

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

A.S.Nos. 429 of 2011 & 770 of 2013

COMMON JUDGMENT:(Per Hon'ble Ms. Justice J. Uma Devi)

The plaintiffs in O.S.No. 98 of 2007 on the file of the XI-Additional District Judge (Fast Track Court), Kakinada who could not succeed in getting the decree of specific performance of an agreement of sale dated 25.1.2007 in their favour in respect of the suit schedule premises bearing door No. 10-5-11 situated at Ward No. 3, Ramaraopeta, Kakinada, but could get the alternative relief of refund of earnest money of Rs.6.00 lakhs said to be paid to the defendant-Smt. Badam Ramayamma, and the defendant who was directed to deposit the earnest money of Rs.6.00 lakhs in favour the plaintiffs within a period of one week from the date of passing of the decree by the lower court, came before us by preferring these appeals.

The sole defendant in the suit died during the pendency of the appeal and her legal representatives were brought on record as per the order made in ASMP No. 3207 of 2013 dated 19.2.2014.

For the sake of convenience, the parties hereinafter will be referred as the 'plaintiffs' and the 'defendant'.

The plaintiffs instituted a suit for specific performance of agreement of sale dated 25.1.2007. It was their contention that the defendant agreed to sell the suit schedule premises to them for total consideration of Rs.58.00 lakhs and executed an agreement of sale dated 25.1.2007 agreeing to execute a regular sale deed in their favour

or in favour of their nominee, the third plaintiff herein and received a sum of Rs.6.00 lakhs from them towards advance sale consideration. It was agreed in the agreement of sale dated 25.1.2007 that the balance of sale consideration would be paid to her by them within four months from the date of agreement of sale. Though a condition was stipulated in the agreement of sale deed dated 25.1.2007 that the balance of sale consideration was payable within four months, the same was not acted upon.

The plaintiffs were always ready and willing to perform their part of the contract and it was the defendant who was postponing the execution of the registered sale deed. While the things stood thus, two telegraphic notices were received by them from Inuganti Nageshwar Rao who was a resident of Kakinada stating that he is in possession of the suit schedule premises and that he obtained temporary injunction order as against the defendant who was interfering with his peaceful possession and enjoyment over the suit schedule premises. They could not proceed to take steps to get the sale deed registered in their names, as the defendant was prevented from delivering possession of the suit schedule premises to them. They got issued a legal notice dated 26.5.2007 calling upon the defendant to execute a registered sale deed in their favour without causing any further delay. In the said notice they made it clear to her that they were always ready and willing to perform their part of contract, but she evaded to receive the said legal notice. Therefore, they filed the suit for specific

performance of agreement of sale dated 25.1.2007 executed in their favour by the defendant.

In her written statement it was contended by the defendant that the plaintiffs approached the Court with unclean hands. Though it was specifically stated in the agreement of sale dated 25.1.2007 that the balance of sale consideration was to be paid on or before 24.5.2007 to get the sale deed registered in favour of the plaintiffs, the plaintiffs never expressed their readiness and willingness to get the sale deed registered in their favour by paying the balance of sale consideration on or before 24.5.2007. The suit schedule premises was not in possession of a tenant and there was no condition in the agreement that sale deed was to be executed after the premises was vacated by the tenant. As per the terms of the agreement, the balance of sale consideration was payable by the plaintiffs on or before 24.5.2007 and in case of their failure to pay the balance sale consideration within the time indicated above, they had to forego the advance sale consideration amount. In the notice dated 29.5.2007 issued by her it was made clear to the plaintiffs that the time was the essence of the contract and directed them to obtain a sale deed in their favour on or before 15.6.2007. The plaintiffs could not get the sale deed registered in their favour within the extended period which she stipulated in the notice dated 29.5.2007. As the plaintiffs failed to perform their part of contract by paying the balance of sale consideration within the stipulated period of four months, they could not maintain the suit for specific performance as against her.

Based on the above pleadings of the parties to the dispute, the learned Additional District Judge framed the following issues for consideration,

- (1) *Whether time is the essence of the contract of suit agreement?*
- (2) *Whether plaintiffs are ready and willing to perform their part of agreement?*
- (3) *Whether plaintiffs are entitled for specific performance of agreement or alternatively for refund of advance amount?*
- (4) *To what relief?*

During the course of trial, the plaintiffs 1 and 3 were examined as PWs 1 and 2 and Exs.A1 to A10 were marked on their behalf. On behalf of the defendant, the sole defendant and her daughter were examined as D.Ws. 1 and 2. The learned Additional District Judge, on appreciation of the evidence on record, accepted the contention of the defendant that time was the essence of the contract and also held that the plaintiffs failed to prove their readiness and willingness to perform their part of the contract and accordingly refused to grant the relief of specific performance of agreement of sale dated 25.1.2007 and granted the alternative relief of refund of earnest money by the defendant.

Feeling aggrieved by the decree and judgment passed by the learned Additional District Judge, the parties to the suit came before us by preferring these appeals.

It was contended by the learned counsel for the appellants/plaintiffs that the judgment rendered by the learned Additional District Judge is contrary to law and evidence on record.

The Additional District Judge committed grave error in coming to the conclusion that time was the essence of the contract. The defendant herself issued a notice extending the time for registration of sale deed in favour of the plaintiffs, and this fact was not properly appreciated by the learned trial Judge. It was because of the telegraphic notices issued by Inuganti Nageshwar Rao intimating the plaintiffs that temporary injunction order was passed in his favour restraining the defendant from interfering with his peaceful possession and enjoyment over the suit schedule premises she was prevented or obstructed from delivering the possession of suit schedule premises to them; as the property was under litigation as was demonstrated in the telegraphic notices, the plaintiffs could not be faulted for non-performing their part of contract. The defendant, by issuing a legal notice, waived the condition stipulated in the agreement of sale that the plaintiffs had to pay the balance of sale consideration within four months from the date of execution of the agreement of sale in question. Though the documentary evidence placed on record was indicating the intention of the parties that the time was not made as essence of the contract, the Court below came to an erroneous conclusion that the time was the essence of the contract. The temporary injunction obtained as against the defendant in favour of Inuganti Nageshwar Rao itself was an impediment for the defendant to handover the possession of the suit schedule premises to the plaintiffs, but this fact was not appreciated in a proper perspective by the learned trial Judge and that the learned trial Judge without looking

into these aspects which were borne by the record had erroneously held that the plaintiffs failed to prove that they were ready and willing to perform their part of contract.

Refuting the aforementioned contentions of the plaintiffs, the learned counsel for the appellant/defendant contended that there existed no error or infirmity in the findings of the trial Court that the plaintiffs failed to prove that they were always ready and willing to perform their part of contract. A condition was stipulated in Ex.A1-agreement of sale dated 25.1.2007 that the plaintiffs had to pay the balance of sale consideration amount of Rs.52.00 lakhs within four months from the date of execution of agreement of sale and in the evidence let in by them it was not made clear that they were ready with the balance of sale consideration amount and were willing to perform their part of contract for getting the sale deed executed in their favour within the period stipulated in the agreement of sale. Though the defendant issued a legal notice by making it clear to the plaintiffs to get a sale deed registered in their favour on or before 15.6.2007 on payment of balance sale consideration, they failed to pay the balance of sale consideration within the time specified in the notice and could not get a sale deed registered in their favour within the extended period. The very purpose of entering into a contract for sale of the suit schedule premises by the defendant was to discharge the debts she incurred and due to non-performance of the contract by the plaintiffs, she had to borrow money from others. The plaintiffs approached the Court with unclean hands for the relief of specific

performance of agreement of sale. The Court below had rightly refused to grant the relief sought by them.

He would contend further that the learned Additional District Judge, though observed that time was the essence of the contract, and that the plaintiffs failed to perform their part of the contract, ordered for refund of the earnest money in contravention of the condition stipulated in the agreement of sale that the plaintiffs had to forego the earnest money if they do not pay the balance of sale consideration within four months from the date of execution of agreement of sale executed by them for purchase of the suit schedule premises.

In the light of the aforementioned contentions raised by the parties, we are now called upon to answer the following questions,

- (1) *Whether the parties treated the time as essence of the contract?*
- (2) *Whether the plaintiffs have proved their readiness and willingness to perform their part of contract?*
- (3) *Whether the failure, if any, on the part of the plaintiffs to perform their part of contract disentitle them from getting the decree of specific performance in their favour?*
- (4) *Whether the defendant is entitled to retain the earnest money paid at the time of entering into agreement in lieu of the forfeiture clause stipulated in the agreement of sale?*

Execution of Ex.A1-agreement of sale dated 25.1.2007 by the defendant in favour of the plaintiffs stipulating time for payment of

balance of sale consideration and for execution of a registered sale deed in their favour or in the name of any person nominated or opted by them in respect of the suit schedule premises within four months i.e., 24.5.2007 from the date of its execution is not in controversy.

The contention of the defendant is that the plaintiffs, by not paying the balance of sale consideration and by not getting a registered sale deed executed in their favour on or before 24.5.2007, breached the terms and conditions of the Ex.A1-agreement of sale dated 25.1.2007. Though she issued Ex.A6-legal notice dated 29.5.2007 through her counsel calling upon the plaintiffs to pay balance of sale consideration of Rs.52.00 lakhs and obtain a registered sale deed from her on or before 15.6.2007 at their expenditure, the plaintiffs, having received the said legal notice, failed to come forward with the balance of sale consideration and get a sale deed registered in their favour within that extended period, and on the other hand, they issued Ex.A7-legal notice dated 31.5.2007 without stating their readiness and willingness to perform their part of contract.

As per the terms and conditions stipulated in the suit agreement of sale it was mutually agreed between the parties for payment of the balance of sale consideration of Rs.52.00 lakhs within four months from the date of execution of the suit agreement of sale. Possession of the suit schedule premises was not delivered to the plaintiffs and as per the terms and conditions stipulated in the suit agreement of sale the possession of the property was to be delivered on the date of execution of registration of sale deed in favour of the plaintiffs, and

before handing over of the possession to them, all the debts relating to the suit schedule premises were to be cleared off by the defendant.

Exs.A2 and A3 – telegraphic notices dated 22.5.2007 received by the plaintiffs 1 and 2 from Inuganti Nageswararao wherein it was averred that he is in possession of the suit schedule premises and temporary injunction order was granted in his favour by the Vacation Civil Judge, Rajahmundry, made them to issue Ex.A4-legal notice dated 26.5.2007 asking the defendant to deliver vacant possession of the suit schedule premises. After the said notice was issued by the plaintiffs, a legal notice – Ex.A6 was issued by the defendant stipulating time to the plaintiffs to pay the balance of sale consideration and get a registered sale deed executed in their favour. Though in the suit agreement of sale, four months time was stipulated for payment of balance of sale consideration and for execution of the registered sale deed in favour of the plaintiffs on or before 24.5.2007, neither of the parties acted as per the said condition. Issuance of Ex.A6 – legal notice by the defendant fixing the time for payment of balance of sale consideration by the plaintiffs on or before 15.6.2007 itself would indicate that the time was not treated as essence of the contract. The defendant herself made an admission in her cross-examination at page-2 that,

“.....I extended time even after the extension of time made by my advocate in the notice. I have so extended the time for two or three times. Every time I used to extend the time more than what the plaintiffs”

Thus it was manifestly clear from the above mentioned portion of the evidence of D.W.1 that the time, within which the sale deed was to be obtained by the plaintiffs in their favour in respect of suit schedule premises, was not acted upon. Extension of time by the defendant for payment of balance of sale consideration and for obtaining the sale deed from her, though was proved by her own admissions made in her evidence, the learned trial Judge failed to take note of them. Issuance of legal notice by her extending the time for payment of balance of sale consideration itself would indicate that it was not her intention to treat the time as essence of the contract. She did not issue notice before expiry of four months' time stipulated in the agreement of sale calling upon the plaintiffs to perform their part of the contract. The learned trial Judge did not take note of the aforementioned aspects which were borne by the record and came to an erroneous conclusion that the time was the essence of the contract.

Section 16 of the Specific Relief Act, 1963 (for short "the Act") says that a person who fails to aver and prove that he performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant, is barred from getting the relief of specific performance.

The plaintiffs, who approached the Court seeking a decree of specific performance of agreement of sale, had the obligation of asserting their readiness and willingness to perform the essential terms of the contract and also prove their readiness and willingness. The

plaintiffs, while entering into the suit agreement of sale with the defendant for purchase of the suit schedule premises paid a sum of Rs.6.00 lakhs towards advance, and agreed to pay the balance of sale consideration of Rs.52.00 lakhs within four months from the date of entering into suit agreement of sale i.e., on or before 24.5.2007. Before expiry of four months period stipulated in the agreement of sale, they never approached the defendant expressing their readiness and willingness to perform their part of contract. No notice was ever issued by them before the expiry of the time stipulated in the suit agreement of sale to get a sale deed registered in their favour stating that they were ready and willing to perform their part of contract. Even after issuance of Ex.A6- legal notice by the defendant calling upon them to pay balance of sale consideration of Rs.52.00 lakhs and obtain a sale deed from her in respect of the suit schedule premises on or before 15.6.2007 at their expenditure, they did not approach the defendant with the balance of sale consideration amount. Without producing any proof as to their readiness and willingness to perform their part of the contract, they got issued Ex.A7- legal notice dated 31.5.2007 stating that soon after delivery of possession of the suit schedule premises, they were willing to obtain a registered sale deed in their favour by paying the balance of sale consideration. As per the terms stipulated in the suit agreement of sale, it was agreed mutually between the parties that the possession of the property would be delivered after payment of balance of sale consideration amount of Rs.52.00 lakhs. Contrary to the said terms stipulated therein, a legal

notice was issued by the plaintiffs asking the defendant to deliver the possession of the suit schedule premises and soon after the possession of the property was delivered to them, they would obtain a registered sale deed from her on payment of balance sale consideration.

The plaintiffs, who were obligated to aver and prove that they were always ready and willing to perform the essential terms of the contract, did not adduce any proof to show their readiness and willingness to perform their part of the contract. No scrap of paper was produced by them to prove their readiness and willingness to perform their part of the contract within the time stipulated in the suit agreement of sale. On the other hand, they raised a contention that the defendant failed to perform her part of contract, as a suit for injunction was filed by Inuganti Nageshwara Rao regarding which telegraphic notices were received from the said Inuganti Nageshwara Rao, it was difficult for the defendant to complete the transaction of handing over of vacant possession of the suit schedule premises as per the agreement of sale.

When we had the occasion of going through the suit agreement of sale, we noticed that Inuganti Nageswara Rao who issued Exs.A2 and A3-telegraphic notices to the plaintiffs, was one of the attestors of Ex.A1. The plaintiffs themselves asserted in the plaint at para-14 that,

“The defendant, after Inuganti Nageswara Rao vacated the suit schedule property, started making efforts to dispose of the suit property to third parties. In the legal notice dated 24.10.2007 the plaintiffs 1 and 2 specifically warned her in this regard.”

The plaintiffs, though were aware that the suit schedule premises was vacated by Inuganti Nageshwara Rao and got issued a legal notice dated 24.10.2007, did not approach the defendant to obtain a registered sale deed in their favour by paying the balance of sale consideration to her. Evidently no document was produced by the plaintiffs to prove that they were having the balance of sale consideration amount with them by 24.5.2007 by which date they had to pay the same to the defendant and obtain a sale deed in their favour.

The first plaintiff, who was examined as P.W.1, though admitted that they had to pay the balance of sale consideration of Rs.52.00 lakhs on or before 24.5.2007, no scrap of paper or any document was produced by them that balance of sale consideration amount was readily available with them by that date. The plaintiffs produced nine documents viz., Ex.A1 was the agreement of sale, Exs.A2 and A3 were the telegraphic notices which they received from Inuganti Nageswara Rao, Ex.A4 was the legal copy of legal notice which the plaintiffs got issued to the defendant dated 26.5.2007, Ex.A5 was the postal acknowledgement of Ex.A4-legal notice, Ex.A6 was the legal notice issued by the defendant, Ex.A7 was the notice issued by the plaintiffs to the defendant dated 31.5.2007, Ex.A8 was the postal acknowledgment of Ex.A7-notice, Ex.A9 was the office copy of legal notice dated 24.10.2007 issued by the plaintiffs to the defendant and Ex.A10 was the postal acknowledgment of Ex.A9-legal notice. These were the only documents produced by the plaintiffs in support of their case and these documents would not show that the

plaintiffs were having the balance of sale consideration amount with them by the date of issuance of the legal notice calling upon the defendant to register a sale deed in their favour.

On careful reading of the evidence on record it was noticed that the plaintiffs failed to comply with the legal requirement which was mandatory as provided under Section 16 of the Act, as no scrap of paper or document was produced by them establishing their readiness and willingness to perform their part of contract.

In a similar case reported in *Killamsetty Eswari (Smt.) and another Vs. Pedada Tulasi Rao (died) per LRs and others*¹ a Division Bench of this Court (of which one of us was a member) held that,

“The requirements of Section 16 (c) of the Act are two-fold. The plaintiffs should establish both willingness as well as readiness. While willingness is an animus of mind which can be established only through oral evidence, readiness is a factor that should be established by something more than mere oral evidence. Unfortunately, the plaintiffs who pleaded readiness and willingness, failed to prove their readiness through any piece of paper or document.”

The plaintiffs filed ASMP No. 2941 of 2017 seeking to receive copy of Fixed Deposit Receipt dated 14.10.2009 as additional evidence to show that a sum of Rs.32.00 lakhs was deposited in the name of third plaintiff (P.W.2) in the month of October, 2009. This

¹ 2017 (3) ALT 550 (DB)

would no way helpful to their case that they were ready and willing to perform their part of the contract. Through this document it is difficult to hold that as on the date stipulated for payment of balance sale consideration they were ready with the said amount and were willing to fulfill the requirements mentioned in the suit agreement of sale, as it would indicate that a sum of Rs.32.00 lakhs was kept in the name of third plaintiff in a Fixed Deposit in the month of October, 2009 which was much later to the agreed date of payment.

The document viz., the copy of Fixed Deposit Receipt filed by the plaintiffs during the pendency of the appeal cannot be received in evidence due to non-fulfillment of requirements of Order 41, Rule 27 of the Code of Civil Procedure. It is not the case of the plaintiffs that the trial Court has refused to receive the said document in evidence, and despite the exercise of due diligence, the said document is not within their knowledge. It is the settled law that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case, as has been held by the Supreme Court in *N. Kamalam Vs. Ayyaswami*². The plaintiffs, by filing the application for receiving of Fixed Deposit Receipt as additional evidence, intend to fill up the lacunae in their case. The same cannot be allowed in the light of legal principle enunciated by the Apex Court in the above case law.

² (2001) 7 SCC 503

In *Sita Ram Vs. Radhey Shyam* ³ it has been held by the Apex Court,

“the plaintiff has to show that his conduct has been blemishless throughout in the context of readiness and willingness to perform his part of the contract.”

Upon close scrutiny of evidence on record, we have no hesitation to hold that the plaintiffs have not complied with the legal requirements which are mandatory as provided under Section 16 (c) of the Act. As already stated by us in the above paras that the readiness and willingness on the part of the plaintiffs to perform their part of contract has not been established, and their failure to perform their part of contract disentitle them from getting a decree of specific performance of agreement of sale in their favour.

Coming to the issue involved in the appeal filed by the defendant, as to the forfeiture of earnest money paid by the plaintiffs due to their failure to perform their part of contract by paying balance of sale consideration within the time stipulated in the agreement of sale is concerned, it is her contention that under Ex.A1-agreement of sale it is agreed by the plaintiffs to pay the balance of sale consideration within four months from the date of execution of agreement of sale and get a registered sale deed executed in their favour or in the name of the person chosen by them at their expenditure within that time. Though it is stipulated in Ex.A1-agreement of sale that the balance of sale consideration is payable on

³ AIR 2008 SC 143

or before 24.5.2007, the time so fixed for payment of balance of sale consideration and for getting a registered sale deed in favour of the plaintiffs, it has not been acted upon. The defendant herself made an admission in her evidence that she extended the time twice or thrice and even after issuance of notice by her advocate stipulating the date as 15.6.2007 for payment of balance of sale consideration, she extended the time. Through this portion of her evidence it can be said without any hesitation that it is not her intention to treat the time as essence of the contract. The defendant, who had made an admission as to the extension of time to the plaintiffs for payment of balance of sale consideration, has no right to retain the advance amount paid to her by the plaintiffs at the time of entering into agreement of sale for purchase of suit schedule premises.

The averments made in the plaint make it clear that the plaintiffs have laid the claim for specific performance of agreement of sale and for the alternative relief of refund of earnest money.

In para-13 of the plaint it is averred that,

“.....The defendant under the guise of an extraneous clause at the end of suit sale agreement wants to forfeit the advance amount of Rs.6,00,000/- and avoid the suit sale agreement. It is unjust, unfair, inequitable besides being opposing to public policy.”

That an alternative remedy of refund of earnest money in a suit for specific performance can be granted subject to some specifications

contained in sub-section (2) of Section 22 of the Act. Under sub-section (2) of Section 22 of the Act no relief under clause (a) or clause (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Since such a restriction creates hardship on the plaintiffs in the lis, at any stage of the proceedings the plaintiffs can be allowed to amend the pleadings so as to seek any alternative relief whenever prayer is made for amendment in terms of proviso to sub-section (2) of Section 2 of the Act.

In the given case the plaintiffs at sub-para (c) of para-19 of the plaint have sought the alternative relief for refund of Rs.6.00 lakhs by the defendant. As the condition stipulated under Ex.A1-agreement of sale specifying a particular time for payment of balance of sale consideration has not been acted upon by the parties, and that the defendant who has extended the time for payment of balance of sale consideration behind the period of four months stipulated in the agreement of sale and has made an admission in this regard, cannot claim for enforcement of forfeiture clause mentioned at the end of the said agreement of sale.

In the appeal filed by the defendant at para-11 it is urged that,

“The appellant in order to avoid interest as decreed by the court below, she has deposited Rs.6,00,000/- on 1.6.2011 vide Challan No. 243, dt. 1.6.2001 in the trial Court in O.S.No. 98 of 2007 in pursuance of the decree and judgment”

The jurisdiction to pass a decree of specific performance under sub-section (1) of Section 20 of the Act is discretionary. The Court below, exercising such jurisdiction vested in it, has ordered for refund of earnest money of Rs.6.00 lakhs by the defendant to the plaintiffs.

In the light of our aforementioned findings that the intention of the parties to treat the time as essence of the contract as culled out from the evidence on record, particularly from the evidence of D.W.1 that time for payment of balance of sale consideration by the plaintiffs is extended by her twice or thrice, and that she has extended the time to the plaintiffs for payment of balance of sale consideration even after the time fixed in the notice issued by her counsel, her contention for enforcement of forfeiture clause cannot be countenanced. In view of our aforementioned findings, she cannot claim that the plaintiffs have to forego the earnest money which they paid to her at the time of entering into the agreement of sale by them for purchase of the suit schedule premises.

The findings recorded above by us on the points 2 and 3 disentitle the plaintiffs from seeking a decree of specific performance of agreement of sale. Therefore, the appeal filed by them fails and the same is hereby dismissed.

The appeal filed by the defendant also fails in view of our aforementioned view that the question of enforcement of forfeiture clause arises only when the parties' intention is to make the time as essence of the contract. The defendant herself has acted in deviation of the said clause by extending time to the plaintiffs for payment of

balance of sale consideration; issuance of notice by her before expiry of four months' period stipulated in the agreement of sale calling upon the plaintiffs to perform their part of the contract is a prerequisite if her intention to make the time as essence of the contract. She is refrained by her conduct from contending that the plaintiffs have to forego the advance amount paid to her at the time of entering into agreement of sale.

In the result, the appeals filed by the plaintiffs and the defendant against the decree and judgment in O.S.No. 98 of 2007 on the file of the XI-Additional District Judge (Fast Track Court), Kakinada are hereby dismissed.

As a sequel thereto, ASMP No. 2941 of 2017 stands dismissed and other pending miscellaneous applications, if any, stand closed.

No orders as to costs.

JUSTICE V. RAMASUBRAMANIAN

Dt. 8.10.2018
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JUSTICE J. UMA DEVI