



A.S.No.1066 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on:	Judgment delivered on:
23.08.2022	18.10.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.S.No.1066 of 2012
and
C.M.P.No.589 of 2016

M.Dineshchand Chordia

.. Appellant

Vs.

1.M.Selvaraj (died)

2.M.Sampathkumar (died)

3.Veerammal

4.Malliga

5.Navaladian

6.Kavitha

(RR 3 to 6 brought on record as LRS of
the deceased 1st respondent, M.Selvaraj,
vide order of this Court dated 12.07.2019
made in C.M.A.No.7308 of 2017 in
A.S.No.1066 of 2012)
7.S.Valarmathi



A.S.No.1066 of 2012

8.S.Yogindhar

9.S.Thithyabharathi

.. Respondents

(RR7 to 9 brought on record as LRS of the deceased 2nd respondent, M.Sampathkumar, vide order of this Court dated 03.08.2022 made in C.M.P.No.144 of 2018 in A.S.No.1066 of 2012)

Prayer: This First Appeal is filed under Section 96 of C.P.C. and Order XLI Rule I C.P.C., against the judgment and decree dated 13.07.2012 made in O.S.No.139 of 2008 on the file of the Additional District Court, Namakkal.

For Appellant : Mr.N.Surya Senthil
for M/s.Surana and Surana

For RR 3 to 9 : Mr.S.Senthil

J U D G M E N T

(Judgment of the Court was delivered by V.M.VELUMANI,J.)

The unsuccessful plaintiff has filed the present appeal challenging the judgment and decree dated 13.07.2012 made in O.S.No.139 of 2008, filed seeking decree of specific performance or in alternate relief of refund of Rs.36,20,650/- together with interest at the rate of 18% per annum.

Case of the appellant:



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2.The suit property was purchased by the father of respondents 1 & 2 by deed of sale dated 05.09.1960. The suit property is ancestral property of respondents 1 & 2 and as well as by inheritance. The appellant agreed to purchase the suit property and respondents agreed to sell the same. The terms and conditions of sale was reduced into writing by agreement of sale dated 20.09.2002. Apart from other conditions, sale price was fixed at Rs.30,00,000/- and time for completion of agreement of sale was fixed at 18 months. The appellant by five Demand Drafts of Rs.2,00,000/- each issued by the Indian Bank, Sowcarpet Branch, discharged the loan of the respondents 1 & 2 in the Lakshmi Vilas Bank, Namakkal. The respondents 1 & 2 earlier had received Rs.4,00,000/- from the appellant. The appellant paid Rs.1,00,000/- on the date of execution of agreement of sale as advance. Balance sale consideration of Rs.15,00,000/- was to be paid within 18 months from 20.09.2002 i.e., from date of agreement.

2(a). The respondents 1 & 2 informed the appellant that there is some encumbrance in the property and they requested one year time to clear the encumbrance and execute the sale deed. The appellant agreed for the same and an agreement of extension of time dated 16.03.2004 was entered into between the appellant and respondents extending the time till



15.04.2005. In the said agreement, instead of 13 months time, by typographical mistake it was mentioned as 12 months. On the date of agreement of extension of time, the appellant paid further advance of Rs.2,00,000/- and totally has paid Rs.17,00,000/- as advance.

2(b). Subsequently, the appellant on several occasions approached the respondents 1 & 2 to execute the sale deed, but they were delaying the same. Hence, the appellant sent a notice dated 17.11.2007 to the respondents 1 & 2. The respondents 1 & 2 sent a reply with false allegations. The appellant in such circumstances filed the above suit in O.S.No.139 of 2008 on the file of the Additional District Court, Namakkal for the relief sought for above.

Case of the respondents:

3.The respondents 1 & 2 filed written statement and denied all the averments in the plaint made by the appellant and stated that the respondents 1 & 2 did not agree to sell the suit property to the appellant. The appellant and his family members are doing finance business throughout India. The 1st respondent was appointed as representative of the



appellant and his family members to collect the loan amount granted by the appellant. The 1st respondent was the representative of the appellant and his family members for more than 20 years to purchase and sell the properties on behalf of appellant and his family members. The respondents 1 & 2 on many occasions have borrowed money from the appellant and his family members including hire purchase agreement. The respondents 1 & 2 purchased five lorries on hire purchase agreement from the family members of the appellant. Out of five lorries, they have taken two lorries from the respondents 1 & 2 and kept with them. The appellant and his family members have to pay the balance amount after deducting the loan amount in respect of two lorries taken by them.

3(a). The 1st respondent is doing finance business as Managing Partner in the name and style of “Sri Navaladiyan Syndicate”. The 1st respondent used to receive deposits from third parties and lend money to various third parties. The borrowers failed to pay the amounts borrowed from the 1st respondent and 1st respondent could not repay the amounts to the depositors on its maturity. Based on the complaint given by the depositors, the suit property was attached in G.O.Ms.No.827, Home (Courts IIA) Department, dated 09.09.2002. The criminal case initiated



against the 1st respondent was pending in C.C.No.9 of 2002. The appellant coming to know about the attachment of the suit property, informed the respondents 1 & 2 that the property can be saved from the attachment by executing agreement of sale. Based on the said advise, the respondents 1 & 2 entered into agreement of sale and also executed the general power of attorney in favour of the appellant's brother to deal with the suit property. It is not the intention of the respondents 1 & 2 to sell the suit property to the appellant. The respondents 1 & 2 did not receive any amount as mentioned in the sale agreement. The suit property is not absolute property of respondents 1 & 2 and it is a joint family property. They have no right to sell the family property. The respondents 1 & 2 did not execute the agreement of extension of time dated 16.03.2004. After issuing notice and receiving reply from the respondents 1 & 2, the appellant has created the agreement of extension of time dated 16.03.2004. The signature in the said agreement is not that of respondents 1 & 2. It is not correct to state that 13 months extension was granted for completing the sale agreement and by typing mistake, it was mentioned as 12 months.

3(b). The appellant and his family members have to give commission to the 1st respondent. When the 1st respondent demanded payment of commission, misunderstanding arose between the 1st



respondent, appellant and his family members. Due to said misunderstanding, the appellant is trying to get the suit property worth of Rs.1,00,00,000/- from the respondents 1 & 2. In any event, the appellant was not ready and willing to perform his part of contract as per the agreement of sale. The appellant never informed the respondents 1 & 2 about his readiness and willingness to perform his part of contract. The suit is barred by limitation.

4. Based on the above pleadings, the learned Judge has framed necessary issues.

5. Before the learned Judge, the appellant examined himself as P.W.1 and one Nachimuthu was examined as P.W.2 and eight documents were marked as Exs.A1 to A8. The 1st defendant examined himself as D.W.1 and two documents were marked as Exs.B1 & B2. G.O.Ms.No.827, Home (Courts IIA) Department, dated 09.09.2002 was marked as Ex.C1 / Court document.

6. The learned Judge considering the pleadings oral and documentary evidence, dismissed the suit holding that appellant failed to prove the payments of amount as per agreement of sale dated 20.09.2002 marked as



Ex.A1, agreement of extension of time dated 16.03.2004 / Ex.A2 is not genuine and the suit is barred by limitation.

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7. Against the said judgment and decree dated 13.07.2012 made in O.S.No.139 of 2008, the appellant / plaintiff has come out with the present appeal.

8. The learned counsel appearing for the appellant contended that the learned Judge having held that Ex.A1 was executed to discharge the loans incurred by the respondents 1 & 2, erred in holding that Ex.A1 is not an agreement of sale to sell the property, but only to protect the property from loans and attachments. The learned Judge failed to consider that the agreement of sale or sale for the property attached will be subject to said attachment. D.W.1 in his evidence has admitted that a sum of Rs.9,80,000/- was due to the Lakshmi Vilas Bank, Namakkal by the respondents 1 & 2 and appellant has paid the said amount to the Lakshmi Vilas Bank, Namakkal. The respondents 1 & 2 have admitted the execution of Ex.A1, but failed to discharge the burden to prove the recitals of Ex.A1 are not true. If really the contention of the respondents 1 & 2 are true, then they could have sent reply immediately to the Ex.A3 / notice



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dated 05.05.2005 denying the claim of the appellant. They have sent Ex.A5 reply dated 12.12.2007 denying the claim of appellant contained in Ex.A4, second notice dated 17.11.2007. The appellant has proved Ex.A2 by examining P.W.2, one of the witnesses to Ex.A2 and the learned Judge rejected the evidence on erroneous ground. The learned Judge erred in holding that signature of P.W.2 is not similar in Exs.A1 & A2. The learned Judge did not properly consider the evidence of P.W.1 in respect of Ex.A2. The learned Judge erroneously held that the signature of 1st respondent and P.W.2 in Exs.A1 & A2 are not similar to their signature in their deposition. The finding of the learned Judge based on comparison is erroneous. The learned Judge ought to have sent the disputed signature and admitted signature to obtain opinion of hand writing expert as requested by the appellant in I.A.No.112 of 2011. The learned Judge did not consider the signature of 2nd respondent in Exs.A1 & A2 and signature of 2nd respondent in those documents are not disputed. Assuming that the respondents 1 & 2 came to know the alleged fraud and misrepresentation by the appellant only through Ex.A3 notice, did not take any legal proceedings to set aside Ex.A1. The learned Judge erred in holding that Ex.A1 is invalid in view of Ex.B1, the power of attorney executed by the respondents 1 & 2 in favour of one Rameshchand Chordia, brother of the appellant. It is not necessary



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for the appellant, being the purchaser of suit property to deposit the balance sale consideration into Court. It is sufficient if he alleges and proves his readiness and willingness to pay the balance sale consideration. In Exs.A3 & A4, notice issued to the respondents 1 & 2, the appellant has expressed his readiness and willingness to perform his part of contract and by oral evidence in the trial proved the same. The learned Judge erred in holding that appellant did not express his readiness and willingness within 18 months as mentioned in Ex.A1 as Ex.A2 is invalid. When the respondents 1 & 2 agreed to do certain things for execution of sale deed, unless they complete such an act, the time for performance will not start running and time is not essence of contract. The attachment of property was not raised till filing of the suit. The respondents 1 & 2 denied their obligation to execute the sale deed only in Ex.A5 / reply notice dated 12.12.2007 issued by them and the time starts only from the said date of refusal. Even if the appellant is not entitled to the relief of specific performance, the learned Judge ought to have granted decree for alternate relief of refund of advance amount together with interest. The learned counsel appearing for the appellant extensively referred to the pleadings, evidence of P.W.2, D.W.1 and contended that the learned Judge shifted the onus of proof on the appellant. In support of his contention, the learned



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counsel relied on the following judgments:

(i) (1999) 6 SCC 337, [*Syed Dastagir Vs. T.R.Gopalakrishna*

Setty], wherein the Hon'ble Apex Court at paragraph No.11 has held as follows:

“ ...11.*Section 16(c) of the Specific Relief Act, 1963 is quoted hereunder :-* 16. *Personal bars to relief. - Specific performance of a contract cannot be enforced in favour of a person -*

(a) xxx xxx xxx

(b) xxx xxx xxx]

(c) *who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.*

Explanation. - For the purposes of clause (c), -

(i) *where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;*

(ii) *the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.*



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It is significant that this explanation carves out contract which involves payment of money as a separate class from [Section 16\(c\)](#). Explanation (i) uses the words it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. This speaks in negative term what is not essential for plaintiff to do. This is more in support of plaintiff that he need not tender to the defendant or deposit in Court any money but the plaintiff must (as per explanation ii) at least aver his performance or readiness and willingness to perform his part of the contract. This does not mean that unless the court directs the plaintiff cannot tender the amount to the defendant or deposit in the Court. Plaintiff can always tender the amount to the defendant or deposit it in court, towards performance of his obligation under the contract. Such tender rather exhibits willingness of the plaintiff to perform his part of the obligation. What is not essential only means need not do but does not mean he cannot do so. Hence, when the plaintiff has tendered the balance amount of Rs.120/- in court even without courts order it cannot be construed adversely against the plaintiff under explanation (i). Hence, we do not find any merit in the submission of the learned counsel for the respondents.”

(ii) (2013) 2 SCC 606, [Gian Chand and Brothers and another



Vs. Rattan Lal Alias Rattan Singh], wherein the Hon'ble Apex Court at paragraph Nos.21 & 22 has held as follows:

“...21.In A. Raghavamma and another v. A. Chenchamma and another[4], while making a distinction between burden of proof and onus of proof, a three-Judge Bench opined thus: -

“12. ... There is an essential distinction between burden of proof and onus of proof : burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence.”

22. The present case is not one such case where the plaintiffs have chosen not to adduce any evidence. They have examined witnesses, proven entries in the books of accounts and also proven the acknowledgements duly signed by the defendant. The defendant, on the contrary, except making a bald denial of the averments, had not stated anything else. That apart, nothing was put to the witnesses in the cross-examination when the documents were



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exhibited. He only came with a spacious plea in his evidence which was not pleaded. Thus, we have no hesitation in holding that the High Court has fallen into error in holding that it was obligatory on the part of the plaintiffs to examine the handwriting expert to prove the signatures. The finding that the plaintiffs had failed to discharge the burden is absolutely misconceived in the facts of the case."

(iii) (2014) 16 SCC 662, [*Shanker Singh Vs. Narinder Singh and others*], wherein the Hon'ble Apex Court at paragraph Nos.25 & 26 has held as follows:

" ... 25. In this connection, we must as well refer to [Section 20](#) (1) of the Act which reads as follows:-

"[Section 20](#). Discretion as to decreeing specific performance - (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal."

26. Damages and specific performance are both remedies available upon breach of obligations by a party to the contract. The former is considered to be



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a substantial remedy, whereas the latter is of course a specific remedy. It is true that explanation (i) to [Section 10](#) of the Act provides that unless and until the contrary is proved, the Court shall presume that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money. However, this presumption is not an irrebuttable one. That apart, for a specific performance of a contract of sale of immovable property, there must be certainty with respect to the property to be sold.”

and prayed for setting aside the Judgment and Decree in O.S.No.139 of 2008 and allowing the appeal.

9.The learned counsel appearing for the respondents reiterated the stand taken by the respondents 1 & 2 in the written statement and contended that the respondents 1 & 2 have not received any advance as mentioned in the agreement of sale dated 20.09.2002. The appellant failed to prove that agreement of sale / Ex.A1 is an agreement to sell the suit property and failed to prove that appellant paid a sum of Rs.15,00,000/- as advance as alleged in Ex.A1. Even if Ex.A1 is executed for the sale of the property, the appellant did not take any steps to perform his part of



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contract within 18 months as mentioned in Ex.A1. Ex.A2 was not executed by the respondents 1 & 2 and appellant failed to prove that Rs.2,00,000/- was paid on that day. P.W.2, the alleged witness to both Exs.A1 & A2 deposed that he is not aware of contents of documents, who prepared the document and who typed the said documents. He also admitted that no amount was paid in his presence. The 1st respondent had business transaction with appellant, his father and his family members for 20 years. The respondents 1 & 2 borrowed money from the appellant and his family members for purchase of lorry on hire purchase agreement. In the said transaction, appellant and his family members have taken two lorries and they are liable to pay the money to the respondents 1 & 2 after adjusting the loan amount. The 1st respondent acted as an agent of appellant in their business transaction and in purchase of properties on behalf of appellant and his family members and sell them. The 1st respondent was doing finance business. In view of the failure on the part of the 1st respondent in returning the money to the depositors, the suit property was attached.

9(a). On coming to know the attachment, the appellant advised the respondents 1 & 2 to enter into an agreement of sale to save the property



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from attachment. Due to long business association of respondents 1 & 2 with appellant and his family members, the respondents 1 & 2 believed the advise of the appellant and executed Ex.A1 and it is not their intention to sell the property. The respondents 1 & 2 did not receive any amount for execution of Ex.A1 / agreement of sale. Ex.A2 / agreement of extension of time was not executed by the respondents 1 & 2. The appellant failed to prove that he paid Rs.2,00,000/- on the date of Ex.A2. The suit property belongs to joint family of the respondents 1 & 2 and they are not the absolute owners of the suit property. The respondents 1 & 2 have no right to sell the property. The respondents 1 & 2 proved that Ex.A1 is not meant for sale of suit property and did not execute Ex.A2. The appellant has filed the present suit after long delay and after the period of limitation. Due to long delay, the appellant is not entitled to discretionary relief of specific performance. The appellant also is not entitled to alternate relief as he failed to prove the payment of amounts as alleged by him. The learned counsel appearing for the respondents referred to pleadings, evidence of P.W.1, D.W.1 and documents filed and contended that the learned Judge has properly appreciated the materials placed before her and dismissed the suit. There is no reason to interfere with the said judgment of the Trial Court. Further, the respondents 1 & 2 have proved the existence of



attachment in G.O.Ms.No.827, Home (Courts IIA) Department, dated 09.09.2002 and that appellant was aware of the same when Ex.A1 was entered into between the appellant and respondents 1 & 2. In support of his contention, the learned counsel appearing for the respondents relied on the following judgments:

(i) ***(2018) 11 SCC 508, [Nabha Power Limited (NPL) Vs. Punjab State Power Corporation Limited (PSPCL) and another]***, wherein the Hon'ble Apex Court at paragraph Nos.72 has held as follows:

“ ...72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really



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only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract."

(ii) **2021 (4) CTC 330, [M.Kumar Vs. V.Balan]**, wherein the Madurai Bench of this Court at paragraph Nos.12 & 13 has held as follows:

" ... 12. Undisputable facts are as follows:

The agreement is dated 14.12.2004. Six months time fixed for performance had expired on 14.06.2005. Notice demanding specific performance was issued on 11.12.2007 and the suit was filed on 12.06.2008. No doubt, law is settled to the effect that time is not essence of a contract in respect of the contract for sale. [Section 16\(c\)](#) of the Specific Relief Act requires the plaintiff to prove that he was ready and willing to perform his part of the contract. [Section 16\(c\)](#) of the Specific Relief Act imposes a personal bar on the plaintiff to seek relief for specific performance in the absence of proof for readiness and willingness. Even in the absence of a defence, the plaintiff has to



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establish that he was ready and willing to perform his part of the contract. The readiness and willingness must be demonstrated by the plaintiff throughout the period of the contract. However, if the plaintiff fails to establish that he was ready and willing to perform his part of the contract, he is debarred from getting the relief of specific performance.

13. No doubt, the Hon'ble Supreme Court has held that mere delay in filing the suit for specific performance cannot be a ground to non-suit the plaintiff, if he is otherwise shown to be ready and willing to perform his part of the contract. Therefore, the judgment in Lakshmikantham's case cannot be a precedent to interpret law to the effect that the requirements of readiness and willingness were totally dispensed with. If only the plaintiff had issued notice within the time fixed under the agreement and filed the suit at the fag end of the limitation period, the decision in Lakshmikantham 's case would squarely apply and the plaintiff cannot be non-suited for being not ready and willing. But in the case on hand, the plaintiff had kept quiet for nearly 3 years before issuing notice seeking specific performance. No doubt, the delay after issuance of notice cannot be a ground to reject the relief for specific performance. In my considered opinion, the delay in issuing notice would definitely show that the plaintiff was not ready and willing to perform his part of the contract. Once it was found that the plaintiff was not ready and willing to



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perform his part of the contract, the appellate court erred in concluding that the delay in filing the suit cannot be taken as a ground for non-suiting the plaintiff.”

and prayed for dismissal of the appeal.

10. Heard the learned counsel appearing for the appellant as well as the learned counsel appearing for the respondents and perused the entire materials on record.

11. Based on the pleadings and arguments of the learned counsel appearing for the appellant and respondents, the following points have arisen for consideration in this appeal:

(i) Whether respondents 1 & 2 with intention to sell the suit property, executed the agreement of sale / Ex.A1 dated 20.09.2002.

(ii) Whether respondents 1 & 2 executed agreement of extension / Ex.A2 dated 16.03.2004.

(iii) Whether appellant was ready and willing to perform his part of contract to the respondents 1 & 2.



(iv) Whether appellant is entitled to alternate remedy of refund of Rs.36,20,650/- together with interest at the rate of 18%.

Points for consideration (i) to (iii):

12.Since all these points arising for consideration are inter-linked, they are taken up for consideration under one head.

12(i). From the materials on record, it is seen that it is the case of the appellant that the respondents 1 & 2 agreed to sell their property described in the schedule of the plaint for total sale consideration of Rs.30,00,000/-. The terms and conditions was reduced into writing by agreement of sale / Ex.A1 dated 20.09.2002 and the same was registered. In the agreement, it was mentioned that appellant paid a sum of Rs.10,00,000/- by five Demand Drafts of Rs.2,00,000/- each issued by the Indian Bank, Sowcarpet Branch, Chennai paid to the Lakshmi Vilas Bank, Namakkal in discharge of the loan taken by the respondents 1 & 2. The respondents 1 & 2 have earlier received a sum of Rs.4,00,000/- from the appellant. Further, on the date of agreement, the respondents 1 & 2 received a sum of Rs.1,00,000/- from the appellant. The appellant and



respondents 1 & 2 agreed that balance sum of Rs.15,00,000/- has to be paid by the appellant within 18 months from the date of agreement and get the sale deed executed in his favour. When the appellant was ready and willing to pay the balance sale consideration, the respondents 1 & 2 informed the appellant that there is some encumbrance in the property and requested one year time to clear the encumbrance over the suit property. The appellant agreed for the same and the agreement of extension of time / Ex.A2 was executed on 16.03.2004 extending the time till 15.04.2005. In the said agreement, by typing mistake it was typed as 12 months instead of 13 months.

12(ii). On the other hand, it is the case of the respondents 1 & 2 that the respondents 1 & 2 were having business transaction with the appellant, his father and his family members for more than 20 years. The 1st respondent acted as an agent in the finance business carried on by the appellant and his family members on commission basis. He also acted as an agent in respect of purchase and sale of the properties on behalf of appellant and his family members. In addition to that, the respondents 1 & 2 borrowed money from the appellant and his family members for purchase of lorry on hire purchase agreement. The 1st respondent was



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carrying on finance business as Managing Partner in the name and style of “Sri Navaladiyan Syndicate”. He used to receive deposits from the general public and lend money to third parties on interest. The persons who borrowed money from the 1st respondent did not repay the amounts borrowed by them and the 1st respondent could not repay the amounts to the depositors on maturity. On a complaint made by the depositors, a criminal case in C.C.No.9 of 2002 was registered against the 1st respondent and others and the suit property was attached by G.O.Ms.No.827, Home (Courts IIA) Department, dated 09.09.2002. The appellant, on coming to know about the attachment, advised the respondents 1 & 2 to enter into an agreement of sale to safeguard the suit property. Believing the same, the respondents 1 & 2 executed the agreement of sale dated 20.09.2002.

12(iii). The facts and circumstances alleged by the respondents 1 & 2 have to be considered to decide whether the respondents 1 & 2 executed the agreement of sale dated 20.09.2002 with an intention to sell the suit property.



12(iv). The respondents 1 & 2 have stated that they were having business transaction with appellant, his father and his family members for more than 20 years. The appellant has not denied the said contention of the respondents 1 & 2. The appellant and his family members and respondents 1 & 2 are known to each other for more than 20 years and they were not strangers at the time of execution of agreement of sale dated 20.09.2002. In view of the same, it is unbelievable that appellant did not know and respondents 1 & 2 did not inform about the attachment of suit property.

12(v). It is more probable that it is the appellant who advised the respondents 1 & 2 to enter into agreement of sale in order to protect the suit property. Further, the appellant mentioned the details of five Demand Drafts issued by the Indian Bank, Sowcarpet Branch for a sum of Rs.2,00,000/- each. According to appellant, he paid the amounts to Lakshmi Vilas Bank, Namakkal in discharge of loan pending in the said Bank. The appellant has not mentioned that said amount was paid as advance for purchase of suit property and as part payment. The transaction discharging the loan of the respondents 1 & 2 cannot automatically be construed as payment of advance towards sale consideration. Similarly, the appellant has not given any details as to when the sum of Rs.4,00,000/-



was given to the respondents 1 & 2. As far as the sum of Rs.1,00,000/- alleged to have been paid by the appellant to the respondents 1 & 2 on the date of execution of agreement of sale dated 20.09.2002, the appellant examined one Nachimuthu as P.W.2, one of the witnesses to the said agreement to prove the said payment. P.W.2 / Nachimuthu deposed that he is not aware as to who prepared the document, who typed it and also the contents of document. He deposed that no amount was paid in his presence. Therefore, the appellant has failed to prove the payment of Rs.15,00,000/- as alleged in the agreement of sale dated 20.09.2002 and failed to prove that part payment of sale consideration i.e., Rs.15,00,000/- as advance especially that the sum of Rs.10,00,000/- paid to Lakshmi Vilas Bank, Namakkal to discharge the loan of respondents 1 & 2 is in fact advance for purchasing the suit property. On the failure on the part of the appellant to prove the payment of Rs.15,00,000/- as advance and in view of long standing business transactions, the appellant and his family members and respondents 1 & 2 had, the contention of the respondents 1 & 2 that agreement of sale dated 20.09.2002 was executed on the advise of the appellant only to safeguard the property attached by the Court Exhibit, Ex.C1 is acceptable.



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12(vi). As far as the agreement of extension of time dated 16.03.2004 marked as Ex.A2 is concerned, it is the case of the appellant that when he was ready to pay the balance sale consideration and get the sale deed executed in his name, the respondents 1 & 2 informed him about the encumbrance in the suit property and requested one year time to clear the encumbrance over the suit property. The appellant agreed for the same and Ex.A2 was entered into between the respondents 1 & 2 and appellant. On the date of Ex.A2, the appellant paid a sum of Rs.2,00,000/- to the respondents 1 & 2. On the other hand, the respondents 1 & 2 denied having entered into such an agreement of extension marked as Ex.A2 and denied the signature in Ex.A2. The respondents 1 & 2 contended that signatures in Exs.A2 and A3 were varied. To substantiate the contention of the appellant that Ex.A2 is a genuine agreement entered into between the appellant and respondents 1 & 2, the appellant examined one Nachimuthu, one of the witnesses of Ex.A2 as P.W.2. P.W.2 deposed that he is not aware, who has prepared and typed Ex.A2 and its contents. P.W.2 also deposed that no money was paid in his presence. The respondents 1 & 2, in Ex.A5-reply notice dated 12.12.2007 as well as in the written statement denied execution of Ex.A2. Ex.A5 / reply notice issued by the respondents 1 & 2 is dated 12.12.2007. The appellant filed the suit on 15.04.2008. Till



such time from 12.12.2007 to 15.04.2008, the appellant did not send any rejoinder denying the contention of respondents 1 & 2 in Ex.A5 / reply notice dated 12.12.2007. Similarly the appellant has not filed any reply statement denying the contention of the respondents 1 & 2 and denying the execution of Ex.A2 in the written statement and forging of signatures in Ex.A2. When a signature in a document is disputed, the Court can obtain opinion of hand writing expert with regard to genuineness of disputed signature. The Court also has power to compare the disputed signature with admitted signature and come to a conclusion that disputed signature is genuine or not. In the present case, the learned Judge opted to exercise her power as per law and compared the signatures in Ex.A2 with signatures in Ex.A1. On such comparison, the learned Judge has concluded that not only the signature of the respondents 1 & 2 in Ex.A2, but the signature of witness P.W.2 also differs and on such conclusion, held that respondents have not executed Ex.A2. The learned Judge has exercised her power properly and there is no reason to interfere with the said finding.

13.The learned counsel appearing for the appellant contended that the appellant has filed application for obtaining opinion of hand writing expert with regard to genuineness of signatures in Ex.A2 and the learned



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Judge without considering and passing order in the said application, had herself compared the signatures and given a finding which is not proper.

The said contention is not acceptable. When the learned Judge is not considering and passing any order on the application filed by the appellant to obtain hand writing expert opinion, he could have easily approached this Court seeking a direction to the learned Judge to consider and pass orders on merits on his application. Having failed to do so, it is not open to the appellant to find fault with the procedure followed by the learned Judge, which is available to her as per law.

14.As far as the readiness and willingness of the appellant to perform his part of contract, i.e., paying the balance sale consideration and getting the sale deed executed in his favour is concerned, the issue is whether the appellant proved his contention that he was always ready and willing to pay the balance sale consideration and get the sale deed executed in his favour. As per the agreement of sale dated 20.09.2002 / Ex.A1, 18 months time was fixed for the appellant to pay the balance sale consideration and get the sale deed executed in his favour. The appellant has not stated that before expiry of 18 months of time limit, he approached



the respondents 1 & 2 that he was ready to pay the balance sale consideration and get the sale deed executed in his favour. Even in Ex.A2, the appellant had not stated that he offered to pay the balance sale consideration within 18 months from the date of A1. In Ex.A2, it has been stated that in view of encumbrance like attachment of suit property at the request of the appellant, the respondents 1 & 2 have agreed to clear the encumbrance and execute the sale deed and extended the time for 12 months up to 15.04.2005. The appellant has not stated when he came to know about the attachment and when he approached the respondents 1 & 2 to clear the said attachment and no details have been stated in Ex.A2. The appellant also did not prove that only due to encumbrance he did not perform his part of contract. According to appellant, he issued Ex.A3 / notice dated 05.05.2005 to the respondents 1 & 2. The respondents 1 & 2 denied the receipt of Ex.A3. The appellant has not mentioned the issue of notice dated 05.05.2005 in the body of the plaint but only mentioned in the list of documents. The appellant has not filed any document to prove that the said notice was served on the respondents 1 & 2.

15. According to appellant, the respondents 1 & 2 did not send any reply. In such circumstances, the appellant did not approach the Court for



relief of specific performance immediately or within reasonable time from 05.05.2005. On the other hand, after two and half years, the appellant sent another notice dated 17.11.2007 marked as Ex.A4. In Ex.A4, the appellant did not mention about issuing Ex.A3 / notice. In Ex.A4, the appellant mentioned that respondents 1 & 2 were making arrangement to sell the suit property for exorbitant price and hence, the appellant has given publication in two Tamil Daily Newspapers viz., 'Kalai Kathir' on 11.04.2007 and in 'Malai Malar' on 27.04.2007, stating that he is an agreement holder and prospective purchaser of suit property. The respondents 1 & 2 sent reply notice dated 12.12.2007, which was marked as Ex.A5 denying their intention to sell the suit property as per Ex.A1 and denied the execution of Ex.A2. After paper publication dated 11.04.2007 and 27.04.2007 and reply notice dated 12.12.2007, the appellant did not approach the Court immediately to get the relief of specific performance. He filed the suit only on 15.04.2008 on the last date of limitation.

15(i). When the vendor in an agreement of sale is making arrangements to sell the property to third party, any prudent purchaser would immediately approach the Court for relief of specific performance. The appellant, who is a Financier failed to approach the Court immediately



which shows that he was not ready and willing to perform his part of contract.

15(ii). It is well settled that in an agreement of sale of immovable property, time is not essence of contract unless it is specifically mentioned in the agreement of sale that time is essence of contract. The vendor may fix the time as essence of contract for various purposes like the discharge of loan, expenses for family function, to purchase another property, etc.,. Hence, when time is not essence of contract, Court have repeatedly held that purchaser must approach the Court within the time limit mentioned in the agreement of sale or within a reasonable time when the vendor refuses to perform his part of contract. The Courts have deprecated the practice of approaching the Court for relief of specific performance after delay of considerable time and on the last day of limitation. In the present case, there is nothing on record to show that appellant expressed his readiness and willingness to perform his part of contract as mentioned in Ex.A1 and within the time limit as mentioned in Ex.A2. Even after receiving Ex.A5 / reply notice dated 12.12.2007, the appellant did not approach the Court within reasonable time.



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15(iii). It is pertinent to note that appellant has issued paper publication in two Tamil Daily Newspapers viz., 'Kalai Kathir' on 11.04.2007 and in 'Malai Malar' on 27.04.2007 as mentioned in Ex.A4 / notice. In Ex.A4, appellant had stated that the respondents 1 & 2 are making arrangements to sell the suit property for exorbitant price and that he is an agreement holder and prospective purchaser. When according to appellant, the respondents 1 & 2 are making arrangements to sell the property as early as on 11.04.2007, any prudent man, especially a person like appellant, who is doing finance business would not have waited for one year but the appellant has approached the Court only on 15.04.2008. As per Section 16(c) of Specific Relief Act, 1963, the relief of specific performance is a discretionary relief. The Court has power to reject the said relief to the plaintiff on the facts and circumstances of the case when the Court is of the opinion that plaintiff is not ready and willing to perform his part of contract. In the present case, even though the appellant has alleged that he was always ready and willing to perform his part of contract, the appellant failed to prove the same. As per first explanation to Section 16(c) of Specific Relief Act, 1963, the purchaser is not bound to tender the balance amount or deposit into Court. But in the judgment reported in **1999 (6) SCC 337**, relied on by the learned counsel appearing



for the appellant, the Hon'ble Apex Court held that inspite of said explanation, the purchaser / plaintiff can always tender balance amount or deposit into Court towards performance of his obligation under the contract. Such a tender rather exhibits willingness of purchaser / plaintiff to perform his part of obligation. In the present case, the appellant failed to prove that he tendered the balance sale consideration. The conduct of the appellant from the materials on record clearly shows that he was not ready and willing to perform his part of contract.

15(iv). In view of the above, the judgments relied on by the learned counsel appearing for the appellant, in the facts and circumstances of the case stated above, do not advance the case of the appellant. The judgments relied on by the learned counsel appearing for the respondents are squarely applicable to the facts of the present case.

16.For the above reasons, all the three points are answered against the appellant and in favour of the respondents.

Point for consideration (iv):



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17.The alternative relief of refund of Rs.36,20,650/- is comprised of Rs.17,00,000/- alleged to have been paid by appellant to respondents 1 & 2 as advance to purchase the suit property. The balance amount is interest on Rs.17,00,000/-. From the materials on record, it is seen that it is the case of the appellant that on the date of agreement, he paid a sum of Rs.1,00,000/- by cash and the respondents 1 & 2 have received a sum of Rs.4,00,000/- by cash on earlier occasion. The appellant has not let in any evidence to prove that he paid a sum of Rs.4,00,000/- cash before the date of agreement and a sum of Rs.1,00,000/- cash on the date of alleged agreement, Ex.A1.

17(i). Balance amount of Rs.10,00,000/- is concerned, according to appellant he paid the same to respondents 1 & 2 by five Demand Drafts each for Rs.2,00,000/- issued by the Indian Bank, Sowcarpet Branch, Chennai. It is the case of the respondents that appellant and respondents 1 & 2 had number of transaction like, respondents 1 & 2 borrowed money for purchase of lorries on hire purchase agreement from appellant, his father and family members of appellant. The respondents 1 & 2 also state that appellant has taken two lorries and did not pay the balance amounts after adjusting the loan amounts. The 1st respondent also took a stand that



1st respondent was acting as agent in the Financial Business and Real Estate Business of appellant and his family members and he used to receive commission for his work. In the cross examination, the 1st respondent as D.W.1 stated that he gave Rs.10,00,000/- in cash to the appellant at Chennai and appellant took five Demand Drafts for Rs.2,00,000/- each and paid the same to Lakshmi Vilas Bank, Namakkal. According to 1st respondent, the appellant convinced the 1st respondent that only if Demand Drafts are taken at Chennai, the agreement of sale and payment of advance amount will be believed and accepted. In as much we have held that agreement of sale / Ex.A1 is not executed by respondents 1 & 2 with an intention to sell the property but it was to prevent the attachment of suit property based on the complaint given by creditors of 1st respondent. The version of the 1st respondent is more probable and acceptable. We have already held that Ex.A1 is not an agreement executed by respondents 1 & 2 with an intention to sell the property. The appellant did not deny that respondents 1 & 2 were having financial transaction with appellant, his father, brother and family members and also 1st respondent acted as an agent in their Finance and Real Estate Business. Therefore, it cannot be safely concluded that the payment of Rs.10,00,000/- by way of Demand Drafts to Lakshmi Vilas Bank, Namakkal is really advance



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amount for Ex.A1. In view of the same, we hold that the appellant did not prove that he paid a sum of Rs.17,00,000/- as advance. In view of the same, the appellant is not entitled to alternate relief as claimed by him. Point (iv) is answered against the appellant.

18.The learned Judge has considered all the materials placed before her in proper perspective and dismissed the suit filed by the appellant by giving cogent and valid reason. We find no reason to interfere with the well considered judgment to set aside the same.

19.For the above reasons, this appeal stands dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

(V.M.V., J) (S.S., J)

18.10.2022

krk

Index : Yes / No

Internet : Yes / No

NOTE: Issue order copy by 27.10.2022.



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To

- 1.The Additional District Judge,
Namakkal.
- 2.The Section Officer,
VR Section,
High Court,
Madras.

V.M.VELUMANI, J.
and
S.SOUNTHAR, J.

krk

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18.10.2022