

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 19.09.2017

JUDGMENT PRONOUNCED ON: 03.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S. No.463 of 1995

and

CMP Nos.996 and 1007 of 2013

1. S.Kalianna Gounder (Deceased)
 2. K.Subramaniam
 3. Suresh
 4. Vinoth
 5. Rishi
- ... Appellants/Defendants 1 to 5

(2nd Appellant recorded as L.R of the deceased first appellant vide order of Court dated 31.07.2008 made in Memo No.57828/2008 dated 21.07.2008)

(Order dated 31/07/2008 was recalled vide order of Court dated 04.09.2008 made in CMP No.1306 of 2008)

(Appellants 3 to 5 declared as major and 2nd appellant discharged from Guardianship vide order of Court dated 6/6/13 made in CMP No.98/13)

Versus

1. S.Periyasamy
2. C.Ramasamy
3. Pappu
4. K.Natarajan
5. K.Subramaniam (deceased)
6. K.Rajendran (died)
7. N.Sekar
8. N.Krishnan
9. Senthil
10. Babu
11. Rajamani (deceased)
12. Arukkani
13. Marayi

14. Nallammal
15. Palaniammal
16. S.S.Thangavel

.. Respondents

(RR 4,5 & 11 are recorded as LR's of the deceased R6 vide order of Court dated 31.07.2008 made in Memo No.57828/2008 dated 21.07.2008)

(Order dated 31.07.2008 was recalled vide order of Court dated 04.09.2008 made in CMP 1306/08)

(RR 12 to 14 impleaded as Lrs of deceased 1st appellant vide order by Court dated 27.01.2012 made in CMP No.493/2010 in AS No.463 of 1995)

(RR 9 & 10 declared as major vide order of Court dated 06.06.2013 made in CMP No.97/2013)

(R 15 brought on record as Lrs of the deceased R5 and R16 brought on record as LR's of the deceased R11 Respondent & 3rd appellant name amended vide order of Court dated 30.08.2017 by RSMJ made in CMP No.96 of 2013 and CMP Nos.27 & 28 of 2014 in AS No.463 of 1995)

Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree passed in O.S.No.246 of 1990 dated 30.09.1994 on the file of the Sub Court, Namakkal.

For Appellants : Mr.AR.L.Sundaresan, Senior Advocate
for Mr.C.H.Pandian

For RR 1 to 3 : Mr.S.Parthasarathy, Senior Advocate
for Mr.S.Saravanan

For RR 7 & 8 : Mr. V.K.Vijayaraghavan

For 9th Respondent : Mr. Lakshmi Narayanan
for Mr.Ilayaraja

For RR 10 to 15 : Mr. K.Senthil Kumar

For 16th Respondent : Mr. V.Manoharan

J U D G E M E N T

This appeal is filed against the Judgment and Decree dated 30.09.1994 passed OS No.246 of 1990 on the file of the Sub Court, Namakkal. The trial Court decreed the suit with costs payable by the defendants 1 to 5. Aggrieved by the same, the defendants 1 to 5 have come up with this appeal.

2. The respondents 1 to 3, as plaintiffs, have filed the above suit in O.S. No. 246 of 1990 for specific performance of the agreement dated 15.12.1986. The said agreement was entered into between the plaintiffs and the defendants 1, 2, 6, 7, 8 and 9 on their own behalf and on behalf of the minor defendants 3, 4, 5, 6, 10, 11 and 12. Pending appeal, the 1st appellant died and 2nd appellant was recorded as legal representative of the deceased 1st appellant. Appellants 3 to 5 who were minors by then, were declared majors and the 2nd appellant was discharged from the guardianship.

3. Agreeing to convey land measuring an extent of 3.15 acres at the rate of Rs.2,20,000/- per acre, the agreement dated 15.12.1986 came to be executed. The total sale consideration payable by the plaintiffs worked out to Rs.6,93,000/-. On the date of the agreement, the plaintiffs paid an advance of Rs.50,000/- and the contract was to be completed within a period of 5 months from the date of the said agreement i.e., on or before 14.05.1987. As per the agreement the defendants were to develop the lands into a lay out and seek approval from the appropriate authorities. Such approval came to be granted in January 1988. Thereafter, on 30.04.1988, the plaintiffs paid a sum of Rs.1,20,000/- and the defendants conveyed six plots of lands as laid out by the plaintiffs. On 31.08.1988, the defendants received a further sum of Rs.1,43,200/- and sold seven plots. One plot was sold on 16.11.1988 and on that date the defendants received a sum of Rs.20,000/-. The payments made and the execution sale deeds on 30.04.1988, 31.08.1988 and 16.11.1988 are not in dispute. Thereafter, on 13.11.1989 the plaintiffs issued a notice demanding specific performance. A reply was sent by the defendants 1 to 5 on 26.11.1989, claiming that the plaintiffs were not ready and willing to perform their part of the contract. They also claimed that as per the agreement the defendants 1 to 5 should be paid a sum of Rs.3,50,000/- towards their share in the land and the agreement was entered into as a single agreement since the plaintiffs wanted to develop the lands by laying out the same into the residential plots. Pointing out that the agreement fixed a period of five months for performance and said period ended on 14.05.1987, the defendants 1 to 5 would claim that the

plaintiffs were not ready and willing to perform their part of the contract. The financial capacity of the plaintiffs to honour the agreement was also denied. However, the defendants 1 to 5 had made it clear that if only the plaintiffs were ready to pay the balance amount within 15 days from the date of the receipt of the reply, the defendants 1 to 5 will be ready and willing to execute the sale deed in terms of the contract. It was also made clear that the said offer is only made out of magnanimity and the same cannot be treated as extension of the time fixed under the agreement. The defendants 7, 8 and 13 sent a reply on 26.11.1989, wherein it was pointed out that those defendants were always been ready and willing to execute the sale deed as per the contract. According to them, it was the 6th defendant Natarajan and his sons, namely defendants 9 and 10, who were delaying the execution of the sale deed and thus had been preventing the defendants 7, 8 and 13 also from receiving the sale consideration and executing the sale deed. It was also made clear that those defendants were not responsible for the delay that had accrued in the execution of the sale deed. Since the defendants 1 to 5 had sent a reply notice refusing to execute the sale deed the plaintiffs have come forward with the above suit on 22.02.1990 seeking specific performance.

4. The plaintiffs would contend that they were always ready and willing to perform their part of the contract and It is because of the inter se disputes between defendants 7, 8 and 13 on the one hand and the defendants 6, 9 and 10 on the other hand, the execution of the sale deed was delayed. Therefore, the plaintiffs contended that they would be entitled to a decree for specific performance.

5. The defendants 1 to 5 filled a written statement claiming that the plaintiffs were not ready and willing to perform their part of the contract. The financial capacity of the plaintiffs to pay the balance sale consideration was also vehemently denied by the defendants 1 to 5. It was also contended that the plaintiff having not utilized an opportunity afforded by the defendants 1 to 5, vide their reply notice dated 03.11.1989, are not entitled to specific performance. The sum and substance of the defence was that the plaintiffs having failed to perform their part of the contract within time stipulated under the contract or within a reasonable time thereafter they are not entitled to seek specific performance.

6. The 7th defendant filed a written statement, which was adopted by defendants 8, and 11 to 13. The 7th defendant in his written statement would admit the agreement as well as fixation of the consideration, but the 7th defendant would contend that though defendants 7, 8 and 11 to 13 were always been ready and willing to perform their part of the contract, it is the

defendants 6, 9 and 10, who have been not co-operating and since there are certain litigations pending between the defendants 7, 8 and 11 to 13 and defendants 6, 9 and 10, there was a delay in execution of the sale deed. It was also contended those defendants, namely defendants 7, 8 and 11 to 13 were always ready and willing to perform their part of the contract and in fact they had made a prayer for the suit being decreed without costs. The other defendants, namely defendants 6, 9 and 10 had not filed a written statement but it is seen from the records that defendants 6 to 13, were represented by the same counsel. It is seen from the proceedings before the trial Court that the defendants 6 to 13 had no objection for the suit being decreed without cost.

7. On the above pleadings, the learned trial Judge, namely the Subordinate Judge, Namakkal, framed the following issues:

1. Whether the defendants 7, 8 and 11 to 13 refused to execute the sale deed/deeds as per the sale agreement?
2. Whether the defendants 7, 8 and 11 to 13 are bound to pay the suit cost?

The Additional issues framed on 12.06.1994 are as follows:

1. Whether the plaintiffs have been ready and willing to perform their part of the contract as per the agreement dated 15.12.1986?
2. Whether the claim of the plaintiffs that the suit agreement could not be performed within a time fixed due to the inter se dispute between the defendants?
3. Whether the suit is barred by limitation?
4. Whether the claim of defendants 1 to 5 that the plaintiffs have agreed to pay a sum of Rs.3,50,000/- to them towards their share of the consideration is true?
5. Whether the suit agreement provides for sale of the property in portions?
6. Whether the time was not essence of the contract?
7. Whether the suit has been properly valued and proper Court fee has been paid?

8. During trial, one Kupuswamy, husband of the 3rd plaintiff was examined as P.W.1 and Exhibits A1 to A12 were marked. The 2nd defendant was examined as D.W.1 and Exhibits B1 to B3 were marked.

9. Upon a consideration of the oral and documentary evidence the learned Subordinate Judge found that the parties did not intend that time will be the essence of the contract. Relying upon the execution of the sale deeds on 30.04.1988, 31.08.1988 and 16.11.1988 by the defendants even after the expiry of the five month period fixed under the agreement dated

15.12.1986, the learned Trial Judge concluded that the plaintiffs were always ready and willing to perform their part of the contract, but the delay had occurred only due to the inter se disputes between the defendants. On such findings the learned Trial Judge decreed the suit as prayed for.

10. Aggrieved the defendants 1 to 5 have come forward with this appeal.

11. I have heard Mr.AR.L.Sunderasan, learned Senior Counsel appearing for Mr.C.H.Pandian, learned counsel for the appellants, Mr.S.Parthasarathy, learned Senior Counsel appearing for Mr.S.Saravanan, learned counsel for the respondents 1 to 3, namely the plaintiffs, Mr.V.K.Vijayaraghavan, learned counsel appearing for the respondents 7 and 8 and Mr.V.Lakshmi Narayanan, learned counsel appearing for Mr.V. Ilayaraja, learned counsel for the 9th respondent, Mr.K.Senthilkumar, learned counsel appearing for the respondents 10 to 15 and Mr.N.Manoharan, learned counsel appearing for the 16th respondent.

12. Mr. AR.L. Sundaresan, learned Senior Counsel appearing for the appellants would contend that the plaintiffs have not shown that they were ready and willing to perform their part of the contract through out. He would contend that, though strictly time may not be the essence of the contract, in case of contract of sale relating to immovable properties, it is incumbent on the plaintiffs to show that they were always ready and willing to perform their part of the contract. Drawing my attention to the fact that the last of the sales under Ex.A5 was on 16.11.1988 and the suit notice demanding specific performance came to be issued by the plaintiffs on 03.11.1989, which is nearly after a year, Mr. AR.L.Sundaresan, learned Senior Counsel would contend that there is no explanation for the delay of nearly a year. He would also point out that in the reply notice issued by D1 to D5 dated 13.11.1989, they had very clearly stated that they were ready and willing to execute the sale deed, if only the plaintiffs pay the balance of sale consideration within 15 days. The other defendants, namely defendants 7, 8 and 10 to 13 have also expressed their willingness to execute the sale deed despite that the plaintiffs have chosen to file a suit in February 1990, again after a delay of 3 months.

13. The learned Senior Counsel would also point out that P.W.1 in his oral evidence particularly in cross examination has stated that he did not offer to pay the balance of sale consideration despite the fact that he had the money on 14.05.1987. Again he would depose that only six plots could be

sold on 30.04.1988, therefore, he paid only a sum of Rs.1,20,000/-, though he was liable to pay more amounts on 30.04.1988, he could not pay the amount because he did not have the money. This deposition, according to the learned Senior counsel, would show that the plaintiffs were not ready and willing to perform their part of the contract.

14. Appearing for the 9th respondent Mr.V.Lakshmi Narayanan, learned counsel would contend that if the decree for specific performance as against the defendants 1 to 5 is set aside in this appeal, the entire decree would go and there cannot be a decree as against the other defendants. The learned counsel would point out that though defendants 7, 8 and 11 to 13 had in fact filed a written statement submitting to a decree without cost, If it is concluded that the plaintiffs were not ready and willing to perform their part of the contract, the said absence of readiness and willingness being attributable to the entire contract, there cannot be a decree for specific performance against the defendants 6 to 13. If the plaintiffs are found to be not ready and willing, the entire suit will have to suffer dismissal.

15. Mr. V.K.Vijayaraghavan, learned counsel appearing for the respondents 7 and 8, Mr.K.Senthilkumar, learned counsel appearing for the respondents 10 and 15 and Mr.N.Manoharan, learned counsel appearing for the 16th respondent would adopt the argument of Mr.V.Lakshmi Narayanan.

16. Mr. S. Pathasarathy, learned Senior Counsel appearing for the respondents 1 to 3, namely the plaintiffs would submit that the conduct of the parties would show that time was not the essence of the contract. He would draw my attention to the contents of the agreement dated 15.12.1986, marked as Ex.A1, which provide for development of the property and for the sale of the same as residential plots. The learned Senior counsel would submit that the agreement is not an agreement of sale simplicitor. Being an agreement which provides for development of the land which requires sanctions from various authorities, it should be construed that obligations could be performed in part as and when the plaintiffs were able to identify the buyers for the plots. He would also contend that the very fact that the defendants have come forward to execute sale deeds for different number of plots on 30.04.1988, 31.08.1988 and 16.11.1988 would show that it was a continuous process and therefore, it cannot be said that the plaintiffs were not ready and willing to perform their part of the contract. The learned Senior Counsel would also take a lead from the reply notice issued on behalf of defendants 7, 8 and 13 to contend that it is the defendants 6, 9 and 10, who were responsible for the delay. Therefore, according to him, the plaintiffs cannot be said to

have been not ready and willing to perform their part of the contract. It also further contended by the learned counsel that even if the plaintiffs are found to be not ready and willing on the basis of the pleadings of defendants 1 to 5, the same cannot be extended to defendants 6 to 13, since they have not denied the readiness and willingness on the part of the plaintiffs.

17. Pointing out that the defendants 6 to 13 had in fact submitted to a decree without costs, the learned Senior Counsel would contend that even if I am to conclude that the plaintiffs were not ready and willing to perform their part of the contract, it is only the decree against the defendants 1 to 5 that could be set aside in this appeal. He would further contend that the defendants 6 to 13 have not chosen to challenge the decree against them.

18. In answer to the contention of Mr. V. Lakshminarayanan, that the Court should not have acted upon the fact that the guardian had submitted to a decree on behalf of the minor defendants 11 and 12, in view of the provisions of Order 32 Rule 7 of the Code of Civil Procedure, which imposes an obligation on the part of the guardian to seek leave to enter into a compromise or an agreement on behalf of the minors and that such an application should be accompanied by an affidavit filed by the guardian and the certificate issued by the counsel that such compromise or agreement beneficial to the interest of the minor, Mr. S. Parthasarathy, learned Senior Counsel would submit that the failure to adhere to the above requirements of Order 32 Rule 7 of the Code of Civil Procedure would only make the compromise voidable at the option of the minor and the same is not void. In support of his contention he would rely upon the judgment of the Hon'ble Supreme Court in Kaushalya Devi and others v. Baijnath Sayal (deceased) and others, reported in AIR 1961 SC 790. It is also contended that the defendants 6 to 13 having been represented by the same counsel and the intrinsic evidence that is available from the reply notice issued by the defendants 7, 8 and 13 to the effect that it was the 6th defendant, who was responsible for the delay, the learned Senior counsel would contend that the plaintiffs cannot be said to be not ready and willing to perform their part of the contract.

19. It is also argued by Mr. V. Lakshmi Narayanan, learned counsel appearing for the 9th respondent that the bar contemplated under Section 16 (c) of The Specific Relief Act is a personal bar to the relief and it does not depend on the stand taken by the defendants. Even in the cases where the defendant would remain ex-parte, if the Court finds that the plaintiffs are guilty of non performance or there was an absence of readiness and willingness on the part of the plaintiffs, the Court has to necessarily dismiss the suit for specific

performance.

20. On the above rival contentions, the following points are framed for determination in this appeal:

1. Whether the decree granted by the trial Court as against the minor defendants, namely defendants 11 and 12, is void or voidable at the option of the minors?
2. Whether the defendants 6 to 13, could claim that the plaintiffs were not ready and willing to perform their part of the contract and hence despite the defendants 6 to 13 having submitted to a decree the Court should not have granted a decree for specific performance and whether the defendants 6 to 13 could be allowed to raise the said issue in this appeal filed by defendants 1 to 5?
3. Whether the plaintiffs were ready and willing to perform their part of the contract.

Point No.1:

21. As could be seen from the written statement filed by the 7th defendant and adopted by defendants 8 and 11 to 13, they had in fact submitted to a decree in the suit. According to learned counsel Mr. V. Lakshmi Narayanan, the defendants 11 and 12 being minors on the said date the decree passed on the basis of a concession or an abandonment or a compromise reached by the guardian without the sanction of the Court either under Order 23 Rule 1 or under Order 32 Rule 7 of the Code of Civil Procedure is void. The learned counsel would submit that the Sub Rule 2 of Order 23 Rule 1 of the Code of Civil Procedure, requires an affidavit to be filed by the guardian accompanied by a Certificate issued by the legal practitioner to the effect that such abandonment is for the benefit of the minors. In cases of a compromise the situation governed by Order 32 Rule 7 of the Code of Civil Procedure, wherein the guardian is required to seek leave of the Court by filing an application, to enter into compromise. The said application to be accompanied by a certificate issued by the counsel to the effect that the compromise is beneficial to the minors. Pointing out that none of the requirements contemplated under Order 23 Rule 1(2) or Order 32 Rule 7 (1A) of the Code of Civil Procedure have been complied with, Mr.V.Lakshmi Narayanan, learned counsel would contend that the compromise or the submission to a decree by the guardian under a decree passed there on is void and therefore is a nullity.

22. In answer to the said contention of the learned counsel Mr.V.Lakshmi Narayanan, Mr. S. Parathasarathy, learned Senior Counsel appearing for the respondents 1 to 3 would submit that the non-compliance with the provisions of Order 32 Rule 7(1)(a)

or Order 23 Rule 1 Sub Rule 2 of the Code of Civil Procedure would only render the decree or Order based on such compromise or concession voidable at the option of the minors and not totally void. In support of his contention he would rely upon the judgment of the Hon'ble Supreme Court, which dealt with a similar situation, which arose out of non compliance with the provisions of Order 32 Rule 7 (1). The Hon'ble Supreme Court in Kaushalya Devi and others v. Baijnath Sayal (deceased) and others, reported in AIR 1961 SC 790, had held that an order or decree passed on the basis of a compromise without express permission of the Court under Order 32 Rule 7 of the Code of Civil Procedure is voidable at the option of the minors and it is not void. He would also rely upon the Judgment of the Supreme Court in Bishundeo Narain and another v. Seogeni Rai and Jagernath, reported in AIR 1951 SC 280, for the said proposition. Admittedly, in the case on hand the minor defendants, who had attained majority, have not chosen to challenge the validity of the judgment and the decree of the trial Court. Therefore, in view of the pronouncements of the Hon'ble Supreme Court cited supra, I do not think the erstwhile minors can now contend that the judgment and decree based on the submission to a decree made by the guardian is void as against them. Therefore, the first question is answered in favour of the plaintiffs/ respondents 1 to 3.

Point No.2:

23. Originally the 7th defendant filed a written statement contending that it is the defendants 6, 9 and 10, who are responsible for the delay in execution of sale deeds in favour of the plaintiffs. The said written statement was adopted by defendants 8 and 11 to 13. The defendants 6, 9 and 10, who are father and sons did not file any separate written statement. It is seen from the record of the trial Court that they were represented by one and the same counsel. Neither the defendants 6 to 13 nor their legal representatives have filed an appeal against the decree granted by the trial Court. It is only the defendants 1 to 5, who had contested the suit and have challenged the decree in this appeal.

24. Mr. S. Parthasarathy, learned Senior Counsel appearing for the respondents 1 to 3, namely the plaintiffs would contend that whatever is my finding on the readiness and willingness of the plaintiffs, the same could be restricted only to the claims of defendants 1 to 5. The defendants 6 to 13, who had submitted a decree cannot take shelter under the appeal filed by the defendants 1 to 5 to contend that if the decree is reversed on the ground of the plaintiffs not being ready and willing to perform their part of the contract, the entire decree should go.

25. Per contra, Mr. Mr.V.Lakshmi Narayanan, learned counsel

appearing for the 9th respondent would submit that Section 16 of the Specific Relief Act, operates as a personal bar for the relief of specific performance. According to the learned counsel, the specific performance of a contract cannot be enforced in favour of a person, who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. Therefore, according to the learned Counsel Section 16(c) creates a personal bar on the plaintiffs to seek specific performance de hors the resistance or acceptance offered by the defendants. He would also submit that even if some of the defendants submitted to a decree and the others contest the suit, if the Court is to conclude that the plaintiffs were not ready and willing to perform their part of the contract, the result would be the dismissal of the entire suit and not a partial decree against the defendants, who submitted to a decree and a dismissal insofar as the defendants, who had opposed to grant of the decree.

26. Mr.S.Parthasarathy, learned Senior Counsel appearing for the respondents 1 to 3 would vehemently contend that such an interpretation would create an anomalous situation whereby a decree is being denied to the plaintiffs, where the defendants had actually submitted to a decree. The learned counsel would also submit that on the facts of the present case, It could be seen that it is the defendants 6, 9 and 10, who had been a stumbling block in the contract being performed. Section 16 (c) of the Specific Relief Act, reads as follows:

Section 16(1) Personal bars to relief:- Specific performance of a contract cannot be enforced in favour of a person-

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

27. It could be seen from the heading of the Section itself that the bar created under Section 16 is personal in nature i.e., personal to the plaintiff. Therefore, if the plaintiff does not aver and prove that he has performed or always been ready and willing to perform his part of the contract, he would not be entitled to a decree de hors the defence of the defendants. In Balamurugan v. Arumugam and Ors. reported in 2010 (23) CTCOL 535, this Court, while considering the nature of the bar enacted under Section 16 of the Specific Relief Act, had held that the absence of readiness and willingness can be raised even by a subsequent purchaser. In answer to the argument that since there was no plea regarding the absence of readiness and

willingness, the plaintiffs did not have an opportunity to lead evidence regarding the same, this Court had observed as follows:

"19. A pertinent argument was advanced by the learned Counsel for the 1st Respondent that despite the averment made by the Plaintiff in the plaint expressing his readiness and willingness, there was no denial by the Defendants, more particularly by the Defendants 1 and 2 and therefore, there was no occasion for him to lead any evidence to prove his readiness and willingness."

"20. In a suit for specific performance, it is for the plaintiff to plead and prove his readiness and willingness to perform his part of the contract. That being a mandatory requirement, the Court before passing judgment against the Defendant has to scrutinise the facts set out in the plaint to find out whether the said requirements, specially those indicated in Section 16(1)(c) of the Act have been complied with or not."

In Ram Awadh (dead) by LR's & Others .Vs. Achhaibar Dubry & another 2000(2) SCC 428, the Hon'ble Supreme Court dealing with Section 16 and the obligations imposed upon the said Section on the plaintiff in a suit for specific performance had observed as follows:

"6. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a Plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one Defendant and not to another. It is open to any Defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in Jugraj Singh v. Labh Singh is erroneous."

28. Therefore, it is clear that de hors the conduct of the defendants in a suit for specific performance, it is incumbent

on the plaintiff to prove continuous readiness and willingness. If such readiness and willingness is absent the whole suit would have to fail and there cannot be a decree against some of the defendants alone in such a suit for specific performance. In my considered opinion in as much as the bar contemplated under Section 16 are personal bars as against the plaintiffs in a suit for specific performance, whether or not there is a plea on the part of the defendants, the plaintiff will have to plead and prove that he or she is always ready and willing to perform his or her part of the contract. A negative finding on the readiness and willingness will entail the dismissal of the entire suit and there cannot be a partial decree. Therefore, the second question is answered in favour of respondents 7 to 16.

Point No.3:

29. Now coming to a question of readiness and willingness on the part of the plaintiff, the plaintiffs has, in paragraph 14 of the plaint, averred that they have been ready and willing to perform their part of the contract, but they were unable to do it because of the conduct of the defendants. In the evidence, P.W.1 has deposed as follows:

“.....லே அவுட் அப்ருவல் ஆன பின்பு, கிரையம் செய்யவேண்டும். ஒப்பந்தத்தில் எழுதியுள்ளதா என்று தெரியாது. 14.5.87ந் தேதி இரண்டு தவணைகளில் பணம் செலுத்தி விட வேண்டும் என எழுதப்பட்டது. 14.5.87ந் தேதிக்குள் பணம் கொடுக்கவில்லை. 14.5.87ந் தேதிக்குள் பணம் இல்லாததால் நான் பணம் கொடுக்கவில்லை என்பது சரியல்ல. பணம் வைத்து இருந்தேன். ஆனால் கொடுக்கவில்லை. முதலில் 30.4.88ந் தேதி 6 பிளாட்டு மட்டும் தான் என்னால் விற்க முடிந்தது, அதனால் ரூ.1,20,000./ கொடுத்தேன், பாக்கிப் பணம் கொடுக்கவில்லை. 30.4.88ந் தேதி வேறு பணம் கொடுக்க வேண்டியிருந்தது, பாக்கி பணம் இல்லாததால் நான் பணம் கொடுக்கவில்லை. பிளாட்டு விற்பனை கொடுக்கலாம் என்று இருந்த விட்டேன். ரூ.1,20,000./ கொடுத்து பின்பு, தான் கே.எஸ்.கருப்பன் இறந்து விட்டார். அவர்கள் வாங்கிய போது 13.8.88ந் தேதி 7 பிளாட்டு விற்பனையில் செய்து கொடுத்தாக ரூ.1,43,200./ கொடுத்தோம். அந்த தேதியில் நான் மொத்த கிரய பாக்கியையும் கொடுக்கவில்லை. பாக்கி பணம் இல்லாததால் கொடுக்கவில்லை, ஏ3 படி தொகை கொடுத்தேன். பாக்கி பணம் முழுவதும் கொடுக்கவில்லை....”

It will be pertinent to point out at this juncture that the defendants 1 to 5, who had opposed the claim of the plaintiffs, in their reply notice dated 13.11.1989 had specifically stated as follows:

“...நமது கட்சிக்காரர்கள் அவர்கள் பாகத்தை அவர்களுக்குரிய கிரய பாக்கி தொகையை வெலுத்தினால் இந்த நோட்டீஸ் கிடைந்த 15 நாட்களுக்குள்

எப்போது வேண்டுமானாலும் தங்கள் கட்சிக் காரர்களுக்காகவோ அல்லது அவர்கள் கோரும் நபர்களுக்காவது கிரயம் செய்து கொடுக்க தயாராய் உள்ளார்கள்”

30. Despite such a reply notice, the plaintiffs did not pay the balance of the sale consideration and take a sale deed from defendants 1 to 5, on the other hand they filed the suit after 3 months from the date of receipt of the reply notice. Mr.AR.L.Sundaresan, learned Senior Counsel appearing for the appellants, namely defendants 1 to 5, pointing out the above facts would contend that at no stretch of imagination, the plaintiffs can be said to have been ready and willing to perform their part of the contract. Relying heavily on the evidence of P.W.1 in his cross examination, wherein he would say that he did not pay the entire balance of sale consideration because he did not have the money, Mr.AR.L.Sundaresan, learned Senior Counsel would submit that there cannot be a better case of absence of readiness and willingness. Drawing my attention of the judgment of the Hon'ble Supreme Court in K.S.Vidyanadam and others v. Vairavan, reported in 1997 (1) CTC 628, and relying upon the observations of the Hon'ble Supreme Court, which are as follows:

(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”.

He would contend that the suit should have been dismissed for want of readiness and willness.

31. He would also invite my attention to the decision of the Hon'ble Supreme Court in Saradamani Kandappan v. Rajalakshmi and others, [2011 (4) CTC 640] and Padmakumari and ors. v. Dasayyan and others in [2015 (6) CTC 545], wherein the Hon'ble Supreme Court has repeatedly pointed out the need for the Courts examining the readiness and willingness of the plaintiffs in suit for specific performance. In fact in Saradamani Kandappan, cited supra, the Hon'ble Supreme Court had observed as follows:-

"25. 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, lapses, 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."

32. After having referred to the judgment of the Hon'ble Supreme Court in Chandrani (smt) (dead) by Lrs. v. Kamalrani (smt) (dead) by Lrs. reported in 1993 (1) SCC 519, it was

concluded that the time fixed under the agreement should be given some meaning and if the plaintiffs are found to be wanting in exhibiting their readiness and willingness to perform their part of the contract by showing that they had the sufficient money as well as the willingness to perform their part within the time stipulated under the agreement, they cannot be said to be ready and willing to perform their part of the contract. I had an occasion to consider similar question in Babulal Tater v. Harakh Chand J. Golecha, reported in 2017 5 CTC 403, wherein I had followed the above pronouncements of the Hon'ble Supreme Court and concluded that the plaintiff therein was guilty of absence of readiness and willingness. From the evidence available on record it is seen that the last of the sale deed pursuant to the agreement was dated 16.11.1988 and thereafter the plaintiffs had not taken any steps to seek execution of sale deed till 03.11.1989 for nearly one year. No doubt it is true that the parties had not intended that time is to be the essence of the contract, this is obvious from the fact that the defendants have chosen to execute sale deed after expiry of the time granted under the original agreement dated 15.12.1986, but that by itself will not enable the plaintiffs to seek specific performance without showing that they were ready and willing. There is no evidence to show that any attempt was made by the plaintiffs to seek execution of sale deeds between 16.11.1988 and 03.11.1989, namely the date of issuance of notice. By the reply dated 13.11.1989 the defendants 1 to 5, who are actually the contesting defendants, had required payment of the entire balance of sale consideration within 15 days from the date of receipt of the reply and take a sale deed. The plaintiffs have not come forward to pay the balance amount and take a sale deed from defendants 1 to 5 atleast with reference to their share of the property. This would by itself show that plaintiffs were not ready and willing to perform their part of the contract. From the evidence of P.W.1, extracted above it is very clear that on 14.05.1987 i.e., the last date for performance of the agreement, the plaintiffs were not ready and willing to perform their part of the contract. It is also seen that on 30.04.1988, the plaintiffs knew that they have to pay a larger sum of money to the defendants for performance of the entire agreement but they paid only Rs.1,20,000/- and took a sale deed for the six grounds alone. This conduct would, in my considered opinion, debars the plaintiffs from seeking the relief of specific performance under Section 16(1)(c) of the Specific Relief Act. Therefore, I conclude that the plaintiffs are not entitled to the relief of specific performance.

33. The next question would arise is what would be the result of this appeal. Mr.S.Parthasarathy, learned Senior Counsel would contend that even if I am to conclude that the plaintiffs were not ready and willing to perform their part of

the contract, I cannot vary the decree as against defendants 6 to 13 in as much as they had submitted to a decree. The contract sought to be enforced to one. The plaintiffs have been held to be not ready and willing to perform their part of the contract. Therefore, Section 16(1) (c) would operate against them. Of course defendants 6 to 13 have not preferred any appeal against the judgment and decree. Therefore, whether in the appeal filed defendants 1 to 5, the entire decree could be reversed or not is a question. The answer is not far to seek. The provisions contained under Order 41 Rule 4 of the Code of Civil Procedure, empowers the Court to vary the decree in favour of all the plaintiffs or all the defendants as the case may be in an appeal against the decree by some of the plaintiffs or the defendants. The only condition being the appeal should be against the whole decree. In the present appeal, I find the appeal is against the entire decree and the memorandum of valuation itself shows that Court fees has been paid on the value of the suit as such and not on the value of the share of the defendants 1 to 5 alone.

34. In the case on hand as already stated the relief is one for specific performance, which is sought for of entire agreement. Therefore, if it is found that the plaintiffs are not ready and willing to perform their part of the contract, the whole decree will go de hors the fact whether some defendants have submitted to the decree or not. Therefore, the result would be, the entire suit in OS No.246 of 1990 would stand dismissed and defendants 1 to 5 alone would be entitled to cost in this appeal.

35. In the result the appeal is allowed with cost for defendants 1 to 5 alone, the judgment and decree in OS No.246 of 1990 will stand set aside and the suit in OS No.246 of 1990 will stand dismissed. Consequently, the connected miscellaneous petitions are closed.

सत्यमेव जयते Sd/-

Assistant Registrar (CS-VIII)

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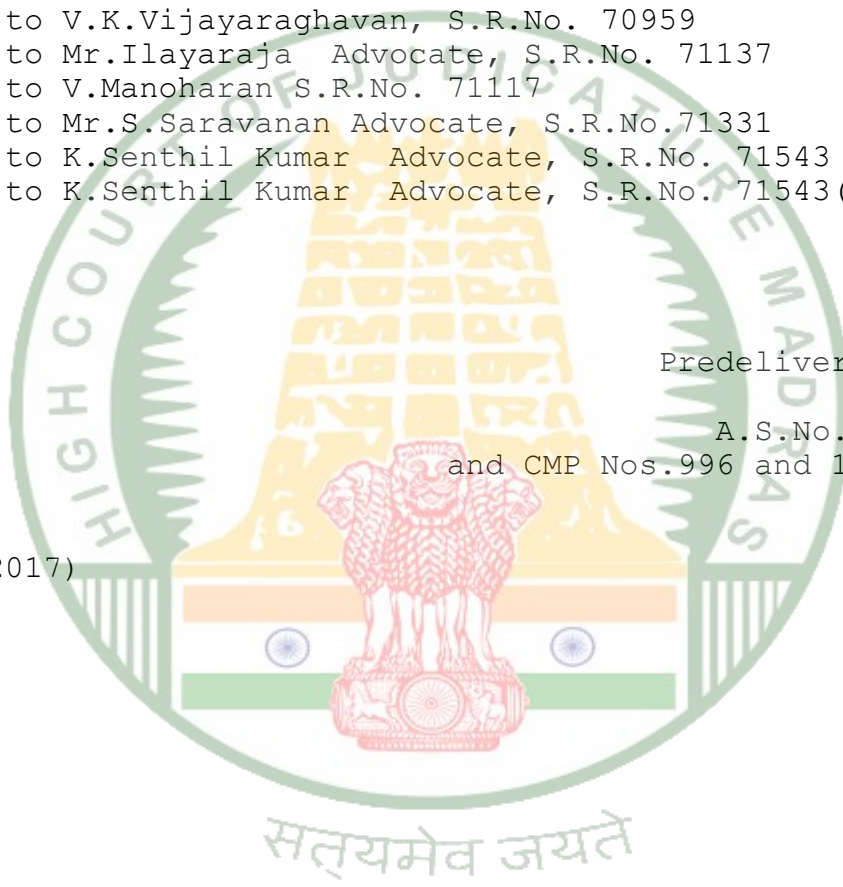
1. The Sub Court,
Namakkal.
2. The Section Officer,
V.R.Section.
High Court, Madras.

+1cc to Mr.C.H.Pandian, Advocate, S.R.No. 70938
+1cc to V.K.Vijayaraghavan, S.R.No. 70959
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Predelivery judgement

A.S.No.463 of 1995
and CMP Nos.996 and 1007 of 2013

GJ (CO)
TR(29/11/2017)



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