

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :19.12.2016

Pronounced on: 04.01.2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

C.S.No.760 of 2013

1. P.B.Prince Andrew
2. R.C.Maheswari .. Plaintiffs

vs.

K.V.Rathnam ... 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 perform the obligations imposed on him under the agreement of sale dated 21.11.2010 and execute and register the deed of sale conveying the suit property to the plaintiffs on receipt of the balance sale consideration of Rs.1,75,00,000/- failing which the Court may direct the Officer of this Court to execute and register the deed of sale so conveying the suit property being the shop bearing No.3, in the ground floor, western side of the building bearing Plot No.C-35, measuring a

plinth area of 413.25 square feet together with 1/25th undivided share in the lands of an extent of 2 Grounds and 725 square feet, comprised in R.S.No.207/17 Part of Koyambedu Village, presently in the Thirumangalam Village, in favour of the plaintiffs;

(b) In the alternative, directing the defendant to pay the plaintiffs a sum of Rs.53,00,000/- being the advance paid in the sum of Rs.35,00,000/- together with inerest thereon at 18% per annum in the sum of Rs.18,00,000/- from the date of payment thereof till the date of plaint, with further interest at 18% per annum on the sum of Rs.35,00,000/- from the date of plaint till the date of payment;

c) costs of the suit;

For plaintiffs : Mr.P.Satheeshkumar

For Defendant : Mr.P.Sesubalanraja

J U D G M E N T

The suit is filed for specific performance or in the alternative for recovery of the advance amount paid to the defendant and for costs.

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

The defendant by an agreement of sale dated 21.11.2010 agreed to sell the plot No.C35 measuring a plinth area of 412 of 25 together with 1/25th share in the land to an extent of 2,725 sq.ft. for a total sale consideration of Rs.2,10,00,000/- to the plaintiffs. On the date of agreement, an advance amount of Rs.30,00,000/- has been paid. The time stipulated for the completion of the sale is on before 20.2.2011. It is also agreed between the parties that the sale is subject to the approval of the defendant's title to the property by the advocate of the plaintiffs, whose opinion shall be final. The plaintiffs have also paid another sum of Rs.5,00,000/- on 09.04.2011 through bank transaction. Thus, the balance consideration payable is only Rs.1,75,00,000/-. As the plaintiffs' lawyer required planning permission to give his opinion and the same was communicated to the defendant to furnish the planning permission. However, the defendant did not provide the planning permission immediately. Therefore, the plaintiffs having invested heavy amount, informed the defendant that they are not insisting on planning

permission and requested him to complete the sale transaction.

3. The defendant has evaded the sale. Having taken substantial advance from the plaintiff, the defendant also leased out the properties to the third parties and avoided to perform his part of the contract. The plaintiffs are always ready and willing to continue to perform the obligation. As the defendant is avoiding the completion of sale, the plaintiffs issued a legal notice on 10.10.2013 calling upon the defendant to execute the sale deed after receipt of the balance sale consideration. Though the defendant received the legal notice sent by the plaintiffs, he neither replied nor came forward to execute the sale deed. Hence, the suit for specific performance or in the alternative for recovery of a sum of Rs.53,00,000/- together with interest at the rate of 18% per annum on Rs.35,00,000/- from the date of plaint till the date of realization.

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

It is the contention of the defendant that due to slow down in his business and sudden financial crises, the

defendant has already availed loan from the State Bank of India. As he had not paid the amount within the period, the bank has taken steps to bring the property of the defendant situate in Neelankarai and the suit property to public auction. Therefore, in order to save the property, he has entered into a sale agreement for the sale of the suit property for a total sale consideration of Rs.2,10,00,000/-. He was under bonafide belief that the balance sale consideration will be paid by the plaintiffs within three months as per the agreement. But the plaintiffs had not paid the balance sale consideration as agreed by them. However, on 09.04.2011, after the lapse of the period mentioned in the agreement, the plaintiffs with a malifide intention has transferred a sum of Rs.5,00,000/- to the defendant's account. The plaintiffs also informed the defendant that they are not in possession of balance sale consideration. Therefore, they have agreed to cancel the agreement and the defendant has agreed to return the advance amount.

5. In the meantime, there was a tremendous pressure to settle the dues to the bank. As the defendant was not in a position to sell the property at Neelankarai as well

as the suit property, he has entered in to a joint venture agreement to sell the property at Neelankarai with one Saji Builders for the sale consideration at the rate of Rs.3,125/- per sq.ft. For the above transaction, the defendant also executed a Power of Attorney in favour of the Saji Builders. The said Power of Attorney holder has sold the property after 8 months at the rate of 4450/- per sq.ft., gaining 42.4% profit.

6. When the matter stood thus, Mr.Muneer Basha filed a complaint against the defendant and his wife and the same resulted in police investigation in Crime No.15 of 2012 by the E.O.W.II, Chennai. Because the plaintiffs have not paid the balance sale consideration at the relevant point of time, he was forced to sell his property at Neelankarai. The plaintiffs were not ready and willing to perform their part of the transaction. The police thoroughly enquired the complaint of the said Muneer Basha and filed a final report holding that Neelankarai property would have sold for not less than Rs.1,35,00,000/-. Therefore, according to the defendant he has suffered heavy loss and even loss of more than Rs.40,50,000/- as on December 2011. Hence, it

is the contention of the defendant that the plaintiffs have to pay the said loss amount of Rs.40,50,000/- as a counter claim along with interest at the rate of 18% per annum. Hence, he has prayed for dismissal of the suit and prayed for allowing the counter claim pleaded in the written statement.

7. On the basis of the above pleadings, this Court framed the following issues on 29.10.2016.

1. Whether the agreement of sale dated 21.11.2010 is true and binding on the parties?

2. Whether the plaintiffs and defendant were ready and willing to perform their part of the contract?

3. Whether the plaintiffs are entitled to relief of specif performance?

4. To what other reliefs, the parties are entitled to?

8. While framing issues, it is seen that issue has not been framed with regard to the counter claim raised by the defendant in the written statement. However, both the parties have adduced evidence not only in respect of the above issues but also the counter claim pleaded by the defendant. Therefore, this Court is of the view that the

following additional issue is required to be framed :

1. Whether the defendant is entitled to a sum of Rs.43,73,500/- as a counter claim from the plaintiff?

9. Since both sides were aware of the counter claim and led evidence with regard to the above additional issue, no further evidence, whatsoever is required.

10. The first issue is an unnecessary issue. There is no dispute with regard to the agreement of sale. Hence this Court has struck out the first issue and recast the issues as follows :

1. Whether the plaintiffs were ready and willing to perform their part of the contract?

2. Whether the plaintiffs are entitled to relief of specific performance?

3. To what other reliefs, the parties are entitled to?

11. On the side of the plaintiffs, P.W.1 was examined and Exs.P1 to P8 were marked. On the side of the defendant, D.W.1 and D.W.2 were examined and Exs.D1 to D4 were marked. The details of the same are hereunder:

Exhibits produced on the side of the plaintiff:

S.No .	Exhibi ts	Date	Description
1.	P-1	25.07.1985	Certified copy of the sale deed
2.	P-2	20.09.1991	Certified copy of the sale deed
3.	P-3	02.02.1995	Certified copy of the sale deed
4.	P-4	21.11.2010	Original sale agreement
5.	P-5	17.07.2013	Copy of the letter given by the defendant to the Inspector of Police, V.5 Thirumangalam Police Station.
6.	P-6	10.10.2013	Copy of the legal notice sent by the plaintiffs to the defendant with postal acknowledgment
7.	P-7	27.05.2011	Certificate given by State Bank of India with regard to deposit of title deeds
8.	P-8	18.08.2014	Copy of the deposit receipt issued by the Indian Overseas Bank, Anna Nagar Branch

Exhibits produced on the side of the defendant:

S. No.	Exhibi ts	Date	Description of documents
1.	D-1	25.07.1985	Certified copy of the sale deed
2.	D-2	20.01.2012	Original receipt issued by the State Bank of India
3.	D-3	---	Certified copy of the final report filed by the Economic Offences Wing-II, Chennai

<i>S. No.</i>	<i>Exhibits</i>	<i>Date</i>	<i>Description of documents</i>
4.	D-4	03.01.2014	Certified copy of the Order passed in by the Chief Metropolitan Magistrate, Chennai.

Witnesses examined on the side of the plaintiffs:

P.W.1. - R.C.Maheswari

Witnesses examined on the side of the defendant

D.W.1 - K.V.Rathnam

12. The learned counsel appearing for the plaintiffs would contend that the defendant had agreed to sell the property for a total sale consideration of Rs.2,10,00,000/-. An agreement of sale was entered into between the parties and the defendant also received an advance of Rs.30,00,000/- on the date of agreement of sale. Since the defendant has failed to produce the planning permission of the building, the sale could not be completed and the substantial time agreed in the contract could not be fulfilled by both sides. Subsequently, the plaintiffs also made another payment of Rs.5,00,000/- on 09.04.2011. Having received the above amount, the defendant has not

returned that amount also. These facts clearly show that time is not an essence of the contract. The plaintiffs are always ready and willing to perform their part of the contract. To avoid to perform his part of the contract and also to avoid the return of the advance amount, the defendant has set up the counter claim based on the police report filed in respect of some criminal complaint filed against the defendant. Absolutely, there is no evidence to prove the so called loss said to have incurred by the defendant in some other contract. The plaintiffs have also sent a legal notice and the defendant has not sent any reply to the said notice. The plaintiffs were always ready and willing to perform their part of the contract. Hence prayed for specific performance or in the alternative for return of the advance amount and also prayed for dismissal of the counter claim.

13. It is the contention of the learned counsel for the defendant that the defendant has agreed to sell the property only in order to clear the dues to the bank and to complete the sale, three months time has been fixed in the agreement. Whereas, the plaintiffs have not completed the transaction within the agreed time. However, on

09.04.2011, after expiry of the time limit, without the knowledge of the defendant, the plaintiffs have transferred a sum of Rs.5,00,000/- to the account of the defendant. The suit has been filed after much delay. The above conduct of the plaintiffs clearly indicate that the plaintiffs were never ready and willing to perform their part of the contract. Only after 2½ years of agreement, the plaintiffs gave a false complaint to the police and tried to get the sale deed on old terms and it was refused by the defendant. The contention of the plaintiffs that the defendant was delaying to provide planning permission is not true. In fact, along with Ex.P.2 document itself, the planning permission has been attached. Therefore, it is the contention of the defendant that the suit for specific performance is not at all maintainable.

14. It is the further contention of the learned counsel of the defendant that because of the delay in payment by the plaintiffs, the defendant had entered into a joint venture contract with the Saji Builders and subsequently, he was forced to sell the property to a lesser amount to the Power of Attorney Holder of the Saji Builders. After 8 months the said Saji Builders have sold

the property for a higher value. Therefore, the defendant has suffered huge loss. The police report, which is marked as Ex.D.3 clearly show that the defendant's other property was sold for much more than value sold by the defendant to the Shaji Builders. Hence defendant is entitled to damages as claimed in the counter claim.

15. In the light of the above submissions, now this Court has to proceed the issues one by one.

16. Heard Mr.P.Satheeshkumar, learned counsel for the plaintiffs and Mr.Mr.P.Sesubalanraja, learned counsel for the defendant.

17. Issue No.1 :

The suit has been laid to enforce the agreement for sale dated 21.11.2010 entered into between the plaintiffs and the defendant, for the sale of the suit property. It is not in dispute by both sides. Ex.P.4 agreement of sale, was entered into between the plaintiffs and the defendant for sale of the property for a sale consideration of Rs.2,10,00,000/-. It is the contention of the plaintiffs that the defendant is avoiding the contract and failed to produce the planning permission. Therefore, there was a delay in performance of the contract by the plaintiffs.

However, the plaintiffs were always ready and willing to perform their part of the contract.

18. Admittedly, there is no dispute with regard to the execution of the agreement for sale of the suit property by the defendant. It is to be noted that in a suit for specific performance, it is for the plaintiffs to establish that they were ready and willing to perform their part of the obligation of the contract till the end. In this regard, on a careful perusal of Ex.P.2 agreement of sale dated 21.11.2010, the parties have specifically agreed to complete the sale on or before 20th February, 2011. There is no dispute with regard to the receipt of the advance amount of Rs.30,00,000/- on the date of agreement. The condition stipulated in the agreement show that the sale shall be completed on or before 20th February, 2011. Further, the terms agreed between the parties show that the proposed sale transaction is subject to the approval of the title of the vendors by the advocate for the purchaser whose opinion on title will be final. The terms agreed between the parties clearly show that the willingness on the part of the plaintiffs to purchase the suit property from the beginning is absent. They have agreed to purchase

the property only by subsequent approval by their lawyer. This condition clearly show the willingness to purchase the property as per the agreement entered into between the parties is absent on the part of the plaintiffs.

19. It has to be noted that to seek a relief of specific performance, the plaintiffs have to prove their readiness and willingness. The readiness means the capacity to raise funds, the willingness is mental attitude. Putting a condition to purchase the property only after approval of their lawyer itself clearly indicate that willingness on the part of the plaintiffs is absent from the beginning. If both the conditions, i.e., readiness and willingness is established from the very inception, the plaintiffs can succeed in getting the sale deed executed in their favour. Whereas, the plaint pleadings itself clearly indicate that only subsequently they have requested the planning permission from the defendant. It has to be noted that the property agreed to be purchased is a flat. The title deeds filed by the Plaintiffs in Ex.P.1, Ex.P.2, Ex.P.3 clearly show that the building is already been occupied by the concerned party. Therefore, the contention of the plaintiffs that only the

defendant had delayed in giving planning permission cannot be countenanced. Even assuming that the plaintiffs are ready and willing from the very beginning, nothing prevented the plaintiffs to take further steps by issuing legal notice at the earliest point of time by the demanding the planning permission from the defendant. They have not done so.

20. Further, the plaint pleadings itself clearly show that in fact only his brother has expressed his capacity to purchase the property. This fact clearly indicate that the plaintiffs have no capacity to mobilize funds at the relevant point of time to pay the balance sale consideration. The second plaintiff was examined as P.W.1 and the first plaintiff is her husband. In her cross examination, P.W.1 has categorically admitted that after entering into the sale agreement, she did not consult any lawyer for opinion. This fact falsifies the pleading of the plaintiffs in para No.4 wherein, it is averred that their lawyer instructed them to get the planning permission. P.W.1 in her evidence has categorically stated that she has not approached the lawyer after agreement. Further, the cross examination of P.W.1 also clearly

indicate that on the basis of the sale agreement, they want to raise the amount by availing loan from the bank. These facts clearly show that the plaintiffs have no capacity to mobilize the funds at the relevant time. The above facts clearly indicate that the plaintiffs were never ready and willing to purchase the property.

21. It has to be noted that though specific time is agreed in the agreement, till the date of legal notice, i.e., 10.10.2013, no steps whatsoever was taken by the plaintiffs to perform their part of contract. Ex.P.8 was filed to show that P.W.1's mother and sister have sufficient money in the deposit. On perusal of Ex.P.7, the deposit has been made only on 18.08.2014 and the endorsement made by the bank officials also clearly show that as against the deposit, a sum of Rs.52,00,000/- was also availed as loan by the above persons. Merely because some amount was deposited in the account by the mother and sister of P.W.1, it will not be sufficient to infer that the plaintiffs had sufficient money at the relevant point of time. The deposit was made only in the year 2014. Whereas the agreement has been entered in the year 2010. From 2010 to 2013, no steps whatsoever has been taken by

the plaintiffs. Therefore, the evidence and also from the pleadings and other documents reveal that the plaintiffs have not established readiness and willingness from the inception of the agreement. Hence, this Court is of the view that as the plaintiffs have not established their readiness and willingness to perform their part of the contract, they are not entitled for specific performance as prayed for and the issue is answered accordingly.

22. Issue Nos.2 and 3 :

The plaintiffs have admittedly paid a sum of Rs.30,00,000/- on the date of agreement and subsequently a sum of Rs.5,00,000/- was also paid through bank transaction, which is also not in dispute by the defendant. In respect of sale agreement executed in the year 2010, the plaintiffs have filed the suit against defendant on 04.11.2013. The delay in coming to the Court clearly exhibit that the plaintiffs were never ready and willing to perform their part of the contract. Though the plaintiffs have not established their readiness and willingness from the beginning, this Court is of the view that the the defendant has not returned that the above advance amount Rs.35,00,000/- and the plaintiffs are entitled for return

of the advance amount along with interest at the rate of 6% per annum from the date of payment till the date of realization. Since the plaintiffs were not ready and willing to perform their part of the contract in time, this Court restricts the rate of interest as above.

23. Additional Issue No.1 :

It is the contention of the defendant that there was sudden fall in his business. Therefore, he has approached the bank for availing loan. Before the loan being processed, one Mr.Muneer Basha of Saji Builders approached the defendant for joint venture. Subsequently, the said Saji Builders offered to purchase the property at Neelankarai. It is according to the defendant that he sold the property at Neelankarai for a lesser rate, at the rate of Rs.3,125/-per sq.ft. After 8 months, the purchaser sold the property at the rate of 4,450/- per sq.ft. and gained 42.4% profit. Therefore, it is the contention of the defendant that the loss was suffered by defendant due to non payment of the remaining sale consideration by the plaintiffs.

24. It is to be noted that the defendant's own pleadings clearly shows that even prior to entering into

contract with the plaintiffs, there was an understanding between the defendant and the Saji Builders for developing the property situate at Neelankarai. Even during the cross examination, the defendant has admitted that he has entered into a joint venture agreement with Saji Builders in the year 2007. Therefore, the contention of the defendant that only due to failure on the part of the plaintiffs to pay the balance sale consideration of the agreed sale amount as per Ex.P.4 sale agreement dated 21.11.2010, only led to loss incurred by him, cannot be sustained. The defendant entered into the alleged joint venture agreement with one Saji Builders much prior to the present agreement of sale entered between the parties in respect of the suit property.

25. The pleadings of the defendant clearly indicates that he has sold his property situated at Neelankarai to Saji Builders. Subsequently, the purchasers intturn sold the said property with some profit. It has to be noted that the defendant having sold the property to the third party and that person who purchased the property gained some profit after some period of his purchase. At no stretch of imagination, the said profit would amount to

profit to the plaintiffs. Once the property is sold by the defendant for the agreed amount, he cannot now complain about the extra amount earned by the subsequent purchaser. Every day makes a difference in the property sale in the market. Therefore, the defendant cannot now complain that such loss is only because of the plaintiffs. The evidence of D.W.1 and his pleadings in the written statement further indicate that there was some dispute between the defendant and Saji Builders which culminated into police complaint as can be seen from Ex.D.3, final report filed by the police. Ex.D3, infact is a closure report filed by the Investigating Officer. Though the complaint was originally given against the defendant, the investigating officer in his investigation found that the purchaser of the property sold for a higher rate at a later stage. As already discussed, once, the defendant has already sold the property to third party and the third party making such gain, he cannot complain later, for which he cannot seek a counter claim from the plaintiffs.

26. The dispute with regard to the joint venture agreement emerged from the year 2007. Further Ex.D.3 is only a police report and the investigating officer has not

been examined. So the said statement also cannot be given any credence unless those persons are tested before this Court. Further, the legal notice sent by the plaintiffs on 10.10.2013 has been marked as Ex.P.6. The same has been received by the defendant to which no reply, whatsoever was sent. The alleged loss has been pleaded only in the written statement. If really, the defendant was conscious about the loss, he could have replied to the legal notice in the year 2013 itself. But such a plea by a counter claim has been made only in the year 2014, when the written statement was filed on 05.11.2014 for the first time. Further, merely because the subsequent purchaser has sold the property for higher value cannot be considered as loss to the previous seller. Therefore, the contention of the defendant in that regard cannot be countenanced. Hence, this Court hold that the defendant is not entitled for any counter claim.

27. In the result, the suit for specific performance is dismissed. However, the suit is decreed for return of the advance amount of Rs.35,00,000/- along with interest at the rate of 6% per annum from the date of payment till the

date of realization. There is no Order as to cost. The counter claim preferred by the defendant is also dismissed.

sd/.N.S.K.J
04.01.2017

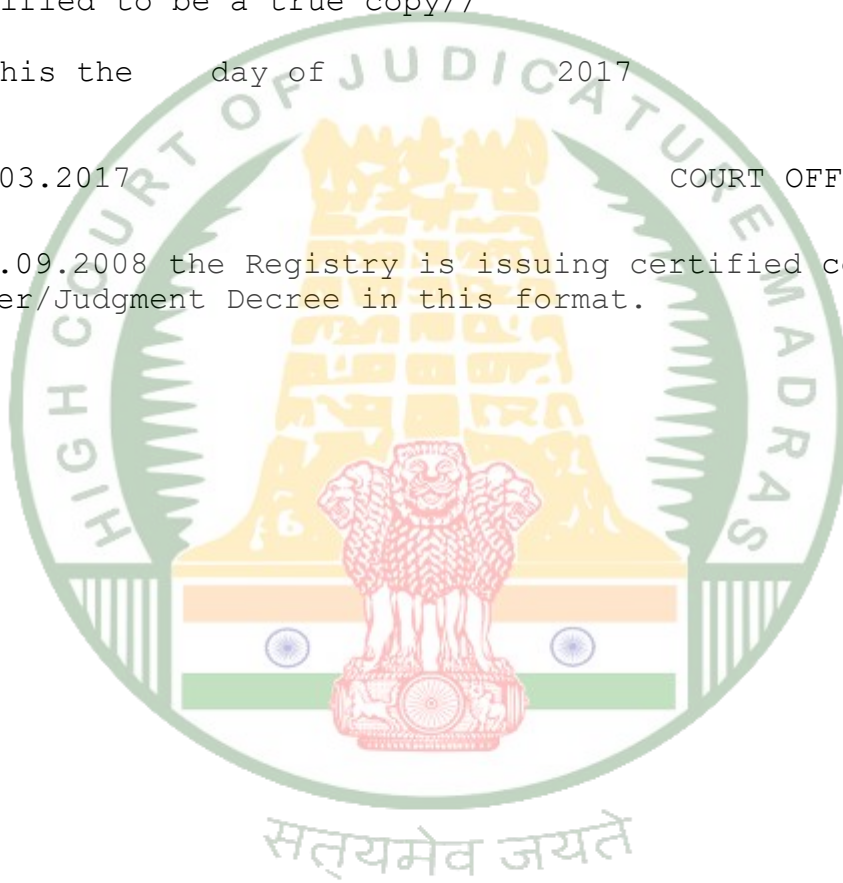
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Dated this the day of JUDICATURE 2017

R.s/17.03.2017

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