

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2018

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.S.No.792 of 2016

Mohammed Mohaideen ... Plaintiff

Vs

A.Ramasamy ... Defendant

Plaint filed under order IV Rule 1 of O.S. Rues read with Order VII Rule 1 & 2 of C.P.C., praying for judgment and decree as follows:

a) To direct the defendant to perform his part of the agreement dated 23.08.2012 by executing the sale deed in favour of the plaintiff on receipt of the balance sale consideration of a sum of Rs.22,00,000/- (Rupees Twenty Two Lakhs only) and on the failure of the defendant in executing the sale deed to direct the Registrar, Original Side, High Court, Chennai, to execute the sale deed on their behalf;

b) To direct the defendant to deliver vacant possession of the suit property to the plaintiff;

c) To grant permanent injunction restraining the defendant his men and agents from any manner alienating, altering or encumbering the suit property being all that land and building being ground floor front portion 1st

shop, and building consisting of 1st and 2nd floor behind the shop in No.64, Sannadhi Stree, 100 Feet Road, Taramani Village, Chennai - 113 comprised in S.No.85/138, admeasuring 1500 sq.ft with common stair case bounded on the North by vacant land, South by 100 feet road, East by Ramasamy 2nd shop, West by Singaram Iron Shop described in the schedule hereunder;

d) or in the alternative for refund of the advance amount of Rs.5,00,000/- paid by the plaintiff to the defendant on the date of agreement together with interest at the rate of 12% per annum from the date of plaint till realization.

For Plaintiff : Mr.N.A.Nissar Ahmed

For Defendant : Mr.Y.Kaja Anavas

JUDGMENT

The suit C.S.No.792 of 2016 has been filed for specific performance of the sale agreement dated 23.08.2012; and for delivery of vacant possession of the suit property and for permanent injunction or an alternative relief for refund of the advance amount of Rs.5,00,000/- together with interest at the rate of 12% per annum from the date of plaint till realization.

2. The averments in the plaint would run thus:-

The plaintiff is the tenant under the defendant in respect of ground floor two shops in Door No.64, Sannathi Street, 100 ft Road, Tharamani, Chennai as per the lease agreement dated 01.01.2012. The plaintiff paid a sum of Rs.7,00,000/- towards advance and the monthly rent was Rs.6,000/-. The plaintiff has been carrying on business for the past several years and paying rents regularly to the defendant. While so, the defendant agreed to sell the property in favour of the plaintiff and an agreement of sale was entered into on 23.08.2012 in respect of the suit schedule property. The total sale consideration was Rs.27,00,000/- and on the date of sale agreement, the defendant received Rs.5,00,000/- as advance and the plaintiff had undertaken to pay another Rs.5,00,000/- within a year and the balance amount on or before 31.12.2016. When the plaintiff tendered a sum of Rs.5,00,000/- in terms of the agreement, the defendant was evading to receive the same and hence the amount was sent by way of cheque through registered post on 06.04.2016, however, the same was returned by the defendant. Thereafter, the plaintiff issued registered letter dated 14.05.2016 expressing his willingness to pay the balance sale consideration to get the sale executed. Though the defendant acknowledged the receipt of the letter, however, he neither replied nor came forward to execute the sale deed. Hence, the suit.

3. In the written statement, the defendant has stated that the agreement of sale dated 23.08.2012 produced by the plaintiff is a fabricated document and even though the defendant agreed to sell the suit property for Rs.27,00,000/- as per the original agreement, the plaintiff paid only Rs.1,00,000/- on the date of agreement and agreed to pay Rs.4,00,000/- within a period of one month therefrom and another Rs.5,00,000/- within one year and the balance sale consideration on or before 31.12.2016, however the plaintiff has not paid Rs.4,00,000/- within one month from the date of agreement, but issued two cheques bearing Nos.002049 and 002050, dated 22.09.2012, each for the value of Rs.1,00,000/-. With an instruction to defendant not to deposit the cheque for collection and instead agreed to pay the cheque amount. As per the arrangement, on 02.11.2012 the plaintiff paid Rs.30,000/-, on 16.11.2012, a sum of Rs.20,000/- on 26.11.2012, a sum of Rs.8,000, on 09.12.2012, a sum of Rs.2,000/-, on 28.12.2012, a sum of Rs.8,000/-, on 28.01.2013, a sum of Rs.8,000/-, on 05.02.2013, a sum of Rs.3,000/-, on 05.03.2013, a sum of Rs.8,000/- and on 28.03.2013, a sum of Rs.8,000/-, thereby, he paid Rs.2,05,000/- to the defendant. Hence, the defendant denied the averment that the plaintiff paid Rs.5,00,000/- initially and was ready to pay Rs.5,00,000/- within a period of one year. After receipt of the letter dated 14.05.2016, when the defendant contacted the plaintiff, he informed that the letter was sent as per the advise of his Advocate and when

he questioned about the alleged payment of Rs.5,00,000/-, the plaintiff did not reply and he went out from the shop. It is further stated that the suit is premature and there was no cause of action to file the suit. The defendant denied the plaintiff's readiness and willingness to perform his contract and prayed for dismissal of the suit.

4. After considering the pleadings, this Court has framed the following issues for consideration:-

"(1) Whether the agreement entered into between the plaintiff and the defendant is enforceable in law, in view of the fact that is not registered?

(2) Whether the second page of the agreement is forged and fabricated as contended by the defendant?

(3) Whether the suit is maintainable in view of the fact that the suit had been instituted even earlier to the period fixed for performance?

(4) Whether the plaintiff has paid an advance of Rs.5,00,000/- as contended by him or a sum of Rs.4,00,000/- as contended by the defendant?

(5) Whether the plaintiff is always ready and willing to perform his part of the agreement?

(6) Whether the plaintiff is entitled to the relief of specific performance of the agreement dated 23.08.2012?

(7) To what other relief the parties are entitled?"

5. During the trial, the plaintiff examined himself as P.W.1 and also examined P.W.2 and P.W.3, who are said to be the witnesses to the sale agreement dated 23.08.2012 and marked Exs.P1 to P3, viz., Ex.P1-copy of sale agreement, Ex.P2-copy of letter dated 06.04.2016, addressed to the defendant along with a copy of the cheque and original postal receipt and the original returned cover, Ex.P3-copy of another letter dated 14.05.2016 addressed to the defendant along with original postal receipt.

6. On the side of the defendant, the defendant was examined as D.W.1 and his wife and father-in-law were examined as D.W.2 and D.W.3 Documents Exs.D1 to D13 were marked, viz., Ex.D1-first page of the sale agreement dated 23.08.2012, Ex.D2-two cheques issued by the plaintiff in favour of the defendant, Ex.D3-death certificate of his father, Ex.D4-legal-heirship certificate of his father, Ex.D5-property tax and tax demand card, Ex.D6-original notice given by the defendant's counsel to plaintiff's counsel dated 27.02.2018, Ex.D7-copy of the complaint given by the defendant to the Inspector of Police, Taramani, dated 07.11.2016, Ex.D8-copy of the complaint given by the defendant to the Commissioner of Police, Taramani, dated 06.02.2017, Ex.D9-copy of the acknowledgment of the complaint dated 06.02.2017, Ex.D10-order passed in Crl.O.P.No.11463 of 2017, dated

29.06.2017, Ex.D11-certified copy of the letter dated 30.08.2017 given by the plaintiff addressed to the Inspector of Police, Taramani, Ex.D12-original application under the RTI Act with postal receipt, Ex.D13-copy of the FIR in Crime No.2301 of 2017, dated 25.10.2017.

Issue Nos.2 and 4 are interwoven and interlinked, hence, this Court is constrained to answer in cumulatively.

7. P.W.1 has deposed stating that he was originally a tenant under the defendant in respect of the suit property and the defendant had entered into an agreement of sale dated 23.08.2012 (Ex.P1), agreeing to sell the property for a total sale consideration of Rs.27,00,000/- and on the date of agreement, the defendant received Rs.5,00,000/- as advance and the plaintiff had undertaken to pay another Rs.5,00,000/- within a year. When the plaintiff tendered a sum of Rs.5,00,000/- as per the agreement, the defendant was evading to receive the same and hence, cheque dated 06.04.2016 was sent through registered post under Ex.P2, but it was returned. P.W.1 was always ready and willing to perform his part of contract and the defendant for the reasons best known to him was evading to perform his part of contract, despite receipt of notice of the plaintiff dated 14.05.2016.

8. The evidence of P.W.2 is to the effect that he signed as a witness in Ex.P1 as requested by the plaintiff, but he does not know any other details of Ex.P1. P.W.3 is the father in law of the plaintiff. He would state in his evidence that he signed as a witness as per the request of the plaintiff, however, he denied the suggestion that Ex.P1 is a forged document.

9. D.W.1 in his evidence stated that page No.2 of the Ex.P1 sale agreement is a forged one and he did not receive Rs.5,00,000/- towards advance as per Ex.P1, but the plaintiff had paid totally Rs.4,00,000/- on various dates. According to D.W.1., Ex.D1 is the original sale agreement dated 23.08.2012. Ex.D2 are two cheques dated 22.09.2012 issued by the plaintiff to the defendant for payment of advance. Exs.D7 & D8 are the complaint given by the defendant against the plaintiff and on the basis of complaint CSR was registered on 06.02.2017 in C.No.555 under Ex.D9. Ex.D11 is the letter dated 30.08.2017 issued by the plaintiff to the Inspector of Police, Tharamani Police Station, in and by which, the plaintiff admitted that an agreement of sale dated 23.08.2012 was entered into for sale of one of the shops of the defendant for a consideration of Rs.27,00,000/- and he paid Rs.1,00,000/- as advance and agreed to pay Rs.4,00,000/- within a period of one month. Since boundaries of the property was not mentioned in the agreement and after making payment of Rs.4,00,000/-, second page of the agreement was changed.

D.W.2 and D.W.3 who are the wife and father-in-law of D.W.1, have deposed that Ex.P1 sale agreement is forged by the plaintiff and Ex.D1 is the genuine agreement and on the date of agreement, the plaintiff paid a sum of Rs.1,00,000/- to the defendant.

10. The learned counsel for the plaintiff would argue that the plaintiff was already in possession of the property as a tenant and after paying Rs.5,00,000/- on the date of agreement i.e., dated 23.08.2012, when the plaintiff attempted to pay another Rs.5,00,000/- within a period of one year as per the agreement and the balance amount on or before 31.12.2016, the defendant evaded to receive the same and hence, the plaintiff issued a notice dated 06.04.2016, enclosing a cheque for Rs.5,00,000/-, which was returned as unclaimed and thereafter under Ex.P3 letter dated 14.05.2016, the plaintiff called upon the defendant to register the sale deed, after receiving the balance sale consideration of Rs.22,00,000/-. It is further submitted that even though the defendant received the notice dated 14.05.2016, but no reply was given, nor he came forward to execute the sale deed and for the default committed by the defendant, the plaintiff cannot be denied the right of specific performance.

11. *Per contra*, the learned counsel for the defendant would urge that Ex.P1 is a forged document and Ex.D1 is the genuine agreement, which has been proved through the evidence of D.Ws' 1 to 3. According to the learned counsel for the defendant, the defendant did not receive Rs.5,00,000/- on the date of agreement dated 23.08.2012, but received Rs.4,00,000/- so far on various dates from the plaintiff and to prove the same, Ex.D2 cheques issued by the plaintiff was marked.

12. In the written statement, a specific stand was taken that Ex.P1 is a forged sale agreement, but the plaintiff did not take any steps to prove it is a genuine by getting opinion of an Expert. On the other hand, the learned counsel for the plaintiff would state that the genuineness of Ex.P1 has been proved through the evidence of P.Ws' 2 and 3, who are the attesting witnesses. In support of his contentions, the learned counsel has cited the following judgment:-

In **CDJ 1966 SC 013 [Fakhruddin vs. State of Madhya Pradesh]**, the Hon'ble Supreme Court held that Sections 45, 47 and 73 of the Evidence Act, handwriting may be proved on admission of the writer by the evidence of some witness in whose presence he wrote. This is direct evidence and if it is available, the evidence of any other kind rendered unnecessary. The opinion

of handwriting expert is also relevant in view of Section 45 of the Evidence Act, but that too is not conclusive.

13. The learned counsel for the plaintiff would argue that even there are some alterations in the agreement, if it does not cause any prejudice to the other side, the document can be accepted and on that score, the document cannot be rejected, by relying on the following judgment:-

CDJ 2002 SC 425 [Ram Khilona & others Vs. Sardar & Others]

In that case, a question arose mere alteration in an agreement does not in any way effect the validity of the deed. The plaintiffs in that case had an apprehension that as the marginal witnesses in the original document were persons closely related to them, the Court may not readily accept the case of the plaintiffs regarding the agreement of sale; therefore, they subsequently introduced two independent persons as marginal witnesses in the document. The alteration, assuming it was made it subsequently did not bring any validity and enforceability of the agreement of sale.

14. It is not disputed that relief of specific performance being an equitable relief both the plaintiff and defendant are expected to approach the Court with clean hands and any false plea or willful suppression of material fact would be viewed seriously, that would itself dis-entitle them from getting relief in their favour.

15. Perusal of the materials reveal that neither in the plaint nor in the letters Exs.P2 & P3, nothing has been stated about payment of advance amount in installments and the circumstances that let to make alterations in Ex.P1. However, in the cross-examination, P.W.1 admits issuance of cheques Ex.D2 and changing of second page of the original agreement. P.W.1 further stated that Ex.D2 cheques were issued in blank as security for some other transaction, but no materials were produced to show the plaintiff had other business dealings with the defendant. Endorsements made in Ex.D2 shows that between 02.11.2012 and 28.03.2013, Rs.95,000/- has been paid. It is to be noted that the police complaint given by the plaintiff against the defendant and the letter issued by the defendant under Ex.P11 are not in dispute, wherein, he admitted payment of advance amount of Rs.1,00,000/-.

16. In the light of the above facts, this Court does not find any substance in the case of the plaintiff and on the other hand, it is evident from the evidence of D.W.1 to D.W.3 and Ex.D2 and Ex.P11 that plaintiff paid Rs.1,00,000/- on the date of agreement, subsequently Rs.3,00,000/- and in total, he paid Rs.4,00,000/-, not Rs.5,00,000/- as claimed by P.W.1. When it is proved that on the date of agreement, the plaintiff had paid only Rs.1,00,000/-, but a false claim has been made as if, he paid Rs.5,00,000/-, it

cannot be considered as mere alteration as suggested by the learned counsel for the plaintiff and the alteration would cause serious prejudice to the defendant. Hence, this Court comes to the irresistible conclusion that Ex.P1 is not a genuine agreement and the case of the plaintiff Rs.5,00,000/- was given on the date of Ex.P1 is not true. It is to be noted that Rs.4,00,000/- has been paid so far is also admitted by the defendant.

Issue No.5:

17. It is next contended by the learned counsel for the plaintiff that readiness and willingness has been averred in the plaint. Further, even though the plaintiff did not have sufficient fund in his bank account, the evidence of P.W.1, would establish that he has sources mobilize upto Rs.50,00,000/-. It is the submission of the learned counsel that these averments in the plaint and evidence would be sufficient to prove his readiness and willingness. In support of his contentions, the learned counsel has relied upon the following judgments:-

(i) In **CDJ 2012 MHC 1849 [C.Subramaniam v. A.Ramachandran**

and another], this Court has held that the plaintiff, who is in possession of the suit property under Section 53-A of Transfer of Property Act and had paid Rs.2,00,000/- as advance, out of sale consideration of Rs.3,75,000/-, need not

rush the Court without even waiting for the defendants to perform his part of contract. It is further observed that approaching the Court for getting specific performance is not a easy affair for the plaintiffs; he has to initially spend cost towards Court fee, Advocate fee and other incidental expenses. If a person is capable of raising money and paying the remaining part of sale consideration that itself is much more sufficient to prove his readiness and willingness to perform is part of contract. The relevant paragraph would run thus:-

" 26. In para No. 11 of its judgment, the trial court ignoring this clinching evidence, opined as though from those Exs. A9 to A15 one cannot infer that the plaintiff was financially sound to perform his part of the contract. No doubt, the trial court would even went to the extent of commenting upon those income tax returns and observe that only meagre amount was paid as income tax by the plaintiff. There the trial court committed a serious mistake. The trial court was misled by the notion as though the income tax paid by the plaintiff should be huge enough to enable the court to visualize that the plaintiff was capable of paying the remaining part of the sale consideration, so to say, the balance amount of Rs. 1,75,000/-. Both oral and documentary evidence adduced on the side of the plaintiff would convey and portray that he was financially sound and that simply because, those documents did not refer to the fact that he was having in his hand a sum of Rs. 1,75,000/- he cannot be described as a person, who was not having financial wherewithal to perform his part of the contract. Even if a

person is capable of raising money and paying the remaining part of the sale consideration that itself is much more sufficient to prove his readiness and willingness to perform his part of the contract. In this regard, I would like to cite the decision of the Hon'ble Apex Court reported in (1997) 4 SCC 482 : 1997-2-L.W. 257 [Bibi Jaibunisha v. Jagdish Pandit] could fruitfully be cited and certain excerpts from it would run thus:

'7. The next question is: whether the appellant was ready and willing to perform his part of the contract? In that behalf, all the Courts have found that the appellants was not ready and willing to perform his part of the contract and an inference has been drawn in support of the finding from the non-production of the Bank Pass-book. It is seen that though he has not produced the passbook, it is not the plea of the respondent that she had no capacity to pay the amount. She established that she has a substantial money to pay the amount. Under these circumstances, it would be unlikely that the appellant would have failed to offer the amount before coming to the Court for the specific performance. It is seen that the last day of the limitation under the contract was February 20, 1973 and the suit was filed on April 7, 1975 within three years under Article 54 of the Schedule to the limitation Act. The courts below were wrong in coming to the conclusion that the appellant had not tendered the amount to the respondent. It is seen that in the evidence of the plaintiff (PW-1), it is stated that he was willing and, in fact, he had offered a sum of Rs. 4,500/-. On the other hand, another witness (PW-3) has stated that he has offered to pay a sum of Rs. 4,000/-. On this minor discrepancy of Rs. 500/-, the court below was not right in disbelieving the entire evidence.

8. The material question is: whether the appellant had capacity to pay the money as offered. On this aspect, there is no consideration by either of

the courts. Under these circumstances, the courts below were in error in reaching the conclusion that the appellant was not ready and willing to perform her part of the contract. As held earlier, there is no dispute on the capacity of the appellant to pay back Rs. 4,000/- the consideration paid under the conveyance executed in favour of the respondent. When we put the question to the learned counsel for the appellant as to what amount his client is willing to pay since the property is required to be reconveyed under the agreement, the learned counsel, in fairness, has stated the appellant is willing to pay a sum of Rs. 40,000/- in lump sum.”

(ii) In **CDJ 2017 MHC 4344 [S.Deivanai & Others vs. V.M.Kothandaraman & Others]**, the Division Bench of this Court has held that mere delay in filing the suit for specific performance would not disentitle the plaintiff to get relief of specific performance.

(iii) **CDJ 2017 MHC 4454 [R.Leela Ammal vs. V.Gopal]**

In that case, within a period of one month of the agreement of sale, the defendant sent a letter stating that she was unwilling to execute the sale deed and in the letter, there is no whisper with regard to readiness and willingness on the part of the plaintiff to perform his contract. Immediately, after receipt of the notice from the defendant, the plaintiff filed a suit for specific performance. On considering those facts, the Division Bench held that the plaintiff has proved his readiness and willingness and to perform his part of contract.

(iv) In **CDJ 2016 MHC 2222 [M.Manoharan vs. G.Ganapathi]**, this Court has held as follows:-

"21. Though there are many discrepancies in the evidence adduced on the side of the respondent/plaintiff regarding the genuineness of Ex.A1-Agreement and passing of consideration under the said agreement, the same came to be rectified by the admission made by the appellant herein/defendant in his evidence as DW1. Hence there shall be no scope for going into the question of genuineness or otherwise of Ex.A1-Agreement for sale. The principle "admitted facts need not be proved", shall apply.

22. So far as the readiness and willingness of the respondent herein/plaintiff to complete the transaction by performing his obligations under the agreement for sale is concerned, it is an admitted fact that the respondent herein/plaintiff has deposited the balance amount of sale consideration into the court to the credit of the suit. From the various exchange of notices also it shall be quite clear that the respondent herein/plaintiff had been all along ready and willing to perform his part of the obligations under Ex.A1-Agreement for sale and on the other hand, it was the appellant/defendant who wanted to wriggle out of the contract, because of the opposition made by the members of his family. Hence this court comes to the conclusion that the finding of the trial court regarding readiness and willingness on the part of the respondent herein/plaintiff is correct and the same does not

deserve any interference. In a suit for specific performance, when the readiness and willingness of the plaintiff stands substantiated, unless the court comes to the conclusion that granting the relief of specific performance will result in miscarriage of justice on the ground that any undue advantage had been taken by the plaintiff, then the plaintiff cannot be denied the relief of specific performance. Hence the finding recorded by the trial court that the respondent herein/plaintiff was entitled to the relief of specific performance as prayed for in the plaint, has got to be confirmed. Accordingly, all the three points, namely Points 1, 2 and 3 formulated for determination in this appeal, are answered in favour of the respondent herein/plaintiff and against the appellant/defendant."

18. It is vehemently contended by the learned counsel for the defendant that the plaintiff has not proved his readiness and willingness to perform his obligation under the agreement. It is argued that the plaintiff in his chief stated that he gave a sum of Rs.5,00,000/- on the date of agreement as advance, however, during cross examination, he admitted that blank cheques bearing Nos.002049 and 002050 were given to the defendant for some other business dealings as security i.e., two cheques were given towards repayment of hand loan. On 14.02.2018, P.W.1 had deposed that on 06.04.2016, he had more than Rs.5,00,000/- in his bank account, if necessary, he is ready to produce the bank account. After one week again when he was

further examined on 20.02.2018, he did not produce bank statement, but stated as follows:-

"As on date, I have not retained a sum of Rs.5,00,000/- in my bank account. As on date I do not have Rs.22 Lakhs in my bank account. As on date, I have cash of nearly Rs.50 Lakhs, as I am doing business. The witness adds: Even now I ready to pay Rs.22 Lakhs towards balance sale consideration to the defendant. I do not remember whether I have filed any document in Court showing that I have Rs.22 Lakhs with me. I have not taken steps to deposit the said amount in Court till date."

19. It is further contended by the learned counsel for the defendant that the plaintiff being the tenant of the defendant, was paying monthly rent to the account of the defendant by RTGS, but failed to pay the amount of Rs.5,00,000/- as per the agreement within a period of one year. According to the learned counsel, if the plaintiff really had an intention to pay the advance amount, it would have been paid in the bank account of the defendant.

20. It is the submission of the learned counsel for the defendant that the conduct of plaintiff and his inconsistent evidence would prove that the plaintiff was not ready and willing to perform his obligation under the

agreement of sale. In support of his contentions, the learned counsel has cited the following judgments:-

(i) **1993 (1) SCC 519 [Chand Rani vs. Kamal Rani]**

"30. The next question is whether the plaintiff was ready and willing? The notices which were exchanged between the parties have to be looked into in determining readiness and willingness. On September 10, 1971 the plaintiff would say through the registered notice that ready money was available for purchase of the property which was followed up by a telegram. The stand is taken by the defendant that within 10 days from August 26, 1971, the sum of Rs 98,000 was not paid; hence, the sum of Rs 30,000 stood forfeited. The redemption of the mortgage would be done and the income tax clearance also would be obtained after the purchase of stamp paper. Where, therefore, the plaintiff was put on notice as to the stand of the defendant with regard to payment of Rs 98,000 which again was reiterated in the notice dated September 16, 1973, nothing would have been easier for the plaintiff than to pay the said sum. Instead of adopting that course what is stated in the notice dated September 24, 1971 by the plaintiff is as follows:

'5. That as per agreement, your clientess has to pay all taxes, rates, municipal taxes up to the date of registration and that the previous and other documents pertaining to the said plot No. 30, Block 'K', sanctioned plan and completion certificates from Municipal Corporation of Delhi in respect of the superstructure built on the said plot shall be handed over along with the vacant possession of first floor by September 30, 1971.

You know that September 30, 1971 is fast approaching and your clientess is still to comply with these requirements besides mentioned in para Nos. 2 and 3 of the agreement.

I, therefore, call upon you to advise your clientess to comply with the requirements well before September 30, 1971 or latest by September 30, 1971 and obtain the further part consideration of Rs 98,000 from my clientess.'

"31. Therefore, even as late as September 24, 1971 the plaintiff was never willing to make the payment of Rs 98,000. In this connection, we have already seen the oral evidence. It shows there was no readiness and willingness. We are in agreement with the conclusion of the Division Bench."

(ii) 2008 (12) SCC 145 [Bal Krishna v. Bhagwan Das]

"14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the

defendant, which he did not foresee. In other words, the courts discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

25. In the evidence also, the plaintiffs have throughout maintained that the agreement of reconveyance was for a sale consideration of Rs.10,000/- only of which Rs.5,000/- has already been paid Rs.1,000/- on 13.10.1953 and Rs.4,000/- on 1.2.1955. There is no specific statement made by the plaintiffs in examination-in-chief or in cross-examination that plaintiff No.1 Bal Krishna and/or his brother plaintiff No.2 Ramanlal were/was ready or are/is ready and willing to pay the entire amount of Rs.25,000/- as consideration amount to the defendant for reconveying the suit house. It may also be pertinent to note that the finding recorded by the trial court that the sale consideration of the suit house was Rs.25,000/- was even challenged by the plaintiffs by filing an appeal before the High Court."

(iii) 2005 (1) CTC 426 [Ulaganatha Reddy vs. Nandagopal Cheti and others

"25. The relief of specific performance is discretionary but not arbitrary and discretion must be exercised in accordance with the sound and reasonable judicial principles. The Court has first to consider whether the Plaintiff has established the case.

His conduct during, at and from the date of contract till date of suit bears great relevance. In a case of specific performance, it is for the Plaintiff to establish that the covenants in the contract are clear, cogent and fair; that he is ready and has always been ready and willing to perform his essential terms of the contract from the date of contract till date of decree. He must come to the Court with clean hands. If his conduct is tainted with falsity of the case or unworthy of acceptance, equity denies him the relief.

27. In the light of the above, if we consider the case in hand, we find that the discretion cannot be exercised in favour of the Plaintiff to grant specific performance. Stipulated time for execution of the Sale deed was fixed by 31.1.1985. As per the terms of Agreement, the balance amount of Rs. 20,899 is to be paid before 31.1.1985 and the Sale Deed is to be obtained. Under Exs.A-2 (dated 28.11.1984) and A-3 (dated 29.1.1985) endorsements, the Plaintiff has paid a further advance of Rs. 8,000 + Rs. 10,000 respectively. A total amount of Rs. 20,101 has been paid, out of the total sale consideration of Rs. 23,000. The Balance amount of Rs. 1,899 remains to be paid. But the same was not paid by the Plaintiff within the stipulated time or within the reasonable time, after Ex.A-3 second endorsement which was made on 29.1.1985. Only the defendants have first issued Ex.A-4 notice on 30.6.1988 stating that the Plaintiff did not pursue the agreement within the stipulated time and inform him that he has lost his right. There is no evidence showing readiness and willingness of the Plaintiff to perform his part of the contract

during the interregnum period between 29.1.1985 and 30.6.1988. In the reply notice, it has been alleged that the Plaintiff was always ready and willing to pay the balance amount to the defendants and get the sale Deed registered. Even in the reply notice, the Plaintiff had not fixed any specific date calling upon the defendants to execute the Sale Deed. By meticulous consideration of the conduct of the Plaintiff, this Court finds that the Courts below have rightly declined to exercise the discretion. The reason given by the Courts below in refusing to grant the relief of specific performance on the ground that there had been delay is well founded."

(iv) 2010 (2) LW 851 [Manoharakumari vs. Anitha]

"45. In a suit for specific performance, the Plaintiff must allege and prove the continuous readiness and willingness to perform the contract on his/her part from the date of the contract. The onus is on the Plaintiff. The requirement of law is two-fold: (i) the Plaintiff must aver in the plaint and (ii) that she must prove by evidence that she has always been ready and willing to perform her part of the contract."

47. Point No. 5:

As per Section 20 of the Specific Relief Act — discretion as to decreeing specific performance, grant of decree for specific performance of contract is not automatic and is one of the discretions of the Court and the Court has to consider whether it would be fair, just and equitable. But the discretion of the

Court is not arbitrary. But the one of the sound and reasonable and discretion guided by Principles of Justice, equity and good conscience. In Section 20(2) of the Act, certain circumstances have been mentioned as to under what circumstances, the Court shall exercise such discretion. If under the term of the contract the Plaintiff gets an unfair advantage over the Defendant, the Court may not exercise its discretion in favour of the Plaintiff. So, also specific relief may not be granted if the Defendant would be put to undue hardship which he did not foresee at the time of agreement, if it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the Plaintiff. In exercising discretion, court is obliged to take into consideration circumstances of the case, conduct of the parties and respective interests under the contracts."

21. In the written statement, the defendant specifically denied and disputed that the readiness and willingness pleaded by the plaintiff to perform his obligation under the agreement. Further, Section 16(c) of the Specific Relief Act, mandates the plaintiff to aver and prove his readiness and willingness from the date of agreement till the date of Decree. Hence, the burden of proof is heavily on the plaintiff to prove his case. It is evident from deposition of P.W.1 that he has been giving inconsistent statements, but no materials have been produced to show from the date of agreement, he was ready and willing to perform his obligations. It has been already held Ex.P1 is

a forged document and the case of the plaintiff that he paid Rs.5,00,000/- on the date of agreement as false. Even assuming the case of the plaintiff is taken as true, the next question that arises for consideration is whether another Rs.5,00,000/- was paid within a period of one year i.e. before 22.08.2013. It is the case of the plaintiff, he was ready to pay the amount, but the defendant evaded. Except these vague and bald statement nothing was brought on record to prove his case that he was having cash on hand or P.W.1 had the capacity to mobilize required fund. Admittedly, letter under Ex.P2 was sent on 06.04.2016 after lapse of more than 2 1/2 years. It is pertinent to note that the plaintiff is a tenant under the defendant and the rent was paid in the bank account of the landlord. So, if the plaintiff is genuinely interested to fulfill his obligations, the amount of Rs.5,00,000/- could have been transferred to the account of the defendant by RTGS. Keeping in view the principles laid down in the above decisions, the materials adduced by the respective parties, this Court is of the considered opinion that the conduct of the plaintiff proves that he was not ready and willing to perform his obligations and the issue is answered against the plaintiff.

Issue No.3:

22. The learned counsel for the plaintiff, by relying upon the following decisions, would submit that time is not the essence of contract in respect of the agreement of sale of immovable property:-

(i) In *CDJ 1977 SC 057 [Govind Prasad Chaturvedi vs. Hari Dutt Shastri and another]* and In *CDJ 1988 SC 379 [Indira Kaur & Others vs. Sheo Lal Kapoor]*, the Hon'ble Supreme Court, on facts held that the time was not the essence of the contract.

(ii) In *CDJ 1996 SC 243 [Gomathinayagam Pillai & Others Vs. Pallaniswami Nadar]* a similar view was expressed stating that 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.

23. In the instant case, it seems that there is no delay in filing the suit and it is the case of the defendant that the suit is premature. The core issues arise for consideration in this case is whether the agreement of sale is genuine and the plaintiff was ready and willing to perform his obligation under the contract. In view of the findings on issue Nos.2, 4 and 5, no separate finding on issue No.3 is required.

Issue No.1:

24. For better appreciation, Section 17 of the Registration Act is extracted below:-

"The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said Section 53A."

25. A plain reading of the above provision makes it very clear after amendment of the above Section in the year 2001, any agreement in respect of immovable property requires registration. It is not disputed that the sale agreement is an unregistered one. It is the contention of the learned counsel for the plaintiff that the plaintiff even prior to Ex.P1 was in possession of the suit property as tenant and hence, the agreement need not be registered. But, I find no force in the submission. Since the plaintiff is taking a shelter under Section 53 of Transfer of Property Act, the agreement requires compulsory registration as per the amended Act. It is relevant to note that this Court has already held that Ex.P1 is the forged document and hence, the issue is answered against the plaintiff.

26. It is pertinent to note here that the original sale agreement of Ex.P1 was not produced and a copy of the agreement was permitted to be marked as Ex.P1 subject to objection. The learned counsel for the defendant would argue that unless the procedures contemplated under Sections 65 and 66 of the Evidence Act are followed, the secondary evidence cannot be permitted to be marked and in support of his contentions he has cited the following judgments:-

(i) **2014 (1) CTC 216 [J.S.Gadwin & another vs. Jashmin]**

"24. From the cumulative reading of the said Sections, it is made clear to the Court that as per Section 63 of the said Act, secondary evidence can be produced if primary evidence is not available. However a document must be proved by primary evidence. If a party wants to produce secondary evidence, he has to fulfil the conditions mentioned in Sections 65 & 66 of the said Act."

(ii) **2013 (2) MLJ 86 [Dr.Ahamed Ali vs. A.Venkatesh]**

"18. Preponderance of probabilities available in the case would candidly indicate that the story woven by the Plaintiff that he could only see the Sale Agreement after the death of his mother is untrue. It is not adverted to in his Reply Notice-Ex.A3 dated 10.7.2002. Further, the ground adduced by the Plaintiff for non-production of original with the Plaintiff could

not be accepted by the Court. No decree for Specific Performance could be comprehended on the strength of production of Xerox copy of Sale Agreement when Ex.A1 received critical attack from the side of the Defendant and in the absence of persuading reasons for non-production of originals. Ex.A1 is crucified by the evidence of hand writing expert that the signatures stated to be of Defendant are not alike. In these circumstances, the Court has much hesitation to uphold the genuineness of Ex.A1. On scrutiny of the pleadings and evidence on record, it is held that the Sale Agreement-Ex.A1 dated 23.9.1998 not true, valid and unenforceable. This point is answered in the negative."

27. The relevant sections of Evidence Act would run thus:-

" (i) **Section-62. Primary evidence:-**

Primary evidence means the document itself produced for the inspection of the Court.

(ii) **Section-64. Proof of documents by primary evidence:-**

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

(iii) **Section-65. Cases in which secondary evidence relating to documents may be given:-**

Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence2;"

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Section-66-Rules as to notice to produce:-

Secondary evidence of the contents of the documents referred to in section 65, clause

(a) , shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:—Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 1[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case\:" Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

- (1) when the document to be proved is itself a notice;
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;
- (4) when the adverse party or his agent has the original in Court;
- (5) when the adverse party or his agent has admitted the loss of the document;
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

28. A cursory perusal of the above provisions and the dictum laid down in the decisions make it clear that documents must be proved by production of primary evidence. Sections 65 and 66 permit admission of secondary evidence under certain circumstances. If these conditions are not complied with, secondary evidence can be permitted to be marked.

29. Indisputably, the plaintiff had not taken any steps for production of the original documents. According to the learned counsel for the plaintiff in Ex.D11, the plaintiff has categorically stated that the original Ex.P1 is with the Police and hence, photo copy can be accepted. I am unable to accept the submission of the learned counsel for the plaintiff for the reasons that the act mandates production of primary evidence and unless the conditions stipulated in Sections 65 and 66 are satisfied under no circumstances secondary evidence can be permitted to be marked. Indisputably, the plaintiff had not taken any steps to comply the conditions and hence, Ex.P1 sale agreement cannot be admitted in evidence. Hence, the above issue is answered against the plaintiff.

Issue Nos.6 & 7:

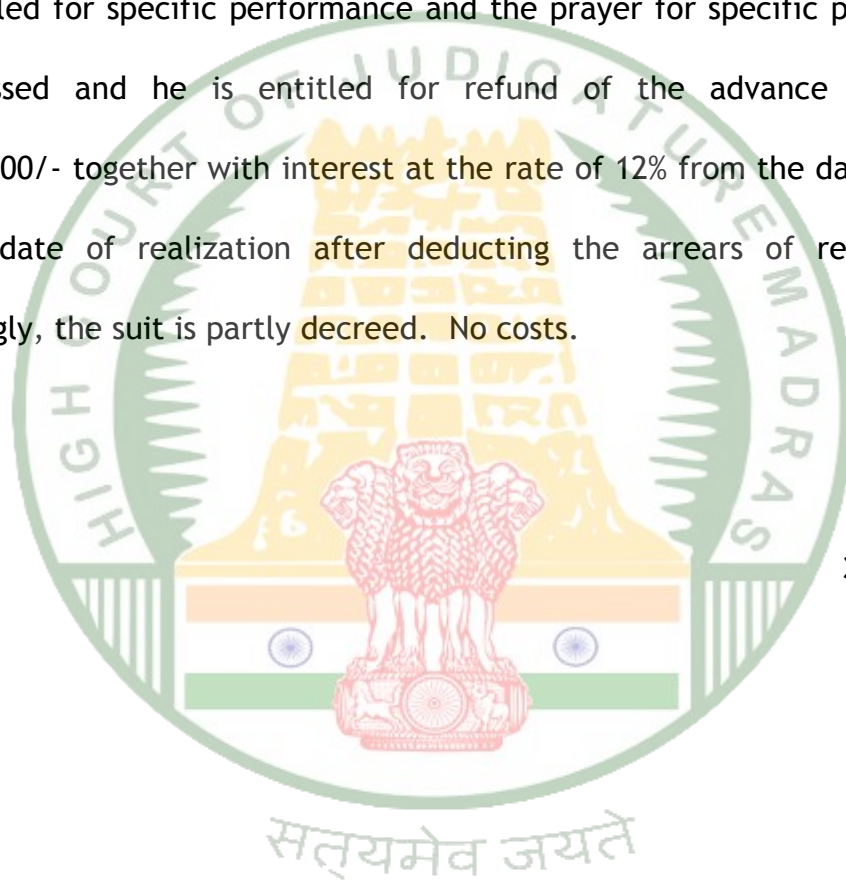
30. It is brought to the knowledge of this Court that the defendant had already filed an eviction petition in R.C.O.P.No.1362 of 2017 against the plaintiff on various grounds, including, the ground of willful default. It is an admitted fact that subsequent to the agreement of sale Ex.P1, the plaintiff is not paying the rent agreed to the defendant. In view of the findings on the above issues, the plaintiff is not entitled for the relief of specific performance of the agreement dated 23.08.2012 and he is entitled for refund of the advance amount of Rs.4,00,000/- along with interest at the rate of 12%. The

defendant shall pay the amount after deducting the arrears of rent to the plaintiff.

31. In the light of the above discussion and finding, the plaintiff is not entitled for specific performance and the prayer for specific performance is dismissed and he is entitled for refund of the advance amount of Rs.4,00,000/- together with interest at the rate of 12% from the date of plaint till the date of realization after deducting the arrears of rent, if any. Accordingly, the suit is partly decreed. No costs.

r n s

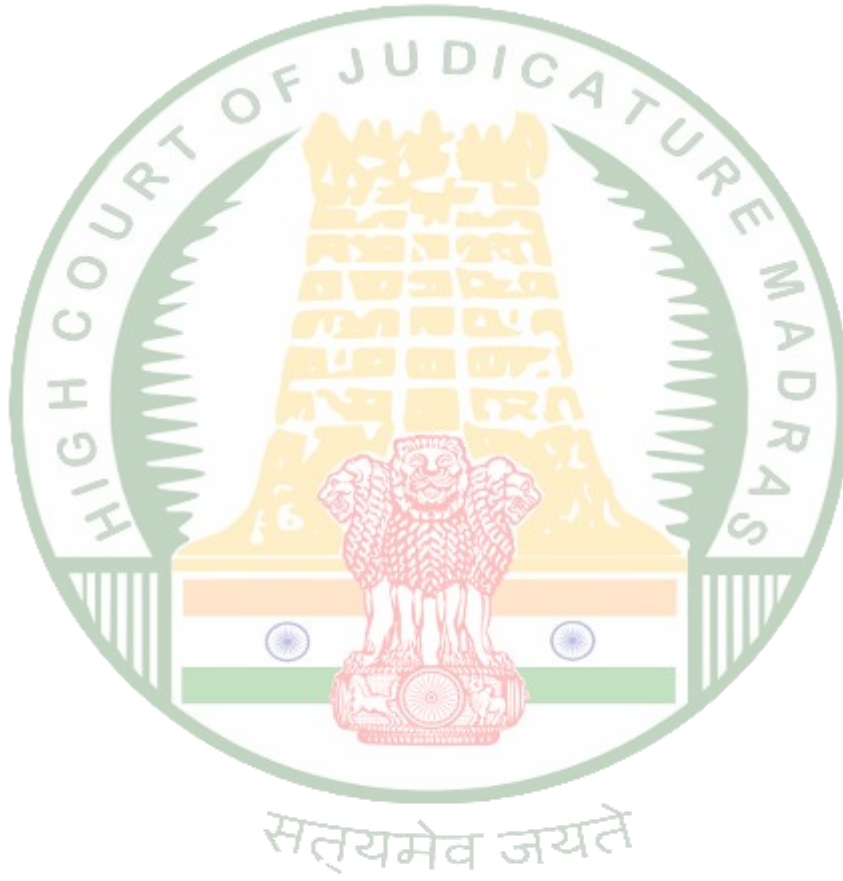
30.11.2018



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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.



WEB COPY

K.KALYANASUNDARAM, J.,

r n s



C.S.No.792 of 2016

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30.11.2018