

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.02.2017

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.1008 of 2003

1.Subramani
2.Devaraj

... Appellants/Defendants

Vs

1.S.Kandasamy

...Respondent/Plaintiff

This appeal is filed under 96 C.P.C. against the judgement and decree dated 28.11.2002 made in O.S.No.118 of 2002 on the file of the Additional District Judge-cum-Fast Track Court No.I, Salem.

For Appellants : Mr.V.Ramesh for
M/s.Sampathkumar Associates

For Respondent : Mr.S.Parthasarathy
for Mr.V.Anand

J U D G E M E N T

The defendants who suffered a decree for specific performance are the appellants. According to the plaintiff, the defendants agreed to sell the suit property to them for a consideration of Rs.3,01,000/- and an agreement of sale was entered into on 28.08.1996. On the date of said sale agreement the plaintiff had paid advance of Rs.45,000/-. Three months period was fixed for performance of the said agreement.

2. According to the plaintiff, he had paid further advance of Rs.7,000/- on 16.11.1999. The 1st defendant has made an endorsement to that effect in the said sale agreement. The plaintiff would plead that since the 1st defendant was in possession of the suit property he wanted time to vacate the premises. In view of the fact that he had fixed his daughter's marriage the period fixed for performance was extended by a month by mutual consent. The plaintiff had also claimed that since guideline value was only Rs.1,50,000/- as against sale price Rs.3,00,000/-, he proposed to execute the sale for Rs.1,50,000/- and the balance amount would be paid by him by cash. The

defendant had also agreed to such proposal.

3. The plaintiff had arranged a housing loan from Vijaya Home Loan Limited and at the instance of the said finance company, the defendants had opened two Savings Bank Accounts on 18.12.1996 with Canara Bank to enable them to encash the amount and execute the sale deed. The plaintiff also purchased stamp papers for the value of Rs.19,500/- and got a draft sale deed. Since the draft sale deed was prepared late in the evening, it was not registered on 18.12.1996.

4. The defendants who had promised to execute the sale deed on the next day changed their position and refused to execute the sale deed as agreed. Since the defendant refused to execute the sale deed, the plaintiff had issued legal notice on 06.02.1997 requiring the defendants to execute the sale deed. The defendants sent a reply claiming that time is the essence of the contract and the plaintiff not having performed his part of the contract within the time fixed, is not entitled to claim specific performance. The reply notice was issued on 17.02.1997 and the suit came to be filed on 28.08.1997 seeking specific performance.

5. The defendants would resist the suit contending that though the agreement and the receipt of Rs.45,000/- as advance are true, the other claims put forth by the plaintiff were denied. The receipt of Rs.7,000/- on 16.11.1996 was also specifically denied. The 1st defendant claimed that the signature in the endorsement is not his signature. He would also claim that opening of the bank account has nothing to do with the plaintiff. The defendants also relied upon the recital in the agreement which provided in the event of failure on the part of plaintiff to perform the contract within the period specified, the plaintiff will not only lose his right for specific performance but the advance amount will also stand forfeited.

6. Relying upon the above facts as well as the fact that the payment of Rs.7,000/- as additional advance on 16.11.1996 was not mentioned in the legal notice, Ex.A3 issued by the plaintiff, the defendants would contend that the plaintiff had come with the false case, therefore he is not entitled to the relief of specific performance. On the above pleadings, the learned Additional District Judge-cum-Fast Track Court No.I, Salem, who tried the suit framed the following issues:

- 1) Whether the plaintiff was ever ready and willing to perform his part of the contract?
- 2) Whether the suit is barred by limitation?
- 3) Whether the plaintiff is entitled to decree for specific performance of the contract?
- 4) Whether the plaintiff is entitled to alternative

relief of refund of advance amount?

5) To what other relief, is the plaintiff entitled to?

7. Upon a consideration of oral and documentary evidence, the learned Trial Judge concluded that the plaintiff had established readiness and willingness to perform his part of the contract. On the payment of Rs.7,000/- as additional advance on 16.11.1996. The learned trial Judge accepted the case of the plaintiff and found that the same has been proved.

8. On the above findings, the learned Trial Judge decreed the suit for specific performance, directing the plaintiff to pay the balance sale consideration of Rs.2,49,000/- within a period of one month. It is not in dispute that the money has been deposited within the time granted by the Trial Court. Aggrieved by the said judgement and decree, the defendants have preferred this appeal.

9. I have heard Mr.V.Ramesh, learned counsel for M/s. Sampathkumar Associates for the appellants and Mr.S.Parthasarathi, learned Senior Counsel for Mr.V.Anand for the respondent.

10. The following points arise for determination in this appeal:

1. Whether the plaintiff had proved that he was ready and willing to perform his part of the contract?

2. Whether the conduct of the plaintiff would disentitle him to seek the relief of specific performance?

3. Whether the conduct of the defendants could be taken note of while deciding the issue the relief to grant specific performance?

11. Mr.V.Ramesh, the learned counsel appearing for the appellants would strenuously contend that time is the essence of the contract and the plaintiff was aware of the fact that the contract itself was entered into for the purpose of marriage of the 1st defendant's daughter and therefore, the failure on the part of the plaintiff to pay the entire sale consideration within the period stipulated under the agreement, should necessarily result in his claim of specific performance being rejected. The learned counsel would also refer to the contents of the agreement, which provides that in the event of failure on the part of the plaintiff to pay the balance sale consideration within the time stipulated, the agreement would become unenforceable.

12. According to the learned counsel the payment of Rs.7,000/- as further advance on 16.11.1996 has not been proved. He would contend that the receipt of the advance amount has been denied by the 1st defendant. The signature and endorsement in

Ex.A2 has also been denied. Therefore, in the absence of any tangible evidence to prove the endorsement and in the absence of any explanation for not seeking performance within the period agreed, the plaintiff has lost his right to seek specific performance.

13. Per contra, Mr.S.Parthasarathy, learned Senior counsel appearing for the respondent would submit that the time for performance fixed under the agreement is not the essence and unless it is shown that it was intended to be the essence of the contract, non compliance with the time schedule, cannot in all the cases defeat the rights of the plaintiff. The learned Senior counsel would further submit that the fact that the defendants had agreed to execute the sale deed on 18.12.1996 is evident from two circumstances. According to the learned counsel, the fact that the plaintiff had prepared a sale deed on 18.12.1996 and the same was engorsed on the stamp papers for a value of Rs.19,500/- would show that the defendants were ready to execute the sale deed on the said date, which is admittedly after the expiry of the time fixed under the agreement.

14. Relying upon opening of two bank accounts consecutively by defendants 1 and 2, the learned Senior counsel would submit that it would indicate that they were ready to the balance of Rs.2,49,000/- and execute the sale deed. According to the learned Senior counsel, the defendants having lured the plaintiff into preparation of the sale deed, cannot now contend that the plaintiff was not ready and willing to perform his part of the contract. He would also refer to the different stands taken by the defendants at every stage of the proceedings and the contents of reply notice Ex.A5, where the defendants had admitted that the plaintiff was ready to pay a sum of Rs.1,50,000/- on 18.12.1996. The learned counsel would refer to the contents of the reply notice wherein it is stated as follows:

“அதே போல் கிரையத் தொகை முழுதும் கொடுக்கவும் அவர் முன்வரவில்லை. அட்வான்ஸ் 45,000.00 செக் 1,50,000.00. ஆக இரண்டு தொகைகளை தவிர மீதி துகையை பற்றியும் நீங்கலும் எதுவும் கூறவும் இல்லை. ஷை தொகைகளை எங்களுக்கு பின்னர் கொடுப்பதாக கூறி ஏமாற்றும் எண்ணத்துடன் செயல்பட்டதுடன் உங்களிடமும் பொய்யான தகவல்களை கூறி நோட்டீஸ் அனுப்பி கோர்ட் மூலம் பரிகாரம் தேடவும் முயற்சித்து உள்ளது, நியாயத்திற்கும் சட்டத்திற்கும் மனச்சாட்சிக்கு விரோதமான செயல்கள் ஆகும் என்பதையும் சுட்டிக் காட்ட விரும்புகிறேன்.”

15. Relying upon the above statement, the learned counsel would contend that the parties never intended the time should be essence of the contract. According to the learned counsel the cumulative effect of the above statements in the reply notice would show that the defendants were in fact ready and willing to

execute the sale deed on 18.12.1996. The learned counsel would also point out that oral evidence of PW2, the attesting witness, who spoke about the fact that the plaintiff was ready and willing to perform his part of the contract.

16. The evidence of DW1 in cross examination, according to the learned Senior counsel would show that he had attempted to withdraw certain admissions made by him in the reply notice. He would also contend that a reading of the evidence available on record and the documents would show that the plaintiff has done all he can do to have the contract performed and it was due to the attitude of the defendants namely fear in receiving the cheque payments, the contract could not be performed.

17. I have considered the rival submissions. The sale agreement is admitted and the receipt of advance of Rs.45,000/- on the date of the agreement dated 28.08.1996 is also admitted. The plaintiff claims to have paid Rs.7,000/- on 16.11.1996, the same is evidenced by endorsement signed by the 1st defendant. The 1st defendant would deny the signature on the said endorsement. PW2 one of the attestor of the agreement has spoken about the said endorsement also. The defendants have not taken any steps to examine the other attestor at least to dispute the claim of the plaintiff. No doubt, the payment of Rs.7,000/- on 16.11.1996 has not been stated in the legal notice issued on 06.02.1997. But such omission alone cannot be a ground to hold that the payment of Rs.7,000/- has not been proved. In fact there is enough indication in the reply notice issued by the defendants themselves that they are aware of the omission on the part of the plaintiff to include the payment of Rs.7,000/- on 16.11.1996 in his legal notice. They have very cleverly stated the notice does not refer to any further payment except Rs.45,000/- and cheque of Rs.1,50,000/-.

18. In the reply notice they had claimed that neither of them were in possession of the property and it remained vacant. In the evidence of DW1, the 1st defendant would contend that he was in possession of the suit property at the time of suit and the suit notice was served only at the suit property. He would also deny the suggestion that he continues to be in possession. He had vacated the premises in the year 2001. The cumulative effect of the pleadings as well as the evidence would show that the parties did not intend time to be essence of contract. The defendants were in fact ready to execute the sale deed on 18.12.1996, but for their disinclination to receive the cheque payment. I am therefore of the considered opinion that the plaintiff has been ready and willing to perform his part of the contract and it is defendants who had refused to receive the cheque payment and delayed the performance of the contract.

19. Of course, there is a delay in between the issue of

reply notice and on the filing of the suit. The plaintiff has averred in the plaint that he attempted to convince the defendants to execute the sale deed with a view to prevent an unnecessary litigation. In his evidence he has also stated as to why waited for 5 months to file the suit. The explanation offered by the plaintiff is quite natural and convincing. I am therefore, of the opinion that the plaintiff should not be non-suited on the ground of absence of readiness and willingness.

20. As regards the contention that the plaintiff has come up with false case with reference to payment of Rs.7000/- on 16.11.1996 and a further sum of Rs.10,000/- on 25.11.1996. I have already found that the payment of Rs.7,000/- has been proved. As regards the payment of Rs.10,000/- is concerned on 25.11.1996, admittedly there is no endorsement in the suit agreement regarding the said payment. PW2 has not spoken about the said payment in his evidence. His evidence is rather unconvincing on the said aspect. However, the plaintiff in the plaint said that he would pay the entire balance after deducting the sum of Rs.52,000/- paid as advance. The Trial Court has also directed the payment of Rs.2,49,000/- as balance consideration. Even while praying for refund of advance, the plaintiff had only sought for advance amount of Rs.52,000/- and he has not included the sum of Rs.10,000/- said to have been paid on 25.11.1996. No doubt, utmost good faith is expected from the plaintiff, who has come with the suit seeking specific performance and not all false pleas could be said to have the effect of non-suiting the plaintiff on the ground of want of bonafide.

21. On this, the learned counsel for the respondent would rely upon the judgement of this Court in Pachaiappan and others v. S.P.Koon Mari reported in 1996 (2) MLJ 378, wherein the observations of the learned Single judge of this court in Guruswami Gounder v. Kesava Reddiar reported in 1996 (1) LW 675 is quoted with approval. The said observation reads as follows:

"9. A careful consideration of the conclusions arrived at by the learned judges of the two Division Benches in the decisions cited supra, would go to show that the respective plaintiffs who approached the competent court in those cases have found to have not only pleaded false cases but tried to get a decree for specific performance of agreement in varied form (S.S. Chockalingam v. R.B.S. Mani. (1994) 1 L.W. 321) and that the plaintiffs attempted to plead part satisfaction of the consideration relying upon materials and liabilities totally unconnected with the suit agreement. Though there can be no dispute with reference to the position of law that good faith and honesty are expected from

parties, who want discretion of the court to be exercised in their favour, and that too, in exercise of jurisdiction in equity, there is no comparison of the cases which were under consideration of the learned judges of the Division Benches referred to supra with the case before me. It is not every incorrect case pleaded or plea made and rejected by the courts that recoils on the plaintiff to be dubbed and castigated as having come with a false case or unclean hands to seek an equitable remedy available in the discretion of the court. It should depend upon the facts of each case and the peculiar circumstances substantiated in a particular case before court and there can be no standardised formula to uniformly deal with the plea in all matters. As noticed earlier, during the course of narration of facts, it is seen that though the plaintiff pleaded that a sum of Rs. 4,000 has been paid on 29.4.1979 without obtaining a receipt or endorsement therefor, he has also stated that if the court is not satisfied with the claim of such payment on that particular date, the plaintiff was ready and willing to deposit that amount also. In the context of the said plea and the conduct of the plaintiff, there is no scope for condemning the plaintiff as having come with unclean hands or with a false case merely because he could not establish his plea of payment on that particular date. In this view of the matter, I am unable to agree with the learned Counsel for the appellant that the plaintiff should be denied the relief of specific performance on the ground of his alleged approach to the court with unclean hands."

The above observations were in effect approved by a Division Bench in Pachiappan and others v. S.P.Koon Mari reported in 1996 (2) MLJ 378. In the light of the above legal principles, I do not think that the plaintiff should be non-suited for claiming that he has paid a sum of Rs.10,000/- which has not been established.

22. The learned counsel for the respondent would also contend that the conduct of the defendants should also be taken into account by considering the case of specific performance. He would invite my attention to the recent pronouncement of the Hon'ble Supreme Court in Zarina Siddique vs. A.Ramalingam Alias R.Amarnathan reported in (2015) 1 SC 705 and in Laxman Tatyaba Kankate and another vs. Taramati Harishchandra Dhattrak reported in (2010) 7 SCC 717 and contend that the conduct of the

defendants should also be taken note of by this Court while exercising the discretion in a suit for specific performance. The observations of the Hon'ble Supreme Court are as follows:-

"35. In the instant case, as noticed above, although defendant no.2 held a registered power of attorney on behalf of defendant no.1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law. ."

23. In view of the above, I consider the conduct of the defendants. They have attempted to take advantage of their own conduct in refusing to execute the sale deed, when the plaintiff was ready even on 18.12.1996. Though in the reply notice they would admit that the plaintiff has offered Rs.1,50,000/- by cheque and the balance amount by cash, while tendering evidence, DW1 would give a go by those admissions and claim that he never admitted the same. During the course of cross-examination he would admit that he was residing in the suit property at the time of initiation of the suit. He was also served with the suit summons in the suit property only. The 1st defendant has chosen to deny his signature in Ex.A2 endorsement. These facts will show that the conduct of the defendants is not above board

24. For the forgoing reasons, I do not find any reason to interfere with the findings of the Trial Court in granting the decree for specific performance. However, taking note of the fact that the suit was filed in the year 1997 and has been pending for nearly two decades and the value of the property have gone up during the long gap, I deem it fit to exercise my discretion to enhance the sale price agreed under the agreement. The property is of an extent of about 2908 sq.ft. in Narasothipatti village

along with a tiled structure. Considering the proximity of this place to Salem Town, which has now come to become a Corporation, I feel ends of justice would be met, if the plaintiff is directed to pay a further sum of Rs.5,00,000/- to the defendants as additional consideration. The said additional consideration shall be deposited before the Trial Court within a period of two months from the date of the receipt of a copy of this order. On such deposit, the plaintiff is entitled to seek execution of the decree.

25. In the result, the appeal is dismissed confirming the judgement and decree dated 28.11.2002 made in O.S.No.118 of 2002 on the file of the Additional District Judge-cum-Fast Track Court No.I, Salem, subject to the enhancement of the sale consideration as indicated above. There will be no order as to costs. Consequently the connected C.M.P.No.16425 of 2003 is closed.

26. It is seen from records that on 02.08.2011, the appeal was disposed of based on a compromise. The said order has been subsequently set aside on an application in M.P.No.988 of 2013 by the respondent. Now the said order abates. The appellants were directed to pay Rs.2,50,000/- within three months from the said date. The learned counsel would submit that since the respondents filed an application to set aside the said order, almost immediately the said sum of Rs.2,50,000/- has been deposited before the trial court. The appellants shall be entitled to withdraw the said sum if it has been deposited.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

vk

To:

1.The Additional District Judge-cum-Fast Track Court No.I,
Salem.

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

+1cc to Mr.V.Anand, Advocate, S.R.No.2456

+1cc to Mr.Sampath kumar, Advocate, S.R.No.9547

A.S.No.1008 of 2003

CNR(CO)

RS(08/05/2017)