

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.03.2018

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

S.A.No.471 of 2016
and C.M.P.No.7827 of 2016

K.A.Kumaresan

.. Appellant/Plaintiff

Vs.

1. K.S.Nanjundan

2. K.N.Nagarajan

3. K.N.Ramesh Babu

4. K.N.Ravishankar

5. C.Venkatraman

6. N.Mohammed Shabbir

7. S.Taj

8. V.Premalatha

9. Minor R.Kamalanath

10.Minor R.Divya Dharshini

.. Respondents/Defendants
1 to 7, 9 to 11/
Defendants 1 to 7 and Lrs
of deceased 8th defendant

सत्यमेव जयते
* * *

Prayer : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgement and decree dated 21.01.2016 made in A.S.No.21 of 2010 on the file of the learned Additional District Court, Krishnagiri, confirming the judgement and decree dated 05.08.2010, made in O.S.No.3 of 2005 on the file of the Principal Subordinate Court, Krishnagiri.

* * *

For Appellant : Mr.N.Manokaran
For Respondents : Ms.N.Sureka for RR 1 to 4
Mr.P.Valliappan for R6
Mr.C.Manusamy for R7
RR 5 and 8 to 10 - Served.
No appearance

J U D G E M E N T

The plaintiff in a suit for specific performance has preferred the second appeal aggrieved by the unanimous decisions of the Courts below refusing to grant him a decree.

2. The case of the plaintiff is that admitting the ownership of the property with the first defendant he had entered into an agreement on 11.03.1994 to purchase the same for a sum of Rs.3,00,000/- and also paid a sum of Rs.1,00,000/- as advance. It was further agreed to complete the transaction within eleven months from the date of the agreement. On 12.11.1994, the first defendant received a further sum of Rs.1,00,000/- from the plaintiff and had made an endorsement in the sale agreement itself. Again on 29.03.1998, the plaintiff had paid balance of the sale consideration of Rs.1,00,000/- and thereby, the first defendant had received the entire sale consideration and made an endorsement on the sale agreement itself. As per the said endorsement, no limitation was fixed for the execution of the sale. While so, on 22.08.2004, defendant Nos.1, 3 and 4 had executed a nominal registered sale agreement in favour of defendant No.5 to sell the suit property for a sum of Rs.1,50,000/-. Therefore, the plaintiff issued a notice on 28.12.2004 and filed the suit on 06.01.2005. Pending the suit, defendant Nos.1 to 4 had executed a sale deed in favour of defendant Nos.6 to 8. Hence, the suit in O.S.No.3 of 2005 on the file of the Principal Subordinate Judge, Krishnagiri, has been filed for specific performance and for permanent injunction restraining defendant Nos.1 to 4 from alienating the suit property and also to declare the sale deed dated 05.02.2007, as null and void.

3. The first defendant filed written statement and defendant No.3 had also filed another written statement, which was adopted by defendants 2 and 4. The said defendants contended that it is their joint family property and defendant Nos.2 to 4 are the sons of the first defendant. The first defendant has got only

one fourth (1/4th) share in the property. The defendants also denied the execution of the sale agreement and contested that the suit itself is barred by limitation. It is further stated that on the date of the agreement dated 11.03.1994, defendant Nos.2 to 4 were minors, and hence, the document itself is void. They sought for dismissal of the suit.

4. The plaintiff examined himself as P.W.1 and also examined one Muhammed Shabbir as P.W.2 and marked Exs.A.1 to A.11. On the side of the defendants, no witness entered into the box and no document was marked.

5. The trial court dismissed the suit, against which, an appeal in A.S.No.21 of 2010 on the file of the Additional District Court, Krishnagiri, was preferred, wherein the trial Court judgement was confirmed. Hence, the instant second appeal is filed.

6. At the time of admission, the following questions of law were formulated for consideration :

"(a) Whether the suit is barred by limitation under Article 54 of the Limitation Act, 1956 ?

(b) Whether the Courts below erred in dismissing the suit on the ground that the defendants 2 to 4 were not parties to Ex.A1 to Ex.A4 especially when the joint family came to an end on the date of the partition dated 11.09.1972, whereupon, the suit property reached the hands of the first defendant as his separate property ?

(c) Whether the Courts below have committed an error in declining to grant the discretionary relief in favour of the plaintiff even though he paid the entire sale consideration to the first defendant under Ex.A1 to Ex.A3 ?

(e) Have not the Courts below committed an error in not drawing an adverse inference against the defendants under Section 114(g) of the Evidence Act for their failure to come to the witness box to give evidence in support of their pleadings ?"

7. Heard the learned counsel for the plaintiff and the learned counsel for the defendants 1 to 4, 6 and 7 and perused the materials on record.

8. It is the case of the plaintiff that the first defendant got the property in a partition between the brothers. It is contested by the defendants that on the date of the said agreement, defendants 2 to 4 were minors, and that the first defendant did not have any right to execute the sale agreement. It is curious to note that the plaintiff is brother's son of the

first defendant and defendant Nos.2 to 4 are the children of the first defendant. Therefore, at the time of entering into the agreement both the parties knew their status and the ownership of the property. Once it is stated that the father is divided, the property in the hands of his father as that of his own. Therefore, the first defendant could not have executed the agreement in the capacity of a Kartha, but had executed the same treating the property as that of his own. Considering the close relationship between the parties, the plaintiff would not have entered into an agreement to purchase the entire property, when the first defendant had only 1/4th share in the same.

9. When the defendants also know this fact, the plaintiff cannot be blamed for not getting the sale agreement executed by the minor children of the first defendant. Though the recitals in the document are not imputable to the attester, in this case, defendant No.2 had signed the agreement as a witness. When it is not established by the defendants that the suit property is a joint family property, and that he cannot bind the shares of the other co-owners, Ex.A.1 cannot be invalidated on the said ground.

10. So far as the possession of the property is concerned, though it has been stated in the plaint as well as spoken to by P.W.1 that possession was given to the plaintiff even as on the date of the sale agreement dated 11.03.1994, even a cursory look at Ex.A.1 shows that there is no mention about handing over of possession on the date of the agreement. Even in Exs.A.2 and 3, which are the subsequent endorsements for having received the sale consideration, there is no mention about handing over of possession to the plaintiff. Hence, the evidence of P.W.1 in this regard that he was put in possession pursuant to the agreement is false and by no stretch of imagination in the absence of any evidence, the plaintiff would be said to be in possession as per Section 53-A of the Transfer of Property Act, 1882. The agreement was entered into on 11.03.1994. The suit was filed on 06.01.2005, which was nearly after eleven years. If only the plaintiff was in possession of the property for more than a decade as claimed, he would have produced documents to that effect to substantiate his contention. In the absence of the same, the version of the plaintiff that the suit property is in his possession is disbelieved by the Courts below and there is no reason to disturb the said factual finding in the second appeal.

11. The next question is with respect to the execution of Exs.A.1, A.2 and A.3. Ex.A.1 is the agreement dated 11.03.1994 and Exs.A.2 and A.3 are the subsequent endorsements for having received the balance of the sale consideration on 12.11.1994 and 29.03.1998 respectively. Though in the written statement, the

first defendant had categorically admitted that an agreement to sell was entered into on 11.03.1994 and that, he agreed to sell the suit land to the plaintiff for a price of Rs.3,00,000/-, and received a sum of Rs.1,00,000/- as advance, there is no mention about the possession. When the execution of the agreement is admitted by the first defendant, the next question that arises for consideration is only readiness and willingness of the plaintiff. A perusal of Exs.A.2 and 3 goes to show that the plaintiff had paid the entire sale consideration. To deny the same, none of the defendants have entered into the box. The endorsement - Ex.A.3, dated 29.03.1998 is claimed to be a fabricated one. However, as stated earlier, when the defendants had not even deposed to the contrary and marked any document in support of their contentions, only an adverse inference has to be drawn against them in this regard.

12. The learned counsel for the plaintiff placed his reliance on the judgment of the Supreme Court in Vidhyadhar V. Mankikrao, AIR 1999 SC 1441 :

"..... 16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh V. Gurdial Singh and Another, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh V. Ajaipal Singh and Ors., AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari V. Radhabai Krishnarao Deshmukh, AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Catpenter V. Narsingh Nandkishore Rawat followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh V. Virender Nath and Another, held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass V. Bhishan Chand and Ors., drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."

13. The learned counsel for the plaintiff also placed reliance on the judgment of this Court in Prabhakaran V. Ranganathan, (2009) 1 MLJ 67, wherein, it has been held as follows :

".... 19. When a party shuns the witness box even though he or she was expected to figure as witness, then adverse inference could be drawn. No doubt, D5 might not be knowing about the details of the family of D1 and in such a case, D5 should have taken steps to summon D3 and D4 to figure as witnesses. In fact, D4 being the seller was duty bound to protect the purchaser's interest as there is warranty to that effect as per Transfer Property Act. But in this case, curiously and peculiarly, no such step was taken by D5 and D6. The totality of the evidence available clearly demonstrates that absolutely D4 has no separate income of his own and on the other hand, the evidence on the side of the plaintiffs would clearly exemplify that the third item of the suit properties was purchased as per Ex.A21 from out of the joint family income alone and in such a case, the trial Court was right in its finding, which warrants no interference under that count."

14. When the plaintiff had parted with the entire sale consideration on 29.03.1998 as per Ex.A.3 endorsement, whether that would be sufficient to prove that the plaintiff was willing and ready to perform his part of the contract. In other words, whether mere payment of the entire sale consideration would itself is sufficient to hold that the plaintiff was ready and willing to perform his part of the contract or the conduct of the plaintiff also has to be considered in this regard.

15. In the case on hand, the first endorsement was made on 12.11.1994 under Ex.A.2, wherein, it is stated that the additional sum of Rs.1,00,000/- was received by the first defendant. As per Ex.A.3 - endorsement, dated 29.03.1998, the balance of the sale consideration was paid. Hence, even the entire consideration was given to the first defendant. The endorsement dated 29.03.1998 reads as follows :

"29/03/1998?k; ehs; ,e;j fpua xg;ge;jk;
mDrupj;J ,e;j xg;ge;jj;jpy; fz;Ls;s epYit xg;ge;j
Jif U:/100000-? xU yc&k; U:gha;fs; ,d;W
K.A.Fknurd; mth;fsplkpUe;J buhf;fkha;
bgw;Wf;bfhz;L mile;Jtpl;nld;/ Mf c& xg;ge;j Jif
U:/300000-? K:d;W yc&k; g{uht[k; brl;yhfptpl;lJ/
ghfP ,y;iy/ ,dp rl;lg;go ehd; eP';fs; nfhUk; nghJ
vt;tpj okhz;L bra;ahky; fpua gj;jpuk; up\$pl;ju;
bra;Jk; bfhLf;f fltd;/"

16. From the above endorsement, it is clear that the parties had not fixed any specific time. The plaintiff having parted with the entire sale consideration ought to have demanded for the execution of the sale deed immediately. The said endorsement also specifically states that as and when the plaintiff demands, the first defendant would register the sale deed in his favour without any demand. A reading of the said recitals also shifts the duty and conduct only on the plaintiff. Merely because the said endorsement does not specify any time, no prudent man would keep quiet when he had parted with the entire sale consideration without getting the title conveyed in his favour. Therefore, the readiness and willingness would not only be referred to the payment of the sale consideration, but also to the conduct of the parties.

17. In this context, it is relevant to see whether the suit is laid within the period of limitation. Admittedly, after the third endorsement, namely, Ex.A.3, where there is no time fixed, it is specifically stated that whenever the plaintiff demands the execution of the sale deed, the first defendant agreed to do the same. Even presuming that the said endorsement had condoned the previous delay, the plaintiff has to give an explanation as to why the suit was filed only on 06.01.2005, nearly seven years after the said endorsement. The said delay, in fact, has frustrated the agreement, as the defendants 1, 3 and 4 had entered into an agreement with defendant 5 for sale of the same property under Ex.A.4 and subsequently, on 05.02.2007, that is pending the suit, the property was sold to defendants 6 to 8. The only reason for the delay, as pleaded in the plaint, is that there were several occasions the plaintiff had approached the defendants to execute the sale deed and there were also several panchayats convened in this regard. Hence, it was argued that the delay cannot be attributed to the plaintiff.

18. The learned counsel for the plaintiff further contended that mere delay in filing the suit for specific performance cannot be a ground for the Court to exercise the discretion against the plaintiff, but the circumstances also had to be considered. In the case on hand, the original agreement is of the year 1994. The third endorsement is of the year 1998, which is well beyond the time prescribed under Ex.A.1 as well as the time prescribed under Article 54 of the Limitation Act, 1956. However, by virtue of the endorsement on the agreement under Ex.A.3, it can be taken that the time was extended or even time need not be the essence of the contract. The plaintiff had filed the suit only in the year 2005, after the defendants had sold the property creating third party interest. The long silence by the plaintiff by not filing the suit, in fact, could be deemed as abandonment or even waiver of his right as per the contract. There is no iota of evidence produced on the side of

the plaintiff seeking equitable relief, excepting Ex.A.5, legal notice dated 28.12.2004. Prior to the said date, there is no action taken by the plaintiff for performing his part of the contract by purchasing stamp papers and demanding the defendant to execute the sale. It is not the case of the plaintiff that there was some unforeseen hardship on the part of the first defendant in performing his part of the contract.

19. When Article 54 of the Limitation Act prescribes the period of three years from the date fixed for specific performance of the contract, mere delay, without extending the period, cannot possibly be a reason for the Court to exercise its discretion, by granting the relief of specific performance. When the Statute prescribes a specific period and the suit is filed beyond the said date, the Courts are left with no other option, but to dismiss the suit as barred by limitation. The question of equity does not arise. In this regard, it is useful to refer to paragraphs 17, 19 and 28 of the judgment of the Hon'ble Apex Court in *Saradamani Kandappan V. S.Rajalakshmi and Others*, (2011) 6 CTC 640, which read as follows :

"17. The appellant contends that time is not the essence of the agreement of sale dated 17.1.1981. She contends that where the vendors fail to give the documents of title to satisfy the purchaser about their title, and the purchaser is ready and willing to perform the contract, the termination of the agreement of sale by the vendors is illegal and amounts to breach of contract. They submit that High Court had failed to apply Section 55 of the Contract Act, 1872. Section 55 of Contract Act deals with the effect of failure to perform at a fixed time, in contract in which time is essential. Said Section is extracted below :

"Section 55. Effect of failure to perform at a fixed time, in contract in which time is essential -- When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do such thing at or before a specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the

essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promisor of his intention to do so."

The above section deals with the effect of failure to perform at a fixed time, in contracts in which time is essential. The question whether time is the essence of the contract, with reference to the performance of a contract, what generally may arise for consideration either with reference to the contract as a whole or with reference to a particular term or condition of the contract which is breached. In a contract relating to sale of immovable property if time is specified for payment of the sale price but not in regard to the execution of the sale deed, time will become the essence only with reference to payment of sale price but not in regard to execution of the sale deed. Normally in regard to contracts relating to sale of immovable properties, time is not considered to be the essence of the contract unless such an intention can be gathered either from the express terms of the contract or impliedly from the intention of the parties as expressed by the terms of the contract.

18.

19. The legal position is clear from the decision of a Constitution Bench of this court in Chand Rani V. Kamal Rani, [1993 (1) SCC 519], wherein this court outlined the principle thus:

"It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact,

there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

Relying upon the earlier decisions of this court in *Gomathinayagam Pillai v. Pallaniswami Nadar* [1967 (1) SCR 227] and *Govind Prasad Chaturvedi v. Hari Dutt Shastri* [1977 (2) SCC 539], this Court further held that fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. Where the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract.

Thereafter this court held that even if time is not the essence of the contract, the Court may infer that it is to be performed in a reasonable time : (i) from the express terms of the contract; (ii) from the nature of the property and (iii) from the surrounding circumstances as for example, the object of making the contract. The intention to treat time as the essence of the contract may however be evidenced by circumstances which are sufficiently strong to displace the normal presumption that time is not the essence in contract for sale of land. In *Chand Rani*, clause (1) of the agreement of sale required the balance consideration to be paid as under:

"Rs.98,000/- will be paid by the second party to the first party within a period of ten days only and the balance Rs.50,000 at the time of registration of the sale deed....". This court held that time regarding payment of Rs.98,000 was the essence, on the following reasoning:

"The analysis of evidence would also point out that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. In cross-examination it was deposed that since income-tax clearance certificate had not been obtained the sum of Rs. 98,000 was not paid. Unless the property was redeemed the payment would not be made. If this was the attitude it is clear that the plaintiff was insisting upon delivery of possession as a condition precedent for making this payment. The income-tax certificate was necessary only for completion of sale. We are unable to see how these obligations on the part of the defendant could be insisted upon for payment of Rs. 98,000. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under Clause (1) of the suit agreement."

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

28. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam (supra) :

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for

completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser."

The above decision also placed reliance on K.S.Vidyanandam and Others Vs. Vairavan, (1997) 3 SCC 1.

20. In the evidence also, P.W.1 had categorically admitted in his cross-examination as follows :

"1998 முதல் 2004 வரை நான் வழக்கறிஞர் மூலம் அறிவிப்ப கொடுக்கவில்லை. நீதிமன்றத்தில் தாவா தாக்கல் செய்யவில்லை ஆனால் பஞ்சாயத்து மட்டும் செய்தோம். கடைசியாக 2001-ல் தான் பஞ்சாயத்து நடந்தது. 98 முதல் 2003 வரை கிரயம் செய்து தருவதாக சொன்னதால் நான் எந்த நடவடிக்கையும் எடுக்கவில்லை. 2001 முதல் 2004 வரை சட்டபூர்வமான நடவடிக்கை எதுவும் எடுக்கவில்லை என்றால் சரிதான். 1998-ல் கிரயம் பத்திரம் செய்துகொள்ள நான் ஸ்டாம்பு பேப்பர் வாங்கவில்லை. தாவா போடும் வரை நான் ஸ்டாம்பு பேப்பர் வாங்கவில்லை என்றால் சரிதான்."

21. The above evidence also goes to show that though time was not the essence of the contract, the plaintiff had not come to Court within the period of limitation. Even presuming that time was not the essence of the contract, the plaintiff is guilty of default for bringing the suit beyond the period of limitation. Applying the principles set out in K.S.Vidyanandam and Others Vs. Vairavan, (1997) 3 SCC 1, this Court finds that there is no justification in the claim of the plaintiff for having filed the suit beyond the period of limitation and

seeking the equitable relief of specific performance. The plaintiff also had not come to Court with clean hands, as the possession aspect has not been focussed by him correctly. Therefore, this Court is of the view that even though the defendants had not entered into the witness box and let-in any evidence, the plaintiff has to fall or succeed only on his own strength and not pick holes in the case of defendants. Thus, the Courts below have thoroughly examined the evidence on record and given a finding that the plaintiff had come to Court out of time, which would impliedly amount to abandonment of his claim. Therefore, the defendants 1 to 4 have created a third party interest by selling the property to defendants 6 to 8. The delay on the part of the plaintiff can only give an inference that the plaintiff had abandoned the contract and he had not kept the contract subsisting. Thus, the plaintiff was non-suited on the ground of limitation by the Courts below, which is correct and no interference is warranted. Accordingly, the questions of law are answered against the plaintiff.

22. Accordingly, the second appeal is dismissed confirming the judgment and decree of the Courts below. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Court, Krishnagiri.
2. The Principal Subordinate Court, Krishnagiri.
3. The Section Officer, V.R. Section,
High Court, Madras. (2 copies)

+1cc to Mr.P.VELLIAPPAN, Advocate, S.R.No.22287
+1cc to Mr.N.MANOKARAN, Advocate, S.R.No.22023
+1cc to Mr.C.MUNUSAMY, Advocate, S.R.No.22010
+1cc to Mr.C.SAMIVEL, Advocate, S.R.No. 21791

Judgement in
S.A.No.471 of 2016

RK (CO)
TR(09/04/2018)