IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 14.02.2020
CORAM
THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM
A.S.No.784 of 2012
M.P.No.1 of 2012

1.C.S.Udayakumar
2.A.Kumar
..Appellants/Plaintiffs

Vs.

1.Palaniammal
2.Valliammal(Deceased)
3.Janaki
4.Pankajam
5.Arukkani
6.Sundarammal
7.A.Chandra
8.S.Kalyani
9.S.Udayakumar
10.Vasuki
11.Lakshmi Prabha ..Respondents/Defendants

RR9 to 11 brought on record as LRs of the deceased R2, vide order dated 27/09/2019 made in C.M.P.No.21098/2019 in A.S.No.784/12

Prayer : First Appeal filed against the Judgment & Decree dated 06.09.2011 passed in O.S.No.798 of 2009 on the file of the First Additional District Judge, Coimbatore.

For Petitioner : Mr.A.Jenasenan

For Respondents: Mr.Gilbert C.Periar
for RR1 & 2
Mr.R.Asokan
for Mr.R.Ashrafkhan
for RR3 to 8
Mr.R.Subramanian
for RR9 to 11
R2-Died steps taken.

ORDER

The appeal suit is directed against the judgment and decree dated 06.09.2011 passed in O.S.No.798 of 2009, on the file of the First Additional District Judge, Coimbatore.

2. The plaintiffs are the appellants and the suit was instituted for specific performance of an agreement to sell the 3/8 shares of the defendants in the suit property.

3. The facts in brief as narrated in the plaint are hereunder:

> Defendants 1 and 2 are each entitled to 1/8 share in the suit property while defendants 3 to 8 are entitled to another 1/8 share. They along with other co-owners entered into an agreement to sell dated 18-08-2006 with the plaintiff in respect of 6.80 acres in Sy.No:296 of Irugur village at the rate of Rs. 7.10 lakhs per acre. Plaintiff has paid Rs.5.0 lakhs under the said agreement and time for completing the sale is fixed at 6 months. The agreement provided that the defendants and their co-owners would produce the title deeds pertaining to the said property, survey it and fix the boundaries for the same and the time originally fixed is extendable till defendants fulfilled their obligations as above. Needless to mention that time is not an essential term of the contract. The defendants or their co-owners never handed over the title deeds to the plaintiff. Be that as it may, the aforesaid agreement recites about a certain document of title, but on verification it is found that the same does not pertain to the property dealt with thereunder. The plaintiff therefore wanted to enter into a registered agreement to sell with a correct title deed. In order a title deed could be so provided, plaintiff negotiated with all the co-owners of the property, advised them to execute a partition deed. The defendants did not even know about the existence of the property, its whereabouts nor have they any valid documents of title. Hence he made ready a partition deed and the same was executed at his cost. Even as this process was underway, the plaintiff cleansed and levelled the property, and verified the revenue records only to discover that of the 6.84 acres, a portion of the property had been acquired for the Railways and the balance available is only 5.80 acres. After the execution of the partition deed as stated above, all the co-owners including defendants 1 and 2, but excluding defendants 3 to 8 have executed a registered agreement to sell dated 04-10-006, and the same was registered on 06-10-2006. Defendants 3 to 8 agreed that they would sell their portion directly to the plaintiff. All the co-owners of the suit property gave its possession to the plaintiff to level it, survey it and develop it by laying survey stones. Plaintiff took possession and fenced a portion of the property and cultivated it. As per the second mentioned sale agreement, all except the present defendants have executed a General Power of Attorney in

favour of the plaintiff for execution of sale deeds as regards their shares in the suit property, and the plaintiff in turn had executed sale deed on 23-04-2008, acting on the strength of the said power of attorney, in favour of one Latha, Kalavathi and Sidheswaran. The defendants however, were not keen to fulfill their contractual obligation. Meanwhile, on 13-08-2007, the 2nd defendant obtained a further advance amount of Rs.2.0 lakhs and to that effect she made an endorsement in the agreement. Defendants 1, 2 and 3 to 8 are entitled to 72.5 cents each, and they are entitled to receive Rs.5,14,750/- each. After adjusting the advance amount the first defendant and defendants 3 to 8 are entitled to receive Rs.4,52,250/- each and the 2nd defendant is entitled to receive Rs.2,52,250/-. The defendants continue to be non co-operative in the matter of execution of sale deeds. Plaintiff, upon taking possession spent considerable amounts totaling upto Rs.10.0 lakhs, to develop and improve the property, and clear it of third party encroachments. In the face of continued indifference of the defendants to comply with their contractual obligations, the plaintiff was constrained to issue a legal notice dated 07-05-2008 on the defendants. Though this notice was received by them, still there was hardly any change in the status quo. The plaintiffs have approached the defendants and conveyed to them of their readiness and willingness to perform their part of the contract, but the latter would only delay things for the former. The plaintiffs were keen to compromise the matter as they were keen to do their business without resorting to legal proceedings. As nothing worked for the plaintiffs in getting the sale deeds executed by the defendants, the suit is laid.

4. The second defendant filed a written statement denying the allegations set out in the plaint and disputing the contentions therein. The defence found in the written statements as under:

3. Denying the plaint allegations the 2nd defendant has filed her written statement and the same was adopted by the first defendant. The essence of the material facts pleaded are: The suit property originally belonged to one Ponna Pannadi. After his demise, the defendants and their co-owners succeeded to it as his heirs. The suit property and other properties were taken care of by one Velan on behalf of the co-owners and in the guise of protecting the properties, Velan collected all the original documents. On account of the long lapse of time, many of the co-sharers were not even aware of the location of the land.

Plaintiffs are dealers in real estate that in the beginning of August, 2006, the plaintiffs approached these defendants and other co-owners that they would purchase the property. Thereupon, the plaintiffs persuaded the defendants that they would take care of interest of all the sharers, get the details of all the properties and documents, effect a partition to the satisfaction of all the defendants in respect of all the properties including the suit property. During the end of August, 2006, they took custody of the original documents from Velan which were necessary for the preparation of partition deed. On the basis of above, on 18-08-2006, an agreement for sale was entered into between the plaintiffs and the defendants and other co-owners. These defendants did not fully verify the contents and conditions of the sale agreement. After a month and a half, wrong particulars regarding the survey number and extent were detected and the plaintiffs are assured to rectify all. Accordingly, plaintiffs made efforts to bring about a partition among the defendants and their co-sharers and on 04-10-2006, brought into existence a partition deed and also an agreement to sell. Both were registered on 06-10-2006. In view of the hurry with which the documents were registered and in view of the disputes between defendants 3 to 8 the plaintiffs which consumed the time available, the contents of the partition deed were not gone through and the defendants trusted the words of the plaintiffs that it contains all the properties mentioned above and they were signed. It is only at that time, it was known that the defendants 3 to 8 were not willing to sign any sale agreement and so it was written as if it was executed by others only. The original partition deed was taken by the plaintiffs in collusion with Velan. While so, the plaintiffs caused a letter dated 02-02-2008 to these defendants stating that the other co-owners had already executed the sale deed which is also false. It is only thereupon the defendants came to know that a fraud has been committed by the plaintiffs and Velan in the execution of the partition deed. It is also pointed out that the sale agreement cannot be enforced as against these defendants as the defective description of property therein is copied from the partition deed and the sale agreement has become invalid one. Where the sale agreement specifically recites that no possession has been given and when the plaintiffs claim possession in pursuance of the said agreement. This is a fraudulent plea and the plaintiff has not come with clean hands. The plaintiffs had not come to court immediately and thereafter they issued pre-suit notice after 3 months. The plaintiffs are not ready and willing to perform their part of the contract.

4. Written statement filed by the defendants 3 to 8 stating that it is a fact that this defendants 3 to 8 have agreed to sell the property along with co-owners for a consideration of Rs.7,10,000/- per acre and not acted on it. The suit is barred by limitation. This defendants have not promised the plaintiffs for sale. There is no suit agreement as mentioned in the plaint. It is also stated that the other co-owners have come forward for the sale of their portions is only on the basis of sale agreement dated 04-10-2006 and the defendants 3 to 8 objected and refused to offer the portions due to the under valuation of the suit property.

5. The Trial Court framed the issues as to whether the plaintiffs are entitled to specific performance? whether the plaintiffs are always ready and willing to perform the contract? whether the time is not an essence of contract? whether the value of the property shown in the agreement is very low and shown in view of fraud played by plaintiff? whether the plaintiffs are not in possession of the property? to what relief?

6. The issues are recast and drawn as follows:

1.Whether the plaintiff are entitled to specific performance?

2.Whether the partition deed dated 04.10.2006 is fraudulently made to deny the plaintiffs specific performance of the suit agreement?

3. Whether the plaintiffs are always ready and willing to perform the contract?

4.Whether the value of the property shown in the agreement is very low and shown in view of fraud played by plaintiff?

5.Whether the plaintiffs are not in possession of the property?

7. The Trial Court summarized the submission of the plaintiffs as under:

(a) The suit properties belonged to a group of eight branches of a common ancestor. They are the vendors. None of the vendors/owners had any knowledge about the suit property. Plaintiff, a real estate promoter, had spent his efforts to collect all the material details of the property for them. Indeed, vendors not even know that they possessed a property such as the suit property.

(b) The suit property has an extent of 5.80 acres in S.F.No: 297/4B of Irugur village. Originally it was believed to be comprised in S.F. No: 296, and to have an extent of 6.84 acres. On that premise, on 18-08-2006, plaintiff entered into an agreement for the sale of the said property with the defendants(3/8 shares) and other sharers (5/8 shares). This agreement is Ext.A-1.

(c) Subsequently, it was discovered that part of that 6.80 acres was acquired for the Railways, and after ascertaining its related particulars the property to be purchased is ascertained as it is described now. Further, Ext.A-1 recites about a title deed of the vendors and traced it to a sale deed of the year 1914. After the execution of Ext.A-1, plaintiffs have found the same to be incorrect. Nor could they, or their intended vendors lay their hands on the title deed to the suit property. Therefore, it was decided to go for a partition deed to be executed by all the sharers. On 04-10-2006, a partition deed among the co-sharers and a fresh agreement to sell based on the partition deed was made. The plaintiffs had to take considerable efforts in that regard, including meeting the cost involved. Exts. A-2 and A-3 respectively are the agreement to sell and the copy of the partition deed. Significantly, defendants 3 to 8 did not join Ext.A-2 and A-3. Therefore the plaintiffs have entered into an oral agreement with defendants 3 to 8 as regards their combined 1/8 share. These defendants remain exparte.

(d) Subsequent to this on 13-08-2007, the 2nd defendant has received Rs.2,00,000/- as additional advance. This is available as part of Ext.A-5, which is a set of endorsements made in Ext.A-2 recording post Ext.A-2 payment of advances. The 2nd defendant did not testify before the Court. But the first defendant as D.W.1 does admit this fact and identify second defendant's signature in Ext.A-5.

(e) In December, 2007, all except the defendants 1,2 and 3 to 8 had executed General Power of Attorney in favour of the first plaintiff to facilitate execution of sale deeds. They are Exts.A-11 to A-15.

(f) All except defendants 1,2 and 3 to 8 have sold their shares as per Ext.A-2.

(g) The plaintiffs have always been ready and willing to perform his part of the contract. They have requisite means to obtain sale. Ext.A-16 to A-18 and A-21 would prove the same. The defendants without legal justification have been evading performance of their contractual obligation. Firstly, Ext.A-2 carry a stipulation that the second party to the agreement, namely the vendors of the property shall hand over all the title deeds and other related documents to the plaintiff on the date of sale. This has not happened. Secondly, the plaintiff with a view to avoid a conflict and a litigation attempted their best to persuade the defendants to fulfill their contractual obligation. P.W.1 therefore wrote persuasively to the defendants. Ext.A-6 is the copy of that letter dated 02-02-2008. Ext.A-7 contains the acknowledgment card of the defendants. D.W.1 denies that she ever received the said letter, and denies the truth.

(h) Left with very little option, the plaintiff issued a legal notice dated 07-05-2008 to all the defendants herein. A copy of the same is Ext.A-4. The first and second defendants jointly issued a reply and the rest issued a separate reply, both through the same counsel. These replies are Exts.A-9 and A-10 respectively.

(i) The plaintiffs have necessary means / financial capacity and also have been willing to perform their part of the contract, but defendants evaded it.

8. The contention of the defendants before the Trial Court is extracted hereunder:

(a) that the plaintiffs have fraudulently brought into existence Ext.A-3 partition deed among the heirs of PonnaPannadi, with the aid of Velan, the sole surviving brother of the defendants, in that the said partition deed states that there is no other property available for partition other than the one partitioned. Firstly, this is factually wrong. Secondly, the defendants hardly had time to go through the partition deed before signing it. Ext. A-3 was executed on 04-10-2006, and was contemporaneously executed along with Ext.A-2, the agreement to sell involved in the suit. Both these documents were registered between 4 pm and 5 pm on 06-10-2006, and the defendants did not have the opportunity go through them. Thirdly, inasmuch as defendants 3 to 8 representing one of the branches did not join Ext.A-3, A-3 is void in law and the same cannot feed title to Ext.A-2.

(b) The plaintiffs were never ready and willing to perform his part of the contract and they never had the resources to perform their part of the contract.

(c) Plaintiffs are guilty of laches, and time cannot be said to be not of the essence of Ext.A-2.

9. With reference to issue Nos.1 to 6, the Trial Court elaborately considered the documents and evidences and by proceeding with the materials produced by the respective parties

to the original suit, the following findings are made:

The substantial set of facts leading up to the execution of Ext.A-2 agreement as alleged by the plaintiffs are fundamentally agreed to by the contesting defendants. Therefore, the facts stated in paragraph 7 (a) to (e) may be referred to. In this broad factual back drop, few facts needs specific emphasis. In Ext.A-1, the first agreement, consideration is fixed at Rs.7.10 lakhs per acre and the total consideration was to be arrived at after measuring the property. Term for performance is fixed as 6 months, but there is an express stipulation that the vendors under the agreement shall hand over the title deeds pertaining to the property dealt with thereunder, and till that happens the 6 months term fixed can be extended. An advance of Rs.5.0 lakhs was given under Ext.A-1. In Ext.A-2 however, apart from correcting the area and the survey number, the total consideration is fixed at Rs.36,03,250/-. The advance that passed hands under Ext.A-1was retained. Time for performance was fixed as 6 months from the date of Ext.A-2 (04-10-2006). However, ExtA-2 differs from Ext.A-1 on two aspects: (i) that there is no stipulation that time is stretchable till title deeds were handed by vendors over as provided in Ext.A-1. (ii) As to possession, Ext.A-2 expressly and unequivocally stipulates that possession of the property was not handed over.

11. The resistance or objections of defendants 1 and 2 can be divided into two parts: (a) That which is extraneous to Ext.A-2 agreement, namely facts founded on Ext.A-3, and (b) the classical defences available for denying specific performance under law.

12. The first of the above relates to certain facts founded in, and in relation to Ex.A-3 partition deed. They are: (i) In page 6 of Ext.A-3, there is a stipulation that 'there are no other properties to be partitioned among the parties' which is factually untrue; (ii) that Ext.A-3 is invalid as defendants 3 to 8 have not joined it; and (iii) inasmuch as Ext.A-3 is made ready by the plaintiff and have been contemporaneously executed and registered along with Ext.A-2, containing facts which are contrary to truth, plaintiff has played fraud on the parties and is not entitled to a relief in equity.

13. This defence, though sounds attractive at first blush, struggles to stand a legal scrutiny. First, in a suit for specific performance, the vendor is

barred from canvassing defect or deficiency in his title as a defence. This is founded on the ratio in C.V. Muni Samappa Vs Kolala Gurunanjappa & Others [AIR 1950 Madras 90] and Koneru Syam Sundar Rao Vs Pendurti Kanaka Durga [CDJ 2002 APHC 1276] to cite a few. Therefore, even if Ext.A-3 is presumed to be invalid, still defendants 1 and 2 cannot take advantage of it. Second, the plaint avers that the plaintiffs were responsible for execution of Ext.A-3, even though it was denied when the first plaintiff testified as P.W.1. At the best it can only mean that P.W.1 has been an active facilitator for he has his commercial interest in mind over the suit property, but the same cannot be stretched infinitely to all the factual details of the family of defendants. It is for the contesting defendants to take responsibility for their interest in their property and they cannot shift their responsibility on another. Third, even after voicing concern about certain factual discrepancies in Ext.A-3 partition, the contesting defendants have not chosen to invalidate it through legal process, an option, and perhaps the only option open to them. Ext.A-2 cannot operate either to forfeit or to foreclose the right of the defendants to challenge Ext.A-3. That right could be agitated only in an independent action and not collaterally as is presently attempted.

14. For the above said reasons, this Court holds that the defendants can not deflect the issue based on their contentions relating to Ext.A-3. Issue 2 is decided against the defendants 1 and 2 and in favour of the plaintiffs.

15. Ext. A-2 has replaced Ext.A-1. There is one significant difference between the two. While Ext.A-1 has dealt with undivided sharers of eight branches of co-sharers, its successor Ext.A-2 relates to specific plots from their individual and divided owners, for Ext.A-3 partition deed continues to have its force, and has not yet been cancelled in the manner known to law. It is not in dispute that the plaintiffs have purchased 5/8 extent from five owners of specific plots described in Schedules A, and D to G of Ext.A-3 partition deed.

16. In one sense, Ext.A-2 is a single agreement consolidating several individual agreements, each one relating to an individual owner of a specific

schedule, but bound by stipulations common to all. They include first, the consideration, second the time for performance and third the clause regarding delivery of possession.

17. Ext.A-3, deals with 'A', 'B', 'C', 'D', 'E', 'F' and 'G' schedules of which the first and the second defendants were allotted 'B' and "C' schedules respectively, and each of these schedules deal with a specific plot of 0.725 acres in Sy.No: 297/4. The total price is fixed for all the seven schedules is Rs.36,03,250/- and accordingly the price per schedule is Rs.5,14,750. (This works out to Rs.7.10 lakh per acre as provided in Ext.A-1). Accordingly, both the first and second defendants shall have to be paid Rs.5,14,750 each/-. Since the payment of advance amount of Rs.5.0 lakhs paid under Ext.A-1 is retained for the purpose of Ext.A-2, the total consideration payable to each of the defendants 1 and 2 is liable to be adjusted to the extent of their share in the advance amount, which works out to Rs. 62,500/- each. This reduces the total consideration payable to each of defendants 1 and 2 to Rs. 4,52,250/-. Be that as it may, on 13-08-2007, the second defendant has obtained an additional advance of Rs. 2,00,000/-, which reduces the balance consideration due to her to Rs. 2,52,250/-.

18. As correctly pointed out by the learned counsel for the defendants, the total consideration for the entire property (i.e, 5.80 acres) @ Rs.7.10/acre is Rs. 41,18,000/-, and including stamp duty and registration charges, but adjusting the advance amount of Rs.5.0 lakhs, the total amount that the plaintiffs shall demonstrate to possess is about Rs.39.89 lakhs. This they have to demonstrate within 6 months from 04-10-2006, the date of Ext.A-2. This six months time expired on 04-04-2007. Have the plaintiffs possessed Rs. 44.89 lakhs in total? If they have possessed the entire consideration on that day, and still if they have not offered to pay it within this six months, then the plaintiffs could be said to be ready but not willing. This applies even if they have possessed the requisite finance for purchasing just two schedules of defendants and still have not expressed their readiness to purchase. On the contrary, if they neither have the finance for the whole property, nor relatable to the specific plots of the defendants 2 and 3, the plaintiffs could said to be neither ready nor willing to perform their part of the contract.

19. Have the plaintiffs the finance necessary to perform their part of the contract in Ext.A-2 on 04-04-2007? In his chief examination at paragraph 10, the first plaintiff as P.W.1 has testified that vide, Ext.A-8 sale deed dated 15-03-2007, he had sold a piece of his property and raised Rs. 6.87 lakhs, besides obtaining a loan from his father to a tune of Rs. 7.50 lakhs. The total amount which according to P.W.1 that he possessed as on 04-04-2007 is Rs.14.37 lakhs. This leaves a deficit of Rs. 25.52 lakhs. If the registration charges etc., is ignored, even then there is a deficit in their demonstrated finances by Rs. 21.81 lakhs. Thereafter, P.W.1 again goes for a loan from his father P.W.2. He has borrowed Rs. 30,000/- on 6-10-2007, and Rs.3.70 lakhs and Rs.12.0 lakhs respectively on 26-12-2007 and 27-12-2007. These details are provided by P.W.2 in paragraph 3 of his affidavit of chief examination. P.W.2 has produced Ext.A-16 bank pass book and Exts.A-17 to A-21 income tax returns.

20. Even if the testimony of P.W.2 is taken on its face value, it is seen that only the father has the money but not his son. However, it is the son, and not the father who is a party to Ext.A-2. The testimonies of P.W.1 and P.W.2 if taken together, declare themselves as simple but significant admissions to show that the plaintiffs did not have requisite finance as on 04-04-2007. Alternatively, even if it were to be considered that the plaintiffs possessed a total sum of Rs. 9,05,000/- being the balance consideration payable to both the defendants as on 04-04-2007, (Ref: earlier paragraph where the plaintiffs are shown to possess Rs.14.37 lakhs), why have the plaintiffs not intimated their readiness and willingness to perform the reminder of their part of the contract to the defendants? The facts proved in this case does not disclose that the plaintiffs were possessed of requisite amounts to show their readiness to perform their part of the contract.

21. After, 04-04-2007, only two positive acts are seen from the plaintiffs. First is that on 13-09-2007 an additional advance of Rs.2.0 lakhs was paid by the plaintiffs to the second defendant and the same was endorsed in Ext.A-2 as part of Ext. A-5 endorsements. (This also includes some of the other executants of

Ext.A-2, but this Court is not concerned with that). This payment was made some five months after the expiry of the time stipulated in Ext.A-2. It is significant to note that in the endorsement so made, the second defendant had not enlarged/extended the time for performance as stipulated in Ext.A-2. The next is a communication from the first plaintiff to the defendants 1, 2 and 3 to 8. This is dated 02-02-2008. It is true, D.W.1 denies it, but Ext.A-7 acknowledgment cards prove that the denial has no basis in truth. That does not however, affect or mitigate the default of the plaintiffs. Neither of these two incidents indicate that the plaintiff were ready and willing to perform their part of the contract. On the other hand they prove the contra.

22. The learned counsel for the defendants 1 and 2 placed several authorities in K.R. Venugopal Vs K.R. Srinivasan and 4 others [2009(1)CTC803], N.P.Thirugnanam (D) by L.rs Vs Dr.R. Jagan Mohan Rao and others [1996-1-L.W. 239], J.P. Builders & Another Vs A. Ramadas Rao & Another [2010 (6) CTC 901], Bama Vs Rukiyal Bivi [2004(1) CTC 109], Vasantha and 3 others Vs M. Senguttuvan [1997-2-L.W.820], S.S. Chokkalingam Vs R.B.S. Mani and 5 others [1994-1L.W.321], which emphasis the plaintiffs need for demonstrating their readiness in performing their part of the contract, and the consequence that would ensue should there be a default. The ratio of these authorities will have application to the facts-situation of this case without any qualification.

23. The learned counsel for the plaintiff argued that in a contract for sale of immovable property, time is always presumed to be not of the essence of contract, and placed reliance on the ratio of the authorities in Swarnam Ramachandran (Smt) and another Vs Aravacode Chakungal Jayapalan [(2004) 8 SCC 689], Balasaheb Dayandeo Naik (Dead) through Lrs and Others [(2008) 2 MLJ 750 (SC)], Kaliappan (died) and others [(2003) 3 MLJ 282]. He also placed reliance on the authority in Yohannan and another Vs Harikrishnan Nair and others [AIR 1992 Kerala 49] to the effect that the consideration is on the lower side is no reason to deny specific performance. The learned counsel for the defendants countered it with the authority in S. Sankaran (died) and 4 others Vs N.G. Radhakrishnan [1994-2-L.W.642].

24. March of law is not a static on-the-spot- march show. It is dynamic as it is sensitive to changing patterns of a constantly changing society. No principle in law will be let to be pegged to a stationary pole if the same exhibits its irrelevancy to meet and reflect the realities of changing society. It is in this dynamic process, in a path-breaking pronouncement in Saradamani Kandasamy Vs. Rajalakshmi [AIR 2011 SCW 4062: (2011) 6 CTC 460: CDJ 2011 SC 641], our Apex Court has held that the traditional view that 'time for performance in an agreement for the sale of immovable property is not an essential term', has out lived its utility, and re-wrote the law on the subject. In the words of the Apex Court:

24. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market value of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, ever when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be lot material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor-defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities,worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating

to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and `non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

The above dictum in Saradamani Kandasamy case literally foreclosed an argument to the plaintiffs that they believed they had. Indeed, time has to be considered as an essential term of the contract and it binds the plaintiffs without any let.

25. Then there is a contention by the contesting defendants that the plaintiffs are guilty of laches. As stated earlier, the original time expired on 04-04-2007, and it was never extended. It is in this back drop, Exts. A-6 letter dated 02-02-2008 was issued by the plaintiffs to the defendants and it was followed by Ext.A-4 suit notice dated 07-05-2008, and Exts.A-9 and A-10, are replies sent by defendants herein to the same. They are dated 26-05-2008 and 24-05-2008 respectively. A plain reading of these replies would indicate that the defendants are least keen to perform the contract. Still the suit was laid only on 14-12-2009. Here the authorities in K.S. Vidhyanaadam and

others Vs Vairavan [AIR 1997 SC 1751], K. Narendra Vs Riviera Apartments (P) Ltd [AIR 1999 SC 2309], S. Ganantha Perumal Vs S. Valliappan [2010 (6) CTC 95] will have a functional role.

26. The learned counsel for the plaintiffs contended that as per Ext.A-2, there is a stipulation that the vendors shall deliver all the title deeds to them, that the same had not been done, and therefore, the time for performance shall be liable to be extended till then. This argument is not sustainable, because, the said clause reads only as follows:

"நம்மில் 2 வது பார்ட்டியார் இந்த சொத்து சம்பந்தப்பட்ட சகல மூலசாசனங்களையும் நாளது தேதி வரையிலான வில்லங்க சான்றிதழையும் மற்றும் பட்டா பாஸ் புத்தகத்தையும் கிரையத் தேதியன்று 1–ம் பார்ட்டியார் வசம் ஒப்படைத்து விட வேண்டியது".

This only implies that all the title deeds have to be delivered only on the date of execution of sale deeds and not prior to that. But what is relevant is it does not state either expressly or impliedly that time shall extend till that date. Secondly, so far as the facts of this case is concerned, even the case of the plaintiffs is that the the suit property does not have a parent title document, and that precisely has necessitated the execution of Ext.A-3 partition deed.

27. The learned counsel for the plaintiffs then took this Court through several portions of testimony of D.W.1 where according to him, the defendants were shown to be either admitting to certain facts relating to, or, attending the cause of action, or that the defendant are in default. But is it not the fundamental rule that the plaintiffs shall succeed on the strength of their case and not by the weakness of the defendants' ?

28. This court holds without any hesitation that the plaintiffs have not established that they are ready and willing to perform their part of the contract Ext.A-2, and this Court does not find that this is a fit case to exercise discretion in favour of plaintiff. It is true that the 2nd defendant has not entered the witness box and testified. But in exercising discretion under Sec.20 of the Specific Relief Act, the conduct of the plaintiff comes for greater scrutiny.

29. The defendant 3 to 8 are remaining exparte. But the agreement that the plaintiff alleges against them is an oral agreement. The plaintiffs have neither pleaded nor attempted to prove (which though is impermissible in law) the terms of such oral agreement. It is for this reason the plaintiffs loses their action against defendants 3 to 8 also. Issues 1, 3 and 4 are decided against the plaintiffs.

30. On to possession, Ext.A-2 contains a positive stipulation that possession has not been handed over to the plaintiffs. There is no documentary evidence to establish the contra. This necessarily would lead to the conclusion that the plaintiffs have not proved possession over the suit property. Issue 5 is decided against the plaintiff.

10. The learned counsel for the appellants contended that the appellants could able to establish the readiness and willingness and in fact, the five branches of the respondents/defendants had already executed a sale deed in favour of the appellants. In view of the fact that the suit sale agreement is a common document, the remaining branch of the respondents/defendants cannot refuse to execute the sale deed in favour of the appellants. In other words, it is reiterated that when part of the suit sale agreement had been complied with by the five branches of the respondents/defendants, the remaining respondents/defendants cannot refuse to execute the sale deed, in view of the fact that the plaintiffs/appellants was always ready and willing to settle the balance sale consideration.

11. It is contended by the learned counsel for the second respondent that they are entitled to take independent stand with reference to their property right and the said decision taken by the respondents 9 to 11 cannot be questioned by the appellants neither the appellants can compel the respondent 9 to 11 to execute the sale deed by stating that other branches had executed the sale deed in favor of the appellants/plaintiffs. The property right being a individual right cannot be enforced merely on the ground that other legal heirs had executed a sale in favor of the plaintiffs. In a suit for specific performance, the respective parties are entitled to take their own stand and establish their grounds before the Trial Court as well as before the Appellate Court. Even during the arguments, the respective learned counsels appearing for the parties to the lis on hand, made an attempt to compromise the issues. However, the learned counsel appearing on behalf of the second respondent made a submission that the property is a valuable property and the

escalation of the price is not comparable.

12. The learned counsel for the second respondent contended that the second defendant died, subsequently, her legal heirs were impleaded and now in the appeal suit, they are arrayed as respondents 9 to 11. The learned counsel appearing on behalf of the second respondent made a submission that the second defendant was not intended to sell the suit schedule property. The property now being a valuable one and the escalation of the price is higher than that of the sale consideration fixed in the suit sale agreement. The respondents 9 to 11 are not proposed to execute any sale in favour of the appellants/plaintiffs. This apart, many years lapsed, during the relevant point of time, the appellants/plaintiffs had not established the readiness and willingness and the market value as of now is higher than that of the sale consideration fixed in the suit sale agreement. For all these reasons, the respondents 9 to 11 are not interested in selling the suit mentioned property and they are settled in Coimbatore.

13. This Court is of the considered opinion that the relief of specific performance being discretionary relief is to be granted by considering the entire facts and circumstances and the conduct of the parties and other relevant factors. In the event of any possibility of inequality, if the relief of specific performance is granted, then the Courts are bound to consider the alternative relief and decline the relief of specific performance. In the lis on hand, the original sale agreement was executed by the defendants on 18.08.2006 and thereafter, another registered sale agreement was signed between the parties on 04.10.2006. Thereafter, the suit was instituted in the year 2009 and now after a lapse of 14 years from the date of agreement, in the event of granting the relief of specific performance, this Court is of the considered opinion that the same will result inequality in respect of the rights of the parties. This apart, the Trial Court also in paragraph No.18 made a categorical finding that "the total sale consideration for the entire property (i.e., 5.80 acres) at Rs.7.10/acre is Rs.41,18,000/-, including the stamp duty and registration charges, but adjusting the advance amount of Rs.5.0 lakhs, the total amount that the plaintiffs shall demonstrate to possess is about Rs.39.89 lakhs. This they have to demonstrate within 6 months from 04.10.2006, the date of Ex.A2. This six months time expired on 04.04.2007. Have the plaintiffs possessed Rs.44.89 lakhs in total? If they have possessed the entire consideration on that day, and still if they have not offered to pay it within this six months, then the plaintiffs could be said to be ready but not willing. This applies even if they have possessed the requisite finance for purchasing just two schedules of

defendants and still have not expressed their readiness to purchase. On the contrary, if they neither have the finance for the whole property, nor relatable to the specific plots of the defendants 2 and 3, the plaintiffs could said to be neither ready nor willing to perform their part of the contract."

14. The above findings of the Trial Court is undoubtedly candid and convincing and in consonance with the documents produced by the parties and with reference to intention established during the course of trial. The said finding of the Trial Court cannot be brushed aside and this Court further found that the Trial Court has elaborately discussed all the documents in detail and arrived at a conclusion that the plaintiffs have not established that they are ready and willing to perform their part of the contract and this Court does not find that this is a fit case to exercise discretion in favour of the plaintiffs.

15. The learned counsel appearing for the appellants/plaintiffs made a submission that the defendants 3 to 8 before the Trial Court remained ex-parte. However, the agreement that the plaintiffs alleged against them is only an oral agreement. The appellants/plaintiffs have neither pleaded nor attempted to prove the terms of such oral agreement. That ground has been considered by the Trial Court in right perspective.

16. Considering the categorical findings of the Trial Court, this Court would like to rely on the judgment of the Supreme Court of India in the case of Surinder Kaur v. Bahadur Singh, reported in 2019 (8) SCC 575, wherein the Apex Court made an observation that "a perusal of Section 20 of the Specific Relief Act clearly indicates that the relief of specific performance is discretionary. Merely because the plaintiff is legally right, the court is not bound to grant him the relief. True it is, that the court while exercising its discretionary power is bound to exercise the same on established judicial principles and in a reasonable manner. Obviously, the discretion cannot be exercised in an arbitrary or whimsical manner. Sub-clause (c) of sub-section (2) of Section 20 provides that even if the contract is otherwise not voidable but the circumstances make it inequitable to enforce specific performance, the court can refuse to grant such discretionary relief. Explanation (2) to the section provides that the hardship has to be considered at the time of the contract, unless the hardship is brought in by the action of the plaintiff."

17. With reference to the facts and circumstances placed before this Court, keeping in mind the observations of the trial Court, this Court is of the opinion that the appellants/plaintiffs had not established any readiness and

willingness before the Trial Court beyond any pale of doubt. Considering further, the suit mentioned property and its market value as of now have been escalated for higher than that of the sale consideration fixed in the suit sale agreement, during the year 2006 and also considering other relevant factors, this Court has no hesitation in arriving at a conclusion that the appellants/plaintiffs have not established any acceptable ground for the purpose of granting the discretionary relief of specific performance.

18. The Trial Court, while rejecting the relief of specific performance, has not considered the grant of alternative relief of refund of advance amount, in view of the fact that there is no relief sought for in the plaint for such refund. However, this Court is of the opinion that in the event of not considering the alternative relief of refund of advance amount, the same will result in an unjust enrichment to the respondents/defendants. When the suit for specific performance is rejected, grant of alternative relief for refund of advance amount must be consequential and the Courts are bound to grant, even if there is no prayer in the plaint. The Courts are empowered to invoke the general clause under Order VII Rule 7 and Order XLI, Rule 33.

19. The alternate relief of return of advance in a suit for specific performance is a consequential relief and therefore, the same need not be construed as a different relief. Once the relief of specific performance is rejected, then the refund of advance amount shall be consequential as no parties to the suit can be allowed to have an unjust enrichment. In other words, the dismissal of the relief of suit for specific performance, cannot stand in the way of granting the alternate relief to refund the advance amount with reasonable interest. The question arises in the absence of any such relief sought for in the plaint, whether the Court can grant the relief or not. This Court is of the considered opinion that the alternate relief to refund the advance amount is to be construed as a general relief, as such a relief is consequential to the rejection of the relief of specific performance. In the event of not considering the alternate relief under the umbrella of general relief, then one of the party to the civil suit would be prejudiced and the other party will get an unjust enrichment.

20. Keeping in mind the prejudice likely to be caused to one of the parties in the event of not granting the alternate relief of refund of advance amount, this Court has to adopt a pragmatic approach and constructive interpretation with reference to the Code of Civil Procedure.

21. Order VII, Rule 7 of the Code of Civil Procedure enumerates that "every Plaint shall state specifically the

relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement".

22. The spirit of Order VII, Rule 7 of the Code of Civil Procedure is to be considered in the general format of the plaint. In the relief column, the plaintiffs used to pray for "grant such other relief or reliefs as the Hon'ble Court may deem fit and proper in the circumstances and thus render justice". Such a relief is to be construed as a general relief sought for in the plaint, the facts and circumstances and the equity to be considered in the interest of justice and the general relief is to be molded, so as to grant the alternate relief of refund of advance amount in the event of rejecting the relief of specific performance by the Courts.

23. Order XLI, Rule 33 of the Code of Civil Procedure enumerates that "the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection". Therefore, the Trial Court granted the general relief by molding the prayer for grant of the relief of refund of advance amount with interest in the event of rejection of the relief of specific performance and the Appellate Court by invoking Order XLI, Rule 33 also grant the similar relief in respect of the appeals preferred against the judgment and decree of the Trial Court. In either of the circumstances, both the Trial Court as well as the Appellate Court are empowered to grant the consequential relief of return of advance amount in the event of rejection of the relief of specific performance on the basis of the principles of equity. Therefore, there is no impediment either for the Trial Court or for the Appellate Court to grant the alternate relief of refund of advance amount to either of the parties to the civil suit or an appeal in the event of rejecting the relief of specific performance in a suit or in an appeal suit.

24. Accordingly, the following orders are passed:

(i) the Judgment and decree dated 06.09.2011 passed in O.S.No.798 of 2009 stands confirmed, with reference to rejection of relief of specific performance.

(ii) However, the appellants/plaintiffs are entitled for refund of advance amount from the respondents/defendants. Accordingly, the first respondent/first defendant is directed to refund the advance amount of Rs.62,500/- along with interest at the rate of 10% per annum from the date of plaint till the date of decree in O.S.No.798 of 2009 and thereafter, 6% per annum till the date of realisation.

(iii)The respondents/defendants 9 to 11 are directed to refund the advance amount of Rs.2,62,500/- from the date of plaint till the date of decree in O.S.No.798 of 2009 and thereafter, 6% per annum till the date of realisation. The respondents 1, 9 to 11 are directed to refund the advance amount as stated above along with interest within a period of four months from the date of receipt of a copy of this Judgment.

25. With the above directions, the appeal suit is modified as above and accordingly, the first appeal stands allowed in part. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy
Sub-Assistant Registrar

ssb

To
1.The First Additional District Judge, Coimbatore.

2.The Section officer
VR section
High Court Madras

+1 cc to Mr.R.Subramanian Advocate sr12969
+1 cc to Mr.A.Jenasenan Advocate sr12164
+1 cc to Mr.R.Ashraf Khan Advocate sr13200

A.S.No.784 of 2012
M.P.No.1 of 2012

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