



**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATE: 06.01.2020**

**CORAM:**

**THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

**A.S. (MD)No.127 of 2017**

**and**

**C.M.P. (MD)No.7117 of 2017**

K.Rajalakshmi

... Appellant / Defendant

Vs.

S.Ganesan

... Respondent / Plaintiff

**PRAYER:** This Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree dated 23.01.2017 in O.S.No.67 of 2012 on the file of the Additional District Court (Fast Track), Kumbakonam.

For Appellant : Mr.V.Meenakshisundaram,  
For Mr.T.Antony Arul Raj

For Respondent : Mr.T.V.Sivakumar

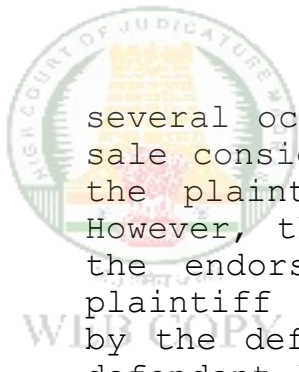
**JUDGMENT**

Aggrieved over the judgment and decree of the trial Court, decreeing the suit filed for specific performance, the present appeal came to be filed.

2.The parties are referred to as per their rank before the trial Court.

3.The brief fact leading to file this appeal, reads as follows:-

The defendant has entered into an agreement of sale of suit property dated 27.12.2010 for total sale consideration of Rs.20,00,000/- and time fixed for completion is three months. On the date of agreement, a sum of Rs.1,00,000/- as advance was paid to the defendant. The plaintiff is always ready to perform his part of the contract and he has approached the defendant for several times and requested to receive the balance sale of consideration. However, the defendant has stated that the property was mortgaged to third party and after redeeming the mortgage, the property will be sold, hence, requested further sum of Rs.2,00,000/- as advance. Accordingly, the plaintiff has paid a sum of Rs.2,00,000/- to the defendant on 19.03.2011. Despite the plaintiff has requested on



several occasions, the defendant has evaded to receive the balance sale consideration and postponed the sale. Further, on 21.05.2011, the plaintiff had paid a sum of Rs.50,000/- to the defendant. However, the defendant has refused to receive the same and sign in the endorsement made in the back of the sale agreement. The plaintiff has issued legal notice on 07.07.2011, which was replied by the defendant on 12.07.2011 with false allegations. Again the defendant has issued notice on 03.08.2011 with cheque for a sum of Rs.3,00,000/-. Immediately, the plaintiff has sent reply notice on 10.08.2011 along with cheque. The plaintiff is ready and willing to perform his part of the contract. Hence, the suit has been filed.

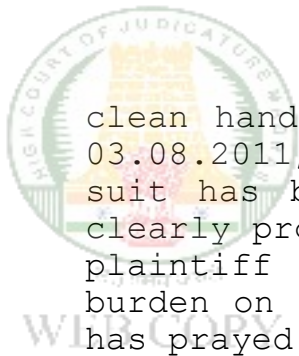
4.It is the contention of the defendant that time stipulated in the agreement is three months. Therefore, the sale ought to have been completed on or before 27.03.2011. The plaintiff is not ready and willing to perform his part of the contract at any point of time. The alleged endorsement for Rs.50,000/- was also denied. The defendant has also revoked the contract and issued legal notice along with cheque. However, the same was refused by the plaintiff. Hence, the defendant has prayed for dismissal of the suit.

5.The trial Court, based on the above pleadings, has framed the following issues:-

- (i)Whether the plaintiff is ready and willing to perform his part of the contract?;
- (ii)Whether the plaintiff is entitled for specific performance as prayed for?;
- (iii)Whether the plaintiff is entitled for alternative relief?;
- (iv)What relief the plaintiff is entitled for?.

6.On the side of the plaintiff, P.W.1 and P.W.2 were examined and Exs.A.1 to A.9 were marked. On the side of the defendant, D.W.1 to D.W.3 were examined and no document whatsoever has been adduced.

7.The learned counsel appearing for the appellant vehemently contended that admittedly, the agreement entered into between the parties with specific time stipulation. The agreement was expired on 27.03.2011 and the entire sale consideration ought to have been paid by the plaintiff, whereas till 19.03.2011, a sum of Rs.3,00,000/- as advance has been paid. Thereafter, the plaintiff has never shown his readiness to pay the remaining sale consideration, whereas first time, legal notice was issued on 07.07.2011 by the plaintiff. In the above legal notice, there is no whisper whatsoever with regard to the alleged endorsement said to have been made in the back of the agreement dated 21.05.2011 for extending the time. Even in another legal notice dated 10.08.2011, the same is found missing. Only at the first time in the plaint, the alleged endorsement dated 21.05.2011 was pleaded, that itself



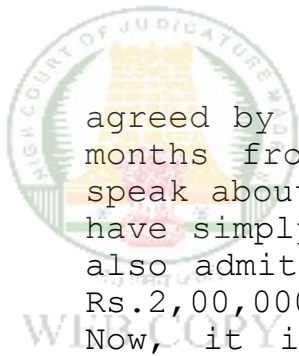
clean hands. Besides, the defendant has issued legal notice dated 03.08.2011, revoking the contract along with cheque, thereafter, the suit has been filed on 30.11.2012 with undue delay, which itself clearly proves that the readiness and willingness on the part of the plaintiff is totally absent. The trial Court has wrongly placed burden on the defendant and decreed the suit. Hence, the defendant has prayed for allowing the appeal.

8.The learned counsel appearing for the respondent submitted that though the agreement was entered on 27.12.2010, time limit fixed for completion is three months. Admittedly, the property was mortgaged by the defendant. It is agreed by the parties that the defendant to execute the sale of the property free of encumbrance. Such being the position, it is the duty of the defendant to redeem the mortgage and make marketable title. Even in the reply notice and legal notice issued by the defendant, she has not whispered anything about the mortgage, whereas the evidence of D.W.1 proves that the mortgage is still subsisting with Laxmi Vilas Bank and has not been redeemed. Therefore, it is the contention of the learned counsel appearing for the respondent that the very advance itself has been paid only for redeeming the mortgage. Even after receipt of advance, the defendant has not redeemed the mortgage. That itself clearly indicates that the plaintiff is always ready and willing to perform his part of the contract. The defendant's conduct, having received the advance and failed to redeem the mortgage, clearly shows that she has not come to the Court with clean hands. Hence, it is the contention of the learned counsel appearing for the respondent that the trial Court has categorically considered these facts and decreed the suit. It is the contention of the learned counsel for the respondent that the remaining sale consideration is also deposited as per the decree and judgment of the trial Court, hence, submitted that the judgment and decree of the trial Court is well balanced and does not require any interference.

9.Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

10.In the light of the above submissions, now the points for consideration are (i)Whether the plaintiff is always ready and willing to perform his part of the contract?; (ii)Whether in the absence of any proof as to the readiness and willingness, the contract could be enforced?; (iii)What relief the appellant is entitled for?.

11.Ex.A.1 is the agreement entered between the parties and execution of the agreement has not been disputed by either side. On perusal of Ex.A.1, it is seen that the defendant in fact has agreed to sell the property for total sale consideration of Rs.20,00,000/-. On the date of agreement i.e., 27.12.2010, a sum of Rs.1,00,000/- has been received as advance by the defendant and it is specifically



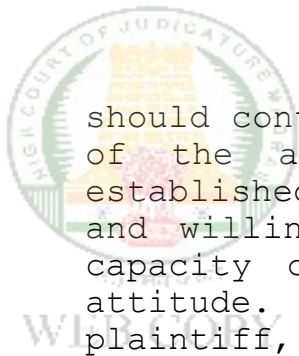
agreed by the parties that the sale shall be completed within three months from the date of agreement. The said agreement does not speak about the clearing encumbrance of the property and the parties have simply agreed to complete the sale within three months. It is also admitted by both sides that on 19.03.2011, further advance of Rs.2,00,000/- has been paid. This aspect is also not disputed. Now, it is the specific case of the plaintiff that though the agreement was expired on 27.03.2011, as the defendant did not redeem the mortgage, time was extended and in fact the defendant has received further sum of Rs.50,000/- on 21.05.2011 and also agreed to extend the time. However, she did not sign such endorsement.

12.It is curious to note that this alleged endorsement dated 21.05.2011 came to be introduced first time in the plaint. Neither in the legal notice nor in the reply notice sent by the plaintiff, there was a whisper whatsoever with regard to the alleged additional payment of Rs.50,000/- on 21.05.2011 or time to pay such amount was extended. Such plea was introduced only in the plaint. It is curious to note that if really such transaction is entered into between the parties on 21.05.2011, there was no reason as to why the same has not been found place in the legal notice issued by the plaintiff on 07.07.2011 under Ex.A.3. It is the normal human conduct to mention such transaction, if really happened on 21.05.2011 much prior to the legal notice. Whereas, the legal notice is silent about the alleged endorsement. Similarly, reply notice Ex.A.6 sent by the plaintiff did not contain anything about the alleged endorsement. This fact clearly gives an inference that the alleged endorsement on 21.05.2011 is an afterthought and introduced at a later point of time. This makes it very clear that the plaintiff has not come to the Court with clean hands. The reason for the alleged creation is as follows:-

*"(i)The evidence of P.W.1 shows that as if the defendant has come to the plaintiff's house for receipt of Rs.50,000/- and refused to sign endorsement on 21.05.2011, whereas P.W.2, son of the plaintiff in his evidence has stated as if they have gone to the defendant's house and paid amount, where the defendant has refused to sign endorsement."*

This fact creates serious doubt. It is further to be noted that admittedly in Ex.A.5, the defendant has in fact revoked the contract, issuing legal notice along with cheque for a sum of Rs.3,00,000/ as advance received by her. Even after such legal notice, the suit has been filed only on 30.11.2012, one year after such refusal. The above fact leads to the conclusion that the plaintiff is not ready and willing to perform his part of the contract.

13.It is well settled that the readiness and willingness have to be proved not only from the date of agreement but also it



should continue throughout the proceedings. From the very inception of the agreement, the readiness and willingness have to be established by the party, who seeks equitable relief. The readiness and willingness are the two distinct acts. The readiness means capacity of mobilise the amounts and the willingness is mental attitude. If both go together and proved on the part of the plaintiff, who is seeking equitable relief, can succeed in the Court of law. Even assuming that the defendant has not redeemed the mortgage, the normal conduct of the plaintiff would be to see that the remaining amount is paid, mortgage is redeemed to make a marketable title. Keeping silent despite the fact that the defendant has refused to execute the agreement and issued legal notice along with cheque amount, revoking the contract, the plaintiff has filed the suit after one year, makes it clear that the mental attitude namely, willingness is totally absent on the part of the plaintiff. Further, on entire perusal of the evidence adduced on the side of the plaintiff, it is seen that absolutely there is no evidence whatsoever available on record to show that the plaintiff had in fact a capacity to pay remaining sale consideration and had capability to mobilise the funds. Such being the matter, merely because the mortgage is not redeemed by the defendant, it cannot be said that only the defendant is at fault and the plaintiff is ready and willing.

14.It is also to be noted that even in the plaint pleadings, except that the property was mortgaged, there are no details whatsoever pleaded in the plaint. Whereas, the evidence of the defendant clearly indicates that on the date of agreement itself, a sum of Rs.7,50,000/- was due over the mortgage. Such being the position, if really the plaintiff was interested to purchase the property and he was very serious, his normal conduct would be to pay remaining sale consideration and get it redeemed the mortgage to make marketable title, but he remained silent. All these facts clearly established that the readiness and willingness is totally absent on the part of the plaintiff. Hence, the finding of the Lower Court, granting the decree only on the basis of the conduct of the defendant, cannot be sustained in the eye of law.

15.The learned counsel appearing for the respondent relied upon the judgment in the case of ***P.D'Souza Vs. Shondriilo Naidu*** reported in ***(2004) SAR (Civil) 726***.

16.On perusal of the above judgment, it is seen that the same cannot be applied to the facts of the present case. The readiness and willingness have to be proved from the very inception of the agreement as being not established by the plaintiff. Though time is not the essence of contract as far as the immovable property is concerned, the specific time agreed between the parties cannot be ignored altogether. When the parties agreed certain time within which agreement would be concluded, they have to perform their



obligation. When the plaintiff's conduct clearly indicates that the alleged endorsement has been created for the purpose of case, only inference of this Court would be that the plaintiff has not come to the Court with clean hands.

17.All these facts clearly indicate that the plaintiff has not come to the Court with clean hands. Coupled with the above discussion, the delay in approaching the Court even after the defendant rescinded the contract, itself clearly indicate that the plaintiff has not established the readiness and willingness. Accordingly, the suit filed for specific performance has to be dismissed and the judgment of the trial Court in that aspect is interfered and set aside.

18.In view of the same, the plaintiff is certainly entitled to alternative relief of a sum of Rs.3,00,000/-, which was admittedly received by the defendant, with interest at the rate of 7% from the date of agreement till the date of realization. Though it is the contention of the learned counsel appearing for the appellant that the appellant has already sent cheque, which was refused, therefore, the interest cannot be awarded, this Court is of the view that since the money is still with the defendant, he is liable to pay interest at the rate of 7% from the date of agreement till the date of realization.

19.Accordingly, this Appeal Suit is allowed. It is also made clear that the respondent has deposited the remaining sale consideration as per the decree and judgment of the trial Court. Therefore, the respondent is permitted to withdraw the amount from the trial Court and the trial Court shall release the amount with accrued interest to the respondent. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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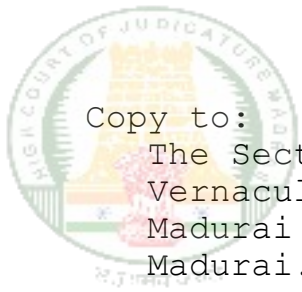
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Sub Assistant Registrar(CS)

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To

The Additional District Judge, (Fast Track),  
Kumbakonam.



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+1 CC to M/s.I.VELPRADEEP, Advocate ( SR-397[F] dated 06/01/2020 )

+1 CC to M/s.H.LAKSHMI SHANKAR, Advocate ( SR-619[F] dated  
07/01/2020 )

**A.S. (MD) No.127 of 2017**  
**06.01.2020**

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