

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07-01-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.130 of 2017

And

C.M.P.Nos.5835, 5836 and 5854 of 2017

P.Jayachandran ... Appellant/Plaintiff

vs.

S.Kumar (Died)

1.K.Indresh Kumar

2.Jayashree

3.K.Sudha

(cause title accepted vide order of
Court dated 15.03.2017 made in
CMP No.4630 of 2017) ...

Respondents/Defendants

Appeal Suit is preferred under Section 96 of the Code of Civil Procedure read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree dated 16.09.2016 passed in O.S.No.37 of 2013 on the file of the learned District Judge, District Court No.II, Kancheepuram.

For Appellant : Mr.E.P.Suntharaam

For Respondents : Mr.P.B.Ramanujam

सत्यमेव जयते
J U D G M E N T

The lis on hand is filed against the judgment and decree dated 16.09.2016 passed by the learned District Judge, District Court No.II, Kancheepuram in O.S.No.37 of 2013.

2. The appellant is the plaintiff in the suit. The suit was instituted by the appellant for the relief of specific performance.

3. The facts, in nutshell, to be considered in this appeal suit are that based on the suit Sale Agreement dated 03.06.2008 with regard to the suit property, the

appellant/plaintiff averred that he paid substantial advance amount of Rs.12 lakhs and fulfilled his part of the contract.

4. When the appellant/plaintiff had fulfilled his part of the contract as per the terms of the agreement and requested the respondents to execute the sale by receiving the balance sale consideration, there was a refusal blatantly, which resulted in institution of the suit for specific perform by the appellant/plaintiff.

5. The learned counsel appearing on behalf of the appellant/plaintiff reiterated that the case on hand is a classic case where the appellant/plaintiff had paid the substantial advance amount, so as to establish his bona fide in order to purchase the property by fulfilling the terms of contract entered into between the parties on 03.06.2008. In view of the fact that the appellant/plaintiff was always ready and willing to perform his part of contract, it is the respondent, who disagreed and expressed his unwillingness to perform his part of the contract, which resulted in institution of the civil suit.

6. The learned counsel for the appellant is of the concrete opinion that it is a fit case for grant of specific performance and the Trial Court on erroneous appreciation of the documents and the evidences, declined the relief of specific performance.

7. The Trial Court arrived a conclusion that the appellant had not established his readiness and willingness, which is the essential principles for the grant of relief of specific performance. The Trial Court has miserably failed to consider the fact that the substantial payment of advance amount of Rs.12 lakhs paid by the appellant to the respondents was admitted by the parties in the evidence. When the payment of substantial amount of advance was admitted by the parties and the appellant was ready and willing to pay the balance sale consideration during the relevant point of time and made a request for execution of sale, then the Trial Court ought to have granted the relief of specific performance in favour of the appellant.

8. At the outset, it is contended on behalf of the appellant that the appellant/plaintiff established before the Trial Court that the agreement was a valid one. The appellant paid the substantial advance amount of Rs.12 lakhs, which was admitted by the respondents and he was ready and willing to pay the balance sale consideration during the relevant point of time and therefore, the appellant had established the principles to be followed for the grant of relief of specific perform. Thus, the appeal is to be allowed.

9. The learned counsel appearing on behalf of the respondents strenuously disputed the contentions by stating that admittedly, the advance amount of Rs.12 lakhs was paid by the appellant to the respondents. Admittedly, the suit Sale Agreement was signed by the parties to the lis. However, the appellant had not established his readiness and willingness and he was delaying the execution as well as the payment of balance sale consideration, which resulted in non-compliance of the suit Sale Agreement.

10. The sequence of dates as well as the conduct of the appellant and the manner in which he acted with reference to the terms of the agreement is unambiguous that the principles of readiness and willingness had not been complied with.

11. The Trial Court, considering the various dates as well as the events, for the purpose of arriving a conclusion that the appellant had not fulfilled his part of the contract by not expressing clear readiness and willingness for the grant of relief of specific performance.

12. In this regard, the learned counsel for the respondents solicited the attention of this Court with reference to paragraph 13 of the judgment, wherein the Trial Court found that the suit agreement with Rs.8,00,000/- advance was paid on 03.06.2008, which was marked as Ex.A-1. Thereafter, on 16.06.2008, further advance amount of Rs.2,00,000/- advance was paid. On 05.07.2010, Rs.2,00,000/- advance was paid. On 06.03.2012 (Ex.A-2) notice was issued by the plaintiff to the defendants and on 13.05.2013, the suit in O.S.No.37 of 2013 was instituted.

13. Referring these dates, the learned counsel for the respondents emphasised that the appellant/plaintiff is doing the Real Estate business in that locality and paying the advance amount in part by part, he delayed the execution of sale and at that point of time, the respondents have taken a decision not to sell the property to the appellant/plaintiff as they are residing in the property. This apart, the property was mortgaged during the relevant point of time and on that ground also, they have declined to complete the sale.

14. This Court is of the considered opinion that suit for specific performance is a discretionary relief and also an equitable one. Thus, the facts and circumstances as well as the conduct of the parties are to be considered for the grant of relief of specific performance.

15. The learned counsel for the appellant citing Section 20 (3) of the Specific Relief Act, 1963, reiterating that when the substantial portion of the contract has been fulfilled by the appellant/plaintiff, then he is entitled for the relief of specific performance.

16. In the present case, the appellant/plaintiff had paid the substantial advance amount of Rs.12 lakhs and expressed his willingness to purchase the property. Thus the relief of specific performance ought not to have been declined by the Trial Court for execution of sale.

17. With reference to the said ground, it is relevant to Section 20 (3) of the Specific Relief Act, which stipulates that "the Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance".

18. Undoubtedly as well as admittedly, the appellant/plaintiff had parted with payment of Rs.12 lakhs as advance. The total sale consideration was Rs.22,57,600/-. Therefore, substantial amount has been paid by way of advance. However, the other mitigating factors are also to be considered. On the other hand, the conduct of the parties are also of paramount importance and it is not based on the advance amount alone the relief of specific performance can be granted. Section 20(3) also enumerates that where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. Therefore, one of the ingredient to be considered as per Section 20(3) is that the contract must be capable of specific performance. Thus, the capability of specific performance of a contract is also important factor as well as the ingredient under Section 20(3) of the Specific Relief Act, which is to be considered.

19. Let us considered the facts. The admitted facts are that the parties to the lis on hand entered into the suit Sale Agreement on 03.06.2008. The parties have agreed that the respondents received an advance amount of Rs.12 lakhs in part by part. However, the notice was issued by the appellant/plaintiff on 06.03.2012, after a lapse of about four years from the date of agreement.

20. Considering the factual circumstances and the financial problems, the respondents had received the advance in part by part from the appellant/plaintiff and at one point of time, they mortgaged the suit schedule property to meet out the family expenditures. After issuing a notice on 06.03.2012, the suit was instituted on 13.05.2013. However, it is stated that

the mortgage was executed during the pendency of the civil suit. The fact remains that the suit was instituted in O.S.No.37 of 2013 on 13.05.2013, after a lapse of about five years from the date of agreement.

21. It is needless to state that the time is the essence of contract. Even in the absence of fixation of time in a contract, in normal parlance, the parties to Sale Agreement should execute the same, within a reasonable period of time or violation of the terms of the contract, the suit should be instituted within a reasonable period.

22. Considering the dates and events narrated in the suit, which was considered by the Trial Court, the agreement was entered into between the parties on 03.06.2008 and after a prolonged period of five years, the suit came to be filed by the appellant/plaintiff for the relief of specific performance. This apart, the suit was dismissed on 16.09.2016 and the appeal suit is filed in the year 2017 and now only taken up for final disposal. The efflux of time is also to be considered in view of the fact that there is escalation in the cost of the suit schedule property as it is situated nearby Porur, which is now part of Chennai City.

23. Therefore, the cost of the land is escalated to such an extent. Efflux of time is also a factor to be considered while granting the relief of specific performance. One cannot think purchase of a land nearby Porur for the amount agreed between the parties at present. These factors are also to be considered as mitigating factors and the likelihood of prejudice to be caused to the land owner.

24. The relief of specific performance, being an equitable relief, the Court should ensure that a balancing approach is adopted to minimise the likelihood of prejudice to be caused to either of the parties to the civil suit. Under these circumstances, the Court has to consider the findings of the Trial Court also. The Trial Court, on appreciation of the evidences and the documents, arrived a conclusion that PW-1 has admitted that he is doing Real Estate business and he has vast experience in selling the properties and entertaining the Sale Agreement.

25. Therefore, when the plaintiff himself admitted that he is doing Real Estate business, he know the price hike on day to day basis. The market price of the property raising even ten times within a year. In these circumstances, he has to be vigilant and be ready to complete the Sale Deed. As admitted by the plaintiff, the defendants expressed their willingness to execute the Sale Deed even on 05.07.2010 while receiving

Rs.2,00,000/- as advance. But the appellant/plaintiff issued notice only on 06.03.2012 i.e., after a lapse of one year 8 months. Further, he filed the suit at the verge of limitation, i.e., nearly 3 years. The inaction on the part of the appellant/plaintiff clearly proved that he is not ready and willing to purchase the property.

26. Though the appellant/plaintiff filed statement of accounts to prove that he is having money, it is not sufficient to prove that he is willing to purchase the property. Further, the appellant/ plaintiff has not deposited the balance sale consideration before the Trial Court even if he filed the copy of demand drafts along with the plaint. If he paid the entire sale consideration or somewhat nearing complete payment of sale amount, he can say that the defendants are ready to perform their part of contract. He has given Rs.12 lakhs as part by part. This itself showed that he is not having full amount to settle the defendants at a time and complete the transaction. Considering these factors, the Trial Court arrived a conclusion that the appellant/plaintiff had not established his readiness and willingness beyond any pale of doubt. Thus, the Trial Court declined to grant the relief of specific performance in favour of the appellant/plaintiff.

27. This Court is also of the opinion that there is a enormous escalation of cost in respect of the suit schedule property as the property is situated nearby Porur, which is part of Chennai City. As admitted by the parties, the Agreement of Sale was entered into between the parties during the year 2008 and there was a prolongation of execution for about five years and the suit was instituted in the year 2013. When these factors were rightly considered by the Trial Court, there is no reason to reconsider the issues as well as the arguments raised by the respective parties to the appeal suit on hand.

28. Under these circumstances, an argument is raised regarding the grant of alternate relief to the appellant/plaintiff though the same has not been prayed for. However, in the plaint, the appellant/plaintiff has prayed that "to grant such other relief that may deem fit and proper in the circumstances of the case and pass further suitable orders and thus render justice".

29. Though such a general relief has been prayed for in the plaint, the Trial Court has declined to grant the alternate relief of return of advance amount with interest to the appellant/plaintiff. Thus, this Court has to consider the consequential relief in lieu of the rejection of relief of specific performance. In every plaint, such a general relief is sought for, enabling the Court to consider the grant of any

other relief, which is possible with reference to Order VII, Rule 7 of the Code of Civil Procedure.

30. Time is the essence of contract. In many number of judgments, the Courts have repeatedly held that time being the essence of contract, the parties must perform their respective portion of the contract within the time limit fixed and only in the event of compliance of the terms of the agreement, the Courts can come to a conclusion that the ground of readiness and willingness so established by such party and not otherwise. Thus, in order to prove the readiness and willingness, the person approaching the Court of Law must establish that he has performed his part of the contract strictly with reference to the terms agreed upon by the parties to the contract. In the absence of any such proof, the Court would not grant the relief of specific performance.

31. The relief of specific performance is the discretionary relief. The relief of specific performance is to be granted considering the facts and circumstances as the relief being equitable one. Even in case if the party has established his lawfulness and the correctness of the agreement and the documents, the Court can refuse to grant the relief of specific performance if the Court is of the opinion that it would be an inequitable to grant such relief in specific performance on account of efflux of time and considering the fact that there is a likelihood of prejudice to either of the parties to the suit.

32. This being the principles to be followed in a suit for specific performance, this Court is of an opinion that the plaintiff at the first instance, is expected to establish that he always ready and willing to perform his part of the contract. Such readiness and willingness was established before the Trial Court in clear and unambiguous terms. Only in such cases, the Courts can grant the relief of specific performance.

33. This apart, the learned counsel for the appellant reiterated that the alternate relief of return of advance is nothing but a consequential relief and the same cannot be construed as a separate relief. The alternate relief of return of advance amount is to be construed as a consequential relief to the rejection of the relief of specific performance. The Courts in the event of rejecting the relief of specific performance, returning of advance to the party would be a consequential relief and therefore, there is no necessity to seek for such relief and such relief can be construed as a general relief. In the event of not granting such a relief, the appellant/plaintiff would be prejudiced.

34. Keeping in mind the likelihood of prejudice to be caused to either of the parties, this Court is of an opinion that in the event of allowing the first respondent to retain the advance amount would amount to unjust enrichment and the Courts cannot allow the party to enjoy any such unjust enrichment on the ground that the relief to the appellant/plaintiff was declined. Therefore, it is relevant to consider the provisions of Order VII, Rule 7 of the Code of Civil Procedure, wherein it is enumerated 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".

35. The very spirit of Order VII, Rule 7 of the Code of Civil Procedure, is to be considered. Generally the procedures followed in the plaint prayer format is that "granting such other relief or reliefs as this Hon'ble Court may deem just and necessary in the circumstances of the case and thus render justice". Such a general relief sought for is to be considered if there is a likelihood of any prejudice to the either of the parties to the civil suit. The facts and circumstances of each case is to be weighed and in the interest of justice, such reliefs can be moulded under Order VII, Rule 7 of the Code of Civil Procedure, within the scope of the general relief sought for in the plaint by the plaintiff in the suit.

36. The concept of equity and justice to be considered in such circumstances are that in the event of rejecting the relief of specific performance, the consequential relief would be to return the advance amount paid by the purchaser. Even in case of mutual cancellation of Sale Agreements, the parties agreed to return the advance amount. Therefore, such a course would be adopted as a consequential relief in consonance with the principles of equity and fairness.

37. Order VII, Rule 7 of the Code of Civil Procedure enumerates grant of general relief and therefore, it is to be construed that the general relief sought for in the plaint by the plaintiff stating that to grant any other relief as the Hon'ble Court may deem fit is to be considered for the purpose of return of the advance amount in the event of rejection of the relief of specific performance. In all circumstances, return of advance shall be the natural consequence in the event of dismissal of the relief of specific performance. Therefore, the alternate relief of return of advance, cannot be denied in all circumstances, except on certain exceptional circumstances, where the parties have agreed for forfeiture clause and such forfeiture clause is valid and enforceable.

38. This being the principles to be followed, this Court is of the opinion that the appellant/plaintiff has not established a case for grant of the relief of specific performance. The Trial Court also made a finding candidly in this regard. Thus, there is no perversity or infirmity in respect of appreciation of the evidences and the documents by the Trial Court for arriving such a conclusion. Accordingly, this Court has no hesitation in arriving a conclusion that the appellant/plaintiff is not entitled for the relief of specific performance and consequently, the judgment and decree dated 16.09.2016 passed by the learned District Judge, District Court No.II, Kancheepuram in O.S.No.37 of 2013 is confirmed. However, this Court is inclined to grant the alternate relief of return of advance amount with interest in favour of the appellant/plaintiff.

39. Accordingly, the respondents are directed to return the advance amount of Rs.12,00,000/- along with interest at the rate of 10% per annum from the date of plaint till the date of realisation and the respondents are directed to settle the abovesaid amount with interest, within a period of six months from the date of receipt of a copy of this judgment. Consequently, the present appeal suit stands allowed in part. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

Svn
To

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

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

+1cc to Mr.E.P.Suntharaam, Advocate SR.No.1668

+1cc to Mr.P.B.Ramanujam, Advocate SR.No.1607

A.S.No.130 of 2017

SSI(CO)
GMY(06/08/2020)