IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.10.2017

CORAM:

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

and

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

O.S.A.No.152 of 2016
and C.M.P.No.10689 of 2016

Duraisingam .. Appellant/Plaintiff

Vs.

1. S.R.Jaganathan,
   S/o.(Late) Rajagopal Iyengar,
   No.15, II Main Road,
   Jaganathapuram,
   Velachery, Chennai-42.

2. Mrs.Prema Krishnamurthy,
   13/1, Park View Apartments,
   Nagendra Nagar,
   Velachery, Chennai-42. ** .. Respondents/Defendants

** R2 Exparte vide Court order
dated 07.09.2017 made in OSA No.152/2016
and CMP No.10689 of 2016

* * *

Prayer : Original Side Appeal filed under Rule 36(i) of the Original Side Rules read with Clause 15 of Letters Patent, against the judgement order Decree dated 27.08.2015, passed in C.S.No.301 of 2007 on the file of this Court.

* * *

For Appellant : Mr.Doraisamy, Senior Advocate
for M/s.V.R.Appaswamee

For Respondent : Mr.V.Ramamurthy for R1

JUDGMENT

[Judgment of the Court was made by RAJIV SHAKDHER, J.]

1. This is an appeal preferred against the judgement and decree of the learned Single Judge dated 27.08.2015.

2. The appellant before us is the original plaintiff in the suit. The dispute, which arises in the appeal, falls in a narrow compass.

2.1. The appellant has, essentially, failed in the suit for the reason that he was unable to demonstrate with the help of requisite evidence that he was ready and willing to perform his obligations under the agreement to sell.

2.2. Accordingly, the suit was dismissed, with a direction that respondent No.1 will return the advance of Rs.4,00,000/- given by the appellant with interest at the rate of 12 % from the date of the suit till the date of payment. Respondent No.1 was further directed to pay interest qua the said sum within the period of one (1) month from the date of receipt of a copy of the judgement.

2.3. The agreement to sell is dated 23.09.2005 (in short, "agreement to sell"). The agreement to sell, admittedly, was, in the first instance, executed between respondent No.1 and 2, i.e., the original defendant No.1 and 2. Respondent No.1 is the owner of the property, which is located at Plot No.27, Survey No.443 in 137, Velachery Village, Guindy-Mambalam Taluk, Chennai District (previously Saidapet Taluk, Chengulpet District), Door No.15, II Main Road, Jagannathapuram, Velacherry, Chennai-600 042, (hereafter referred to as, "the subject property") and ad-measures 3600 Sq.Ft.

2.4. We are informed that respondent No.1 is, approximately, 83 years old.

2.5. The appellant stepped into the transaction, by virtue of respondent No.2 appointing him as her nominee. Admittedly, the appellant is a real estate broker, who facilitated execution of the agreement to sell between respondent No.1 and 2.

2.6. Amongst other things, under the terms of the agreement to sell, respondent No.2, who is the original purchaser, was required to pay a total consideration of Rs.66,00,000/-, for purchasing the subject property.

2.7. Respondent No.2, in pursuance of the same, paid an advance sum of Rs.3,00,000/-, followed by payment of a sum of Rs.1,00,000/- via two tranches of Rs.50,000/- each. The two tranches of Rs.50,000/- each, came to be made over, due to the reason that the original time frame given for completion of sale transaction, which was three (3) months, expired on 29.12.2005.

The first tranche was paid on 20.12.2005, followed by the second tranche of Rs.50,000/-, which was made over on 06.02.2006.

2.8. Upon payment of second tranche of Rs.50,000/-, respondent No.1 and 2, mutually, agreed to extend the time limit for fulfilment of their respective obligations under the agreement to sell, by another three (3) months.

2.9. The appellant, as indicated above, stepped into transaction on 03.08.2006, when respondent No.2 appointed him as her nominee qua the agreement to sell.

3. Admittedly, no prior notice of the fact that the appellant was appointed as a nominee was given to the owner i.e. Respondent No.1. The record, however, shows that on the same date, i.e., 03.08.2006, respondent No.2 addressed a communication to respondent No.1 informing him with respect to the appointment of the appellant as her nominee. Pertinently, the power conferred on respondent No.2 to appoint a nominee is set out in clause 6 of the agreement to sell.

3.1. There is no dispute that the said communication was received by respondent No.1. However, upon receipt of the said communication on 05.08.2006, respondent No.1 wrote to respondent No.2, indicating therein that, since, the matter concerning the execution of a sale deed had been "dragged" by respondent No.2, the agreement to sell had lapsed. One of the reasons set out therein was that because of the delay, the market value of the subject property had enhanced, given the efflux of time.

3.2. It may also to be noted that in the very same communication, respondent No.1 averred that he had approached respondent No.2 with a proposal to return the advance amount of Rs.4,00,000/- along with interest. It was further indicated that the total amount that respondent No.1 owed was Rs.5,00,000/-, and that, this proposal was rejected, as respondent No.2 made a demand for payment of a further sum of Rs.2,00,000/-. The demand, evidently, for payment of an additional sum of Rs.2,00,000/- was made on behalf of the appellant.

3.3. Respondent No.2, who had, as indicated above, already removed herself from the transaction, curiously, had her advocates' write to the advocate for respondent No.1 on 16.08.2006. In the said communication, it was asserted on behalf of the respondent No.2, by her advocates, that : the nomination had been made in favour of the appellant; and the fact that Rs.4,00,000/- had been paid towards the purchase of the subject property.

3.4. The assertion made by respondent No.1's advocate vide communication dated 05.08.2006, that a sum of Rs.2,00,000/-, was demanded for payment to the appellant was denied. Furthermore, it was indicated that respondent No.2's nominee i.e., the appellant, was ready and willing to perform his part of the obligation and, in that behalf, was in possession of sufficient funds.

3.5. Interestingly, there was no reference to the fact that respondent No.1 had not furnished copies of the title deeds and/or revenue records. This aspect of the matter is highlighted here, in view of the fact that the appellant, before the learned Single Judge, gave this as the reason as to why the sale transaction could not be consummated.

4. Moving on with the narrative, on 23.08.2006, respondent No.1 via his advocate, wrote to respondent No.2 reiterating the fact that the extension of three (3) months granted on 06.02.2006, had expired on 06.05.2006. The stand taken in this communication was that the agreement to sell had lapsed on 06.05.2006. It was also asserted on behalf of respondent No.1 that the action of respondent No.2 in nominating the appellant was, therefore, inefficacious, as the agreement to sell had lapsed.

5. The record shows that the appellant, for the first time, engaged in communication with respondent No.1, when, he had his advocates write to respondent No.1, on 27.11.2006. As alluded to above, for the first time, it was sought to be brought to the notice of respondent No.1 that necessary title deeds and documents had not been furnished for scrutiny, despite, a demand being made, in that behalf, by respondent No.2.

5.1. As noticed by us above, respondent No.2's Advocate in their communication dated 16.08.2006, had not made any such grievance.

6. It is in this background, that the appellant instituted the suit on 12.04.2007, which was nearly five (5) months after communication had been sent by his advocate on the subject, to which we have made a reference above.

7. Upon summons being issued in the suit, written statements were filed by the respondents. Upon completion of pleadings, and admission and denial of documents, the following issues were framed :

1. "Whether the sale agreement dated 23.09.2005 is a true and valid document?
2. Whether the nomination under Clause 6 of the agreement is true, valid and enforceable?
3. Whether the plaintiff was ready and willing to perform his part of the obligations?
4. Whether time is essence of the agreement?
5. Whether the suit agreement stood terminated, abandoned and forfeited?
6. Whether the assignment of the agreement of

sale by the second defendant to the plaintiff is supported by a valid consideration?

7. Whether the suit agreement suffers from material alteration?
8. Whether the plaintiff is entitled to the equitable relief of specific performance ?
9. To what relief, if any, the plaintiff is entitled ?”

8. The learned Single Judge, after considering the evidence on record, returned the following finding of facts, which, broadly, can be paraphrased as follows:

(i) That the appellant was not ready and willing to perform his part of the obligation under the agreement to sell.

(ii) Even though, time was not the essence of the contract, neither the appellant nor respondent No.2 was ready and willing to purchase the subject property within a reasonable time from the date on which agreement to sell was executed.

(iii) Given the fact that the Court was exercising an equitable and discretionary jurisdiction, weight had to be given to the fact that more than a decade had passed, since, the agreement to sell was executed. Increase in prices of the immovable property had raised the possibility of unfair advantage accruing to the appellant, if, the transaction was taken to its logical end.

(iv) The fact that respondent No.1 had himself taken a stand in the written statement that he was willing to return the advance paid qua the subject property, the said sum i.e., Rs.4,00,000/- along with interest should be ordered to be refunded by respondent No.1 in favour of the appellant.

9 Given this background, the appellant preferred the instant appeal.

10. In support of the appeal, arguments were advanced by Mr.Duraisamy, learned Senior Advocate, instructed by Mr.V.R.Appaswamee, while, on behalf of respondent No.1, submissions were made by V.Ramamurthy.

10.1. Pertinently, respondent No.2 was set ex-parte vide order dated 07.09.2017.

11. It is submitted by Mr.Duraisamy, learned Senior Advocate that the impugned judgement rendered by the learned Single Judge is erroneous for the following reasons :

(i) It is well settled that qua an agreement dealing with sale of immovable property, time is not the essence. The fact that time for performance, which was, initially, set at three

(3) months was extended, thereafter, by another three (3) months, by mutual agreement arrived at between respondent No.1 and 2, would show that time was not of the essence for consummating the sale transaction.

(ii) Respondent No.1 had never disputed the fact that the appellant was ready and willing to perform his obligations under the agreement to sell. The appellant is an income tax assessee, and therefore, quite logically, would have the capacity to pay the balance consideration, which was a sum of Rs.62,00,000/-.

(iii) The escalation in prices would have to be examined in the context of prices prevailing on the date, when, the agreement to sell was executed, i.e., September, 2005, and not prices, which prevailed as on date.

12. On the other hand, Mr.V.Ramamurthi, who appeared on behalf of respondent No.1, largely, relied upon the impugned judgement to advance his arguments. Learned counsel for respondent No.1 sought to highlight the fact that respondent No.1 was aged, approximately, 83 years, and that, this was his only residential property. Learned counsel further contended that the appellant, who is a real estate agent, stepped into the transaction only to make financial gains, albeit, without investing any capital amount, and therefore, did not press for consummation of the sale transaction, as he did not have the necessary financial wherewithal. In other words, his submission was that the appellant did not produce any evidence, which would demonstrate that he had the financial wherewithal to complete the sale transaction.

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

14. What emerges, clearly, from the record, and these are facts, which are not in dispute, is as follows :

(i) That the agreement to sell, Ex.P.1, was executed between respondent 1 and 2. The appellant along with another person was only a witness to the said agreement.

(ii) The time for completing the sale was pegged at three (3) months from the date of the execution of the agreement to sell.

(iii) Respondent No.1, received a sum of Rs.3,00,000/- from respondent No.2, the original purchaser, and in respect of the same, had issued a stamped receipt dated 18.09.2005.

(iv) In addition to the said sum of Rs.3,00,000/-, an additional sum of Rs.50,000/- was received by respondent No.1, once again, from respondent No.2, on 20.12.2005. This was followed by respondent No.1 receiving yet another sum of Rs.50,000/- from respondent No.2, albeit, on 06.02.2006. The receipt generated for the said sum of Rs.50,000/- affirmed the fact it was paid to extend the time for completion of sale by a further period of three (3) months.

(v) Respondent No.2, appointed the appellant as her nominee, without prior intimation to respondent No.1.

(vi) Via the communication dated 03.08.2006, respondent No.2 informed respondent No.1 that she had appointed the appellant as her nominee.

(vii) For the first time, the appellant wrote to respondent No.1 on 27.11.2006.

15. The aforesaid admitted facts would show that, clearly, the extended period of three (3) months expired on 06.05.2006, and that, the appellant was appointed as her nominee, only after the said period had expired.

15.1. Respondent No.1, thus, took a stand in her communication dated 05.08.2006, that the agreement to sell had lapsed, and therefore, the appellant's nomination was null and void.

16. Mr.Duraisamy, however, argues that time was not of the essence. The learned Single Judge has indicated that, while, time was not the essence, it was incumbent upon the appellant to have acted within a reasonable period of time to enforce his rights under the agreement to sell. The aforementioned dates and events, which are not in dispute, would show that despite the fact that the appellant was in the knowledge of the contents of the agreement to sell, right from the time it was executed, as he was witness to the agreement to sell, he chose not to act qua the same till 12.04.2007, when, the suit for specific performance was instituted, despite the fact that respondent No.1 had put the appellant to notice that his appointment as the nominee of respondent No.2 was not valid, after extended period of three (3) months had expired on 06.05.2006. In this regard, the following observations of the Supreme Court rendered in the decision concerning in Chand Rani V. Kamal Rani, (1993) 1 SCC 519, being relevant are extracted hereafter :

> ".... it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident) : (1) from the express terms of the contract ; (2) from the nature of the property ; and (3) from the surrounding circumstances, for example, the object of making the contract."
>
> (emphasis is ours)

16.1. The Constitution Bench judgement of the Supreme Court in Chand Rani's case was followed by the Supreme Court in

K.S.Vidyanadam and Others V. Vairavan, (1997) 3 SCC 1. Similar observations were made in this case as well. For the sake of convenience, the same are extracted hereafter :

> "...... 10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovably property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. ....
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> 11. Shri Sivasubramaniam cited the decision of the Madras High Court in S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar, AIR 1952 Mad 389, holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality — and the reality is constant and continuous rise in the values of urban properties — fuelled by large-scale migration of people from rural areas to urban centres and by inflation. ....."

16.2. Be that as it may, the learned Single Judge has also non-suited the appellant on two other grounds, to which we have made a reference above : (i) First, that the appellant was unable to show that he was ready and willing to fulfil his part of the obligations contained in the agreement to sell. (ii) Second, since, in the interregnum more than a decade had passed, there was a steep escalation in the price of the subject property, which would make it inequitable to exercise discretion in favour of the appellant.

17. In our view, in so far as readiness and willingness of the appellant to perform his obligations is concerned, it can only be ascertained from the evidence on record.

17.1. As indicated above, while, the appellant via his Advocates' notice, which is dated 27.11.2006, did assert that the appellant was ready and willing to perform his part of the obligation, there was nothing shown, which would have us to come to such a conclusion.

17.2. This aspect with regard to the readiness was put to Mr.Duraisamy, who countered the same by submitting that since, the appellant was an income tax assessee, it was an adequate indicator of demonstrable financial capacity to pay the balance sale consideration to respondent No.1.

17.3. On being asked as to whether any other evidence was placed before the learned Single Judge with regard to the appellant's financial capacity, the learned Senior Advocate admitted that no other material was placed on record.

17.4. In our view, while, it may not be necessary for the appellant to demonstrate that he had an amount equivalent to the balance consideration lying credited in his bank account, it was, certainly, incumbent upon him to be able to demonstrate to the trial court that he had the necessary financial wherewithal. The initial burden with regard to readiness and willingness is on the person, who seeks performance of the agreement to sell.

17.5. Given the evidence on record, we are not persuaded to hold that merely because the appellant was an income tax assessee, he had the financial capacity to pay the balance sale consideration to respondent No.1. In coming to this conclusion, we need not go to the extent of saying that the appellant was not willing to perform his part of the obligation, though, as indicated above by us, and the learned Single Judge had held that there was unexplained delay in approaching the Court by way of the instant suit.

17.6. Be that as it may, as adverted to above, in so far as the readiness is concerned, we are in agreement with the learned Single Judge that the appellant had failed to demonstrate that he had the necessary financial capacity to pay the balance sale consideration of Rs.62,00,000/- to respondent No.1. Our sense of the matter is that the appellant, who is a real estate agent, was only attempting to make a quick-buck, by keeping the litigation in play, till such time he found another suitable financial backer to purchase the subject property. Such financial adventurism by the appellant, who is a realtor and is pitted against an 83 year old man fighting to save his only residential property deserves to be dissuaded.

18. On the last aspect as to whether discretion should be exercised in favour of the appellant, notwithstanding the age and circumstances of respondent No.1, we are in agreement with the learned Single Judge that the price of the subject property has escalated enormously, given the elapse of time between the date, when the agreement to sell was executed, and today. To exercise equitable jurisdiction in favour of the appellant, would, in our view, neither be fair nor equitable. In this case, the advance paid is equivalent to, approximately, 6% of the total consideration agreed to between the parties. In this behalf, we may note with profit, the following observations of the Supreme Court in Mrs.Saradamani Kandappan V. Mrs.S.Rajalakshmi and Others, 2011 (4) L.W. 97 (SC) :

> "…. 25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and `non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to

sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

26. It is now well settled that laws, which may be reasonable and valid when made, can, with passage of time and consequential change in circumstances, become arbitrary and unreasonable. .....”

(emphasis is ours)

19. Before we conclude, we may also note that there was an unexplained delay in instituting the suit. The suit was instituted on 12.04.2007, though, the appellant was appointed as the nominee of respondent on 03.08.2006.

19.1. The explanation given by the appellant to get over delay was that respondent No.1 had not furnished copies of the original title deeds. In this behalf, the following needs to be noted :

19.2. The agreement to sell was executed on 23.09.2005. The appellant, for the first time, got his Advocates' to write to respondent No.1 was on 27.11.2006. It was, in this letter that the appellant raised the issue that photocopies of the original title deeds had not been furnished for scrutiny by respondent No.1. This assertion was, clearly, an afterthought.

19.3. Respondent No.2, in her letter dated 16.08.2006, had not made a grievance that photocopies of original deeds were not supplied, or, that the original title deeds were not presented for scrutiny.

19.4. We find it curious that respondent No.2 would part with a sum of Rs.4,00,000/-, without having, in the very least, scrutinized the original title deeds and obtained photocopies of the same.

19.5. The fact that this plea is false is borne out from the testimony of P.W.1. In this behalf, the relevant part of his testimony is extracted hereafter :

“At that time, we verified the original documents relating to the property which was shown to us by the 1st defendant. The sale price was fixed at Rs.66 lakhs. I deny the suggestion that the transaction was finalised on 18.09.2005 and an advance of Rs.3 lakhs was paid to the 1st defendant. We entered into the sale agreement with the 1st defendant on 23.09.2005 under Ex.P.1. ....”

(emphasis is ours)

19.6. Clearly, the appellant has not given reasons as to why he did not institute the suit in time.

20. For all these reasons, we are not inclined to interfere with the judgement of the learned Single Judge. Accordingly, the appeal is dismissed. Resultantly, pending application shall stand closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gg

To
The Sub Assistant Registrar (O.S.),
Madras High Court, Chennai.

+1cc to Mr.V.R.APPASWAMEE, Advocate, S.R.No. 72891/17

+1cc to Mr.V.RAMAMURTHY, Advocate, S.R.No. 72835/17

O.S.A.No.152 of 2016
and C.M.P.No.10689 of 2016

SJ (CO)
TR(30/11/2017)