

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2020

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.397 of 2011
and
C.M.P.No.16069 of 2017

M.Munusamy

..Appellants/Plaintiff

Vs.

1.N.Somasundaram
2.N.Ganesh
3.B.Thaheera

... Respondents

R3 impleaded as party respondent vide order dated 03/07/2017 made in M.P.No.1 of 2011 in A.S.No.397 of 2011

PRAYER: First Appeal filed against the Judgment and decree in O.S.No.128 of 2010 dated 11.03.2011 on the file of the learned District Judge, District Court No.II, Kancheepuram.

For Appellants : Mr.N.S.Siva kumar

For Respondents : Mr.R.Krishna for RR1 & 2
Non-appearance for R3

O R D E R

The appeal suit is instituted against the judgment and decree passed in O.S.No.128 of 2010 dated 11.03.2011 on the file of the learned District Judge, District Court No.II, Kancheepuram.

2. The plaintiff is the appellant in the appeal suit and the respondent is the defendant. The suit was instituted by the appellant mainly on the ground that the defendants agreed to sell the plaint schedule property to the plaintiff for a sale consideration of Rs.13,30,000/- on 31.08.2007 by way of written sale agreement. On the date of agreement, the defendants had received an advance amount of Rs.6,50,000/- and the same has been endorsed in the sale agreement. The time for the execution of the sale deed is fixed as 90 days and that ended on 28.11.2007. The contention of the appellant/plaintiff is that he was waiting for the registration of sale deed. In spite of repeated demands, the defendants are evading to perform their part of the contract. The plaintiff has not

stated all along that he is ready and willing to perform his part of the contract and ready to pay the balance sale consideration, as per the suit sale agreement. In view of the fact that the defendants had not expressed their readiness and willingness to perform their part of the contract, the suit came to be instituted for specific performance.

3. The defendants in their written statement disputed the contention as well as averments made in the plaint by stating that the parties had entered into a contract of sale on 31.08.2007 and the sale consideration was Rs.13,30,000/- and an advance amount of Rs.6,50,000/- was received. Time was the essence of the contract as the agreement itself states that 90 days is fixed for completion of the contract. It is contended that the defendants are always ready and willing to preform their part of the contract by receiving the balance sale consideration and to execute and register the sale deed in favour of the plaintiff. However, the plaintiff was not ready and willing to perform his part of the contract within a stipulated time of 90 days. Thus, the plaintiff had failed to perform his part of the contract and the time is the essence of the contract, therefore, the petitioner is not entitled for the relief of specific performance.

4. The Trial Court framed the issues as to whether the time is the essence of the contract? whether the plaintiff was always ready and willing to perform his part of the contract? whether the plaintiff is entitled to the relief of specific performance as prayed? and to what relief?

5. The plaintiff examined himself as P.W.1 and marked as Exs.P1 to P4 on his side. The second defendant himself is examined as D.W.1 and no exhibits were marked on the side of the defendants.

6. With reference to issue No.1, the trial Court made a finding that as per the suit sale agreement, the time agreed between the parties was 90 days, which ended on 28.11.2007. The plaintiff contended before the Trial Court that as per Ex.A1, agreement of sale, it is mentioned as 90 days for due execution of sale deed. However, none of the conditions in Ex.A.1 has confirmed the above said 90 days. Ex.A1, Agreement of sale is absolutely silent with regard to the dictum "time is an essence of contract" or "if at all the contract is not performed within the stipulated time of 90 days, the agreement has become null and void or not enforceable". In the absence of any such clause in the agreement, the principle "time is an essence of the contract" cannot be applied at all. Thus, in the present case, time is not an essence of the contract and therefore, the plaint is to be considered and the relief as such sought for in the appeal suit is to be granted. The defendants contended before the Trial Court that Ex.A.1, Sale

agreement is admitted by the parties. The sale consideration of Rs.13,30,000/- was also admitted. The advance payment of Rs.6,50,000/- was also admitted. The time for execution and registration of the sale deed was fixed for 90 days and the same was not denied. When the plaintiff had not expressed their readiness and willingness to perform his part of the contract by paying sale consideration within a time limit agreed between the parties (i.e. 90 days), then the plaintiff is not entitled for the relief of specific performance.

7. The learned counsel appearing on behalf of the appellant relied on the judgment of the Supreme Court of India in the case of BEEMANENI MAHA LAKSHMI vs. GANGUMALLA APPA RAO reported in (2019) 6SCC 233, wherein the following observations are made "even otherwise, it is required to be noted that the plaintiff deposited the entire balance sale consideration as directed by the learned Trial Court within the extended period of time. It is required to be noted that as it was submitted on behalf of the defendant before the learned Trial Court that the plaintiff does not have any capacity to pay the balance sale consideration, to test his bona fides the learned trial court directed the plaintiff to deposit the balance sale consideration which the plaintiff did deposit. Merely because the said amount was deposited out of the fund/amount received by him by selling the property in the year 1993, by that itself cannot be presumed and/or inferred that at the time of execution of the agreement to sell and/or thereafter even at the time of the notice, the plaintiff was not having sufficient fund to pay the balance sale consideration. It is required to be noted that an agreement to sell is dated 30.12.1985 and the plaintiff was directed to deposit the amount in the year 1993. It is not expected from the plaintiff that he would continue to deposit the same with the bank all these years. What is required to be considered is as and when he is called upon to make the deposit, he has deposited the amount to show his bonafides or not? Therefore, as such, both the learned trial Court as well as the High Court have rightly passed a decree for specific performance". Relying on the above observations of the Supreme Court, the learned counsel for the appellant reiterated that he was possessing cash, during the relevant point of time, and he was ready and willing to settle the balance sale consideration for the purpose of execution of sale, as per the suit sale agreement. Thus, when the appellant was ready and willing to pay the balance sale consideration by keeping cash with him, the Trial Court ought to have considered the grant of relief of specific performance.

8. This Court is of the considered opinion that mere possession of cash by the appellant would not be a ground to claim the relief of specific performance. In order to establish the bonafide, the appellant ought to have deposited

the cash either before the Bank or before the Trial Court so as to consider his case for the purpose of relief of specific performance. The present pleading that the appellant was keeping cash with him is insufficient for establishing the readiness and willingness to grant the relief of specific performance. The readiness and willingness is to be established by proving any documents or evidences before the Trial Court and by way of conduct. The conduct in normal circumstances would be that if at all the appellant was possessing cash with him, during the relevant point of time, the same would have been deposited either before the Bank or before the Trial Court, then alone, the Court can arrive at a conclusion that the appellant was ready and willing to perform his part, as per the suit sale agreement. Thus, the pleading that he is ready and willing to perform his part is insufficient and readiness and willingness is to be proved beyond any pale of doubt and conduct of the parties in this regard are paramount importance to consider the discretionary relief of specific performance.

9. The Trial Court considered the issues and arrived at a conclusion relying on the judgments of the Supreme Court and the facts as well as the terms and conditions agreed between the parties in the suit sale agreement, time is the essence of the contract.

10. As far as the issue Nos.2 and 3 are concerned, the Trial Court made a finding that contrary to the notice, Ex.A.2 dated 21.01.2008 was issued, after the expiry of 90 days. Equally, the plaintiff has not taken any step to deposit the balance sale consideration either before the Bank or before the Trial Court or even at the time of the arguments made before the Trial Court in the suit. This apart, the plaintiff had surprisingly made a prayer for an alternative relief of refund of the advance amount along with the accrued interest, which would also establish that the plaintiff was not willing to pay the sale consideration and get the sale deed executed and registered. The evasive character of the plaintiff was established before the Trial Court and therefore, he is not entitled for the discretionary relief of specific performance. The Trial Court arrived at a conclusion that the plaintiff has not established readiness and willingness and even through notice Ex.A.2, it was found that the said notice was issued after the expiry of 90 days as agreed between the parties in the suit sale agreement. Relying on these documents and evidences, the Trial Court arrived at a conclusion that the plaintiff is not entitled for the discretionary relief of specific performance. Under these Circumstances, the trial Court declined to grant relief of specific performance in favour of the plaintiff but considered the alternative relief of refund of advance amount and ordered that the relief of recovery of a sum of Rs.6,50,000/- with interest at the rate

of 12% per annum from the date of plaint till the date of the decree and thereafter, 6% per annum from the date of decree till the date of recovery.

11. This Court is of the considered opinion that there is no perversity or infirmity in respect of the findings arrived by the Trial Court with reference to the issues framed. When there is a doubt regarding the readiness and willingness as established before the Trial Court by the parties, this Court is of the opinion that the discretionary relief of specific performance cannot be granted. Under these circumstances, this Court is not inclined to interfere with the findings of the trial Court and agreement. Accordingly, the judgment and decree dated 11.03.2011 passed in O.S.No.128 of 2010 is confirmed and the first appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

ssb

To
The learned District Judge,
District Court No.II, Kancheepuram.

+1cc to M/s.N.S.Sivakumar, Advocate SR.4632

A.S.No.397 of 2011

and

C.M.P.No.16069 of 2017

RSI (CO)
CB(27/02/2020)

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