

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.08.2018
PRONOUNCED ON : 10.09 .2018

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.228 of 2015

Sundarababu

...Appellant/Defendant

Vs.

Rudragiri

...Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 30.01.2015 passed in A.S.No.4 of 2014 on the file of II Additional District Court, Ranipet, confirming the judgment and decree dated 26.07.2013 passed in O.S. No.130 of 2007, on the file of Subordinate Court, Ranipet.

For Appellant : Mr. I. Abrar Mohammed Abdullah

For Respondent : Mr.T.P. Prabhakaran

JUDGMENT

In this second appeal, challenge is made to the judgment and decree dated 30.01.2015 passed in A.S.No.4 of 2014 on the file of II Additional District Court, Ranipet, confirming the judgment and decree dated 26.07.2013 passed in O.S. No.130 of 2007, on the file of Subordinate Court, Ranipet.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for specific performance.

4. The case of the plaintiff, in brief, is that the suit property belongs to the defendant and the defendant entered into an agreement with the plaintiff on 10.06.2005 to sell the suit property in his favour for a total consideration of Rs.2,11,515/- and received a sum of Rs.75,000/- on the date of agreement and as per the terms of the said agreement, the plaintiff has to pay a further sum of Rs.25,000/- during the month of July 2005, but, the defendant refused to receive the same and subsequently, the defendant issued a legal notice dated 24.08.2006 and on receipt of which, the plaintiff immediately

met the defendant and offered to pay the entire sale consideration, but, once again, the defendant evaded to receive the same and the plaintiff has been always ready and willing to pay the balance sale consideration and get the sale deed executed in his favour and has been repeatedly requesting the defendant with reference to the same, however, it is only the defendant who had been evading to complete the sale transaction by receiving the balance amount, hence, the plaintiff caused the issuance of a legal notice dated 22.12.2006 to the defendant to comply with the terms of the sale agreement. The defendant received the said notice and not responded to the same, hence, according to the plaintiff, he has been necessitated to lay the suit for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiff is not maintainable either in law or on facts. It is true that the defendant is the absolute owner of the suit property and also it is true that the defendant had entered into a sale agreement on 10.06.2005 with the plaintiff to sell the suit property and received an advance of Rs.75,000/- from the plaintiff on the date of sale agreement. As per the terms of the sale agreement, the plaintiff was supposed to pay a sum of Rs.25,000/- out of the balance sale consideration on 10.07.2005 and the rest of the balance sale consideration on or before January 2006. However, the plaintiff had never bothered to pay either Rs.25,000/- nor the balance sale consideration on or before January 2006 and it is false to state that the plaintiff had offered to pay Rs.25,000/- in the month of July 2005 and the defendant was available in his address and if really the plaintiff had been interested in the completion of the sale, he would have contacted the defendant and sort out the matter and it is only the plaintiff who had been evading to complete the sale transaction for the reason that funds were struck up and he was not in a position to arrange the payment of balance sale consideration. The defendant after waiting endlessly for nearly 7 months and as the plaintiff had failed to come forward to pay the balance sale consideration and complete the sale transaction, issued a legal notice on 24.08.2006 cancelling the sale agreement and directed the plaintiff to take back the advance amount of Rs.75,000/- within 7 days on receipt of the said notice. The plaintiff received the abovesaid notice on 01.09.2006 and failed to reply nor meet the defendant and it is false to state that the plaintiff has been always ready and willing to pay the balance sale consideration. The plaintiff issued a legal notice on 22.12.2006 calling upon the defendant to comply with the terms of the sale agreement and the defendant sent a reply notice on 29.12.2006 to the plaintiff's counsel stating all the above facts and called upon the plaintiff to withdraw the notice as time had elapsed and directed the plaintiff to take back the advance amount. The

counsel had received the said reply notice, however, the plaintiff had failed to comply with the terms of the sale agreement and knowing fully well that time is the essence of the contract and though the plaintiff had been given sufficient time to comply with the terms of the sale agreement, having failed to comply with the same, cannot be allowed to put the blame on the defendant and hence the suit laid by the plaintiff is devoid of merits and liable to be dismissed.

6. In support of the Plaintiff's case, PW1 was examined and Exs.A1 to A4 were marked. On the side of the defendant DW1 was examined and EXs.B1 and EX.B2 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the courts below were pleased to decree the suit as prayed for. Impugning the same, the present second appeal has been laid.

8. The second appeal has been admitted on the following substantial questions of law.

- a) Whether the lower appellate court was right in holding the time is not the essence of the contract without looking into the conduct of the parties?
- b) Whether the lower appellate court was right in granting the relief of specific performance in the absence of a prayer for declaration that the cancellation of the agreement by the defendant vide Ex.A2 is invalid?"

9. The suit has come to be laid by the plaintiff for specific performance in respect of the sale agreement dated 10.06.2005, which document has come to be marked as Ex.A1. There is no dispute between the parties as regards the execution of the sale agreement Ex.A1. Thus, it is found that the parties had entered into the abovesaid sale agreement, whereunder, the defendant, being the owner of the suit property, agreed to alienate the same in favour of the plaintiff for the price mentioned therein and it is found that by way of the abovesaid sale agreement, the defendant had received a sum of Rs.75,000/- from the plaintiff on the date of the sale agreement. As regards the abovesaid facts, there is no issue between the parties.

10. On a perusal of Ex.A1, it is found that the parties had agreed thereunder, whereby, the plaintiff should pay the defendant a sum of Rs.25,000/- towards the balance sale consideration on or before 10.07.2005 and the remaining balance

sale consideration on or before January 2006 and on such terms, the parties had agreed that the sale deed should be executed and registered as agreed to between the parties. Thus, it is found, as rightly put forth by the defendant, considering the agreement entered into between the parties by way of Ex.A1, the sale transaction should be completed within a specific time framework. It is seen that accordingly, the parties had spelt out the time schedule for completing the sale transaction and accordingly it is noted that the plaintiff had been directed to pay the balance sale consideration of Rs.25,000/- on or before 10.07.2005 and the remaining balance sale consideration on or before January 2006. Thus, it is noted that the parties are very particular that the sale transaction should be completed at the most on or before January 2006. In the light of the above position, even though it could be stated that the time may not be the essence of the contract in respect of the agreement of the sale of immovable property, however, when the parties had endeavoured to fix the outer time limit for completing the sale transaction as in the present case, as rightly put forth, the parties should have felt that the time factor is an essential ingredient of the agreement and accordingly on that reasoning, it is seen that both the plaintiff and the defendant by way of Ex.A1 sale agreement had fixed the specific time limit for completing the transaction.

11. In the light of the abovesaid factors, it has to be seen whether the plaintiff who has come forward with the suit seeking the discretionary and equitable relief of specific performance, had been ready and willing to perform his part of contract as stipulated under Ex.A1. As above seen, as per the terms of Ex.A1, the plaintiff should, at the first instance, pay a sum of Rs.25,000/- on or before 10.07.2005. It is found that there is no material placed on record by the plaintiff to establish that he had paid the abovesaid sum of Rs.25,000/- to the defendant on or before 10.07.2005. Though the plaintiff would vaguely aver in the plaint that he had offered to pay the abovesaid sum to the defendant during the month of July 2005 and the defendant had evaded to receive the same, when the abovesaid version of the plaintiff has been stoutly contested and repudiated by the defendant, it is for the plaintiff to establish the abovesaid case other than making a bare averment that he had offered to pay the sum of Rs.25,000/- during the month of July 2005. No further proof or material is placed by the plaintiff to evidence that the defendant had been evading to receive the sum by one way or the other and hence he could not proceed further. If really, the plaintiff had offered to pay the sum of Rs.25,000/- during the month of July 2005 and despite the same the defendant had evaded to receive the amount, as a prudent person, the next course of action that the

plaintiff should have adopted is to cause a legal notice to be sent to the defendant expressing his readiness and willingness to pay the sum of Rs.25,000/- by avering that he had offered the said amount during the month of July 2005 and despite the same, the defendant had evaded to receive the same. However, though the plaintiff would aver in the plaint that he has offered to pay Rs.25,000/- during the month of July 2005 and the same had been refused to be accepted by the defendant, as to why the plaintiff thereafter remain silent without taking any further follow up action, there is no proper plea or explanation put forth in the plaint on the part of the plaintiff. It is thus found that thereafter the plaintiff had not evinced any interest to express his readiness and willingness to the defendant to pay the balance sale consideration and complete the sale transaction as agreed to between the parties.

12. As per the terms of Ex.A1, it is seen that apart from the payment of Rs.25,000/- on or before 10.07.2005, the plaintiff is also required to pay the balance sale consideration on or before January 2006 and complete the sale transaction. However, there is no material placed by the plaintiff to show that he had the means and possessed the balance sale consideration and was willing to part with the same to the defendant before the stipulated time of January 2006 and it is only the defendant who had refused to receive the same. With reference to such act on the part of the plaintiff, there is no clear plea in the plaint. The plaintiff would only aver very vaguely that he has been ready and willing to pay the balance sale price and repeatedly been requesting the defendant to receive the same. If the abovesaid case of the plaintiff has any element of truth and the defendant had been evading to complete the sale transaction by receiving the balance sale consideration, even thereafter, nothing prevented the plaintiff to take further follow up action in the manner known to law. Atleast by noting that the defendant had refused to receive the balance sale consideration at the end of January 2006, the plaintiff, as a prudent person, should have taken further proceedings in tune with the terms of the sale agreement Ex.A1. To show his readiness and willingness, he should have issued a legal notice to the defendant calling upon him to receive the balance sale consideration and complete the transaction. But, as above noted, other than the bare plea of his readiness and willingness to pay the balance sale consideration and his allegation that the defendant had refused to receive the same on some pretext or the other, that apart, no further concrete action is found to have been initiated at the instance of the plaintiff with reference to the completion of the sale transaction. Thus, it is found that as rightly put forth by the defendant, no acceptable and reliable material has been placed by the plaintiff to show that he has been ready and willing to

pay the balance sale consideration on or before January 2006 as contemplated under Ex.A1 sale agreement.

13. As above noted, the parties had fixed a specific time limit within which the sale transaction is agreed to be completed. In the light of the above discussion, when it is noted that the plaintiff has failed to place any acceptable and reliable material evincing his readiness and willingness to pay the balance sale amount as stipulated under Ex.A1, particularly, the plaintiff having failed to establish that he had been having the balance sale consideration and ready to part with the same and it is only the defendant had been evading to receive the same, in such view of the matter, it is seen that the defendant after waiting for nearly 7 months ending January 2006, noting that the plaintiff had failed to come forward to pay the balance sale consideration as stipulated under Ex.A1 and accordingly opining that the plaintiff is not interested in proceeding further in the matter and accordingly proceeded to issue a legal notice to the plaintiff on 24.08.2008 expressing the abovesaid facts and accordingly informing that in as much as the plaintiff had failed to comply with the terms of the sale agreement and perform his part of the contract as stipulated thereunder, accordingly directed the plaintiff to receive the advance amount of Rs.75,000/- from the defendant within 7 days from the date of receipt of the abovesaid notice, failing which, also informed the plaintiff that the sale agreement dated 10.06.2005 would stand cancelled. The abovesaid notice has been marked as Ex.A2. The receipt of Ex.A2 has not been controverted by the plaintiff. Thus it is seen that after the expiry of nearly 7 months from the outer time limit fixed under Ex.A1, the defendant had chosen to send Ex.A2 notice to the plaintiff putting forth the case that the plaintiff had failed to perform his part of the contract in paying the balance sale consideration as stipulated under Ex.A1 and resultantly directed the plaintiff to receive the advance sum within 7 days and also informed the plaintiff of his intention to cancel the sale agreement. As above noted, the plaintiff had received the said notice and according to the defendant, the abovesaid notice had been received by the plaintiff on 01.09.2006. Even after the receipt of Ex.A2 notice sent by the defendant's counsel, it is seen that the plaintiff had not shown any interest to respond to the same immediately or meet the defendant with reference to the same and thereby part with the balance sale consideration and complete the sale transaction. Though the plaintiff would aver that immediately after receipt of Ex.A2, he had met the defendant and offered to pay the balance sale consideration and it is only the defendant who had evaded to receive the same, at least on noting the abovesaid conduct of the defendant, nothing prevented the plaintiff from taking the further course of action available to him under law by issuing a suitable reply notice to the

defendant explaining the abovesaid facts. On the other hand the plaintiff, other than making the abovesaid bare averments in the plaint, had not endeavoured to place reliable material to conclude safely that he had met the defendant after the receipt of Ex.A2 notice and offered to pay the balance sale consideration but it is only the defendant who had refused to receive the same. Such being the position, it is found that the abovesaid case of the plaintiff is unsustainable and on the whole, it is seen that the plaintiff has miserably failed to establish the essential ingredient of the readiness and willingness on his part for obtaining the equitable relief of specific performance.

14. It is found that thereafter nearly 4 months after the issuance of Ex.A2 notice, the plaintiff had chosen to send a legal notice to the defendant on 22.12.2006 marked as Ex.A3 and by way of the abovesaid notice, the plaintiff would aver and claim that he had offered to pay the further sum of Rs.25,000/- during July 2005, but the defendant had evaded to receive the same and again offered to pay the balance sale consideration after the receipt of Ex.A2 notice and again the defendant evaded to receive the same and accordingly asserted that he had been always ready and willing to pay the balance sale consideration and get the sale deed executed, but it is only the defendant who had refused to receive the balance amount and execute the sale deed and thereby called upon the defendant to receive the balance sale amount and execute the sale deed within 7 days from the date of receipt of the said notice. It is thus found that nearly 11 months after the outer limit fixed by the parties to complete the sale transaction under Ex.A1, only in the month of December 2006, the plaintiff, for the first time, has come forward with the notice calling upon the defendant to receive the balance sum and execute the sale deed and the plaintiff had not endeavoured to send the legal notice immediately to the defendant on noting the alleged evasive attitude of the defendant in receiving the sum of Rs.25,000/- said to have been offered by the plaintiff during July 2005. As rightly put forth by the defendant, in as much as no such offer had been made by the plaintiff to the defendant as regards the payment of Rs.25,000/- during July 2005 and the defendant had not evaded to receive such payment, it is found that the plaintiff had not evinced to take any follow up action with reference to the same. Further, even after receipt of Ex.A2 notice, it is found that the plaintiff had not shown his readiness and willingness to perform his part of the contract though he would aver that thereafter he had met the defendant and offered to pay the balance sale price and get the sale deed executed and it is only the defendant who had evaded to receive the same. If that be so, on noting the abovesaid stance of the defendant, nothing prevent the plaintiff to take further follow up action in issuing a

reply notice to Ex.A2 or a fresh legal notice to the defendant calling upon him to complete the sale transaction by executing the sale deed. On the other hand, it is found that nearly 4 months after the issuance of Ex.A2, the plaintiff has come forward with the notice on 22.12.2006 and all those facts seen cumulatively, would only go to show that in as much as the plaintiff has never been ready and willing to perform his part of the contract and accordingly unable to place any acceptable and reliable material to substantiate his case with reference to the proof of readiness and willingness on his part in completing the sale transaction. The courts below seems to have accepted the plaintiff's case on the footing that the defendant during the course of cross examination, had, in one place, admitted about the offer of the plaintiff in paying the balance sale consideration and his refusal to receive the same. As however rightly put forth by the defendant's counsel, the evidence of the party should be read as a whole and it should not be read in piece-meal, the courts thereby should not come to the conclusion that the said party had tendered the evidence in a particular fashion this way or that way. Reading of the evidence tendered by the witness during the course of cross examination on a whole, if assessed, it is found that though the defendant at one point of time would testify that the plaintiff had offered to pay the balance sale consideration and he had refused to receive the same, considering the context in which the abovesaid evidence had been rendered, it is found that prior to the abovesaid evidence, the defendant was cross examined with reference to the notice sent by him marked as Ex.A2 and the reply sent by the plaintiff marked as Ex.A3, accordingly in that context when he had been cross examined, he had averred that the plaintiff had offered to pay the balance sale consideration and he had refused to receive the same. On a reading of his evidence adduced further would go to show that as per the case of the defendant he had replied to Ex.A3 on 29.12.2006, which has been marked as Ex.B1 and accordingly he has further testified that the plaintiff had come forward with the suit and denied the stand that the plaintiff had been always ready and willing to pay the balance sale consideration and it is only the defendant who had evaded to receive the same and further would also depose that in as much as the plaintiff had refused to part with the balance sale consideration as stipulated under Ex.A1 sale agreement, he had refused to receive the same. Viewed in the abovesaid context, if the evidence of the defendant is assessed in toto, it is found that the defendant on noting the conduct of the plaintiff in not coming forward to pay the balance sale consideration and complete the sale transaction, proceeded to issue the legal notice on 24.08.2006 marked as Ex.A2 whereunder he has clearly averred that the plaintiff had failed to perform his part of the contract and thereby apprised the plaintiff of his intention to cancel the

sale agreement and accordingly directed the plaintiff to receive the advance sum of Rs.75,000/- within 7 days from the date of receipt of notice, failing which, the sale agreement would stand cancelled. Admittedly, the plaintiff having failed to come forward and receive the advance sum within 7 days of the receipt of Ex.A2 notice, resultantly, it is found that on such failure of the plaintiff as put forth by the defendant in Ex.A2 notice, the sale agreement stands cancelled. In such view of the matter, if the evidence of the defendant is viewed accordingly, it is noted that in as much as the act of the plaintiff, if any, qua the payment of the balance sale consideration is not in accordance with the time limit set out by the parties under Ex.A2, it is seen that the same had been turned down by the defendant and accordingly it is found that the defendant during the course of cross examination, as above noted, deposed about the payment of balance sale consideration by the plaintiff and his refusal to receive the same and also given the reason for the refusal that in as much as the plaintiff had failed to offer the balance sale consideration within the time limit set out by the parties under Ex.A1, he has refused to receive the same. Accordingly it is seen that when the defendant had made out clearly that the sale agreement stands cancelled under Ex.A2 and when the plaintiff had failed to comply with the directions of the defendant put forth under Ex.A2 and receive the advance sum within 7 days of the receipt of said notice, resultantly the position would be that the sale agreement would remain cancelled. Such being the position, the defendant cannot be expected to accede to the request of the plaintiff to receive the balance sale consideration thereafter and complete the sale transaction.

15. Some justification should be given to the endeavour of the parties in fixing certain time limit for completing the transaction. Accordingly, as in the present case, the parties had agreed to complete the sale transaction within a specific time limit and in such view of the matter, the parties having fixed the outer time limit for completing the sale transaction, when it is found that despite the same, the plaintiff had failed to perform his part of the contract within the said outer time limit and following the same, the defendant after waiting for a considerable time, had chosen to cancel the sale agreement thereby, the plaintiff still not showing his readiness and willingness to go further and complete the sale transaction and on the other hand, had chosen to send the reply notice only 4 months thereafter, it is found that there is a total absence of readiness and willingness on the part of the plaintiff in completing the sale transaction. In such view of the matter, the courts below had erred in placing reliance of the abovesaid testimony of the defendant adduced during the course of the cross examination as if the plaintiff had been always ready and

willing to perform his part of the contract. On the other hand the conduct of the plaintiff as above discussed would only go to show that he had never been ready and willing to perform his part of the contract at any point of time prior to Ex.A3 and when it is seen that much prior to the same, the sale agreement had been chosen to be cancelled by the defendant under Ex.A2, it is found that the plaintiff cannot be granted the relief of specific performance, particularly, when he is at fault in completing the sale transaction.

16. No doubt, there is no default clause provided in the sale agreement Ex.A1, still the parties have accepted to complete the same transaction within a reasonable time. In so far as Ex.A1 is concerned, as above noted, the parties had fixed the outer time limit for completing the sale transaction, in such view of the matter, the contention put forth by the plaintiff that time is not the essence of the contract entered into between the parties, as such, cannot be countenanced. On the other hand, as the parties intended to complete the sale transaction within a particular point of time, it is found that they had agreed to fix the outer time limit and despite the same, when it is seen that only one year thereafter, the plaintiff had expressed his readiness and willingness to complete the sale transaction and even much prior to the same, by way of Ex.A2 notice, the defendant had chosen to cancel the sale agreement and the plaintiff having knowledge about the same, having not chosen to seek the relief of declaration of the cancellation of the sale agreement made under Ex.A2 as invalid, it is found that the plaintiff cannot be granted the equitable relief of specific performance in the light of the abovesaid factors. Considering the escalation of prices of the immovable properties augmenting day by day and accordingly when it is noted that as far as this case is concerned, the parties had fixed a time limit for completing the sale transaction, though generally time may not be the essence of the contract in respect of the immovable property, considering the intention of the parties in this matter, it is seen that they had chosen to fix the time limit and accordingly it has to be held that time is the essence of the contract involved in this matter. When it is found that the plaintiff had miserably failed to establish his readiness and willingness to perform his part of the contract and in the meanwhile, the sale agreement had come to be cancelled, the plaintiff without seeking the declaration with reference to the same as invalid and the plaintiff having failed to establish his readiness and willingness to perform his part of the contract for nearly one year after the expiry of the time limit fixed under Ex.A1, in my considered opinion, the plaintiff should not be extended the descriptionary relief of specific performance prayed for.

17. In this connection, the defendant's counsel placed reliance upon the decisions reported in (2015)8SCC 695 (Padmakumari and Ors Vs. Dasayyan and Ors)

(1995)5SCC 115 (N.P.Thirugnanam (D) by L.Rs., Vs. Dr.R.Jagan Mohan Rao and others)

2011(4) CTC 640 (Saradamani Kandappan Vs. S.Rajalakshmi & Ors)

(2013) 15 Supreme Court Cases 27 (I.S.Sikandar (dead) by Lrs. Vs. K.Subramani and others)

2018(4) CTC 13 (S.Sarojini and another Vs. P.Mariappan and another)

18. The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at the hand.

19. The substantial questions of law formulated in this second appeal are accordingly answered against the plaintiff and in favour of the defendant.

20. In conclusion, the judgment and decree dated 30.01.2015 passed in A.S.No.4 of 2014 on the file of II Additional District Court, Ranipet, confirming the judgment and decree dated 26.07.2013 passed in O.S. No.130 of 2007, on the file of Subordinate Court, Ranipet are set aside and resultantly the suit laid by the plaintiff in O.S.No.130 of 2007 is dismissed as regards the relief of specific performance prayed for and in the alternative, the plaintiff is granted the decree for the refund of the advance amount of Rs.75,000/- from the defendant with interest at 6% per annum from the date of the agreement till the date of repayment and accordingly the suit laid by the plaintiff is disposed of.

21. Resultantly, the second appeal is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The II Additional District Judge, Ranipet,

2. The Subordinate Judge, Ranipet

+lcc to Mr.T.P.Prabhakaran, Advocate SR.NO.62445

KGK (CO)

sm:10.10.2018

S. A.No.228 of 2015



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