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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 2nd DAY OF MARCH 2021

THE HON'BLE MS. JUSTICE P.T.ASHA

C.S.No.1170 of 2008

S. Jamal Mohideen,
S/o Shahul Hameed,
No.1, Raja Annamalai Road,
II Floor,
Purasawalkam, Chennai – 600 084.

... Plaintiff

VS.

K.T. J.Prakash,
No.154, I Floor,
Purasawalkam High Road,
(Next to Abirami Theatre),
Kellys, Chennai – 600 010.

... Defendant

Civil Suit praying that this Hon'ble Court be pleased to pass a judgment and decree against the Defendant:

***for a direction directing the Defendants, to Specifically enforce the agreement of sale by executing the sale deed infavour of the Plaintiff or his nominee of the scheduled mentioned property after receiving the balance sale consideration of Rs.2.25 crores and handover the vacant possession of the same free of all encumbrances morefully described in**

the schedule or in the alternative directing the defendant to pay:



a) damages, which is valued moderately at Rs.2 crores only together with interest at the rate of 18% p.a., as per custom and contract from this date to till the date of realization;

b) return of advance amount of Rs.10 lakhs only, together with interest at the rate of 18% p.a. from the date of the agreement i.e. 01/07/2005, till the date of realization, which has been agreed between both the parties to the sale agreement dated 01/07/2015, as per clause 14 of the said agreement.

*** Amended as per order dated 16/6/17 in Application No.1629 of 2017**

This suit having been heard on 22.12.2020 in the presence of Mr.G.Veerapathiran, Advocate for the plaintiff herein and Mr.V.K.Vijayaraghavan, Advocate for the defendant herein, and upon reading the plaint filed herein and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over the consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court having observed that the defendant had admitted that he had executed an Agreement of sale, and evidence has not been filed by the plaintiff to prove that he is ready and willing with his side of the bargain, on the contrary, the evidence of P.W.1. would ring the death-knell for the plaintiff's case that he was ready and willing to perform his part of the



contract, and the witness was not sure as to whether the plaintiff had the money to pay the balance sale consideration and also taking into account the fact that the plaintiff has not chosen to enter into the witness box and adduce evidence, and there is every likelihood of the defendant suffering a hardship as it is impossible for the defendant to execute a sale deed for the property, and this suit is partly allowed, and **it is ordered and decreed as follows:-**

That the defendant herein, do pay to the plaintiff herein, a sum of Rs.17,60,822/- (Rupees Seventeen Lakhs Sixty Thousand Eight Hundred and Twenty Two only) with further interest at the rate of 6% per annum on the sum of Rs.10,00,000/- (Rupees Ten Lakhs Only) from this date till the date of payment.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
02nd DAY OF MARCH 2021.

Sd./-

ASSISTANT REGISTRAR (O.S.I)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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C.S.No.1170 of 2008

DECREE

DATED: 02.03.2021

THE HON'BLE MS. JUSTICE
P.T.ASHA

FOR APPROVAL: 23/07/2021

APPROVED ON : 26/07/2021



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.12.2020

Delivered on: 02.03.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.S.No.1170 of 2008

S. Jamal mohideen ... Plaintiff

vs.

K.T. Prakash ... Defendant

PRAYER: Civil Suit filed under Order VII Rule 1 of the Code of Civil Procedure read with Order IV Rule 1 of the Original Side Rules, 1956 to direct the defendants to specifically enforce the agreement of sale by executing the Sale Deed in favour of the plaintiff or his nominee of the scheduled mentioned property after receiving the balance sale consideration of Rs.2.25 crores and hand over the vacant possession of the same free of all encumbrances morefully described in the schedule of in the alternative directing the defendant to pay damages which is valued moderately at Rs.2 crores only together with interest at the rate of 18% per annum as per cusotm and contract from this date to tll the date of realization and to return of advance amount of Rs.10 lakhs only, together with interest at the rate of 18% per annum from the date of agreement, i.e, 01.07.2005, till the date of realization which has been



agreed between both the parties to the sale agreement dated 01.07.2015 as per clause 14 of the agreement with costs.

For Plaintiff : Mr. G.Veerapathiran

For Defendant : Mr.V.K.Vijayaraghavan

JUDGMENT

This Civil Suit was originally filed under Order VII Rule 1 of the Code of Civil Procedure read with Order IV Rule 1 of the Original Side Rules, 1956, for a mandatory injunction directing the defendant to execute the Sale Deed in favour of the plaintiff or his nominees in respect of the schedule mentioned property after accepting the balance sale consideration of Rs.2,25,00,000/- and to hand over the vacant possession of the property free of all encumbrances and failing such compliance by the defendant, the Court shall execute the Sale Deed in favour of the plaintiff.

I. PLEADINGS:

(i)Plaintiff's case:

The case of the plaintiff that can be deduced from the original
Plaint, (which is rather economical with words) and the amended plaint

(which is an elaborate narrative) is as follows:



(1) The defendant offered to sell the suit schedule property which belonged to him to the plaintiff. After negotiations, the parties had reduced into writing the terms of their Agreement under an Agreement of Sale dated 01.07.2005. As per the terms of the Agreement, the plaintiff had agreed to purchase their property for a total sale consideration of Rs.2,35,00,000/- and a sum of Rs.10 lakhs was paid as advance vide a Cheque dated 02.07.2005. It is the plaintiff's case that though the defendant had assured that he would get all the documents for the plaintiff's scrutiny this assurance was observed in the breach. The plaintiff would submit that despite assuring him that he would settle the issues with Kalanther Naina Mohamed (hereinafter called Naina Mohamed) the defendant had failed to do so. In fact, there was a suit in C.S.No.486 of 2003 filed by Naina Mohamed which had to be withdrawn. The plaintiff's case is that though he was always ready and willing to pay the balance sale consideration, the defendant had failed in his obligations. On 06.06.2008, the plaintiff had informed the defendant vide a registered letter that he is ready and willing to go ahead with the Sale there was no response from the defendant. The Legal Notice dated 17.06.2008 also evoked the same reaction. Hence, the suit. In the amended Plaint, the plaintiff sought for the alternative



relief of the refund of the advance amount.

(ii) Defendant's case:

The Written Statement and the Additional Written Statement matched the length of the Plaint. In the Additional Written Statement, though the defendant had denied the factum of his agreeing to sell the suit property however in his earlier narrative in the original Written Statement, the defendant would contend that the Agreement to sell the property was forced on him due to his impecunious state and the plaintiff had been fully apprised of the fact that only if his creditors are settled the documents would not come into his hands. The plaintiff who was fully aware of this fact had not come forward to make further payments which would clearly demonstrate that the plaintiff was not possessed with the requisite funds. The defendant would also contend that despite being aware about the Agreement of Sale with Naina Mohamed the plaintiff had included the entire extent into the Agreement of Sale. The defendant would submit that on several occasions he had called upon the plaintiff to pay him the agreed balance amount of Rs.40 lakhs which request was also not complied with. Therefore, this clearly indicates that the plaintiff did not have the wherewithal. As an appendage to the narrative, the defendant would



state that the plaintiff who was dabbling in real estate was attempting to knock off his property for a paltry sum.

II. ISSUES:

By order dated 14.09.2016, the following issues were framed:

“1. Whether the suit transaction that the plaintiff had with the defendant on 01.07.2005 was a loan transaction or an agreement of sale of suit property ?

2. If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the plaintiff was ready and willing to perform his part of the obligation under the agreement?

3. If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the plaintiff is entitled to the equitable relief of specific performance of agreement dated 01.07.2005 ?

4. If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the defendant would suffer hardship under Section 20(b) of the Specific Relief Act, 1963, if decree for specific performance of agreement dated 01.07.2005 is granted



to the plaintiff as prayed for ?

5. To what other reliefs are the parties entitled to ?

6. Who is entitled to costs of the suit ? ”

(2) On the side of the plaintiff, one R. Soundararajan was examined as P.W.1. The plaintiff has not entered the box to adduce evidence. Ex.P.1 to Ex.P.6 were marked through him. The defendant had given evidence as D.W.1 and Ex.D.1 and Ex.D.2 were marked.

III. SUBMISSIONS:

(1) Mr. G. Veerapathiran, learned counsel appearing on behalf of the plaintiff would submit that under the Ex.P.2 - Agreement of Sale, the defendant was required to provide the documents of title, however, the plaintiff had not produced the same. Therefore, the plaintiff was unable to proceed with the Sale. He would further argue that under the Agreement of Sale, it had been clearly stated that in the event of the defendant being unable to execute the Sale then he must refund the advance amount together with interest @18% per annum till the payment. Under the Ex.P.2 - Agreement of Sale, the defendant was to settle Naina Mohamed and three others. The argument was that the



defendant would pay Naina Mohamed and reach an out of Court settlement in C.S.No.486 of 2003. That apart, the Agreement also envisaged that the defendant had to hand over the vacant possession of the property from the tenants at the time of registration of Sale Deed and when the balance sale consideration was to be paid. He would submit that the defendants were unable to settle their outstanding to the various financiers as well as the encumbrances of the Income Tax Authorities which was more than 32 to 43 in number. Further, he was unable to vacate his tenants and therefore, the plaintiff could not proceed with the Sale. He would also submit that D.W.1 during his cross examination has admitted these facts. These encumbrances have been cleared much later and only now there is no impediment to sell the property. In fact, the last of the encumbrance has been cleared in the year 2014 or 2015. D.W.1 had in his evidence admitted that they had not informed the plaintiff about the same. The learned Counsel would also draw the attention of this Court to the admission of D.W.1 that Ex.P.2 is only an Agreement of Sale and therefore, the defence taken by him in the first Written Statement was false. The learned counsel would argue that the plaintiff was ready and willing to perform their part of the Contract and it was only the conduct of the defendant that



had prevented the Sale going through. Therefore, the suit ought to be decreed. He would also submit that in the event of this Court coming to the conclusion that the plaintiff is not entitled to the Decree for specific performance then the Court should grant the alternate relief for refund of the advance together with interest.

(2).Per contra, Mr.V.K.Vijayaraghavan, learned counsel for the defendant would submit that the plaintiff has entered into an Agreement of Sale after being fully appraised about the financial condition of the plaintiff and the pressing need for funds by the defendant. He would submit that the plaintiff was aware about the Agreement of Sale with the said Naina Mohamed and the pendency of the suit C.S.No.486 of 2003 the details of which had been conveniently burked in the original Plaint.

(3)The learned counsel for the defendant would submit that despite the defendant taking note of the plea that the plaintiff was never ready and willing to perform his part of the Contract, the plaintiff has not let in any evidence to dispel the above statement. In fact, the plaintiff has not entered the witness box to submit himself for cross examination. Therefore, the best evidence has been kept away.

(4)P.W.1 was unable provide any clarity on the details



surrounding the negotiations and execution of Ex.P.1 and also with reference to wherewithal of the plaintiff. The encumbrances that existed on the property was well known to the plaintiff. He would submit that the plaintiff has come forward with false allegations with reference to Agreement of Sale in favour of the said Naina Mohamed and three others and the suit for specific performance filed by them in C.S.No.486 of 2003.

(5)The learned counsel would argue that the plaintiff's contentions regarding C.S.No.486 of 2003 is totally contra to the recitals contained in Ex.P.2. He would argue that the defendant had entered into this Agreement only with an intention of bailing himself out of his financial crisis. Therefore, it was imperative that the defendant received money emergently. However, the plaintiff did not come forward to pay the balance sale consideration as promised and the sale could not go through. The defendant would contend that therefore, the plaintiff was not entitled to refund of the advance. He prayed for dismissal of the suit.

(6)The learned counsel would rely on the following Judgments in

support of his arguments:



(a) Effect of non-examination of the plaintiff:

- (i).Man Kaur (dead) By LRs v. Hartar Singh Sangha [(2010) 10 Supreme Court Cases 512]
- (ii).Janki Vashdeo Bhojwani and another v. Indusind Bank Limited and others [(2005) (2) Supreme Court Cases 217]

(b) Effect of non perusal of the title deeds:

- (i)A.V.Ram Balaji, Proprietor Akshitha Property Developers, Arasu Garden, No.3/6, Natarajan Salai, Thirumalai Nagar, Ramapuram, Chennai – 600 089 and another v. M/s.Hotel Silver Starts Private Limited represented by its Managing Director Mr.N.M.Sabjan, No.9, Purasawalkam High Road, Chennai – 600 007 [2017-1- L.W. 972]

(c) Whether necessary pleadings had been made:

- (i)Kamal Kumar v. Premlata Joshia and others [2020-2-L.W. 749]

(d) The allegations in the Plaint have to be proved by evidence:

- (i) Anil Rishi v. Gurbaksh Singh [2006 (4) CTC 524]

(e) Readiness and willingness not proved:

- (i) K.M. Raju v. Javed Sait [2017-3- L.W.92]
- (ii) Balakrishnan and others v. B. Veni and others [2017-5-L.W.344]
- (iii) P. Jayachandran v. S. Kumar (died) and others [2020-1- L.W.762]
- (iii) Syed Abdul Gani v. Sajjida Begum and another [2016-5-L.W. 433]

(f) Suit cannot be decree in respect of mandatory injunction:

- (i) Atma Ram v. Charanjit Singh [2000-2-L.W.777]



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IV.DISCUSSION:**(i)Issue No.1 :**

“1.Whether the suit transaction that the plaintiff had with the defendant on 01.07.2005 was a loan transaction or an agreement of sale of suit property?”

(1)Though the defendant in the Additional Written Statement after the amendment of the Plaint would submit that the relationship between the parties is that of a creditor and debtor, however, in the original Written Statement filed on 27.08.2015, the defendant had tacitly admitted the Agreement of Sale by stating that he was not in a position to execute the Sale Deed since the loan had not been cleared and he was unable to clear the encumbrances. The defendant has also stated that as per the Agreement, the plaintiff had agreed to pay the loan amount to the financiers and other debts. However, these amounts have not been paid to the financiers and they had therefore refused to give the documents for perusal. Therefore, the defendant has admitted the execution of Agreement of Sale.

(2)In the Written Statement filed after the amendment also, the defendant had stated that at the time of entering into the suit Agreement

he was indebted to several persons and could not discharge their debts



and this factum was also reflected in the Agreement of Sale. However, it is only in Paragraph -15 of the Written Statement that the defendant had come forward with the contention that the Agreement of Sale was executed in the form of security for repayment of loan amount and that the real intention was that it would be a the loan Agreement. This statement is taken for the first time only in the second written statement filed on 09.09.2016 whereas in the Written Statement filed on 27.08.2015, the defendant had admitted that he had executed an Agreement of Sale. Therefore, the Issue No.1 is answered in favour of the plaintiff.

(ii) Issue Nos.2 and 3:

“2.If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the plaintiff was ready and willing to perform his part of the obligation under the agreement?”

3.If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the plaintiff is entitled to the equitable relief of specific performance of agreement dated 01.07.2005?”

(1)The case of the plaintiff in the original Plaint dated 27.06.2008

was that he had entered into an Agreement of Sale with the defendant



to purchase an extent of 5040 sq.ft. at Door No.154, Purasawalkam High Road, Kellys, Chennai – 600 010 for a total sale consideration of Rs.2.35crores. A sum of Rs.10,00,000/- was given to the defendant vide a Cheque dated 02.07.2005 and a xerox copy of the receipt has been marked as Ex.P.3. Ex.P.2 is the Agreement of Sale dated 01.07.2005. The Agreement would show that the tentative date for paying the balance sale consideration of Rs.2.25crores was 30.09.2005 after clearing the dues to the income Tax Department, financiers and agreement holders. The Agreement would also read that the time is the essence of the Contract. The reitals would also provide that the defendant should make payment to the Agreement holder namely, Naina Mohamed and three others and after making the payment the suit C.S.No.486 of 2003 should be settled out of Court and a Compromise Memo filed.

(2)The records would reveal that after the execution of Ex.P.2, the first demand that was made by the plaintiff was only on 06.06.2008. In this letter, the plaintiff has stated that they have been contacting the defendant for executing the Sale Deed but the defendant had been dodging the same. Except for this *ipsi dixit* there is no other



independent evidence to prove this statement. In his pleadings, the plaintiff had stated that he has been periodically asking for the result of the suit and the defendant had refused to inform him about the same. It is rather strange that the plaintiff who is aware about the number of the suit has not taken any steps to independently verify the status of the suit. This would only show that the plaintiff was not too keen on proceeding with the Sale or did not possess the necessary wherewithal. In the amended Plaint, the plaintiff has sought for the alternate relief of refund of advance amount. The plaintiff has not chosen to enter into the witness box to give evidence. The Manager of his brother's concern has adduced evidence as P.W.1. P.W.1 would initially state that he is aware about the details of the Agreement, however, in his cross examination, he would submit that he is unaware if the plaintiff had the requisite funds to pay the balance sale consideration in an answer during his cross examination on 03.08.2017 he would state as follows:

“...On the date of agreement, I do not know whether the plaintiff had Rs.10,00,000/- in his account to pay the defendant on the date of agreement. I do not know whether the plaintiff had money to pay the balance of sale



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consideration due to the defendant during six months period referred inn Ex.P.2. I am, not operating or dealing with his accounts. I do not now whether the plaintiff had money to pay the balance of sale consideration on his account after the expiry of six months.”

(3)After making such a categoric statement, on an afterthought, the witness would add that the plaintiff could mobilize the funds. Therefore, it is clear that on the date of evidence also funds were not available. This admission has been further strengthened by answer that he did not know whether the plaintiff had mobilized the money to purchase any property. He would also state that it was the plaintiff's brother who had given the advance money which was paid to the defendant. This evidence would clearly prove that the plaintiff has not proved that he was ready and willing even on the date of execution of Ex.P.2 and through out the Contract. Further, he has not chosen to enter into the witness box and since the best evidence has been kept away this Court has to draw adverse inference for the non examination.

<https://hcservices.ecourts.gov.in/hcservices/> In the Judgment reported in **Man Kaur (dead) By LRs v. Hartar**

Singh Sangha [(2010) 10 Supreme Court Cases 512], the Hon'ble



Supreme Court has extracted the observation of an earlier Judgment reported in **Vidhyadhar v. Manikrao [(1999) 3 Supreme Court Cases 573]**, where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct...”

(4) Therefore, it is clearly evident that the plaintiff did not have the requisite funds even for paying the advance amount as the witness has clearly stated that it was the plaintiff's brother who had given the advance money to the plaintiff. Considering the fact that the plaintiff has not been able to establish his readiness and willingness to proceed with the Agreement. The Hon'ble Supreme Court in the Judgment reported in **Saradamani Kandappan v. S. Rajalakshmi and others [2011(4) LW 97]** has held that though the time cannot be considered as an essence of the Contract insofar as it relates to the immovable properties, however, while exercising its discretion in suits for Specific Performance, the Courts should bear in mind that when parties fix a time schedule for completion of the transaction that has some significance and cannot be ignored. In these cases greater scrutiny has



to be made regarding readiness and willingness. In the instant case, the plaintiff cannot seek to succeed on the basis of mere rhetoric that he was ready and willing but should support the same with cogent and convincing evidence. This Judgment has been followed in a latter Judgment of the Hon'ble Supreme Court reported in **Padmakumari and others v. Dasayyan and others [2016 (1) LW 97]**.

5.Evidence has not been filed by the plaintiff to prove that he is ready and willing with his side of the bargain. On the contrary, the evidence of P.W.1 would ring the death-knell for the plaintiff's case that he was ready and willing to perform his part of the Contract. Issue No.2 is answered against the plaintiff.

(6)Since it has been categorically stated by PW.1 that the witness was not sure as to whether the plaintiff had the money to pay the balance sale consideration and also taking into account the factthat the plaintiff has not chosen to enter into the witness box and adduce evidence. Issue No.3 is also answered against the plaintiff.

(iii).**Issue No.4:**

“4.If the suit transaction dated 01.07.2005 was an agreement to purchase suit property, whether the defendant would suffer hardship under Section 20(b) of



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the Specific Relief Act, 1963, if decree for specific performance of agreement dated 01.07.2005 is granted to the plaintiff as prayed for?”

(1)The suit has been filed for a specific performance in respect of an extent of 5040 sq.ft in Door No.154, Purasawalkam High Road, Kellys, Chennai – 600 010, together with building. Even on the date of execution of the Agreement of Sale Ex.P.1, the plaintiff was very much aware that there was a prior Agreement in favour of Mr.Kalanther Naina Mohamed and three others in respect of which a suit C.S.No.486 of 2003 was pending. Out of 5040sq.ft, an extent of 1372 sq.ft had been sold. Therefore, even on the date of which the Agreement of Sale was entered into, the plaintiff was very much aware that he will not be in a position to purchase the entire extent of 5040 sq.ft. as an extent of 1372 sq.ft had been agreed to be sold to Naina Mohamed. It also appears that the same had been sold and Ex.D.1 is the certified copy of the said Sale. Therefore, it is clear that the plaintiff cannot execute a Sale Deed in respect of the suit schedule property as 1372 sq.ft has already been sold to the third person. Therefore, there is every likelihood of the defendant suffering a hardship as it is impossible for



schedule. Issue No.4 is also answered against the plaintiff.

VI. Issue Nos.5 and 6:

“5.To what other relief's are the parties entitled to ?

6.Who is entitled to costs of the suit ? ”

(1)The defendant had accepted the receipt of the advance amount of Rs.10 lakhs. The defendant had entered into the Agreement of Sale for the sole purpose of receiving money to clear his outstanding. He had reached the stage where he was being hounded by his creditors to repay their dues, the plaintiff who had agreed to purchase the property and who had promised further sums of money failed to pay a single penny after the initial advance of Rs.10lakhs. It was only on 06.06.2008 that the plaintiffs had issued the first letter stating that he was ready to proceed with the sale.

(2).The defendant has suffered on account of not receiving the money at the opportune moment. However, since the defendant had admitted the receipt of the money he shall be directed to refund the sum of Rs.10 lakhs to the plaintiff. The defendant has also admittedly utilized the sum of Rs.10 lakhs. Since the delay is only on the part of the plaintiff there shall be an order for interest only @6% per annum



from the date of the suit till the date of payment. Issue Nos.5 and 6 is also answered against the plaintiff.

In the result, this Civil Suit is partly allowed directing the defendant to refund the sum of Rs.10,00,000/- together with interest at the rate of 6% per annum from the date of Plaint till the date of payment.

Sd./-P.T.A.J.

02.03.2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

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