defendant had sought for time citing the failure of the tenants to vacate the house. However, the plaintiffs have expressed their willingness to take the sale deed even without the tenants vacating the property. According to the plaintiffs, a further demand was made on 29.10.1995, in reply to which the first defendant had refused to execute the sale deed. Hence, legal notice was issued on 07.11.1995, to which a reply was sent by the first defendant on 28.11.1995 making false allegations and refusing to execute the sale deed. Hence, the plaintiffs came forward with this suit.

3. During the pendency of the suit, the first defendant died intestate on 18.05.2005 and the defendants 2 to 7 have been impleaded as Legal Representatives of the deceased first defendant.

4. The first defendant had filed a written statement contending that the agreement is true and the sale price was also admitted. However, the first defendant would contend that time is the essence of contract and since the time has expired he is not bound to execute the sale deed. It is further contended that the plaintiffs were not ready and willing to perform their part of the contract. It is also claimed that the tenants were none other than the sons of the first defendant and hence they would vacate at any time.

5. Before the trial Court, the first plaintiff examined himself as P.W.1, one Mariyadoss was examined as P.W.2 and Exs.A1 to A27 were marked on the side of the plaintiffs. On the

side of the defendants, the 7th defendant examined himself as D.W.1 and Exs.B1 and B2 were marked. On a consideration of the oral and documentary evidence, the learned Principal Additional Subordinate Judge, Coimbatore framed the following issues:-

1. Whether the plaintiffs are entitled to the relief of Specific Performance?
2. Whether the suit has been properly valued and proper Court fee has been paid?
3. To what relief the plaintiffs are entitled?

On 28.11.2001, the following additional issue has been framed.

1. Whether the plaintiffs were ready and willing to perform their part of the contract?

6. On a consideration of the oral and documentary evidence, the learned Principal Subordinate Judge concluded that the plaintiffs were ready and willing to perform their part of the contract and they have also established that they are capable for paying the balance sale consideration. The learned trial judge also concluded that the tenants were not vacated and the bunk shop situated on the eastern side of the property was also not removed and as per clause VI of the agreement, the conditions relating to removal of the bunk shop and eviction of the tenants are mandatory for execution of the sale deed. Upon such conclusion, the learned Principal Subordinate Judge decreed the suit as prayed for. Aggrieved by the said judgment and decree, the defendants 2 to 7 have preferred the above appeal.

7. I have heard Mr.N.Ishtiaq Ahmed, learned counsel appearing for the appellants and Mrs.M.Chithira Gomathy, learned counsel appearing for the respondents.

8. The following points arise for determination in this appeal.

1. Whether the time could be held to be the essence of contract on the facts and circumstances of the case?

2. Whether the plaintiffs have established that they were ready and willing to perform their part of the contract in order enable them to seek specific performance of the agreement?

3. Whether the exercise of discretion by the trial Court in favour of the plaintiffs is based on sound judicial principles?

9. I have gone through the entire oral and documentary evidence in the suit. Mr. N.Ishtiaq Ahmed, learned counsel for the appellants would rely upon Clause III of the agreement, which reads as follows:-

“3. இந்த ஒப்பந்தத் தேதியிலிருந்து 6 மாதங்களுக்குள், நெ.(2) மீதிப் பணம் முழுவதும் கொடுத்து, வீட்டைக் கிரயம் செய்து கொள்ள வேண்டியது.”

and would contend that since the plaintiffs have not come forward to pay the balance sale consideration within the time stipulated under the agreement, they have lost the right to seek specific performance in the agreement. In support of his contention, the learned counsel for the appellants would also rely upon the judgments of the Hon'ble Supreme Court reported in 2015(2) Scale 651, 2013 (15) SCC 27 and 2015 (8) SCC 695.

10. Per contra, Mrs.M.Chithira Gomathy, learned counsel appearing for the respondents would invite my attention to Clauses IV, V and VI of the agreement dated 19.01.1996. The said Clauses read as follows:-

“4.நெ.(2), வீட்டைக் கிரயம் செய்து கொள்ளும் முன்பு, வீட்டின் இரண்டு போர்சனிலும் குடியிருக்கும் நபர்களை காலி செய்து தருவது நெ.(1)ன் பொறுப்பு.

5. அதே போல், வீட்டின் கிழக்குப் பக்கம், வீட்டிற்கு சொந்தமான காலியிடத்திலுள்ள, மரத்தினாலான பெட்டிக்கடையையும், அதிலுள்ள வாடகைதாரரையும் காலி செய்து தருவது நெ.(1)ன் பொறுப்பு.

6. மேல்குறிப்பிட்ட (4) மற்றும் (5) ஆம் நிபந்தனைகள் நிறைவேற்றப்பட்ட பின்பே, வீட்டை முழுக்கிரயம் செய்து கொள்ள நெ.(2) ஒப்பக் கொண்டுள்ளார்.”

Relying upon the above said clauses of the agreement, the learned counsel for the respondents would contend that reading of clause VI of the agreement would show that the eviction of the tenants and removal of the bunk shop are conditions which should precede the execution of the sale deed. The learned counsel for the respondents would further contend that it is an admitted case that the tenants were not evicted and the bunk shop has not been removed. Therefore, according to her, time cannot be considered to be the essence of the contract in order to dis-entitle the plaintiffs to the relief of specific performance.

11. The learned counsel for the respondents would rely upon the Division Bench Judgment of this Court in R.ARAVINDAN Vs. K.R.S.JANAKIRAMAN AND OTHERS reported in 2015(6) CTC 593, wherein, this Court has considered the time being the essence of the contract as well as the principles of which the court should exercise the discretion in a suit for specific performance. Even in the Judgment of the Hon'ble Supreme Court in I.S.SIKANDAR(DEAD)BY LRS. Vs. K.SUBRAMANI AND OTHERS reported in 2013 (15) SCC page 27, wherein, it has held that while examining the question of time being the essence of the

contract, particularly with reference to the contract relating to immovable property court should also look in to the surrounding circumstances in order to decide the intention of the parties at the time of the agreement.

12. In NANJAPPAN Vs. RAMASAMY AND ANOTHER reported in 2015 (2) SCALE 651, the Hon'ble Supreme Court has considered the question of readiness and willingness, the Hon'ble Supreme Court took note of the undue delay in filing the suit and held that it will not be proper to exercise the discretion in favour of the plaintiffs who had come to the court belatedly.

13. In PADMAKUMARI AND OTHERS Vs. DASAYYAN AND OTHERS, reported in 2015(8)SCC 695, the Hon'ble Supreme Court has taken note of the failure on the part of the plaintiffs to pay the balance sale consideration within the time fixed in the agreement and held that he is not entitled to discretionary relief of specific performance. In the said decision, the Hon'ble Supreme Court took note of specific clause in the agreement of sale and concluded that the claim of the plaintiffs that the defendants had not performed their part of the contract is myth and hence it could not be accepted. In this background if we look at the agreement in the case on hand, the following position emerges. Clause III of the agreement fixed a period of six months as the time for payment of sale consideration. Clause IV provides that the first defendant should ensure the eviction of the tenants in the two portions before execution of the sale deed. Clause V provides that the first defendant should also remove the bunk shop which is situated the eastern side of the house after evicting the tenant occupying the said bunk shop. Clause VI, in my opinion is more crucial, it provides that the compliance condition No.4 and 5 are mandatory and it is after the said compliance, the sale deed is to be executed. Admittedly, in the case on hand, the tenants were not evicted and the bunk shop was not removed till the filing of the suit. The plaintiffs have let in cogent evidence would show that they have been demanding execution of the sale deed within the time fixed under the agreement. It could also be seen from the evidence on record that it is the first defendant who had delayed the execution of the sale deed on the pretext of his inability to evict the tenants. Though the attempt was made to project the case of inability on the part of the plaintiffs to raise funds, the same was not believed by the trial Court on the ground that the plaintiffs have proved that had the wherewithal to raise funds and pay the balance sale consideration. It should pointed out at this juncture the first plaintiff is an employee of a Nationalised Bank and the second plaintiff is working as Teacher in a school. Therefore, there is no plausible reason to hold that the plaintiffs are persons incapable of paying the balance sale consideration. The evidence of D.W.1, namely, the 7th defendant in the suit is totally lacking

material particulars. Even in the Chief Examination, he has deposed that his father had not let out the property to any one. But, he admitted that his brothers were occupying portions of the house. Even in the Chief examination, he has not denied the claim of the plaintiffs that they have been seeking execution of the sale deed within a period of six months as fixed under Ex.A1 agreement. A combined reading of clauses 3,4,5 and 6 of the agreement would conclusively establish that the parties never intended the time frame of six months to be the essence of the contract. Therefore, Point No.1 is answered against the appellants.

14. POINT NO.II: On the question of readiness and willingness to perform their part of the contract, the plaintiffs have let in convincing evidence to show that they are possessed sufficient wealth in order to enable them to pay the balance sale consideration and they had also been making demands for execution of sale deed and it was the first defendant who was delaying the entire transaction. Though, D.W.1 in his evidence would state that his father was ready to evict the tenants. It is seen from the records that the defendants are still in occupation of the suit property and they did not vacate within a period of six months contemplated under agreement. The plaintiffs have made demands in the month of July,1995 and explanation given by them for waiting till July is reasonable and deserves acceptance. The plaintiffs have issued a legal notice on 07.11.1995 demanding performance and the same was replied on 28.11.1995. The suit came to be filed on 14.12.1995, i.e. within a period of two weeks from the date of reply notice. Therefore, I am of the considered view that the plaintiffs have proved that they were ready and willing to perform their part of contract and there is no delay on their part in seeking the relief of specific performance. Thus, the second point is also answered against the appellants.

15. POINT NO.III: On the question of discretion, the Division Bench of this Court, in R.ARAVINDAN Vs K.R.S.JANAKIRAMAN AND OTHERS reported in 2015 (6) SCC 593, has held that the discretion given to the Court in case of specific performance could be guided by judicial principles. I have already found that the parties did not intend time to be the essence of the contract and the plaintiffs have established that they were always ready and willing to perform their part of the contract. From the conduct of the parties, it is also seen that the plaintiffs have established blemishless conduct, whereas the defendants, particularly the deceased first defendant had not complied with the requirements of the eviction of the tenants and removal of the bunk shop as per the agreement. It is settled position of law that the conduct of the defendants should also been taken into account while exercising the discretion vested in the court in the matter of specific performance. Therefore, I find that the trial Court rightly

exercised the discretion in favour of the plaintiffs/respondents. Hence, the Point No.3 is also answered in favour of the respondents.

16. For the foregoing reasons, I do not find any merit in this appeal and the appeal is dismissed, confirming the Judgment and decree dated 20.01.2003 made in O.S.No.1622 of 1995 on the file of the learned Principal Additional Subordinate Judge, Coimbatore. However, taking note of the facts and circumstances of the case, there will be no order as to costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

The Principal Additional Subordinate Judge,
Coimbatore.

+1 cc to Mr.N.Ishtiaq Ahmed Advocate sr 69429

+1 cc to Mr.R.N.Amarnath Advocate sr 72552

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