

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.01.2017

PRONOUNCED ON : 18.01.2017

CORAM

THE HONOURABLE MR.JUSTICE R. SUBRAMANIAN

A.S.No.707 of 2012

&

M.P.No.1 of 2012

1.Noorjahan

2.G.Shakira

... Appellants/Defendants

Vs.

Amudha

... Respondent/Plaintiff

Prayer: This appeal is filed under Section 96 of C.P.C. Against the judgment and decree dated 01.12.2011 passed in O.S.No.264/2010 on the file of District Judge, District Court No.2, Kanchipuram and award costs to the appellants throughout.

For Appellants : Mr.N.R.Anantha Rama Krishnan

For Respondent : Dr.A.E.Chelliah, Senior Counsel
for M/s.Shalom Associates

JUDGMENT

The defendants who suffered a decree for specific performance are the appellants in this appeal. The respondent/plaintiff filed the suit in O.S.No.264/2010 on the file of the District Judge, Kanchipuram contending that the appellants had entered into an agreement of sale on 01.06.2006 agreeing to convey the suit property for a total consideration of Rs.11, 50,000/-(Rupees Eleven lakhs fifty thousand only). On the date of the agreement the plaintiff had paid in advance of Rs. 1,50,000/-(Rupees One lakh fifty thousand only). A period of three months was fixed for performance of the obligations under the agreement. The plaintiff had paid a further advance of Rs. 40,000 on 09.07.2006. An endorsement for the receipt of Rs.40,000/-(Rupees Forty thousand only) was made on the agreement itself. The agreement also provides that the defendant will have to convey the property without any encumbrance. According to the plaintiff she came to know that there was an encumbrance in the form of a Mortgage created by the defendant in favour of one Powerlal Jain during 1999 for a

sum of Rs. 50,000/- agreeing to repay the same with interest at the rate of 24% per annum. The plaintiff would also plead that she has always been ready and willing to perform her part of the contract. Since the first defendant did not come forward to clear the encumbrance and execute the sale deed she had issued a legal notice on 20.11.2008 calling upon the defendant to receive the balance of consideration and execute the sale deed in favour of the plaintiff. Since the defendant did not come forward to execute the sale deed but chose to send a reply claiming that the plaintiff has lost the right to seek specific performance, the plaintiff was forced to come forward with the above suit.

2.The first defendant filed a written statement contending that though the agreement is true, it was agreed between the parties that time should be the essence of the contract. Since the plaintiff did not come forward to pay the balance of sale consideration and get the sale deed executed within the period of three months fixed under the contract, the plaintiff was not entitled to the relief of specific performance. It is further urged on the part of the defendant that the defendant had in fact approached the plaintiff seeking payment of balance of sale consideration on several occasions; however it was the plaintiff who was delaying the payment of balance of sale consideration. It is the further case of the defendant that she had offered to return the advance money by way of a demand draft on 09.04.2009. However the plaintiff had returned the demand draft and thereafter taken steps to number the suit, though the suit was filed on 12.01.2009. The fact that the first notice demanding execution of sale deed was issued by the plaintiff on 20.11.2008 that is nearly after two years and three months from the date of expiry of the three-month period fixed under the sale agreement was highlighted by the defendant to plead that the plaintiff was not ready and willing to perform her part of the contract. It was also contended that time being the essence of the contract; the plaintiff is not entitled to seek specific performance at this distant point of time.

3.The written statement filed by the first defendant was adopted by the second defendant who is the power of attorney agent of the first defendant. On the above pleadings the Learned District Judge, Kanchipuram framed the following issues:

- 1) Whether the plaintiff was ready and willing to perform her part of the contract under the agreement?
- 2) Whether the defendants had delayed performance of the contract?
- 3) Whether the plaintiff is entitled to the Reliefs prayed for in the suit?
- 4) To what other reliefs the plaintiff is entitled to?

4. On the side of the plaintiff two witnesses were examined and exhibits A1 to A8 were marked. The defendant examined herself as DW-1 and exhibits B1 to B3 were marked. Upon consideration of the oral and documentary evidence the Learned District Judge came to the conclusion that time is not the essence of the contract. The Learned District Judge accepted the evidence of DW-2 who claims to have attested the agreement. The said witness had deposed that he had in fact approached the defendants on several occasions, on behalf of the plaintiff, requiring the defendants to execute the sale deed. Accepting the said evidence of PW-2, the Learned District Judge concluded that the plaintiff had proved that she was always ready and willing to perform her part of the contract and the delay was caused only by the conduct of the defendants in not disclosing the existence of the mortgage loan which amounted to an encumbrance over the suit property. On the above findings the learned trial judge decreed the suit as prayed for directing the defendant to execute the sale deed after receiving the balance of sale consideration. The Learned District Judge also directed the defendant to discharge the mortgage on receipt of the balance of sale consideration and thereafter execute the sale deed in favour of the plaintiff. The Learned District Judge had also directed the plaintiff to pay interest at 6% per annum on the sum of Rs.50,000/- (Rupees Fifty thousand only) being the principal amount of the mortgage created by the first defendant from 01.06.2006 to 25.10.2011 namely from the date of the agreement till date of deposit of the balance of sale consideration into Court.

5. Aggrieved by the said decree the defendants have come forward with the above appeal. I have heard Mr.N.R.Anantharamakrishnan learned counsel appearing for the appellant and Mr.A.E.Chelliah, learned Senior counsel appearing for M/s. Shalom Associates for the respondent. Following points arise for determination in the Appeal:

- 1) Whether, on the facts and circumstances of the case, the plaintiff has established that she was continuously ready and willing to perform her part of the contract?
- 2) Whether the non-disclosure of the mortgage by the defendants would by itself prevent the defendants from contending that the delay in seeking specific performance would disentitle the plaintiff from being favoured with a decree for specific performance?
- 3) Whether the inaction on the part of the plaintiff for nearly 2 years and three months is fatal to the case of the plaintiff?
- 4) whether the plaintiff is entitled to the alternative relief of refund of advance?

6. The learned counsel for the appellant would take me through the contents of the agreement and submit that a reading of the agreement would clearly show that the parties intended time to be the essence of the contract. The fact that the plaintiff has not made a demand within the three-month period fixed under the agreement would, according to the learned counsel, disentitle the plaintiff to seek the discretionary relief of specific performance. He would further contend that the plaintiff was never ready and willing to perform her part of the contract. Highlighting the fact that the first notice of demand was issued only on 20.11.2008; the learned counsel would strenuously argue that the plaintiff was guilty of laches and nonperformance. It is pointed out by the learned counsel for the appellant that the plaintiff had not disclosed any of the steps taken by her to seek performance of the agreement before 20.11.2008 in the plaint. According to the learned counsel excepting the state that she has always been ready and willing to perform a part of the contract, the plaint is bereft of any details regarding the attempts made by the plaintiff. He would also contend that whatever has been stated in the evidence of PW-1 and PW-2 without being backed by the pleadings cannot be looked into. The learned counsel would further take me through the evidence of PW-1 and contend that the plaintiff herself has admitted that the value of the property has gone up several times during the two years and three months gap between 31.08.2006 and 20.11.2008. The learned counsel would also rely upon the following decisions in support of his contentions 1997 (3) SCC 1, 2010 (10) 512, 1995 (5) SCC 115, 2011 (4) CTC 640, 2016 (6) CTC 58.

7. Inviting my attention to the observations of the Honourable Supreme Court in the judgment in K.S.VIDYANADAM -Vs- VAIRAVAN 1997 (3) SCC 1 which are as follows:-

"Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties- evolved in times when prices and values were stable and inflation was unknown- requires to be relaxed if not modified, particularly in the case of urban immovable properties. It is high time, we do so."

The Honourable Supreme Court had further observed:-

"All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time limit (s) for taking steps by one or the other party, it must have some significance and that the said time limit (s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties)".

8.The learned counsel would also point out that the observations of the Honourable Supreme Court made above have been reiterated and followed in Saradamani Kandappan -Vs- S.Rajalakshmi & others 2011 (4) CTC 640. He would invite my attention to the following observations of the Supreme Court

"Till the issue is considered an appropriate case, we can only reiterate what has been suggested in K.S.Vidyanadam (supra):

- Courts while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.
- Courts shall apply greater scrutiny and stiffness when considering whether the purchaser was ready and willing to perform his part of the contract.
- Every suit for Specific performance may not be decreed merely because it is filed within the period of limitation by ignoring the time limit stipulated in the agreement. Courts will also frown upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that the purchaser can wait for one or two 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."

9.After observing so the Honourable Supreme Court had further pointed out that the purchaser cannot wait till the fag end of the period of limitation to file a suit seeking specific performance. Pointing out that there has been a spiraling increase in prices of immovable property, the Honourable Supreme Court had ruled that that it will be a cruel joke on the vendor to direct him to execute the sale deed for the price that was fixed several years ago.

10.The learned counsel would also invite my attention to the recent judgment of the Honourable Supreme Court in Padma Kumari & Others .Vs. Dasayyan & Others reported in 2015 (8) SCC 695 wherein the Honourable Supreme Court has reiterated that the time fixed under the agreement should be given some meaning/importance in the matter of granting and decree for specific performance. The learned counsel would also refer to the judgment of mine in T.Baskar .Vs. S.Venkatammal & Others reported in 2016 (6) CTC 58 for the same proposition.

11. Per contra, Mr. A.E. Chelliah, the learned senior counsel appearing for the respondent/plaintiff would contend that the nondisclosure of the existence of the encumbrance namely the mortgage in favour of Powerlal Jain by the defendant was the cause for delay in performance of the contract. The learned counsel would also draw my attention to the evidence of Pws-1 & 2 and contend that the plaintiff has done all that is expected of her in order to prove that she has been always ready and willing to perform her part of the contract. The learned counsel would also rely upon the judgments of the Honourable Supreme Court reported in AIR 1977 SC 1005 and AIR 1988 SC 1074. Relying upon the above decisions, the learned counsel would contend that time is not the essence of the contract in respect of contracts for sale of immovable property. He would also lay considerable emphasis on the fact that the plaintiff has come forward with the suit within the stipulated period of three years. The learned Senior counsel would also contend that the conduct of the defendant in not disclosing the existing encumbrance should be taken into account while deciding on the grant of the discretionary relief of specific performance.

12. I have considered the rival submissions. No doubt, the Hon'ble Supreme Court in the decision rely upon. The learned counsel appearing for respondent namely AIR 1977 SCC 1005(1) & AIR 1988 SCC 1074 has held that time is not the essence of the contract relating to the sale of immovable properties. However in the recent decisions, the Hon'ble Supreme Court itself had pointed out that the time fixed under the agreement must be given some meaning. If we examine the case on hand in light of the observations made by the Hon'ble Supreme Court in K.S. Vdiyanadam and Others .Vs. Vairavan, Saradamani Kandappan & Others .Vs. S. Rajalakshmi & Others and Padmakumari & Others .Vs. Dasayyan & Others, unless the plaintiff proves that she has been ready and willing to perform her part of the contract continuously she cannot be favoured with a decree for Specific Performance. No doubt, the defendant has not disclosed the existence of the mortgage. But that by itself would not justify the inaction on the part of the plaintiff for merely 2 years and 3 months that is from the date of expiry of a period fixed for performance to the date of the notice demanding for performance. It is seen from the evidence of PWs-1 and 2, they have spoken about the demands having been made, as rightly pointed out by the learned counsel for the appellants in the absence of pleadings detailing the demands said to have been made the evidence of PWs-1 and 2 cannot be taken on its face value. It is also borne out from the evidence of PW-1, that the value of the property has risen several times during the period between 31.08.2006 and 20.11.2008. Apart from the above the discrepancies in the evidence of PWs-1 & 2 are also to be taken into account. While the plaintiff as PW-1 would depose that she had demanded Specific Performance, PW-2

the attesting witness would claim that he has made the demand on behalf of the plaintiff. There is no documentary evidence of any demand having been made by the plaintiff prior to the issuance of the notice dated 20.11.2008. Admittedly, the defendant had sent a reply to the notice on 26.11.2008. The suit came to be filed on 12.01.2009. I find that the plaintiff has not satisfactorily explained the delay between the last date fixed for performance i.e. 31.08.2006, and the date of issuance of the legal notice under Ex.A-3 i.e. 20.11.2008. This inaction on the part of the plaintiff coupled with absence of any plausible explanation for the said inaction, in my view, would only go to show the plaintiff was not continuously ready and willing to perform her part of the contract.

13.The learned Senior counsel Mr.A.E.Chellaiya appearing for the respondents would contend that the non disclosure of the mortgage which was subsisting on the date of the agreement would have to be taken into account while deciding the question of grant of a decree for Specific Performance. According to the learned Senior counsel such non disclosure would prevent the defendants from contending that the plaintiff was not ready and willing to perform her part of the contract. I am afraid that such a contention cannot be countenanced. Even in the notice dated 20.11.2008, the plaintiff has demanded execution of sale deed and expressed that she is ready and willing to take the sale deed subject to the mortgage. It is not her case that she had called upon the defendants to discharge the mortgage earlier and that she had waited for the defendants to discharge the mortgage. In the light of the above conduct of the plaintiff, I am unable to countenance the plea of the learned Senior counsel.

14. It is on record that the parties had agreed upon a period of 3 months for completion of the contract. It is also on record that the agreement itself was entered into, to enable the defendant to discharge certain loans and liabilities incurred by her for the celebration of her daughter's marriage. In such back drop, the plaintiff had to have taken steps at the earliest for performance of the contract. In my considered opinion, the delay between 31.08.2006 and 20.11.2008 would definitely have the effect of nonsuiting the plaintiff. In the light of the above discussion, I am constrained to answer points 1 to 3 raised in the appeal against the respondents/plaintiff.

15.Having held that the respondents/plaintiff would not be entitled to the relief of Specific Performance it remains to be seen as to whether she would be entitled to the alternative relief of refund advance with interest. The execution of the agreement, and the receipt of sum of Rs.1,50,000/- (Rupees One lakh fifty thousand only) on the date of the agreement namely 01.06.2006, and the receipt of sum of Rs.40,000/- (Rupees Forty

thousand only) on 09.07.2007 are not in dispute. The agreement does not provide for forfeiture of the advance. Therefore in law as well as inequity, the defendants are liable to refund the advance to the plaintiff. Since the conduct of the defendants is also not free from blame and they are also guilty of suppression of the existence of mortgage, the defendants will have to necessarily compensate the plaintiff by way of refund of advance with appropriate interest. Considering the fact that the agreement was entered into 2006 and the fact that the plaintiff had deposited a balance of sale consideration also in the year 2011. I deem it fit to award interest at the rate of 12% on the sum of Rs.1,90,000/- (Rupees One lakh ninety thousand only) from the date of the agreement, i.e., 01.06.2006 till date of repayment. Eventhough, the sum of Rs.40,000/- (Rupees forty thousand only) was paid on 09.07.2007, the said sum will also carry interest from 01.06.2006. This conclusion of mine is considering the fact that the defendants have had the benefit of a sum of Rs.1,90,000/- (Rupees One lakh ninety thousand only) for almost 10 years.

16. In the result, the appeal is partly allowed, the judgment and decree of the Trial Court granting the relief of Specific Performance is set aside, and the suit is decreed for refund of advance of Rs.1,90,000/- (Rupees One lakh ninety thousand only) with interest at 12% p.a. From 01.06.2006 till date of payment. The plaintiff/responent will be entitled to withdraw the balance of sale consideration deposited by her in the trial Court on 25.10.2011. Taking note of the fact that the suit is partially decreed, I did not make any order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

KP

To

The District Judge,
District Court No.2,
Kanchipuram.

+2cc's to Mr.N.R.Anantha Rama Krishnan, Advocate, S.R.No.3311

A.S.No.707 of 2012

KJ(CO)
CA(07/02/2017)