IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2017

Pronounced on : 10.01.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.535 of 2012

1. A.V.Ram Balaji,
   Proprietor Akshitha Property Developers,
   Arasu Garden,
   No.3/6, Natarajan Salai,
   Thirumalai Nagar,
   Ramapuram, Chennai - 600 089.

2. A.R.Asogan .. plaintiffs

vs.

M/s.Hotel Silver Stars Pvt. Ltd.,
Rep. by its Managing Director,
Mr.N.M/Sabjan,
No.9, Purasawalkam, High Road,
Chenna - 600 007 .. Defendant

Civil Suit filed under Order IV Rule 1 of Original Side Rules 1956 read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendant.

a) Directing the defendant to specifically enforce the oral agreement of sale dated 01.08.2009 by executing Sale Deed to and in favour of the plaintiffs of their nominees in respect of the suit property more fully described in the Schedule to the Plaint a agreed between the plaintiffs and the defendant under the oral agreement dated 01.08.2009 on payment of the balance consideration of Rs.14,00,00,000/- and in the event of the defendant refuses to execute the Sale Deed this Hon'ble Court may duly direct the Registrar, High Court Original Side to execute the Sale Deed to and in favour of the plaintiffs or their nominees on payment of the balance consideration of Rs.14,00,00,000/- by depositing the same in the account of the suit;

b) direct the defendant to deliver the vacant possession of the suit property more fully described in the Schedule hereunder to the plaintiffs;

c) for a permanent injunction restraining the defendant its, men, agents, servants, ect. from in any manner alienating, encumbering or dealing with the suit property with third parties;

c) costs of the suit;

For plaintiffs : Mr.T.Thiageswaran
for M/s.Waraon & Sai rams

For Defendant : Mr.K.Rajasekaran

J U D G M E N T

The suit is filed for specific performance directing the defendant to specifically enforce the oral agreement of sale dated 01.08.2009 by executing the sale deed in favour of the plaintiffs after accepting the balance sale consideration of Rs.14,00,00,000/- and also for directing the defendant to delivery the vacant possession of the suit property to the plaintiffs and consequential injunction restraining the defendant from encumbering the suit property in any manner.

2. The brief facts of the case of the plaintiffs are as follows:

The defendant approached the plaintiffs in the month of July 2009 for sale of the suit property. After detailed discussion, the plaintiffs agreed to purchase the suit property for a total sale consideration of Rs.14,50,00,000/- on condition that the defendant get necessary permission to remove the BSNL tower erected in the terrace of the building and produce no objection certificate from the authorities before entering into the formal agreement of sale. During negotiations, at the request of the defendant, the plaintiffs, based on such negotiations, on 01.09.2009, the plaintiffs paid a sum of Rs.50,00,000/- by way of cheques dated 27.07.2009 drawn on Central Bank of India and dated 31.07.2009 drawn on ING Vysya Bank to the defendant. After receipt of the above payment, the defendant failed to perform his part of the agreement as per the oral agreement of sale dated 01.08.2009. Whenever, the plaintiffs contacted the defendant, the defendant's answers were evasive with regard to the removal of the BSNL tower and also with regard to the production of the original documents and property tax receipts for the purpose of verification to finalise the sale. Therefore, the defendant committed breach of contract continuously abstaining from the performing his part of the contract. The plaintiffs is always ready and willing to perform his part of the contract by paying the balance sale consideration. However, the defendant by some how or other have not performed his part of the obligation. When the matter stood thus, the defendant issued a notice dated 15.03.2012 with imaginary grounds culminating the draft sale agreement with the forfeiture of the advance amount. It is the case of the plaintiffs that there was no such draft agreement given by the defendant to the plaintiffs nor the plaintiffs prepared such draft agreement. The entire allegation contained in the legal notice were made with a malafide intention. Therefore, the plaintiffs was forced to issue a reply notice dated 02.04.2012. The plaintiffs is always ready and willing to perform his part of the contract. Hence the suit.

3. Brief contentions of the written statement filed by the defendant :

Denying the allegations of the plaint that there is an oral agreement of sale, it is the contention of the defendant that there was no agreement for sale. Though in the discussion, it was agreed for sale of the suit property for Rs.14,50,00,000/-, it was agreed by the parties that the plaintiffs shall pay Rs.1,50,00,000/- as an advance and on payment of such advance amount, the agreement of sale would be executed. The plaintiffs has paid only a sum of Rs.50,00,000/- as advance. It was specifically agreed that on payment of remaining sum of Rs.1,00,00,000/-, agreement for sale will be executed. A draft agreement of sale was also prepared and the defendant's signature was obtained by the plaintiffs and the agreement was taken by them. As the plaintiffs failed to pay the advance of Rs.1,00,00,000/- as agreed, the agreement of sale was not executed by both the parties. Therefore, it is the contention of the defendant that there was an agreement to enter into an agreement for sale. Though the defendant has received cheques for a sum of Rs.50,00,000/- dated 27.07.2008 and 31.07.2008 respectively, same clearly show that the oral agreement dated 01.08.2009 is not agreed between the parties. The plaintiffs being property developers had approached the defendant to purchase the suit property. As the defendant was in financial difficulties, agreed to sell the suit property of a sale consideration of Rs.14,50,00,000/- on the condition that the entire sale consideration shall be paid within 45 days. In fact, the plaintiffs has induced the defendant to have faith in the plaintiffs' capacity to complete the sale within a period of 45 days. However, the plaintiffs have not paid the advance as agreed. The draft agreement submitted by the defendant was signed by the defendant, is also not signed by the plaintiffs and not executed by the plaintiffs. The plaintiffs was delaying the transaction. In fact, the defendant has originally agreed to sell the suit property to meet out his pressing financial commitments. As the plaintiffs failed to pay the balance sale consideration to complete the sale within the period orally agreed, the defendant has terminated the contract by issuing a legal notice on 15.03.2012. Only after the legal notice issued by the defendant, the plaintiffs issued a reply notice dated 02.04.2012 making a false allegation that the agreement itself was entered on a condition that the defendant should remove the BSNL tower erected in the suit property. The plaintiffs was never ready and willing to perform their part of the contract at any point of time. The plaintiffs having parted with a sum of Rs.50,00,000/- at the initial stage is waiting to take the benefit of escalation of the price of the property. The suit has been filed beyond the period of limitation. Hence, prayed for dismissal of the suit.

4. On the basis of the above pleadings, this Court framed the following issues on 11.06.2014.

1. Whether the plaintiffs are entitled to a decree of specific performance on the basis of the alleged oral agreement dated 01.08.2009?

2. Relief and costs

5. On the side of the plaintiffs, the second plaintiffs was examined as P.W.1 and Ex.P.1 to P.5 were marked. On the side of the defendant, the Managing Director of the defendant was examined as D.W.1 and Ex.D.1 an D.2 were marked.

Exhibits produced on the side of the plaintiffs:

S.No.	Exhibits	Date	Description
1.	P-1	15.03.2012	Notice sent to the plaintiffss by the defendant
2.	P-2	02.04.2012	Copy of the reply notice sent by the plaintiffs to the defendant.
3.	P-3	29.01.2010	Copy of deed of surrender of lease
4.	P-4	13.03.2013	Copy of legal notice sent by BSNL to the defendant Original sale agreement
5.	P-5	23.02.2013	Copy of reply notice sent by the defendant to BSNL

Exhibits produced on the side of the defendant:

S.No.	*Exhibits*	*Date*	*Description of documents*
1.	D-1	08.08.2012	Authorisation letter given by the defendant to D.W.1.
2.	D-2	--	Draft Agreement of Sale

Witnesses examined on the side of the plaintiffss:

P.W.1. - A.V.Ram Balaji

Witnesses examined on the side of the defendant

D.W.1 - N.M.Sabjan

6. It is the contention of the learned counsel appearing for the plaintiffs that the oral sale agreement dated 01.08.2009 is not disputed. The defendant has agreed to sell the property for a total sale consideration of Rs.14,50,00,000/- and a sum of Rs.50,00,000/- has been paid as an advance on 01.08.2009 by way of cheques. However, the defendant had not removed the BSNL tower erected in the suit property as agreed in the agreement. That was the reason for the delay on the part of the plaintiffs. The plaintiffs were always ready and willing to perform their part of the contract. When the matter stood thus, the defendant issued a legal notice dated 15.03.2012 to the plaintiffs and a suitable reply has also been sent and the suit has been filed within the period of limitation.

7. Once, the defendant had agreed to sell the property and received the advance amount, he cannot refuse to honour the oral agreement. Though the contract was not reduced into writing, the conduct of the parties clearly prove the contract between the parties. The plaintiffs are always ready and willing to perform their part of the contract. Hence, they are entitled for specific performance. In support of their arguments they have also

placed reliance on the unreported judgment of this Court **C.S.No.707 of 2008, dated 12.07.2016(Russel Credit Limited Vs. Ravi Shankar Industries Pvt. Ltd., and Ors.)**

as well as the judgments of the Hon`ble Supreme Court reported in **2002 (9) Supreme Court Cases 664 (Bommaka Nagabhushana Reddy Vs. W.Srinivasa Rao) ; 2009(5) Supreme Court Cases 462 (Ahmadsahab Abdul Mulla (2) Dead by proposed LRs. Vs. Bibijan and others)** and **2015 (5) Supreme Court Cases 223 (Rathnavathi and others vs. Kavita Ganashamdas)**

8. Countering the above arguments, the learned counsel for the defendant submitted that there was no *consensus ad idem* between the parties to enforce the contract under law. There was only a discussion between the parties to sell the property. During the discussion, the plaintiffs have agreed to pay an advance of Rs.1,50,00,000/- and agreed to enter into an written agreement for sale. As they failed to pay the remaining amount of Rs.1,00,00,000/- as agreed, the written contract could not be entered between the parties. Even though a draft agreement was handed over by the defendant, same not fructified in written written contract. Further, the terms of the oral contract is not proved in the manner known to law. The allegation of the plaintiffs that the defendant agreed to remove the BSNL tower has been pressed into

existence only in the reply notice issued by the plaintiffs in the year 2012. Till such time, there was no whisper whatsoever made by the plaintiffs with regard to such agreement between the parties. The conduct of the plaintiffs in remaining silent from the alleged date of oral agreement till the date of legal notice sent by the defendant on 15.03.2012, clearly establish the fact that the plaintiffs were never ready and willing to perform their part of the contract.

9. The plaintiffs, being a property developers, having parted a small sum as an advance, waited for the price escalation of the property to get undue advantage and filed the present suit. Absolutely, there is no evidence available on record to show that there is *consensus ad idem* between the parties to enforce a legally enforceable contract. At any event, the alleged oral agreement is also terminated by the defendant on 15.03.2012 itself. Without seeking declaration to declare that such termination is not valid in law, the suit for specific performance is not maintainable. The learned counsel further submitted that absolutely, there is no evidence whatsoever available on record to infer the readiness and willingness on the part of the plaintiffs to grant equitable relief of specific performance. Hence prayed for dismissal of the suit. In support of his arguments, he has relied upon the following judgments reported in **1990 SCR 2350 - (Smt. Mayawanthi Vs.**

Smt. Kaushalya Devi); 1996 4 SCC 526 (His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar); 2014(1) LW 47 (T.S.Sikandar (D) by LRs. Vs. K.Subramani & others); 2015(4) TNL 221 Civil (V.Saraswathi Vs. Daweed Beevi); 2011 (12) Supreme Court Cases 18 (Saradamani Kandappan Vs. S.Rajalakshmi and others) and 2015(1) Supreme Court Cases (Zarina Siddiqui Vs. A.Ramalingam Alias R.Amarnathan).

10. In the light of the above submissions and pleadings and evidence adduced by both both sides, this Court has to answer the issues one by one.

11. Issue Nos.1 & 2 :

It is the case of the plaintiffs that the defendant has agreed to sell the suit property for a total sale consideration of Rs.14,50,00,000/- and received Rs.50,00,000/- on 01.08.2009. The defendant also agreed to remove the BSNL tower erected in the suit property. As he delayed the performance, the remaining sale consideration could not be paid. Hence, the suit.

12. Whereas, it is the contention of the defendant that there was no oral agreement and there was only a discussion which has been culminated into an oral agreement for sale. The plaintiffs have agreed to pay Rs.1,50,00,000/- as advance and enter into an oral contract of sale. As they failed to pay the balance of the advance amount of Rs.1,00,00,000/- as agreed by them, the written

contract could not be entered into between the parties, inspite of the draft agreement signed by the defendant.

13. In the background of the above contentions, when the pleadings carefully perused, it is the contention of the plaintiffs that an oral agreement was entered on 01.09.2009. On that day itself, he issued two cheques dated 27.07.2009 and 31.07.2009 respectively. The further contention of the plaintiffs show as if there was an agreement to remove the BSNL tower erected in the suit property, which has been disputed by the defendant. But the defendant has contended that the plaintiffs have agreed to pay Rs.1,50,00,000/- and they paid only Rs.50,00,000/- and remaining Rs.1,00,00,000/- advance amount has not been paid and hence, the written agreement of sale was not executed between the parties.

14. The first plaintiff was examined as P.W.1. In his entire chief examination, he never whispered anything about the agreement with regard to the payment of Rs.1,50,00,000/- as an advance. Whereas, in his cross examination, he has admitted that they have agreed to pay Rs.1,00,00,000/- and on such payment, they agreed to enter into a written agreement of sale. Further, in the cross examination, it is also admitted that he has agreed to pay the balance of Rs.1,00,00,000/- after clearance of pending property tax receipts and after removal of BSNL tower and no objection certificate from BSNL authorities. This

aspect was not at all pleaded in the plaint. Whereas, in his reply notice marked as Ex.P.2, it is specifically stated that another amount of Rs.1,00,00,000/- shall be paid at the time of executing a formal agreement of sale. This aspect is never pleaded in the plaint. In fact, in Ex.P.2, reply notice given by the plaintiffs, it is categorically stated by the plaintiffs that they have agreed to pay a sum of Rs.1,00,00,000/- at the time of executing the formal agreement of sale. Having agreed to such terms orally, no evidence, whatsoever, is available on record to show that the plaintiffs have made any attempt to pay the balance amount of Rs.1,00,00,000/- to get the written sale agreement executed.

15. From the allegations of both sides, even though the parties agreed to sell the property for Rs.14,50,00,000/-, there are no other conditions as pleaded by both sides have been established. In the absence of any evidence to that effect, merely on the basis of the pleadings and oral evidence of the plaintiffs, it cannot be concluded that there was a *consensus ad idem* between the parties to specifically perform their part of their obligation. The reply notice Ex.P.2 itself clearly indicate that a formal agreement for sale shall be executed only at the time of paying the remaining advance amount of Rs.1,00,00,000/-. But, no steps, whatsoever, has been taken by the plaintiffs to pay the remaining amount of

Rs.1,00,00,000/- as agreed by them to get the sale agreement executed between the parties. Even assuming that there was an oral agreement for sale of the suit property, absolutely, there is no evidence to show that what are all the conditions stipulated between the parties and how the payment to be made and what is the time stipulation etc. In the absence of the same, this Court is not in a position to infer that the defendant had agreed to remove the BSNL tower from the suit property. It is further to be noted that the plaintiffs, being a property developer, as admitted in the evidence and having agreed to purchase the suit property for such a huge value, their conduct in keeping silent without taking any steps either to verify the title deeds or to make some attempt to get the transaction completed, clearly indicate that they are not at all ready and willing to perform their part of the contract from the beginning.

16. It is further to be noted that having paid Rs.50,00,000/-(Rupees fifty lakhs only), the plaintiffs have not even sent any legal notice demanding the performance of the contract on the side of the defendant. The above conduct of the plaintiffs clearly indicate that they were not ready and willing to perform their part of the contract. The readiness means capacity to mobilize the funds. Willingness is a mental attitude of the party to complete the transaction. If any one of the ingredients is

not established by the plaintiffs, the relief of specific performance cannot be granted, which is being the equitable remedy. Absolutely there is no evidence whatsoever on record to show that the plaintiffs had capacity to mobilise the funds. No bank account whatsoever has been placed before the court to show that they are having the capacity to mobilize the funds. In the absence of proof to show that they have capacity to mobilize the remaining sale consideration of Rs.14,00,00,000/-, the contention of the defendant that the plaintiffs being a property developer, having paid some money and waiting for the benefit of price escalation in respect of the property cannot be ignored altogether.

17. It is to be noted that from the inception of the alleged oral agreement dated 01.08.2009, till Ex.P.1 legal notice issued by the defendant terminating the alleged oral contract, no effort whatsoever has been taken by the plaintiffs to perform their part of the contract. The evidence of P.W.1 would clearly show that the defendant has agreed to sell the property since they are in dire need of money to meet out their pressing financial commitments. In the cross examination, the plaintiffs have admitted the above aspect. The above admission, in fact, prove the contention of the defendant that they were under dire need of money at the relevant point of time. They have agreed to sell the property, provided the plaintiffs settle the

amount within 45 days. The normal prudence of man demand immediate action to get the property registered in his name, particularly when agreed for oral sale agreement to purchase of such huge property. The plaintiffs, even though, parted with Rs.50,00,000/- on the basis of the alleged oral agreement, never made any attempt to see the contract completed in the manner agreed between them in an oral discussion. Absolutely, there is no evidence available on record to show that the plaintiffs had made any effort to get the written sale agreement executed from 01.08.2009 till the date of Ex.P.1, when the legal notice was issued by the defendant.

18. That apart, even after filing the suit, even during the evidence, they were not able to show that they had money in their hands or they had capacity to raise the funds to purchase the property. Though the deposit of the balance of sale consideration is not a mandatory, but mere filing a suit after three years of the alleged oral agreement, without depositing any money to the Court also clearly establish the fact they were never ready and willing to perform their part of the contract. Therefore, this Court is of the view that the discretionary relief of specific performance cannot be granted in favour of the plaintiffs.

19. In the Judgment reported in **2002(9) Supreme Court Cases** Honourable Supreme Court has held as follows :

> "Transfer of Property Act, 1882 – S.54 – "An agreement for sale of property" and "a promise to transfer a Property" - Held, both convey the same meaning and effect in law – Hence, High Court erred in taking the view that the agreement in question was not an agreement of sale, but a promise to transfer the suit property – Suit for specific performance of contract for the sale of property in question was wrongly dismissed by the High Court on the basis of the above view – Specific Relief Act, 1963, Ss.10 and 20 – Contract Act, 1972, S.2(e)."

In the above judgment, admittedly there was a written agreement signed by the respondent and there were documents. Therefore, the above judgment relied upon by the plaintiffs is not applicable to the present facts of the case. Similarly the judgment reported in **2009(5) Supreme Court Cases 462** deals with limitation and this judgment will not help the plaintiffs case in any way. In the judgment of this Court in **C.S.707 of 2008,** the above judgment is also based on the written contract and hence, this judgment is also not applicable to the facts of the case. In the judgment reported in **2015 (5) Supreme Court**

Cases 223, which is dealing with the suit filed under Order II Rule 2 CPC for filing subsequent suit and hence, the above judgment is also not applicable to the facts of this case.

20. In the judgments cited by the learned counsel for the defendant the judgment reported in **1990 SCR 2350,** it has been held that the Written Agreement of sale in favour of the plaintiffs were terminated and the plaintiffs have not prayed for declaratory relief, hence suit for specific performance not maintainable. In the judgments reported in **1996 4 SCC 526, 2014(1) LW 47, 2015(4) TNL 221 Civil, 2011 (12) Supreme Court Cases 18, 2015(1) Supreme Court Cases** Honourable Apex Court held that once the plaintiff failed to establish readiness and willingness, suit for specific performance has to fail.

21. Having regard to the above judgments and further the fact that the readiness and willingness on the part of the plaintiffs has not at all established from the beginning to end and having regard to the fact that the alleged oral agreement is also terminated as early as on 15.03.2012, without seeking any declaration to declare such cancellation is not valid in law, the plaintiffs cannot seek specific performance.

22. In view of the discussion held above specific discretionary equitable relief of specific performance is

equitable relief and the plaintiffs have failed to eastablish their readiness and willingness from the beginning till the end besides they have also not sought any declaration with regard to the alleged termination of the alleged oral contract, suit for specific performance is not maintainable. Further, the plaintiffs have not asked any alternative relief. Therefore, the alternative relief to return the advance amount cannot be ordered without any prayer. The issues are answered accordingly against the plaintiff.

32. In the result, the suit is dismissed. No cost.

sd/.N.S.K.J

10.01.2017

//Certified to be a true copy//

Dated this the day of 2017.

P.M./13.06.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.