

Appeal Suit No. 50 and 231 of 2011

R. SUBBIAH, J

and

P. VELMURUGAN, J

(Order of the Court was made by **R. SUBBIAH, J**)

These appeal suits are listed today under the caption “for being mentioned” at the instance of the counsel for the appellants in A.S. No. 50 of 2011.

2. Both these Appeal Suits arise out of the common Decree and Judgment dated 07.10.2010 passed in O.S. No. 19 of 2008 on the file of the Additional District Judge (Fast Track Court), Tirupattur, Vellore District. By a common Judgment dated 20.09.2017, this Court allowed A.S. No. 50 of 2011 and dismissed A.S. No. 231 of 2011.

3. It is now brought to the notice of this Court that in the common Judgment dated 20.09.2017, reference was made to the suit filed before the trial court as “O.S. No. 19 of 2009” instead of “O.S. No. 19 of 2008”, and therefore, the learned counsel for the appellants in A.S. No. 50 of 2011 prays for substituting the year of institution of the suit wherever it appears in the Common Judgment dated 20.09.2017.

4. We have heard the counsel for both sides. In the common Judgment dated 20.09.2017 passed in the above Appeal Suits, we notice that due to a typographical error, the year of institution of the suit was erroneously indicated as

<http://www.judis.nic.in> O.S. No. 19 of 2009, instead of indicating it as O.S. No. 19 of 2008. Therefore, it is

R. SUBBIAH, J
and
P. VELMURUGAN, J

hereby ordered that in the common Judgment dated 20.09.2017, wherever reference was made to the suit against which the instant appeals are filed, it shall be read as "O.S. No. 19 of 2008" by deleting O.S. No. 19 of 2009.

(R.P.S.J.) (P.V.J.)

05-04-2018

rsh

Note : Issue order copy on 09.04.2018 to the parties at free of cost.



WEB COPY

AS No. 50 and 231 of 2011

05-04-2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04-09-2017

Pronounced on : 20-09-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P. VELMURUGAN

Appeal Suit No. 50 and 231 of 2011

A.S. No. 50 of 2011

1. Padma
2. Vijaya Bhanu

.. Appellants

Versus

C. Nasi

.. Respondent

A.S. No. 231 of 2011

C. Nasi

.. Appellant

Versus

1. Padma
2. Vijaya Bhanu

.. Respondents

A.S. No. 50 and 231 of 2011:- Appeals filed under Section 96 of Code of Civil Procedure against the Judgment and Decree dated 07.10.2010 made in O.S. No. 19 of 2009 on the file of Additional District Judge (Fast Track Court), Tirupattur, Vellore District

A.S. No. 50 of 2011

For Appellants : Mr. T.R. Rajagopalan, Senior Advocate
for Mr. T.R. Rajaraman
For Respondent : Mr. P.A. Sudesh Kumar

A.S. No. 231 of 2011

For Appellant : Mr. P.A. Sudesh Kumar
For Respondents : Mr. T.R. Rajagopalan, Senior Advocate
for Mr. T.R. Rajaraman

R. SUBBIAH, J

The Plaintiffs in O.S. No. 19 of 2008 on the file of the Additional District Judge (Fast Track Court), Tirupattur, Vellore District have come forward with A.S. No. 50 of 2011 aggrieved by the decree and Judgment dated 07.10.2010 in so far as it relates to the refusal on the part of the trial Court to impose costs, while decreeing the suit for specific performance filed by them. The defendant in O.S. No. 19 of 2008 has filed A.S. No. 231 of 2011 questioning the validity of the very same decree and judgment dated 07.10.2010, whereby the suit filed by the plaintiffs for specific performance was decreed.

2. For easy reference, the parties to these appeals shall be referred to as per their litigative status in the suit as Plaintiffs and defendant.

3. As per the averments contained in the plaint, on 01.12.2007, the plaintiffs and defendant have entered into an agreement of sale whereby the defendant agreed to sell the suit schedule mentioned property owned by him to the plaintiffs for Rs.89,000/- per cent. On the date of execution of the agreement of sale, the plaintiffs have paid a sum of Rs.5,00,000/- as sale advance by way of two demand drafts each for a sum of Rs.2,50,000/- bearing No. 955625 dated 30.11.2007 drawn on Indian Overseas Bank, Vellore and demand draft bearing No. 599429 dated 30.11.2007 drawn on Canara Bank, Vaniyambadi. Both the demand drafts were drawn in favour of the defendant, whereby the plaintiffs have paid a sum of Rs.5,00,000/- as sale advance on the date of execution of the agreement dated 01.12.2007. Thereafter, as requested by the defendant, the plaintiffs have paid a further sum of Rs.5,00,000/- by means of two demand drafts, one dated 28.12.2007 bearing No. 955688 for Rs.2,50,000/- drawn on Indian Bank, Vellore

Branch and another demand draft No.599482 dated 28.12.2017 for Rs.2,50,000/- and on receipt of the two demand drafts, the defendant has also made an endorsement in the reverse of the sale agreement as an acknowledgment for having received the further sum of Rs.5,00,000/-. Thus, the plaintiffs have totally paid a sum of Rs.10,00,000/- as sale advance. According to the plaintiffs, though time was not mutually intended as essence of the contract, the plaintiffs were always ready and willing to perform their part of the contract by paying the balance sale consideration and to get the sale deed executed in their favour. The Plaintiffs have also approached the defendant on several occasions to pay the balance sale consideration and to get the sale deed executed in their favour, but the defendant neglected and evaded to perform his part of the contract under some pretext or other.

4. According to the plaintiffs, as per the agreement dated 01.12.2007 entered into between the plaintiffs and defendant, the defendant has an obligation to (a) produce encumbrance certificate from 01.01.1970 to till the date of transaction (b) produce property tax receipt upto date (c) to form 20 feet breadth of road on the Western side of the 1st item of the schedule mentioned property (d) to measure the land with the help of qualified surveyor in the presence of the plaintiffs to ascertain the actual extent of land available for sale and (e) to produce proof for discharging the mortgage debt due to the State Bank of India, Tirupattur Branch. According to the plaintiffs, the defendant did not fulfil any of the conditions mentioned in the agreement, but whenever the plaintiffs approached him to perform his part of the contract, he postponed the execution of the sale deed by stating that he would get the nil encumbrance certificate and also fulfil other conditions contained in the agreement. In such circumstances, by letter dated 05.05.2008, the

plaintiffs expressed their readiness and willingness to perform their part of the contract and called upon the defendant to perform his part of the contract. According to the plaintiffs, on receipt of the letter dated 05.05.2008, the defendant sent a reply dated 14.05.2008 containing false and untenable averments. Again, on 23.05.2008, the plaintiffs have sent a notice through their advocate calling upon the defendant to be present in the office of the Sub-Registrar, Jolarpet on 30.05.2008 between 10.00 am and 01.00 p.m. to execute the sale deed in their favour by receiving the balance sale consideration. However, the defendant did not turn up on 30.05.2008 to the office of the Sub-Registrar, Jolarpet. In the meantime, on 29.05.2008, the defendant had sent a reply with false allegations stating that the plaintiffs have obtained his signature in the agreement of sale dated 01.12.2007 without disclosing the conditions to be fulfilled by him and that the conditions incorporated in the agreement of sale are not capable of being performed. Thus, according to the plaintiffs, the defendant has admitted the execution of the agreement dated 01.12.2007 and the receipt of a sum of Rs.10,00,000/- as sale advance. The defendant, having executed the agreement of sale dated 01.12.2007 in the presence of the witnesses with full knowledge of the conditions to be fulfilled by him, is estopped from contending that he was not aware of the conditions incorporated in the agreement of sale dated 01.12.2007. In such circumstances, the plaintiffs have filed the suit for the following relief:-

“(a) directing the defendant to execute and register proper sale deed of schedule mentioned property in favour of the plaintiffs at the cost of the plaintiffs within the time to be fixed by this Honourable Court

b. In default of the defendant, permit the plaintiffs to get the sale deed of the schedule mentioned properties executed and registered through court process

c. Directing the defendant to pay the plaintiffs the costs of the suit and procedures relating thereto

d. Granting injunction against the defendant and his agents from alienating the schedule mentioned property either in part or as a whole to third parties

e. Granting such other relief or reliefs as this Honourable Court may deem fit and proper in the above circumstances of the case.”

5. Resisting the case of the plaintiffs, the defendant has filed a written statement denying the averments contained in the plaint. According to the defendant, it is incorrect to state that the defendant agreed to sell the suit schedule mentioned property to the plaintiffs at the rate of Rs.89,000/- per cent. It is the case of the defendant that the husband of the first plaintiff has brought a typed agreement of sale, obtained his signature and handed over the demand drafts at Yelagiri. Further, only the husband of the first plaintiff had discussion with the defendant regarding the conditions incorporated in the agreement of sale and no discussion took place between the plaintiffs and the defendant with regard to the terms and conditions incorporated in the agreement of sale except agreeing that the time is the essence of the contract. According to the defendant, in the agreement of sale, six months time was stipulated for completing the sale. The defendant denied that the plaintiffs have approached him on several occasion with the balance sale consideration and expressed their readiness and willingness to get the sale deed executed in their favour and that he was unwilling to perform his part of the contract. According to the defendant, he had never seen the plaintiffs at the time of signing the agreement of sale and also subsequently. The defendant was always ready to perform his part of the contract within the time stipulated in the agreement of sale dated 01.12.2007. Since the plaintiffs did not come forward to get the sale deed executed in their favour within the time stipulated under the agreement of sale, the defendant was deprived of purchasing another property and consequently he had incurred heavy loss. It is further stated in the written statement that the defendant has discharged the mortgage, informed it to the plaintiffs and requested them to pay the balance sale consideration. Nevertheless,

the plaintiffs did not come forward to pay the balance sale consideration and to get the sale deed executed in their favour. The plaintiffs have incorporated several clauses in the agreement of sale only with an intent to get time for performance of their contract besides that such clauses contained in the agreement of sale are incapable of being performed. For the letter dated 05.05.2008 sent by the plaintiffs, the defendant had sent a reply letter dated 14.05.2008 whereby he has rescinded the contract entered into with the plaintiffs. It is further reiterated that the defendant never signed the agreement with full knowledge about the conditions incorporated therein. The averment of the plaintiffs that they were waiting at the office of the Sub-Registrar, Jolarpet on 30.05.2008 with the balance sale consideration is false and therefore he prayed for dismissal of the suit.

6. On the above pleadings, the trial court framed as many as six issues. During the course of trial, the first plaintiff examined herself as PW1 besides examining 4 other witnesses as Pws 2 to 5 and marked Exs. P1 to P6. On the side of the defendant, the defendant examined himself as DW1 and Exs. B1 to B3 were marked. Exs. C1 to C4 were also marked as court documents. The trial Court, after assessing the oral and documentary evidence, by a Judgment dated 07.10.2010, decreed the suit filed by the plaintiffs as prayed for however directed the parties to bear their own costs.

7. The learned counsel appearing for the appellant/defendant would vehemently contend that as per the agreement, six months time was contemplated and time was the essence of the agreement. The plaintiffs miserably failed to prove that they were ever ready and willing to perform their part of the contract within the time stipulated in the agreement of sale. After paying the sum of Rs.10 lakhs, the plaintiffs remained silent and they did not turn up thereafter. In fact, the

defendant has performed his part of the contract by discharging the mortgage from the bank, formed the 20 feet road on the Western side of the 1st item of the suit property and informed it to the plaintiffs. Despite the same, the plaintiffs never offered to pay the balance sale consideration within the time stipulated in the agreement. As per the clauses contained in the agreement of sale, if the defendant failed to execute the sale deed in favour of the plaintiffs within the time stipulated, the plaintiffs are only entitled for refund of the advance sale consideration paid. Therefore, as per the conditions incorporated in the agreement, the remedy open to the plaintiffs is only to get refund of the advance sale amount and not for enforcement of the contract. Further, the learned counsel for the defendant submits that the plaintiffs did not prepare the draft sale agreement. The agreement was typed and brought only by the husband of the first plaintiff and he obtained the signature of the defendant at Yelagiri. Before and after execution of the agreement of sale dated 01.12.2007, no discussion took place between the plaintiffs and defendant. The defendant had never seen the plaintiffs and the signature of the defendant was not obtained in the agreement of sale dated 01.12.2007 in the presence of the plaintiffs. The defendant has not signed the agreement dated 01.12.2007 in the presence of the witness. The defendant was only aware that time was the essence of the contract and the plaintiffs have to perform their part of the contract within a period of six months from the date of execution of the agreement of sale on 01.12.2007. The other clauses contained in the agreement of sale dated 01.12.2007 were not made known to the defendant. These facts were clearly spoken to by the defendant during his examination as DW1 before the court below. But the trial court, without considering these aspects, has erroneously decreed the suit merely on the finding that the defendant admitted his signature in the agreement as well as the factum of receipt of sale advance of Rs.10,00,000/-..

The trial court has not examined the various clauses contained in the agreement of sale, which are incapable of being performed. Further, the counsel for the appellant/defendant submitted that the defendant has cancelled the agreement of sale dated 01.12.2007 in and by the reply letter dated 14.05.2008 sent to the plaintiffs, Ex.A4. Thereafter, the plaintiffs have sent a rejoinder through their advocate on 23.05.2008 calling upon the defendant to be present in the office of the Sub-Registrar, Jolarpet on 30.05.2008 contending as though they were ready and willing to perform their part of the contract. Even though PW3, Sub-Registrar, Jolarpet was examined as PW3 to show that the plaintiffs were present in the office of the Sub-Registrar, Jolarpet on 30.05.2008, the plaintiffs did not prove that on that date, they were having sufficient amount in their possession to pay the balance sale consideration and to get the sale deed executed in their favour. In fact, in order to prove the wherewithal of the plaintiffs, they have examined PW4, Manager of Canara Bank, Bangalore and PW5, Senior Manager of the Indian Overseas Bank, Bangalore and their evidence would only indicate that the plaintiffs were having their bank account in a Bank at Bangalore and it will not be helpful to them to establish that they were ready and willing to perform their part of the contract. The evidence of Pws 4 and 5 will not help the plaintiffs to prove that on the last date for performance of the contract namely 30.05.2008, they were having ready money available with them in cash to fulfil their part of the obligations under the contract. The trial court, without considering these aspects has rendered a finding that since the plaintiffs have proved that they were waiting in the office of the Sub-Registrar, Jolarpet on 30.05.2008, they have proved that they were ready and willing to perform their part of the contract. The trial court has further concluded that the balance amount is lying in the bank account of the plaintiffs and therefore they are having sufficient money to pay the balance sale consideration. Such a finding

given by the trial court is not legally sustainable to conclude that the plaintiffs have established that they are having sufficient fund on the last date for performance of the agreement of sale namely on 30.05.2008.

8. It is submitted by the learned counsel for the appellant/defendant that the fundamental principle for granting the relief of specific performance is to examine as to whether the provisions of Section 16 and 20 of The Specific Relief Act, 1963 are fulfilled. As per Section 20 of the Specific Relief Act, the Court is not bound to grant the relief of specific performance merely because it is lawful to do so. Further, as per Section 20 of The Specific Relief Act, the discretionary power vested in the Court for decreeing a suit for specific performance should not be exercised in an arbitrary manner, but based on sound and strong reasonings, guided by judicial principles and capable of correction by a Court of appeal. It is further submitted that as per Order VI Rule 3 of CPC, Clause 3 of Form 47 and 48 in Appendix A and under Section 16 (c) of The Specific Relief Act, it is mandatory to plead and prove readiness and willingness in unequivocal terms in a suit for specific performance. In the present case, in para No.3, the plaintiffs have contended that “....*though time was not mutually intended as essence of contract of sale, the plaintiffs have been always from the date of sale agreement ready and willing to perform their part of contract.* Such a pleading made by the plaintiffs in the plaint alone is not sufficient to prove that they were ready and willing to perform their part of the contract. Therefore, in the absence of compliance with mandatory provisions of Law, the plaintiffs are not entitled for a decree for specific performance. In this regard, the learned counsel for the appellant/defendant placed reliance on the decision of the Honourable Supreme Court in the case of

Supreme Court Cases 695 wherein it was held that in the absence of compliance to the mandatory provisions contained under Order VI Rule 3 of CPC, Clause 3 of Form 47 in Appendix A, it has to be held that the plaintiff has not complied with the legal requirement mandated under Section 16 (c) of the Specific Relief Act.

9. The learned counsel for the appellant/defendant also placed reliance on the decision of the Honourable Supreme Court in **(Jayakandham and others vs. Abaykumar)** reported in **(2017) 5 Supreme Court Cases 178** and **(Saradamani Kannappan vs. S. Rajalakshmi and others) (2011) (12) Supreme Court Cases 18** to contend that the conduct of the plaintiffs in not adhering to the terms and conditions incorporated in the agreement of sale had deprived the defendant from purchasing another property and he has incurred heavy loss.

10. Countering the submission of the counsel for the appellant/defendant, the learned Senior counsel appearing for the respondents/plaintiffs would contend that it is incorrect to state that time was the essence of the contract. In fact, there is no stipulation in the agreement that the contract has to be completed within a specified period. Thus, according to the learned Senior counsel for the respondents/plaintiffs, time was not the essence of the contract. Though the defendant has stated that he could not purchase some other property in view of the alleged failure on the part of the plaintiffs to fulfil their part of the contract within the time stipulated in the agreement, he has not furnished the particulars of the property which he intended to purchase. In the above circumstances, according to the learned Senior counsel for the plaintiffs, time was not the essence of the contract. Therefore, the learned Senior counsel for the plaintiffs would contend that the decision relied on by the defendant in the case of **(Saradamani Kannappan**

vs. S. Rajalakshmi and others) (2011 (12) Supreme Court Cases 18 cannot be made applicable to the facts of this case.

11. With regard to the submission of the counsel for the defendant that as per Clause 7 of the agreement, the plaintiffs are only entitled for refund of the amount in case of failure on the part of the defendant and they cannot seek to enforce the contract, the learned Senior counsel for the plaintiffs relied on clause 8 of the agreement wherein it is specifically agreed that in the event of failure on the part of the plaintiffs or defendant to perform their respective obligation, either of them can seek for enforcement of the contract. Therefore, the learned Senior counsel appearing for the plaintiffs would contend that the plaintiffs are entitled to seek for enforcement of the contract as contemplated under Clause 8 of the Agreement of sale dated 01.12.2007 and consequently, the suit filed by the plaintiffs for specific performance is maintainable.

12. The learned senior counsel for the plaintiffs would further submit that it is not the case of the defendant that even before expiry of the period stipulated under the contract, the plaintiffs failed to perform their part of the contract. In fact, even on 05.05.2008, the plaintiffs have sent a letter, Ex.A3 to the defendant expressing their readiness and willingness to perform their part of the contract. In fact, before the expiry of the six months period on 30.05.2008, the plaintiffs sent a rejoinder on 23.05.2008 calling upon the defendant to be present in the office of the Sub-Registrar, Jolarpet on 30.05.2008 to execute the sale deed in their favour. Despite the same, the defendant did not turn up to the office of the Sub-Registrar. Immediately thereafter, the plaintiffs have filed the suit for specific performance and therefore, the question of delay on the part of the plaintiffs in performing their part

of the contract will not arise.

13. The learned Senior counsel for the plaintiffs would further contend that as per the agreement of sale dated 01.12.2017, the defendant has to do certain acts on his part namely (a) to produce encumbrance certificate from 01.01.1970 to till the date of transaction (b) to produce property tax receipt upto date (c) to form 20 feet breadth of road on the Western side of the 1st item of the schedule mentioned property (f) to measure the land with the help of qualified surveyor in the presence of the plaintiff to ascertain the actual extent of land available for sale and (e) to produce proof for discharging of the mortgage debt due to the State Bank of India, Tirupattur Branch. However, the defendant failed and neglected to discharge the aforesaid obligations. Even as admitted by the defendant, he has only discharged the mortgage from the bank and therefore, it is clear that it is the defendant who did not fulfil his part of the contract and consequently, the plaintiffs were left with no other alternative except to institute the suit for specific performance of the agreement of sale dated 01.12.2007. Further, the plaintiffs have proved before the trial court that they had the wherewithal to perform their part of the contract by examining the officials of the Bank where the plaintiffs are having bank account and through whom Exs. C2 and C3, statements of account of the plaintiffs respectively were marked. Above all, the plaintiffs have also examined the Sub-Registrar, Jolarpet as PW3 to prove that on 30.05.2008, they were waiting in the office of the Sub-Registrar, Jolarpet. PW3 in his evidence has categorically stated that on 30.05.2008, a settlement deed dated 30.05.2008 was executed in which the plaintiffs have signed as witness to identify one Chinnaraj, executant of the settlement deed. Thus, the presence of the plaintiffs in the office of the Sub-Registrar, Jolarpet on 30.05.2008 was proved by documentary

evidence, which would only indicate that the plaintiffs were ready and willing to perform their part of the contract. In such circumstances, the submission of the counsel for the defendant that the plaintiffs have not produced any evidence to show that they were having sufficient cash on 30.05.2008 to pay the balance sale consideration is legally not sustainable.

14. The learned Senior counsel for the plaintiffs would further submit that the contention of the defendant that he was not aware of the terms and conditions of the agreement of sale dated 01.12.2007 is legally not sustainable. The defendant, having admitted that he has signed the agreement of sale dated 01.12.2007 and also discharged the mortgage from the bank, cannot be heard to contend that he has not seen the plaintiffs and the agreement of sale dated 01.12.2007 was typed and brought only by the husband of the plaintiffs and he signed the agreement without knowing the contents thereof. In this context, the learned Senior counsel for the plaintiffs placed reliance on the Judgment of the Division Bench of this Court in the case of **(K.V. Madhavakrishnan vs. S.R. Sami and others)** reported in **(1980) 2 Madras Law Journal Page No. 398** to contend that when a person with full knowledge and understanding subscribes his signature in a document without taking the trouble of reading it or without asking the document to be read and explained to him, but signs it relying on the word of another, cannot be heard to say that it is not a valid document.

15. As regards the submission of the counsel for the defendant that the plaintiffs has not specifically pleaded in the plaint about their readiness and willingness as contemplated under Order VI Rule 3 of CPC, Clause 3 of Form 47 and 48 in Appendix A and under Section 16 (c) of The Specific Relief Act, it is

submitted by the learned Senior counsel for the plaintiffs that the plaintiffs, in the plaint, in clear terms, have pleaded their readiness and willingness to perform their part of the contract, which was also proved by production of documentary evidence namely Ex. A3, letter dated 05.05.2008 sent by the plaintiffs, Ex.A5, rejoinder dated 23.05.2008 sent by the plaintiffs as also the documentary evidence Exs. C2 and C3 and therefore, it is futile on the part of the defendant to contend that there was no sufficient pleading in the plaint or the plaintiffs did not establish that they are ready and willing to perform their part of the contract.

16. As regards the refusal on the part of the trial court to award costs while decreeing the suit for specific performance, the learned Senior counsel for the plaintiffs would contend that the court below, having found that the plaintiffs are entitled to a decree for specific performance, has erred in decreeing the suit without costs. It is further submitted that the plaintiffs have paid a major portion of the sale consideration of Rs.10,00,000/- towards sale advance to the defendant besides they have paid a sum of Rs.6,00,826/- towards court fee, while so, the Court below ought to have decreed the suit with costs.

17. Having regard to the above submission of the counsel for both sides, the following points arise for determination in these appeals namely

- (a) Whether time is the essence of the contract between the plaintiffs and defendant
- (b) Whether the plaintiffs have pleaded and proved that they were ready and willing to perform their part of the contract
- (c) Whether the plaintiffs are only entitled to refund of the advance amount paid by them and not for enforcement of the contract as per clause 7 of the agreement of sale dated 01.12.2007
- (d) Whether the plaintiffs are entitled for costs of the suit.

18. The point Nos. 1 and 2 that arise for determination in this appeal are

inter-related and inter-twined. A conclusion arrived on one of the points will have a bearing on the other. Therefore, both the point Nos. 1 and 2 are dealt with and taken up for discussion together.

19. As we have dealt with the factual matrix of the case in detail, we refrain from dealing with the same any further. Suffice it to state that there was an agreement of sale entered into between the plaintiffs and defendant on 01.12.2007 and the factum of execution of the agreement is not in dispute. Further, the plaintiffs have paid a sum of Rs.10,00,000/- as sale advance by means of demand drafts and the receipt of which was also not denied by the defendant. What is contended by the defendant is that he had never seen the plaintiffs, the agreement of sale dated 01.12.2007 was typed and brought by the husband of the first plaintiff in which he has signed without knowing the terms and conditions incorporated thereof. It is further contended by the defendant that even though six months time was prescribed in the agreement of sale dated 01.12.2007 and time was the essence of the contract, before the expiry of the period, the plaintiffs never turned up to fulfil their part of the obligation and therefore the defendant has rescinded the contract through his reply letter dated 14.05.2008. It is further contended by the defendant that as per clause 7 of the agreement of sale dated 01.12.2007, if the defendant failed to fulfil his part of the contract, the plaintiffs can, at the best, be entitled for refund of the advance amount paid by them and they cannot seek to enforce the contract by filing the suit for specific performance. In view of the above submission of the defendant, it is necessary to look into the relevant portion of the agreement of sale dated 01.12.2007, which reads as follows:-

“1.

2. The party of the 1st part shall obtain the encumbrance certificate for the period from 01.01.1970 till date at his cost and also pay the property tax and other taxes for the said property, produce

the receipts there for. The sale deed shall be executed by party of 1st part in favour of parties of 2nd part or their nominee.

3. The remaining balance amount which shall be paid by the parties of 2nd part and the party of the 1st part agreed to receive the balance amount on the day when the party of the 1st part executing proper sale deed of schedule mentioned property to the parties of the 2nd part or their nominee.

4. The execution and registration of sale deed shall be completed with in 6 (six) months from the date of this agreement. In the meantime, the party of the 1st part should measure the land on his own cost with the help of qualified survey officer in the presence of parties of 2nd part after informing well in advance. In the meantime the party of the 1st part should form the 20 feet breadth of road on the Western side of the 1st item of schedule mentioned property.

5. The party of 2nd party shall bear all the expenses of the sale that is stamp, registration, drafting charges etc., in respect of sale. On the date of execution of sale deed the party of 1st part should deliver possession of the schedule mentioned property to the parties of 2nd part or their nominees.

6. The party of 1st part shall discharge mortgage debt over the schedule mentioned property with in the stipulated time mentioned in this sale agreement.

7. If the party of the 1st part fail to execute and register proper sale deed of schedule mentioned property with in the time specified herein above, he shall return the entire amount received by him from the parties of 2nd part.

8. The party of the 1st part and parties of the 2nd part shall have their respective right to specific performance of contract of sale through Court of law under this sale agreement.

9.

10.”

20. Thus, on perusal of the terms and conditions incorporated in the agreement of sale dated 01.12.2007, it is evident that even though six months time was indicated for performance of the contract, it is subject to fulfilment of certain obligations by the defendant. Therefore, it has to be seen as to whether the defendant has fulfilled his obligations contained in the agreement of sale.

21. It is an admitted fact that there are five conditions stipulated in the agreement of sale and they have to be fulfilled by the defendant. Admittedly, out of the five conditions, the defendant has discharged his obligation of discharging the

mortgage from the bank. However, it is not proved by any evidence that the defendant has fulfilled the other conditions incorporated in the agreement of sale dated 01.12.2007. On the one hand, the defendant has asserted that he has agreed to sell the suit property only with an intention to purchase another property with the sale proceeds. On the other hand, the defendant did not furnish the details of the property to be purchased by him such as the owner of the property from whom he has intended to purchase the property, the place where the property is situate, the price to which he has agreed to purchase it or whether any agreement of sale has been entered into by him with the vendor. If really the defendant intended to purchase another property with the sale proceeds to be received from the plaintiffs, he ought to have fulfilled his obligations incorporated in the agreement of sale. Rather, the defendant failed to perform his part of the contract contained under the agreement dated 01.12.2007. Further, the contention of the defendant that the conditions incorporated in the agreement of sale are incapable of being performed cannot be countenanced. Having signed the agreement dated 01.12.2007 agreeing to fulfil those conditions, it is not open to the defendant to turn around and say that the conditions are incapable of being performed and therefore, he could not discharge his obligations. Thus, according to the plaintiffs, the six months time fixed under the agreement of sale dated 01.12.2007 is only to enable the defendant to fulfil the conditions incorporated therein to purchase some other property. Thus, from the clauses contained in the agreement of sale dated 01.12.2007, it is evident that the six months time was stipulated only to enable the defendant to perform his obligations mentioned therein and there was no obligation on the part of the plaintiffs to be performed within the period of six months. In such circumstances, we are of the opinion that time was not the essence of the contract between the plaintiffs and defendant.

22. It is the specific defence of the defendant that the agreement of sale was typed and brought by the husband of the first plaintiff and he has signed it without knowing the contents thereof. On the one hand, the defendant contends that he was not aware of the contents of the agreement of sale dated 01.12.2007 and on the other hand, he admitted that he has redeemed the mortgage from the bank, which was one of the conditions incorporated in the agreement of sale dated 01.12.2007. Thus, it is futile on the part of the defendant to contend that he was not aware of the contents of the agreement of sale dated 01.12.2007. In this context, useful reference could be made to the decision of the Division Bench of this Court in the case of **(K.V. Madhavakrishnan vs. S.R. Sami and others)** reported in **(1980) 2 Madras Law Journal Page No. 398** wherein it was held as follows:-

“14. The general rule of law is that a party of full age and understanding is normally bound by his signature to a document whether he reads it or understands it or not. Equity does not save people from the consequences of their own folly but will save them from being victimised by other people. .

16.Whenever a person of full age and understanding puts his signature to a legal document without taking the trouble of reading it or without asking the document to be read and explained to him but signs it relying on the word of another as to its character, content or effect, he cannot be heard to say that it is not his document.....

23. In the present case, we find from the cross-examination of the defendant, as DW1, that he is a B.Com., graduate and he is not a layman. As mentioned above, the defendant merely contended that without knowing the conditions incorporated in the agreement of sale, he has signed it. If it is so, the defendant himself has to be blamed and he cannot be heard to say that he has nearly signed the agreement of sale dated 01.12.2007. It is not the case of the defendant that the husband of the first plaintiff obtained his signature in a typed

document by coercion, force or misrepresentation. Further, on signing the agreement of sale, he has received two demand drafts for a sum of Rs.2,50,000/- each representing the sale advance. Therefore, we cannot accept the theory of innocence putforward by the defendant as a defence to deny the right of the plaintiffs to have the contract enforced on his failure. Even in the evidence of the defendant, as DW1, during his cross-examination he has admitted that he has not demanded to produce the copy of the agreement of sale inspite of receipt of the letter dated 05.05.2008, Ex.A3, from the plaintiffs. He has also admitted in the cross-examination that in Ex.A1, agreement of sale dated 01.12.2007, there are certain conditions incorporated to survey the land, provide pathway etc., but he has not fulfilled those obligations. Thus, the defendant did not fulfil his part of the obligations contained in the agreement dated 01.12.2007 and it will give rise to the plaintiffs to invoke clause 8 of the agreement to enforce the contract by instituting the suit for specific performance.

24. Be that as it may, according to the plaintiffs, they have demanded the defendant to execute the sale deed in their favour on various occasion. As the defendant remained silent, evaded and avoided to complete the sale transaction, it is the plaintiffs who have sent the letter dated 05.05.2008, Ex.A3 in which they have clearly expressed their readiness and willingness to perform their part of the contract. On receipt of the letter dated 05.05.2008, the defendant sent a reply dated 14.05.2008, Ex.A4 in which he has stated that he has demanded the plaintiffs to pay the balance sale consideration and to get the sale deed executed in their favour, but they did not come forward to do so, with the result, he could not purchase the property which he intended to purchase. Further, by the reply letter dated 14.05.2008, the defendant rescinded the agreement of sale dated

01.12.2007. Even though the defendant has rescinded the contract, it is not his case that he has refunded or repaid the advance amount of Rs.10 lakhs paid by the plaintiffs. At this stage, it is pertinent to mention here that for the first time, only after receipt of a letter dated 05.05.2008 from the plaintiffs, the defendant had sent a letter as though he was ready and willing to perform his part of the contract but the plaintiffs failed to get the sale deed executed in their favour. Even otherwise, the agreement of sale dated 01.12.2007 stipulates six months time for performance of the contract which expires on 30.05.2008. Even from the date of reply namely 14.05.2008, the plaintiffs have still time to perform their part of the contract. Therefore, even before completion of the period fixed under the contract, the defendant cannot rescind the contract instead he ought to have called upon the plaintiffs to come forward to pay the balance sale consideration before 30.05.2008. Furthermore, to fortify their contention that they were always ready and willing to pay the balance sale consideration and to get the sale deed executed in their favour, the plaintiffs have sent a rejoinder notice dated 23.05.2008, Ex.A5 calling upon the defendant to come to the office of the Sub-Registrar, Jolarpet on 30.05.2008 to execute the sale deed in their favour. Admittedly, the notice dated 23.05.2008 was received by the defendant, but he did not go to the office of the Sub-Registrar, Jolarpet. The Plaintiffs also, to prove their presence in the office of the Sub-Registrar, Jolarpet on 30.05.2008, have marked the settlement deed dated 30.05.2008, Ex.C1, executed by Chinnaraj in favour of one Chandra in which, the plaintiffs have signed as witness to identify the executant of the document. Further, the plaintiffs have also examined the Sub-Registrar, Jolarpet who has deposed that on 30.05.2008, the plaintiffs have attested a settlement deed executed by one Chinnaraj. Therefore, undoubtedly, the plaintiffs were present in the office of the Sub-Registrar, Jolarpet on 30.05.2008 thereby they have proved that they were

ready and willing to perform their part of the contract. On the contrary, the defendant would contend that even though the plaintiffs could have been present in the office of the Sub-Registrar, Jolarpet on 30.05.2008, they were not in possession of cash for paying the balance sale consideration to him and to get the sale deed executed in their favour. This contention of the defendant cannot be countenanced. When the plaintiffs have established that they are having ready money available in their respective Bank accounts, they can pay the balance sale consideration either by cash or demand draft or any other acceptable mode of payment and they need not possess cash with them to pay the balance sale consideration. Furthermore, the plaintiffs have also paid the advance amount of Rs.10 lakhs by means of four demand drafts. In such circumstances, the plaintiffs cannot be expected to keep huge cash to pay the balance sale consideration to the defendant. The Plaintiffs have also examined the Manager of the Banks in which they are having savings bank account. PW4 was the Manager of Canara Bank, Bangalore, through whom Ex.C2, statement of account was marked. PW4 deposed that as on 30.05.2008, a sum of Rs.41,92,144.55 was lying in the bank account of the husband of the first plaintiff. Similarly, PW5, Senior Manager of Indian Overseas Bank, Bangalore through whom Ex.C3, statement of account was marked. PW5 in his evidence has deposed that as on 30.05.2008, a sum of Rs.41,06,932.47 was lying in the bank account of first plaintiff. Thus, the Plaintiffs, through acceptable and cogent evidence, have proved that they are having the wherewithal and were resourceful enough to pay the balance sale consideration to the defendant. The fact that sufficient amount is lying in the bank account of the plaintiffs itself is enough to prove that the plaintiffs are capable of paying the balance sale consideration. In such circumstances, the contention of the defendant that the plaintiffs have not shown that they were having the balance sale

consideration by cash on 30.05.2008 has to be rejected. In this context, useful reference can be made to the decision of the Honourable Supreme Court in the case of **(K. Saraswathy @ K. Kalpana (dead) by Lrs vs. P.S.S. Somasundaram Chettiar)** reported in **AIR 1989 1553 SC** wherein it has been held that where the party in compliance with the order of the Court for depositing certain amount in Court tendered a cheque for the prescribed amount on the last date for payment and the same was encashed in due course, the payment by cheque was valid payment in the absence of anything in the order suggesting that deposit was to be made in cash. By placing reliance on the above decision, the learned Senior counsel for the plaintiffs would contend that when it is proved that the plaintiffs have the wherewithal to pay the balance sale consideration, even on the last date stipulated in the agreement for sale on 30.05.2008, they can very well pay the amount to the defendant by cheque and the plaintiffs need not possess cash with them.

25. The next submission made by the counsel for the defendant is that the plaintiffs have not proved their readiness and willingness to perform their part of the contract as has been contemplated under Order VI Rule 3 of CPC, Clause 3 of Form 47 and 48 in Appendix A and under Section 16 (c) of The Specific Relief Act, We are not inclined to accept the said submission for the reasons that the plaintiffs, in the plaint, have described in clear terms as to their readiness and willingness to perform their part of the contract. The suit was instituted immediately after 30.05.2008, the last date for performance of the contract contained in the agreement of sale. The Plaintiffs have also, during the course of trial, marked documentary evidence as well as examined witness to prove that their intention to get the sale deed executed in their favour was continuous and they were in

possession of ready money to complete the sale transaction. In such circumstances, we are not inclined to hold that the plaintiffs did not plead in their plaint as to their readiness and willingness and it is in contravention to the procedures contemplated under Order VI Rule 3 of CPC, Clause 3 of Form 47 and 48 in Appendix A and under Section 16 (c) of The Specific Relief Act. Therefore, we answer both the point Nos. 1 and 2 framed in this appeal in favour of the respondents/plaintiffs in these appeals by holding that time was not the essence of the contract and the plaintiffs were always ready and willing to perform their part of the contract.

26. The next point for consideration is as to whether the plaintiffs are only entitled for refund of the sale advance and not entitled to enforce the contract, as contemplated under Clause 7 of the agreement. According to the learned Senior counsel for the plaintiffs, as per clause 8 of the agreement, the plaintiffs are entitled to institute the suit for specific performance of the agreement and to enforce the contract. We find that even on 05.05.2008, the plaintiffs have sent a letter, Ex.P3 to the defendant unequivocally expressing their intention to pay the balance sale consideration and to get the sale deed executed in their favour. In the reply dated 23.05.2008, Ex.P5, sent by the defendant, he has stated that since the plaintiffs did not come forward to complete the sale transaction within the time stipulated in the agreement of sale dated 01.12.2007, he is rescinding the contract. While doing so, as mentioned supra, the defendant did not return the advance amount of Rs.10,00,000/- paid by the plaintiffs at the time of execution of the agreement of sale dated 01.12.2007. Even before the trial court, it is not the case of the defendant that the plaintiffs are not entitled for enforcement of the contract and at the best they can get back the advance amount paid by them, as contained under

Clause 7 of the agreement of sale dated 01.12.2007. In fact, in the written statement filed by the defendant, he has even stated that since the plaintiffs did not come forward to get the sale deed executed in their favour within the time stipulated, they are not entitled to get refund of the amount and therefore the advance amount paid by them is forfeited. In Para No.5 of the written statement filed by the defendant in the suit, it is specifically stated by him as follows:-

“5. ஒப்பந்தத்தில் கண்டுள்ளதாக சொல்லுகின்ற எந்த பரிகாரத்தையும் வாதிகள் அடைய உரிமை இல்லை. வழக்கில் கோரியுள்ள எந்த பரிகாரத்தையும் வாதிகள் அடைய உரிமை இல்லை. ஒப்பந்தப்படி ஒப்பந்த தேதிக்குள் மீதி தொகையை செலுத்திவிட்டு வாதிகள் கிரையம் செய்து கொள்ளாத காரணத்தினால் முன் பணத்தையும் வாதிகள் இழந்துவிடுகிறார்கள். தவிர ஒப்பந்தப்படி வாதிகள் நடந்து கொள்ளாத காரணத்தினால் இந்த எதிர்வாதிக்கு ஏற்பட்டிருக்கின்ற இழப்பீட்டிற்காகவும் வாதிகள் எதிர்வாதிக்கு நஷ்டயீட்டுத் தொகை செலுத்த கடமைப்பட்டிருக்கின்றனர்.....”

27. It is evident from the averment contained in the written statement that the defendant has not only stated that the advance amount paid by the plaintiffs is forfeited but also went one step ahead to contend that the act of the plaintiffs in not paying the balance sale consideration within the time stipulated under the agreement of sale dated 01.12.2007 has deprived him from purchasing another property and as such, the plaintiffs are liable to compensate him for the loss sustained. In such view of the matter, at this stage, we feel that it is not open to the defendant to contend that as per clause 7 of the agreement of sale dated 01.12.2007, the plaintiffs are only entitled for refund of the amount paid by them during the year 2007 and not to seek for enforcement of the contract. On the other hand, clause 8 of the agreement of sale dated 01.12.2007 specifically stipulates that in the event of failure on the part of the plaintiffs or defendant to perform their respective obligation, either of them can seek for enforcement of the contract.

Therefore, we answer point No.3 also against the defendant holding that the plaintiffs are entitled for enforcement of the contract as per the terms and

conditions contained in the agreement of sale dated 01.12.2007.

28. As regards the appeal filed by the plaintiffs in A.S. No. 50 of 2011 as against the refusal on the part of the trial Court to impose costs, while decreeing the suit for specific performance filed by them, we find that the trial Court has accepted the case of the plaintiffs in it's entirety and decreed the suit. We also find that the plaintiffs have paid a huge sum of Rs.6,00,826/- towards court fee at the time of instituting the suit in the year 2007. While so, we are of the opinion that the trial Court ought to have decreed the suit with costs and failure to do so has caused prejudice to the plaintiffs.

29. In the result, the Judgment and Decree dated 07.10.2010 made in O.S. No. 19 of 2009 on the file of Additional District Judge (Fast Track Court), Tirupattur, Vellore District is confirmed in so far as it relates to the grant of decree for specific performance filed by the plaintiffs. Resultantly, A.S. No. 50 of 2011 filed by the plaintiffs is allowed and A.S. No. 231 of 2011 stands dismissed. Consequently, the suit in O.S. No. 19 of 2009 on the file of the Additional District Judge (Fast Track Court), Tirupattur, Vellore District shall stand decreed with costs. No costs in these appeals. Consequently, connected CMP No. 1 of 2011 in A.S. No. 231 of 2011 is closed.

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(R.P.S.J.) (P.V.J.)

20-09-2017

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Index : Yes

To

The Additional District Judge
(Fast Track Court) Tirupattur
Vellore District

R. SUBBIAH, J
and
P. VELMURUGAN, J

rsh



Pre-delivery Common Judgment in
A.S. Nos. 50 & 231 of 2011

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