

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 14.08.2018	Delivered on 11.09.2018
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CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S. No. 588 of 2011
and MP No.1 of 2011

T.R.Murugesan ... Appellant/1st Defendant
Vs

1. S. Balakrishnan
2. N. Rajeshwaran

N.Radhakrishnan, (died)

3. Sugunakumari
4. R.Parameswari
5. K.Chitrakala @ Kavitha
6. Manonmani

... Respondents/Plaintiff & 2 to 6 Defendant

Appeal filed under Order 41 Rule 1 read with Section 96 of CPC, against the judgment and decree dated 15.09.2011 made in OS. No.114 of 2007 on the file of the Principal District Court, Namakkal.

For Appellant : Mr.N.Manokaran

For 1st Respondent : Mr.AR.L.Sundaresan, Senior Counsel
for M/s.M.Guruprasad

J U D G E M E N T

R.SUBRAMANIAN, J.

The first defendant in OS No.114 of 2007 on the file of the Principal District Court, Namakkal, who suffered a decree for specific performance, is the appellant.

2. The said suit was laid down by the 1st respondent in this appeal seeking specific performance for an agreement sale dated 05.02.2007. According to the plaintiff, as per the agreement dated 05.02.2007, the defendants 1 to 3 had agreed to convey an

extent of about 14,517 sq.ft. of vacant site to the plaintiff at a consideration of Rs.135/- per sq.ft. Under the agreement, defendants 1 to 3 had received a sum of Rs.2,00,000/- as advance on the date of the agreement and a further sum of Rs.3,00,000/- on 27.02.2007. The said agreement also provides that the defendants should demarcate the 30 feet wide passage from the main road to reach the property and the defendants should also arrange for the persons, who are having interest over the said passage to sign the sale deed as witnesses. The agreement provides for a period of 60 days for performance and the consequences of non-performance are also set out in the agreement.

3. According to the plaintiff, though he made several demands for execution of sale deed, the defendants did not come forward to demarcate the 30 feet passage and evaded execution of sale deed. The plaintiff would contend that he issued a legal notice demanding execution of sale deed on 11.07.2007 and the 1st defendant alone sent a reply on 27.07.2007 admitting execution of the agreement and the receipt of the advance amount, however, the 1st defendant denied that he had agreed to obtain signatures of the other persons having interest in the passage as witnesses in the sale deed that is to be executed. The 1st defendant further claimed that time is the essence of the contract and the plaintiff having failed to pay the balance of sale consideration within the time fixed under the agreement, namely on or before 10.04.2007, the plaintiff has lost his right to enforce the agreement.

4. The plaintiff would further contend that time was never intended to be an essence of the contract. He would also claim that the agreement being one with reciprocal promises, unless the defendant had complied with his part of the contract, he cannot resist the suit on the ground of absence of readiness and willingness on the part of the plaintiff. On the above pleading, the plaintiff sought for a decree for specific performance. The plaintiff also sought for alternative relief of refund of advance with reasonable interest. Pending suit, the 3rd defendant died and defendants 4 to 7 were brought on record as the legal representatives of the 3rd defendant.

5. The 1st defendant filed a written statement contending as follows:

The execution of the agreement and the receipt of advance of Rs.5,00,000/- was admitted. It was claimed that the time is the essence of the contract and inasmuch as the plaintiff was not

willing to perform his part of the contract within the time stipulated under the agreement, the plaintiff has lost his right to enforce the agreement. The claim of the plaintiff that he had approached the defendants seeking execution of the sale deed was stoutly denied. It was also contended that the plaintiff is not entitled to the prayer for alternative relief, since the agreement provides that in the event of his not paying the balance sale consideration within the stipulated time, the plaintiff would forfeit the advance amount. It was claimed that the legal notice was properly replied to. On the above contentions, the defendants sought for dismissal of the suit.

6. On a consideration of the pleadings as well as the evidence on record, the learned Principal District Judge, Namakkal, framed the following issues for consideration.

1. Whether the plaintiff is entitled to Specific performance of the agreement dated 05.02.2007?
2. Whether the plaintiff was ready and willing to perform his part of the contract dated 05.02.2007?
3. To what relief if the plaintiff is entitled to?

7. At trial, three witnesses were examined on the side of the plaintiff and the wife of the 1st defendant was examined as D.W.1. Exs.A1 to A5 were marked on the side of the plaintiff and no documentary evidence was produced on the side of the defendants.

8. The learned District Judge, who tried the suit on a consideration of the oral and documentary evidence concluded that the plaintiff is entitled to specific performance of the agreement of the sale. The learned District Judge would also conclude that time cannot be considered to be the essence of the contract, inasmuch as the agreement requires the defendants to measure and demarcate the 30 feet pathway from the main road to reach the suit property. Since the defendants have failed to comply with the said condition, they cannot resist the suit contending that time is the essence of the contract. The learned Trial Judge, also found that the plaintiff has established his readiness and willingness as required under Section 16(c) of the Specific Relief Act and hence he would be entitled to decree for specific performance.

9. Aggrieved the 1st defendant has come forward with the above appeal.

10. We have heard Mr.N.Manokaran, learned counsel appearing for the appellant and Mr.AR.L.Sundaresan, learned Senior Counsel appearing for Mr.M.Guruprasad, for the 1st respondent. The other respondents though served are not appearing either in person or through counsel.

11. Mr.N.Manokaran, learned counsel appearing for the appellant would contend that the parties intended that time should be the essence of the contract. According to him, the very fact that the agreement fixes the last date for performance as 10.04.2007 and it also provides for a consequence on failure to adhere to the time schedule fixed under the agreement, time should be construed to be the essence of the contract. Once time is held to be the essence of the contract, the plaintiff having not come forward to pay the balance of sale consideration and take the sale deed within time stipulated under the agreement cannot seek to specifically enforce the agreement. Mr.N.Manoharan, would also further contend that the very notice seeking execution of sale deed was issued 3 months after the expiry of the contract i.e. on 11.07.2007 and despite having received the reply notice dated 27.07.2007, the plaintiff had chosen to file the suit only on 02.11.2007 another 3 months thereafter. Therefore, according to Mr.N.Manokaran, the plaintiff was never ready and willing to perform his part of the contract within the time stipulated under the contract.

12. He would also point out that even in the reply notice, the 1st defendant had stated that the demarcation of the 30 feet pathway has already been done and the said claim of the 1st defendant has not been denied by the plaintiff, either in the plaint or in his proof affidavit. Therefore, according to Mr.N.Manokaran, the only obligation that was cast upon the defendant, viz. to demarcate the 30 feet pathway was already discharged and it was also made clear through the reply notice that the demarcation has been done.

13. Stressing upon the fact that the claim of the 1st defendant in the reply notice that the demarcation has already been done has not been denied in the plaint or in the proof affidavit of P.W.1, Mr.N.Manokaran would contend that the Trial Court was not right in concluding that the defendants have not performed their part of the contract. Adverting to the reasoning of the Trial Court that time cannot be held to be the essence of the contract, on the ground that the contract contains reciprocal promises and since the defendants had not performed their part of the obligation, viz. to demarcate the 30 feet passage. Mr.N.Manokaran would contend that the Trial Court

had in fact made a special pleading on behalf of the plaintiff, when the plaintiff had no such case either in the plaint or in his proof affidavit.

14. Per contra, Mr.AR.L.Sunderasan, learned Senior Counsel appearing for the respondent/plaintiff would contend that time cannot be said to be the essence of the contract and in any event since the contract contains reciprocal promises and the defendants having not come forward to perform their part of the obligations cannot be allowed to contend that the plaintiff was not ready and willing to perform his part of the contract. He would further contend that under the agreement, the defendants had agreed to get the persons having interest in the 30 feet pathway to sign as witnesses in the sale deed. This being a reciprocal promise and the non-performance of that promise would debar the defendants contending that the plaintiff is guilty of non-performance.

15. We have considered the rival submissions and we find the following points arise for determination in this appeal.

1. Whether the parties intended time to be the essence of the agreement dated 05.02.2007?
2. Whether the defendants are guilty of non-performance of the reciprocal promise?
3. Whether the plaintiff was ready and willing to perform his part of the contract in terms of Section 16(C) of the Specific Reliefs Act?
4. Whether the plaintiff is entitled to the alternative relief?

Point Nos. 1 and 2:

16. The execution of the agreement dated 05.02.2007 as well as the receipt of a sum of Rs.5,00,000/- towards advance are admitted. Insofar as the time for performance of the agreement is concerned, the sale agreement Ex.A1, reads as follows:

“ஆக டை வீதம் வரும் மீதி கிரயத் தொகையை 4 லக்கமிட்டவர் இன்றுமுதல் 60 நாட்களுக்குள் (10.04.2007) 1,2,3 லக்கமிட்டவர்களிடம் செலுத்தி தன் செலவில் கிரயம் செய்து கொள்ள வேண்டியது. தவறினால் இன்று கட்டியுள்ள அட்வான்சை 4 லக்கமிட்டவர் இழந்து விட வேண்டியது,”

The agreement further provides as follows:

“மேலும் மெயின் ரோட்டில் இருந்து 30 அடி அகலத்தில் கிழ்மேலாக தடத்தை

அளந்தும், அத்து காண்பிக்க வேண்டியது. அப்பொழுது இந்த தடத்திற்கு சம்மந்தப்பட்ட இதர நபர்களையும் கிரயப் பத்திரத்தில் சாட்சி கையெழுத்து வாங்கிக் கொடுக்கவும் 1, 2, 3 லக்கமிட்டவர்கள் கட்டுப்பட்டவர்கள் என நம் முழுமன சம்மதியில் எழுதிக் கொண்ட கிரய உடன்படிக்கை பத்திரம் ”

17. The obligations of the parties have been set out clearly in the agreement of sale Ex.A1, the plaintiff is bound to pay the balance of sale consideration on or before 10.04.2007 and the defendants are bound to demarcate the 30 feet pathway leading to the suit property from the main road. The defendants had also agreed to get the signatures of the other persons interested in the pathway as witnesses in the same. In the reply notice dated 27.07.2007, the 1st defendant had categorically stated that the 30 feet pathway has been demarcated through a surveyor. However, the 1st defendant has denied the claim of the plaintiff that the defendants have agreed to get the other persons interested in the pathway, to sign as witnesses in the sale deed. Stressing upon the said denial, Mr.AR.L.Sunderasan, learned Senior Counsel appearing for the plaintiff/1st respondent would contend that the defendants are guilty of non-performance of their reciprocal obligations and therefore, the plaintiff cannot be non-suited on the ground that time was considered to be the essence of the contract.

18. Mr.AR.L.Sunderasan, would also draw our attention to the judgment of the Division Bench of this Court in S.Deivanai and others v. V.M. Kothandaraman and others, reported in 2017 (4) CTC 734, to buttress his submission on the ground of reciprocal promises. In the said judgment the Division Bench, after referring to Sections 53 and 54 of the Contract Act, had held that the reciprocal promises as per the agreement, namely measurement of the land covered under the agreement before 10.02.2007, production of receipt for redemption of the mortgage, to show the original title documents pertaining to the suit property and hand over the copies before 10.02.2007 were all promises, which should have been performed by the defendants prior to the payment of sale consideration contemplated under Ex.A1. There is no dispute on the proposition of law laid down by the Division Bench, where the agreement specifies the time at which the reciprocal promises are to be performed by the parties, it shall be performed as per the order set out in the agreement. If the agreement is silent about the same then under Section 52 of the Contract Act, the reciprocal promises will have to be performed in that order which the nature of the transaction requires.

19. A perusal of Ex.A1 agreement dated 05.02.2007 would show that it imposes an obligation on the plaintiff to pay the balance of sale consideration by on or before 10.04.2007. It imposes two obligations on the defendants:

- i. To measure and demarcate the 30 feet wide pathway from the main road;
- ii. To get those persons who are interested in the pathway to sign as attesting witnesses in the same.

20. The agreement does not provide for the order in which these promises are to be performed. Therefore, necessarily, we will have to fall back upon Section 52 of the Contract Act, to decide as to order in which these promises are to be performed. Section 52 of the Contract Act, 1872, reads as follows:

52. Order of performance of reciprocal promises.— Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

21. Therefore, it has to be determined as to in what order the reciprocal promises should be performed in terms of Section 52. The promise relating to demarcation of the pathway will have to be performed first. The promise by the plaintiff to pay the balance of sale consideration will have to be performed second. Getting the persons interested in the pathway to sign as attesting witnesses in the sale deed, will come necessarily third in the order. The necessity to get a person to sign as attesting witness will arise only after payment of balance of sale consideration at the time of execution of the sale deed. Therefore, the non-performance or the denial of the liability to perform the third part, namely to get persons interested in the pathway to attest the sale deed will not in any manner dilute the liability of the plaintiff to have paid the sale consideration on or before 10.04.2007. As regards the other promise, namely the promise to demarcate the pathway, in the reply notice dated 27.07.2007, the 1st defendant has taken a specific stand that the pathway has been demarcated with the help of a surveyor and the same has been admitted by the plaintiff.

22. The suit came to be filed almost 3 months after the issuance of the reply notice Ex.A5 dated 27.07.2007. Nowhere in

the plaint, has the plaintiff alleged that said claim made in the reply notice is false. The plaintiff has filed his proof affidavit on 06.07.2011, even in the proof affidavit there is no averment to the effect that the claim of the 1st defendant in the reply notice dated 27.07.2007 relating to demarcation of the 30 feet wide pathway is false or incorrect. Therefore, the plaintiff cannot now claim that the demarcation was not done. In fact, the Trial Court had not adverted to the absence of such a plea, either in the plaint or in the proof affidavit but went on to conclude that the defendants have not discharged their obligations of demarcating the 30 feet pathway.

23. Coming to the question of time being the essence of the contract, it is settled law that if an agreement fixes a particular date for performance of the contract and provides for consequences on failure to perform then the normal presumption that time is not the essence of the contract with regard to transactions relating to immovable property are concerned does not arise.

24. A reading of Ex.A1 agreement dated 05.02.2007 would show that apart from spelling out the last date for payment of balance of sale consideration as 10.04.2007, it also spells out the consequence of failure. Failure on the part of the plaintiff would result in his losing the earnest money and the failure on the part of the defendants would entail the plaintiff to sue for specific performance. We have already extracted the relevant portion of Ex.A1, which deals with the time for performance. Ex.A1 agreement prescribes that the purchaser shall pay the balance of sale consideration on or before 10.04.2007 and it also provides that in the event of failure the purchaser, namely the 1st respondent would forfeit the advance. There is nothing in the agreement which enables extension of time.

25. In Chand Rani v. Kamal Rani, reported in 1993 (1) SCC 519, the Hon'ble Supreme Court had held that in case of sale of immovable property time is not the essence of the contract. However, if the parties agreed to a specified time in the agreement, to perform their part of the contract then time is the essence of the contract and the parties are required to adhere to the same. While arriving at such a conclusion, the Hon'ble Supreme Court has after referring to Section 55 of the Contract Act, quoted with the approval the following passage from Halsbury's Law of England:

"22. In Hind Construction Contractors case quoting Halsbury's Laws of England, this Court observed at

pages 1154-55 as under : (SCC pp. 76- 77, paras 7 & 8) "In the latest 4th edn. of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol. 4, Para 1179, which runs thus 1179. Where time is of the essence of the contract. - The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion. Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may be obliged to fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.

The Hon'ble Supreme Court further observed as follows:

"It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include a clause providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clause would be construed as rendering ineffective the express provision relating to the time being of the essence of contract."

26. In *Saradamani Kandappan vs S. Rajalakshmi & Ors*, reported in 2011 (4) CTC 640, the Hon'ble Supreme Court while considering the question as to whether time is the essence of the contract in respect of contract relating to sale of immovable property are concerned has observed as follows:

"The intention to make time stipulated for payment of balance consideration will be considered to be the essence of the contract where such intention is evident from the express terms or the circumstances necessitating the sale, set out in the agreement. If for example, the vendor discloses in the agreement of sale, the reason for the sale and the reason for stipulating that time prescribed for payment to be the essence of the contract, that is, say, need to repay a particular loan before a particular date, or to meet an urgent time bound need (say medical or educational expenses of a family member) time stipulated for payment will be considered to be the essence. Even if the urgent need for the money within the specified time is not set out, if the words used clearly show an intention of the parties to make time the essence of the contract, with reference to payment, time will be held to be the essence of the contract."

27. If we are to examine the contents of the Ex.A1 in the light of the law declared as above, even though the agreement does not specify any urgent need for money, it however specifies that the payment of the balance of sale consideration is to be made on or before a particular date and there is no provision for extension of the time fixed under the agreement. This by itself in our considered opinion make the time fixed under the agreement as the essence of the contract. We are therefore of the considered opinion that the time fixed under Ex.A1 for payment of the sale consideration is the essence of the contract.

28. We have already found that the order in which the reciprocal promises are to be performed. The 1st defendant has in the reply notice categorically claimed that the promise relating to demarcation of the 30 feet pathway has been performed and the plaintiff had not chosen to deny the said claim either in the plaint or in the reply notice. The wife of the 1st defendant has been examined as D.W.1, there is nothing in the cross examination to suggest that the claim of the 1st defendant in the reply notice is incorrect.

29. In view of the above, we are constrained to conclude that the 1st defendant had in fact demarcated the pathway as required by the agreement even before the issuance of Ex.A2 legal notice by the plaintiff on 11.07.2007. As regards the obligation cast on the defendants to make available the persons interested in the pathway to sign as attesting witnesses, the same would arise only after the plaintiff had tendered the sale consideration and the sale deed has been prepared. Admittedly, the plaintiff did not tender the sale consideration before 10.04.2007 and the legal notice demanding execution of sale deed itself was issued by the plaintiff only on 11.07.2007. Therefore, the question of performing the second part of the promise did not arise at all. We are therefore unable to countenance the submission of the Mr.AR.L.Sunderasan, learned Senior Counsel appearing for the respondent/plaintiff to the effect that the plaintiff cannot be non-suited on the ground of non-performance because the defendants had not performed their obligations arising out of the contract. In view of the foregoing reasons Points No. 1 and 2 are answered against the plaintiff/respondent and in favour of the appellant/defendant.

Point No.3:

30. Even assuming that time is not the essence of the contract, under Section 16(c) of the Specific Relief Act, the plaintiff must be shown to have been ready and willing to perform the contract right from the date of the agreement till date of the filing of the suit. The agreement was entered into on 05.02.2007, it fixes the outer time limit for payment of sale consideration as 10.04.2007. It does not enable any extension of time, though the plaintiff would alleged that he has been demanding performance, the first written demand on his side was by way of Ex.A2 legal notice dated 11.07.2007 i.e. 3 months after the time fixed for performance of the contract. A reply notice is sent on 27.07.2007, the suit is filed on 02.11.2007, nearly 3 months after the receipt of the reply. There is no explanation whatsoever for the delay of three months, after the receipt of the reply notice.

31. Mr.N.Manoharan, learned counsel appearing for the appellant would contend that in view of the Judgments of the Hon'ble Supreme Court in

(i) Saradamani Kandappan Vs. S.Rajalakshmi and Others, reported in 2011 (4) CTC 140;

(ii) Padmakumari and others Vs. Dasayyan and others reported in 2015 (5) Scale 409;

the recent judgments of the Hon'ble Supreme Court in

(iii) Kalawati (D) through L.Rs. and others v. Rakesh Kumar and Others, reported in 2018 (3) SCC 658 and

(iv) P.Meenakshisundaram v. P.Vijayakumar and another, reported in 2018 (3) CTC 428.

the plaintiff cannot be said to have been ready and willing to perform his part of the contract, throughout the period and hence he is not entitled to the relief of specific performance. In Saradamani Kandappan's case, cited supra, the Hon'ble Supreme Court had pointed out that the readiness and willingness must be from the date of the agreement till date of the filing of the suit and emphasis has been laid on the continuity of the said readiness and willingness. In order to succeed in a suit for specific performance the plaintiff must plea and prove that he has been continuously ready and willing to perform his part of the contract. The said position has been reiterated in Padmakumari and others Vs. Dasayyan, cited supra.

32. In Kalawati (D) through L.Rs. and others v. Rakesh Kumar's case, cited supra, the Hon'ble Supreme Court had after referring to I.S.Sikandar (dead) by L.Rs. v. K.Subramani and others, reported in 2013 (15) SCC 27, had quoted with approval the following passage from the said judgment:

"45....Further, the plaintiff is required to prove the fact that right from the date of execution of the agreement of sale till the date of passing the decree he must prove that he is ready and has always been willing to perform his part of the contract as per the agreement..."

47. Further, there is nothing on record to show that the plaintiff could have made arrangement for payment of the balance consideration amount to them. But, on the other hand the Trial Court has recorded the finding of fact to the effect that the correspondence between the parties and other circumstances would establish the fact that the plaintiff had no money for payment of balance sale consideration...."

33. In P.Meenakshisundaram v. P.Vijayakumar and another, cited supra, the Hon'ble Supreme Court had observed as follows:

"8. As regards suit for specific performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his

part of the contract all through i.e., right from the date of the contract till the date of hearing of the suit. If respondent No.1 was well aware about the encumbrance and the parties had chosen that the balance consideration be paid to the appellant before 20.03.2001 so that the sale deed could be registered without any encumbrance, it was for respondent No.1 to have taken appropriate steps in that behalf for completion of transaction. The facts on record disclose that the first step taken by respondent No.1 after the suit agreement was well after four months, when further amount of Rs.2 lakhs was paid on 21.01.2001. Thereafter nothing was done till 20.03.2001 by which the transaction had to be completed. The record is completely silent about any communication sent around 20.03.2001 towards completion of transaction. As a matter of fact the first step thereafter was six months after the deadline namely on 22.09.2001 when the communication (Ex.A6) was sent along with amount of Rs.10 lakhs. The written submissions filed on behalf of respondent No.1 also do not indicate any steps till this time so as to say that he was all the while ready and willing to complete the transaction.

34. Now, let us examine the case of the plaintiff in the light of the law declared by the Hon'ble Supreme Court. Ex.A1 agreement was entered into on 05.02.2007 and it provided for payment of entire balance of sale consideration on or before 10.04.2007. Admittedly, the plaintiff has paid a sum of Rs.2,00,000/- on the date of the agreement and further a sum of Rs.3,00,000/- on 27.02.2007, thereafter, the plaintiff has not done anything to show that he was ready and willing to perform his part of the contract, till he issued the legal notice under Ex.A2 on 11.07.2007. For nearly 3 months from the last date fixed for performance of the contract, namely 10.04.2007, the plaintiff has remained silent. Even though he would claim that he had approached the defendant seeking execution of the sale deed, the said claim was not supported by any proof. On receipt of the legal notice, the 1st defendant had sent reply on 27.07.2007 expressly stating that the plaintiff was not ready and willing to perform his part of the contract and he had no resources to pay the balance of sale consideration.

35. The plaintiff chose to wait for another 3 months to file the suit on 02.11.2007, this sustained inaction on the part of the plaintiff would definitely lead to an inference of the

plaintiff was not ready and willing to perform his part of the contract. As pointed out by the Hon'ble Supreme court in various decisions, cited supra, the plaintiff must not only prove his readiness, he should also establish willingness. The proof affidavit of the plaintiff is totally lacking in particulars of the demands made by the plaintiff seeking execution of sale deed and offering to pay the sale consideration.

36. Except the bald statement that despite several oral demands, the defendants had not come forward to execute the sale deed, there is nothing in the plaint or the proof affidavit to show that the plaintiff actually demanded execution of sale deeds prior to issuance of Ex.A2, legal notice on 11.07.2007.

37. In cross examination, suggestions have been made questioning the financial ability of the plaintiff to complete the transaction. Despite the same, the plaintiff had not chosen to file any document to establish his ability to pay the balance sale consideration and take the sale deed within time stipulated under the contract. One of the easiest method that was available for the plaintiff to show his readiness and willingness is to show that he was possessed of sufficient funds on 10.04.2007 or before that date. Such an attempt has not been made by the plaintiff.

38. Considering the overall circumstances and the evidence available on record, we are constrained to conclude that the plaintiff has not established that he was ready and willing to perform his part of the contract throughout the period. The contention that there were reciprocal promises and because the defendants did not come forward to perform their obligations, the plaintiff cannot be held to be guilty of delay and laches cannot also hold water, because the defendants have specifically claimed that they are performed the promise relating to demarcation of the 30 feet wide pathway and as regards the other obligation, namely, to get the persons interested to pathway to sign the attesting witnesses the same would arise only after the plaintiff pays the balance of sale consideration and the sale deed is ready for execution. Therefore, Point No.3 is answered against the 1st respondent and in favour of the appellant.

Point No.4:

39. This leads us to the last question as to whether the plaintiff is entitled to refund the advance. The execution of the agreement and the receipt of the advance amount are admitted. No doubt true, the agreement provides for forfeiture of the entire advance in the event of the failure on the part of

the plaintiff to perform his part of the contract. We have also found that the plaintiff is guilty of non-performance. However, we must point out that the defendants have also not come to Court with clean hands. While the agreement specifically sets out that the defendants will have to make arrangement to get the persons interested in the pathway to sign as attesting witnesses, the 1st defendant in the reply notice had chosen to deny the very term of the contract. Moreover, we find that the clause providing for forfeiture is penal in nature and the same does not amount to a provision for liquidated damages.

40. In view of the same, we are of the view that the plaintiff would be entitled to the alternative relief of refund of advance. Point No.4 is answered in favour of the plaintiff/1st respondent.

41. In fine the appeal is allowed, the decree for specific performance granted by the Trial Court is set aside and there will be a decree for refund of advance amount of Rs.5,00,000/- with 9% interest, from the date of suit till date of repayment. The parties are directed to bear their own costs, both in the suit as well as in this appeal. The suit in OS No.114/2007 will stand decreed for the alternative relief of refund of advance amount. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To
1.The Principal District Court,
Namakkal.

+1cc to Mr.N.Manokaran, Advocate sr.no.63307
+1cc to Mr.M.Guruprasad, Advocate sr.no.63882

A.S. No. 588 of 2011
and MP No.1 of 2011

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