

IN THE HIGH COURT OF JUDICATURE AT MADRAS**RESERVED ON : 13.03.2017****PRONOUNCED ON : 16.03.2017****CORAM****THE HONOURABLE MR.JUSTICE T.RAVINDRAN****C.S.No.580 of 2012**

Nirmala S.Raj

..
vs

Plaintiff

1. P.Ravi Kumar

2. The Chief Manager,
City Financial Consumer Finance
India Limited,
Old.No.117, New No.54,
Citadal, Near CSI Kalyani
Hospital,
Radhakrishnan Road,
Chennai - 600 004.

3. Kotak Mahindra Bank Limited,
Retail ARD Customer Care,
Kotak Infiniti Dass India Tower,
No.3, 2nd Floor, 2nd Line Beach Road,
Parrys, Chennai - 600 001. ..

Defendants

(3rd defendant impleaded as per
order dated 25.11.2014 in
A.No.7491 of 2014).

For Plaintiff : Mr.K.P.Gopalakrishnan

For Defendant : Mr.S.Kanniah
No.1

For Defendant : No representation
Nos.2 & 3

JUDGMENT

The suit has been laid by the plaintiff for specific performance or in the alternative for the recovery of the advance amount with interest.

2. The averments contained in the plaint are briefly stated as follows:

The first defendant is the absolute owner of the plaint schedule mentioned property and the first defendant entered into an agreement with the plaintiff on 23.07.2009 agreeing to sell the suit property for a total sale consideration of Rs.50,50,000/- free of all encumbrances and in pursuance of the same, the plaintiff has paid a sum of Rs.21,00,000/- towards advance. The above said agreement contained inter alia the clause that the purchaser, namely, the plaintiff can deduct a sum of Rs.11,50,000/- payable to the tenant. The first defendant, in pursuance of the mentioned sale agreement, had executed a registered power of attorney in favour of one Ms.Jenette D/o.J.A.Thambusami. The first defendant had agreed to redeem the suit property from the second defendant, where the original documents had been given and loan taken. The plaintiff paid a sum of Rs.11,50,000/- to the tenant of the suit property, namely, K.M.Sikkander Kasim and the first defendant handed over the vacant possession of the suit property to the plaintiff on 25.10.2010 and necessary endorsement has been made with reference to the same in

the sale agreement. The plaintiff, still owe Rs.18,00,000/- to the first defendant towards the balance sale consideration and she is ready to pay the same at any point of time as and when the first defendant clear the loan payable to the second defendant garnishee bank and handover the original documents of the suit property to the plaintiff and register the sale deed. The first defendant, however, is evading to get the document released from the garnishee and handover to the plaintiff for completing the sale transaction, though the plaintiff has been always ready and willing to perform her part of the contract. Inasmuch as the first defendant did not pay the money due to the bank and get back the original title deeds, the plaintiff had been prevented from performing her part of the contract and in view of the same, the plaintiff has been necessitated to lay the suit for appropriate reliefs.

3. The averments contained in the written statement filed by the first defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. The suit is barred by laches and limitation on the part of the plaintiff and hence, liable to be dismissed.

4. The plaintiff is the wife of one M.Sampath Rajkumar, who claimed to be a practicing advocate and also engaged in real estate business. The plaintiff's husband was introduced to the defendant by

one V.Ramesh maintenance supervisor of "Marina Square Apartment, where in the suit property is located and accordingly, inasmuch as the defendant was in need of money on account of meeting his financial commitments agreed to sell the suit property to the plaintiff's husband for a lower price and accordingly, the sale agreement was entered into between the plaintiff and the first defendant and the parties have mutually agreed to complete the sale consideration within a period of 90 days from the date of the execution of the sale agreement between the parties and thus, the time was the essence of the contract.

5. The plaintiff's husband prevailed upon the defendant to execute the power of attorney deed in favour of Ms. Janette D/o.J.A.Thambuswamy. Further, the plaintiff's husband also insisted the defendant to deliver the vacant possession of the suit property. Accordingly, the first defendant made arrangement to vacate the tenant in occupation of the suit property by settling his dues and the plaintiff and her husband occupied the premises on 25.10.2010 and even prior to that, they were collecting the rental amount from the tenant in occupation of the suit property. The first defendant, though, was ready to complete the sale consideration, it is only the plaintiff and her husband, who had been evading the same on the footing that they were taking steps to sell their property at Perungudi Village and after settling the same, they would take steps to clear the dues due to

the second defendant bank and complete the sale transaction. Believing the above said words of the plaintiff and her husband, the first defendant kept quiet and however, inasmuch as the plaintiff and her husband did not take step to discharge the loan due to the second defendant bank, the whole contract between the parties has become frustrated by the inability to complete the sale transaction within the time stipulated in the agreement, as the plaintiff and her husband were unable to raise the necessary funds to complete the sale transaction. But, without taking further steps to complete the sale transaction, the plaintiff has been squatting upon the suit property preventing the first defendant from getting any income therefrom.

6. It is false to state that the plaintiff had settled the dues to the tenant, by remitting a sum of Rs.11,50,000/-. In fact, the defendant has paid a substantial amount of Rs.8,00,000/- to the plaintiff's husband in order to vacate the tenant from the suit property. The plaintiff's husband has contributed only the balance amount of Rs.3,50,000/- and then, settled his claim by repaying a sum of Rs.11,50,000/- to the said tenant viz. K.M.Sikkander Kasim and obtained vacant possession after getting endorsement in the sale agreement to suit his convenience without the knowledge of the first defendant. The claim of the plaintiff that she has to pay only a sum of Rs.18,00,000/- towards the balance sale consideration is not correct and false. The plaintiff has to pay a sum of Rs.26,00,000/-

towards the balance sale consideration and in view of the breach committed by the plaintiff, the first defendant has sustained monetary loss as described in the written statement. In fact, it is only the plaintiff and her husband, who are legally liable to pay a sum of Rs.60,78,448/- to the first defendant and the first defendant reserves his rights to initiate appropriate legal proceedings to recover the said sum and hence, the suit is liable to be dismissed.

7. On the basis of the pleadings, the following issues are framed for determination in the suit.

" 1. Whether the plaintiff is entitled to a decree for specific performance of the Agreement dated 23.07.2009?"

2. Whether the plaintiff has been ready and willing to perform her part of contract?"

3.Relief and cost."

8. In support of the plaintiff's case, PW1 has been examined and Exs.P1 to 7 were marked. On the side of the defendants, DW1 has been examined and Exs.D1 to 4 were marked.

9. ISSUES NOS. 1 & 2:

The plaintiff has laid the suit seeking the relief of specific performance in respect of the sale agreement dated 23.07.2009. According to the plaintiff, in respect of the suit property belonging to the first defendant, the first defendant and the plaintiff entered into an agreement dated 23.07.2009 for the sale of the suit property and accordingly, it is the case of the plaintiff that the first defendant agreed to sell the suit property free of all encumbrances in favour of the plaintiff for a sum of Rs.50,50,000/- and pursuant to the same, according to the plaintiff, she has paid a sum of Rs.21,00,000/- as advance and further, according to the plaintiff, in terms of the conditions set out in the sale agreement, she has also paid Rs.11,50,000/- to the tenant towards the lease amount and thus, according to the plaintiff, in toto, as per the sale agreement above mentioned, she has paid a sum of Rs.32,50,000/- and only the remaining amount of Rs.18,00,000/- is to be disbursed to the first defendant for completing the sale transaction and according to the plaintiff, inasmuch as the first defendant had not cleared the loan with reference to the suit property pending with the second defendant garnishee bank and retrieved the original documents pertaining to the suit property, the sale transaction could not be completed and further according to the plaintiff, despite the pre - suit legal notice dated 31.03.2012, the first defendant failed to come forward to complete the sale transaction by handing over the original title deeds and therefore, it is stated that the plaintiff has been necessitated to

institute the suit seeking the relief of specific performance mainly or in the alternative for the refund of the advance amount paid pursuant to the sale agreement above referred to with interest as claimed in the plaint.

10. The execution of the sale agreement dated 23.07.2009 in respect of the suit property between the plaintiff and the first defendant has not been controverted by the first defendant. Equally, the payment of Rs.21,00,000/- by the plaintiff towards the advance under the sale agreement has also not been disputed by the first defendant. As seen from the pleas set out by the first defendant in the written statement and also, the evidence tendered by the first defendant examined as DW1, it is noted that the receipt of a sum of Rs.11,50,000/- towards the sale consideration paid by the plaintiff by way of the payment of the lease amount of a sum of Rs.11,50,000/- to the tenant, who had occupied the suit property is admitted and thus, it is found that the first defendant has agreed that the plaintiff has in toto paid a sum of Rs.32,50,000/- towards the sale consideration, pursuant to the sale agreement above mentioned. Though in the written statement, the first defendant has taken a plea that the plaintiff had paid only a sum of Rs.3,50,000/- towards the lease amount and it is only the first defendant, who had paid a sum of Rs.8,00,000/- in order to vacate the tenant from the suit property, as regards the above defence set out by the first defendant in the written

statement, the same is not buttressed by acceptable and reliable evidence.

11. In this connection, the first defendant examined as DW1, in his evidence, during the course of cross examination, has clearly admitted that as per the sale agreement, he has received a sum of Rs.21,00,000/- by way of two cheques and at the time of the agreement of sale, there was a due of Rs.39,00,000/- to the bank and the total agreed sale consideration was Rs.50,50,000/- and he had already received a sum of Rs.21,00,000/- and after that, he has also made an endorsement in Ex.P2 that he had received a sum of Rs.11,50,000/- and accordingly, he had received a total sum of Rs.32,50,000/- and thereafter, he has, further, admitted that the balance amount would be Rs.18,00,000/- as on 25.10.2010. Therefore, as seen from the above admission of the first defendant, it is found that towards the sale consideration fixed at a sum Rs.50,50,000/-, the first defendant has received a total sum of Rs.32,50,000/- and the remaining amount to be paid towards the sale consideration is only Rs.18,00,000/- as on 25.10.2010.

12. It is also noted and admitted by the first defendant that pursuant to the payment of the lease amount by the plaintiff, the possession of the suit property had been handed over to the plaintiff and the same has not been controverted by the first defendant. It is

not the case of the first defendant that the plaintiff had taken possession of the suit property illegally, pursuant to the sale agreement. On the other hand, it is found that as per the terms set out by the parties in the sale agreement, it is noted that the plaintiff had been put in possession of the suit property, pursuant to the clearance of the lease amount in respect of the suit property.

13. It has to be seen whether the plaintiff has been always ready and willing to perform her part of the contract to obtain the discretionary and equitable relief of specific performance sought for by her in the plaint. Admittedly, the sale agreement had been entered into between the parties on 23.07.2009. It is also found that the parties have fixed a specific time limit, within which, the sale transaction should be completed. It is noted that as per the terms prescribed in the sale agreement, the parties have agreed that before expiry of 90 days from the date of the sale agreement, the sale transaction should be completed.

14. In other words, it is noted that the parties have agreed that the time should be essence of the sale agreement.

15. According to the plaintiff, inasmuch as the first defendant had failed to clear the loan amount pending with the second defendant bank and obtain the documents of title pertaining to the

suit property and hand over the same to her, the transaction could not be completed and hence, according to the plaintiff, though she was always ready and willing to perform her part of the contract, on account of the laches and failure on the part of the first defendant, the sale transaction could not be completed and left with no other alternative, according to the plaintiff, she has sent the pre-suit notice on 31.03.2012 and as the first defendant refuted the same containing untenable allegations by way of a reply notice on 14.04.2012, it is the case of the plaintiff that she has been constrained to lay the suit for specific performance.

16. Even though there is a condition in the sale agreement that the first defendant should settle the loan account with the second defendant bank and get the original documents and thereby, complete the sale transaction, it is for the plaintiff to establish that as regards her readiness and willingness to complete the sale transaction, she has been ever ready from the inception of the sale agreement. When both parties admit that a specific time limit fixed for completing the sale transaction, when it is found to expire on 22.10.2009, it is to be proved by the plaintiff that right from 23.07.2009, she has been ready to complete the sale transaction. However, it is found that even with regard to her readiness and willingness before the period fixed in the sale agreement, there is no acceptable and reliable evidence produced by the plaintiff. The plaintiff has not established that she had been

possessed of adequate capacity to pay the balance sale consideration amounting to Rs.18,00,000/- on or before the time limit prescribed in the sale agreement. With reference to the above position, there is no reliable evidence adduced on the side of the plaintiff. The plaintiff has not placed any material to show that she was possessed of adequate means to complete the sale transaction. The documents marked on her side Exs.P1 to 7 do not vouchsafe the above aspect of the plaintiff's case. It is found that the time limit fixed in the sale agreement expires on 22.10.2009, even thereafter, the plaintiff has not expressed her readiness and willingness to complete the sale transaction by tendering the balance sale amount to the first defendant as prescribed in the sale agreement. On the other hand, it is noted that at the end of the third year, after the date fixed in the sale agreement, it is found that for the first time only on 31.03.2012, the plaintiff has chosen to issue the legal notice to the first defendant calling upon her to complete the sale transaction as per the sale agreement. Prior to the same, there is no material on the part of the plaintiff to establish that she had been always ready and willing to perform her part of the contract. It is found that only after the first defendant had rebutted the case of the plaintiff by issuing a reply notice, it is noted that the plaintiff has instituted the suit for specific performance.

17. The relief of specific performance being a discretionary and

equitable remedy, the party coming forward seeking such a relief should establish her case to be a genuine one. In other words, the plaintiff has to establish that she has always been ready and willing to perform her part of the contract. The ***sine qua non*** element for the establishment of the plea of readiness and willingness on the part of the plaintiff being conspicuously absent in the present case and the plaintiff having not taken any steps to establish that aspect of the matter, as rightly contended by the first defendant's counsel, the very fact that the plaintiff has failed to establish her readiness and willingness to perform her part of the contract, since the date of the sale agreement, it is found that the plaintiff would not be entitled to seek the discretionary and equitable remedy of the specific performance sought for by her in respect of the sale agreement dated 23.07.2009.

18. It is contended by the plaintiff's counsel that inasmuch as the first defendant has failed to settle the loan account and retrieve the original documents pertaining to the suit property, the sale transaction could not be gone through. The mere failure on the part of the defendant alone would not be sufficient. It is for the plaintiff to establish that she has been always ready and willing to perform her part of the contract from the commencement of the sale agreement. That aspect of the matter having not been complied with by the plaintiff and not also established by acceptable and reliable evidence,

it is found that the plaintiff has failed to establish that she was having sufficient means and ready to pay the balance sale consideration within the time limit specified in the sale agreement and even thereafter to complete the sale transaction. In such view of the matter, it is found that the plaintiff cannot be allowed to base her relief on the loopholes in the defendants' case and thereby, try to succeed in her case without establishing her entitlement to obtain the relief sought for.

19. In the light of the above discussions, I hold that the plaintiff has failed to establish that she has been ready and willing to perform her part of the contract in respect of the sale agreement dated 23.07.2009 and hence, I hold that the plaintiff is not entitled to obtain decree for specific performance of the above mentioned sale agreement. Accordingly, issue Nos.1 & 2 are answered against the plaintiff.

20. ISSUE NO.3:

The plaintiff has also, in the alternative, sought the relief of refund of advance amount with interest. As adverted to earlier, the first defendant has admitted the receipt of Rs.32,50,000/- from the plaintiff towards the sale consideration, pursuant to the sale agreement dated 23.07.2009. In such view of the matter, it is found that the first defendant is liable to return the said amount to the

plaintiff, inasmuch as it has been held that the plaintiff is not entitled to obtain the relief of specific performance.

21. However, it is argued by the first defendant's counsel that inasmuch as the plaintiff has been put in possession of the suit property, pursuant to the sale agreement, on the basis of the payment of the lease amount and enjoying the benefits thereof, according to the first defendant's counsel, the plaintiff cannot also seek the relief of refund of advance amount as claimed in the plaint. However, the above contention of the first defendant's counsel cannot be accepted . It is found that as per the terms set out in the sale agreement, the plaintiff has paid the part of the sale consideration amounting to Rs.32,50,000/-. It is also noted only pursuant to the sale agreement above referred to, the plaintiff had been put in possession of the suit property. In such view of the matter, when it has not been established that the plaintiff had been placed in possession of the suit property otherwise than under the sale agreement and also the plaintiff possession and enjoyment of the suit property is illegal or contrary to the law, the contention of the first defendant's counsel that the plaintiff would not be entitled to obtain the relief of refund of the advance amount claimed by her is not sustainable.

22. In the light of the above position and also the clear admission on the part of the first defendant that the plaintiff has paid

a sum of Rs.32,50,000/- towards the sale consideration under the sale agreement dated 23.07.2009, it is found that in the interest of justice, the plaintiff should be given back the said amount.

23. However, it is noted that the plaintiff has sought the return of the refund of the advance amount with interest at the rate of 24% from the date of the agreement, till the date of realization. However, considering the transaction entered into between the parties, in my opinion, in the interest of justice, it would be sufficient, if the first defendant is ordered to pay the refund of the sum of Rs.32,50,000/- with interest at the rate of 12% per annum from the date of the sale agreement, till the date of the decree and thereafter, at 6% till the date of realization.

24. In support of the plaintiff's case, the decision reported in **2010-2-L.W.368 (A.Ramadas Rao V. M/s.J.P.Builders, rep.by its Proprietor and another)** is relied upon, however, considering the facts and circumstances of the present case, as rightly contended by the first defendant's counsel, the above citation is found to be not applicable. Still the principles of law outlined in the above said case are taken into consideration and followed as applicable.

In the light of the above reasons, I hold that the plaintiff is not

entitled to obtain the relief of specific performance sought for in the plaint in respect of the sale agreement dated 23.07.2009, I hold that the plaintiff is entitled to the refund of the advance amount from the first defendant amounting to Rs.32,50,000/- with interest at 12% per annum from the date of agreement till the date of decree and thereafter, at 6% per annum till the date of realization. Accordingly, the suit is decreed in part in favour of the plaintiff against the first defendant. I further hold that the plaintiff is not entitled to obtain the relief of permanent injunction as claimed. The plaintiff's suit as against the defendants 2 & 3 is dismissed. Considering the facts and circumstances of the case, there is no order as to costs.

16.03.2017

Index : Yes/No

Internet: Yes/No

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T.RAVINDRAN,J.

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Pre-delivery Judgment in
C.S.No.580 of 2012
and
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16.03.2017

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