

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2019

CORAM

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

S. A.No.257 of 2013

1. Shanthi
2. Veeramani

... Appellants\Defendants

Vs.

Rajendiran

... Respondent\Plaintiff.

Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree dated 13.12.2012 made in A.S.No.15 of 2012 on the file of the II Additional District Court, Tindivanam, confirming the judgment and decree, dated 17.06.2011 made in O.S.No.86 of 2010 on the file of the Additional Sub Court, Tindivanam.

For Appellants : Mr.N.Suresh

For Respondent : Mr.D.Ravichander

JUDGMENT

The unsuccessful defendants are the appellants herein and the challenge in this Second Appeal is to the judgment and decree, dated 13.12.2012 made in A.S.No.15 of 2012 on the file of the II Additional District Court, Tindivanam (first Appellate Court), whereby, the judgment and decree dated 17.06.2011 made in O.S.No.86 of 2010 on the file of the Additional Sub Court, Tindivanam (trial Court) was confirmed.

2. The parties herein shall be referred to as per their rank assigned in the trial Court.

3. The plaintiff filed the suit seeking for the relief of specific performance by stating that both the parties (plaintiff and the defendants) entered into a sale agreement dated 18.06.2005, and as per the terms of the said agreement, the defendants agreed to sell the suit property in favour of the plaintiff for a consideration of Rs.5,60,000/- and the defendants to execute the sale deed in respect of the suit property in favour of the plaintiff within a period of three months. Accordingly, the plaintiff paid a sum of Rs.50,000/-

towards advance and agreed to pay the balance within a period of three months from the date of agreement.

4. Further, the plaintiff stated that he paid a sum of Rs.1,50,000/- to the defendants on 08.08.2005 and the same was endorsed by the parties on the reverse of the agreement, marked as Ex.A.2. The plaintiff again paid a sum of Rs.17,150/- to the defendants on 05.11.2005 and such endorsement is marked as Ex.A3. Thus, the plaintiff has paid a total sum of Rs.2,17,150/- towards the sale consideration of Rs.5,60,000/-. According to the plaintiff, he was always ready and willing to pay the balance sale consideration and called the defendants several times to receive the balance sale consideration and to perform their part of the contract, by executing the sale deed in respect of the suit property in favour of the plaintiff. But the defendants were not ready to perform their part of the contract and despite issuance of legal notice, dated 03.02.2006 calling upon the defendants to convey the suit property within 10 days time, the defendants took no steps to perform the contract, rather, they attempted to create third party right over the suit property, which necessitated the plaintiff to file the suit for specific performance.

5. The defendants contested the suit by filing a written statement, admitting the fact that they entered into an agreement with the plaintiff in respect of the suit property and received an advance of Rs.50,000/- and also the receipt of further sum of Rs.1,50,000/-. However, they denied receipt of sum of Rs.17,150/- from the plaintiff. They further stated that as per the terms of the agreement, if they did not pay the amount due to the Tindivanam Cooperative Urban Bank Ltd., (henceforth, referred to as 'Bank') within three months, then, the plaintiff should pay and discharge the debt due to the Bank. But the plaintiff has not acted as per the terms of the agreement and did not discharge the debt due to the Bank. Therefore, the plaintiff has violated the terms of the agreement and hence, the property was brought for auction.

6. Further, the defendants also denied that the plaintiff was always ready and willing to perform his part of the contract and stated that only with an intention to prevent the Bank from bringing their property for sale, they entered into such agreement with the plaintiff. However, the plaintiff failed to discharge the debt due to the Bank. Hence, the Bank brought the property for auction and to prevent the same, again, the defendants borrowed amount and cleared the debt. Hence, the defendants denied the averment set out in the plaint that the plaintiff was ever ready and willing to perform his part of the contract and is not entitled to the relief sought for. The

defendants also denied the issuance of legal notice as alleged by the plaintiff and thus, prayed for dismissal of the suit.

7. Before the trial Court, the plaintiff examined himself as P.W.1 and one other witness by name Soundarrajan as P.W.2 and marked six documents, viz., Exs.A1 to Ex.A6. On the side of the defendants, two witnesses were examined as D.W.1 and D.W.2. (i.e.second defendant) and one document was marked as Exs.B.1.

8. The trial Court, on the basis of both oral and documentary evidence, decreed the suit as prayed for. Aggrieved by the said judgment and decree, the defendants preferred an Appeal before the First Appellate Court.

9. The First Appellate Court also concurred with the findings of the trial Court and dismissed the Appeal. Challenging the same, the defendants have preferred the present Second Appeal.

10. At the time of admission of the second appeal, the following substantial questions of law were framed for consideration:-

i) Whether the Courts below have rendered perverse finding that the respondent is always ready and willing to perform his part of his contract and he has sufficient means to pay the balance sale consideration?

ii) Whether time is the essence of contract as pleaded by the appellants?

11. The learned counsel appearing for the appellants submitted that the suit was filed by the plaintiff for specific performance on the basis of agreement dated 18.06.2005. The defendants are the owners of the suit property. It is true that they have entered into an agreement with the plaintiff vide agreement dated 18.06.2005. As per the terms of the agreement entered into between the parties, the plaintiff has to pay the entire sale consideration of Rs.5,60,000/- within three months from the date of entering into the agreement. The learned counsel further submitted that the defendants borrowed money from the Tindivanam Cooperative Bank by mortgaging their house property and the very purpose of entering into such agreement itself was to prevent the Bank from bringing the property into auction. Therefore, he contended that only for the purpose of

redeeming the said property and to prevent the Bank from bringing the property to auction, such an agreement for sale was entered into between the defendants and the plaintiff and in terms of the agreement, the plaintiff is expected to pay the entire sale consideration within the time as prescribed in the agreement, (i.e., three months) and from and out of the sale consideration received before the execution of the sale deed, the defendants would clear the mortgage by paying the loan amount with the Bank and in case, the defendants did not pay the amount due to the Bank Ltd., within three months, then, the plaintiff should pay and discharge the debt due to the Bank.

12. The learned counsel further contended that, it is a trite law that, in a suit for specific performance, the time is essence of the contract. In the present case, as per Ex.A.1, entire sale consideration has to be paid within a period of three months. Since the plaintiff failed to discharge debt due to the Bank, the property of the defendants was brought to sale. This per se, would show that the plaintiff was not ready and willing to perform his part of the contract within the specified time. Further, the learned counsel referred to the cross examination of P.W.1, wherein, P.W.1 admitted the fact that he was not in a position even to arrange a sum of Rs.50,000/- towards advance amount to be paid by him at the time of entering into the sale agreement, and the said Rs.50,000/- was paid in piecemeal of Rs.20,000/- and Rs.30,000/- and the same was clubbed together and obtained, as evident from the receipt received for a sum of Rs.50,000/- at the time of entering into the agreement.

13. Further, the learned counsel submitted that the plaintiff himself admitted in his cross examination that he met the Manager of the Bank and provided an assurance with the Bank Manager that he would settle the loan amount within a period of three months time. Therefore, the learned counsel further contended that, the obligation of the plaintiff is to come forward to make the entire sale consideration and thereafter request the defendants to make the sale deed. In case, at the time of paying the sale consideration, if the loan amount is not paid, then, the plaintiff is supposed to have retained that amount and the balance amount should have been paid. Therefore, conduct of the plaintiff itself would show that he was not ready and willing to make payment until the date of filing the suit.

14. The learned counsel for the appellants/defendants also referred to para No.2 of Ex.A4, wherein, it is stated as follows :-

"My client and you Nos.1 and 2 further agreed that you Nos.1 and 2 should discharge

the loan availed by you Nos.1 and 2 from Tindivanam Cooperative Urban Bank before the sale of the property to my client and if you Nos.1 and 2 failed to discharge the same, my client is entitled to declain the amount due under the loan out of the balance of sale consideration for payment of the same to the said bank:-".

15. Further, the learned counsel for the appellants/defendants submitted that the plaintiff paid a sum of Rs.1.5 lakhs on 08.08.2005, i.e 40 days i.e., after the date of entering into the agreement and the same was endorsed by the parties on the reverse of the agreement, marked as Ex.A.2. However, with regard to the another endorsement made on 05.11.2005, for the receipt of Rs.17,150/-, the learned counsel denied the said endorsement as the same was forged and fabricated one. Therefore, the said amount cannot be treated as part of the advance money paid for performance of the contract. The learned counsel further submitted that even though the plaintiff was not able to mobilise sum towards the balance sale consideration within the specified time, he has issued a legal notice on 03.02.2006, as if, he was ready and willing to perform his part of the contract and filed the suit for a specific performance on 06.02.2006.

16. Further, the learned counsel contended that the defendants not at all received any notice, stating that the plaintiff was ready and willing to perform his part of the contract. However, behind the back of the defendants, the plaintiff has filed the suit and obtained an exparte injunction order. Even in his cross-examination, the plaintiff has categorically admitted that he was not in a position even to arrange a sum of Rs.50,000/- towards advance amount to be paid by him at the time of entering into the sale agreement. When that being the case, both the trial Court and the First Appellate Court committed a grave error in decreeing the suit as prayed for. Both the Courts below failed to take note of significant factor that in a suit for specific performance, time is the essence of the contract and the plaintiff failed to perform his part of the contract within the time as stipulated in the agreement and also failed to comply with the assurance made before the Bank Manager that, he would settle the loan amount before the execution of the sale deed and the defendants will clear the loan out of the funds received from the plaintiff towards the loan obtained from the Bank and thereafter execute the sale deed. Thus, from the evidence of P.W.1, it is very much clear that the sale agreement was entered into only with an intention not to let the defendants property to be brought out in a public auction by the Bank and to save the property.

Further, he contended that the defendants apprehending that their reputation would get marred, if their property come to auction, have entered into agreement with the plaintiff and not for the purpose as concocted by the plaintiff. These facts have not been taken into consideration by both the Courts below.

17. Further, the learned counsel contended that the Courts below did not consider the fact that the legal notice was issued on 03.02.2006 and the suit was filed on 06.02.2006, which means without proper notice to the defendants, the plaintiff instituted the suit behind the back of the defendants and obtained an injunction order restraining the defendants from encumbering the property. Further, it is contended that, except legal notice, no other documents were marked on the side of the plaintiff to prove his readiness and willingness to perform the contract. That apart, the legal notice itself is not an authentic document so as to establish the readiness and willingness of the plaintiff and file the present suit. All these aspects were not taken not by the Courts below and decreed the suit by holding that the plaintiff despite showing his readiness and willingness, the defendants failed to perform their contract.

18. The learned counsel for the appellants also relied upon the decision of the Hon'ble Supreme Court, reported in (2011) 12 SCC 18 (Saradamani Kandappan Vs S.Rajalakshmi and others) which would be applicable to the facts and circumstances of the case at hand and the relevant paras from the said decision are extracted herein below:

'' "Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S.Vidyanadam:

(i) The 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) The 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. The 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 that 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 the 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".

57. The terms of the contract make it clear that payment of the sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in Clause 4 and thereafter the vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees. The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, Section 52 of the Contract Act does not help the appellant but actually supports the vendor respondents".

19. Therefore, the learned counsel for the appellants lastly submitted that the question of defendants performing their part of the contract will arise only after the payment of entire sale consideration by the plaintiff within the specified time, and as per the terms of the agreement, entire sale consideration has to be paid by the plaintiff within a period of three months time, which admittedly, the plaintiff has not done. Even thereafter also, i.e. before the alleged issuance of legal notice, the plaintiff never shown any readiness and willingness to perform his part of the contract and hence, he is not entitled to a decree prayed for. Thus, the learned counsel submitted that to that extent the findings of both the Courts below are perverse and liable to be set aside.

20. Per contra, the learned counsel appearing for the respondent/plaintiff submitted that, as per the terms of the agreement entered into between the plaintiff and the defendants, the plaintiff paid a sum of Rs.50,000/- towards advance and agreed to pay the balance within a period of three months from the date of agreement. Accordingly, he paid a sum of Rs.1,50,000/- to the defendants on 08.08.2005 and the same was endorsed by the parties on the reverse of the agreement, marked as Ex.A.2. Again, on 05.11.2005, the plaintiff paid a sum of Rs.17,150/- to the defendants and such endorsement is marked as Ex.A3. Thus, the plaintiff has paid a total sum of Rs.2,17,150/- towards the sale consideration of Rs.5,60,000/- and he was always ready and willing to pay the balance sale consideration and called the defendants several times to receive the balance sale consideration and to perform their part of the contract. However, it is the defendants, who evinced no interest in accepting the balance sale consideration and evaded from performing their part of the contract. Even before the issuance of the legal notice, the plaintiff called upon the defendants to receive the balance sale consideration and perform their part of the contract. Since the defendants failed to respond to the said notice, the plaintiff filed the suit. All these aspects were rightly taken note of by the trial Court and allowed the suit as prayed for and the first Appeal preferred against the said judgments was also allowed, by confirming the judgement of the Trial Court and such concurrent finding of fact by both the Courts below cannot be interfered in this Second Appeal, for the reason that, as per Section 100 of Civil Procedure Code, the scope of this Court is very limited to interfere on the concurrent findings of the facts by the Courts below.

21. Thus, the learned counsel contended that the plaintiff was always ready and willing always to perform his part of the contract and till the date of filing the suit, he expressed his readiness and it is the defendants, who did not come forward to execute the sale deed. As per the agreement, the defendants have to clear the loan amount, which is due to the Bank and thereafter, only the sale deed can be executed. The plaintiff have paid a sum of Rs.1.5 lakhs on 08.08.2005 which is well within the period of three months and thereafter, the plaintiff had adjusted a sum of Rs.17,150/- which amount the defendants are liable to pay towards the rental arrears and the hand loan received by them. The said amount was paid by the defendants to the plaintiff on 05.11.2005, on the same date, the said amount was repaid to the defendants by the plaintiff towards part of the sale consideration.

22. The learned counsel further contended that since the said part payment was made after the expiry of three months period, therefore, he has contended that time is not the essence of the contract in the present case. Under these circumstances, the plaintiff also issued legal notice dated 03.02.2006 calling upon the defendants to receive the balance the sale consideration within 10 days of the receipt of the notice, by specifying the date and time where the plaintiff shall pay Rs.3,42,850/- to defendants 1 & 2 and to execute the sale deed. However, since the defendants made attempt to alienate the property, the plaintiff did not have any other option, except, to file the suit to protect the suit property and accordingly, he has filed suit for the relief of specific performance on 06.02.2006 i.e., within three days from the date of issue of the legal notice. Therefore, he concluded his arguments that the plaintiff was ever ready and willing to perform his part of the contract till the date of filing the suit, which was proved beyond doubt and the Courts below also took into consideration all these aspects and rightly decreed the suit. Therefore, he prayed for dismissal of the appeal.

23. Heard the learned counsel for both sides and perused the pleadings, both the oral and documentary evidences and the citations produced in support of their contentions.

24. Admittedly, there was a sale agreement entered into by the plaintiff and the defendants dated 18.06.2005 for sale consideration of Rs.5,60,000/- in respect of the suit property within a period of three months from the date of sale. In the present case, the period of three months was over on 17.09.2005. Hence, the plaintiff is expected to make the balance the entire sale consideration on or before 17.09.2005. At the time of entering into the agreement a sum of Rs.50,000/- was paid by the plaintiff and a further sum of Rs.1,50,000/- on 08.08.2005. Thus, there is no dispute with regard to the payment of Rs.2,00,000/- by the plaintiff before the date of expiry of the agreement on 17.09.2005. In the agreement, it is specifically mentioned that within three months' time, the sale deed should be executed, or otherwise the plaintiff can settle the amount of loan and approach the Court for execution of the sale deed by depositing the balance consideration, which would clearly indicate that it is the obligation of the plaintiff to settle the loan of the bank. In case, if the same is not settled, the said amount will be deducted from the sale consideration. So it would clearly shows it is the obligation of the plaintiff to make the sale consideration within a period of three months. That apart, the main intention of entering into the agreement of sale is only to settle the dues, which the defendants owe to the bank and thereafter, to execute the sale deed, for which

purpose, the plaintiff should have paid the entire sale consideration within a period of three months from the date of entering into the agreement and the same was not done. Since the plaintiff failed to discharge the debt within a stipulated period of three months, the defendants are not bound by the terms of the agreement. Therefore, the plaintiff is not entitled to the relief sought for.

25. A perusal of the pleadings, documents and deposition of PW1 would merely show that the plaintiff was all along ready and willing to perform his part of the contract upto the date of filing of the suit, but, to prove the same, he has not marked any document. Further, when the plaintiff made the payment of Rs.1.5 lakhs on 08.08.2005, nothing prevented the plaintiff to make the full payment when he was ready and willing to make the entire payment. Since the plaintiff did not have sufficient money, he was not able to pay the entire sale consideration, which would clearly goes against him, as per the principles of law laid down by the Hon'ble Supreme Court in the following reported decisions:-

1. (2011) 12 SCC 18 in the case of (Saradamani Kandappan Vs S.Rajalakshmi and others).

2. (2011) 1 SCC 429 in the case of (J.P.Builders and another Vs A.Ramadass Rao and another)

3. 2018 (3) CTC in the case of (P. Meenakshi Sundaram Vs P.Vijayakumar and another) at paragraph Nos.5 and 8 reads as follows:-

“5. In Gomathinayagam Pillai and others Vs. Pallniswami Nadar, 1967 (1) SCR 227, after referring to the observations of the Privy Council in Ardeshir Mama Vs. Flora Sassoon, L.R.55 I.A.360, 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 Sassoon 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".

8. As regards Suit for Specific Performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his part of the Contract all through i.e., right from the date of the Contract till the date of hearing of the suit" ''.

26. In the above said case, it is clearly held that the plaintiff should be ready and willing to perform his part of the contract always from the date of agreement before the expiry of the date to make the payment. But in the present case it appears that, after paying a sum of Rs.1.5 lakhs, on 08.08.2005, the plaintiff did not have any means to pay the balance consideration within a period of three months time. Even after the expiry of three months time, the plaintiff did not pay any amount, but according to the plaintiff, a sum of Rs.17,150/- was paid by the defendants towards the rental dues and hand loan received from the plaintiff, which was, in turn, repaid to the defendants, towards the part of the sale consideration on 05.11.2005 which is beyond the period of three months time. This would also clearly prove that, after the expiry of three months period, the plaintiff did not have any means to pay the balance sale consideration to the defendants. Therefore, the statement of the plaintiff that he was ready and willing to pay the amount from the date of entering into the agreement cannot be accepted and it is only a false statement and these facts were not well considered by both the Courts below on par with the settled legal proposition of law by the Hon'ble Supreme Court. Thus, both the Courts below committed an error in coming to a conclusion that the plaintiff was ready and willing to perform

his part of the contract and the defendants were not ready and willing.

27. Further, the plaintiff sent the legal notice on 03.02.2006 calling upon the defendants to come forward for executing the sale deed by fixing the date and time within ten days of the receipt of the notice. But, all of a sudden within three days after the issue of the notice, i.e., on 06.02.2006, the plaintiff filed the suit alleging that they are making attempt to alienate the property. Except the bald averments/allegations, no other documents were produced to prove, within two days from the date of sending the notice that the defendants are making attempt to alienate the property. Therefore, it is clear that the suit instituted by the plaintiff is not on valid grounds.

28. Further, this Court would like to point out that relief sought for under Specific Relief is an equitable relief. When the Court is granting such relief, the Court should have clear mind, and even if it has an iota of doubt, it should restrain itself from granting such relief. In the present case, as discussed above, the Courts below keeping in mind umpteen numbers of doubts granted the equitable relief of specific performance and decreed the suit, in favour of the plaintiff, which shocks the conscience of this Court. When the Courts have doubts in granting such relief, it ought to have rejected the claim of the plaintiff, but, both Courts below have miserably erred in holding that the plaintiff is entitled to the discretionary relief of specific performance, merely on the ground, that the suit was filed in time, without properly appreciating the readiness and willingness and the conduct of the plaintiff.

29. Thus, it is clear that Courts below, without applying their mind in a rightful manner decreed the suit, which has to be set aside. It is no doubt true that the Scope of Section 100 CPC is very limited for this Court to interfere with the concurrent judgments of the Courts below. However, since already stated supra, since the decision of the Courts below shocks the conscience of this Court, this Court is bound to interfere with the judgement and decree passed by the Courts below. Accordingly, the judgment and decree of the Courts below are set aside. Consequently, the substantial questions of law formulated in the second appeal are answered in favour of the defendants and against the plaintiff and I hold that the plaintiff was not ready and willing to perform his part of the contract and therefore, he is not entitled to the discretionary relief of specific performance.

30. In the result, the Second Appeal is allowed. Though the respondent/plaintiff is not entitled to any relief of specific performance, since he has made a payment of Rs.2,00,000/- (Rs.2,17,150 - Rs.17,150 = Rs.2,00,000/- disputed amount), this Court directs the appellants/defendants to return the same within a period of four weeks time from the date of the judgment and decree made ready with 9% interest from the date of payment till the date of realization and further if any money is deposited in the Courts below, the same may be returned to the plaintiff. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1. The Additional Subordinate Judge,
Tindivanam.
2. The IIInd Additional District Court,
Tindivanam.

Copy to

The Section Officer,
VR Section,
High Court, Madras.

+1cc to N.Suresh, Advocate Sr.23833
+1cc to Mr.D.Ravichandar, Advocate Sr.23775

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