

IN THE HGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:19.01.2017

DATE OF DECISION:21.02.2017

COARAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No. 863 of 2009

M.Kaja Nijamudden

... Appellant/Defendant

-Versus -

A.Rajamani

... Respondent/Plaintiff

This appeal is filed under Section 96 of C.P.C. against the judgement and decree dated 20<sup>th</sup> July 2009 in O.S.No.806 of 2007 on the file of the Additional District and Sessions Judge, (Fast Track Court No.III), Coimbatore.

For Appellant : Mr.Srinath Sridevan

For Respondent: Mr.S.Muthuraman

#### J U D G E M E N T

The defendant who suffered a decree for specific performance is the appellant. The suit was filed by the plaintiff claiming that the defendant had entered into an agreement of sale on 15/12/2006 agreeing to convey the suit property for consideration of Rs. 6,35,000/-. An advance of Rs.35,000/- was paid on the date of the agreement and a period of four months was fixed for performance of the agreement. The time fixed under the agreement was extended up to 15/06/2007 on 02/04/2007 and there was a further extension up to 15/08/2007. Since the defendant did not execute the sale deed, despite demands made by the plaintiff, a legal notice came to be issued on 06/08/2007 by the plaintiff. The defendant sent a reply on 09/08/2007 claiming that time was the essence of the contract and the plaintiff was never ready and willing to perform his part of the contract within the time stipulated under the agreement. On receipt of the reply the plaintiff came forward with the present suit for specific performance.

2. The suit was resisted by the defendant contending that the agreement itself was entered into since he needed money for performance of his daughter's marriage. Therefore, according to the defendant, it was agreed between the parties that time should be the essence of the contract. The defendant would

contend that the plaintiff was never ready and willing to perform his part of the contract and the two extensions were granted only at the instance of the plaintiff. Despite the said extensions the plaintiff had not come forward to pay the balance sale consideration and take the sale deed. The defendant would also question the ability of the plaintiff to pay the balance sale consideration of Rs. 6 lakhs. The defendant had also pointed out that in and by the reply notice dated 09/08/2007 he had terminated the contract. On the above pleadings the defendant has sought for dismissal of the suit.

3. On the above pleadings the learned Additional District Judge, (FTC-III) Coimbatore framed the following issues

- 1) Whether the plaintiff is entitled to the relief of specific performance and delivery of possession of the suit property?
- 2) In the alternative, whether the plaintiff is entitled to refund of advance amount with interest and charge over the suit property as prayed for?
- 3) To what relief?

4. The plaintiff had examined himself as PW-1 and exhibits A1 to A9 were marked. On the side of the defendant he was examined as DW-1 and one Ramesh was examined as DW-2. No documentary evidence was produced on the side of the defendant.

5. Upon a consideration of oral and documentary evidence, the learned Trial Judge has concluded that the plaintiff was always ready and willing to perform his part of the contract. The learned Trial Judge had also taken note of the oral evidence of the defendant as DW-1 as well as the contents of the documents namely, exhibits A-6 and A-8 which are bank statements to conclude that the plaintiff had enough resources to pay the balance of sale consideration.

6. On the above findings the learned Trial Judge decreed the suit for specific performance. The question of granting the alternative relief did not arise inasmuch as the main relief was granted. Aggrieved by the said judgment and decree the defendant is on appeal.

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

1. Whether the plaintiff has established that he has been ready and willing to perform his part of the contract throughout in terms of section 16 (c) of the Specific Relief Act?
2. Whether the parties have intended time to be the

essence of the contract?

8. I have heard Mr.Srinath Sridevan the learned counsel for the appellant and Mr.S.Muthuraman, the learned counsel appearing for the respondent.

9. Mr. Srinath Sridevan the learned counsel appearing for the appellant would vehemently contend that the plaintiff has not established that he was always ready and willing to perform his part of the contract. Pointing out the plea of the defendant that the extensions were granted at the instance of the plaintiff and the fact that exhibits A-6 and A-8 would show that the defendant was not possessed of the entire balance of sale consideration namely, a sum of Rs. 6 lakhs, the learned counsel would submit that the plaintiff has miserably failed to prove that he was always ready and willing to perform his part of the contract. It is also the further contention of the learned counsel that it was agreed between the parties that time should be the essence of the contract. In the said circumstances according to the learned counsel the learned trial judge has erred in granting a decree for specific performance.

10. Per contra, Mr.S.Muthuraman, learned counsel appearing for the respondent would contend that the extensions were made at the instance of the defendant and not at the instance of the plaintiff. He would point out that even in the legal notice issued on 06/08/2007 the plaintiff had very clearly stated that the extensions were made because the defendant could not vacate the property and deliver vacant possession. The learned counsel would further submit that in the reply notice dated 09/08/2007 the defendant had admitted the extensions, but, would claim that it was due to the inability of the plaintiff to pay the balance sale consideration. The learned counsel would submit that the contents of exhibit A-6 would belie the claim of the defendant. According to the learned counsel there was a credit balance of about Rs.5 lakhs in the savings bank account of the plaintiff during the relevant period. It is also contended by the learned counsel that the plaintiff has stated in his proof affidavit that he had a sum of Rs. 1 lakh on hand apart from the bank balance. Pointing out that the statement of accounts provides unimpeachable documentary evidence as to the ability of the plaintiff to pay the balance of sale consideration, the learned counsel would contend that the trial court was right in granting the decree for specific performance.

11. I have considered the rival submissions. The execution of the agreement as well as the extension of the time fixed under the agreement is admitted. By the second extension the period for performance of the agreement was extended up to 15/08/2007. The plaintiff had sent a legal notice within the

extended time namely, 06/08/2007. It is the defendant who had taken a unreasonable stand that the plaintiff was not ready and willing to perform his part of the contract. The defendant would go one step further and claim that the plaintiff was not possessed of sufficient means to pay the balance sale consideration. I am unable to countenance the submission of the learned counsel for the appellant to the effect that time was the essence of the contract. The very fact that the parties had agreed upon in two extensions would show that the parties did not intend time to be the essence of the contract. Even assuming that time should be treated as essence of the contract, admittedly the plaintiff had issued the legal notice within the time stipulated under the contract i.e. 15/08/2007.

12. The next limb of the argument of the learned counsel for the appellant is that the plaintiff has not established that he was always ready and willing to perform his part of the contract. The learned counsel would submit that even according to the bank statements produced by the plaintiff he did not have the entire balance sale consideration of Rs.6 lakhs in his bank account during the relevant period. Therefore, the learned counsel would contend that the plaintiff has not established his readiness and willingness. Section 16 (c) of the Specific Relief Act does not require the plaintiff to jingle the coins before the court. What is required is that the plaintiff should prove that he has the enough means to raise the funds. In the case on hand, in my considered opinion, the plaintiff has by producing the bank statements established that he had enough and more means to perform his part of the contract.

13. The learned counsel for the appellant would submit that the reply notice was issued on 09/08/2007 and the suit came to be filed only on 06/11/2007. This delay of three months, according to the learned counsel would disentitle the plaintiff from being favoured with a decree for specific performance. True, there is a delay of three months on the part of the plaintiff in approaching the court, that alone cannot be a ground to reject the claim for specific performance, if the plaintiff has otherwise proved his readiness and willingness. I therefore, find that the plaintiff had established that he was always ready and willing to perform his part of the contract and the defendant has miserably failed to prove that the plaintiff was not possessed of sufficient means to pay the balance sale consideration and take a sale deed.

14. The agreement is of the year 2006. Nearly a decade has passed by. Out of the total consideration of Rs.6,35,000/-, the plaintiff had paid only a sum of Rs. 35,000/- as advance. It is also a matter common knowledge that price of properties has increased considerably during the past 10 years. Normally inadequacy of consideration or raise in prices during the

pendency of the litigation cannot be taken into account for either granting or refusing the relief of specific performance. The plaintiff is also a pensioner. While exercising the discretion in favour of the plaintiff, I am constrained to consider the equities also. Keeping in mind the fact that the advance paid is not a major portion of the sale consideration, I feel that it will be in the interests of justice to direct the plaintiff to pay an additional consideration over and above the amount agreed to. Considering the fact that the property is situated in Mettupalayam town and taking into account the increase in price of real estate in the past 10 years, I am of the considered opinion that ends of justice would be met by directing the plaintiff to pay an additional consideration of Rs.4 lakhs apart from Rs. 6,35,000/- which has already been paid/deposited by the plaintiff.

15. Such an enhancement of consideration by the court has been resorted to by the Honourable Supreme Court in K.Prakash -Vs- B.R.Sampathkumar (2014 (6) CTC 88) the said pronouncement of the Honourable Supreme Court has been followed by me in Nagarathinam -Vs- S.Jaya(2017(1) CTC 46). The direction to pay the additional consideration stems out of the fact that specific performance being a discretionary relief the court can in the interests of justice, while exercising the discretion, work out the equities between the parties.

16. In view of the above, the appeal will stand dismissed confirming the judgment and decree of the trial court subject to the condition that the plaintiff/respondent should pay a further sum of Rs.4 lakhs as additional consideration. The said additional consideration shall be paid/deposited within a period of eight weeks from the date of receipt of a copy of this Judgment. Considering the overall circumstances, I leave the parties to bear their own costs. Consequently the connected M.P.No.1 of 2009 is also dismissed.

After the judgement was pronounced Mr.Srinath Sridevan, learned counsel appearing for the appellant would submit that the sole appellant died on 20.01.2017 that is a day after the judgment was reserved. The above fact is recorded.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

vk

To

The Additional District and Sessions Judge,

(Fast Track Court No.III), Coimbatore.

Copy to:

The Section Officer, VR Section, High Court, Madras.

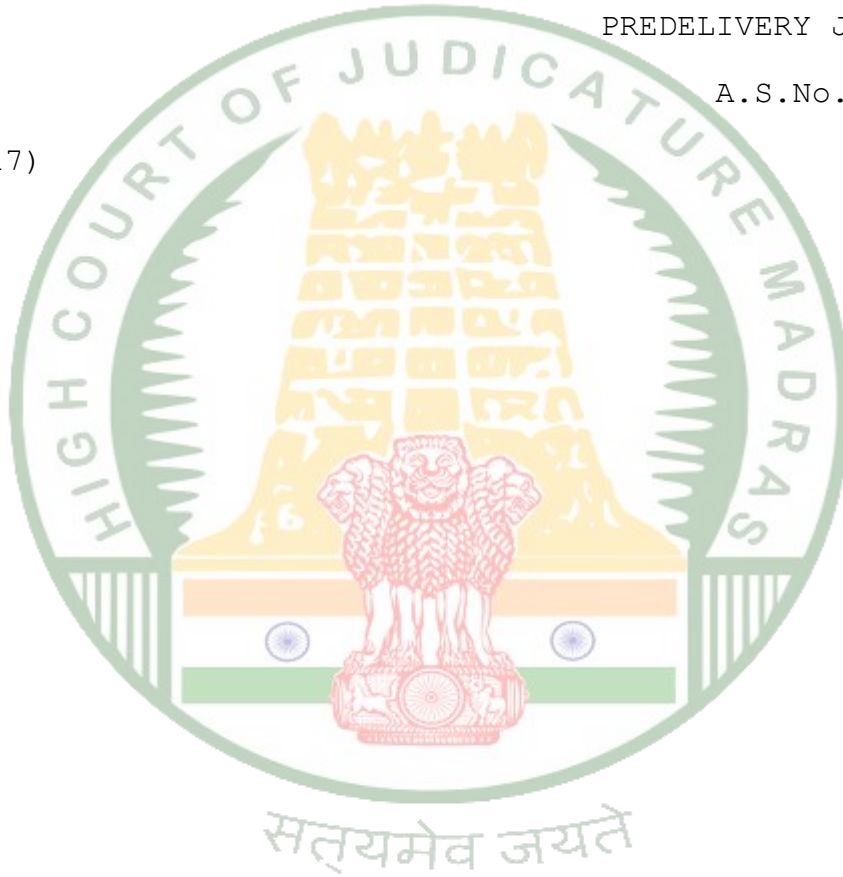
+1cc to M/s.Srinath Sridevan, Advocate sr.11284

+1cc to Mr.S.Muthuraman, Advocate sr.10905

PREDELIVERY JUDGEMENT in

A.S.No.863 of 2009

rsy(co)  
ss(7/3/2017)



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