

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.02.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.927/2009

1.G.Kasi Reddiyar
2.K.Kumar

..Appellants/Defendants

..Vs..

K.Ravi

..Respondent/Plaintiff

Prayer: Appeal filed under Order 41 A Rule 1 Read With Section 96 of Civil Procedure Code to set aside the Judgment and Decree in O.S.No.290 of 2007 dated 30.04.2009 on the file of the learned Principal District Judge, Tiruvallur.

For Appellants : Mr.M.Krishna Murthy
For Resonden : Mr.R.Rajaram

JUDGMENT

The defendants who suffered a decree for Specific Performance are the appellants. According to the plaintiff, he had entered into an agreement for purchase of the suit property measuring for the total extent of 1 acre 84 ½ cents for a total consideration of Rs.14,85,225/- (Rupees Fourteen Lakhs Eighty Five Thousand Two Hundred and Twenty Five only) on 27.02.2006. Under the said agreement he had paid an advance of Rs.5,68,000/- (Rupees Five Lakhs Sixty Eight Thousand Only). As per the said agreement, the balance amount has to be paid within a period of three months and the defendants will have to pay the taxes payable for the suit property. The plaintiff sent a legal notice demanding execution of sale deed on 12.02.2007. The said legal notice was returned as "not claimed". Since the defendants failed to comply with the demand, the plaintiff came forward with the above suit for Specific Performance.

2.The defendants resisted the suit contending that the suit agreement is true, but time is the essence of the contract and since the plaintiff has not come forward to pay the balance of the sale consideration within the period stipulated in the agreement, the defendants are not bound to comply with the demand for Specific Performance. It was also contended that the defendants had entered into an agreement for purchase of 10

acres of agricultural lands from one Munusamy believing that the plaintiff would come forward to pay the balance of sale consideration within a period of three months from the date of agreement. According to the defendants the failure on the part of the plaintiff to pay the balance of sale consideration within a period of three months, has disabled them from purchasing the property from the said Munusamy and they suffered loss, since the said Munusamy had refused to return the advance of Rs.2,50,000/- (Rupees Two Lakhs Fifty Thousand Only). On consideration of the above pleadings, the learned Principal District Judge, Tiruvallur framed the following issues:

"1)Whether the plaintiff is entitled for Specific performance of contract as per the sale agreement dated 27.02.2006 entered into between the plaintiff and the 1st defendant as prayed for?

2)Whether the time is essence of the contract as alleged in the written statement?

3)Whether the plaintiff was ready and willing to perform his part of the contract within the stipulated time as agreed to in the contract?

4)To what other relief that the plaintiff is entitled to?

3.On the side of the plaintiff, PW-1 and PW-2 were examined and Ex.A-1 to A-4 were marked. On the side of the defendants, DW-1 to DW-4 were examined and no documentary evidence was produced.

4.On consideration of the rival pleadings and the evidence, the learned trial Judge came to the conclusion that time is not the essence of the contract. He also found that the plaintiff has been ready and willing to perform his part of the contract. On the above findings, the learned trial Judge decreed the suit for Specific Performance. The alternative relief of refund of the advance was rejected. Aggrieved by the said judgment and decree, the defendants have come forward with this appeal.

The following points arise for determination in this appeal.

"1)Whether the plaintiff is entitled to a decree for Specific Performance or the alternative relief?

2)Whether the plaintiff has established that he was ready and willing to perform his part of the

contract through out in terms of Section 16(c) of the Specific Relief Act?

2)Whether time is essence of the contract?

5.I have heard Mr.M.Krishnamurthy, learned counsel appearing for the appellants/defendants and Mr.R.Rajaram, learned counsel appearing for the respondent/plaintiff.

6.Mr.M.Krishna Murthy, learned counsel appearing for the appellants would contend that time is the essence of the contract and the plaintiff having not come forward to pay the balance amount within the period of three months stipulated in the agreement, cannot claim the Specific Performance of the agreement, that too, after a period of nearly nine months.

7.Per contra, Mr.R.Rajaram, learned counsel appearing for the respondent would contend that time is being the essence of the contract was not contemplated by the parties. He would further submit that the defendants had not paid the taxes due as per the agreement. He would contend that the respondent / plaintiff was always ready and willing to perform his part and the fact that the defendants had not chosen to receive the notice itself would show that they did not want to honour the agreement.

8.The agreement of sale dated 27.02.2006 prescribed a period of three months for payment of balance of sale consideration. The agreement also provides that the defendants will have to pay the taxes and convey property free of encumbrance. It is seen from the evidence that the plaintiff has not made any written demand within the period of three months. Even in his proof of affidavit, the plaintiff has not stated as to when he demanded execution of sale deed. His proof affidavit reads as follows:

"Where demanded the defendants evaded completion".

This, in my considered opinion, cannot be a substitute for the readiness and willingness contemplated under Section 16(c) of the Specific Relief Act. In his cross examination, plaintiff as PW-1 would claim that he requested the defendants to execute the sale deed within one month from the date of the agreement and he had examined PW-2 as a witness to prove such demand. During cross examination, he has said that since the defendants attempted to sell the properties to third parties the plaintiff had come forward to file the suit. PW-2 has been examined to prove the readiness and willingness on the part of the plaintiff. PW-2 is not an attestator to the agreement.

He had stated in his evidence, the plaintiff had demanded execution of sale deed atleast five times prior to the notice. He would go one step further and say that the defendants refused to receive the sale consideration and demand higher sale consideration. The above deposition of PW-2 is beyond the pleadings and evidence of PW-1. His evidence in my opinion is unrealistic to be relied upon. The suit notice was issued on 12.02.2007 and the same was returned with an endorsements "not claimed" on 01.03.2007. Thereafter, the plaintiff had filed this suit on 23.08.2007. The plaintiff has not given any acceptable reason for the delay on his part between 01.03.2007 and 23.08.2007. The delay is nearly one year and six months from the date of the agreement till date of the suit. In a recent pronouncement of the Hon'ble Supreme Court in Padma Kumari & Others .vs. Dasayyan & Others reported in 2015 (8) SCC 695, it has been pointed out that the time fixed under the agreement should be given some importance. These observations have been made after having considered, the general law that time is not the essence of the contract in respect of agreements relating to immovable properties. In Saradamani Kandappan .vs. S.Rajalakshmi and others, reported in 2011 (4) CTC 640 (SC), the Hon'ble Supreme Court had observed that the period of three years fixed under Article 54 of the Limitation Act is only an outer time limit, but that does not by itself obviate the plaintiff from proving his readiness and willingness throughout that is from the date of the agreement till date of the sale or filing of the suit. Infact, the Hon'ble Supreme Court had reiterated the observations in K.S.Vaidyanadam and others .vs. Vairavan, reported in 1997 (1) CTC 628 (SC) wherein, the Hon'ble Supreme Court has observed as follows:

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

[emphasis supplied]

In view of the above principles laid down by the Hon'ble Supreme Court and the total lack of evidence on the side of the

plaintiff regarding readiness and willingness on his part I am constrained to hold that the plaintiff is not entitled to relief of the Specific Performance.

9.The learned District Judge had applied the law relating to Specific Performance as it stood then and has granted a decree. The development of law between the disposal of the suit by the learned District Judge has given a totally new dimension to the law relating to readiness and willingness in cases of Specific Performance. I am therefore unable to agree with the findings of the learned District Judge, on the question of readiness and willingness.

10.The plaintiff has also sought for the alternative relief of refund of an advance, the trial Court had rejected refund of advance since the main relief is granted. Now that I have concluded that the plaintiff is not entitled to the Specific Performance, it has to be considered by whether he is entitled to the alternative relief of refund of advance. The defendants in their written statement have stated that they are ready to refund the advance. Therefore, I conclude that the plaintiff is entitled to refund of advance. There will be a decree for refund of Rs.5,68,000/- (Rupees Five Lakhs Sixty Eight Thousand Only) with interest from 27.02.2006 till date of realisation.

11.In the result, the appeal is allowed, the judgment and decree of the trial Court granting Specific Performance is set aside. There shall be a decree for refund of the advance of Rs.5,68,000/- with 12% per annum from 27.02.2006 till date of realisation. In the circumstances of the case, there shall be no order as to costs in this appeal.

Sd/-

Asst.Registrar

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Sub Asst. Registrar

To

The Principal District Judge,
Tiruvallur.

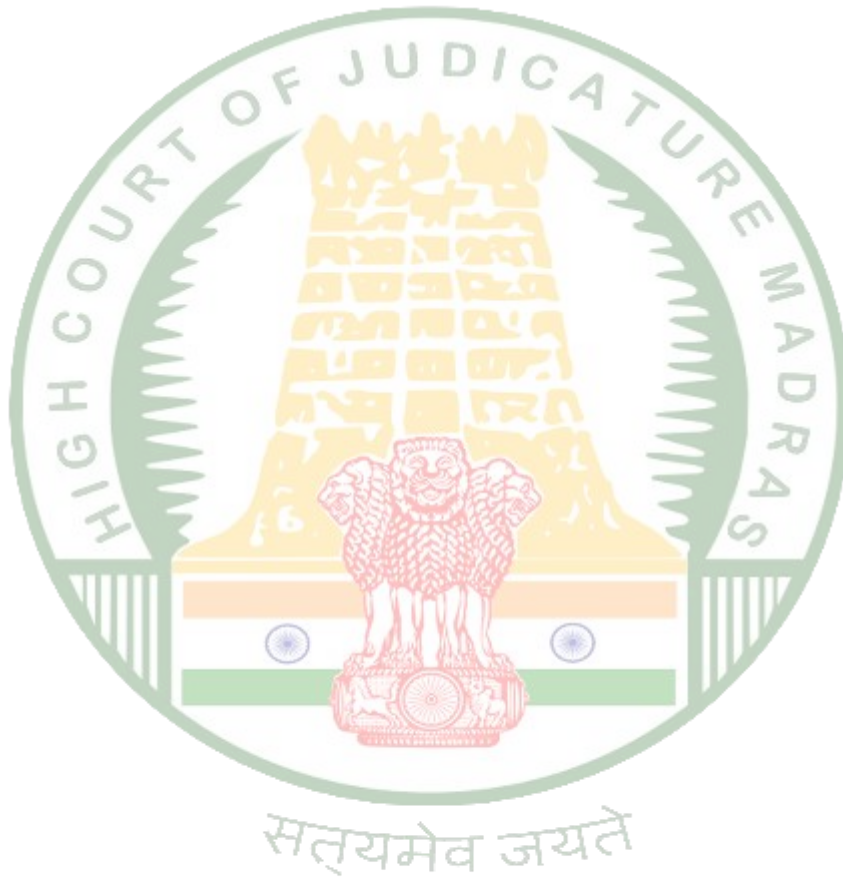
2. The Section Officer, Vernacular Records,
High court, Madras-104.

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+2ccs to M/S. M. Krishna Murthy Sr. 7981
+1cc to M/S. J. Suresh, Advocate SR. 7963

A.S.No.927 of 2009

RSK(CO)
VR(21/03/2017)



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