

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 07.10.2016

PRONOUNCED ON: 19.10.2016

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.254 of 2010

Syed Abdul Gani

Plaintiff

Vs

1. Sajjida Begum

2. A.Hassan Ali

Defendants

Prayer:- This Civil Suit is filed under Order VII Rule 1 of CPC read with Order II

Rule 1 of the Original Side Rules for the reliefs as stated therein.

For Plaintiff : Mr.C.R.Dhasarathan

For Defendants : Mr.R.Abdul Mubeen

JUDGEMENT

This civil suit is filed by the Plaintiff to pass a judgement and decree against the Defendants:-

- (a) directing the Defendants to execute the sale deed, by receiving the balance sale price, in respect of the house, ground and premises, bearing Old No.28, New No.31, Lal Begum Street, Triplicane, Chennai-5, measuring 1353 square feet or thereabouts more fully described in the schedule and register the same and on the Defendants failing to do so, this court itself to execute the sale deed in favour of the Plaintiff.
- (b) directing the Defendants to deliver vacant possession of the suit property, except the portion of the property in occupation of the Plaintiff as a tenant.
- (c) directing the Defendants to pay the costs of the suit.

2. The case of the Plaintiff, in a nutshell, as set out in the plaint is as follows:-

a. The Plaintiff, who is the tenant under the 1st Defendant, had entered into a sale agreement, dated 11.12.2007, with the 1st Defendant, with respect to the suit property, viz. house, ground and premises, bearing Old No.28, New No.31, Lal Begum Street, Triplicane, Chennai-5, measuring 1353 square feet for a total sale consideration of Rs.36,00,000/- and on the same day, a sum of Rs.2,00,000/- was paid as advance. Under the said sale agreement, the balance sale consideration and the registration of the sale deed had to be completed within 90 days. The Plaintiff had paid another sum of Rs.4,80,000/- and also handed over three cheques, dated 01.07.2008, 15.07.2008 and 30.07.2008, for Rs.5 lakhs, Rs.4 lakhs and Rs.4 lakhs respectively, towards the sale consideration. Since the 1st Defendant wanted the payment to be made in cash, the amounts mentioned in the said cheques were paid by the Plaintiff by cash and owing to trust, he did not seek return of the said three cheques. The Plaintiff had, thus, paid a total sum of Rs.19,80,000/- towards the sale consideration and the balance to be paid was Rs.16,20,000/-, for which payment, he was also sanctioned house loan facility.

b. Unfortunately, due to family circumstances, namely, the sudden demise of his wife's brother, he could not arrange for execution and registration of the sale deed. The 2nd Defendant is the son of the 1st Defendant and the Defendants demanded additional sale consideration and the Plaintiff did not agree to the same. The 2nd Defendant filled up the said three cheques in his

name and presented the same for encashment and since they were returned, he initiated criminal proceedings under Section 138 of the Negotiable Instruments Act in CC.No.15320 of 2008 on the file of the 13th Metropolitan Magistrate, Egmore, Chennai.

c. The Plaintiff issued a legal notice dated 20.7.2008. The 1st Defendant, who received the said notice, did not sent any reply. The 2nd Defendant did not receive the first notice. The 2nd notice dated 9.8.2008 was sent to the 2nd Defendant and he sent a reply dated 18.8.2008, stating that the agreement of sale was cancelled, since the time was the essence of the contract and within 90 days, the agreement was not concluded and hence, the advance of Rs.2 lakhs was forfeited. It is further stated that the amounts mentioned in the cheques were actually the hand loans received by the Plaintiff from the 2nd Defendant and that the 1st Defendant had settled the property in favour of the 2nd Defendant on 28.7.2008 and that the market value of the property was Rs.85 lakhs and the sale consideration mentioned in the agreement of sale was very much under valued.

d. It had been further stated in the plaint that the 2nd Defendant had entered into the agreement of sale with Shajath Mohamed Khan for a sale consideration of Rs.1,15,00,000/-. The Plaintiff pleaded that he was always ready and willing to pay the balance sale consideration and had not committed any breach of the contract. Though the time was the essence of the contract, only because of the calamity in the Plaintiff's family, the sale agreement could not be concluded in time. The 2nd Defendant has been added as a party, since

the 1st Defendant had settled the property in the name of the 2nd Defendant. In such circumstances, this civil suit has been filed, seeking the relief of specific performance of the agreement of sale, dated 11.12.2007.

3. In the written statement filed by the 2nd Defendant, which was adopted by the 1st Defendant, the 2nd Defendant admitted the agreement of sale dated 11.12.2007, entered into between the 1st Defendant and the Plaintiff and also the fact of payment of advance sale consideration of Rs.2 lakhs by the Plaintiff to the 1st Defendant. It is further stated in the written statement that the Plaintiff was the tenant in the 1st Floor Rear Portion Flat and was paying a monthly rent of Rs.6000/-. It has been specifically stated that the time was the essence of the contract of the agreement and since the Plaintiff did not complete the sale transaction within 90 days, the agreement had become frustrated. Consequently, the relationship of the vendor and the purchaser between the 1st Defendant and the Plaintiff had ceased to exist. Subsequently, the Plaintiff received a hand loan of Rs.11 lakhs for his business purposes and agreed to pay the same with a profit of Rs.2 lakhs and as security, he had issued the three cheques for Rs.5 lakhs, Rs.4 lakhs and Rs.4 lakhs, dated 1.7.2008, 15.07.2008 and 30.7.2008 respectively. Since the Plaintiff did not repay the hand loan, the 2nd Defendant deposited the cheques into the bank for encashment and they were dishonoured with an endorsement 'stop payment'. There was also insufficient balance in the account of the Plaintiff and consequently, criminal proceedings under Section 138 of the Negotiable Instruments Act had been initiated in CC.No.15320 of 2008 before the 13th

Metropolitan Magistrate, Egmore, Chennai and the same is pending. The 2nd Defendant denied that the said cheques were issued towards the sale consideration. The time fixed for concluding the sale agreement had expired as early as on 11.3.2008 and the cheques were issued only in the month of July 2008. The 2nd Defendant further denied the payment of Rs.4,80,000/- by cash by the Plaintiff. The 2nd Defendant specifically denied that part of sale consideration of Rs.19,80,000/- as stated in the Plaint had been paid by the Plaintiff towards the sale consideration. The suit has been filed only subsequent to the proceedings under Section 138 of the Act. The 2nd Defendant did not receive the first notice issued by the Plaintiff and to the second notice, he had sent a suitable reply, denying the liability towards the sale agreement. The Plaintiff is a wilful defaulter in payment of rent and consequently, eviction proceedings were also contemplated against the Plaintiff. Since the time was the essence of the agreement, the Plaintiff not having adhered to the time limit of 90 days, cannot seek the relief of specific performance of the agreement, which had already lapsed. In such circumstances, this civil suit is liable to be dismissed.

4. On perusal of the pleadings of the parties, the following issues were framed:-

1. Whether the time was agreed to be the essence of the contract in the suit agreement for sale, dated 11.12.2007 between the Plaintiff and the 1st Defendant?
2. Whether the Plaintiff paid a further sum of Rs.4,80,000/- towards the balance sale consideration apart from the advance of Rs.2,00,000/- mentioned in the agreement?

3. Whether the amounts covered by the cheques, dated 01.07.2008, 15.07.2008 and 30.07.2008 were paid by the Plaintiff to the 1st Defendant as part payment of the balance consideration with the understanding that the cheques would be returned by the 1st Defendant?
 4. Whether the said cheques were issued for repayment of a loan of Rs.11,00,000/- obtained by the Plaintiff for his business?
 5. Whether the Plaintiff has so far paid a total sum of Rs.19,80,000/- towards the sale consideration agreed to between the parties?
 6. Whether the parties agreed to treat the advance amount of Rs.2,00,000/- mentioned in the suit agreement to be adjusted towards the rental arrears and the rental advance on the understanding that the relationship of vendor and purchaser under the agreement would no longer subsist and the relationship of landlord and tenant alone would continue?
 7. Whether the Plaintiff was ready and willing from the date of agreement and continues to be ready and willing to perform his part of the agreement for sale?
 8. Whether the Plaintiff is entitled to the relief of specific performance directing the Defendant to execute the sale deed in accordance with the suit agreement?
 9. Whether the Plaintiff is entitled to the relief of possession of the suit property except the portion of the property in the occupation of the Plaintiff?
 10. To what other reliefs the Plaintiff is entitled to?
5. On the side of the Plaintiff, the Plaintiff examined himself as PW.1

and his wife as PW.2 and marked Exs.P1 to P8. On the side of the Defendants, the 2nd Defendant was examined as DW.1 and Exs.D1 to D5 were marked.

6. This court heard the learned counsel on either side and considered their submissions and also perused the materials placed on record.

7. **Issue (1):-** The agreement of sale entered into between the

Plaintiff and the 1st Defendant dated 11.12.2007 had been marked as Ex.P1. It is not a registered document. After tracing of the title of the suit property, the following terms and conditions have been stipulated in the agreement of sale Ex.P1 :-

1. The Vendor shall sell the said property to the purchaser or his nominee without any encumbrance whatsoever.
2. The Purchaser shall pay a total sum of Rs.36,00,000/- (Rupees thirty six lakhs only) to the Vendor towards sale consideration for the said property.
3. The Purchaser on this day has paid a sum of Rs.2,00,000/- (Rupees two lakhs only) as advance cum part sale consideration by way of cheque dated 14.12.2007 bearing No.137051 drawn on State Bank of Mysore to the Vendor and the balance sale consideration shall be paid before registration of the sale deed.
4. Sale shall be completed by both the parties within 90 days from the date of execution of this agreement for sale time being the essence of the contract.
5. Before registration of sale deed the Vendor shall furnish the following:-
 - i. All title deeds relating to the said property.
 - ii. Electricity and Municipal taxes and charges paid to the authorities.
6. If any of the parties fail to comply with the terms of this agreement within the stipulated time, the affected party will be at liberty to enforce the specific performance of the contract besides claiming damages.
8. Among the above said conditions 1 to 6, condition (4) relates to

the period within which the agreement should be concluded. According to the condition (4), the sale was to be completed by both the parties within 90 days from the date of execution of the sale agreement and it has also been

specifically stated that the time is the essence of the contract. It is the stand of the Plaintiff that subsequent to the agreement, which is dated 11.12.2007, he had also paid by cash a sum of Rs.4,80,000/- towards the sale consideration. It is the further stand of the Plaintiff that apart from the amount of Rs.4,80,000/-, he had also issued three cheques for Rs.5 lakhs, Rs.4 lakhs and Rs.4 lakhs on 1.7.2008, 15.7.2008 and 30.7.2008. Since the 1st Defendant wanted the above sums of money in cash, he had also paid the said sums by cash. But, because of the trust imposed on the Defendants, he did not seek return of the said cheques.

9. The law with respect to the issue (1) as to whether the time is the essence of the contract has been more elaborately dealt with in the decision of the Honourable Supreme Court reported in **2011 12 SCC 18 (Saradhamani Kandappan Vs. S.Rajalakshmi and others)**, wherein it has been held in paragraphs 22, 23, 25, 35, 36 and 37 as under:-

“22. Section 55 of Contract Act deals with the effect of failure to perform at a fixed time, in contract in which time is essential. Said Section is extracted below :

“Section 55. Effect of failure to perform at a fixed time, in contract in which time is essential. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do such thing at or before a 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.

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time? but the promisee is entitled to compensation from the promisor for any

loss occasioned to him by such failure.

Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he gives notice to the promisor of his intention to do so."

23. The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

25. The legal position is clear from the decision of a Constitution Bench of this court in **Chand Rani v. Kamal Rani [1993 (1) SCC 519]**, wherein this court outlined the principle thus:

"19. It is a well accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in

unequivocal language.”

An aside regarding the principle “time is not of the essence” for future consideration

35. It is of some interest to note that the distinction between contracts relating to immovable properties and other contracts was not drawn by section 55 of Contract Act (or any other provisions of Contract Act or Specific Relief Act, 1963). Courts in India made the said distinction, by following the English law evolved during the nineteenth century. This Court held that time is not of the essence of the contracts relating to immovable properties and that notwithstanding default in carrying out the contract within the specified period, specific performance will ordinarily be granted, if having regard to the express stipulation of the parties, nature of the property and surrounding circumstances, it is not inequitable to grant such relief. [vide *Gomathinayagam Pillai* (supra), *Govind Prasad Chaturvedi* (supra) and *Indira Kaur v. Sheo Lal Kapoor* 1988 (2) SCC 188 and *Chand Rani* (supra) following the decision of Privy Council in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* AIR 1915 PC 83 and other cases]. Of course, the Constitution Bench in *Chand Rani* made a slight departure from the said view.

36. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the

year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

37. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

10. In the case on hand, as stated above, at the time of agreement of sale on 11.12.2007, the Plaintiff had paid an advance of Rs.2 lakhs towards the sale consideration of Rs.36 lakhs. In the terms of the agreement, it had been specifically stated that the agreement should be completed within 90 days and that time is the essence of the contract. For the agreement to be completed within 90 days, the Plaintiff has to, in the first place, pay the balance sale

consideration. Even if the balance sale consideration is not paid, the Plaintiff should express his readiness and willingness to pay the said balance sale consideration by proving to the court that he had sufficient means to pay the balance sale consideration within 90 days. After establishing his means to pay the balance sale consideration, the Plaintiff should further establish his willingness and readiness to come forward to pay the said amount or at least tender the said amount to the 1st Defendant. In the case on hand, the Plaintiff has done neither. In fact, in the Plaint, there is an averment that he had paid a sum of Rs.4,80,000/- by cash, but unfortunately, there is no date mentioned as to when the said amount was paid. The dates are mentioned with respect to the payment of Rs.5 lakhs, Rs.4 lakhs and Rs.4 lakhs as 1.7.2008, 15.7.2008 and 30.7.2008. These three dates were well beyond the period of 90 days mentioned in the sale agreement. Moreover, the said three cheques were issued in the name of the 2nd Defendant, who is not a party to Ex.P1 agreement of sale and he is a third party stranger. He may be the son of the 1st Defendant, but that cannot be a ground for the Plaintiff to tender the amounts to the 2nd Defendant, who is not the agreement holder. Even other wise, it is on record that the said three cheques had been dishonoured. However, the Plaintiff had claimed that he had paid by cash the amounts towards the said cheques. Since those amounts had not been paid to the 1st Defendant, it cannot be presumed by this court that the amounts were paid to the 2nd Defendant on behalf of the 1st Defendant. The 1st Defendant has an independent jural standing and in her individual capacity, she signed the

agreement of sale and in the said agreement of sale, the Plaintiff had undertaken as follows:-

2. The Purchaser shall pay a total sum of Rs.36,00,000/- (Rupees thirty six lakhs only) to the **Vendor** towards sale consideration for the said property.

11. It is further seen that consequently, the Plaintiff has the initial burden to pay the balance sale consideration to the 1st Defendant alone. In fact, in the agreement of sale, it has been specifically mentioned that the balance sale consideration was to be paid before the registration of the sale deed. This has not been complied with by the Plaintiff. During his chief examination, the Plaintiff had widened the scope of the suit and had stated that apart from the sale consideration, even prior to the sale agreement, an additional sum of Rs.36 lakhs had been paid to the daughter of the 1st Defendant and to the wife of the 2nd Defendant. However, since this aspect had not been pleaded in the plaint, evidence which has not been pleaded, cannot be looked into by the court.

12. In the written arguments submitted by the learned counsel for the Plaintiff, the following details had been given:-

SCHEDULE OF PAYMENT			
1	01.08.2007	Citi Bank Cheque issued by the Plaintiff in favour of the 1st Defendant ep6	Rs.1,00,000
2	12.09.2007	Withdrawn by the Plaintiff from the Citi Bank and paid cash to Hajjira Parveen D1's daughter	Rs.7,50,000
3	01.11.2007	Withdrawn by the Plaintiff from Citi Bank and paid cash to the 2nd Defendant Ex.P6	Rs.5,00,000
4	06.12.2007	Withdrawn by the Plaintiff from Citi Bank and paid cash to the 2nd Defendant Ex.P6	Rs.4,00,000
5	31.08.2007	Withdrawn by the Plaintiff from Standard Chartered Bank and paid cash to D1 Ex.P6	Rs.1,00,000
6	30.11.2007	Withdrawn by the Plaintiff from the Standard	Rs.4,00,000

SCHEDULE OF PAYMENT			
	7	chartered Bank and paid cash to the 2nd Defendant Ex.P6	
7	15.11.2007	Withdrawn by the Plaintiff from ICICI Bank and paid cash to the 2nd Defendant Ex.P6	Rs.2,80,000
8	05.11.2007	Allahabad Bank Cheque issued by the Plaintiff in favour of Tasleem Hussain, wife of the 2nd Defendant Ex.P6	Rs.3,30,000
9	20.12.2007	Withdrawn by the Plaintiff from State Bank of Mysore and paid by cash to Defendants Ex.P7	Rs.2,00,000
10	28.01.2008	Withdrawn by the Plaintiff from State Bank of Mysore and paid by cash to Defendants Ex.P7	Rs.50,000

13. However, as stated above, except S.No.9, which is the advance amount mentioned in Ex.P1 and S.No.10, which is only a withdrawal by the Plaintiff, no other amount has been paid after the agreement of sale. The various amounts mentioned by the Plaintiff as having been paid to the daughter of the 1st Defendant or even to the 2nd Defendant cannot be related to the agreement of sale, which was entered into subsequently. There has been no evidence tendered by the Plaintiff as to why the agreement of sale did not mention the payment of amounts prior to the said date. The agreement of sale entered into in the year 2007 did not require registration and is an agreement between the two private parties and there could have been no legal impediment in mentioning the entire amounts paid towards the sale transaction. Since the Plaintiff had not come forward with these details and since within 90 days from the date of agreement of sale, there has been no payment at all made by the Plaintiff to the 1st Defendant and there is also no evidence that within the period of 90 days, the Plaintiff had the necessary funds and that he was ready and willing to partake with the said funds towards the sale consideration, this court holds that the Plaintiff had abandoned the agreement. As per the decision of the

Constitution Bench of the Honourable Supreme Court in **Chand Rani v. Kamal Rani [1993 (1) SCC 519]**, it has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language. In the case on hand, therefore, this court holds that after the expiry of 90 days, since the Plaintiff had not taken even a single step towards performing his obligation under the agreement, though time cannot be the essence of the contract, the Plaintiff cannot hold the Defendants in ransom perpetually. The agreement had worked itself out after the period of 90 days and consequently, this court holds that issue (1) is answered against the Plaintiff.

14. **Issues (2), (3) and (4):-** Issue (2) relates to the payment of Rs.4,80,000/- by cash towards the balance sale consideration, issue (3) relates to the payment by the three cheques dated 1.7.2008, 15.7.2008 and 30.7.2008 by the Plaintiff and issue (4) relates to whether the said cheques were issued for payment of loan of Rs.11 lakhs.

15. As mentioned above, the agreement of sale is dated 11.12.2007. It had been mentioned that the agreement should be completed within 90 days, namely, on or before 11.3.2008. The Plaintiff had stated that he had paid a cash of Rs.4,80,000/- towards the balance sale consideration. Unfortunately, the date of payment of the said amount had not been mentioned in the plaint. It had also not been mentioned in his chief examination and no document has also

been produced to show the availability of the said amount of Rs.4,80,000/- on any particular day and payment of the same to the 1st Defendant. There is also no endorsement for payment of Rs.4,80,000/- in the agreement of sale Ex.P1. Therefore, in the absence of any such valid evidence, it is highly inconceivable that the Plaintiff, who claims indulgence from this court, had actually paid the said sum of Rs.4,80,000/- by cash to the 1st Defendant. When such a huge amount is paid, it is only prudent that a receipt is obtained from the 1st Defendant or an endorsement is made on the agreement of sale. In fact, in the sale agreement, subsequent to the agreement date, there is no mention about any further payment towards the balance sale consideration. In the absence of any evidence either directly or indirectly for payment of cash of Rs.4,80,000/-, this court is unable to agree with the contention of the learned counsel for the Plaintiff that he had paid the said sum towards the balance sale consideration. In fact, there is no evidence for payment of the said sum at all.

16. Issue (3) and (4) relate to the amounts by the three cheques, which are dated 1.7.2008, 15.7.2008 and 30.7.2008. Here again, the said three cheques relate to the period far exceeding the 90 days mentioned in the agreement of sale. It has been stated in the plaint that the Defendants wanted the payment by cash and consequently, the Plaintiff paid the amounts by cash and because of trust, he did not take return of the cheques. On the other hand, it is the stand of the 2nd Defendant that he had given a loan of Rs.11 lakhs and the Plaintiff issued these three cheques towards repayment of the said loan. At any rate, before this court, the 2nd Defendant is not the agreement holder in

Ex.P1 and he is only a witness to the document. The 2nd Defendant was not even the owner of the property. Therefore, this court cannot conclude that the amounts mentioned in the said three cheques were issued towards the sale consideration. Even other wise, the three cheques had been dishonoured and consequently, no amount flowed to the Defendants. Therefore, again this court holds that the said three cheques were unrelated to the agreement of sale. It has also to be mentioned that the three cheques are the subject matters of the criminal proceedings initiated before the criminal court, which court alone has to decide as to whether the cheques were issued for consideration or not. This court is concerned only with the sale consideration and consequently, this court holds that the three cheques were not issued with respect to the sale consideration mentioned in Ex.P1. Accordingly, issues (2), (3) and (4) are answered against the Plaintiff.

17. Issue (5): - It is seen from the evidence that the Plaintiff had not proved that he had actually paid the sum of Rs.4,80,000/- by cash and also the sum of Rs.5 lakhs, Rs.4 lakhs and Rs.4 lakhs by cheques dated 1.7.2008, 15.7.2008 and 30.7.2008. In fact, the said three cheques had been issued in the name of the 2nd Defendant. The 2nd Defendant is not a party to the agreement of sale Ex.P1. The date of payment of the amount of Rs.4,80,000/- has not been specifically mentioned in the plaint. Consequently, this court holds that the Plaintiff had not paid Rs.19,80,000/- towards the sale consideration to the 1st Defendant who is the Vendor and accordingly, this issue (5) is also answered against the Plaintiff.

18. **Issue (6):-** It has been mentioned in the written statement of the 2nd Defendant that he had issued notices, stating that since time was the essence of the contract, the amount of Rs.2 lakhs had been adjusted towards the rental arrears. Ex.D5 dated 11.3.2011 is the notice issued by the Defendants and Ex.D6 is the notice sent through telegram dated 8.4.2011 by the 2nd Defendant in this regard. These two notices have been issued after the institution of the suit and consequently, they cannot be relied upon by either of the parties. Therefore, this court holds that the said amount of Rs.2 lakhs relates only to the advance sale consideration and cannot be taken as an adjustment towards the arrears of rent. Accordingly, this issue (6) is answered against the Defendants and in favour of the Plaintiff.

19. **Issues (7) and (8): -** In view of the findings rendered in respect of the issues (2), (3) and (4) and since there is no evidence to show that the Plaintiff was ready and willing to pay the balance sale consideration, the Plaintiff is not entitled for the relief of specific performance of the contract. Accordingly, these issues (7) and (8) are answered against the Plaintiff.

20. **Issue (9):-** The Plaintiff is already a tenant in the suit property. Hence, this issue is left open to be adjudicated before the appropriate forum in accordance with law.

21. **Issue (10):-** It had been admitted in the written statement that when the agreement of sale was entered into on 11.12.2007, an advance of Rs.2 lakhs towards the sale consideration was paid by the Plaintiff to the 1st Defendant. The Plaintiff had not come forward with legally acceptable evidence

for payment of balance of sale consideration as stated by him. The agreement had worked itself out and had expired within 90 days. However, the Defendants had retained the said amount of Rs.2 lakhs. This amount is liable to be paid back to the Plaintiff with interest. Consequently, this court holds that the Plaintiff is entitled for return of the said sum of Rs.2 lakhs, which was paid as advance towards the sale consideration, from the 1st Defendant with interest.

22. Since the Defendants pleaded that the agreement had run out of time and had still retained the advance amount of Rs.2 lakhs, which has necessitated the Plaintiff to constitute this suit for specific performance, the Plaintiff is also entitled for costs.

23. In the result, this civil suit is partly allowed to the extent mentioned above, with costs. i.e in so far as the issues (1) to (9) are concerned, this civil suit is dismissed and in so far as the issue (10) is concerned, this civil suit is decreed for a sum of Rs.2,00,000/- (Rupees two lakhs only) with interest at 12% p.a from the date of the plaint till the date of decree and thereafter, 6% p.a. from the date of the decree till the date of payment. The said decretal amount along with costs shall be paid by the 1st Defendant to the Plaintiff within a period of three months.

19.10.2016

Index:Yes/No
Web:Yes/No
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