

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.NOS.560 OF 2011 AND 169 OF 2012
& M.P.NO.1 OF 2012

1.Mrs M.Kuppammal
2.M.Durai Arasan
3.M.Balachandran
4.M.Girija

... Appellants in A.S.No.560/2011

K.Sivakumar

... Appellants in A.S.No.169/2012

Vs.

1.V.Shanthi

2.Sivakumar

... Respondents in A.S.No.560/2011

1.Shanthi

2.M.Kuppammal

3.M.Durai Arasan

4.M.Balachandran

5.M.Girija

... Respondents in A.S.No.169/2012

First Appeals filed under Section 96 of Civil Procedure Code as against the judgment and decree dated 18.08.2011 made in O.S.No.8682 of 2010 on the file of II Fast Track Court, Additional District Court, Chennai.

For Appellants : Mr.K.V.Ananthakrushnan
A.S.No.560/2011

For Appellants : Mr.V.Chandrakanthan
A.S.No.169/2012

For 1st respondent : Mr.A.Thiyagarajan for R1
both appeals

COMMON JUDGMENT

These two appeals arise out of the judgment and decree dated 18.08.2011 passed in the same suit namely O.S.No.8682 of 2010 on the file of (II Fast Track Court) Additional District Court, Chennai. Hence, both the appeals are taken up together and disposed of by this common judgment.

2. Defendants 2 to 5 in O.S.No.8682 of 2010 are the appellants in A.S.No.560 of 2011 and respondents 2 to 5 in A.S.No.169 of 2012. The first defendant is the appellant in A.S.No.169 of 2012. The plaintiff is the first respondent in both the appeals. The suit in O.S.No.8682 of 2010 was filed by the first respondent seeking specific performance of the agreement of sale dated 24.12.2006. According to the plaintiff, the defendants, who are all successors-in-interest of the original owner viz., Dhanalakshmi Ammal, had agreed to sell the property for a total consideration of Rs.40 lakhs and had received an advance of Rs.7,34,000/- on the date of the agreement. The agreement provided for 120 days as the time for performance.

3. The property was occupied by some tenants. It was agreed that the vendors viz., the defendants, should take steps to evict the tenants before the expiry of the period fixed under the contract. Though the time fixed under the contract i.e., 120 days expired on 24.04.2007, the defendants had evicted the tenants only in June, 2007. Since the defendants did not come forward to execute the sale deed after the eviction, the plaintiff was constrained to issue legal notice on 03.07.2007, demanding execution of the sale deed. The first defendant sent a reply on 21.08.2007 specifically claiming that he had never signed the agreement. Defendants 2 to 4 claimed that since the time fixed under the agreement had expired, they are not bound to execute the sale deed. They also made a demand for higher consideration of Rs.60 lakhs. Hence, the plaintiff was constrained to file a suit.

4. The suit was actually instituted before this Court on 01.11.2007 as C.S.No.1011 of 2007 and upon transfer, it was re-numbered as O.S.No.8682 of 2010. It should be pointed out at this juncture that during the interregnum, the other sharers, who were entitled to 4/6 shares, had executed two sale deeds conveying their shares on 05.07.2007 and 16.08.2007. Therefore, the plaintiff, at the time of filing the suit, had purchased 4/6 shares in the suit property. Out of the remaining 2/6 shares, the first defendant in O.S.No.8682 of 2010 is entitled to 1/6 share and defendants 2 to 5, who are the appellants in A.S.No.560 of 2011, are entitled to 1/6 share.

5. The suit was resisted by the first defendant contending that he never executed any agreement and that his signature has been forged. Insofar as defendants 2 to 5, who are the appellants in A.S.No.560 of 2011, are concerned, they have claimed that the time is the essence of the contract and since

the plaintiff did not come forward to pay the balance sale consideration and to take the sale deed within the time stipulated, they are not bound to honour the agreement. In any event, they have demanded higher consideration of Rs.60 lakhs.

6. Based upon the above pleadings, the learned Additional District Judge, cum Fast Tract Court No.II, Chennai, framed the following issues.

- (1) Whether the time is the essence of the contract under the agreement, dated 24.12.2006?
- (2) Whether the sale of the properties by some of the parties to the agreement and extension of the time by them will bind the other parties to the contract?
- (3) Whether the plaintiff was always ready and willing to perform the sale contract?
- (4) Whether the suit is bad for non joinder of the other sharers?
- (5) Whether there was any misrepresentation to the first defendant by obtaining a signature in the agreement, dated 24.12.2006?
- (6) Whether the plaintiff is entitled for the relief of specific performance?
- (7) To what other reliefs, the plaintiff is entitled to?

7. On the side of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A34 were marked. On the side of the first defendant, he was examined as D.W.1 and his wife-Saraswathi was examined as D.W.2. On the side of defendants 2 to 5, the second defendant-Kuppammal was examined as D.W.3 and Exs.B1 to B10 were marked. On a consideration of the oral and documentary evidence placed on record, the learned trial Judge came to the conclusion that the claim of the first defendant that he was induced to execute the agreement by misrepresentation was not correct. The learned trial Judge further concluded that the first defendant has executed the document with the knowledge of the contents of the sale agreement. Though the agreement prescribes the period of 120 days the time for performance of the contract was extended since the defendants were unable to vacate the tenants. Finally, the tenants were vacated only in June 2007. In view of the above admitted facts the trial Court held that time was not intended to be the essence of the

contract. The trial Court also found that the plaintiff was always ready and willing to perform his part of the contract. The fact that Majority of the sharers viz., 4/6 shares, had already executed sale deeds in favour of the plaintiff was also taken into account by the learned trial Judge. On the above findings, the suit was decreed, granting the relief of specific performance in favour of the plaintiff. Aggrieved, the first defendant filed A.S.No.167 of 2012 and defendants 2 to 5 have filed A.S.No.560 of 2011.

8. Heard Mr.V.Chandrakanthan, learned counsel appearing for the appellant in A.S.No.169 of 2011/first defendant in OS.8682/2010, Mr.K.V.Ananthakrushnan, learned counsel appearing for appellants in A.S.No.560 of 2011/defendants 2 to 5 in OS.8682/2010 and Mr.A.Thiagarajan, learned counsel for the first respondent/plaintiff, and perused the evidence on record.

9. Mr.V.Chandrakanthan, learned counsel appearing for the appellant in A.S.No.169 of 2011/first defendant, would contend that the first defendant was induced to sign the agreement on the basis of misrepresentation and therefore, the plaintiff cannot seek a decree for specific performance as against him. He would also contend that the plaintiff was not ready and willing to perform her part of the contract and she did not come forward to pay the balance sale consideration within the time stipulated and therefore, the plaintiff was not entitled to the relief of specific performance and the judgment and decree passed by the learned trial Judge are liable to be set aside.

10. Mr.K.V.Ananthakrushnan, the learned counsel appearing for appellants in A.S.No.560 of 2011/defendants 2 to 5, strenuously contended that time is the essence of the contract. The plaintiff having failed to show that she had made a demand for execution of the sale deed within 120 days fixed under Ex.A1 agreement, she cannot succeed. In support of his contention, he relied upon the judgment of the Supreme Court in Saradamani Kandappan V. S.Rajalakshmi and others ((2011) 4 CTC 640).

11. Per contra, Mr.A.Thiagarajan, learned counsel appearing for the first respondent in both the appeals/plaintiff, would contend that the contract being one for sale of immovable property, time cannot be considered as the essence of the contract. He would also contend that, admittedly, the tenants were evicted only in June 2007 by the defendants and therefore, the plaintiff is justified in issuing the notice in

July 2007. He would further contend that several payments were made to the other sharers between 24.12.2006 and 03.07.2007. According to him, the said conduct would show that the plaintiff was ready and willing to perform her part of the contract.

12. On the above arguments, the following points arise for determination in this appeal.

1. Whether the first defendant had established his claim that he was induced by misrepresentation to sign the agreement dated 24.12.2006?
2. Whether the parties intended time to be the essence of the contract?
3. Whether the plaintiff was ready and willing to perform the part of the contract in terms of Section 16(c) of the Specific Relief Act, 1963?

13. POINT NO.1:- As far as the claim of the first defendant that he was induced to subscribe to the agreement dated 24.12.2006 by misrepresentation, the trial Court has relied upon the evidence of D.W.1-Sivakumar. In the cross examination, he had stated that he studied upto 10th standard and he is conversant with English to certain extent. He also admitted that the plaintiff had discharged the loans borrowed by the family. It is in the evidence of D.W.2, who is the wife of the first defendant, that the signature in Ex.A4 is her husband's and she was also with him when her husband signed in Ex.A4. She has also admitted that Velu took the documents and that all the tenants about 10 in number were vacated during June, 2007. In view of the said categorical admissions made by both D.Ws.1 and 2, the learned trial Judge concluded that the plea of the first defendant that he was induced to sign the agreement by misrepresentation cannot be believed. I have also gone through the said evidence referred to by the learned trial Judge and I do not find any reason to interfere with the said factual finding by the learned trial Judge rejecting the claim of the 1st defendant regarding misrepresentation as to the nature of the document viz the agreement of sale.

14. POINT NO.2:- The first defendant as well as defendants 2 to 5 would contend that time was the essence of the contract and therefore, the plaintiff, having not taken any step to pay the balance sale consideration within 120 days i.e. on or before 24.04.2007, is not entitled to seek for specific performance. No

doubt, the sale agreement dated 24.12.2006 spells out a period of 120 days for performance of the contract. It also says that the vendors shall surrender vacant possession of the property at the time of the registration of the sale deed itself. Clause 10 of the agreement provides that the vendors shall execute the sale deed in favour of the purchaser or his nominee/nominees whenever the purchaser calls upon the vendors to do so. It is also in evidence that the other parties had received certain amounts as part of the sale consideration from the plaintiff even after the expiry of the said 120 days. The trial Court had found that those part payments cannot be deducted from the share of defendants 1 to 5. The other co-owners cannot be termed as agents of defendants 1 to 5. Once it is found that the other sharers have received certain amounts towards part payment of the sale consideration even after 24.03.2007, it cannot be said that the parties intended time to be the essence of the contract. It is the whole contract that has to be looked into. The contract cannot be split up to decide as to whether defendants 1 to 5 intended time to be the essence of the contract and other sharers did not have such intention. Therefore, once it is shown that the other sharers, had received part of the sale consideration from the plaintiff even after the date fixed for performance of the contract viz., 24.03.2007, the plaintiff cannot be non suited on the ground that she did not seek specific performance within the time stipulated. Therefore, the second question is answered against the appellants.

15. POINT NO.3:- Coming to the question of readiness and willingness to perform the part of the contract in terms of Section 16(c) of the Specific Relief Act, 1963, both the counsels viz., Mr.V.Chandrakanthan, learned counsel for the appellant/first defendant and Mr.K.V.Ananthakrishnan, learned counsel for the appellants/defendants 2 to 5, would vehemently contend that in the absence of issuance of any notice prior to 24.03.2007 it cannot be presumed that the plaintiff was ready and willing to perform the contract. Admittedly, the first notice demanding performance was issued by the plaintiff on 03.07.2007 and it was nearly three months after the time fixed by the parties under the contract.

16. Mr.A.Thiagarajan, learned counsel for the first respondent/ plaintiff in both the appeals would contend that, on receipt of the notice, the other sharers had sold 4/6 shares in favour of the plaintiff on 05.07.2007 and 16.08.2007. Therefore, there is no question of the plaintiff being not ready and willing to perform the part of the contract. From the evidence available on record, it is clear that the tenants vacated the property only in June, 2007. The agreement provides that the vendors shall hand over vacant possession of the property to the plaintiff at the time of the execution of the sale deed.

Therefore, it is clear that the defendants were not in a position to hand over the possession of the property during March or April 2007. Even in the reply notice issued by defendants 2 to 5, they have only demanded higher consideration on the ground that the plaintiff has not complied with her part of the contract before the date fixed for performance. Even in the notice dated 03.07.2007, the plaintiff expressed her willingness to pay the balance sale consideration to the defendants and the delay occurred was only due to the fact that the tenants did not vacate. It is, in fact, stated that the plaintiff had purchased the stamp paper on 23.06.2007 itself since the defendants had agreed to execute the sale deed on 25.06.2007. When the above statements have not been denied in the reply notice issued either on behalf of the first defendant or on behalf of the defendants 2 to 5, this would clearly show that the plaintiff cannot be said to be not ready and willing to perform her part of the contract. However, the fact that there was a delay on the part of the plaintiff cannot be denied. In a suit for specific performance, when a discretion has been exercised by the trial Court, the Appellate Court, in the interest of justice, can modify the decree in order to minimise the loss to both the parties. The delay caused by the plaintiff, which is about three months, in my opinion, can be compensated by directing the plaintiff to pay additional consideration to mitigate the loss that could have been caused by the appellants because of the delay.

17. In NAGARATHINAM V. S.JAYA ((2017) 1 CTC 46), I have considered the grant of enhanced consideration in a suit for specific performance. After referring to the decision of the Supreme Court in K.PRAKASH V. B.R.SAMPATH KUMAR ((2014) 6 CTC 88), I have concluded that the appellant was entitled for enhanced consideration payable under the agreement in order to mitigate the loss. Admittedly, in the case on hand, the agreement was entered into on 24.12.2006 and nearly 11 years have passed. The property is situated in a prime area in the city. Of course, the appellants in both the appeals put together are entitled to only 2/6 shares in the total extent of 1639 sq.ft. i.e.about 546 sq.ft.

18. Even if these appeals are allowed and the suit is dismissed with reference to the 2/6th share of the appellants which works out to only 546sq ft., they will not be in a position and enjoy the same in view of the Development Control Laws and Rules that are in force. Therefore, it would be in the interest of justice to direct the plaintiff to pay more consideration so as to mitigate the loss that would be caused to the appellants. Hence, taking into account the increase in the value of the property during the pendency of the litigation, I am of the considered opinion, that it would be appropriate that

the plaintiff is directed to pay a sum of Rs.13,00,000/- (Rupees thirteen lakhs only) each to the appellants in both the appeals i.e. Rs.13 lakhs/- to the first defendant and Rs.13 lakhs to defendants 2 to 5 after deducting a sum of Rs.1,00,000/- (Rupees one lakh only) that has been paid to defendants 2 to 5 even prior to the suit. Insofar as the first defendant is concerned, it is found that he had not received any advance, hence he is entitled to a sum of Rs.13,00,000/-. The plaintiff is granted a month's time to deposit the enhanced consideration as above.

19. In fine, the appeals are partly allowed and the judgment and decree of the trial Court are confirmed subject to the condition that the plaintiff pays a sum of Rs.12,00,000/- (Rupees twelve lakhs) to defendants 2 to 5 and a sum of Rs.13,00,000/- (Rupees thirteen lakhs only) to the first defendant as additional consideration. The plaintiff shall deposit the balance sale consideration within a period of one month from today to the credit of the suit i.e., O.S.No.8682 of 2010. In view of the peculiar facts and circumstances of the case, there would be no order as to costs. Consequently, connected miscellaneous petition is closed.

24.08.2017

BEING MENTIONED

This matter having been listed under the caption "For Being Mentioned" on 21.09.2017 in pursuant to the order of this Court 24.08.2017, and made herein in the presence of the aforesaid counsels on either side, the Court made the following Order:-

Today, the above matter is posted under the caption "For Being Mentioned" at the instance of the learned counsel appearing for the 1st respondent.

2. Mr.A.Thiyagarajan, learned counsel appearing for the 1st respondent would submit that the above appeals were disposed of by this Court on 24.08.2017 and this Court had directed the respondents to deposit the balance sale consideration including the enhanced consideration within a period of one month. Mr.A.Thiyagarajan, learned counsel would submit that the copy of the order has not been made available to him till date and the period stipulated in the order expires on 24.09.2017.

3. In view of the said statement and the fact that the order has not been issued to him, the time granted for deposit as directed in the said judgment dated 24.08.2017, is extended for a further period of one month from today.

Sd/-
Assistant Registrar(CS CCC)

//True Copy//

Sub Assistant Registrar

To

Additional District Court ,
Fast Track Court No.II, Chennai-1.

+1cc to Mr.V.Chandrakanthan, Advocate sr.61438
+1cc to Mr.K.V.Anantha Krushnan, Advocate sr.61521
+2cc to Mr.A.Thiagarajan, Advocate sr.61580,61581
+1cc to Mr.A.Thiagarajan, Advocate sr.70957 (09/10/17)

A.S.Nos.560 of 2011 and 169 of 2012

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