

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.06.2017
PRONOUNCED ON : 12.06.2017

CORAM

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.211 of 2012 & M.P.No.1 of 2012

S.A.Kothandaraman

.. Appellant/Defendant

Vs.

M/s.Crystal Residency India Private Limited
Rep. by its Managing Director
M.A.Manshoor,
S/o.Adimaikuti
Having office at
No.51/22, Model School Road,
Thousand Lights, Chennai.

.. Respondent/Plaintiff

Appeal filed under Order XXXVI Rule 1 r/w. Section 96 CPC
against the judgment and decree dated 12.07.2011 made in
O.S.No.68 of 2010 on the file of the District Judge, District
Court No.II, Kancheepuram.

For Appellant : Mr.P.Valliappan
For Respondent : No appearance

J U D G M E N T

Aggrieved over the judgment and decree passed by the learned
District Judge, District Court No.II, Kancheepuram in granting
specific performance, the present appeal came to be filed by the
defendant in the suit.

2. The parties are arrayed as per their ranking before the
trial Court for the sake of convenience.

3. The brief facts of the plaintiff case is as follows :
The plaintiff is carrying on real estate business of
promoting and developing the lands in and around Chennai and to
form layouts of the plots and selling the plots to the
prospective purchasers. The defendant is the owner of the suit
property and agreed to sell the same to the plaintiff for a
total sale consideration of Rs.11,05,000/- on 05.09.2005 and
received an advance of Rs.10,000/- on that day. The defendant
has also agreed to hand over all the original documents to the

plaintiff and arrange for survey of the property and to get the approval from the Government authorities. The time stipulated in the agreement is 90 days for completion of the contract. However, the same is not the essence of the contract. The plaintiff is always ready and willing for completing his part of the contract, but the defendant failed to receive the balance said sale consideration and execute the sale deed. On several occasions, the plaintiff representatives and Managing Director of the Plaintiff company himself personally approached the defendant and demanded to execute the sale deed in favour of the plaintiff. But the defendant failed to receive the balance sale consideration and execute the sale deed. Therefore, the plaintiff issued a legal notice dated 08.12.2006 calling upon him to receive the balance sale consideration and execute the sale deed. However, the legal notice was refused to be received by the defendant. After legal notice, the defendants also took a demand draft on 13.12.2006 drawn on J & K Bank Ltd., Mount Road Branch, for Rs.8 lakhs in favour of the defendant and agreed to pay the remaining sale consideration of Rs.2,95,000/- at the time of registration of the sale deed. But the defendant failed to receive the same. The defendant taking advantage of the hike in land price demanded more amount. Hence, the suit.

3. The brief contentions of the written statement filed by the defendant :

Denying the execution of the agreement, it is the contention of the defendant, that he never intended to sell his property at any point of time. When the defendant was in dire need of funds, approached the plaintiff's representative for availing a loan of Rs.10,000/- on 05.08.2005. The representative of the plaintiff got the signature of the defendant in a plank stamp paper and paid the amount of Rs.10,000/-. The defendant never executed any sale agreement. The properties are his ancestral properties and he has no right to execute the sale deed regarding the entire properties. The plaintiff has not come to the court with clean hands. He has obtained the signature of the defendant in blank papers. It is also contended by the defendant that the plaintiff has never approached the plaintiff to perform his part of the contract and the defendant is also not aware of the demand draft taken by him. Hence, prayed for dismissal of the suit.

4. On the basis of the above pleadings, the following issues were framed by the trial court.

1. Whether the defendant has executed the sale agreement dated 05.09.2005 agreeing to sell the suit property to the plaintiff for a sale consideration of Rs.11,05,000/- and received an advance of Rs.10,000/- on that day?

2. Whether time is essence of the contract?
3. Whether plaintiff is always ready and willing to perform their part of the contract ?
4. Whether the stamp paper signed by the defendant which is for Rs.10,000/- is for the loan amount?
5. Whether the plaintiff is entitled for the relief of specific performance?
6. To what relief?

5. On the side of the plaintiff, P.W.1 and 2 were examined and Ex.A.1 to A.8 were marked. On the side of the defendant, defendant examined himself as D.W.1 and no documents were marked on his side.

6. On the basis of the evidence and materials available on record, the learned trial Judge decreed the suit for specific performance. As against which the present appeal came to be filed.

7. The learned counsel appearing for the appellant vehemently contended that the plaintiff is a real estate business man and taking advantage of the signature obtained by the defendant in some other matter, has filed the suit to knock out the properties from the defendant and the alleged agreement has not been established. Even assuming that Ex.P.1 is proved, the conduct of the plaintiff assumes significance. Even though specific time limit of 90 days is specified in the agreement to pay the remaining sale consideration and to complete the sale, the plaintiff has not taken any steps to do the same. Whereas, he has sent a legal notice for the first time on 08.12.2006. Thereafter, he is alleged to have taken a demand draft in favour of the defendant for a sum of Rs.8,00,000/- on 13.12.2006. The evidence of P.W.1 and 2 clearly show that the demand draft has been taken only in order to show that he is ready and willing to perform his part of the contract. But infact, the above demand draft has not been brought to the knowledge of the defendant at any point of time. Even after the legal notice, the suit was filed only in the year 2007, after ten months of the legal notice. Hence, submitted that the plaintiff is never ready and willing to perform his part of the contract and his readiness and willingness from the inception of the agreement is highly doubtful in this case. The conduct of the parties also clearly show that the plaintiff has not come to the court with clean hands. Hence, prayed for allowing this appeal.

8. Despite several opportunities given to the respondent, he has neither appeared in person nor through his counsel. Hence,

this Court, having no other option, proceeded to dispose of the appeal on merits.

9. In the light of the above submissions, the points that arise for consideration in this appeal are

1. Whether the agreement dated 05.09.2005 is true and valid and truly executed by the defendant?

2. Whether the plaintiff is always ready and willing to perform their part of the contract?

3. Whether the plaintiff is entitled to the relief of specific performance of the agreement dated 05.09.2005?

4. Points 1 to 3 :

It is the case of the plaintiff that the defendant had executed the agreement Ex.A.1 dated 05.09.2005 agreeing to sell the suit property for a sum of Rs.11,05,000/-. P.W.1 is said to be the Managing Director of the plaintiff company and P.W.2, one Samath Basha was examined on the side of the plaintiff to prove the execution of the agreement. Of course, the initial burden is always on the plaintiff to establish that the agreement was executed by the defendant. Once, the execution is established, then the burden shifts on to the defendant to show that the agreement is not intended for sale.

5. It is the case of the defendant that he has borrowed a sum of Rs.10,000/- as a loan and signed in a blank stamp paper, which was subsequently utilised by the plaintiff as a sale agreement. It is also equally true that if there is any loan transaction, burden lies on him to establish the same by bringing some evidence, and probabalize his defence.

6. In the above background, when Ex.A.1 agreement said to be the agreement of sale, when carefully seen, it is styled as an agreement receipt and blanks were only filled in ink and cyclostyled conditions were incorporated in the agreement. In the first page of the agreement, Samath Basha has not signed as a witness. Further, when the agreement when carefully read, there is no details of the properties and it is stated as if the defendant has agreed to sell the land at the rate of Rs.5000/- per cent. It is also the contention of the plaintiff that after the agreement signed by the defendant, he demanded Rs.6,500/- per cent. Therefore, the same was also agreed and written on the back side of the agreement. Wherein, on the same day, P.W.2 has also signed as a witness along with the said Rajagopalan.

7. It is curious to note that the P.W.2 in his evidence has stated that he was present at the time of agreement. In his chief examination, he has stated that on 05.09.2005, the agreement was entered for sale of the property for Rs.6,500/- per

cent and the defendant has agreed for the same and has also signed the agreement on the same day. If really, the defendant has agreed to sell the property for Rs.6500/- per cent, on the same day as stated by P.W.2, the same should have been reflected in Ex.A.1 receipt. Whereas, in the first page of the agreement, the sale consideration has been mentioned as Rs.5000/-per cent. It is further to be noted that if really, P.W.2 was present during the entire transaction, he could have also signed as a witness in the first page of the agreement. Whereas, his signature was only found in the second page of the agreement. It is to be further noted that P.W.2 in his evidence stated that at the time of executing the agreement only the stamp paper was purchased by P.W.1. This evidence also create a serious doubt about the very same transaction. Whereas, the stamp paper endorsement shows that the stamp paper was purchased on 27.08.2005 and the evidence of P.W.2 further shows that he is none other than an employee of P.W.1.

8. Therefore, merely on the basis of the signature of the defendant found in the agreement, it cannot be stated that the agreement was entered into between the parties. For a valid agreement, there must be consensus ad idem between the parties. Though the defendant has admitted his signature in Ex.A.1 and A.2, that itself is not a ground to presume that the agreement is validly executed. When the evidence of P.W.2 with regard to the purchase of the stamp paper and arriving to a conclusion at the sale consideration is analysed, the same create a serious doubt about the agreement entered into between the parties as stated by P.W.1.

9. P.W.1, in his chief examination has stated that the sale consideration was finalised in his office and a sum of Rs.6,500/- per cent has been finalised. If really, Rs.6500/- is finalised, there was no need whatsoever to write Rs.5000/- per cent, as sale consideration of the agreement. Further, his evidence also shows that he is not aware of the other witness who signed in Ex.A.2. Therefore, if really P.W.1 was intended to purchase the property, he could have entered into an agreement in a proper manner. Ex.A.1 has been written even without giving description of the properties. Except mentioning the survey number, the description and boundaries of the property are not at all mentioned. Therefore, the very execution of the document is itself doubtful in this case.

10. Even assuming that Ex.A.1 is proved, as per the evidence of P.W.1 and P.W.2, now it has to be analysed whether the plaintiff is ready and willing to perform his part of the contract from the inception of the agreement. As per the agreement, Ex.A.1, only paltry sum of Rs.10,000/- has been paid. And it is also specified that remaining sale consideration,

Rs.10,95,000/- shall be paid within three months and the sale shall be completed within three months. The period agreed in the agreement has expired in December 2005 itself. Even thereafter, no steps whatsoever, has been taken by the plaintiff. Only for the first time, a legal notice has been issued on 18.11.2006.

11. It is to be noted that as far as the immovable properties are concerned, time is not an essence of the contract, but the specific time agreed between the parties to complete the agreement makes the time essence of the contract. Till the legal notice, except the oral evidence of P.W.1 that he has met the defendant and handed over the amount, no materials, whatsoever is available on record. Even his cross examination when carefully seen, P.W.1 has admitted that only the company people have allegedly met the defendant twice and the plaintiff has met him only once. Absolutely, there is no evidence, except his evidence, whatsoever, as to when he had met the defendant and what was the conduct of the defendant at the relevant time. Therefore, merely on the basis of the some oral evidence of the interested witnesses, it cannot be presumed that he was always ready and willing to perform his part of the contract.

12. Another curious aspect in this case is that for the first time, he has sent a legal notice on 08.12.2006, which is also refused and returned to the plaintiff. The notice dated 08.12.2006 has been marked as Ex.A.3. The legal notice was returned to the sender on 14.12.2006. Even before the legal notice coming back to the sender, the plaintiff is said to have taken the pay order in the name of the defendant for a sum of Rs.8,00,000/-. A copy of the pay order has been marked as Ex.A.5. The pay order was taken on 13.12.2006, even before the legal notice was returned to him. It is the evidence of P.W.1 that after taking the demand draft, some of the employees of the plaintiff company informed the defendant about the same and expressed their readiness to complete the transaction. Whereas, in his cross examination, he has stated that only through a mediator, he has informed the defendant about the demand draft. Further, his entire evidence does not show that he has made an attempt to serve the demand draft to the defendant. The conduct of taking the demand draft subsequent to the legal notice clearly indicate that the same has been taken only to show that he is ready and willing to perform his part of the contract. If the plaintiff is really intended to purchase the property, he could have taken the demand draft for the entire amount of the remaining sale consideration. Whereas, he has taken the demand draft for Rs.8 lakhs. He is also not able to say whether the demand draft has been cancelled by him immediately and what was the fate of the demand draft.

13. All these facts clearly indicate that the demand draft has been taken only for the purpose of the case to create some

document in the specific performance suit. The evidence of P.W.2, who is none other than the employee of the plaintiff clearly show that the plaintiff's job is to enter into an agreement and sell the property to some body. These facts probabalize the fact that taking advantage of the agreement, expecting hike in the prices, to gain undue advantage, cannot be ruled out. This is further probabalized by the fact that even though specific time is fixed in the agreement, sending a legal notice on 08.12.2006 after expiry of the agreement and filing the suit after ten months of the legal notice, the plaintiff being a real estate promoter was waiting for an opportunity, for hike in price, for selling the same to third parties. Therefore, the delay in approaching the Court in these nature of transactions cannot be ignored altogether. The same clearly shows that the plaintiff infact has taken advantage of Ex.A.1 and wants to take an undue advantage over the defendant by parting only a paltry sum of Rs.10,000/- as an advance and filing a suit to enforce the agreement, which also creates a serious doubt. Therefore, this Court on seeing the entire evidence and materials has no hesitation in holding hat Ex.A.1 cannot be enforced in the court of law for granting specific performance.

14. A person, who seeks equitable relief must also come to the court with clean hands. The manner in which the demand draft was taken only shows as if he is ready and willing to perform his part of the contract show that the same has been done only for the purpose of the case. Further from the date of the agreement, the plaintiff was never ready and willing to perform his part of the contract. The plaintiff has also not produced any document to show that at the relevant point of time he has the capacity to mobilize the funds. Further, if the plaintiff is really intended to purchase the property, a normal conduct of a human being is to verify the title deeds immediately then and there and demarcate the property or atleast identify the property. But the evidence of the plaintiff does not show that he has taken any such steps.

15. All these facts lead only to the inference that the plaintiff is not at all ready and willing to perform his part of the contract from the very beginning. The trial court without considering the evidence properly has perversely held that there is no separate agreement between the plaintiff and the defendant with regard to the time limit. As the findings of the trial court is not only perverse but shows non application of mind by the trial Judge, who is in the rank of a District Judge. In fact, that gives an inference that he has not gone through Ex.A.1 agreement properly. Therefore, this Court is of the view that the judgment of the trial court granting specific performance without considering the nature of the agreement, the manner in which the plaintiff, being a real estate promoter, who tried to take advantage of the agreement over an innocent farmer, simply decreed the suit and such findings of the trial court cannot be

sustained in a court of law. Accordingly, the points are answered.

16. In the result, this appeal is allowed with costs and the judgment of the trial court is set aside and the suit is dismissed. Consequently, the connected miscellaneous petition is closed.

-s/d-

Assistant Registrar (CS-II)

True Copy

Sub-Assistant Registrar

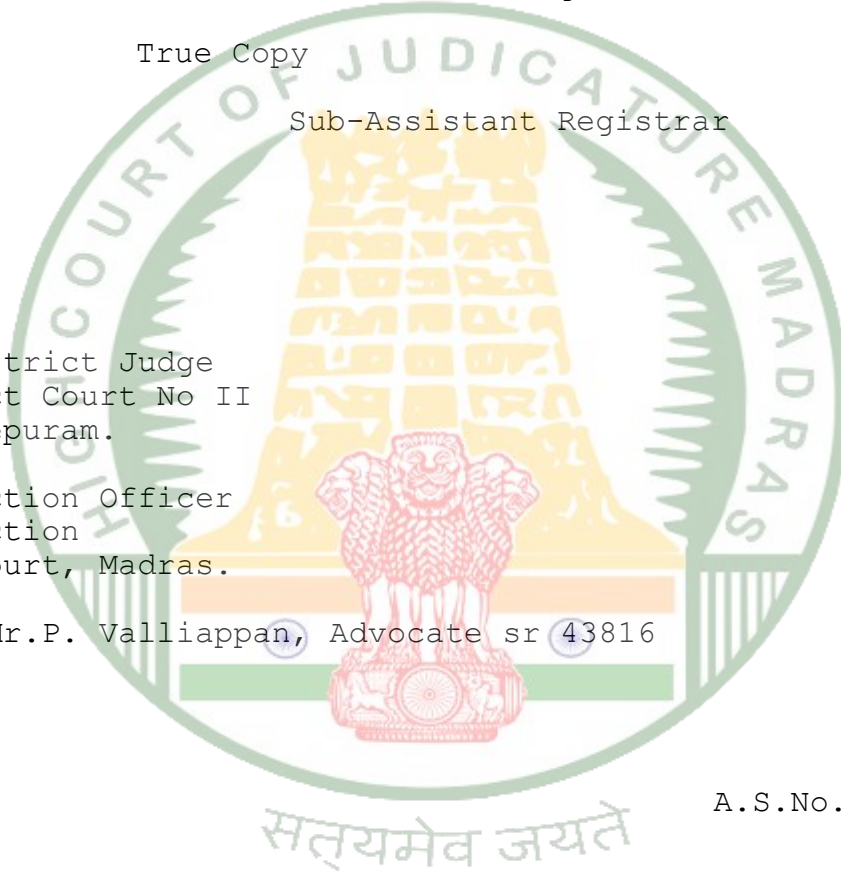
vrc

To

1. The District Judge
District Court No II
Kancheepuram.

2. The Section Officer
V.R Section
High Court, Madras.

+1 CC to Mr.P. Valliappan, Advocate sr 43816



A.S.No.211 of 2012

GJ (CO)
SP (08/08/2017)

WEB COPY