IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

A.S.No.646 of 2009
and M.P.No.1 of 2009

M/s. Besto Brite Steels Private Limited
Registered Office at
No.4, Bandala Venugopal Street,
Triplicane, Chennai and works at
T.D.5.A, SIDCO Industrial Estate,Thirumzhisai
Chennai - 602 108
and also at No.46, SIDCO Industrial Complex,
SIDCO, Hosur,
Rep. by its
Managing Director-cum-Authorised
Signatory Mr.V.Karunanidhi .. Appellant / Defendant

Vs.

V.Muthu Krishnan .. Respondent / Plaintiff

Appeal Suit filed under Section 96 of the Code of Civil Procedure, to allow this appeal by setting aside the judgment and decree, dated 25.08.2008 passed in O.S.No.87 of 2004 on the file of the Additional District Judge, Krishnagiri.

For appellant : Mr.M.S.Krishnan, Senior Counsel
for Mr.K.G.Vasudevan

For respondent : Mr.V.Lakshminarayanan

JUDGMENT

(Judgment of the Court was delivered by P.KALAIYARASAN, J)

This Appeal Suit is directed against the Judgment and Decree, dated 25.08.2008 passed by the Additional District Court, Krishnagiri in O.S.No.87of 2004 decreeing the suit for specific performance.

2. The plaint averments are as follows :

(i) The defendant is a private limited company represented by its Managing Director. The defendant company owed a sum of Rs.24,00,000/- to ICICI Bank and the same would be cleared out of the sale proceeds by selling the suit schedule property. There was also labour problem and the company was in arrears of electricity charges. Representing the above facts, the defendant wanted to sell the suit property. The plaintiff after the conclusion of the sale talks, entered into a sale agreement with the defendant on 16.07.2003 fixing the sale price at Rs.24,00,000/-. Rs.10,000/- was paid as an advance and the balance of sale consideration of Rs.23,90,000/- is to be paid to the ICICI Bank, Chennai on behalf of the defendant to discharge the loan liability within 15 days and the defendant also agreed to execute the sale deed after clearance of the loan dues to ICICI Bank. Though the plaintiff is capable of purchasing the property out of the own deposits assets and resources, he approached the Indian Overseas Bank to raise Rs.20,00,000/- to avoid any future income tax complications. He also arranged the remaining amount of the sale consideration out of his resources.

(ii) One of the essential terms and conditions of the sale agreement is that the defendant should remove all the machinery from the schedule mentioned property within 15 days and deliver vacant possession at the time of the sale deed. In the meanwhile, on 25.07.2003, the plaintiff received a protest letter from the Union of the defendant company workers objecting to the plaintiff purchasing the suit property stating that the management has not cleared the dues of the workers and also stating that the dispute is pending before the Deputy Commissioner of Labour, Salem. The plaintiff also learnt that the defendant had failed to clear the electricity charge arrears and other statutory liabilities. On 30.07.2003 when the plaintiff along with the mediators met the defendant and requested him to remove the machinery and also clear other arrears including the workers dispute, the defendant represented that they will not remove the machinery and the plaintiff has to lease back the property to the defendant company to run the industry for a monthly rent of Rs.26,800/-. Though the plaintiff has been ready and willing to pay the balance of sale consideration and take the sale deed only on account of the non co-operation of the defendant and other breach committed by the defendant, the sale transaction could not be gone through within the said period. The plaintiff issued a legal notice, dated 20.08.2003 to the defendant, for which he sent a reply on 21.08.2003 with false allegations. Therefore, the plaintiff has filed the suit.

3. The averments made by the defendant in the written statement are as follows :

(i) It is true that the suit property belongs to the defendant company. The defendant company had already closed its operations in the suit property due to various factors and decided to settle the suit property to clear the mortgage loan to ICICI Bank, Chennai. The defendant company and its sister concern namely Radiant Steels Pvt., Ltd., and Star Brite Steels Pvt., Ltd., Chennai took secured loan from the ICICI Bank, Chennai for which the suit property was given as security by deposit of title deed and the machinery was hypothicated to it. The total loan amount with interest had accumulated to over Rs.1,51,60,000/- and after negotiation, the said ICICI Bank on 24.03.2003 had agreed to receive Rs.67,00,000/- as one time settlement for full and final settlement of all the dues of all the said three companies.

(ii) As stipulated by the Bank, the defendant company paid Rs.30,00,000/- on 31.03.2003 to the ICICI Bank. At the request of the defendant as a special case the Bank extended the period for the balance payment till 31.07.2003. The defendant made frantic efforts and paid Rs.7,90,000/- on 07.07.2003 and Rs.1,00,000/- on 15.07.2003 to the ICICI Bank. The balance payable was Rs.28,10,000/-. Under the said circumstances, the defendant company was compelled to negotiate and agreed to sell the suit property to the plaintiff for Rs.24,00,000/- on 16.07.2003. The sale agreement, dated 16.07.2003 was entered into between the plaintiff and the defendant for the sale of the suit property for Rs.24,00,000/- and the defendant received Rs.10,000/- as advance.

(iii) The plaintiff agreed to pay the balance sale consideration directly to the ICICI Bank. Since the payment had to be made to the ICICI Bank within the stipulated time towards one time settlement, time was made essence of the contract. The plaintiff was never ready and willing to perform his part of the agreement. As there was pressure on the defendant from the ICICI Bank, Chennai to clear its dues by 31.07.2003, up to 15.07.2003, the defendant paid Rs.8,90,000/-. Rs.1,00,000/- and Rs.4,50,000/- on 21.07.2003 and 26.07.2003 respectively. Since the plaintiff has not paid the balance sale consideration as agreed upon, the defendant had to pay the amount subsequently with additional interest of Rs.1,59,171/- for delayed payments to the ICICI Bank.

(iv) It is false to allege that the plaintiff approached the Indian Overseas Bank to obtain the loan and it had funds in his accounts and resources. The allegation that one of the essential terms in the condition of the sale agreement is that the defendant would remove all the materials from the suit property within 15 days is not true. The plaintiff was well aware that the machinery in the suit property was also hypothecated to the ICICI Bank, Chennai and that the machineries in the suit property was also hypothecated to the ICICI Bank, Chennai and that machineries could be removed from the suit property only after clearing the entire amount due to ICICI Bank. There was no dues payable to the defendant workers. The allegation that the defendant refused to remove the machinery in the suit property and he represented that the suit property is to be leased back to the defendant company on monthly rent is false. Therefore the suit is liable to be dismissed.

4. The trial Court framed necessary issues and after analysing oral and documentary evidence of both sides, decreed the suit as prayed for. Aggrieved by the same, the defendant has preferred this Appeal Suit.

5. The learned Senior counsel appearing for the appellant / defendant argued that time is essence of the contract and the plaintiff was never ready and willing to perform his part of the contract and the trial Court without considering these facts, decreed the suit.

6. The learned counsel appearing for the respondent interalia argued that removal of machinery and deliver vacant possession within 15 days is one of the essential condition and the same has not been done by the defendant. Further there was dues to the workers and there was labour problem and arrears of electricity charges has not been paid. Thus the defendant breached the agreement and the trial Court after analysing the evidence has rightly decreed the suit and the same does not require any interference.

7. The admitted facts are that the plaintiff and the defendant executed the sale agreement, dated 16.07.2003 wherein the plaintiff agreed to purchase the suit property for Rs.24,00,000/- and paid an advance of Rs.10,000/- to the defendant. The plaintiff agreed to pay the balance of sale consideration into the ICICI Bank, Chennai on behalf of the defendant to discharge the loan liability within 15 days and the defendant also agreed to execute the sale deed after the clearance of the loan dues to ICICI Bank.

8. The main argument of the respondent / plaintiff is that the defendant had not removed all the machineries from the suit property within 15 days as per the terms and conditions of the sale agreement and time is not essence of the contract.

9. Before analysing the divergent contentions of the parties, it will be appropriate to extract the relevant terms and conditions of the sale agreement, Ex.A.1, dated 16.07.2003 :

> "And Whereas, the vendor company mortgaged the schedule mentioned property in favour of ICICI, Chennai, for raising loan facilities and the vendor company decided to sell the schedule mentioned property with the consent of ICICI, Chennai, in order to discharge the bank loan

liability.

And Whereas, the vendor agreed to sell the schedule mentioned property for a total sale consideration amount of Rs.24,00,000/- (Rupees Twenty Four Lakhs only) for the above said purposes and reasons. The vendee has also agreed to purchase the schedule mentioned property from the vendor and in pursuance of the above said sale talk, the vendor and vendee enter into this agreement of sale mutually agreeing to the following terms and conditions :

1. That the vendor shall sell to the vendee the schedule mentioned property free from all encumbrance, charges, liens for a total sale consideration amount of Rs.24,00,000/- (Rupees Twenty Four Lakhs only). The vendee is also paying an advance amount of Rs.10,000/- (Rupees Ten Thousand only) to the vendor by way of cash on this day and the vendor does hereby acknowledge the receipt of the advance amount. The vendor has authorised the vendee to pay the balance of sale consideration amount of Rs.23,90,000/- (Rupees Twenty Three Lakhs and Ninety Thousand only) on its behalf to ICICI Bank, Chennai, to clear the entire loan dues payable by the vendor to the said bank and the vendee agrees to pay the said balance of sale consideration amount of Rs.23,90,000/- (Rupees Twenty Three Lakhs and Ninety Thousand only) by way of Demand Draft payable to ICICI Bank, Chennai, in pursuance of this agreement of sale and clear the encumbrance for the schedule mentioned property within 15 days of this agreement and the vendor does hereby admit that such payment of the balance of sale consideration by the vendee to the ICICI Bank, Chennai is accepted as payment of balance of sale consideration to the vendor. The vendor agrees that the vendor will execute and register the sale deed within the above said period on the above undertaking given by the vendee to clear the loan does of Rs.23,90,000/- (Rupees Twenty Three Lakhs and Ninety Thousand only) outstanding to ICICI Bank, Chennai.

...

8. That the vendor also undertakes to remove the machinery kept inside the schedule mentioned premises within 15 days and keep the shed vacant and the vendor further agrees to deliver vacant possession of the schedule mentioned property at the time of the execution and registration of the sale deed.

...

11. That the vendor and vedee do hereby mutually agree that in the event of the vendee not being in a position to pay the balance of sale consideration in the aforesaid manner to clear the ICICI Bank liability to the extent of Rs.23,90,000/- (Rupees Twenty Three Lakhs and Ninety Thousand only) within the stipulated period, this agreement shall stand automatically cancelled and the vendor is entitled to forfeit the said advance amount and sell the property to others without any reference to the vendee.

12. That if the vendor does not clear the outstanding dues to Tamil Nadu Electricity Board and any other dues and statutory payments to any of the Government Agencies or Institutions, the vendee is entitled to deduct such amount from the balance of sale consideration or rescind the contract and in that event the vendee is entitled to get the refund of the advance amount."

10. Normally in an agreement of sale of immovable property, time is not essence of the contract. If the intention of the parties is to fix the time limit to perform the contract, then time is the essence of the contract. The learned Senior counsel appearing for the appellant cited the Constitutional Bench Judgment of the Hon'ble Supreme Court in Chand Rani v. Kamal Rani reported in (1993) 1 SC 519 and contended that time is expressly made as essence of the contract as the object of sale itself is to clear the Bank dues under one time settlement scheme. In this Judgment it has been held as follows :

"20. We will now refer to the decisions of this Court. In Gomathinayagam Pillai case [1967 (1) SCR 227 : 1967 AIR(SC) 868] it was held at pages 231 to 233

"...Section 55 of the Contract Act which deals with the consequence of failure to perform an executory contract at or before the stipulated time provides by the first paragraph 'When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the opinion of the promise if the intention of the parties was that time should be of the essence of the contract.'It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In Jamshed Khodaram Irani v. Burjorji Dhunjibhai [ILR 40 Bom 289] the Judicial Committee of the Privy Council observed that the principle underlying Section 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed 'Under that law equity, which governs the rights of the parties is cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.... Their Lordships are do opinion that this is the doctrine which the section of Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in Tilley v. Thomas [(1867) 3 Ch App 61]"

The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts v. Berry [(1853) 3 DGM &G 284]) there is nothing in the 'express stipulation between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds... mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case.

"Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having rally and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to

> have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time-limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time-limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. 'Prima facie, equity treats the importance of such time-limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a court of law the contract has not been literally performed by the plaintiff as regards the time-limit specified.'"
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> ...
>
> 25. From an analysis of the above case-law 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 are1. 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"

11. Here in this case on hand, it has been specifically expressed that the plaintiff should pay the balance sale consideration directly to the Bank to clear the mortgage debt within 15 days from the date of the sale agreement. It is also further mentioned in the agreement that if the payment is not made within the stipulated time, the agreement shall stand cancelled. Before stipulating the conditions in the sale agreement, it has been stated that the defendant decided to sell the schedule property in order to discharge the bank loan liability. There is no dispute that the defendant agreed to sell the suit property to the plaintiff only to clear the loan amount due to ICICI Bank under one time settlement within the time stipulated by the Bank, i.e., 31.07.2003. As the plaintiff had not paid the amount to the Bank within the

stipulated time, the defendant had to sell the properties including the house property under Ex.B.10, dated 31.07.2003 and Ex.B.11, dated 10.09.2003 and cleared the loan amount due to ICICI Bank.

12. The letter from the ICICI Bank stipulating time till 31.07.2003 for one time settlement has also been marked as Ex.B.1. Considering the express terms of the contract and the object of making a contract from the above said surrounding circumstances, it is clear that time is essence of the contract in this case.

13. The plaintiff examined as P.W.1 and the attestor to the agreement examined as P.W.2 admit during cross-examination that the time is the essence of the sale agreement and defendant agreed to pay the balance sale consideration within 15 days. Though the plaintiff sought loan of Rs.20,00,000/- from IOB and he was also having funds to pay the balance sale consideration, he has not paid the amount as per the terms of the contract.

14. The contention of the plaintiff is that as per the terms of the contract the defendant has not removed the machineries from the suit property within 15 days. As per the terms of the agreement, the defendant is to remove the machinery kept inside the suit property and deliver the vacant possession at the time of execution and registration of the sale deed. As per the agreement, sale deed has to be executed after payment of the balance sale consideration into ICICI Bank by the plaintiff. The defendant took prompt effort by writing a letter to the ICICI Bank, Ex.B.5, dated 18.07.2003 seeking permission to remove the machineries from the suit property. The Bank sent a reply dated 19.07.2003 expressing its inability to accord permission as the machineries were under hypothecation. Therefore, only after payment into the Bank under one time settlement, the defendant will remove the machineries and deliver vacant possession at the time of execution of the sale deed.

15. The contention that the defendant when approached with request to remove the machineries represented that the premises is to be rented out to the defendant company itself is denied by the defendant. The persons who are alleged to have accompanied with the plaintiff for such meeting have not been examined on the side of the plaintiff. Therefore the above contention of the respondent / plaintiff is not sustainable.

16. Another contention of the respondent / plaintiff is that in the meanwhile he received a letter from the labour union saying that dispute of the workers with the company is

pending with the Deputy Commissioner of Labour. Even in the pliant, it is stated that there was labour problem in the company and knowing the labour problem, the plaintiff entered into an agreement of sale. Further there is absolutely no acceptable evidence to show that there are dues to the workers by the company as alleged by the plaintiff.

17. It is also contended on the side of the respondent / plaintiff that there was arrears of electricity charges. With respect to the arrears of electricity charges, it is provided in Clause 12 of the Agreement that the vendee is entitled to deduct such amount from the balance of sale consideration. Therefore, the contention raised by the respondent / plaintiff is not acceptable.

18. As far as readiness and willingness, it is everlasting principle that the purchaser should always be ready and willing to pay the sale consideration and perform his part of the contract throughout. In this case, no doubt the plaintiff filed Fixed Deposit receipts in his name and his family members. There is also evidence that he applied for loan from Indian Overseas Bank. Willingness is different from readiness. Though there is evidence to show that the plaintiff was with means, it is needless to say that he was not actually willing to perform his part of contract. It is pertinent to note that though 15 days time has been stipulated for the execution, he has not paid the amount and performed his part of contract. Therefore, the plaintiff is not entitled to the decree as prayed for by him.

19. The trial Court is not correct in decreeing the suit and for the reasons stated supra, the suit is liable to be dismissed.

In the result, this Appeal Suit is allowed with costs, setting aside the Judgment and Decree, dated 25.08.2008 passed in O.S.No.87 of 2004 on the file of the Additional District Judge, Krishnagiri. The suit in O.S.No.87 of 2004 is dismissed with cost. Consequently connected miscellaneous petition is closed.

-s/d-
Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

tsvn

To

The Additional District Judge
Krishnagiri.

+1 CC to Mr.K.G.Vasudevan, advocate sr 10130.
+1 CC to Mr.V. Raghavachari, advocate sr 9549.

A.S.No.646 of 2009

SP(23/02/2018)