

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :10.07.2017
DATE OF DECISION:19.07.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.693 of 2010
and M.P.No.1 of 2010

1. S. Sakthivel
2. S.Rajalakshmi

... Appellants/Plaintiffs

Vs

R.Velusamy

... Respondent/Defendants

This appeal is filed under Section 96 C.P.C. and Order 41 Rule 1 & 2 of C.P.C., against the judgement and decree dated 15.03.2010 made in O.S.No.138 of 2007, on the file of the I Additional District Judge of Coimbatore.

For Appellants : Mr.R.Krishna Prasad
for M/S.Sarvabhauman Associates
For Respondent : Mr.J.Hariharan
for Mr.V.Nicholas

J U D G E M E N T

The plaintiffs whose suit for specific performance in OS No.138 of 2007 was dismissed are the appellants. According to the plaintiffs they entered in to an agreement of sale for purchasing the suit properties namely an extent of 1400sq.ft. of land along with a house in Sowripalayam Village of Coimbatore Taluk. The said agreement was entered into on 18.08.2006, wherein the total consideration was fixed at Rs.5,90,000/-. The plaintiffs paid an advance of Rs.75,000/- on the date of the agreement and a period of three months was fixed for the performance of the contract. According to the plaintiffs though they were ready and willing to perform their part of the contract the defendant did not comply with the essential term of the agreement namely the production of Nil Encumbrance Certificate. However the defendant chose to send a notice on 06.01.2007 cancelling the agreement, claiming that the plaintiffs have not performed their part of the contract. Subsequently, the plaintiffs by their notice dated 10.01.2007 called upon the defendant to execute the sale deed on

18.01.2007. The plaintiffs would aver that, though they have gone to Registrar's Office on 18.01.2007 the defendant did not come forward to execute the sale deed therefore they sent another notice calling upon the defendant to come forward to execute sale deed on 24.01.2007. Since the said notice was also not complied with, the plaintiffs filed the present suit on 12.03.2017. It is also averred in the plaint that the plaintiffs have been through out ready and willing to perform their part of the contract and the delay in performance occurred only due to the failure on the part of the defendant to produce the Nil Encumbrance Certificate.

2. The suit was resisted by the defendant contending that the plaintiffs have suppressed various facts. According to the defendant the suit agreement dated 18.08.2006 is not the first agreement between the parties. Initially the parties had entered into an agreement dated 03.05.2006 for the sale of the very property for a consideration of Rs.6,25,000/-. The plaintiffs failed to perform their part of the contract under the said agreement. However, claiming that there was a short fall in the extent of the property agreed to be sold they wanted scalling down of the sale consideration. The defendant also agreed and a new sale agreement was entered into between the parties on 17.07.2006, wherein the price of the property was fixed at Rs.5,90,000/- and the time for performance also fixed as three months. This was done on the specific request of the plaintiffs and on their undertaking that they would honour the commitment within the period fixed therein. However the plaintiffs, according to the defendant, did not come forward to honour the said commitment and hence a new agreement was entered into 18.08.2006, fixing the period for performance as three months and the parties intended time to be the essence of the contract. Since the plaintiffs did not come forward to pay the balance of sale consideration the defendant was forced to cancel the agreement by his notice dated 06.01.2007, after having waited for over, nearly two months after the actual date for performance that is 17.11.2006. The defendant would also contend that he had filed the suit in OS.No.423 of 2007 on the file of the District Munsif, Coimbatore praying for declaration that the registered agreement dated 18.08.2006 has become honest and inoperative.

3. According to the defendant only after the receipt of the summons in IA.No.459 of 2007 filed by him in OS.No.423 of 2007 seeking an order of injunction against the plaintiffs, the plaintiffs have come forward with the present suit on 12.03.2007. Highlighting the above facts the defendant would plead the plaintiffs were not ready and willing to perform their part of the contract and therefore they are not entitled to a

decree for specific performance.

4. On the above pleadings, the learned trial Judge namely the First Additional District Judge, Coimbatore, framed the following issues in the suit:

1. Whether the plaintiffs are entitled for specific performance?
2. Whether the plaintiffs are ready and willing to perform their part of the contract as per the agreement?
3. To what relief?

5. P.W.1 was examined on the side of the plaintiffs and Exhibits A.1 to A.11 were marked. On the side of the defendant D.W.1 and D.W.2 were examined and no documents were produced.

6. Considering the evidence on record the learned Trial Judge came to the conclusion that the cancellation of the agreement by the defendant on 06.01.2007 would clearly show that the defendant was reluctant to execute the sale deed. However the trial Court took note of the conduct of the plaintiffs and concluded that plaintiffs were not ready and willing to perform their part of the contract. The trial Court also took note of the fact that the present suit in OS.No.138 of 2007 was decreed ex-parte on 31.07.2007 and the plaintiffs were directed to deposit the balance of sale consideration within one month i.e. on or before 31.08.2008. However, the plaintiffs choose to deposit the balance of sale consideration only on 17.09.2007 and the delay for the deposit was not properly explained. It is also found that the the reason assigned for the delay was not genuine. The trial Court also took note of the fact that the plaintiffs suppressed the earlier agreements of the sale in the plaint and concluded that the plaintiffs were not ready and willing to perform their part of the contract. On the aforesaid finding the learned Trail Judge dismissed the suit for specific performance and granted the relief of refund of advance with interest.

7. Aggrieved the plaintiffs have come forward with the instant appeal.

8. I have heard Mr.R. Krishna Prasad for M/s. Sarvabhauman Associates, learned counsel appearing for the appellants and Mr.J.Hariharan for M/s.V.Nicholas, learned counsel appearing for the respondent.

9. Mr.R. Krishna Prasad, learned counsel appearing for the appellants would contend that the time cannot be considered to be the essence of the contract. According to the learned counsel the very agreement dated 18.08.2006 prescribes a condition that the defendant should produce a Nil Encumbrance Certificate to enable the plaintiffs to pay the balance of consideration and take the sale deed. The learned counsel would lay considerable stress on the following clause found in the agreement.

“அதிலுள்ள வீடு வகையறா ஸ்தாவர சொத்தை இன்று முதல் “3” (மூன்று) மாத கெடுவிற்குள் சர்வ வில்லங்க சுத்தியாய் சொத்தின் வரிகள் கிரைய தேதி வரை பாக்கியின்றி செலுத்தி சொத்தைக் குறித்த வில்லங்க சாட்பிகேட் கிரைய தேதி வரை எடுத்துக் கொடுத்து சொத்தைக் குறித்த அசல் மற்றும் மூல தஸ்தாவேஜைகளுடன் நம்மில் 2/பார்ட்டியின் கிரையப் பத்திர செலவிலி

10. According to the learned counsel the above recitals in the agreement dated 18.08.2006 would show that the production of Nil Encumbrance Certificate is a precondition for the plaintiffs to pay the balance sale consideration. Since the said condition was not complied with, the learned counsel would contend that, the time cannot be considered to be the essence of the contract. The learned counsel further would contend that the unilateral cancellation of the agreement by the defendant on 06.01.2007 would by itself show that the defendant wanted to avoid performance of the contract.

11. On the other hand Mr.J.Hariharan, learned counsel appearing for the respondent would contend that the plaintiffs have not come to court with clean hands. Therefore, they are not entitled to the discretionary relief of specific performance. The learned counsel would also contend that the earlier agreements dated 03.05.2006 and 17.07.2006 were cancelled only at the instance of the plaintiffs, in order to enable them to pay the money within a time stipulated. He would further submitted that once the defendant had chosen to cancel the agreement by notice dated 06.01.2007, the present suit filed without seeking a declaration the cancellation is invalid is not maintainable.

12. The learned counsel would invite my attention to the following judgments of the Hon'ble Supreme Court in K.S.Vaidyanadam and others v. Vairavan, [1997 (3) SCC 1]; Saradamani Kandappan v. Rajalakshmi and others, [2011 (4) LW 97] and Padmakumari and ors. v. Dasayyan and others in [2015 (6) CTC 545], relying upon the above decisions, the learned counsel for the respondent would contend that the plaintiffs must have done something to show that they were ready and willing to perform their part of the contract within a time stipulated under the contract. Pointing out that the time for performance stipulated under Ex.A1 and agreement expired on 17.11.2006 and the fact

that the plaintiffs did not move their little finger till 10.01.2007, the learned counsel would submit that the plaintiffs cannot be favoured with a decree for specific performance. He would also high light the fact that the notice dated 10.01.2007 emanated from the plaintiffs only after receipt of his notice dated 06.01.2007 cancelling the agreement for non performance on the part of the plaintiffs.

13. On the above arguments the following points arise for determination in the appeal:

1. Whether the plaintiffs have established that they have been continuously ready and willing to perform their part of the contract?
2. Whether the plaintiffs would said to be entitled to specific performance of the contract, despite the fact that they have not offered to perform their part of the contract within the time stipulated under the agreement.

Points 1 and 2:

14. Since the both points involve consideration of the conduct of the plaintiffs they are taken up together. The agreement is not in dispute. The fact that the agreement fixed the time limit for performance is also not in dispute. The contention of the learned counsel for the appellants plaintiffs is that the performance of the agreement is dependent on the production of Nil Encumbrance Certificate by the plaintiffs. The learned counsel would draw my attention to the particular portion of the agreement which has been extracted above and contend that the period fixed under the agreement is subject to the production of Nil Encumbrance Certificate by the defendant. I do not think so, the language of the agreement does not suggest such a interpretation. It only says the defendant has to get a Nil Encumbrance Certificate up to the date of sale that which means that the Nil Encumbrance Certificate has to be produced at the time of the execution of the sale deed. Execution of sale deed would naturally occur after the payment of balance sale consideration by the plaintiffs. Therefore the interpretation placed by the learned counsel for the appellants on the contents Ex.A1 agreement cannot be accepted. Apart from the above, it is seen that the suit agreement is not the first agreement between the parties.

15. The fact that there were two earlier agreements dated 03.05.2006 and 17.06.2007 is not in dispute. What is claimed is in the agreement dated 03.05.2006 the extent was shown as 2000sq.ft. It was subsequently found that the extent available is only 1400sq.ft. Therefore, the said agreement was cancelled and a new agreement entered into on 17.07.2006. It prescribed the period of three months. According to the defendant it is only because the plaintiffs wanted the extension of time, the present agreement was entered on 18.08.2006 fixing for further

period of three months from 18.08.2006.

16. The law relating to readiness and willingness to perform their part of the contract and time being the essence of the contract has really underwent the change after the judgment of the Hon'ble Supreme Court reported in Saradamani Kandappan v. Rajalakshmi and others, [2011 (4) LW 97], the said position has been reiterated by the Supreme Court in Padmakumari and ors. v. Dasayyan and others in [2015 (6) CTC 545]. Therefore, the plaintiffs in a suit for specific performance must establish in unequivocal terms that they were ready and willing to perform their part of the contract from the date of the agreement till the date of filing of the suit or till the date fixed for performance.

17. It is not enough to show that the plaintiffs have deposited the money after the ex-parte decree having been passed in the suit. Even there, there is a delay on the part of the plaintiffs. The ex-parte decree in the suit was passed on 31.07.2007 and the last date for the deposit as directed by the trial Court was on 31.08.2007. It is an admitted fact that the money was not deposited within a time granted by the Court and the same was deposited on 17.09.2007. The delay about 17 days and the reason given for the delay is also found to be false. Ofcourse true that the trial Court had accepted the reason given by the plaintiffs for the delay of 17 days and has allowed them to deposit the money, but the same will not have the effect of curing want of readiness and willingness on the part of the plaintiffs. As already stated that it was the defendant who issued first notice cancelling the agreement on 06.01.2007 and only after the receipt of the said notice the plaintiffs issued legal notice dated 10.01.2007 calling upon the defendant will execute the sale deed on 18.01.2007. And even thereafter he did not choose to file the suit within a reasonable time, the suit filed only on 12.03.2007 i.e. nearly after two months after the second notice demanding performance dated 18.01.2007. It will not be out of place, at this juncture to point out that the defendant had filed the suit in OS.No.423 of 2007 seeking a declaration that the agreement has become honest due to lapse of time on 01.02.2007 and it is after the service of notice in IA No.459 of 2007 filed along with the suit, the present suit for specific performance came to be filed by the plaintiffs.

18. In the light of the above controverted facts and law declared by the Hon'ble Supreme Court in the above three decisions, I do not have any hesitation in concluding that the conduct of the plaintiffs is far from satisfactory, in order to enable them to seek a decree for specific performance. The trial Court has rightly granted the decree for refund of advance of Rs.75,000/- along with interest at 7.5% from the date of agreement till the date of realisation. I find that the

plaintiffs have not established that were ready and willing to perform their part of the contract through out in terms of the Section 16C of the Specific Relief Act. Therefore both the points in the appeal are answered against the plaintiffs appellants and the Appeal is dismissed, confirming the judgment and decree of the trial Court. However there will be no order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.

-s/d-
Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

jv

To

1. The I Additional District Judge,
Coimbatore.
2. The Section Officer
V.R Section, High Court
Madras.

+1 CC to M/s. Saravana Bhuman Associates sr 50565
+1 Cc to Ms. V. Nicholas, Advocate sr 50442.

A.S.No.693 of 2010

CNR (CO)
sp (07/08/2017)

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