

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 05.09.2019	Delivered on 18.09.2019
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.10 of 2014

K.C.Rajabathar ..Appellant/Respondent/Plaintiff

vs.

B.Purushothaman .. Respondent/Appellant/Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 04.07.2013 and made in A.S.No.1 of 2012 on the file II Additional District Court, Tindivanam reversing the Judgment and Decree dated 15.10.2009 and made in O.S.No.52 of 2006 on the file of Principal Subordinate Court, Tindivanam.

For Appellant : Mr.K.Doraisami, SC
for M/s. Muthumani Doraisami

For Respondent : Mrs. C.Jayachitra
for T.S.Baskaran

J U D G E M E N T

The plaintiff in OS No.52 of 2006 having succeeded in obtaining a decree for specific performance, before the Trial Court which was set aside on appeal by the Lower Appellate Court in AS No.1 of 2012 has come up this Second Appeal, challenging the judgment and decree of the II Additional District Judge, Tindivanam, dated 04.07.2013 made in AS No.1 of 2012.

2. The case of the plaintiff in brief is as follows:

The defendant, who is the owner of the suit property had agreed to sell the suit property for a consideration of Rs.2,70,600/- and had received an advance of Rs.50,000/- from the plaintiff on 02.08.2003. The terms of the agreement were reduced in writing on the said date. As per the agreement, the defendant was obliged to hand over the original documents of the

property to the plaintiff and also effect measurement of the property within a period of three months. The plaintiff had agreed to pay the balance of sale consideration within the said period and take the sale deed.

3. According to the plaintiff, the defendant did not comply with the terms of the agreement, namely, he did not discharge the debt borrowed by him by depositing the title deeds with a third party and he did not also take steps to have the property measured. However, on 11.08.2003, the defendant required the plaintiff to pay a further sum of Rs.50,000/- towards further advance. The plaintiff had paid the said amount and an endorsement was also made by the defendant in the suit agreement itself. Again on 27.03.2004, the defendant received a sum of Rs.20,000/- from the plaintiff and made an endorsement in the xerox copy of the sale agreement dated 02.08.2003. On 22.06.2004, the defendant required the plaintiff to pay a further sum of Rs.60,000/- towards further advance for his daughter's marriage. The same was also paid by the plaintiff. An endorsement acknowledging the receipt of the sum of Rs.60,000/- was made by the defendant in the xerox copy of the suit agreement dated 02.08.2003. Thus, the defendant had received a sum of Rs.1,80,000/- out of the total consideration of Rs.2,70,600/- from the plaintiff up to 22.06.2004, leaving a balance of only Rs.90,600/- due and payable by the plaintiff towards the sale consideration.

4. Since the defendant did not come forward to discharge the debt and also measure the property, the plaintiff had issued a notice on 20.07.2006, calling upon the defendant to receive the balance of sale consideration and execute the sale deed. Though the defendant received a notice on 22.07.2006, did not choose to send a reply. Hence the plaintiff had filed the above suit seeking specific performance on 01.08.2006. The plaintiff has always been ready and willing to perform his part of the contract throughout and he has got the balance of consideration also readily available with him.

5. The defendant resisted the suit contending that the suit agreement was not intended to be an agreement of sale. According to the defendant, he used to borrow monies from the plaintiff, whenever he needed for agricultural operations and when the plaintiff insisted for security the agreement was entered into. Thus, according to the defendant, the suit agreement was executed only to serve as a security for the borrowings and there was no consensus ad idem between the parties for sale of the property. It was also further claimed

that there has been an inordinate delay on the part of the plaintiff in issuing the notice demanding specific performance. The plaintiff was therefore, not ready and willing to perform his part of the contract. It is the further claim of the defendant that the suit property is worth more than Rs.9,00,000/- as on the date of the agreement. The plaintiff's suit was termed as one actuated by greed, in order to grab the property from the defendant.

6. At trial, the plaintiff was examined as P.W.1 and one Radhakrishnan, who figures as an attesting witness in the agreement of sale marked as Ex.A1, was examined as PW.2. Exhibits A1 to A5 were marked on the side of the plaintiff. The defendant examined himself as D.W.1 and examined one Tamilvanan as D.W.2.

7. The learned Subordinate Judge, Tindivanam, who tried the suit concluded that the defendant has not established his plea that the agreement was executed to serve as security for the loan transaction and it was not intended to be an agreement of sale. The learned Subordinate Judge also found that the plaintiff has established the payment of a sum of Rs.1,80,000/- on various dates as pleaded by him. The Trial Court also further found that the defendant had admitted that he had not discharged the loan borrowed by him by depositing the title deeds of the property with a third party. The learned Subordinate Judge also found that the plaintiff has been ready and willing to perform his part of the contract and it was the defendant, who has been delaying performance of the contract. The learned Trial Judge also as of fact found that time was not intended to be the essence of the contract.

8. In coming to the said conclusions, the learned Subordinate Judge relied upon the conduct of the defendant in having received monies on various dates, even after the expiry of the three months period fixed under the agreement. The learned Subordinate Judge concluded that Exhibits A1, A2 and A5 would prove that the plaintiff has parted with a sum of Rs.1,80,000/- on 02.08.2003, 11.08.2003, 27.03.2004 and 22.06.2004. These payments were actually admitted by the defendant. In view of the above findings, the learned Subordinate Judge concluded that the plaintiff would be entitled to a decree for specific performance. On the above said conclusion, the learned Subordinate Judge decreed the suit directing the plaintiff to deposit the balance of sale consideration within a period of three months.

9. Aggrieved by the said judgment and decree, the defendant preferred an Appeal in AS No.1 of 2012 on the file of the II Additional District Court, Tindivanam. The learned II Additional District Judge framed only one point for determination in the Appeal which reads as follows:

Whether the Appeal can be allowed or not?

10. The learned Additional District Judge, however, discussed the evidence on record and agreed with the Trial Court, insofar as, the nature of the agreement is concerned. The learned District Judge found that the case of the defendant that the agreement was executed to serve as a security for the borrowings of the defendant has not been established by concrete evidence. Therefore, the learned Additional District Judge found that Ex.A1 agreement was intended to be a sale agreement and the plaintiff has parted with sum of Rs.1,80,000/- on various dates. However, the learned Additional District Judge, on the question of readiness and willingness, concluded that the plaintiff was not ready and willing to perform his part of the contract. In coming to the said conclusion, the learned Additional District Judge, took note of the fact that the plaintiff having made the last payment on 22.06.2004 had issued a notice demanding specific performance after two years i.e., on 20.07.2006. This unexplained delay of two years, according to the learned Additional District Judge, would disentitle the plaintiff seeking to the discretionary relief of specific performance.

11. The learned Additional District Judge also concluded that the plaintiff has not made out his readiness and willingness, as required under Section 16(c) of the Specific Relief Act. On the aforesaid conclusions, the learned Additional District Judge allowed the Appeal setting aside the Judgment and decree of the Trial Court and dismissed the suit. Aggrieved the plaintiff has come forward with the above instant Second Appeal.

12. The following questions of law were framed by this Court, while admitting the above Second Appeal:

1. Whether the lower appellate court violated the provisions of Order 41 Rule 31 (a) C.P.C. in not framing the points for determination in the Appeal excepting to

state as to whether the Appeal was to be allowed or not?

2. Whether the lower appellate court went wrong in brushing aside the categorical findings of the trial Court with regard to the readiness and willingness of the plaintiff?

13. I have heard Mr.K.Doraisami, learned Senior Counsel assisted by Mr.Kandan Doraisami, appearing for the appellant and Mrs.C.Jayachitra, learned counsel appearing for Mr.T.S.Baskaran, learned counsel appearing for the respondent.

14. Elaborating on the questions of law framed, Mr.K.Doraisami, learned Senior Counsel would contend that Order XLI Rule 31 of the Code of Civil Procedure mandates an Appellate Court to frame points for determination, state the decision there on and the reasons for the decision. Drawing my attention to the point for determination framed by the Lower Appellate Court, the learned Senior Counsel would contend that the judgment of the Lower Appellate Court is vitiated for non framing essential points for determination. He would also further submit that the Lower Appellate Court being the Final Court in fact, is bound to consider the reason assigned by the trial Court for its conclusion and if it chooses to disagree with the said reasons, it ought to have given its own reasons for such disagreement. It is the contention of Mr.K.Doraisami, learned Senior counsel that the Lower Appellate Court apart from failing to frame points for determination has not given any reason to disagree with the conclusions of the Trial Court. Therefore, according to him, the judgment of the Lower Appellate Court is vitiated.

15. Contending contra, Ms.C.Jayachitra, learned counsel appearing for the respondent would submit that mere failure to frame points for determination will not vitiate the judgment of the Lower Appellate Court. According to her, the Lower Appellate Court has considered the entire evidence on record and had come to its own conclusion on the basis of such consideration. Once it is found that the Lower Appellate Court had appreciated the evidence and had answered the relevant issues that arise for consideration in the Appeal, the judgment cannot be said to be vitiated merely because the Lower Appellate Court had failed to frame points for determination.

16. I perused the judgment of the Lower Appellate Court, I am inclined to agree with the submissions of the learned counsel for the respondent on this question. Though, the Lower Appellate Court had framed only one point for determination as extracted above, the Lower Appellate Court had examined the evidence on record and recorded its findings on each and every issue raised by the defendant.

17. As already pointed out, the Lower Appellate Court which had agreed to the conclusions of the Trial Court on the nature and purpose of Ex.A1, however, differed with the reasoning for the conclusions of the Trial Court only on the question of readiness and willingness. Once it is found that the Lower Appellate Court had considered the evidence and had recorded its conclusions on the basis of such consideration, I do not think that the judgment can be said to be vitiated, only because of the failure on the part of the Lower Appellate Court to frame points for determination. Therefore, the question of law No.1 is answered to the effect that the judgment of the Lower Appellate Court is not vitiated by non framing of points for determination, since the Lower Appellate Court had examined the entire evidence and recorded its findings on various issues that are raised in the appeal.

18. Arguing on question of Law No.2, Mr.K.Doraisamy, learned Senior Counsel for appearing the appellant would vehemently contend that the Lower Appellate Court erred in misreading the plaint. Drawing my attention to the observation of the Lower Appellate Court that the plaintiff has not pleaded that he has always been ready and willing to perform his part of the contract. The learned Senior Counsel would submit that at page 3 of the plaint, the plaintiff has specifically stated that the plaintiff has always been ready and willing to perform his part of the contract. He would draw my attention to the following pleading found in paragraph 6 of the plaint:

“மேற்படி தொகை போக 2.8.2003 தேதியிட்ட கிரய அக்ரிமெண்டிற்கு பிரதிவாதிக்குச் சேர வேண்டிய மிகுதி கிரயத் தொகை ரூ.90,600 மட்டுமே ஆகும். மேற்படி தொகையை வாதி தொடர்ந்து தன் வசம் தயாராகவே வைத்துள்ளார். அக்ரிமெண்டின் உடிரத்தின்படி மேற்படி தொகையைப் பெற்றுக் கொண்டு கிரயத்தை பூர்த்தி செய்து கொடுக்கும்படி பிரதிவாதியை வாதி தொடர்ந்து கேட்டு வருகிறார். மேலும் நிலத்தை அளந்து அசல் ஆவணங்களைக் கொடுக்குமாறு வாதி கேட்டு வந்தார். ஆனால் பிரதிவாதி வாதியின் கோரிக்கைக்கு சிறிதளவு ம் செவி சாய்க்கவில்லை. இருந்த போதிலும் வாதி 2.8.2003 தேதியிட்ட கிரய அக்ரிமெண்டின் படி எப்போதும் இப்போதும் மிகுதித் தொகை

ரூ.90,600 ஐ செலுத்தி கிரயத்தைப் பூர்த்தி செய்து கொள்ள தயாராகவே இருக்கிறார். ”

19. According to Mr.K.Doraisami, the Lower Appellate Court had ignored the pleading in paragraph 6 of the plaint and had taken only one line out of context to conclude that the plaintiff has not pleaded that he has been ready and willing to perform his part of the contract, I am in agreement with the said submission of the learned Senior Counsel. The pleadings extracted above would show that the plaintiff has pleaded the essential ingredients of readiness and willingness, as required under Section 16(c) of the Specific Relief Act. The Lower Appellate Court had in fact omitted to read the entire pleading which led to its conclusion that the plaintiff has not pleaded that he was always ready and willing to perform his part of the contract.

20. The plaintiff has been non suited by the Lower Appellate Court on the ground that there has been a delay in issuing the notice dated 20.07.2006. Both the Courts below have concurrently found that the agreement is true and valid and the plaintiff has established his claim relating to the payments made by him as per the agreement. The result of the conclusion is that the defendant had received the following amounts from the plaintiff on various dates

(i)	02.08.2003	Rs.50,000/-
(ii)	11.08.2003	Rs.50,000/-
(iii)	27.03.2004	Rs.20,000/-
(iv)	22.06.2004	Rs.60,000/-
Total		Rs.1,80,000/-

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21. The last of the said payment was made on 22.06.2004, the notice demanding specific performance was issued on 20.07.2006, it is this delay of nearly two years and one month, which has been taken as a factor by the Lower Appellate Court to conclude that the plaintiff was not ready and willing to perform his part of the contract. Mr.S.Doraisamy, learned Senior Counsel appearing for the plaintiff would vehemently contend that the Lower Appellate Court was not right in concluding that there was unnecessary or undue delay in seeking specific performance.

22. According to him, the suit having been filed within the period of limitation, the Lower Appellate Court was not justified in concluding that the plaintiff was not ready and willing to perform his part of the contract. The learned Senior Counsel would also draw my attention to the evidence of the defendant as D.W.1, wherein, he had stated that he had not taken steps to measure the property as required under the agreement within the three months period. The defendant had also further stated that he had not discharged the loan borrowed by him by depositing the Original Title Deeds with the third party. These admissions, according to the learned Senior Counsel would justify the delay on the part of the plaintiff in seeking specific performance.

23. The learned Senior Counsel would also point out that the plaintiff had parted with nearly 2/3rd of the sale consideration even as on 22.06.2004 and both the Courts below have found that the defendant had in fact received the said sum of Rs.1,80,000/- between 02.08.2003 and 22.06.2004. It is also the submission of the learned Senior Counsel that the parties never intended time to be an essence of the contract and the same is demonstrated by the fact that the defendant had received monies from the plaintiff even after the expiry of the three months period fixed under the agreement.

24. The learned Senior Counsel would also draw my attention to the judgments of the Hon'ble Supreme Court in R.Lakshmikantham v. Devaraji, reported in 2019 SCC online SC 907, and Madhukar Nivrutti Jagtap and others v. Smt.Pramilabai Chandulal Parandekar and others, reported in 2019 SCC online SC 1026.

25. In R.Lakshmikantham's case, the Hon'ble Supreme Court while considering the question of readiness and willingness has observed as follows:

"10. In the aforesaid circumstances, the High Court was also incorrect in putting a short delay in filing the Suit against the plaintiff to state that he was not ready and willing. In India, it is well settled that the rule of equity that exists in England, does not apply, and so long as a Suit for specific performance is filed within the period of limitation, delay cannot be put against the

plaintiff - see Mademsetty Satyanarayana v. G.Yelloji Rao and others, AIR 1965 Supreme Court 1405 (paragraph 7) which reads as under:

"(7) Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a Court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems-English and Indian-qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises."

26. In Madhukar Nivrutti Jagtap's case, the Hon'ble Supreme Court after having considered the various earlier judgments of the Hon'ble Supreme Court and the judgment in R.Lakshmikantham's case concluded that the delay of two years between 1966 and 1968 cannot be considered to be a long delay which would disentitle the plaintiff from obtaining the relief of specific performance. After quoting the observations in R.Lakshmikantham's case extracted above, the Hon'ble Supreme Court has observed as follows:

"13.7. Having examined the matter in its totality and in the light of applicable principles, we are satisfied that the given set of facts and circumstances of this case lead only to the conclusion that the plaintiffs have shown their readiness and willingness to perform their part of the contract and there does not operate any personal bar against their claim for specific performance. Therefore, the second question is also answered in favour of the plaintiffs."

Relying upon the aforesaid decisions, Mr.K.Doraisami, learned Senior Counsel would contend that the Lower Appellate Court was

not right in reversing the well considered judgment of the Trial Court and concluding that the plaintiff was not ready and willing to perform his part of the contract.

27. Contending contra, Ms.C.Jayachitra, learned counsel appearing for the respondent would submit that no doubt the defendant had received a sum of Rs.1,80,000/- up to 22.06.2004, but the said payment alone would not amount to the plaintiff having established his readiness and willingness throughout the period. She would draw my attention to the judgment of the Hon'ble Supreme Court in Saradamani Kandappan v. S.Rajalakshmi and others, reported in 2011 (4) CTC 640, in support of her contention that prolonged inaction on the part of the plaintiff would disentitle him from obtaining the discretionary relief of Specific performance, even if the suit had been filed within the period of limitation. She would also point out that though the last payment was made on 22.06.2004, the plaintiff had chosen to issue notice demanding specific performance only on 20.07.2006 and has followed it up with the suit on 01.08.2006 i.e., almost on the last date of limitation. She would also draw my attention to the observations of the Hon'ble Supreme Court in K.S.Vaidyandam and others v. Vairavan reported in AIR 1997 SC 751, wherein the Hon'ble Supreme Court had held that in view of the spiraling raise in price of immovable property, a suit for specific performance filed after 2 ½ years, from the date of the agreement cannot be decreed exercising the discretionary power of the Court.

28. I have considered the rival submissions.

29. The question of readiness and willingness cannot be put in a straight jacket. The factum of readiness and willingness has to be gathered from the circumstances prevailing in each case. In the case on hand, the agreement was entered into on 02.08.2003, it provided certain obligations to be performed by the parties to the agreement. The defendant was required to discharge the loan borrowed by him and also to have the property measured at his cost. The plaintiff was also required to pay the balance of sale consideration within three months period. It is in evidence that the defendant did not perform either of the two obligations imposed on him. On the other hand, the defendant has been receiving monies from the plaintiff, even after the expiry of the three months period. He had received a sum of Rs.20,000/- on 27.03.2004 and further a sum of Rs.60,000/- on 22.06.2004, totaling to Rs.80,000/- which is almost 1/3rd of the sale consideration after the expiry of the three months period. Apart from the said sum of Rs.80,000/-,

the defendant has received a sum of Rs.50,000/- on the date of the agreement dated 02.08.2003 and another Rs.50,000/- on 11.08.2003. Thus it could be seen that the plaintiff has parted with a sum of Rs.1,80,000/- which is nearly 2/3rd of sale consideration agreement.

30. The plaintiff had issued a legal notice on 20.07.2006 and the same has been received by the defendant on 22.07.2006. There was no reply to the said notice. The suit was filed on 01.08.2006, it is not the case of the defendant that he had sent a reply subsequently. Therefore, the defendant has not chosen to send a reply notice denying the claim of the plaintiff made in the notice dated 20.07.2006. In Ex.A3 notice, the plaintiff has categorically stated that he has been ready and willing to pay the balance of sale consideration and take the Sale Deed. It is the defendant who has been delaying the performance by not performing his obligations, namely, discharging the loan and also having the property measured.

31. It is not the case of the defendant that he had discharged the loan or he has got the property measure, within the three months period or at any time thereafter, before the institution of the suit. In both the judgment cited by the learned counsel for the respondent, namely, Saradamani Kandappan's case and K.S.Vaidyandam's case, the Hon'ble Supreme Court had held that undue delay in seeking specific performance would disentitle the plaintiff from obtaining the discretionary relief of specific performance. The question whether the delay is undue delay or not, has to be decided on the given circumstances and the evidence available in each case. The conduct of the parties, in the case on hand, would show that it was the defendant's conduct, which had delayed the performance of the agreement.

32. No doubt, the plaintiff has not issued a notice soon after making the payment on 22.06.2004. The notice came to be issued only on 20.07.2006 ie., nearly two years later after last payment was made under the agreement. However, in the notice dated 20.07.2006, the plaintiff had specifically stated that though he had been demanding performance, the defendant has not come forward to perform his obligations and execute the sale deed. It is not the case of the defendant that he had performed the obligations under the agreement. The defendant had also not chosen to send any reply to the notice dated 20.07.2006 which was admittedly received by him on 22.07.2006. I am therefore of

the considered opinion that the plaintiff has proved that he has always been ready and willing to perform his part of the contract and the Lower Appellate Court had, in fact, misread the evidence in coming to the conclusion that the plaintiff was not ready and willing to perform his part of the contract.

33. I find that the conclusion of the Lower Appellate Court on the question of readiness and willingness, is perverse and is against the spirit of the evidence that is on record in the case on hand. It is also seen that the Lower Appellate Court had not considered the reasons assigned by the Trial Court, in coming to the conclusion that the plaintiff was always ready and willing to perform his part of the contract. The Lower Appellate Court has also not assigned any reason for differing from the conclusions of the Trial Court on the question of readiness and willingness. The agreement has been found to be true and valid. The payment of a sum of Rs.1,80,000/- was also found to be true, in such circumstances, the discretion has to be necessarily exercised in favour of the plaintiff, who had parted with almost 2/3rd of the sale consideration. Of course, there has been a delay on the part of the plaintiff in issuing the legal notice, but that delay alone, in my considered opinion, will not disentitle him from obtaining the relief of specific performance on the given facts and circumstances.

34. However, I am of the considered opinion that the defendant has to be compensated for the delay. Such compensation will have to necessarily depend on the increase in the value of the property. It is common knowledge that the value of the immovable property was on the raise between 2004 and 2006. The suit property measures 66 cents along with the 1/3rd share in the Well and the Electricity Service connection. It is not in dispute that the 2/3rd share in the Well and the Electricity Service connection belonged to the plaintiff, he having purchased the same from the brothers of the defendant. The sale consideration fixed under the agreement is about Rs.4100/- per cent of land.

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35. The plaintiff has paid 2/3rd of sale consideration even on 22.06.2004. The defendant having received a sum of Rs.1,80,000/-, had the benefit of the money for all these years and he is also in enjoyment of the property. Therefore, I am of the considered opinion that the equities can be adjusted by directing the plaintiff to pay a further sum of Rs.4,00,000/-, apart from the balance of sale consideration of Rs.90,600/-,

while granting a decree for specific performance in favour of the plaintiff.

36. In fine, the Second Appeal is allowed, the judgment and decree of the Lower Appellate Court are set aside, the judgment and decree of the Trial Court are restored with a modification that the plaintiff shall pay a sum of Rs.4,90,600/- as balance of sale consideration. Upon such payment, the defendant is directed to execute the sale deed, conveying the suit property in favour of the plaintiff. The plaintiff shall have two months time from today, to deposit the balance of sale consideration, less any amount already deposited by him pursuant to the decree of the Trial Court to the credit of the suit. There shall be no order as to costs in this appeal.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

jv

To

1. The II Additional District Judge,
Tindivanam.
2. The Principal Subordinate Judge,
Tindivanam
3. The Section Officer,
V.R.Section,
High Court of Madras.

+1cc to Mr.T.S.Baskaran, Advocate SR.No.80011

+1cc to Mr.Muthumani Doraisami, Advocate SR.No.80051

S.A.No.10 of 2014

SPD(CO)
GMY(30/10/2019)