

RESERVED ON : 10..03..2017
DELIVERED ON : 06..4..2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

A.S.No.665 of 2009

Soundarajan

... Appellant/plaintiff

Vs.

1. Mrs. Vettobai (deceased)

2. Mr.K.Boobalan

3. Ravichandran

4. Mrs.Sasikala

... Respondents/defendants

(R3 and R4 brought on record
as LRs of the deceased R1 vide
order of this Court
dated 15.12.2016 in CRMP Nos.19481 to
19483/16

Prayer:- This Appeal suit has been filed under Section 96 of CPC read with order 41-A of CPC, against the judgment and decree of the Principal District Judge, Tiruvallur dated 31.10.2008 and made in O.S.No. 64 of 2006.

For Appellant : Mr. A.Palaniappan

For Respondents: Mr.M.Sriram

J U D G M E N T

The non-suited plaintiff has preferred the instant appeal aggrieved by the judgment and decree passed by the Principal District Judge, Thiruvallur in O.S.No.64 of 2006.

2. For the sake of convenience, the parties are referred to, as per their ranking before the trial Court.

3. The plaintiff filed a suit in O.S.No.64 of 2006, before the learned Principal District Judge, Thiruvallur, for specific performance for a sale consideration of Rs.8,40,000/- to an unperformed contract on a sale agreement dated 15.07.1999.

4. The brief facts of the case of the plaintiff are as follows:

i) The 1st defendant is the owner of the suit property. By agreement dated 15.07.1999, the 1st defendant has agreed to convey an extent of 1 acre 56 cents to the plaintiff for a total sale consideration of Rs.23,40,000/-. On the date of agreement, a sum of Rs.3,00,000/- was paid as advance. Time stipulated to complete the contract was 9 months. However, the same is not conclusive one. After the agreement, the property was handed over to the plaintiff and he was empowered to supervise the same, converting the same into house plots and to erect boundary stones to form roads and also to negotiate the sale of the property with third parties or the intending purchasers. The plaintiff spent considerable amount for levelling the same and made several improvements.

(ii) On 16.9.2002 at the request of the plaintiff, the 1st defendant has sold a land measuring an extent of 1 acre to 2nd defendant and Kesavan. Apart from the above sale, the remaining land to an extent of 0.56 cents is available and the same is retained by the plaintiff for his own use. He has also put up fence in and around the suit "C" schedule property and also dug a well. The plaintiff paid a sum of Rs. 18,54,550/- on various dates. Similarly, he has also paid a sum of Rs.2,00,000/- at the instance of the 1st defendant to one Kandasamy, Watchman, who is the then care taker of the property and also paid a sum of Rs. 40,000/- to one Vijayan towards brokerage. Apart from the above payment, he has also paid a sum of Rs.37,500/- to the son-in-law of the 1st defendant and Rs.10,000/- to the grand son of the 1st defendant. Under such circumstances, the 1st defendant issued a legal notice dated 15.4.2004, which was replied by the plaintiff. After receipt of reply, the plaintiff has paid a sum of Rs.4,17,500/- and in all, the plaintiff paid a sum of Rs.21,47,050/- towards sale consideration. Thus, only a sum of Rs.1,92,950/- is due and payable by the plaintiff.

(iii) When the matter stood thus, the 1st defendant has issued another legal notice dated 13.03.2006 suppressing the earlier notice and payments made by the plaintiff and the same was also replied to by the plaintiff. The plaintiff is always ready and willing to pay the balance sale consideration of Rs. 1,92,950/- to have the sale deed registered in respect of the "C" schedule property. The 2nd defendant, inspite of the knowledge of existence of the agreement in favour of the plaintiff, has purchased 50 cents in "C" schedule property and hence, he is not a bonafide purchaser. The plaintiff is always ready and willing to perform his part of contract. Hence, the suit.

5. The brief averments of the written statement filed by the 1st defendant, which is adopted by the 2nd defendant are as follows:

The 1st defendant admitted the execution of the agreement for total consideration of Rs.23,40,000/- and also receipt of a sum of Rs.3,00,000/- towards advance. It is the contention of the 1st defendant that time stipulated in the agreement is the essence of the contract. The plaintiff has not chosen to pay the remaining sale consideration. It is also denied by the 1st defendant that possession was handed over to the plaintiff and he has spent considerable amount for improvement in the property. It is also denied that the plaintiff has put up fence in that property. In fact, the plaintiff has no money and pleaded inability to pay the balance sale consideration. The plaintiff paid only a sum of Rs.9,00,000/- to the 1st defendant to register a document in favour of one Kesavan by suppressing the original sale consideration of Rs.20,00,000/- received from the said Kesavan. Thus, a sum of Rs. 11,00,000/- has been taken away by the plaintiff by deceiving the 1st defendant and failed to pay the said amount. Since the plaintiff has not chosen to pay the balance sale consideration, the remaining 57 cents was not registered. The plaintiff has committed fraudulent act upon the 1st defendant by selling the property at higher rate by taking sale consideration as a middle man and obtained wrongful gain. The reason for entering into an agreement by fixing 9 months time, is to discharge several liabilities created by her late husband and also for taking care of her health as well as her husband. The plaintiff taking advantage of the ignorance of the 1st defendant, has paid the amount in piece meal and created the alleged endorsements in order to save the law of limitation since the suit agreement lapsed on 15.7.1999. Therefore, the suit filed by the plaintiff for specific performance is not maintainable. The plaintiff was never ready and willing to perform his part of the contract. The contract has also been terminated. The plaintiff has come to Court with unclean hands. Thus, the defendants prayed for dismissal of the suit.

6. Based on the above pleadings, the trial Court formulated as many as six issues for consideration. They are:

1. Whether the plaintiff is entitled for specific performance of contract as prayed for?
2. Whether the 2nd defendant is bonafide purchaser to the "C" schedule property?
3. Whether the time is essence of contract?
4. Whether the plaintiff is failed to perform his part of contract as per agreement?
5. To what relief the parties are entitled to?
6. Whether the suit barred by limitation?

7. On the side of the plaintiff, the plaintiff examined himself as PW1 and one another witness was examined as P.W.2 and Exs. A1 to A23 were marked. On the side of the defendants,

the 1st defendant examined herself as DW1 and 2nd defendant was examined as D.W.2 and Exs. B1 to B9 were marked.

8. The learned trial Judge, after analysing the entire evidence and the documents adduced before him, has dismissed the suit. Aggrieved over the same, the present appeal came to be filed.

9. Assailing the judgment and decree of the Trial Court, the learned counsel appearing for the appellant/ plaintiff submitted that though 9 months time was stipulated in the agreement dated 15.07.1999 to pay the balance sale consideration and complete the contract, the parties had not intended to make time as the essence of contract and the same is evident from the subsequent receipt of sale consideration on various dates by the 1st defendant till 18.09.2005. In fact, time stipulated in the agreement has been waived by the 1st defendant. In the agreement, there is a specific recital to the effect that sale shall be registered in favour of the plaintiff or his nominees. Accordingly, one acre of the land was registered by the 1st defendant at the instance of the plaintiff for valuable consideration.

10. It is submitted by the learned counsel that the plaintiff has already paid substantial payment and he is liable to pay a sum of Rs.1,92,000/- alone towards balance sale consideration. Having received more than 2/3 of the sale consideration, the 1st defendant, in order to defeat the rights of the plaintiff, has fraudulently executed a sale deed in respect of "C" schedule property to the 2nd defendant. The 2nd defendant, who purchased part of the property as nominee of the plaintiff, is aware of the existence of the agreement between the parties and hence, he is not a bonafide purchaser. The above conduct clearly shows that there is a collusion between the 1st and 2nd defendants only to defeat the rights of the plaintiff.

11. It is the submission of the learned counsel that various payments made even after the expiry of stipulated time, would clearly prove that the parties never intended to make the time as essence of the contract. The 1st defendant all along received the amount from the date of agreement till 2005 but suddenly conveyed the property to the 2nd defendant. Hence, it is submitted by the learned counsel for the plaintiff that the plaintiff was always ready and willing to purchase the property and the plaintiff is also in possession of the property. The 2nd defendant, knowing the fact that the plaintiff is in possession of the remaining land, purchased the property and hence, he is not a bonafide purchaser.

12. It is the further contention of the learned counsel for the appellant / plaintiff that having received the amount, the 1st defendant has issued a legal notice on 15.4.2004, cancelling the agreement, which was properly replied by the plaintiff. Even after sending such a legal notice, the 1st defendant has received substantial amount towards the sale consideration. After receipt of such amounts, the 1st defendant has again sent a legal notice on 13.3.2006 under Ex.A19 terminating the contract. According to the learned counsel, such termination is illegal and the same cannot be given any importance. The conduct of the 1st defendant receiving the major portion of sale consideration and issuing legal notice terminating the contract is nothing but fraudulent act done by the 1st defendant. Hence it is the contention of the learned counsel that the plaintiff was always ready and willing to perform his part of the contract and he had the money readily available to deposit the remaining sale consideration of Rs.1,92,000/-. According to the learned counsel, learned trial Judge, without considering the above aspects, has simply dismissed the suit for specific performance.

13. In support of his arguments, the learned counsel for the appellant/plaintiff has placed reliance on the judgments reported in (2000) 6 SCC 685 (RAM NIVAS THROUGH LRS v. BANO AND OTHERS); 100 LW 582 (N.B. NAMAZI V. CENTRAL CHINMAYA MISSION TRUST BY ITS TRUSTEE) ; 2004 (1) LW 622 (JAYARAMAN V. DALAVAI NAGARAJAN); (2000) 6 SCC 420; (MOTILAL JAIN V. RAMDASI DEVI (SMT) AND OTHERS; 2011 (5) LW 736 (T.R.K. SARASWATHY v. R.KANDASAMY AND OTHERS); 2014 SCC Online P&H 9015 (MANDIR SINGH AND OTHERS V. GURJANT SINGH AND ANOTHER) and 2014 SCC online Raj. 5888 (ABDUL SAMI V. SMT. NEELU DHANDHIYA).

14. Countering the argument, the learned counsel for the respondents/defendants submitted that when there is a specific time agreed between the parties, the plaintiff, being the real estate broker, by taking advantage of the ignorance of the 1st defendant, who is a widow and aged person, has successfully dragged the agreement till 2006, by paying certain amount to show as if he has performed his contract. As such, according to the learned counsel, there is a clear breach of contract on the part of the plaintiff in not paying the balance sale consideration. It is submitted by the learned counsel that except paying the advance amount of Rs.3,00,000/- on the date of agreement, he has not paid any amount within the time as agreed between the parties. The plaintiff, being real estate broker, has finalised the sale in respect of 1 acre with one Kesavan and 2nd defendant. Accordingly, the plaintiff sold the property in favour of 2nd defendant and one Kesavan and after sale of the above property, the plaintiff has paid only a sum of

Rs.9,00,000/- and has taken away the remaining amount. This fact would clearly indicate that the plaintiff is not at all interested in performing his part of the contract.

15. It is the further contention of the learned counsel for the respondents/defendants that having sold the property for higher value, the plaintiff has paid only Rs.9,00,000/- to the 1st defendant and the remaining sum of Rs.11,00,000/- was swindled by the plaintiff in the year 2002 itself. The conduct of the plaintiff in coming to Court belatedly would also clearly probabalise the defendants' contention that the suit is nothing but an attempt to gain unlawful enrichment. According to the learned counsel for defendants, the suit filed in the year 2006 is barred by limitation and since the plaintiff was never ready and willing to perform the contract, his attitude clearly proves that he has not come to Court with clean hands. It is the submission of the learned counsel that the evidence of D.W.2 would clearly show that, the purchase has been finalised by the plaintiff. The above evidence has not even been denied by the plaintiff. Hence, the learned counsel submitted that suit for specific performance cannot be decreed in favour of the plaintiff.

16. The learned counsel for the respondents / defendants vehemently contended that the 1st defendant has already terminated the contract by issuing legal notice dated 15.4.2004 under Ex.A16. Again on 13.3.2006, the 1st defendant has issued another legal notice cancelling the agreement. Hence, it is submitted by the learned counsel that without claiming any declaration with regard to cancellation, the suit for specific performance is not maintainable. Further, there is no evidence to show that the plaintiff is in possession of the property. Hence, it is submitted that the learned trial Judge, after considering all these aspects, has rightly dismissed the suit and the same does not warrant any interference. In support of his arguments, the learned counsel for the respondents has placed reliance on the judgments reported in (2015) 8 SCC 695 (PADMAKUMARI AND OTHERS v. DASAYAN AND OTHERS) and 2014-1-L.W 47 (L.S.SIKANDAR V. K.SUBRAMANI AND OTEHRS).

17. In the light of the above submission, the points that arise for consideration in this appeal are:

- (i) Whether the plaintiff was always ready and willing to purchase the property?
- (ii) Whether the plaintiff has committed breach of the terms and conditions?
- (iii) Whether the parties were not intended to make time as essence of the contract? and
- (iv) Whether the 2nd defendant was the bonafide purchaser and he could find fault with?

Point Nos. 1 to 3:

18. It is the admitted fact that the 1st defendant, who is the owner of the property, has executed registered sale agreement dated 15.7.1999 for sale of an extent of 1.6 acres for total consideration of Rs.23,40,000/- to the plaintiff. Ex.A1 is the original agreement entered into between the parties. On a perusal of Ex.A1, it is seen that the plaintiff has agreed to purchase the property for a valuable consideration of Rs.23,40,000/-. The plaintiff has also agreed to complete the sale transaction within a period of 9 months from the date of receipt of the said agreement. It is not disputed that a sum of Rs.3,00,000/- was paid towards advance as on the date of the agreement itself. The recitals in the agreement clearly show that 9 months time was fixed to pay the remaining sale consideration and the 1st defendant has agreed to execute the sale deed either to the plaintiff or his nominees. The stipulated time of 9 months actually expired in the month of April 2000. Thereafter, no amount whatsoever, was paid by the plaintiff, within the period stipulated in the agreement.

19. It is to be noted that though time is not an essence of the contract generally, as far as immovable properties are concerned, specific time agreed between the parties in the agreement cannot be ignored altogether. It is well settled that when the time agreed between the parties is not adhered to by the parties, such contract would be voidable at the option of the other party, who can exercise his/her right either to waive the condition or renew the contract itself. In this case, the 1st defendant, has not chosen to adopt either mode. Whereas, she has received a sum of Rs.9,00,000/- on 18.09.2000 towards balance sale consideration, as could be seen from the endorsement made in the agreement, which is marked as Ex.A2.

20. It is also to be noted that the aforesaid amount has been received almost three years after the date of the agreement. Subsequently, under Ex.A3, endorsement dated 27.3.2002, another sum of Rs.50,000/- was received by the 1st defendant. Similarly, under Ex.A4 dated 17.06.2004, a sum of Rs.50,000/- was paid to the 1st defendant. Thereafter, on 21.5.2005, a sum of Rs.1,00,000/- was paid, as seen under Ex.A5 and on 28.7.2005, a sum of Rs.60,000/- was paid. Likewise, under Ex.A7 dated 25.8.2005, a sum of Rs.50,000/- was paid to the 1st defendant. A sum of Rs.50,000/- was paid on 21.09.2005, 12.10.2005 and 26.01.2005, which are evident from Exs.A8 to A10 respectively.

21. Similarly, it is the case of the plaintiff that he has paid paltry amount of Rs.5000, 7500 and 10,000/- under Exs.A11 to A15 to the son-in-law and grand son of the 1st defendant. It is to be noted that the 1st defendant is a widow and aged person. A deep analysis of the evidence of the plaintiff, makes it clear that, in fact, he was dealing as commission agent and has also involved in real estate business. Merely because an agreement was entered into between the parties and the 1st defendant has not chosen to exercise her option to repudiate her contract or waive the time stipulated in the contract, that itself cannot be a ground for the plaintiff to take undue advantage with the 1st defendant, by keeping the contract alive by paying paltry sum as and when required. The conduct of paying the amounts in piecemeal on various occasions, as seen from Ex.A12 to A15, clearly gives an inference that the 1st defendant being the widow, is under economic duress. The plaintiff has successfully kept the contract alive by making payments on various dates, including paltry amounts from the year 2002 to 2005. This conduct of the plaintiff paying paltry amount would also gives an inference that, in fact, he has made such payments only to keep the contract alive and to make himself enriched in the entire transaction.

22. In this regard, it is pertinent to point out that P.W.1 during cross examination deposed that some cents of land, at his instructions, were sold to the 2nd defendant and another 40 cents were registered in favour of one Kesavan at his instance. Ex.B1 is the sale deed dated 16.09.2012 registered in favour of one Kesavan for an extent of 40 cents, as per which, the total sale consideration was Rs.3,31,360/-. On the same day, under Ex.B2, 60 cents of land were registered in favour of the 2nd defendant for a total sale consideration of Rs.4,97,040/-. A perusal of Exs.B1 and B2 shows that 1 acre was sold below a sum of Rs.9,00,000/- on 16.09.2002. In this regard, it is the evidence of P.W.1 that he has paid Rs.9,00,000/- to the 1st defendant on 18.9.2002. In his cross examination, he has admitted that in Exs. B1 and B2, the plaintiff stood as attesting witnesses. He has also admitted in the cross examination that total consideration for Exs. B1 and B2 was Rs.11,00,000/- at the relevant time, whereas he has paid only Rs.9,00,000/- to the 1st defendant and remaining Rs.2,00,000/- was retained by him.

23. On the other hand, though it is the contention of the learned counsel for the defendants that the plaintiff has sold the property for a sum of Rs.20,00,000/- and swindled a sum of Rs.11,00,000/-, there is no specific evidence to prove the same.

But the fact remains that even though Exs. B1 and B2 show the sale consideration below a sum of Rs.9,00,000/-, the plaintiff himself admitted that he has sold the property to the 1st defendant and Kesavan for Rs.11,00,000/- and whereas he has paid only Rs.9,00,000/- to the 1st defendant towards the sale consideration as agreed in the agreement. If really the plaintiff had an intention to complete the terms of contract by performing his part of obligation, he would have paid the entire amount of Rs.11,00,000/- received by him as the sale consideration of Exs.B1 and B2. Per contra, retaining the amount of Rs.2,00,000/- by him would clearly indicate and, in fact, probabalise the defendants' contention that the plaintiff had not intended to purchase the property.

24. It is the further contention of the learned counsel for plaintiff that, though not pleaded in the plaint, since there was a litigation pending in High Court in respect of the suit property, time was not the essence of the contract, and, therefore, he paid money subsequently.

25. It is to be noted that while the sale was effected in respect of one acre with one Kesavan and second defendant, as seen from Exs. B1 and B2 the plaintiff herein stood as one of the attesting witnesses in the document. It is the specific case of the plaintiff in his evidence that the sale was registered only at his instructions. The recitals in Exs.B1 and B2 would clearly show that the case was pending before the High Court and subsequently it was transferred to City Civil Court and a compromise decree was passed and, therefore, the 1st defendant is the absolute owner of the property. In such circumstances, the plaintiff, being one of the attesting witnesses and having taken active part in registering these documents, is now estopped from contending that the reason for delay is pendency of the case also.

26. It is well settled that mere attestation in the document will not amount to admitting the contents of the documents. But in the given case, the plaintiff took active role in registering the documents in favour of 2nd defendant and one Kesavan. The same probablises that he is aware of the fact that litigation is already over. Therefore, now the plaintiff cannot take advantage of the recitals found in the agreement that the litigation is pending in the Court and cannot contend that the same was the reason for delay in paying the entire sale consideration. Having known that litigation was over, the plaintiff has not shown his readiness in getting the document registered in his favour. After paying nine lakhs in the year 2002, he kept quiet till 17.06.2004, i.e. almost for 1 year and 3 months, and on that date he has paid a sum of Rs.50,000/-. Once again he kept quiet for almost 11 months and

on 21.5.2005, he has paid another sum of Rs.1,00,000/- and three months thereafter, he has paid Rs.1,00,000/- under Ex A6 and A7. Subsequently, he started paying the paltry amount of Rs.5,000/-, 7,500 and Rs.10,000/- etc., to the persons, who are unconnected with the agreement. These facts would clearly show that the plaintiff has taken undue advantage of the position of the 1st defendant herein and paid some amount in intervals and got her signature posing as if the contract was alive and to show that as he was always ready and willing to perform his part of contract.

27. It is pertinent to point out at this juncture, that readiness and willingness is the continuous process. It should be present from the date of the agreement till the document is completed. At every stage, the plaintiff should show his readiness and willingness. The act of paying the amount of Rs.9,00,000/- by the plaintiff after three years from the date of the agreement itself would prove that he has not shown his readiness and willingness continuously. The conduct of the plaintiff could be seen from his admission in the cross examination, wherein he has stated that he received a sum of Rs.11,00,000/- towards sale consideration under Exs.B1 and B2 but he has paid only Rs.9,00,000/- to the 1st defendant on 18.9.2002. This would clearly probabalise the fact that the plaintiff is not at all ready and willing to perform his part of the contract. The plaintiff, all along, has been cautious in getting endorsement from the 1st defendant and also getting receipt for the paltry amount said to have been paid by him to the son-in-law and grand son of the 1st defendant. He has failed to prove the balance sale consideration of Rs. 2,40,000/- said to have been paid by him to one Kesavan, Watchman another person, who is a land broker.

28. It is to be noted that it is the specific case of the plaintiff that he was in possession and enjoyment of the property. That being the case, there was no necessity whatsoever, arose for him to pay a sum of Rs.2,00,000/- to the watchman. Though it is the contention of the plaintiff that only the 1st defendant has given a letter under Ex.A23 instructing him to pay the amount of Rs.2,00,000/- to watchman from the sale consideration and get receipt for the same and even though this document is taken as a proof to show that the plaintiff was authorised to pay a sum of Rs.2,00,000/-, and to get receipt from the watchman, in the cross examination P.W.1 has taken a contrary stand. The plaintiff examined the said watchman as P.W.2, who, in his evidence, has stated that he was a care taker in the suit property and he has received Rs.2,00,000/- from the plaintiff on 10.9.2001 and he has also executed receipt for the said amount.

29. Further both in the chief examination as well as cross examination, he has asserted that he has given receipt to the plaintiff for the said amount. Whereas, P.W.1 in his evidence during cross examination has categorically admitted that he has not obtained any receipt from D.W.2 for the payment of Rs.2,00,000/- and another sum of Rs.50,000/- paid to broker. Therefore, it is clear that the evidence of P.W.1 and P.W.2 with regard to the payment of Rs.2,50,000/- is inconsistent with each other and it is totally unreliable. When the plaintiff was all along very cautious even in getting receipt for the payment of Rs.5,000/- said to have been paid to the son-in-law and grand son of the 1st defendant, there was no reason as to why he has not obtained receipt from the watchman for paying such huge amount of Rs.2,00,000/-. This aspect of the evidence creates serious doubt about the statement made by P.W.1.

30. Though P.W.1, in his evidence, has stated that he has made payment of Rs.2,00,000/- and Rs.50,000/- to watchmen and broker respectively, the same has not been explained by him as to why the amount of Rs. 50,000/- is given to broker, when he was in no way connected with the agreement. These facts clearly show that, in fact, the plaintiff has not intended to purchase the property but he has entered into the agreement only for the purpose of selling the property to the third parties. If really, the plaintiff had intention to purchase the property, he should have shown his readiness and willingness from the very beginning. Though it is stated that the so called amount said to have been paid to the watchman and broker has been paid from the sale consideration the same has not been proved. That aspect itself would clearly show that plaintiff has not come to Court with clean hands.

31. Even assuming that there was a litigation pending with regard to the suit property as per Ex.A1, it is clear that in the year 2002 itself, the same came to an end, which is evident from Exs. B2 and B3. Even thereafter, the plaintiff has not tendered the balance sale consideration to get the sale deed registered in his favour. This fact clearly shows that the essential term as agreed between the parties in the agreement has been breached by the plaintiff and readiness has also not been established. The conduct of the plaintiff in paying the balance sale consideration in a piecemeal manner with huge delay, would clearly show that readiness is totally lacking on his part and his mental attitude to purchase the property for himself, is also absent from the very beginning. Only when the readiness and willingness on the part of the plaintiff has been proved together, he can seek equitable relief of specific performance.

32. It is further to be noted that under Ex.A16 dated 15.4.2004, the 1st defendant has sent a legal notice stating that as the plaintiff has failed to pay the sale consideration, the agreement became invalid. The tenor of the legal notice clearly shows that the 1st defendant, in fact, expressed her reluctance to proceed with the agreement. Even after the 1st defendant made it clear that the agreement became invalid, the plaintiff has not come forward to pay the balance sale consideration whereas, he has paid Rs.15,000/- on 17.06.2004, i.e. after receipt of the aforesaid legal notice dated 15.4.2004 and thereafter he continued to pay certain amounts under Exs. A4 to 16.

33. It is further to be noted that finally, under Ex.A19, the 1st defendant also expressed her inability stating that since the plaintiff has breached the terms of contract, the contract is barred by time. Agreement was also cancelled for the fraudulent act committed by the plaintiff. She has also clearly stated that the plaintiff has received Rs.20,00,000/- from one Kesavan and paid only Rs.9,00,000/- and thereby she was cheated.

34. In any event, on 13.3.2006, the 1st defendant has exercised her option cancelling the agreement. As already discussed above, when the parties to the contract failed to perform the obligation within the stipulated time, the contract became voidable at the option of the promisee, as per Section 55 of the Indian Contract Act. In the instant case, the plaintiff, despite the fact that the litigation came to end and despite receipt of a sum of Rs.11,00,000/- towards sale consideration under Ex.B1 and B2, as per his evidence, has failed to pay the full amount. Even after the legal notice dated 15.4.2004 expressing reluctance by the 1st defendant, the plaintiff paid only a sum of Rs.15,000/- on 17.06.2004 and thereafter, paid some amounts in intervals.

35. Though it may be stated that in view of the subsequent receipt of payments, the 1st defendant has chosen to waive the conditions stipulated in the agreement, it is to be noted that the contract between the parties is voidable in view of the failure on the part of the plaintiff to pay the entire sale consideration and get the sale deed registered in his favour. Merely because some payments have been made subsequently, the 1st defendant has not exercised her option to repudiate the contract. Since the plaintiff has not come forward to pay the sale consideration even after the legal notice dated 15.4.2004, finally under Ex.A19, the 1st defendant has terminated the contract. Thereafter, the suit has been filed on 25.4.2006

for specific performance.

36. From the entire evidence adduced on the side of plaintiff and the defendants, this Court is of the view that the plaintiff is very meticulous in getting the endorsement from the 1st defendant without adhering to the conditions stipulated in the agreement and at no point of time, he has proved his readiness and willingness to perform his part of the contract. The nature of the payments received by the 1st defendant clearly indicates that she has received the above payment under economic duress. The manner in which the payments were made in intervals would clearly explicit the fact that the 1st defendant was in adversity.

37. It is well settled that adversity of person is not a boon for others to take unfair advantage. Merely because Ex.A1 agreement was registered in the year 1999 and some payments were made in intervals till 2005, it cannot be stated that the plaintiff was always ready and willing to perform his part of the contract. Further, as discussed above, the alleged payment of Rs.2,50,000/- said to have been made to watchmen and broker has also not been proved. It is seen that though the evidence of D.W.1 would also clearly show that even the advance amount of Rs.3,00,000/- was not paid in lump sum and the same has been paid in installments, in the agreement, it was mentioned as if the entire sum of Rs.3,00,000/- was received by the 1st defendant in lump sum. Hence, from an analysis of the entire evidence of P.W.1, P.W.2 and D.W.1, this Court is of the view that the plaintiff has not made any case for grant of specific performance. On the other hand, readiness and willingness is seen to be totally absent from the very beginning.

38. In this regard, the learned counsel for the appellant/plaintiff placed reliance on the judgment reported in 2000 (6) SCC 685 (RAM NIWAS (DEAD) VS. BANO AND OTHERS) wherein, the Hon'ble Supreme Court, taking into consideration the fact that 2/3rd consideration was paid at the time of execution of the agreement, has granted specific performance. Whereas in the given case, except a sum of Rs.3,00,000/- paid on the date of agreement, the other payments have not been made in time and further there is no continuous readiness and willingness shown on the part of the plaintiff. Therefore, the above judgment relied on by the plaintiff/appellant is not applicable to the facts of the present case. The other judgments relied on by the learned counsel for the appellant/plaintiff are also not helpful to the plaintiff in any manner.

39. It is to be noted that, according to the plaintiff, only a sum of Rs.1,92,950/- alone is liable to be paid towards balance sale consideration. Whereas this Court has found that

another sum of Rs.2,50,000/- said to have been paid to the Watchman and broker has also not been established. That apart, so called alleged balance sale consideration has also not been deposited before the Court by the plaintiff till date to show his readiness and willingness. Of course, deposit of balance sale consideration is not mandatory as per Section 16 of the Specific Relief Act but the same will not be a bar for the plaintiff to show his readiness by depositing the balance sale consideration. Further, there is no evidence, whatsoever, on record to show that the plaintiff had ready money in his hand or source to pay the balance sale consideration. The conduct of the plaintiff would clearly prove that he has made distinct approach in paying money in piece meal. Hence, this Court holds that the plaintiff has not at all established his readiness and willingness and in fact, he has breached the contract.

40. Further despite termination of the contract under Ex.A19, the plaintiff has not sought any declaration to declare that termination of contract is bad in law. In the absence of such declaratory relief, specific performance cannot be granted.

41. In this regard, it is useful to refer the judgment in the case of I.S.Sikandar (d) by LRS v. K.Subramani and others (2014 (1) LW 47) wherein the Hon'ble Supreme Court has held as follows:

"... .. It is an undisputed fact that there is an Agreement of Sale executed by defendant Nos.1-4 dated 25.12.1983 in favour of the plaintiff agreeing to sell the schedule property in his favour for a sum of Rs. 45,000/- by receiving an advance sale consideration of Rs.5,000/- and the plaintiff had further agreed that the remaining sale consideration will be paid to them at the time of execution of the sale deed. As per Clause 6 of the Agreement of Sale, the time to get the sale deed executed was specified as 5 months in favour of the plaintiff by the defendant Nos.1-4, after obtaining necessary permission from the competent authorities such as the Urban Land Ceiling Authority and Income Tax Department for execution and registration of the sale deed at the cost and expenses of the plaintiff. If there is any delay in obtaining necessary permission from the above authorities and the payment of layout charges, the time for due performance of agreement shall further be extended for a period of two months from the date of grant of such permission. In the instant case, permission from the above authorities was not obtained from defendant Nos. 1-4. The period of five months stipulated under clause 6 of the Agreement of Sale for execution and registration of the sale deed in favour of the plaintiff had expired. Despite the same, the defendant Nos. 1-4 got issued legal notice dated 06.03.1985 to the plaintiff pointing out that he has failed to perform his part of the contract in terms of the Agreement of Sale by not paying balance sale consideration to them and

getting the sale deed executed in his favour and called upon him to pay the balance sale consideration and get the sale deed executed on or before 18.3.1985. The plaintiff had issued reply letter dated 16.3.1985 to the advocates of defendant Nos. 1-4, in which he had admitted his default in performing his part of contract and prayed time till 23.05.1985 to get the sale deed executed in his favour. Another legal notice dated 28.03.1985 was sent by the first defendant to the plaintiff extending time to the plaintiff asking him to pay the sale consideration amount and get the sale deed executed on or before 10.04.1985, and on failure to comply with the same, the Agreement of Sale dated 25.12.1983 would be terminated since the plaintiff did not avail the time extended to him by defendant Nos. 1-4. Since the plaintiff did not perform his part of contract within the extended period in the legal notice referred to supra, the Agreement of Sale was terminated as per notice dated 28.03.1985 and thus, there is termination of the Agreement of Sale between the plaintiff and defendant Nos. 1-4 w.e.f. 10.04.1985. As could be seen from the prayer sought for in the original suit, the plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law. Therefore, we have to hold that the relief sought for by the plaintiff for grant of decree for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law. Accordingly, the point No. 1 is answered in favour of the defendant No.5."

Considering the above judgment and facts discussed above, this Court holds that the plaintiff has not only shown his readiness and willingness from the very inception but has also committed breach of terms and conditions of the contract. Therefore, the plaintiff is not entitled for specific performance. Accordingly, these points are answered.

Point No. 4:

42. It is the case of the plaintiff that the 2nd defendant has purchased the remaining cents of the property, knowing the existence of the agreement. Therefore he cannot be said to be a bonafide purchaser. In this regard, Ex.B5 filed by 2nd defendant shows that after the contract was terminated in the year 2006 under Ex. A.19, the 1st defendant and the legal heirs have sold the property to the 2nd defendant on 21.3.2006. It is to be noted that the 2nd defendant has already purchased property to an extent of 50 cents under Ex.B2. The above sale

is not repudiated by the plaintiff. In fact, it is the case of the plaintiff that only at his instruction, the above sale was made.

43. Though the defendants have not pleaded about the subsequent sale in the written statement, it is to be noted that a specific issue has been framed by the trial Court with regard to the said aspect and 2nd defendant was examined as D.W.2, who, in his evidence, has stated that the sale was done through the plaintiff and he only negotiated the deal. Generally in the absence of pleadings, any amount of evidence will not be taken into consideration. But at the same time, when the facts of the case are clearly known to the parties and when the parties proceed for trial knowing the dispute between them, lack of pleadings will not cause much prejudice to the parties.

44. That apart, there was a specific issue framed by the learned trial Judge as to whether the 2nd defendant is the bonafide purchaser in respect of "C" schedule property. Even though no specific pleadings are available on record, admittedly, the parties proceeded for trial, on the basis of the facts and evidence adduced by the 2nd defendant on that issue. Once the parties proceeded their respective case, based on the evidence adduced and aware of the respective cases, this Court is of the view that mere lack of pleadings will not affect the plaintiff, because he has canvassed the case on the basis of the evidence of D.W.2 in this regard.

45. Further more, it is the specific case of D.W.2, that he has purchased 56 cents for valuable consideration. In fact, the plaintiff was a land broker and the 2nd defendant approached him and the deal was finalised only through him. In the entire cross examination, he has asserted only the plaintiff alone has facilitated the registering of document. It is the further evidence of D.W.2 that in previous sale under Exs.B1 and B2, they paid only Rs.1,00,000/- and purchased the property under Ex.B5 only through the plaintiff. The entire evidence of D.W.2 that the purchase is made only through the plaintiff has not even been denied in the cross examination. Similarly, evidence of D.W.2 that the plaintiff was a land broker is also denied. When the facts were known to either side and the same are not denied, it is deemed to be admission. Hence, this Court is of the view that taking into consideration the previous purchase made at the instance of the plaintiff and merely because the plaintiff has not signed as attesting witness, it cannot be stated that the sale itself is made in collusion between defendants.

46. In this context, it is worthy to refer the judgment reported in 1996-2-LW 494 (RAGUPATHY, G.R v. Dr.K.SANKAR) , wherein this Court has observed as follows:

".. ..8. I cannot agree with the said submission of the learned counsel for more than one reason. The contention of the lack of pleadings was not raised before the authorities below, and I further find that the lack of pleadings, if any, has not prejudiced the case of the tenant, petitioner herein, in any way. The object of pleading is only to put the parties on notice, of the real matter in issue. But if the parties are already aware of the real matter in issue and they have also joined in issue over the same, the lack of pleadings can never be treated as a ground to reject the claim. Pleadings before Rent Controller cannot be given that much of importance given to pleadings in a suit before Civil Court. Proceeding before a Rent Control Court is summary in nature and the provisions of the Code of Civil Procedure are not fully made applicable to the extent provided under the statute. We must further note that the Rent Control Court is not a Civil Court and the Act itself is more or less a self contained Code, so far as the relationship of landlord and tenant is concerned."

47. Considering the above dicta and also considering the undisputed facts that the property was purchased under Ex.B5 sale deed, after the execution of sale deed with the plaintiff and that the plaintiff is also aware of the said purchase, this Court is of the view that it cannot be stated that the above purchase is tainted with collusion and fraud. Accordingly, this point is answered.

In the result, the appeal is dismissed confirming the judgment and decree dated 31.10.2008 made in O.S.No.64 of 2006. No costs.

-s/d-
Assistant Registrar(CSVIII)

True Copy

Sub-Assistant Registrar

ga

To
The Principal District Judge,
Tiruvallur

+1 cc to Mr.M.Sriram Advocate sr 21120
+2 cc to M/s.A.Palaniappan Advocate sr 21862 dt 26/04/2017

A.S.No.665 of 2009

rj(co)
aa18/04/2017



WEB COPY