

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 02.08.2019

Judgment Pronounced on : 28.11.2019

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.511 of 2007
and MP.No.1 of 2007

1.Selvaraj (died) 1st Appellant / Appellant /
Defendant
2.Neelavathi
3.Jayachitra
4.Ambika
5.Arunmozhi
6.Vendamirutham Appellants 2 to 6

(Appellants 2 to 6 are brought on record as L.Rs of the
deceased sole appellant Vide Order of Court dated 03.06.2019
made in CMP.No.22725/2017 in S.A.No.511/2007)

Vs

Murugan ... Respondent/Respondent / Plaintiff

Prayer :- Second Appeal filed under Section 100 of CPC,
against the decree and judgment dated 29.09.2006 in
A.S.No.44/2005 on the file of the Principal District Court,
Villupuram confirming the decree and judgment dated 27.04.2005
in O.S.No.32/1996 on the file of the Additional Sub Court,
Tindivanam.

For Appellants : Ms.R.Meenal
For Respondent : Mr.D.Ravichander

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JUDGMENT

The defendant in a suit for specific performance, who suffered successive decrees against him before the Courts below, has come forward with this appeal. During the pendency of the appeal, the vendor in the sale agreement passed away, consequent to which his widow and 4 daughters are brought on record as appellants 2 to 6. For narrative convenience, the parties would be referred to by their ranks before the trial Court.

2.1 The facts are admitted to a larger extent on either side.
The suit property originally belonged to the defendant. On

02.07.1994, the defendant and the plaintiff had entered into a sale agreement whereby the defendant had promised to sell the suit property for a total consideration of Rs.2.60 lakhs/-. The plaintiff had paid an advance amount of Rs.10,000/-, and had promised to fulfill his part of the contract within four months. The plaintiff had issued a suit notice dated 11.10.1995, marked Ext.A.2, and it was replied to by the defendant vide Ext.A4, dated 29.10.1995.

2.2 In the reply notice, the defendant had contended that: (a) The plaintiff was not ready and willing to perform his part of the contract, and that the four months time stipulated in the agreement was an essential term of the contract. (b) That the defendant had entered into a back to back agreement with one Nainar for purchase of the latter's property, for which he intended to make use of the sale consideration to be obtained from the sale of the suit property.

3. Subsequently, the plaintiff laid the suit for specific performance, and the defendant resisted the suit on the aforesaid two grounds which he had already notified to the plaintiff in his reply notice.

4.1 During trial, the both plaintiff and the defendant have examined respectively as P.W.1 and D.W.1. Both have examined one independent witness each to speak in aid of their respective cases. The agreement on which the cause of action was found was marked Ext.A-1, followed by the suit notice and the reply notice which came to be marked as Exts.A-2 and A-4.

4.2 The trial Court rejected the defendant's case and decreed the suit. Its line of reasoning are two: First, that the plaintiff had deposited the balance sale consideration of Rs.2.50 lakhs in the Court to prove his readiness and willingness; and (b) That the defendant had not established his alleged agreement with Nainar, to indicate that he had suffered a loss owing to plaintiff's failure to perform his obligations under Ext.A-1 agreement within the stipulated time.

4.3 In the appeal preferred by the defendant, the First Appellate Court dismissed the appeal and confirmed the trial Court's decree. Hence, defendant has preferred this second appeal.

5. The appeal was admitted for considering the following two substantial questions of law:

(a) Have the Courts below gone wrong in ignoring that the plaintiff was not willing to perform his part of the contract since the suit notice itself was issued long after the expiry of the time stipulated in Ext.A1 contract?

exercising the discretion in favour of the defendant?

6. The learned counsel for the appellants submitted that :

(a) The plaintiff had never been willing to perform his part of the contract, which is borne out by his suit notice, marked as Ext.A2 issued some 11 months after the expiry of the time stipulated for performance of mutual contractual obligation.

(b) Even though time is generally not considered as an essential term of the contract, given the escalation clause, the same cannot be ignored, and this is emphasised in Saradamani Kandappan's case. This apart, there is a forfeiture clause in the agreement itself which provided for forfeiture of the advance amount paid by the plaintiff should he fail to perform his obligations under Ext.A-1. Not just that, where the defendant fail to perform his contractual obligations, in addition to the legal course open to the plaintiff, the defendant also has to pay twice the advance amount as damages. This is an indication that the contract considered time is essence of the contract.

(c) Under Section 20 of the Specific Relief Act, the relief itself is discretionary, and placed reliance on the judgment of the Hon'ble Supreme Court in Jayakantham and others vs. Abaykumar [2017 (5) SCC 178].

7. Per contra, the learned counsel for the respondent brought to the notice of the Court the judgment of the Hon'ble Supreme Court in C.A.No.2420 of 2018 between R.Lakshmikantham Vs Devaraji [(2019) 8 SCC 62] to the effect that if the suit was laid within the period of limitation by the agreement holder for specific performance then, the failure to file the suit immediately after the time fixed for performing the contractual obligation under the agreement of sale cannot be put against the plaintiff. In other words, the learned counsel would argue that a mere delay in issuing a suit notice some 11 months after the time fixed for performance could not be interpreted or constructed as plaintiff's lack of his readiness and willingness to perform his part of the contract.

8. Responding to it, the learned counsel for the appellants would now argue that in the authority of the Hon'ble Supreme Court in R.Lakshmikantham Vs Devaraji case is distinguishable on facts.

9. Ext.A-1 agreement is admitted. Neither side canvassed a case for constructing any of the terms thereof. In other words, there was unanimity between both sides that no term of the contract is ambiguous. What is in issue is whether the facts, more particularly the evidentiary facts made available on record indicate if the time stipulated in Ext.A-1 agreement is an essential term of the contract.

10.1 The Hon'ble Supreme Court in Saradamani Kandappan v. S.Rajalakshmi [(2011) 12 SCC 18] and earlier in K.S.Vaidhyanathan Vs Vairavan [(1997)3 SCC 1] has delved deeply on the origin of the presumption that the time for performance stipulated in a contract for sale of immovable property is generally not to be treated as an essential term of the contract. The foundation of this presumption appears to be that generally price of immovable properties are not market sensitive to show violent fluctuation in a short period, and that it has a general tendency to increase only gradually. Then the Hon'ble Supreme Court proceeds to declare that what might have been a valid presumption in earlier times might not be considered as an universal truth to bind the Courts at all times, as the contemporary times witness an increase in the economic activity which has created greater demand for land, which in turn activates the price rise of lands even in a short period.

10.2 However, for this to apply, the Court still would require a foundation in facts. Here is a case where on the date of notification of his intent to perform his part of the contract by the plaintiff Vide Ext.A-2 suit notice, the delay was a mere 11 months since the expiry of the time stipulated in the contract. Therefore, possibility of a sharp rise in price in this 11 months period, unless proved to the contra, cannot be presumed. At any rate, the foundation for the defendant's case was not rooted in the possibility of a sharp rise in price, but his own inability to perform his part of the contract that he claims to have entered into with Nainar. As concurrently held by the Courts below, this fact was not established.

11. Ultimately, it is a question of fact, and if the defendant/appellant has to succeed here, he need to establish that the findings of the Courts below is marred by any perverse reasoning. This is not demonstrated. Necessarily, all the substantial questions of law raised have to be decided against the defendant/appellant.

12. In the result, the appeal is dismissed and the judgment and decree dated 29.09.2006 in A.S.No.44/2005 on the file of the Principal District Court, Villupuram, is hereby confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To:

- 1.The Principal District Judge
Villupuram.
- 2.The Additional Sub Judge
Tindivanam.
- 3.The Section Officer
VR Section, High Court, Madras.

+1cc to M/s.R.Meenal , Advocate SR.No. 99633

+1cc to Mr.D.Ravichandar , Advocate SR.No. 99677

S.A.No.511 of 2007

A.SK(27/08/2020)



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