

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:03.03.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.882 of 2009

1.N.Sundaramurthy

2.Sarasathal

3.G.Subbulakshmi

4.P.Pushpa

5.Poovathal

6.Minor Yasodha

rep. by mother and natural guardian

Poovathal (5th appellant herein)

... Appellants

Vs

1.Suseeladevi

2.Sumathi

3.Suresh

4.Samathal

5.Poongodi

6.A.R.Subramaniam

7.Muthammal

8.Poovathal

... Respondents

This appeal is filed under Order 41 Rule 1 and 2 r/w Section 96 of C.P.C. against the judgment and decree dated 30.04.2009 made in O.S.No.548 of 2004 on the file of the Additional District Judge and Fast Track Court-IV, Coimbatore at Tiruppur.

For Appellants	: Mr.Aditya Varadarajan for Mr.N.Anand Venkatesh
For Respondents	: Mr.S.V.Jayaraman Senior counsel for Mr.K.Govi Ganesan

J U D G E M E N T

The defendants in the suit, O.S.No.548 of 2004, for specific performance are the appellants. According to the plaintiffs, the suit properties originally belonged to one Ponnappa Gounder, who died leaving behind three sons namely 1)Nachimuthu, 2)Kandasamy (died) and 3)Subramanian (died). The said Nachimuthu represented by his son Sundaramoorthy as a power agent along with defendants 5 to 8, who are legal representatives of the deceased Kandasamy and Subramanian entered into an agreement of sale on 21.01.2000 agreeing to convey the suit properties for a total consideration of Rs.10,52,250/-. Rs.50,000/- and Rs.2,60,000 were paid on 13.01.2000 and 21.01.2000 respectively towards advance. The sum of Rs.2,60,000/- was paid by way of cheque dated 27.01.2000. Thus the total advance amount works out to Rs.3,10,000/-. A period of one year was fixed for performance.

2. The 1st plaintiff had issued a notice 14.05.2002 demanding performance as per the agreement. Since the defendants refused to comply with the demand, the 1st plaintiff had filed the above suit seeking specific

performance of the agreement dated 21.01.2000. The suit came to be filed on 21.01.2003. The 1st plaintiff died pending suit. His legal representatives were impleaded as plaintiffs 2 to 4.

3. Since one of the vendors namely, Nachimuthu Gounder died on 29.02.2010 i.e. a month after the agreement, his legal representatives were shown as defendants 1 to 4. The legal representatives of the deceased Gvoindasamy were shown as defendants 5 and 6 and the legal representative of Subramaniyan were shown as defendants 7 and 8. The defendants 9 to 11 are the other legal heirs of the deceased 1st plaintiff. The 1st defendant filed a written statement admitting the agreement and the receipt of the advance. The 1st defendant would however claim that since Nachimuthu gounder had died, the power of attorney has become invalid and therefore, the agreement executed by the power agent is unenforceable. Apart from the said plea, the 1st defendant would also plead that the 1st plaintiff was not ready and willing to perform his part of the contract. Even though a long period of one year was fixed for performance, according to the 1st defendant, the plaintiff never came forward to pay the balance consideration and take the sale deed. The fact that the 1st plaintiff kept quiet for nearly two years and the suit itself came to be filed on 21.01.2003 i.e. exactly three years after the execution of the agreement, the 1st defendant would contend that the suit has to fail for want of readiness and

willingness on the part of the 1st plaintiff.

4. The 2nd defendant filed a separate written statement disputing validity of the agreement and would contend that the amounts were received by the 1st defendant and therefore, he is not liable for either specific performance or for the refund of the advance. The defendants 5 to 8 had filed a separate written statement. They had denied the knowledge of the agreement as well as the receipt of the advance amount. They would also contend that the 1st plaintiff was not ready and willing to perform his part of the contract and hence, they are not liable for refund of advance amount. The defendants 2 to 4 had filed an additional written statement claiming that the properties were joint family properties. According to them after the death of Nachimuthu Gounder, they have expressed the difficulties in conveying the properties to the 1st plaintiff. Therefore, the 1st plaintiff had agreed to take back the advance. They would also claim that the property remains undivided and hence, there cannot be any conveyance of the property without a proper partition. The defendants 9 to 11 filed a memo stating no objection for grant of a decree. The 1st defendant had also filed an additional written statement questioning the status of plaintiffs 2 to 4 and defendants 9 to 11 as legal representatives of the deceased 1st plaintiff.

5. On the basis of the above pleadings, the learned Additional District Judge (FTC-IV), Coimbatore at Tirupur, framed the following issues:

- 1) Whether the plaintiff was ready and willing to perform his part of the contract as per the agreement?
- 2) Whether the suit agreement is unenforceable due to the death of Nachimuthu Gounder or due to the fact that minor's interest is sought to be sold under the suit agreement?
- 3) Whether the plaintiff is entitled to the relief of specific performance?
- 4) What other relief is the plaintiff entitled to?

The following additional issues were also framed?

- 1) Whether the plaintiffs 2 to 4 are entitled to a decree as legal representatives of the deceased 1st plaintiff?
- 2) Whether the defendants 9 to 11 are entitled to any right over the suit property?
- 3) Whether the claim for specific performance by Rangasamy Gounder is maintainable after his death?

6. PWs.1 and 2 were examined on the side of the plaintiffs. Exs.A1 to A9 were marked. No documentary evidence was produced on the side of the defendants.

7. Upon a consideration of oral and documentary evidence, the learned Trial Judge concluded that the time is not essence of the contract and the 1st plaintiff has established his readiness and willingness. The fact that the 1st plaintiff has deposited the balance sale consideration was taken as a proof of him being ready and willing to preform his part of the contract. The learned Trial Judge has also concluded that there is no prayer for alternative relief cannot be a ground for rejecting the claim. The learned Trial Judge also rejected the claim of the defendants that the property remains undivided and the extent of the property agreed to be sold namely 91- 1/2 cent is not specified by boundaries and therefore, there cannot be a decree for specific performance. The learned Trial Judge also rejected the claim of the defendants that on the death of Nachimuthu Gounder, the power given to the 1st defendant has ceased and hence, the agreement became unenforceable. On the aforesaid findings, the learned Trial Judge decreed the suit granting the main relief of specific performance and as a consequence prayer for refund of advance amount was rejected. Aggrieved by the said decree, the defendants 1 to 6 have preferred the above appeal.

8. I have heard Mr.Aditya Varadarajan for Mr.N.Anand Venkatesh, learned counsel appearing for the appellants and Mr.S.V.Jayaraman, learned senior counsel for Mr.K.Govi Ganesan, learned counsel appearing for the

respondents 1 to 3. Respondents 4 and 5/defendants 7 and 8 have not challenged the decree. The respondents 6 to 8/defendants 9 to 11 who are legal representatives of the deceased 1st plaintiff have also not chosen to claim any right against the plaintiffs 1 to 4.

9. Mr. Aditya Varadarajan, learned counsel appearing for the appellants would contend that the 1st plaintiff has not established that he was ready and willing to perform his part of the contract as required under Section 16(c) of the Specific Relief Act. Relying upon the description of the property in the agreement as well as in the plaint, the learned counsel would submit that the property agreed to be sold is an undivided extent of 91- ½ cents out of a total extent of 4 acres 89 cents in S.No.20/3 and 31/3. Claiming that no partition had taken place regarding the undivided extent of 91- ½ cents, subject matter of the agreement, the learned counsel would contend that there cannot be a decree for specific performance for sale of an unidentifiable property. The learned counsel would also contend that not having claimed the relief of partition, the plaintiff is not entitled to a decree for specific performance.

10. The learned counsel would reiterate the fact that the agreement is dated 21.01.2000. The period of one year fixed for performance has expired on 21.01.2001. Notice demanding performance was issued only on 14.05.2002 and the suit came to be filed on 21.01.2003. Pointing out that the suit was filed

exactly three years after the agreement, the learned counsel would submit that the 1st plaintiff is guilty of laches and non-performance.

11. Per contra, Mr.S.V.Jayaraman, learned Senior Counsel appearing for the respondents 1 to 3/plaintiffs would contend that there is no laches on the part of the plaintiffs. Even though there was a delay, the same was due to the fact that the property remained undivided. He would also contend that unless it is shown that there has been serious prejudice to the defendants because of the delay, the plaintiffs cannot be denied the relief of specific performance on the basis of absence of readiness and willing. The learned Senior Counsel would also invite my attention to certain observations of the judgement of the Division Bench of this Court in ***Nemi Chand Jain and another vs. G.Ravindran and others*** reported in ***2010 (2) CTC 751***.

12. Upon a consideration of the above rival contentions, the following points emerge for determination in this appeal:

1. Whether the 1st plaintiff is always ready and willing to perform his part of the contract in terms of Section 16 (c) of the Specific Relief Act?

2. Whether the suit for specific performance simplicitor in the absence of prayer for partition is maintainable?

Point No.1.

13. It is not in dispute that the agreement is dated 21.01.2000 and the period of one year for performance has expired on 21.01.2001. A reading of the agreement does not show that there was a duty caused upon the defendants to effect a partition. In fact the agreement reads that the plaintiff is at liberty to take the sale deed/s in respect of the entire land or in respect of portions thereof as house sites. Therefore, it should have been the intention of the parties to develop the land into house-sites and thereafter sell the same. The agreement also recites that if the 1st plaintiff fails to pay the balance sale consideration within one year and take the sale deed, the advance amount would be forfeited.

14. The learned counsel appearing for the appellants would invite my attention to the judgement of the Hon'ble Supreme Court *Saradamani Kandappan vs. S.Rajalakshmi and others* reported in (2011) 2 SCC 18 in 2011 4 CTC 640. Placing reliance on the said judgement, the learned counsel would contend that though time is not the essence of the contract, time fixed under the contract must be given some meaning. The learned counsel would also draw my attention to the observations of the Hon'ble Supreme Court in *K.S.Vidyanandam vs. Vairavan* reported in (1997) 3 SCC 1 wherein, the Hon'ble Apex Court had held that Courts may be vary for granting specific

performance of agreement upon considering the length of delay. The plaintiffs attempted to show that the property is undivided and there is no partition as the agreement does not impose any obligation on the defendants to have the property partitioned as a reason for the delay. In the notice dated 14.05.2002 marked as Ex.A8, the 1st plaintiff has not claimed that defendants agreed to have the property partitioned and have their shares identified before the execution of the sale.

15. Apart from the issuance of Ex.A8, there is nothing on record to show that the 1st plaintiff had demanded the execution of the sale deed within the period of one year fixed under the agreement. The financial status of the 1st plaintiff is not in dispute. The defendants have not denied the means of the 1st plaintiff to pay the balance sale consideration. That by itself in my considered opinion, will not be a substitute for readiness and willingness. The 1st plaintiff had also deposited the balance sale consideration (after filing of the suit) as contemplated under Section 16 (c) of the Specific Relief Act. There is no explanation for the silence on the part of the 1st plaintiff from the date of the agreement till issuance of notice for nearly two years. This definitely negatives the claim of readiness and willingness on the part of the 1st plaintiff.

16. Mr.S.V.Jayaraman, learned Senior counsel appearing for the

respondents would further rely upon certain observations of the Division Bench of this Court in *Nemi Chand Jain and another vs. G.Ravindran and others* reported in **2010 (2) CTC 751** and contend that the purchaser who has paid more than 50% of the sale consideration towards advance and the sale consideration cannot be said to be not ready and willing to perform his part of the contract. The Division Bench after taking into account the cumulative effect of the several factual aspects which emanated from the pleadings and evidence in that case came to the conclusion that the plaintiff therein was ready and willing to perform his part of the obligations. In the case before the Division Bench, the agreement was entered into on 16.5.2007. The plaintiffs were bound to pay the balance of sale consideration on or before 31.07.2007 and get the sale deed engrossed on requisite stamp papers. On the very next day fixed for performance i.e. on 17.05.2007, the plaintiffs had paid a sum of Rs.1 crore towards further advance. Therefore, the total advance amount paid was Rs.4 crores as against the sale consideration of Rs.6,68,38,500/-. Nearly 2/3rd of the sale consideration was paid in October 2007. It is seen from the report that HR & CE Department had claimed title to a portion of the properties and the defendants in the said suit had agreed to solve the issue and thereafter execute the sale. The defendants therein received a caveat on 23.01.2008 and thereafter the suit notice came to be issued on 25.02.2008. The defendants sent a reply on

7.3.2008. The suit came to be filed almost immediately thereafter. From the dates available in the report, it could be seen that the suit on the basis of the agreement dated 17.05.2007 was filed even in the year 2008. Under those circumstances and after having found that the plaintiffs have paid a sum of Rs.4 crores as against the total sale consideration of Rs. 6 crores and 68 lakhs, the Division Bench came to the conclusion that the plaintiffs should be held to be ready and willing to perform their part of the contract. Even after holding so, this Court rejected the relief of specific performance on the ground of hardship. It must be pointed out that on the question of readiness and willingness there is a definite change in the law after the judgement of the Hon'ble Supreme Court in *Saradamani Kandappan vs. Rajalakshmi* reported in **2011 (4) CTC 640**. The Hon'ble Supreme Court after an in depth analysis of the law relating to readiness and willingness held that the plaintiffs who had entered into an agreement and waited for two or three years to file the suit at their leisure time cannot be said to be always ready and willing. This view reiterated by the Hon'ble Supreme Court in *Padmakumari & Ors. vs. Dasayyan & Ors.* reported **2015 (6) CTC 545** wherein, the Hon'ble Supreme Court after referring *Chand Rani (D) by Lrs. V.Kamal Rani (D) by Lrs.*, reported in **1993 (1) SCC 519** has held that though time is not essence of the contract, some importance should be given to the time fixed in the contract and it should be shown that the plaintiff

has shown any readiness or willingness to perform his part of the contract within the stipulated period otherwise the Discretionary relief of specific performance cannot be granted. In fact, the Hon'ble Supreme Court has referred to recitals of the agreement and held that absence of readiness and willingness on the part of the plaintiff to perform his part of the contract within the period fixed under the agreement would be a fatal to the claim for specific performance. In the light of the above, there is definite change in the law relating to readiness and willingness in a suit seeking the relief of specific performance after 2011. We have to consider the present case in the light of the observations of the Hon'ble Supreme Court in *Saradamani Kandappan vs. Rajalakshmi* reported in **2011 4 CTC 640** and in *Padmakumari & Ors. vs. Dasayyan & Ors.* reported **2015 (6) CTC 545**. On the fact it is gathered that the plaintiff really falls short of the requirement of readiness and willingness to perform his part of the obligations. The agreement does not impose the obligation to effect a partition on the defendants. The notice issued by the plaintiff demanding performance on 14.05.2002 also does not require the defendants to effect partition. In view of the above discussion, I am constrained to conclude that the 1st plaintiff has not established continuous readiness and willingness to perform his part of the contract as required under the Statute. The suit came to be filed in 2003. As already pointed out in the march of law subsequent to 2011 renders the plaintiff

dis-entitled to the discretionary relief of specific performance.

Point No.2

Description of the property in the agreement as well as in the plaint are as follows:

brhj;J tpguk;

@jpUg;g{h; hp o jpUg;g{h; \$hapd;l; 1 rg; o jpUg;g{h; jhYhfh

Md;o ghisak; fpuhkj;jpy; 101 be gl;lh jhf;fy; fth;d;bkd;l; rh;nt bek;gh;

20-3 be g";ir Vf;fh; 2/86 f;F j U: 2/5/0 f r 31-3 be g[V 2/03 f;F U:

1/10/0 Mf ,uz;L fhiyfsYk; bkhj;jk; g[[v 4/89 f;F j U: 3/15/0 ,jpy;;

bghJtpy; g[/ v 0/91 1-2 ½(bjhd;Dhw;wp xd;diu) brd;l; tp!;jPuzKs;s

tprha g{kp g{uht[k; rfpjk;/ i& g{kpf;Fz;lhd rfy khK:y; tHpeil ghj;jpa';fs;

rfpjk;/:@

17. From the above discription, it can be seen that what is sought to be sold is an undivided share to an extent 91- ½ cents out of total extent of 4 acres 89 cents. As already stated the agreement does not impose obligation on the defendants to have the property partitioned before sale. The plaintiff has not chosen to seek the relief of partition and separate possession under Section

22 of the Specific Relief Act. The plaintiff could have sought for the relief of partition and separate possession under Section 22 (1) (a). Sub Section 2 of Section 22, provides that Court should not grant any relief under Clause (a) or Clause (b) of Sub Section (1) unless it has been specifically claimed.

18. Mr.S.V.Jayaraman, learned Senior counsel appearing for the appellants would submit that Proviso to Section 22 enables the plaintiff to seek amendment at any stage of the proceedings. It is well settled law that specific performance is a discretionary relief and it need need not be granted merely because it is legal to do so. The fact that the property remains undivided was within the knowledge of the 1st plaintiff even at the time of agreement. He had in fact chosen to take advantage of it by claiming in the plaint that the delay in demanding specific performance is because of the absence of partition. Therefore, it is not as if the 1st plaintiff was unaware of the fact that the property remains undivided. I do not think that the Court should render a helping hand to plaintiffs who were aware of the facts but still did not choose to seek the relief based on their rights. The suit agreement is of the year 2000 and the suit came to be filed in 2003 nearly 14 years have gone by. It is for the plaintiffs to seek the relief of partition by way of amendment. In the absence of relief of partition and separate possession, I do not think that the relief of specific performance should be granted to the plaintiffs. Unfortunately, the

learned Trial Judge has not adverted to the absence of prayer for partition and granted a decree, which in my opinion cannot be accepted at all. Now I have held that the plaintiffs are not entitled to the relief of specific performance, it has to be seen as to whether the plaintiffs are entitled to refund of advance amount. Fortunately the 1st plaintiff has prayed for refund of advance. The execution of the agreement and the receipt of advance have been admitted. Though the defendants 2 to 4 would deny the execution of agreement and claim that the 1st defendant alone is liable, they have not chosen to deny the execution of the power of attorney in favour of the 1st defendant. A perusal of the agreement would show that Nachimuthu Gounder was a party to the suit agreement and he was represented by the 1st defendant as his power agent and therefore, the defendants 2 to 4 are also liable to refund of advance amount. The plaintiffs claimed refund of advance with interest at 12% per annum. Taking note of prevailing circumstances and the rate of interest, it is deemed fit to grant a decree for refund of advance of Rs.3,10,000/- with interest at 12% per annum from the date of the agreement till date of payment.

19. In fine, the appeal is allowed in part. The judgement and decree of the Trial Court are aside and the suit for the relief of specific performance will stand dismissed. There will be a decree for refund of advance with interest at 12% per annum from the date of the agreement i.e. 21.01.2000 till date of

realisation. Considering the nature of the dispute, I do not make any order in this appeal as to costs. Consequently the connected M.P.No.1 of 2009 is closed.

20. The plaintiffs are entitled to cost in the suit as granted by the Trial Court. The plaintiffs have deposited the balance sale consideration into the court and they will be entitled to withdraw the same.

03.03.2017

Internet : Yes
Index : Yes
vk

To
The Additional District Judge, Puducherry at Karaikal.

R.SUBRAMANIAN,J

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