

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.03.2017

CORAM

THE HON'BLE MR.JUSTICE P.KALAIYARASAN

C.S.Nos.994 of 2001 and Tr.C.S.No.577 of 2011

1. N.Murugesu Pandian
2. M.Devilal

.. Plaintiffs in both the suits

vs

1. S.K.Arasu @
Santhana Krishna Arasu (deceased)
2. Premavathy
3. V.Shanmugam
4. Nalini
5. Krishnakumari
6. V.Rajendran
7. Prema
8. Sudha

.. Defendants in both the suits

(7 and 8th defendants are impleaded as per
order in I.A.No.9237 of 2009 in
O.S.No.2085 of 1999, dated 15.06.2010)

(7 and 8th defendants are impleaded as per
order dated 24.08.2009 made in
A.No.3368 of 2009)

Prayer in C.S.No.994 of 2001 : Civil Suit filed under Order VII Rule
1 of CPC read with Order IV Rule 1 of O.S.Rules, seeking for a

judgment and decree, directing the defendants to execute and register the sale deed in respect of the schedule properties by specific performance of the sale agreement, dated 10.05.1997 between plaintiffs and defendants failing which this Court may direct the officer of the Court to execute the sale deed and puts the plaintiffs in peaceful possession and enjoyment of the suit properties or in the alternative direct the defendants to refund the sum of Rs.13.00 lakhs together with interest at 18% from 19.10.1997 till realization and for costs.

Prayer in Tr.C.S.No.577 of 2011 : Civil Suit filed under Order VII Rule 1 of CPC, seeking for a judgment and decree, to grant a permanent injunction restraining the defendants herein or their nominee or nominees, agents, servants or anyone calling for an on their behalf from in any manner alienating or encumbering or mortgaging the schedule mentioned properties in Schedules 'A' and 'B' (Item Nos.1 and 2) to any other third party, except the plaintiffs and for costs.

For Plaintiff : Mrs.Chitra Sampath, Senior counsel
for Mr.S.Muthukumar in both the suits

For Defendant : Mr.V.Lakshminarayanan for all
the defendants in both the suits

COMMON JUDGMENT

The plaintiffs have filed two suits against the same defendants, one for permanent injunction and another for specific performance or in the alternative for refund of the advance amount with interest.

2. The brief facts of the case of the plaintiffs as disclosed from the plaints in both the suits are as follows :

(i) The plaintiffs entered into an agreement of sale with the defendants on 10.05.1997 in respect of plaint 'A' and 'B' schedule properties for a total value of Rs.49 lakhs. On 10.05.1997, the plaintiffs had paid an advance of Rs.9 lakhs and thereafter, paid a further sum of Rs.3 lakhs on 10.09.1997 and a sum of Rs.1 lakh on 19.10.1997.

(ii) The plaintiffs 1 and 2 were already tenants in respect of the properties at Door No.60 and 61 respectively and they paid the rents as and when they became due and after finalisation of the agreement, they were not asked to pay further rents in lieu of interest on advance. As per the conditions of the agreement, the defendants did not produce encumbrance certificate for the properties and also did not vacate the tenants from the premises. Though the plaintiffs requested the defendants to comply with the conditions of the sale agreement and to execute the sale deed, the defendants failed and neglected to honour the same.

(iii) The plaintiffs issued a legal notice dated 10.12.1998. The defendants sent a reply dated 04.01.1999. In the reply they have stated that they appropriated a sum of Rs.1 lakh towards liquidated damages. The defendants neither gave any notice regarding the appropriation of the sum nor returned the balance advance amount. The plaintiffs came to know that the defendants are making arrangements to sell the plaint schedule properties to third parties for a higher price. So as to protect the rights of the plaintiffs, they first filed a suit for permanent injunction. The defendants also filed Rent Control Proceedings for eviction of the plaintiffs. The plaintiffs state that one C.S.Subramanian stood as Mediator but nothing came fruitful. The plaintiffs are always ready and willing to perform their part of the contract. Therefore, a separate comprehensive suit for specific performance has also been filed.

3. The contentions in the written statement filed by the defendants in both the suits are as follows :

(i) The defendants are the owners of the plaint schedule properties situated at Door No.60 and 61, Reddy Street, Villivakkam, Madras. It is true that the plaintiffs entered into an agreement of sale with the defendants on 10.05.1997 in respect of plaint 'A' and 'B' schedule properties for a sale consideration of Rs.49 lakhs. The

defendants had agreed to this price because of two prime reasons. (1) that the plaintiff being tenants of the property demanded pagadi to vacate and (2) for the marriage and educational expenses of the defendants' daughters.

(ii) Notice was issued in November 1996 to the first plaintiff and one Deivanai, proprietor Bharath Medicals terminating the tenancy, as they defaulted in payment of rent from July 1996. Only to defend the above proceedings, R.C.O.P.No.329 of 1997 and 330 of 1997 were filed by the tenants and in the said proceedings, the first plaintiff gave an undertaking in July 1997 that he would pay the arrears of 8 months rent and also future rents regularly.

(iii) The defendants agree that the plaintiffs paid a sum of Rs.9 lakhs and further sum of Rs.3 lakhs and finally Rs.1 lakh. The defendants entered into sale agreement with the plaintiffs only because they were in need of money to perform the marriage of Mythili and Bhuvaneswari. As far as the first defendant is concerned, he wanted to alienate so as to facilitate the educational expenses of his daughter Sudha. C.S.Subramanian never stood as Mediator and he is none other than the co-brother of the first plaintiff. He is the root cause for all the mischief caused. His name also finds a place in the

complaint lodged by the defendants to the police.

(iv) Prior to the sale agreement, dated 10.05.1997, original title deeds and encumbrance certificates from the year 1963 to 1995 were inspected by the parties and their lawyer. The plaintiffs had scrutinized the original document and even otherwise, nothing prevented the plaintiffs for further inspection of any deed, which are available in the Co-operative Housing Society, Chennai- 7.

(v) The question of handing over all the title deeds will not arise when the plaintiffs had failed to pay the sale price. The conduct of the plaintiffs can be judged by the undertaking given by the first plaintiff in Court of Small Causes for payment of rent along with arrears and the same was not complied with till date. The plaintiffs never exhibited their readiness or willingness to get the sale completed. Both the plaintiffs agreed to execute the sale deed within a period of 18 months from 10.05.1997. But the plaintiffs failed to pay the amount within the stipulated time. The plaintiffs did not have the wherewithal to pay these amounts. In fact they have not paid the rents from July 1996. It is totally false to allege that the plaintiffs have not been asked to pay rents.

(vi) The defendants approached the plaintiffs on several occasions to complete the sale agreement but all their efforts were in vein. The suit for specific performance is not maintainable and it is

barred under Order 2 Rule 2 of the Code of Civil Procedure. The suit is also barred under the provisions of Limitation Act. The plaintiffs are not entitled to any relief, much less the highly equitable relief of specific performance. The plaintiffs have no money to purchase the property and they are using the litigation to gain time. The plaintiffs were never ready and willing to perform their part of the contract. Therefore, both the suits are liable to be dismissed.

4. After going through the pleadings of both sides, the following issues have been framed for determination in both the suits.

Issues framed in C.S.No.994 of 2001 :

(1) Whether the plaintiffs were ready and willing to complete the sale transaction ?

(2) Whether the plaintiffs were capable of completing the sale transaction ?

(3) Whether the suit is barred by provisions of Order II Rule 2 of CPC ?

(4) Are the plaintiffs entitled to the alternate relief of recovery of Rs.13 lakhs with interest at 18% per annum ?

(5) To what reliefs the plaintiffs are entitled to ?

Issues framed in Tr.C.S.No.577 of 2011 :

(1) Whether the plaintiffs are entitled to the relief of permanent injunction as prayed for ?

(2) Whether the defendants are the owners of the entire suit

schedule properties ?

(3) To what reliefs the plaintiffs are entitled to ?

5. O.S.No.2085 of 1999 pending on the file of the City Civil Court, Chennai, for permanent injunction has been transferred to this Court and re-numbered as Tr.C.S.No.577 of 2011. On transfer of the said suit, trial was clubbed with C.S.No.994 of 2001 and common evidence has been recorded. On the side of the plaintiff, one witness has been examined and 27 Exhibits marked. On the side of the defendants, two witnesses have been examined and 47 Exhibits marked.

6. Since both the suits have been filed on the basis of the single agreement between the same parties and common evidence has also been recorded, common Judgment is delivered.

7. Issue No.3 in C.S.No.994 of 2001 :

Two suits have been filed by the same plaintiffs against the same defendants, one for permanent injunction and another for specific performance or in alternative for recovery of advance amount. The defendants contend that the second suit for specific performance

is barred by provision of Order 2 Rule 2 of Civil Procedure Code. In the first suit filed for permanent injunction, the plaintiffs averred in Para 5 of the plaint (Tr.C.S.No.557 of 2011) that they are filing a separate suit for specific performance and since the defendants are trying to sell away the properties to third parties, they are filing the suit for permanent injunction.

8. The learned counsel appearing for the defendants contend that the cause of action in both the suits are one and the same and the subsequent suit is clearly hit by Order 2 Rule 2 CPC and cited the Judgment of the Hon'ble Supreme Court in **Virgo Industries (Eng.) (P) Ltd., v. Venturetech Solutions (P) Ltd.**, reported in (2013) 1 SCC 625. The Hon'ble Supreme Court in the above Judgment has held as follows:

"9... It is therefore, clear from a conjoint reading of the provisions of Order 2 Rules 2(2) and (3) CPC that the aforesaid two sub-rules of Order 2 Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. it is only in the latter situations

where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit proved that at the time of omission to claim the particular relief he had obtained leave of the court in the first suit."

9. It is also appropriate to look into the decision of the Hon'ble Supreme Court in **Ratnavathi v. Kavita Ganashamdas** reported in **2014 (6) CTC 333**, wherein it has been held that the plea of bar contained in Order 2 Rule 2 CPC cannot be raised where cause of action is distinct and the cause of action for the suit for specific performance is distinct from cause of action in a suit for permanent injunction. In the above Judgment, it has been held as follows :

"30. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction are different than that of the suit for specific performance of agreement

31. In case of former, plaintiff is required to make out the existence of prima facie case, balance of convenience and irreparable loss likely to be suffered by the plaintiff on facts with reference to the suit property as provided in Section 38 of the Specific Relief Act, 1963

(in short "the Act") read with Order 39 Rule 1 & 2 of CPC. Whereas, in case of the later, plaintiff is required to plead and prove her continuous readiness and willingness to perform her part of agreement and to further prove that defendant failed to perform her part of the agreement as contained in Section 16 of The Act.

32. One of the basic requirements for successfully invoking the plea of Order II Rule 2 of CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based.

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36. The submission has a fallacy for two basic reasons.

Firstly, as held above, cause of action in two suits being different, a suit for specific performance could not have been instituted on the basis of cause of action of the first suit. Secondly, merely because pleadings of both suits were similar to some extent did not give any right to the defendants to raise the plea of bar contained in Order II Rule 2 of CPC. It is the cause of action which is material to

determine the applicability of bar under Order II Rule 2 and not merely the pleadings. For these reasons, it was not necessary for plaintiff to obtain any leave from the court as provided in Order II Rule 2 of CPC for filing the second suit."

10. In the presents suits on hand, though the cause of action seem to be similar, by going through the entire pleadings of both suits, one can easily infer that the first suit filed for bare injunction is to restrain the defendants from alienating the property by making out a prima facie case, the balance of convenience and irreparable loss likely to be caused to the plaintiffs, whereas the second suit for specific performance has been filed pleading about non-performance of part of agreement by the defendants and also readiness and willingness of the plaintiffs to perform their part. Therefore, the cause of action in both the suits are distinct and the second suit for specific performance is not barred under Order 2 Rule 2 CPC. This issue is answered accordingly.

11. Issue No.2 in Tr.C.S.No.577 of 2011 :

The issue about ownership of the suit properties does not arise at all, as there is no dispute with respect to the ownership. Having admitted the ownership, the plaintiffs entered into the sale agreement with the defendants. Admittedly, D1 is the owner of 'A'

schedule properties and D2 to D6 are the owners of 'B' schedule properties. D2 and D8 are the legal heirs of D1. As per Ex.D.10, before entering into the sale agreement, the plaintiffs also perused the original documents and received the xerox copies of the documents. Therefore, this Court holds that the defendants are the owners of the suit schedule properties.

12. Issue Nos.1 and 2 in C.S.No.994 of 2001 :

There is no dispute that agreement for sale of the suit schedule properties was entered into between the plaintiffs and defendants on 10.05.1997 and the same is marked as Ex.P.17. The factum remains that the sale consideration was fixed at Rs.49 lakhs and a sum of Rs.9 lakhs was paid as advance and further payments of Rs.3 lakhs and Rs.1 lakh were paid on 10.09.1997 and 19.10.1997 which are also not in dispute. As per the recitals of the agreement, the sale deed shall be completed within a period of 18 months from the date of agreement. The vendor agreed to hand over vacant possession of the land occupied in Door Nos.56, 57, 58 and 59. The vendors undertook to hand over the title deeds of the schedule mentioned properties for inspection and scrutiny. The purchasers agreed to vacate the tenant namely Bharat Medicals carrying on business in Door No.60. The vendors undertook to produce

Encumbrance Certificate from 01.01.1963 to 10.10.1997. It is contended on the side of the plaintiffs that the defendants neither handed over the title deeds of the schedule mentioned properties nor the Encumbrance Certificate and they have also not vacated the tenants as agreed upon in the agreement.

13. The learned counsel appearing for the defendants per contra contend that the plaintiffs scrutinized the title deeds and returned and the sale deed could not be executed as the plaintiffs are not ready and willing to perform their part of contract by paying the balance sale consideration. It is further contended on the side of the defendants that mainly for the purpose of two marriages of the daughters of the defendants, properties were agreed to be sold and therefore, time is essence of the contract. It is further contended by the defendants that the plaintiffs are not entitled to the equity relief of specific performance when they fail to pay the balance consideration within the stipulated time due to paucity of fund.

14. In the reply notice, Ex.D.24 issued by the defendants, it has been clearly stated that 18 months time was fixed since amounts were required for present family circumstances like the marriage of the daughters of two of the defendants. The plaintiffs issued rejoinder

notice to the above reply and the same has been marked as Ex.D.25. In this rejoinder, the plaintiffs in paragraph 4 stated that subsequent payments of Rs.3 lakhs on 10.09.1997 and Rs.1 lakh on 19.10.1997 were paid for the marriage of daughter of one of the defendants. Thus, the defendants impliedly admit that for marriages of the daughters of defendants, part of the sale consideration was paid.

15. The learned counsel for the defendants cited the Judgment of the Hon'ble Supreme Court in **His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar** reported in **(1996) 4 SCC 526** and contended that time is essence of contract when the sale consideration was required for the marriage of daughters of the defendants. The Hon'ble Supreme Court in this Judgment has held as follows :

"1. This is an illustrious case of dilatory tactics by the petitioner who entered into the contract to purchase the land of 500 sq. yds. in the heart of the city of Delhi by agreement dated 27-2-1975. The hard fact is that the defendant was in dire need of money to celebrate his daughter's marriage on 16.05.1975. The agreement was that the draft sale deed should be finalised within seven days and sale deed registered. Time is, therefore, the essence of

the contract in this case..."

16. In this case on hand, sale agreement was entered into on 10.05.1997. Time limit of 18 months was fixed. Therefore, before 09.11.1998 balance sale consideration should have been paid and sale deed executed. The marriage invitations of daughters of two defendants are marked as Ex.D.21 and Ex.D.22. Bhuvaneswari and Mythili were given in marriage on 19.08.1998 and 22.11.1998, as per the above documents. Considering the factual aspects of this case, this Court holds that sale agreement was entered into mainly for the purpose of getting marriage of the daughters of the defendants. Therefore, time is essence of the contract.

17. It is well settled that readiness and willingness must be there continuously from the date of agreement up to the date of hearing. For this, the learned counsel appearing for the defendants cited our Hon'ble Supreme Court Judgment, **Gomathinayagam Pillai and others v. Palani Swami Nadar**, reported in **AIR 1967-II-S.C.W.R. page 147**. The relevant portion of the decision reads thus :

"The respondent has claimed a decree for specific performance and it is for him to

establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in *Ardeshir Mama v. Flora Sasson*: "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit. (Emphasis supplied)"

18. Readiness is the capacity including the financial position to pay and willingness relates to the conduct of the person. In this case, the defendants contend that the plaintiffs are not having sufficient fund to pay the balance consideration. Though the plaintiffs filed the

income tax returns of various years, have not filed income tax returns or any other documents to show the income of the plaintiffs of the relevant years, namely 1997 and 1998. The first plaintiff examined as P.W.1 himself admits during cross-examination that he has not filed any document to show that from the year 1997 to 2001, he was having liquid funds in his hand. He also says that D6 is the statement of accounts of Vysya Bank Ltd., of their business Velmurugan Dresses and the closing balance is shown only as Rs.7,262/-. Ex.D.37 and Ex.D.38 are cheques with returned memo of the Banks. The cheques issued for a paltry amount by D2 were returned with endorsement of insufficient fund.

19. Ex.D.9 and Ex.D.10 are the orders passed by Rent Controller under Section 11(4) of the Tamil Nadu Buildings (Lease and Rent Control) Act. This clearly discloses that the first plaintiff had been in default in paying rent from 01.07.1996 to 30.09.1999. Thus the first plaintiff was not even in a position to pay the rent to the landlord. Thus from the above factors, it is crystal clear that the plaintiffs were not capable of paying the balance consideration and therefore, this Court holds that the plaintiffs were never ready and willing to pay the balance consideration.

20. As far as stipulation in the agreement as to the production of documents and Encumbrance Certificate, in the reply notice itself, the defendants have stated that the original title deeds were scrutinised by the plaintiffs at the time of execution of sale agreement itself and the defendants also furnished the Encumbrance Certificate. Ex.D.10 is the receipt given by the plaintiffs with respect to the document. In this, it has been specifically mentioned that original documents were returned and the plaintiffs received the xerox copies of the documents from the first defendant on 10.05.1997.

21. The learned Senior counsel appearing for the plaintiffs strangely argued that the recitals (since original documents returned) was subsequently inserted. The above argument is contrary to the evidence given by P.W.1. It is also contended that due to subsistence of mortgage, the documents could not have been produced. The property was mortgaged in a society. Both the plaintiffs as well as the defendants during their evidence admit that they took assistance of their lawyers while executing the sale agreement. Therefore, without scrutinizing the original deeds, Ex.D.10, the receipt for original documents would not have been given on the date when the sale agreement was executed. P.W.1 during his cross-examination on 04.08.2008 has deposed that he gave the receipt on 10.05.1997 to

the defendants. He does not whisper about any subsequent insertion in the said receipt. The plaintiffs have not denied about the receipt of the encumbrance certificate given by the defendants in their rejoinder.

22. With respect to handing over the vacant possession by vacating the tenants, D.W.2 says in his evidence that there were four tenants including the second plaintiff Devilal at Door No.57, 58, 59 and 61 and excepting the second plaintiff, other three tenants vacated the premises at Door No.57, 58 and 59. The other portions of the said properties are occupied by the plaintiffs as tenants. As far as Bharathi Medicals situated in Door No.60, the plaintiffs agreed to vacate the tenant, as per Clause 5 of the agreement. Therefore, the contention that the defendants fail to perform their part of the contract is unacceptable. For the aforesaid reasons, this Court holds that the plaintiffs were not capable and they were not ready and willing to complete the sale transaction.

23. Issue No.4 in C.S.No.994 of 2001 :

There is no dispute that the plaintiffs have paid advance of Rs.9 lakhs at the time of execution of the sale agreement and further payments of Rs.3 lakhs on 10.09.1997 and Rs.1 lakhs on

19.10.1997, totalling Rs.13 lakhs. As per the agreement, in case of breach committed by the purchaser, the vendor agreed to return the advance deducting the liquidated damages of Rs.1 lakh. Therefore, the plaintiffs are entitled to the advance amount of Rs.13 lakhs paid to the defendants less the liquidated damages of Rs.1 lakh as agreed in the agreement. Therefore, the plaintiffs are entitled to the alternative relief of Rs.12 lakhs, as the plaintiffs alone committed the breach of contract and filed the suit and 9% interest is awarded. This issue is answered accordingly.

24. Issue No.1 in Tr.C.S.No.577 of 2011 :

In view of the decisions for the above issues, the plaintiffs are not entitled to the relief of permanent injunction.

25. Issue No.5 in C.S.No.994 of 2001 and Issue No.3 in Tr.C.S.No.577 of 2011 :

The plaintiffs are entitled to recovery of Rs.12 lakhs from the defendants with 9% interest from the date of plaint till the date of realisation.

In fine, C.S.No.994 of 2001 is partly allowed and the plaintiffs are entitled to get a sum of Rs.12 lakhs from the defendants with 9% interest from the date of plaint till the date of realisation.

Tr.C.S.No.577 of 2011 is dismissed. No costs.

28.03.2017

Index : Yes / No

tsvn

P.KALAIYARASAN, J

tsvn

**Pre-Delivery Common
Judgment in
C.S.No.994 of 2001
and
Tr.C.S.No.577 of 2011**

28-03-2017

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