

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.08.2017

Pronounced on : 06-09-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Appeal Suit No. 805 of 2010

P. Perumal ... Appellant/Plaintiff

Versus

S.N. Ramachandran ... Respondent/Defendant

Appeal filed under Order 41 Rule 1 read with Section 96 of the Code of Civil Procedure against the Judgment and Decree dated 30.04.2010 made in O.S. No. 45 of 2006 on the file of the Principal District Court, Krishnagiri.

For Appellant : Mr. M. Venkatachalapathy, Senior Advocate
for Mr. V.R. Shanmuganathan

For Respondent : Mr. V. Raghavachari

JUDGMENT

R. SUBBIAH, J

This appeal is filed as against the Judgment and Decree dated 30.04.2010 made in O.S. No. 45 of 2006 on the file of the learned Principal District Judge, Krishnagiri, in and by which, the suit filed by the plaintiff/appellant for specific performance of the agreement dated 26.01.2004 was dismissed.

2. For easy reference, the parties shall be referred to as Plaintiff and defendant as they were arrayed in the suit.

3. According to the plaintiff/appellant, the defendant/respondent herein had purchased the land comprised in Survey No.101/1 measuring an extent of 2 acre 75 cents situated in Nallaganakothapalli Village, within Shoolagiri Sub-Registration on 18.01.1991 from one Srinivachar and Govindamma and after such purchase, the defendant has also mutated the revenue records and obtained patta in his name. It is the further case of the plaintiff that out of the total extent of 2 acres and 75 cents purchased by the defendant, land measuring to

an extent of 0.20 cents was acquired by the National Highways Authority for the purpose of implementing the project of widening the road. After such acquisition, the remaining land measuring Hectare 1.03.05 was assigned in favour of the defendant with new Survey No. 101/1B and for this extent of land also, patta was issued in favour of the defendant. Thus defendant was not in possession of the entire extent of land measuring 2 acres and 75 cents. Apart from acquisition of land measuring to an extent of 20 cents, land measuring to an extent of 0.9 cents lying on the Western side is being used as pathway by the owners of the land on the Southern side. The defendant has fenced the land measuring only to an extent of 2 acres 46 cents, which is the actual extent of land in his possession.

4. It is the case of the plaintiff that the defendant approached him for sale of the above said land during the last week of December 2003. On 01.01.2004, the plaintiff and defendant through one Krishtappa negotiated for purchase of the property by the plaintiff and at that time, the defendant produced xerox copies of the sale deed, patta and other records for his perusal. During the course of negotiation, the defendant was unable to furnish the correct extent of land available for sale and therefore, no agreement was executed on that date. However, it was agreed that the sale price shall be Rs.10 lakhs per acre of land. It was also mutually agreed that after the defendant furnishes the necessary particulars with regard to the extent of land in his possession and agreement of sale could be executed for the extent of land he is intending to sell. Further, it happened to be the Tamil month of Margazhi and therefore, it was mutually agreed that the agreement of sale could be executed after 15.01.2004. However, the defendant could not produce the documents as sought for by the plaintiff but insisted the plaintiff to enter into an agreement of sale. Accordingly, on 26.01.2004, an agreement was entered into between the plaintiff and the defendant agreeing to sell the land which is in possession of the defendant, excluding the land acquired by the National Highways Authority. In the agreement of sale dated 26.01.2004, no specific extent of land was indicated and the sale price fixed was Rs.28,00,000/-. As per the agreement, the plaintiff has to pay Rs.5 lakhs on or before 16.02.2004. On the date of agreement, the plaintiff paid a sum of Rs.3,00,000/- by way of cash and another sum of Rs.2,00,000/- by cheque from the account maintained by the son of the plaintiff by name Kumar. The cheque was issued with a clear understanding that there is no sufficient funds to honour the cheque and therefore it need not be presented. The plaintiff also promised the defendant to pay the cheque amount of Rs.2,00,000/- by cash within a week. However, the defendant presented the cheque and it was dishonoured. Even after dishonour, the cheque was not returned to the plaintiff. In such circumstances, the plaintiff could not pay the sum of

Rs.5,00,000/- before 16.02.2004 as stated in the agreement. But subsequently, the plaintiff paid the sum of Rs.2,00,000/- by cash as demanded by the defendant and it was paid through Krishtappa, the mediator.

5. According to the plaintiff, the defendant promised to get the land surveyed after demarcating the land owned and possessed by him. The defendant also agreed to negotiate with the Western side owners of the land who are using it, measuring an extent of 9 cents, as pathway. It was specifically agreed in the agreement of sale that only after the defendant furnishes the correct particulars relating to the extent of land in his possession and after demarcating the same, the sale deed can be executed. However, as the defendant did not fulfil his promise to survey the land and furnish the particulars relating to the actual extent of land to which he has title, the plaintiff did not pay the amount of Rs.5 lakhs as per the agreement before 15.02.2004. Further, the defendant did not resolve the dispute over the 9 cents of land which is being used as pathway by the owners on the Southern side of the land owned by the defendant. Even though the plaintiff was ready and willing to perform his part of the contract, the defendant evaded and avoided to execute the sale deed in his favour. In fact, after waiting for several months, the plaintiff, at his cost, surveyed the land and found that the defendant owns land measuring an extent of 2 acres and 46 cents alone. Thereafter, in order to fulfil his obligation, the plaintiff has drawn a demand draft dated 07.10.2004 for Rs.10 lakhs and sent it through one Thulasiram and it was handed over to the wife of the defendant. Thus, in all, the plaintiff has paid a total sum of Rs.15,00,000/- out of Rs.28,00,000/- as sale consideration and only a balance of Rs.13,00,000/- is due and payable by the plaintiff. Even though the plaintiff and the mediator Krishtappa have made several attempts and requested the defendant to execute the sale deed, it was evaded by the defendant. While so, on 26.09.2005, the defendant sent a notice through his advocate in which it was stated that the sum of Rs.10 lakhs was clandestinely deposited by the plaintiff in his bank account without his knowledge and consent. Further it was stated that in view of the non-performance of the terms and conditions incorporated in the agreement of sale dated 26.01.2004 by the plaintiff, the defendant sought to cancel the agreement of sale. However, after receipt of the notice, the plaintiff requested the defendant to demarcate the lands stating that he was ready and willing to get the sale deed executed in his favour. In spite of such request, the defendant sent another notice dated 04.09.2005 through his advocate enclosing the demand draft of Rs.10 lakhs paid by the plaintiff. Immediately, the plaintiff sent a detailed reply notice on 03.10.2006 repudiating the averments made in the notices sent on behalf of the defendant and

thereafter, he has filed the suit on 05.10.2006 for specific performance of the agreement dated 26.01.2004.

6. Repudiating the plaint averments, the defendant has filed his written statement contending inter alia that it is false to state that the defendant is not in possession of the entire extent of land measuring 2 acres and 55 cents in Survey No.101/1B and it is equally false to state that the defendant has title in respect of the land measuring to an extent of 2 acres 46 cents only. The defendant also denied as false that he approached the plaintiff and expressed his intention to sell the land during December 2003 and also negotiated with the plaintiff and one Kristappa on 01.01.2004 for sale of the land. The defendant also denied as false that the sale price was fixed at Rs.10,00,000/- per acre. Even though the defendant admits the execution of the agreement of sale dated 26.01.2004, he denied as false the statement of the plaintiff that he agreed to demarcate the land or furnish the correct extent of land available for sale. According to the defendant, there is no recitals to that effect in the agreement of sale dated 26.04.2004. The Plaintiff, being a well educated person and being wordly-wise would not have ventured to enter into a sale transaction with the defendant without being aware of the actual extent of land agreed to be purchased by him. Such an averment has been made only to get over the period of limitation as the delay will disentitle him to seek the relief of specific performance under the suit agreement.

7. According to the defendant, time is the essence of the contract between him and the plaintiff. As per the agreement of sale, the plaintiff is bound to pay a sum of Rs.5,00,000/- towards advance sale consideration on or before 15.02.2004 out of which the plaintiff has in fact paid a sum of Rs.3,00,000/- by way of cash. As far as the balance sum of Rs.2,00,000/- is concerned, he has issued a cheque for Rs.2,00,000/- drawn from the bank account maintained by his son and on it's presentation, it was dishonoured. Therefore, what was paid before 15.02.2004 was only Rs.3,00,000/- as against the sum of Rs.5,00,000/- payable by the plaintiff. The averment that the sum of Rs.2,00,000/- was paid in cash in lieu of the cheque was denied by the defendant. Thus, the plaintiff has contravened the terms and conditions incorporated in the agreement of sale by not paying the sum of Rs.5,00,000/- before 15.02.2004. Therefore, the non-payment of the sum of Rs.5,00,000/- before 15.02.2004 has resulted in breach of the covenants contained in the agreement of sale dated 26.01.2004 by the plaintiff.

8. It is the case of the defendant that as per the agreement of sale dated 26.01.2004, the entire sale has to be completed before 31.03.2004 and in the event of non-payment of balance sale amount by the plaintiff, the defendant is entitled

to forfeit the advance amount. On the contrary, if the defendant failed to execute the sale deed even though the plaintiff offered to get the sale deed executed in his favour by paying the balance sale consideration, then the plaintiff has to deposit the balance sale consideration and have the contract enforced by filing a suit for specific performance. However, the plaintiff did not pay the entire sale consideration before 31.03.2004, as has been indicated in the agreement of sale dated 26.01.2004.

9. It is contended by the defendant in his written statement that the plaintiff, without his knowledge, has clandestinely deposited the sum of Rs.10,00,000/- in his bank account and he came to know about such deposit only when he obtained a true statement of the account for submission of his income tax returns. Even the said sum of Rs.10,00,000/- was deposited on 08.12.2004, atleast eight months after the expiry of the time fixed under the agreement for performance of the contract. Therefore, on 26.09.2005, the defendant sent a notice through his advocate intimating the plaintiff that the agreement stands cancelled. Subsequently, the defendant, through his counsel, sent another notice dated 04.09.2006 enclosing a demand draft for a sum of Rs.10,00,000/- drawn in favour of the plaintiff. Thereafter, the plaintiff sent a reply dated 03.10.2006 containing false and untenable averments.

10. According to the defendant, the plaintiff committed breach of terms and conditions contained in the agreement of sale and therefore, he is estopped from seeking the relief of specific performance. It is further contended that after expiry of the agreement, the plaintiff has stealthily and surreptitiously, without the knowledge of the defendant, has deposited the sum of Rs.10,00,000/- in his savings bank account maintained with ING Vysya Bank, Hosur on 08.12.2004 and on coming to know about such deposit at a later point of time, the defendant sent a notice dated 26.09.2005 cancelling the agreement of sale dated 26.01.2004 and also sent another notice dated 04.09.2006 enclosing a demand draft for Rs.10,00,000/- drawn in favour of the defendant. According to the defendant, the plaintiff did not adhere to the time schedule fixed under the agreement of sale dated 26.01.2004 and therefore, he prayed for dismissal of the suit.

11. The trial Court, on the basis of the averments contained in the plaint as well as the written statement, framed the following issues for consideration namely

- (i) Whether the plaintiff was ready and willing to perform his part of the contract as per the terms and conditions contained in the agreement of sale dated 26.01.2004
- (ii) Whether time was the essence of the

contract

(iii) Whether the suit is barred by limitation

(iv) Whether the plaintiff is entitled for the relief of specific performance

(v) To what other relief the plaintiff is entitled to?

12. Before the trial court, the plaintiff examined himself as PW1, two other witnesses namely Thulasiram and Krishtappa were examined as Pws 2 and 3 and Exs. P1 to P8 were marked. On the side of the defendant, the defendant examined himself as DW1 along with two other witnesses namely Muniyappa and Balasubramanian as Dws 2 and 3 and Exs. B1 to B3 were marked. The trial court, on conclusion of trial and after analysing the oral and documentary evidence, dismissed the suit on the ground that the plaintiff failed and neglected to perform his part of the contract within the time fixed under the agreement of sale dated 26.01.2004 and therefore, he is not entitled to the relief of specific performance.

13. The learned Senior counsel appearing for the plaintiff/appellant would contend that the defendant is the owner of the land measuring 2 acres 75 cents out of which 20 cents were acquired by the National Highways Authority and 9 cents of land on the Western side is being used as a pathway by the adjacent land owners. Therefore, the plaintiff is owner of the land measuring only 2 acre and 46 cents. Even the extent of land measuring 2 acre 46 cents has not been properly demarcated and the defendant himself is not sure as to how much land he is in possession and the extent of land to which he is having title. Therefore, at the time of entering into the agreement of sale dated 26.01.2004, the plaintiff required the defendant to furnish the correct particulars with regard to the extent of land in his possession, survey the land and demarcate it. However, the defendant failed and neglected to furnish the particulars sought for by the plaintiff. Even at the time of execution of the agreement of sale dated 26.01.2004, the plaintiff paid a sum of Rs.3 lakhs which was also admitted by the plaintiff. At the same time, the plaintiff has issued a cheque drawn from the bank account maintained by his son for Rs.2,00,000/- and handed over it to the defendant with a clear understanding that the cheque need not be presented and he will pay the amount covered in the cheque by cash within a week. However, the defendant presented the cheque and got it dishonoured. In spite of the same, the plaintiff, to show his bonafide, has paid the sum of Rs.2 lakhs in cash through Kistappa, PW3 and it was also received by the defendant. As per the agreement of sale, the plaintiff has to pay Rs.5 lakhs on or before 15.02.2004 and the balance of Rs.18 lakhs before 31.03.2004. Thus, the plaintiff has performed his part of the contract by advancing a sum of Rs.5 lakhs towards part of the

sale consideration within the time stipulated. In this context, when PW3 Kistappa was examined, he has clearly deposed that the sum of Rs.3 lakhs was paid in cash at the time of execution of the agreement and another sum of Rs.2 lakhs was paid by cheque. He further deposed that the cheque was dishonoured and thereafter, the plaintiff has paid the sum of Rs.2 lakhs in cash. PW3 also deposed that inspite of several requests made to the defendant, he has not surveyed, measured or demarcated the land as requested by the plaintiff. By placing reliance on the evidence of PW3, the learned senior counsel for the plaintiff would contend that it is the defendant who has committed breach of the terms and conditions contained in the agreement of sale and therefore, the plaintiff is entitled for the relief of specific performance.

14. As regards readiness and willingness on the part of the plaintiff, it is contended by the learned Senior counsel for the plaintiff that in the agreement of sale dated 26.01.2004, no specific measurement or extent of the land is indicated because the defendant himself was not sure as to what is the extent of the land which is available and it's boundaries. In fact, even at the time of entering into agreement of sale, the plaintiff requested the defendant to produce the documents relating to the correct extent of the land, survey the land and also to demarcate it. However, the defendant failed and neglected to do so and in the absence of the same, the plaintiff cannot be expected to fulfil his part of the contract by paying the balance sale consideration. Even as per the recitals contained in the agreement of sale, if the plaintiff commits default of the conditions incorporated in the agreement, he is not entitled for refund of advance amount. On the other hand, if the defendant commits default, the plaintiff is entitled to seek his remedy by filing a suit for specific performance. In the present case, the defendant has refused, failed and neglected to perform his part of the contract and it has rendered the plaintiff impossible to perform his part of the contract. In such circumstances, according to the learned Senior counsel for the plaintiff, it cannot be said that time was the essence of the contract and the same will not disentitle the plaintiff from seeking the relief of specific performance.

15. The learned Senior counsel for the plaintiff would further contend that it is not the case of the defendant that the plaintiff has no money available with him or incapable of paying the balance sale consideration. In fact, the plaintiff, having failed in all his attempts to get the sale deed executed in his favour by the defendant, has drawn a demand draft on 07.10.2004 for Rs.10 lakhs and it was handed over to the wife of the defendant through one Thulasiram, PW2 and thereafter it was also deposited by the defendant and he used the amount for his personal expenses. However, after one year from the date of

deposit of the demand draft, the defendant returned it through the notice dated 04.09.2006. Having used the amount for his own expenses, the defendant has falsely averred that he came to know about the deposit of the amount only when he obtained a statement from the Bank a year after depositing the demand draft for filing income tax return. In any event, the defendant has utilised the sum of Rs.10 lakhs paid by the plaintiff and it would only indicate that notwithstanding the expiry of the time stipulated under the agreement of sale, the defendant has accepted the sum of Rs.10 lakhs paid by him and thereby he has, by his own act, extended the period for performance of the contract. In this context, the learned Senior counsel for the plaintiff placed reliance on Ex.B2, statement of account and submitted that on perusal of the same, it would be evident that as on the date when the demand draft for Rs.10 lakhs was deposited by the defendant, there was only a sum of Rs.38,545/- available as balance in his account. However, after depositing the demand draft, the defendant has regularly withdrawn several amount exceeding Rs.38,545/- and therefore, the defendant cannot plead ignorance about the deposit of the demand draft for Rs.10 lakhs in his account. This conduct of the defendant in utilising the sum of Rs.10 lakhs paid by the plaintiff and returning it after one year and 9 months would show that time was not the essence of the contract. In fact, during the pendency of the suit, the plaintiff has deposited amount in a fixed deposit and the fixed deposit receipt dated 14.07.2008 for Rs.10 lakhs was marked as Ex.P8 which would show that the plaintiff is financially capable of paying the balance sale consideration. While so, according to the learned Senior counsel for the plaintiff, the trial court is not justified in dismissing the suit for specific performance.

16. The learned Senior counsel for the plaintiff placed reliance on the decision of the Division Bench of this Court in the case of (Mct. M. Chidambaram Trust, rep. By its Trustee Mct. P. Chidambaram vs. V. Ravichandran) reported in 2017 3 Law Weekly 733 to contend that the conduct of the defendant in utilising the amount of Rs.10 lakhs paid by the plaintiff and returning it after more than a year thereafter would only indicate that time was not the essence of the contract and that the plaintiff was financially capable of paying the balance sale consideration.

17. The learned Senior counsel for the plaintiff has also relied on the decision of the Honourable Supreme Court in the case of (Zarina Siddiqui vs. A. Ramalingam @ R. Amaranathan) reported in (2015) 1 Supreme Court Cases 705 to contend that the relief of specific performance being an equitable discretionary relief, such discretion must be exercised in accordance with sound and reasonable judicial principles by taking note of the conduct of the parties to the transaction. For the same

proposition, the learned Senior counsel for the plaintiff also relied on the decision of the Honourable Supreme Court in the case of (K. Prakash vs. B.R. Sampath Kumar) reported in (2015) 1 Supreme Court Cases 597.

18. Countering the submissions of the learned senior counsel for the plaintiff, the learned counsel for the defendant would vehemently contend that the plaintiff failed to fulfil his part of the contract. As per the agreement of sale, the plaintiff has to pay a sum of Rs.5 lakhs before 16.02.2004. However, the plaintiff has paid only Rs.3 lakhs on the date of the agreement of sale and did not pay the balance of Rs.2 lakhs. In fact, a cheque drawn from the bank account maintained by the son of the plaintiff was tendered for Rs.2 lakhs, but the cheque was dishonoured on its presentation. Even though it was falsely contended that the sum of Rs.2 lakhs was subsequently paid, it was not established by the plaintiff in a manner known to law. In fact, even after dishonour of the cheque, the defendant was in possession of the cheque, which would show that the plaintiff never paid the balance sum of Rs.2 lakhs. Thus, as on 15.02.2014, the plaintiff has paid only Rs.3 lakhs and not Rs.5 lakhs as required under the agreement of sale dated 26.01.2004. Further, the sale has to be completed before 31.03.2004 as per the agreement of sale, but the plaintiff has not come forward to pay the balance sale consideration before that date and as such the defendant was not in a position to execute the sale deed. From the date of execution of the agreement, the plaintiff exhibited slackness, indolence and refusal to abide the terms of the contract. The Plaintiff, knowing fully well that the sale has to be completed before 31.03.2004, remained silent without asserting his right as an agreement holder before 31.03.2004. On the other hand, after expiry of about eight months, the plaintiff had clandestinely deposited a sum of Rs.10 lakhs purportedly with an intention to get the lapsed contract extended. Thereafter, on coming to know about the deposit of Rs.10 lakhs, the defendant sent a notice dated 26.09.2005 intimating the plaintiff that he is seeking to cancel the agreement of sale dated 26.01.2004. For the notice dated 26.09.2005, the plaintiff did not sent any reply. Subsequently, by a notice dated 04.09.2006, the defendant returned the demand draft for Rs.10 lakhs deposited by the plaintiff.

19. As regards the false case projected by the plaintiff as if he has paid Rs.2 lakhs by cash through Krishtappa, PW3, it is contended by the counsel for the defendant that during cross-examination, PW3 has stated that he was not aware of any payment having been made by him to the tune of Rs. 2 lakhs. Further, during the cross-examination of the plaintiff, the plaintiff has deposed statements contrary to what has been pleaded in the plaint. According to the counsel for the defendant, for the

first time in the reply notice dated 03.10.2006 sent by the plaintiff, he has pleaded as though the defendant did not furnish the exact extent of the lands, surveyed the lands or demarcated them. If really the defendant did not furnish the particulars required, the plaintiff could have exercised his right as an agreement holder and demanded the same from him before the expiry of the contract. However, in the present case, there is no evidence to show that the plaintiff had ever made any attempt to perform his contract before 31.03.2004. Above all, it is stated by the counsel for the defendant that immediately after the dismissal of the suit, by a demand draft dated 21.05.2010, the defendant has tendered a sum of Rs.13 lakhs received from the plaintiff. Therefore, according to the counsel for the defendant, there is no cause of action for the plaintiff to continue the appeal proceedings and the appeal has to be dismissed.

20. Keeping the above submissions made by the counsel for both sides, we have perused the materials placed on record. The following points emerges for consideration in this appeal namely

(i) Whether time was the essence of the agreement of sale dated 26.01.2004 entered into between the appellant and the respondent?

(ii) Whether the plaintiff proved his readiness and willingness to perform his part of the contract?

21. Admittedly, the plaintiff and the defendant have entered into an agreement of sale dated 26.01.2004 in and by which the defendant agreed to sell the suit property in favour of the plaintiff. It is also an admitted fact that in the agreement of sale, a condition was incorporated to the effect that the plaintiff has to pay the defendant a sum of Rs.5,00,000/- on or before 15.02.2004. Yet another condition incorporated in the agreement of sale is that the entire sale transaction has to be completed on or before 31.03.2004. It is also an admitted fact that out of the sum of Rs.5,00,000/- payable by the plaintiff, he has paid a sum of Rs.3,00,000/- on the date of execution of agreement of sale by cash. As far as the balance sum of Rs.2,00,000/- is concerned, it is the case of the plaintiff that he had handed over a cheque for a sum of Rs.2,00,000/- to the defendant, which was drawn from the bank account maintained by his son. According to the plaintiff, the cheque was handed over to the defendant with a specific and express understanding that the cheque need not be presented and that he will pay the sum of Rs.2,00,000/- in cash. According to the plaintiff, the cheque was handed over to the defendant only as a security in lieu of the cash to be paid later. However, the defendant presented the cheque and it was dishonoured. Thus, according to the defendant, before 15.02.2004, the plaintiff did not pay the sum of Rs.5,00,000/- as agreed but

only paid Rs.3,00,000/- . On the contrary, the plaintiff would contend that after dishonour of the cheque, he has paid a sum of Rs.2,00,000/- in cash and paid it through Kistappa, PW3. In the written statement filed by the defendant, he has specifically denied having received the sum of Rs.2,00,000/- in cash through PW3. The trial court, on analysing the evidence of PW1 and PW3 has come to a conclusion that if the sum of Rs.2,00,000/- has been really paid by the plaintiff, he could have received back the cheque given to the defendant. However, it was stated that the cheque remained with the defendant. Further, the plaintiff has not produced any other proof to show that he has paid the sum of Rs.2,00,000/- in cash. Therefore, the trial court concluded that the plaintiff did not perform his part of the contract and failed to pay the sum of Rs.5,00,000/- before 15.02.2004. We have also noticed from Para No.4 of the plaint averments that "the defendant did not move his little finger in demarcating the extent available for executing necessary sale deed, and further he did not settle the dispute of pathway on the western side. The mediator Kistappa made several attempts but the defendant alone evaded his request. So the plaintiff was not able to pay the amount of five lakhs as per the agreement." Thus, on the one hand, the plaintiff contends that he has paid the balance sum of Rs.2,00,000/- and fulfilled his obligation and on the other he contends that as the defendant did not furnish the particulars sought for, he did not pay the amount and even the non-payment of the sum of Rs.2,00,000/- will not be a ground for rescinding the contract. Thus, the plaintiff has approbated and reprobated in his pleadings and also did not prove that he has paid the balance sum of Rs.2,00,000/- as has been indicated in the agreement before 15.02.2004. Thus, the plaintiff has contravened the terms and conditions stipulated under the agreement of sale dated 26.01.2004, Ex.P3.

22. As regards the payment of Rs.10,00,000/- said to have been paid by the plaintiff to the wife of the defendant, first of all, it has to be stated that the period within which the sale transaction has to be completed expired on 31.03.2004. Before 31.03.2004, the plaintiff did not perform his part of the contract. Between 31.03.2004 and 07.12.2004, the date on which the demand draft was drawn, the plaintiff maintained silence and he did not raise his little finger towards the defendant or complained that it is the defendant who did not perform his part of the obligations under the contract. The Plaintiff, knowing well that the sale transaction has to be completed before 31.03.2004, ought to have taken some steps prior to the expiry of the period of contract. Even assuming that the plaintiff has tendered the demand draft for Rs.10 lakhs to the wife of the defendant, after paying the amount of Rs.10 lakhs, admittedly, the defendant neither intimated the plaintiff nor asserted his right to get the sale deed executed in his favour on the basis of the amount of Rs.10 lakhs paid by him. According to the

defendant, the amount of Rs.10 lakhs was clandestinely deposited into his account and he came to know about such deposit only during September 2005 when he has obtained a statement of bank account for the purpose of filing the income tax return. Immediately, the defendant sent a notice dated 26.09.2005, marked as Ex.A4, through his advocate inter alia contending that the amount of Rs.10 lakhs was clandestinely deposited in his account when the period for performing his part of the contract itself expired on 31.03.2004. For the reasons best known, the plaintiff did not send any reply to the same. Thereafter, through another notice dated 04.09.2006, Ex.A5, the defendant returned the demand draft for Rs.10,00,000/- to the plaintiff. On analysing the above factual matrix, it can safely be concluded that the plaintiff was never ready and willing to perform his part of the contract. In fact, the plaintiff has abandoned his right to get the sale deed executed in his favour by not paying the balance sale consideration on or before 31.03.2004. It is also evident that time is the essence of the contract, within which, the plaintiff failed and neglected to discharge his contractual obligations. On the contrary, for non-performance of his obligation, the plaintiff would contend that the defendant did not furnish the correct particulars of the land which is in his possession, which deprived him to get the contract completed. First of all, such a contention was raised for the first time in the reply notice sent by the plaintiff on 03.10.2006, marked as Ex.P6. Further, this contention of the plaintiff is falsified by his own admission. When the plaintiff was cross examined, he has specifically admitted that there is no recital in the agreement of sale to the effect that the sale transaction will be completed only after the defendant survey and/or demarcate the suit property.

23. The Plaintiff has filed the suit for specific performance of the agreement of sale dated 26.01.2004 and in a suit of this nature, it is he, who has to prove that he was ready and willing throughout to perform his part of the obligations under the contract. It is not enough to merely plead that he was ready and willing to do his part of the obligation but it has to be proved to the satisfaction of the Court. In the present case, we find that absolutely, there is no evidence forthcoming from the plaintiff that he was ready and willing to perform his part of the contract and that it is the defendant who evaded and avoided to execute the sale in his favour. As mentioned above, the period of contract ends on 31.03.2004 within which the plaintiff has to pay the balance sale consideration to get the sale deed executed in his favour. In the present case, only on 07.12.2004 viz., after about eight months of the time stipulated in the agreement of sale, he has deposited the amount. It is not the case of the plaintiff that even before 31.03.2004 he has paid the balance sale

consideration but it was refused by the defendant. There is absolutely no evidence to show as to whether the plaintiff has asserted his right, as an agreement holder, to get the sale deed executed in his favour before 31.03.2004 or what prompted him to draw a demand draft for Rs.10,00,000/- on 07.12.2004, after eight months from the date on which the period of contract comes to an end. In other words, before 31.03.2004, the plaintiff did not exhibit his wherewithal to pay the balance sale consideration or taken any step in that direction, in such event, we can only conclude that the plaintiff was never ready and willing to perform his part of the contract and therefore, he is not entitled to the relief of specific performance.

24. The learned Senior counsel for the plaintiff would vehemently contend that the amount of Rs.10,00,000/- paid by the plaintiff was deposited by the defendant in his bank account and he has merrily utilised the same for his personal expenses, which would only show that the defendant, on his own, has extended the period of contract. On perusal of Ex.B2, statement of account, the trial Court rendered a finding that on 08.12.2004, the demand draft for Rs.10,00,000/- was deposited in the account of the defendant. On that day, there was only a sum of Rs.38,545/- available as balance in his account. But after the demand draft was deposited, the defendant has withdrawn various amounts. Be that as it may, the fact remains that the demand draft was returned by the defendant through a notice dated 04.09.2006, Ex.P6. Further, the amount was admittedly deposited by the plaintiff only after the expiry of the period of contract and therefore, the submission of the learned Senior counsel for the plaintiff that the deposit of amount of Rs.10,00,000/- in the bank account of the defendant would automatically extend the period of contract cannot be accepted.

25. In the light of the above, we confirm the decree and judgment passed by the trial Court. The Appeal suit is dismissed. No costs.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

To

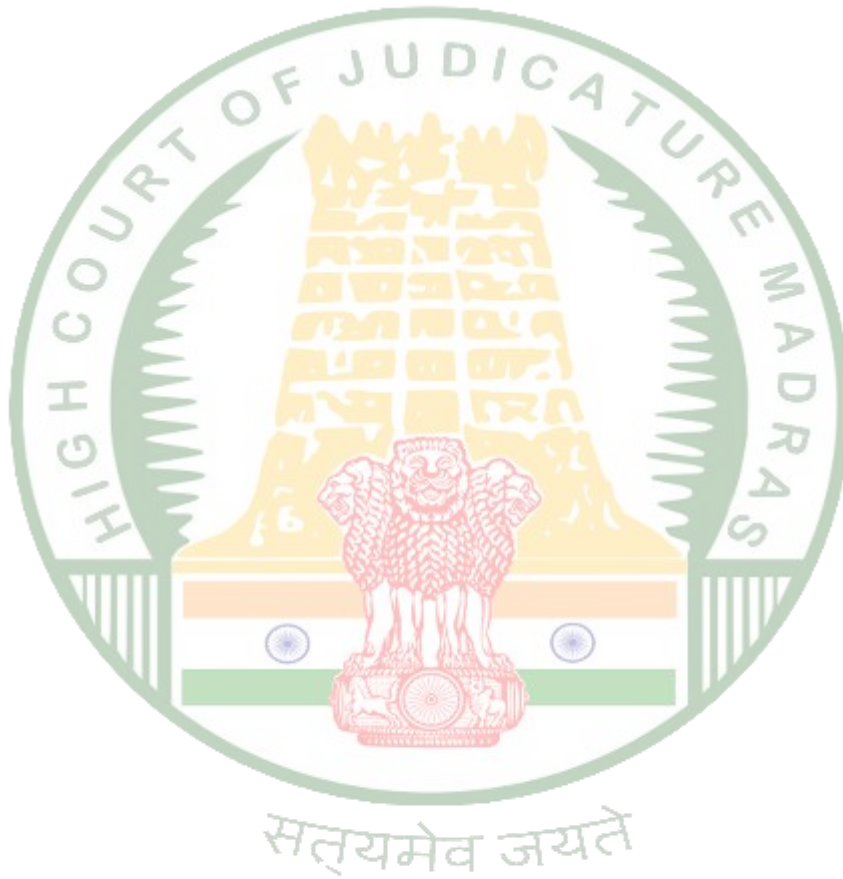
The Principal District Judge
Krishnagiri

+ 1 cc to Mr. V. Raghavachari, Advocate, SR.64265

+ 1 cc to M/s.T.Panchatsaram, Advocate, SR.64423

A.S. No. 805 of 2010

CNR (CO)
NR 25/10/2017



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