

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2019

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH
and
The Hon'ble Mr. Justice C.SARAVANAN

A.S.No.74 of 2012

1.K.Arukani
2.Sugantha Vani
3.K.Ramaraj .. Appellants

Vs

P.Ramachandran .. Respondent

Appeal preferred under Section 96 C.P.C. r/w Order XLI Rule 1 of C.P.C. against the judgment and decree dated 12.04.2011 passed in O.S.No.196 of 2007 on the file of Fast Track Court No.1, Additional District and Sessions Court, Coimbatore.

For Appellants .. Mr.T.V.Krishnakumar for
Mr.E.D.Sethupathi

For Respondent .. Mr.S.Mukunth for
M/s Sarvabhauman Associates

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

The appellants are the defendants in the suit in O.S.No.196 of 2007 on the file of Fast Track Court No.1, Additional District and Sessions Court, Coimbatore, filed for specific performance. The suit having been decreed on 12.04.2011, the present appeal is before us.

2. On 30.11.2006, a sale agreement was entered into between the parties fixing the time limit as three months. The agreement clearly stipulates that in the event of the respondent/plaintiff not complying with it within the time provided, he would forego the amount of Rs.3 lakhs. Similarly, if the appellants failed to execute the sale deed, the

respondent shall deposit the remaining amount and seek a relief of specific performance.

3. On 24.01.2007, a legal notice was issued by the respondent under Ex.A2. The operative portion of the aforesaid document is reproduced hereunder:

"2. All of you and my client construed that the time is essence of the contract. My client states that in pursuance of above said sale agreement my client complied his part performance, only by receiving balance sale consideration and executing the sale deed is pending on your part. There is no purpose exist to prolong the time in executing the sale deed."

4. A reply was given by the appellants under Ex.A5 dated 31.01.2007 in the following manner:

"Our clients state that the averments contained in para 1 of your notice that a sale agreement dated 30.11.2006 was entered into between our clients and your clients agreeing to sell the notice mentioned property for a total sale consideration of Rs.27,00,000/- (Rupees twenty seven lakhs only) is true. Our clients also admit the receipt of Rs.3,00,000/- (Rupees three lakhs only) as advance. Our clients are ready to receive the balance of sale consideration of Rs.24,00,000/- (Rupees twenty four lakhs only) and execute the sale deed in favour of your client.

You are hereby requested to direct your client to prepare a draft sale deed and send the same for approval either to us or to our clients within seven days from the date of receipt of this reply notice.

If inspite of this reply, the draft sale deed is not sent by your client either to us or to our clients within the said seven days from the date of receipt of this reply notice, the sale agreement dated 30.11.2006 shall automatically stand cancelled without any further communication and the advance amount shall be forfeited.

On sending the draft sale deed, your client is also requested to intimate our clients the date, time and office of the Registrar where our clients have to appear for completing the registration.

Our clients state that they are always ready and willing to perform their part of contract and

it is only your client is not ready and willing to perform his part of the contract. Only with a malafide intention to cover up the lapses on the part of your client, this kind of notice under reply is issued.

If your client fails to perform his part of the contract, within the stipulated period in the sale agreement and in spite of this reply notice, your client rushes to Court, same will be defended by our clients at the costs and risks of your client and our clients will not be responsible for the cost incurred by your client."

5. Under Ex.A6 dated 14.02.2007, the respondent through the counsel gave a further notice. We deem it appropriate to reproduce the relevant paragraph of the rejoinder notice though not happily worded:

"My client sending draft Sales Deed for approval for your clients side 1. Mrs.K.Arukkani, 2.Miss Sugunthavanim and 3.Mr.K.Ramraj.

My client preferred the draft Sale Deed only on the basis of xerox copy Sale Deed given by your clients. My client hereby request your clients to come forward to measure the schedule mentioned property described in your clients Sale Deed and also you are requested to lay boundary stones in order to take actual possession of the property."

6. Thus, even according to the respondent, time is the essence of the contract. The appellants did not dispute the execution of Ex.A1 along with covenants. However, the appellants sought for production of the Sale Deed within a period of one week from the date of receipt of the said notice as was done by the respondent while issuing Ex.A2 by giving very same 7 days notice. Thereafter, the respondent issued rejoinder notice sending the draft Sale Deed with a request to measure the suit property and lay the boundary. This was done on 14.02.2007. Curiously thereafter, the respondent has chosen to file a suit in O.S.No.196 of 2007 on 27.02.2007 itself for the reasons best known to him. Though Ex.A1 clearly states that if the appellants did not agree for the execution of the Sale Deed or delay it, the respondent/plaintiff can file the suit after depositing the remaining sale consideration, but the same was not done, knowing that the suit itself was filed without the requisite Court fee.

7. The suit was decreed ex-parte giving one month time to the respondent to pay the remaining sale consideration. Without complying with the same, the respondent filed the petition seeking extension. In the meanwhile, the appellants filed the petition to set aside the ex-parte decree, which was allowed.

8. Before the trial Court, the following issues have been framed and Exs.A1 to A9 were marked by the respondent while examining three witnesses on his side. On behalf of the appellants, only DW1 viz., the first appellant was examined:

- (i) Whether the sale agreement with regard to the suit schedule property is true and valid ?
- (ii) Whether it is true that the plaintiff was ready and willing to perform his part as per the agreement ?
- (iii) Whether the plaintiff is entitled to the suit for specific performance ?
- (iv) To what other relief the plaintiff is entitled to?

9. P.W.1 was asked about his readiness and willingness. Though he had stated that he has means and his wife is employed, no material whatsoever has been produced. He has further stated that he is ready and willing to pay the remaining amount under Ex.A2. He has also agreed that he did not pay the amount after the ex-parte decree dated 13.11.2009. He has tacitly admitted that though he was in possession of the remaining amount of Rs.24 lakhs during the currency of the three months period mentioned under Ex.A1 for execution of the sale deed, it was accordingly utilised for his business for buying some other land. Thus, from his own evidence, P.W.1 has stated that he did not possess sufficient means to make the payment. From the averment of the plaint also, it appears that the apparent reasons for the plaintiff to approach the Court is to pre-empt the appellants to file the suit. This could be seen in the plaint averment. Para 7 of the plaint is usefully extracted hereunder.

"VII.The plaintiff through his counsel sent rejoinder notice dated 14.02.2007 to the defendants counsel along with draft prepared sale deed for approval on the part of the defendants. The defendants counsel received the rejoinder notice on 16.02.2007. Even after receipt of draft sale deed, the defendants did not come forward to complete sale transaction. The plaintiff reliably learn that the defendants are trying to alienate the suit property to some third party by concealing the sale Agreement

dated 30.11.2006 exist between plaintiff and defendants. The defendant even after admitting the sale Agreement trying to alienate the suit property to some third party is highly illegal and condemnable. Since the defendants failed to comply their part performance and the time fixed for completion of sale transaction expire on 27.02.2007, the plaintiff without any delay approached before this Hon'ble Court for the relief of decree of Specific Performance of the agreement dated 30.11.2006."

10. PW.2 is the brother of the first appellant. While giving evidence, he also spoke in favour of the respondent, particularly, in tune with Ex.A1. In a similar way, P.W.3 also adduced evidence.

11. The trial Court, while giving its specific finding on readiness and willingness in the teeth of the facts narrated above, nonetheless decreed the suit by taking note of the fact that Ex.A1 was not disputed. Challenging the same, the present appeal has been filed.

12. The learned counsel appearing for the appellants/defendants submitted that readiness and willingness are different concepts. The plaintiff seeking specific performance will have to prove the same from the date of his readiness and willingness and till the date of giving effect to the decree. Therefore, it is a continuous process. Though the appellants are ready and willing, the respondent/plaintiff has not come forward to make the payment. There was no need for the respondent to issue legal notice even during the agreement in force. The Court below has not considered the issue with respect to the readiness and willingness, but misdirected itself by placing reliance on Ex.A1-sale deed. In support of his contentions, the learned counsel has relied on the following decisions.

- 1.P. Meenakshisundaram Vs. P,.Vijayakumar and another (CDJ 2018 SC 319); and
2. Vijay Kumar and Others Vs. Om Prakash (CDJ 2018 SC 1235).

13. The learned counsel for the respondent/plaintiff would submit that readiness and willingness can be enured from the attending circumstances. If Ex.A1 has not been acted upon, consequence will have to follow. P.W.1 continuously spoke in his evidence as that of P.Ws.2 and 3. There was no reply to the last notice given on behalf of the appellants under Ex.A6.

Since the Court below has considered the relevant materials, no interference is required.

14. We have already dealt with the facts and circumstances leading to the case. We are at a loss to understand as to why the respondent thought it fit to issue Ex.A2 dated 24.01.2007 during the currency of the sale agreement Ex.A1 dated 30.11.2006. It is the specific case of the respondent that time is the essence of the contract as in the case of Ex.A1. Ex.A1 also speaks about the consequences that would be tacit of the non-compliance of the agreed terms. There is absolutely no material to hold that the respondent was ready and willing. The respondent has rushed to the Court and filed the suit on 21.01.2007 itself. Even the suit was filed with deficit Court fee. It is well open to the respondent to file a suit by depositing the remaining sale consideration which was not done. Perhaps that could not be done in view of the admission made by the respondent as P.W.1 in his evidence. He has clearly stated that the aforesaid remaining amount was utilised for some other business purpose. That is the reason why he could not pay the amount notwithstanding the ex-parte decree obtained in his favour within the time granted by this Court. This compelled him to file an application seeking extension of time. The plaintiff/agreement holder will have to show the readiness and willingness under Section 16 of the Specific Relief Act throughout the proceedings. In P. Meenakshisundaram Vs. P. Vijayakumar and another (CDJ 2018 SC 319), the Apex Court, considering the scope and ambit of readiness and willingness and its mandatory nature, has held as follows:

"5. In Gomathinayagam Pillai and Others v. Pallaniswami Nadar ((1967) 1 SCR 227) after referring to the observations of the Privy Council in Ardeshir Mama v. Flora Sassoon⁴, this Court laid down that in a suit for specific performance of an agreement, the plaintiff must plead and prove that he was ready and willing to perform his part of the contract since the date of the contract, right upto the date of the hearing of the suit. The observations by this Court in that behalf were as under:-

"But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in Ardeshir Mama v. Flora Sasson [L.R. 55 I.A. 360, 372]

"In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit."

6. Similarly in J.P. Builders and Another v. A. Ramadas Rao and Another⁵, it was observed by this Court in paragraphs 21 and 25 as under :-

"21. Among the three clauses, we are more concerned about clause (c). "Readiness and willingness" is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him."

"25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff."

15. Similarly, in Vijay Kumar and Others Vs. Om Prakash (CDJ 2018 SC 1235), the Apex Court has held as follows:

"(7). In order to obtain a decree for specific performance, the plaintiff has to prove his readiness and willingness to perform his part of the contract and the readiness and willingness

has to be shown through out and has to be established by the plaintiff. In the case in hand, though the respondent/plaintiff has filed the suit for specific performance on 29th April, 2008, the respondent/plaintiff has not shown his capacity to pay the balance sale consideration of Rs.22,00,000 (Rupees twenty two lakhs). In his evidence, the respondent/plaintiff has stated that he has borrowed the amount from his friends and kept the money to pay the balance sale consideration. As rightly pointed out by the Trial Court, the respondent/plaintiff could not produce any document to show that he had the amount of Rs.22,00,000 (Rupees twenty two lakhs) with him on the relevant date; nor was he able to name the friends from whom he raised money or was able to raise the money. Further more, as rightly pointed out by the Trial Court, the respondent/plaintiff could have placed on record his Accounts Book, Pass Book or the Statement of Accounts or any other negotiable instrument to establish that he had the money with him at the relevant point of time to perform his part of the contract. We are, therefore, in agreement with the view taken by the Trial Court that the respondent/plaintiff has not been able to prove his readiness and willingness on his part.

(8) The relief for specific performance is purely discretionary. Though the respondent-plaintiff has alleged that he was ready and willing to perform his part of the contract, the First Appellate Court ought to have examined first whether the respondent-plaintiff was able to show his capacity to pay the balance money. In our considered view, the First Appellate Court as well as the High Court has not properly appreciated the evidence and the conduct of the parties. The First Appellate Court as well as the High Court, in our view, was not right in reversing the judgment of the Trial Court and the impugned order cannot be sustained and liable to be set aside."

16. Thus, in the light of the above decisions, we are of the view that the judgment and decree rendered by the Court below requires interference. However, we find that the relief being discretionary coupled with the fact that Ex.A1 having been admitted and the respondent has approached the Court immediately thereafter, we have to exercise our discretion in order to render justice to the parties. As the receipt of Rs.3 lakhs is admitted, and Ex.A1 having been executed as early as on

30.11.2006, we put the query to the learned counsel for the appellants that as to whether the appellants are ready and willing to pay the sum of Rs.9 lakhs to the respondent. The learned counsel fairly submitted that the aforesaid amount will be paid within a period of eight weeks from the date of receipt of a copy of this order. The said statement is recorded. Accordingly, while setting aside the judgment and decree of the trial Court, there shall be a decree directing the appellants to pay a sum of Rs.9 lakhs (Rupees nine lakhs only) to the respondent within a period of eight weeks from the date of receipt of a copy of this order.

17. In the result, the appeal suit stands allowed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

raa

To

The Additional District Judge,
Fast Track Court No.1, Coimbatore.

+1c to M/S.Sarvabhauman Associates, Sr.22809
+1cc to Mr.E.D.Sethupathi, Advocate Sr.22787

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