

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on:15.02.2017****Pronounced on:21.02.2017****Coram****THE HON'BLE DR. JUSTICE G. JAYACHANDRAN****Second Appeal No.690 of 2007 and
M.P.No.1 of 2007**

R.Rajendran

.. Appellant

/vs/

R.Samundi

.. Respondent

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree in A.S.No.34 of 2006 on the file of the Principal District Court, Vellore and dated 23.01.2007 in reversing the judgment and decree in O.S.No.91 of 2001 on the file of the Sub Court, Tirupattur and dated 27.03.2006.

For Appellant :Mr.V.Raghavachari

For Respondent :Mr.P.Veenasuresh for
M/s T.R.Rajaraman

J U D G M E N T

The plaintiff is the appellant herein. The suit is for specific performance based on the agreement dated 20.05.1998 fixing five months time for completion of contract. The sale consideration was Rs.2,00,000/-.

On the date of agreement, the plaintiff has advanced Rs.2,000/- to the defendant. Though time for performance was prescribed in the agreement, it was not the essence of the contract. When the plaintiff came to know that the defendant is trying to sell away the property to a third party, he caused notice to the defendant calling upon him to come and execute the sale deed on 30.04.2001. The defendant did not turn up to receive the balance sale consideration of Rs.1,98,000/- and execute the sale deed. Hence, the suit for specific performance.

2. The contention of the defendant as found in the written statement is that he entered into agreement with the plaintiff on 20.05.1998 and the sale consideration was fixed at Rs.2,00,000/-. The time for completing the performance was fixed at five months and the time was the essence of the contract, because the defendant wife was suffering from heart ailment to meet out her medical expenses, he was in dire necessity for money. The plaintiff was not ready to perform his part of contract within the time stipulated under the contract. Since the plaintiff failed to pay the balance sale consideration, in time, the defendant was not able to admit his wife in the hospital for treatment, as a consequence his wife died on 07.12.2000. The plaintiff was never ready and willing to perform his contract. Contrarily, on the strength of this agreement he earlier filed the suit in

O.S.No.1 of 2000 alleging that the defendant has removed the trees in the suit property and sought for damages. That suit was dismissed on 26.03.2002. The appeal preferred by the plaintiff in A.S.No.27 of 2002 was also dismissed on 19.09.2003. As per the contract, the plaintiff ought to have completed the contract by 20.10.1998, since he did not come forward to complete the contract, the defendant issued notice on 04.10.1998 calling upon the plaintiff to tender the balance sale consideration of Rs.1,98,000/- and to complete the contract. The plaintiff did not care to honour the terms of contract within the time prescribed, he has approached this court with unclean hands to knock away the property. Infact, the plaintiff purchased another property of defendant on 08.03.2001 for sale consideration of Rs.30,000/-, even at that point of time, he did not insist for performance of this sale agreement, since the time is the essence of the contract and the agreement already repudiated, the plaintiff is not entitled for any relief. Further, under Order 2, Rule 2 of the Civil Procedure Code, earlier suit filed by the plaintiff for damages, is a bare to file subsequent suit.

3. The trial Court allowed the suit holding that time was not the essence of the contract and the plaintiff was ready and willing to perform his part of contract. For the said conclusion, the trial Court has relied upon

Ex.B6 where the plaintiff has purchased the property of the defendant on 08.03.2001 for Rs.30,000/- and the fact of depositing the balance sale consideration of Rs.1,98,000/- on 27.04.2004. The trial Court has also observed that the termination of contract notice alleged to have been sent by the defendant on 04.10.1998 was wantonly sent to a wrong address with intention to defeat the lawful claim of the plaintiff.

4. Against the decree passed by the trial Court, the defendant preferred A.S.No. 34 of 2006. The lower appellate Court reversed the trial Court finding. It held time was essence of the contract. The plaintiff ought to have approached the Court immediately after expiry of time prescribed, if the defendant has really refused to perform his contract. Since he has waited for nearly 3 years, adverse inference has been drawn by the lower appellate Court that the plaintiff was not ready and willing to perform the contract. Regarding the previous suit O.S.No.1 of 2000, the lower appellate Court relying upon the judgment of this Court reported in ***M/s Raptakos Brett and Company Private Limited represented by Principal Officer, v. M/s Mode Business Centre Private Limited represented by its Director[2006(2) MLJ p.411]*** held that the cause of action for both earlier suit and present suit are one and the same. When the plaintiff taugt fit to claim damages based on unconcluded contract, he should

have sought for the relief of specific performance also. Since the plaintiff has not included whole claim which he was entitled to make in respect of cause of action he shall not afterwards sue for the relief of specific performance which he has intentionally relinquish while filing the ealier suit.

5. Aggrieved by the reversal of the trial Court judgment, the plaintiff is before this court by way of second appeal raising the following Substantial Questions of Law:-

“(a)Whether the lower appellate Court is right in holding that the plaintiff was not ready and willing to perform his part of contract, when the entire sale consideration had been deposited in the court and the credit worthiness of the plaintiff was never in dispute?

(b)Whether the lower appellate Court is right in holding that time is the essence of the contract, when the settled law on the subject and the law laid down by the Supreme 1967 SC 868, 2005 11 SCC 73 and 1993 1 SCC 519 holds otherwise?

(c)Whether the lower appellate Court is justified in reversing the well considered judgment of the trial court without even considering the evidence of DW1 and his pleadings?

(d)Whether the lower appellate Court is justified in assuming that the plaintiff was never ready

and willing to perform his part of contract overlooking the fact that he had deposited the balance of sale consideration in court on the date of institution of the suit?

(e) Whether the lower appellate Court is right in holding that the suit is barred by the principles of res judicata or Order 2 Rule 2 when the scope of the present proceedings is entirely different from the suit earlier?

(f) Whether the principles of Order 2, Rule 2 CPC will apply when the relief sought for in the suit for specific performance and in O.S.No.1 of 2000 are different?"

6. This Court before admitting this case has caused notice to the respondent to ascertain whether any substantial question of law involved in this case to allow the appeal. Accordingly, the respondent has entered appearance through his counsel and made his submissions.

7. The learned counsel appearing for the appellant submitted that the plaintiff and the defendant are brothers and his demand to complete the contract was a continuous one and he never relinquished his right to enforce the contract. The learned lower appellate Court Judge failed to see the time limit prescribed under Article 54 of the Limitation Act for instituting

the suit for specific performance which commences only from the date of refusal. In the present case the defendant never refused the execution of the sale deed and Exs.B2 and B3 purported to be the notice issued by the defendant, admittedly, sent to a wrong address and therefore, it could not be construed as if the defendant was ready and willing to sell his property.

8. It was further contended by the learned counsel appearing for the appellant that mere recital of fixation of time for performing the contract will not make time an essence of the contract. The right of the agreement holder to seek for specific performance within three years from the date of refusal is a statutory right and that right cannot be deprived. It was also contended by depositing the balance sale consideration of Rs.1,98,000/- in the Court, the readiness is established and his ability to generate fund is no more a question for consideration. Regarding the observation of the lower appellate Court about the application Order 2, Rule 2 of the Civil Procedure Code, the learned counsel appearing for the appellant contended that the judgment rendered in the earlier suit will not attract the principle of Order 2 Rule 2 of the Civil Procedure Code.

9. Per contra, the learned counsel appearing for the respondent

submitted that the respondent desperately wanted to sell the property to meet out his wife medical expenses and it is admitted by the plaintiff that the defendant's wife was terminally ill and she was wanting for medical care. The death of the defendant's wife due to heart ailment on 07.12.2000 establishes that time was the essence of the contract and both the parties entered into an agreement only on such term the failure of the plaintiff to complete the contract within the time stipulated renders the agreement unenforceable. The learned counsel further contended that the specific performance relief being an equitable relief after advancing just Rs.2000/- for total consideration of Rs.2,00,000/-, the plaintiff waited for 2 years and 11 months before issuing pre-suit notice calling upon the defendant to come to Sub Registrar Office on 30.04.2001, but on the very same day he instituted the suit for specific performance in the court of law.

10. The very conduct of the plaintiff will clearly show that after abandoning the agreement, without pursuing the suit for specific performance he has first approached the Small Causes Court O.S.No.1 of 2000 claiming damages for the alleged removal of trees from the suit property. Thus, relinquished the right to enforce the agreement. Later, he is not entitled to file the present suit, since such suit is barred under Order 2, Rule 2 of the Civil Procedure Code. While the trial Court has failed to

consider the fact, the lower appellate Court has rightly pointed out the correct law and dismissed the suit.

11. In support of their respective case, the learned counsel are cited the judgments which are in their favour. For the sake of brevity this Court points out only the following two judgments:

(1)The Hon'ble Supreme Court, which covers differentiates of specific performance suit in ***Chand Rani (Smt) (Dead) by LRS v. Kamal Rani (Smt) (Dead) by LRS reported in (1993) 1 Supreme Court 519(5 Judges Bench)***, wherein para 25 reads as under:-

"25. From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

- (1)From the express terms of the contract;
- (2)From the nature of the property; and
- (3)From the surrounding circumstances, for example: the object of making the contract."

(ii)The Judgment of the Hon'ble Supreme Court reported in ***Saradamani Kandappan v. S.Rajalakshmi and Others 2011 (4) CTC 640***, wherein para 28 reads as under:

"28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S.Vidyanadam (supre):

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore, time/period prescribed cannot be ignored.

(ii) Court will apply greater scrutiny and strictness when considering whether the purchaser was 'ready' and 'willing' to perform his part of the contract.

(iii) Every Suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limit-stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a Suit and obtain specific performance. The three years period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

12. In the light of the above guidelines of the Hon'ble Supreme Court, the judgment of the lower appellate Court is justifiable and acceptable for the following reasons:

"(1) The time has been prescribed in the contract and the plaintiff has never sought for his enforcement till expiry of two years and 11 months.

(2) Though the plaintiff relied upon the presuit notice to show his ready and willingness calling upon the defendant to come to Sub Registrar Office on 30.04.2001 to execute the sale

deed, he has not placed any evidence to show that on that day, he had money with him to pay the defendant, if he had turned up to the Registrar Office.

(3) For the total sale consideration of Rs.2,00,000/- the plaintiff has advanced only Rs.2000/- which is 1% of the total sale consideration. After nearly three years, he seeks for enforcement of that contract and expects the vendor to sell the immovable property for the rate prevailed three years above."

13. As pointed out by the Hon'ble Supreme Court in the light of galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds, it is more pertinent to revisit the principle that time is not an essence of the contract relating to immovable property. The plaintiff has rushed to Court by filing Small Causes suit in O.S.No.1 of 2000 seeking damages from the plaintiff for removal of trees standing in the suit property. When he filed that suit he was only an agreement holder paid only 1% of total sale consideration. He has not sought for enforcement of the substantial part of the agreement by filing specific performance of the agreement, but relinquished that relief and sought only damages for the property to which he has not even paid substantial money but only paid a peanut of 1% of total sale consideration.

14. The lower appellate Court is right in dismissing the suit for the

above reasons. The appellant has come to the Court with unclean hands filing earlier suit without including all the relief which he has entitled. When Order 2 Rule 2 of the Civil Procedure Code mandates the plaintiff should include whole of the claim, which he is entitled to make in respect of the cause of action, but omit to sue in respect of any portion of his claim. He cannot afterwards sue in respect of the portion so omitted or relinquished by filing the earlier suit.

15. This Court finds no error in the finding of the lower appellate Court and no substantial question of law involved in this case. Hence, the ***second appeal is dismissed with costs***. Consequently, connected M.P.No.1 of 2007 is also dismissed.

21.02.2017

Index:No

Internet:Yes

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To

1.The Principal of District Court, Vellore.

2.The Sub Court, Tirupattur.

Dr.G.Jayachandran, J.

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Pre-delivery judgment made in
S.A.No.690 of 2007 &
M.P.N.1 of 2007

21.02.2017

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