IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.11.2017

DELIVERED ON : 19.12.2017

Coram

The Honourable Mr.Justice RAJIV SHAKDHER

and

The Honourable Mr.Justice N.SATHISH KUMAR

Original Side Appeal No.388 of 2013

G.Vijaya raj alias Vijayakumar .. Appellant

Vs.

1. D.Jayaraman

2. D.Subburaj

3. G.Mohanraj ** ... Respondents

** R3 was given up in the appeal
vide B SR No.62272

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Prayer : Appeal filed under Order XXXVI, Rule 1 of Original Side Rules, against the Judgement and Decree dated 05.06.2013 in C.S.No.181 of 2008, on the file of this Court.

Prayer in CS.181/08: To directing the defendants to perform their part of contract as per the Agreement for Sale dt 31.1.2007 by execting the sale Deed and register the same in favour of the Plaintiffs with respect to the suit schedule property by accepting the balance sale consideration of Rs.15,00,000/- and for costs.

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For Appellant : Mr.A.V.Arun

For Respondents: Mr.R.Ravichandran for RR 1 and 2

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J U D G E M E N T

RAJIV SHAKDHER, J.

1. This is an appeal preferred against the judgement and decree dated 05.06.2013, passed in C.S.No.181 of 2008, by the learned Single Judge.

2. The appellant before us was arrayed as defendant No.2 in the suit. Defendant No.1 in the suit is the brother of the appellant, who was to begin with arrayed as respondent No.3 in the instant appeal.

2.1. Though, initially, as indicated above, the brother of the appellant was impleaded as respondent No.3, a specific averment is made in the appeal that respondent No.3 was given up as a party in the present proceeding.

2.2. Defendant No.1 in his written statement filed in the suit, evidently, has stated that he had executed a release deed dated 12.05.2008, in favour of the appellant. Thus, the stand, which defendant No.1 took was that, all rights, title and interest in the suit property had been released by him in favour of his brother, i.e., the appellant.

2.3. It may be pertinent to note that the release deed was not filed either by the appellant, or, his brother, i.e., defendant No.1.

2.4. The remaining respondents, as would be obvious, are the original plaintiffs. The relief that the respondents/plaintiffs sought in their suit for specific performance was that the appellant and his brother be called upon to execute a sale deed in accordance with the terms contained in the agreement for sale, dated 31.01.2007 [in short, "the agreement for sale, Ex.P.5”] and register the same in their favour, by accepting the balance sale consideration of Rs.15,00,000/-.

2.5. The learned Single Judge vide the impugned judgement decreed the suit in favour of the respondents/plaintiffs and granted a month's time for payment of the balance consideration. Furthermore, the appellant and his brother were called upon to execute the sale deed thereafter within a period of two months of having received the balance consideration.

2.6. As indicated above, the appeal has been preferred by one of the defendants, i.e., defendant No.2. The appellant, being aggrieved, has preferred the instant appeal on various grounds.

3. Before we touch upon the same, it would be in order to advert to the broad facts pertaining to the matter qua which there is no dispute :

3.1. The respondents/plaintiffs had entered into, in the first instance, an agreement for sale with the appellant and his brother dated 20.09.2006, (Ex.P.1), qua the suit property. The total consideration, that was payable by the respondents/ plaintiffs to the appellant and his brother, was a sum of Rs.32,50,000/-. The said agreement for sale also adverted to the fact that the appellant and his brother had received a sum of Rs.15,00,000/- in cash as advance towards the sale consideration.

3.2. This fact, though, is not correct. The accepted position inter se the contesting parties, is that, the respondents/plaintiffs had, in fact, paid a sum of Rs.7,25,000/- to secure the redemption of the suit property, which was mortgaged to, one, Mr.C.Rajkumar Bagmar. Furthermore, the said agreement for sale (Ex.P.1), placed several obligations on both parties, i.e., the appellant and his brother and the respondents/plaintiffs. Suffice it to say this agreement did not reach fruition.

3.3. As a matter of fact, on 05.12.2006, the respondents/ plaintiffs issued a legal notice (Ex.P.4), via their Advocate, in which, an allegation was made that the original title deeds were never produced for perusal and verification. It was, specifically, averred in the said legal notice on behalf of the respondents/ plaintiffs that they had paid a sum of Rs.7,25,000/- as advance to the appellant and his brother. The thrust of this notice was that the said advance was taken by the appellant and his brother only to redeem the mortgage, and that, they had no intention to sell the property, as the original title deeds had not been produced. The said notice concluded by holding out that the respondents/plaintiffs had terminated the agreement for sale dated 20.09.2006 (Ex.P.1), and therefore, would want the repayment of the money advanced towards purchase of the suit property, along with interest at the rate of 18% per annum commencing from the date of the said agreement. For this purpose, fifteen (15) days time was given to the appellant and his brother.

3.4. The record shows that the parties herein, thereafter, entered into a fresh agreement for sale (Ex.P.5), on 31.01.2007. The terms and conditions of this agreement were, almost, similar to the earlier agreement for sale dated 20.09.2006 (Ex.P.1). One of the aspects, qua which, the two agreements differed was, while, six (6) months time was fixed for consummation of the sale transaction in the former, the tenure for completion of sale, was reduced to three (3) months in the latter.

3.5. Furthermore, the sale consideration was also reduced from Rs.32,50,000/- to Rs.30,00,000/-.

3.6. The admitted position, is that, respondent No.1/plaintiff No.1 had paid by this time, an additional sum of Rs.7,75,000/- to the appellant and his brother. Thus, the total amount paid to the appellant and his brother was a sum of Rs.15,00,000/-; which, included the sum of Rs.7,25,000/- paid as advance. Therefore, at this point in time, the respondents/plaintiffs were required to pay the balance sale consideration equivalent to Rs.15,00,000/-, out of the total, agreed, consideration of Rs.30,00,000/-.

3.7. The disputes between parties appear to have erupted from this point onwards. There are allegations and counter allegations flung at each other by parties. Each party seeks to establish that the other party failed to fulfill his part of the obligations provided for in the agreement for sale (Ex.P.5).

3.8. Before one comes to this aspect of the matter, one, may also touch upon few other aspects for the purpose of completing the narration.

3.9. The respondents/plaintiffs claim that, since, they got a whiff of the fact that the appellant and his brother were intending to create third party rights in the suit property, they filed a police complaint on 03.12.2007 (Ex.P.12). This action of the respondents/plaintiffs was followed by a legal notice dated 29.12.2007 (Ex.P.13). The appellant and his brother, in turn, responded to the legal notice vide a reply dated 12.02.2008.

4. Pertinently, in the interregnum, i.e., in and about 25.01.2008, the respondents/plaintiffs had lodged the instant suit for specific performance.

4.1. Upon pleadings being completed, the Court framed the following issues :

> "(1) Whether the suit for specific performance is maintainable, since the plaintiffs themselves unilaterally terminated the sale agreement under legal notice dated 05.12.2006 ?
> (2) Whether the second sale agreement dated 31.01.2007 is enforceable under law ?
> (3) Whether time is the essence of contract ?
> (4) Whether the plaintiffs are ready and willing to perform their part of contract ?

(5) Whether the plaintiffs are entitled to a decree of specific performance ?
(6) To what relief, the plaintiffs are entitled ?”

4.2. As indicated above, the learned Single Judge decreed the suit, and while doing so, found all issues in favour of the respondents/plaintiffs.

5. Arguments on behalf of the appellant in the matter were advanced by Mr.A.V.Arun, Advocate, while, on behalf of the respondents/plaintiffs, submissions were made by Mr.Ravichandran, Advocate.

6. The submissions of Mr.Arun, can, broadly, be paraphrased as follows :

(i) That the respondents/plaintiffs were never ready and willing to fulfill their part of the obligations under the agreement for sale (Ex.P.5). The respondents/plaintiffs did not have sufficient funds available with them. This aspect, according to the counsel, came through, upon a perusal of the Bank Passbook of respondent No.1/plaintiff No.1 (Ex.P.19), which showed that till 22.12.2007, he had only a sum of Rs.15,695/- in his account. Reliance, in this behalf, was also placed on the Bank Passbook (Ex.P.20) to demonstrate that the respondent No.2, i.e., plaintiff No.2 had balances ranging between Rs.5,432/- to Rs.14,415/- at the relevant point in time, i.e., between January, 2007 and April, 2007. It was submitted that moneys were invested only in December, 2007, in Fixed Deposits (FDs) to justify the institution of the suit.

(ii) The respondents/plaintiffs had not discharged their part of the obligations cast upon them under the agreement for sale (Ex.P.5), on the material dates. The respondents/plaintiffs had issued no demand notice, calling upon the appellant and his brother to fulfill their part of obligations. Instead, the respondents/plaintiffs had filed a false complaint with the police to pressurize the appellant and his brother into executing a sale deed qua the suit property.

(iii) That the learned Single Judge ought to have held that the obligations cast on the appellant and his brother to demolish the superstructure, which stood on the suit property, prior to the execution of the sale deed, was an unconscionable clause, which required the appellant and his brother to perform that which was not capable of being performed.

(iv) The learned Single Judge ought to have borne in mind clause 9 of the agreement for sale (Ex.P.5), which required the respondents/plaintiffs to submit to the appellant and his brother, a draft sale deed. The respondents/plaintiffs, having failed to do so, had breached clause 9 of the agreement for sale (Ex.P.5).

(v) The learned Single Judge ought to have taken cognizance of the conduct of the respondents/plaintiffs in as much as in their legal notice dated 05.12.2006 (Ex.P.4), they had taken the stand that, since, the original title deeds were not furnished, they were constrained to terminate the earlier agreement for sale dated 20.12.2006 (Ex.P.1). A perusal of the testimony of P.W.1 would show that he was aware of the fact that the appellant and his brother had taken out a public notice related to the loss of the title deed executed in their favour. In this behalf, reliance was placed on Ex.P.11, which is a paper publication dated 26.04.2007. Via this paper publication, the appellant and his brother tried to bring to the notice of the public, at large, that they had lost the title documents pertaining to the suit property.

(vi) The learned Single Judge ought not to have exercised his discretion in favour of granting specific performance of the agreement for sale (Ex.P.5), without coming to a definitive conclusion that the respondents/plaintiffs were ready and willing to perform their part of the obligations cast upon them under the subject agreement for sale (Ex.P.5).

6.1. In support of the aforesaid submissions, reliance was placed by Mr.Arun, on the following decisions :

(i).M.R.Rathindran V. Saraswathi Narayanan, 2017 (6) CTC 113;
(ii).Saradamani Kandappan V. S.Rajalakshmi, (2011) 12 SCC 18;
(iii).Nanjappan V. Ramasamy, 2015 (2) Scale 651; and
(iv).M.Jayaprakash Narayanan V. Santhammal, 2017-4-L.W. 540.

7. On the other hand, Mr.Ravichandran, submitted that the respondents/plaintiffs had discharged their obligations cast upon them under the agreement for sale (Ex.P.5). For this purpose, he not only relied upon the findings returned in the impugned judgement, but also took us through the depositions and the documentary evidence filed, in that behalf, by the respondents/ plaintiffs.

7.1. Learned counsel, emphatically, contended that the fact that the respondents/plaintiffs had paid a substantial part of the sale consideration would show their readiness and willingness to perform their part of the obligations.

7.2. It was the contention of the learned counsel that the submissions advanced on behalf of the appellant that, because the draft sale deed was not submitted, and therefore, there was a breach by the respondents/plaintiffs of the obligations cast on them under the agreement for sale, was a bogey set up by the appellant and his brother, to wriggle out of a solemn agreement executed between parties.

7.3. Learned counsel submitted that under the terms of the agreement for sale entered into between the parties, the appellant and his brother were required, essentially, to do the following :

(i) First, to handover a vacant and an unencumbered suit property.

(ii) Second, to have all public documents mutated in their name and that too within a stipulated period.

(iii) Third, to apply to the municipal authorities for permission to demolish the superstructure, which stood on the suit property, and thereafter, have the same demolished.

7.4. Learned counsel submitted that none of these steps were taken by the appellant and his brother, and resultantly, they enjoyed the benefit of having retained the sum of Rs.15,00,000/- paid by the respondents/plaintiffs towards purchase of the suit property.

7.5. Learned counsel stressed on the fact that had it not been for the respondents/plaintiffs, the appellant and his brother could not have redeemed the property, which was mortgaged to, one, Mr.C.Rajkumar Bagmar. The fact that respondents/plaintiffs had the necessary wherewithal to pay the balance sale consideration, was sought to be demonstrated by placing reliance on Exs.P.15, P.17, P.19 and P.20.

7.6. Furthermore, Mr.Ravichandran, contended that, since, the appellant and his brother did not accept the balance sale consideration, the same was invested in FDs and that, pursuant to the order of this Court dated 04.09.2017, four (4) Fixed Deposit Receipts (FDRs) amounting to a sum of Rs.15,00,000/- were handed over to the Registrar General of this Court.

7.7. What has come to fore, though, that these FDRs were made out in and about 02.04.2014.

7.8. In support of his submissions, learned counsel placed reliance on the decision of the Supreme Court in Laxman Tatyaba Kankate V. Taramati Harishchandra Dhatra, (2010) 7 SCC 717.

REASONS :

8. We have heard the learned counsel for the parties and perused the record.

9. According to us, the following points emerge for our consideration :

Points for Consideration:

(I) Whether the purported failure on the part of the respondents/plaintiffs to furnish a draft sale deed to the appellant and his brother was fatal to their obtaining relief in the suit for specific performance ?

(II) Whether the respondents were always ready and willing to perform their part of the obligations cast upon them under the agreement for sale (Ex.P.5) ? and

(III) Whether time was of essence in the consummation of sale ?

Point No.(I) :

10. In order to appreciate this aspect of the matter one would have to advert to the main terms and conditions of the agreement for sale (Ex.P.5). The main terms and conditions of the said agreement are contained in clauses 1, 5, 6, 7, 8, 9, 11 and 12. For the sake of convenience, the aforementioned clauses are extracted hereafter :

> "1) The PARTIES OF THE FIRST PART has agreed to sell the property, i.e., all that premises bearing present Old Door No.30, Previous Old Door No.21, Venkatesa Maistry Street, Sowcarpet, Chennai 600 079, measuring an extent of 1486 Sq.Ft. or thereabouts and comprised in O.S.No.3779/A & R.S.No.7733, CC No.6351, morefully described in the Schedule hereunder free from all encumbrance with vacant possession to the PARTIES OF THE SECOND PART or his nominee or nominees.
>
> 2) to 4) XXXXX
>
> 5) The PARTIES OF THE FIRST PART agrees and undertake to pay all the public taxes, charges and dues in respect of the property morefully described in the Schedule hereunder till date of execution of the deed of sale.
>
> 6) The PARTIES OF THE FIRST PART agrees and undertakes to have mutation of all the public records in their name within 2 months, from this date of agreement of sale.
>
> 7) The PARTIES OF THE FIRST PART agrees and undertakes to handover vacant possession of the said property to the PARTIES OF THE SECOND PART at the time of executing sale deed.
>
> 8) The PARTIES OF THE FIRST PART agrees and undertakes to handover all the original documents including the original title deed and other certified copies of the said

property, to the PARTIES OF THE SECOND PARTY advocate for perusal and for preparation of sale deed.

9) The PARTIES OF THE SECOND PART shall prepare and furnish a draft sale deed for the approval of the PARTIES OF THE FIRST PART, and thereafter the PARTIES OF THE SECOND PART shall prepare a regular Sale Deed for execution and registration and the entire sale transaction shall be completed within 3 (Three months) from this date, subject to advocate legal opinion in respect of the Schedule mentioned property and further subject to availability of an auspicious date, for the said purpose and time is essence for this purpose.

10) XXXXX

11) If the PARTIES OF THE FIRST PART fails to execute the Sale Deed in favour of the PARTIES OF THE SECOND PART then in such event the parties of the first part has to pay a sum of Rs.3,00,000/- (Rupees three lakhs only) towards as damages along with the advance money to the PARTIES OF THE SECOND PART, likewise if the PARTIES OF THE SECOND PART fails to Register the Sale Deed then they have to forfeit a sum of Rs.3,00,000/- (Rupees three lakhs only) from the advance money paid by them to the PARTIES OF THE FIRST PART.

12) The PARTIES OF THE FIRST PART agrees and undertakes to demolish, the Schedule mentioned property by getting prior approval from Corporation of Chennai before the date of registration of sale deed in favour of the PARTIES OF THE SECOND PART. .....”(emphasis is ours)

10.1. A perusal of the aforementioned clauses would show that there were some obligations, which were cast on the appellant and his brother, which were required to be discharged just prior to the execution of the sale deed, while, there were others, which had been discharged well ahead of that date. For instance, the obligation cast on the appellant and his brother to pay public taxes qua the suit property and to have their names mutated in the public record, to our minds, was an obligation, which was required to be fulfilled well before the date, when, the respondents/plaintiffs could be called upon to submit a draft sale deed. The other obligation, such as, having the property vacated could have, perhaps, waited till, a draft sale deed was submitted by the respondents/plaintiffs.

10.2. The evidence on record shows that the appellant and his brother, admittedly, had not carried out mutation of the suit in their names in property in public records, as was required under the agreement for sale (Ex.P.5). This is evident from a mere perusal of the following extract from the testimony of appellant (D.W.1) :

> "..... It is correct state that in clause 7 & Ex.P.1 that we have to stands the patta and other public declaims in within three months from of the date of agreement of sale. Witness arise prior to execution of Ex.P.1 except property Tax, Water and Sewerage Tax which are in my father's name all other documents are in our name. ...."

10.3. Clearly, as per the appellant's own stand, in so far as the municipal authorities were concerned, mutation had not been carried out. In the record of the municipal authorities, the name of their father stood as the Assessee. Therefore, for the appellant to contend that because the draft sale deed was not submitted, and therefore, the respondents/plaintiffs were in breach of the agreement for sale (Ex.P.5), according to us, is a submission, which is, untenable.

10.4. This is, de hors, the material on record, which shows that the appellant and his brother had not been able to have the suit property vacated. This aspect of the matter emerges upon a perusal of the reply dated 12.02.2008. (Ex.D.1), issued by the appellant to the legal notice dated 29.12.2007 (Ex.P.13) served upon him. In the reply sent out on behalf of the appellant and his brother, the assertion made is that, they had "vacated most of the tenants". Clearly, even on that date, i.e., on 12.02.2008, there were some tenants still residing in the suit property.

10.5. Furthermore, there is nothing on record to show that the appellant and his brother had, in fact, applied to the Corporation of Chennai for permission to demolish the superstructure which stood on the suit property. While, this was a step, which could have taken by the appellant and his brother, even, prior to submission of the draft sale deed, no such step was, apparently, taken by them. The failure to take this step takes the force out of the argument advanced on behalf of the appellant that the demolition of the superstructure could have only followed the submission of draft sale deed by the respondents/plaintiffs.

10.6. Therefore, for all these reasons, we are of the view that, as correctly argued by Mr.Ravichandran, the non-submission of the draft sale deed by the respondents/plaintiffs was only a red herring, which was set up by the appellant and his brother to wriggle out of the obligation cast on them under the agreement for sale (Ex.P.5).

Point No.(II) :

11. In order to deal with the assertion made on behalf of the appellant with regard to the aspect that respondents/plaintiffs were neither ready nor willing to perform their part of the obligations under the agreement for sale, one, has to look at the following :

(i) First, was there a pleading to that effect in the plaint filed on their behalf ?

(ii) Second, whether the facts and circumstances leading upto point institution of the suit are demonstrative of the respondents'/plaintiffs' readiness and willingness to consummate the sale transaction ?

11.1. Taking the second point first, it would be seen that the respondents/plaintiffs, admittedly, under the first agreement for sale dated 20.09.2006 (Ex.P.1), had paid a sum of Rs.7,25,000/-, which was the very amount used by the appellant and his brother to seek redemption of the mortgage created on the suit property by, one, Mr.C.Rajkumar Bagmar. This aspect of the matter can be discerned, if, one were to peruse the discharge receipt dated 21.09.2006 (Ex.P.2), and the documents appended as acknowledgment of cancellation of sale agreement dated 17.10.2006 (Ex.P.3). There is also no dispute that the respondents/plaintiffs had paid another sum of Rs.7,75,000/- to the appellant and his brother. Thus, the total amount, which was paid to the appellant and his brother was a sum of Rs.15,00,000/-.

11.2. Therefore, by the time the agreement for sale (Ex.P.5), was executed between the parties, out of the total agreed sale consideration of Rs.30,00,000/-, a sum of Rs.15,00,000/- stood already paid by the respondents/plaintiffs to the appellant and his brother. The fact that Rs.15,00,000/-, which was 50% of the total consideration, had been paid by the respondents/plaintiffs demonstrated that they were willing, if not ready, to discharge their remaining obligation under the agreement for sale (Ex.P.5).

11.3. As indicated above, all along the respondents/ plaintiffs had, literally, put their money where their mouth is.

They paid, even before the agreement for sale (Ex.P.5) was executed, 50% of the sale consideration. They averred in their plaint that they had approached the appellant and his brother to consummate the sale transaction on several occasions between January 2007 and December 2007. The appellant and his brother, on the other hand, had sought time to have the property vacated. The failure of the appellant and his brother in coming forward to consummate the sale transaction led to the respondents/plaintiffs filing a police complaint on 03.12.2007 (Ex.P.12), as they apprehended creation of third party rights by the appellant and his brother qua the suit property.

11.4. The keenness of the respondents/plaintiffs in having the sale deed executed is also demonstrable from a perusal of the notice dated 29.12.2007 (Ex.P.13) served on their behalf by their Advocates, on the appellant and his brother. In this notice, the respondents/plaintiffs emphasized the fact that they had always been ready and willing to pay the balance consideration. The said notice concluded by stating that the appellant should fix a date for execution of the sale deed qua the suit property by accepting the balance sale consideration as stipulated under the agreement for sale (Ex.P.5). In the reply dated 12.02.2008, (Ex.D.1), the only defence taken was that the respondents/plaintiffs instead of having the sale deed executed had sought reduction of the sale consideration.

11.5. Furthermore, it was stated that the superstructure was not demolished, as a request, in that behalf, had been made by the respondents/plaintiffs. Both these defences appear to be unbelievable for the reason that there is no material on record brought forth by the appellant, which would have us believe that the respondents/plaintiffs had sought for either a reduction in the sale price, or, had called upon the appellant and his brother not to demolish the superstructure. Therefore, the defence taken, before us, that because the draft sale deed was not executed and consequently, the sale transaction could not be consummated is a defence, which appears to be an afterthought, as it was not the contention propounded, in the first instance, by the appellant and his brother, while, replying to the legal notice served upon them by the respondents/plaintiffs.

11.6. Furthermore, the respondents/plaintiffs, contrary to the argument advanced on behalf of the appellant, clearly, had the necessary wherewithal to pay the balance consideration qua the suit property; a fact, which emerges upon a perusal of Exs.P.15, P.17, P.19 and P.20. The FDRs span the period between 22.09.2006 and 22.12.2007.

11.7. This apart, there is no dispute that the respondents/ plaintiffs are in the business of manufacturing silver utensils, and that, they are income tax payees. A perusal of the respondents'/plaintiffs' passbooks does show that were frequent deposits and withdrawal of amounts. The argument advanced on behalf of the appellant that since the passbook of the respondents/plaintiffs between January and April, 2007, did not show that they had enough credit balance, and hence should necessarily lead to the conclusion that they would not have been able to pay the remaining sale consideration if called upon to do so, according to us is untenable, as the test for demonstrating readiness is not that the party concerned should have requisite amount in his/her bank account, but that, he/she should have the necessary wherewithal to garner funds. The vendee must be able to satisfy the Court that he has a means to shore up the necessary funds. In this behalf, it is relevant to note that on 22.12.2007, there was a credit balance in the sum of Rs.7,61,531/-, in the account of respondent No.1/plaintiff No.1 (see Ex.P.19). Similarly, the passbook of respondent No.2/plaintiff No.2 (see Ex.P.20) would also show that as on 27.12.2007, it carried a credit balance of Rs.7,80,093/-. A close examination of the aforesaid passbook would show that money was frequently deposited and withdrawn from the account. Therefore, we have no manner of doubt that at every given point in time, the respondents/plaintiffs were in a position to pay the balance sale consideration of Rs.15,00,000/-.

11.8. The following observations of the Supreme Court in a recent judgement rendered in : K.Kanthamani vs. Nasreen Ahmed, 2017 (2) CTC 656 (SC), captures the essence of the law on this aspect :

> ".... 24. The expression "readiness and willingness" has been the subject-matter of interpretation in many cases even prior to its insertion in Section 16(c) of the Specific Relief Act, 1963. While examining the question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract/agreement, the Privy Council in a leading case which arose from the Indian courts (Bombay) in Bank of India Ltd. v. Jamsetji A.H. Chinoy [Bank of India Ltd. v. Jamsetji A.H. Chinoy, 1949 SCC OnLine PC 81 : (1949-50) 77 IA 76 : AIR 1950 PC 90] , approved the view taken by Chagla A.C.J., and held inter alia that
>
> > "it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness."
>
> 25. The following observations of the

Privy Council are apposite: (Jamsetji case[Bank of India Ltd. v. Jamsetji A.H. Chinoy, 1949 SCC OnLine PC 81 : (1949-50) 77 IA 76 : AIR 1950 PC 90] , SCC OnLine PC)

> "… Their Lordships agree with this conclusion and the grounds on which it was based. It is true that Plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and in the present case the appellate court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:
>
> > 'In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion that Plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury —if the matter was left to the jury in England—would have come to the conclusion that a man, in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from Defendants 1 and 2.'
>
> For the foregoing reasons, their Lordships answer Question (4) in the affirmative."
>
> (emphasis supplied)

26. This Court in Sukhbir Singh v. Brij Pal Singh [Sukhbir Singh v. Brij Pal Singh, (1997) 2 SCC 200 : AIR 1996 SC 2510] followed the aforesaid principle with these words: (SCC

p. 202, para 5)

> "5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law. ...."

11.9. Thus, in our view, as rightly pointed out on behalf of the respondents/plaintiffs, they were both ready and willing to perform their obligations under the agreement for sale (Ex.P.5).

12. Going back to the first point as to whether there is an averment in the plaint to the effect that respondents/plaintiffs were ready and willing to perform their part of the obligation as envisaged in the agreement for sale (Ex.P5), one would have to peruse the plaint. A perusal of the plaint shows that the respondents/plaintiffs have in paragraph No.7 stated as follows:

> "7. The plaintiffs state that when in the 2nd week of September 2007 they have approached the defendants, the plaintiffs were informed by them that they were searching for suitable accommodation for their family also and for one of their flour mill (presently run by one of the defendants in the said premises). The plaintiffs have again approached in the 3rd week of October 2007 knowing that the remaining tenant had also been vacated and expressed their readiness and willingness to pay the balance sale consideration. The plaintiffs state that the defendants are still residing in the suit schedule property and they have not

demolished the superstructure in the suit schedule premises, which is against the covenant in the Agreement for Sale. But both the defendants have not replied properly to the plaintiffs and the defendants have given evasive reply and on doubting their behaviour, the plaintiffs enquired in their known circle and their enquiry reveals that both the defendants are trying to sell the Schedule property to some third party for illegal enrichment. The plaintiff further states that they have deposited the balance sale consideration in fixed deposit in the Agreement for Sale; when on 29.12.2007 the notice sent to the defendants and they have received the same and failed to comply the demand made in the notice and on all subsequent days."

12.1. A careful perusal of the aforesaid averments made in the plaint would show that respondents/plaintiffs have indeed taken the stand that they were at every given point in time, ready and willing to perform their part of the obligation as contemplated in the agreement for sale (Ex.P5).

Point No.(III) :

13. The argument advanced on behalf of the appellant that time was of the essence, and therefore, specific performance could not be granted in favour of the respondents/plaintiffs by the learned Single Judge in the facts and circumstances of the case appears to be a submission, which is untenable. The general principle of law, qua which one cannot quibble, is that qua immovable properties time is not of the essence, though, parties can, by agreement, make time the essence for completion of the transaction even, in case of immovable properties. Furthermore, even if time is not the essence of the contract, given the fact that prices of immovable properties are skyrocketing, such transactions need to be completed within a reasonable time frame.

13.1. In the facts and circumstances of this case, as alluded to above by us, clearly, under clause 9 of the agreement for sale (Ex.P.5), parties were required to consummate the sale transaction within three (3) months of submission of draft sale deed by the respondents/plaintiffs. As observed hereinabove, this obligation cast on the respondents/plaintiffs, was preceded by the obligations placed on the appellant and his brother, which required them to ensure that all public taxes, charges, dues, etc., were paid, and that, in public record, their names stood mutated qua the suit property. The obligation to have mutation carried out in their names by the appellant and his brother was to be fulfilled within two (2) months of the execution of the agreement for sale (Ex.P.5). Clearly, this was not done as even according to D.W.1, in the municipal record, in so far the property tax and sewerage tax were concerned, the name of their father continued to be reflected.

13.2. Furthermore, clearly, the following other aspects of the transaction were not taken forward by the appellant and his brother :

(i) Firstly, the appellant and his brother were unable to secure the property from the tenants ; an aspect, which is established upon a mere perusal of the assertion made by them in their own reply dated 12.02.2008.

(ii) Secondly, the appellant and his brother had taken no steps to apply to the Corporation of Chennai for permission to demolish the superstructure.

13.3. Therefore, for all these reasons, the period of three (3) months stipulated in clause 9 ceased to be of essence.

14. This apart, there is intrinsic evidence to show that time was, perhaps, not of the essence, as parties had quantified the damage, which would have to be paid by the one, in breach of his obligations to the other, to compensate for the loss. Clause 11 of the agreement for sale (Ex.P.5) shows that in case, the appellant and his brother were in breach, they would have to pay a sum of Rs.3,00,000/- (Rupees three lakhs only) along with the money advanced by the respondents/plaintiffs, while, on the other hand, if, the respondents/plaintiffs were in breach, the appellant and his brother were entitled to forfeit a sum of Rs.3,00,000/- (Rupees three lakhs only) from the money advanced to them by the respondents/plaintiffs. However, as indicated by us hereinabove, even if, time was not of the essence, surely, given the escalation in prices of immovable properties, the respondents/plaintiffs were required to act within a reasonable time frame to bring the sale transaction to fruition.

14.1. In the instant case, we find that the respondents/ plaintiffs did take steps to agitate their rights within a reasonable period of time. While, the respondents/plaintiffs have asserted in their plaint that between May, 2007 and July, 2007, and third week of October, 2007, they approached the appellant and his brother for completion of the sale transaction, in the written statement, this assertion has been denied. Therefore, in a sense, on the fact of it the stand taken by the parties before us on this aspect is only a word of one party, as against that of another.

14.2. However, if, one were to look to more concrete actions, which, the respondents/plaintiffs took to agitate their rights, one would find that they were within the realm of reasonable time frame principle. This aspect of the matter emerges from their action in lodging a police complaint on 03.12.2007 (Ex.P.12) and, thereafter, serving a legal notice dated 29.12.2007 (Ex.P.13) on the appellant and his brother. While, the former may be construed as a over-the-top reaction, the latter was, clearly, in line with their right to have the sale transaction completed. Thus, the submission advanced on behalf of the appellant that, since, the respondents/plaintiffs were unable to complete the sale transaction within three (3) months of the execution of the agreement for sale (Ex.P.5), and hence, were not entitled to the relief of specific performance, is a submission, which, according to us, is untenable.

14.3. Before we conclude, we may also indicate that we had, clearly, asked the learned counsel for the appellant, as to whether there were any tenants in the suit property. We were told by Mr.Arun, in the presence of the appellant, who is also a practicing Advocate, that there were nine (9) tenants in the suit property. Having elicited this response from the appellant, we had put to Mr.Ravichandran, whether the respondents/plaintiffs would be interested in securing the suit property with tenants. Mr.Ravichandran, on instructions of respondent No.1, who was also present in Court, informed us that the respondents/plaintiffs would have no difficulty in securing the property with the tenants in place.

14.4. Thus, having regard to the foregoing aspects, we are of the view that no interference is called for with the conclusion reached by the learned Single Judge that the decree for specific performance is required to be granted in favour of the respondents/plaintiffs.

15. During the course of the arguments, one of the submissions advanced by the learned counsel for the appellant was that the respondents/plaintiffs were required to deposit the balance consideration within one (1) month of the date of the decree, and that, since, they had failed to do so, no specific performance could be granted.

15.1. On behalf of the respondents/plaintiffs, it was submitted that, since, the appellant and his brother had refused to accept the money, they had invested the like amount in FDs. It was in this background that vide order dated 04.09.2017, we had directed the respondents/plaintiffs to hand over the FDRs to the Registrar General of this Court. The record shows that pursuant to our order dated 04.09.2017, that the needful was done. The report of the Registry is indicative of the fact that the respondents/plaintiffs had, in fact, invested moneys in FDs, in and about, 02.04.2014. This would show that though the investment was not made within a period of one (1) month, it, certainly, was not too far in point in time.

15.2. However, having regard to the fact that the respondents/plaintiffs were required to deposit the balance consideration within one (1) month, in our view, they should be called upon to pay interest at the rate of 12% per annum between 05.07.2013 and 02.04.2014. After 02.04.2014, the appellant and his brother would be entitled to the interest at the rate, on which, the amount stood invested in various FDs. In other words, the respondents/plaintiffs will not only be liable to pay the balance sum of Rs.15,00,000/- to the appellant and his brother, but would also pay interest at the rate of 12% per annum for the period spanning between 05.07.2013 and 02.04.2014. In addition thereto, appellant and his brother will be entitled to interest accumulated on the FDs, lodged in this Court.

16. The decree passed by the learned Single Judge is varied to this extent.

17. The appeal is disposed of accordingly. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS-iv)

//True Copy//

Sub Assistant Registrar

gg

To

The Sub Assistant Registrar (Original Side),
High Court, Madras.

Copy to:
1. The Registrar General, High Court, Madras.

2. The Section Officer, Accounts Section, High Court, Madras.

+2cc to Mr.K.KANNAN, Advocate, S.R.No. 90397
+1cc to Mr.A.V.ARUN, Advocate, S.R.No. 90386

Pre-Delivery Judgement
in O.S.A.No.388 of 2013

SVI(CO)
TR(22/01/2018)