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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.03.2022

Delivered on : 13.04.2022

CORAM :

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

A.S.No.47 of 2013

V.Ayyappan ... Appellant/ Defendant

Vs.

G.R.Thiagasundara Mudaliar ... Respondent/ Plaintiff

Prayer : Appeal Suit filed under Section 96 and Order 41 Rule 1 of the Code of Civil Procedure against the judgment and decree dated 21.09.2012, passed in O.S.No.19 of 2009 on the file of the District & Sessions Court, Thiruvarur.

For Appellant : Mr.J.Kannan

For Respondent : Mr.C.Uma Shankar

J U D G M E N T

The appeal has been filed against the judgment and decree, dated 21.09.2012, passed in O.S.No.19 of 2009 on the file of the District Court, Thiruvarur.

2.The defendant, who suffered a decree for specific performance before the trial Court, is the appellant herein.

3.For the sake of convenience, the appellant shall hereinafter be referred to as "defendant" and the respondent shall be referred to as "plaintiff".

4.The case of the plaintiff is as follows :

- The defendant, who is a lessee in the suit property which belongs to Sri Thiagarajaswamy Devasthanam Annadhana Kattalai, administered by Sri Thiagarajaswamy Temple, Thiruvarur ("the Temple" for brevity), entered into an agreement with the plaintiff on 04.02.2004 to transfer the right of lease in favour of the plaintiff, for a sale consideration of Rs.13,50,000/-.

- The suit property is a landed property, comprising of trees, plants and vacant land, on which, there is a saw-



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mill, three shops rented out to third parties, an office and the defendant's residential house.

- On the date of agreement, i.e. on 04.02.2004, the plaintiff paid an advance of Rs.2,00,000/- to the defendant by way of cheque.
- It was agreed that the plaintiff shall pay another sum of Rs.1,50,000/- before February, 2004 and the balance sale consideration before July, 2004.
- It was also agreed that the defendant has to discharge the loan which he has availed from Thiruvavur Vijayapuram Lakshmi Narayana Co-operative Bank and after discharge, to deposit the title deeds and other details relating to discharge, with the plaintiff. It was also agreed that the defendant has to discharge all his other liabilities with the advance amount of Rs.3,50,000/-, which the defendant receives from the plaintiff.
- The defendant agreed to hand over all the original documents of the suit property at the time of registration, including vacant possession of shops, his house, office, saw-mill, etc.
- Pursuant to the execution of the agreement, the defendant received various amounts in the following manner :

S.No.	Date	Amount	Mode
1.	04.02.2004	Rs.2,00,000/-	Cheque
2.	22.04.2004	Rs.1,50,000/-	Cheque
3.	09.06.2004	Rs.75,000/-	Cheque
4.	06.11.2004	Rs.1,00,000/-	Cheque
5.	22.02.2005	Rs.25,000/-	Cheque
6.	26.05.2005	Rs.1,00,000/-	Cheque
7.	27.01.2007	Rs.15,000/-	Cash

- The receipts of these amounts were duly endorsed by the defendant.
- Since time was not essence of the contract, the plaintiff was hopefully waiting for the defendant to discharge the loan with the advance amount paid by the plaintiff.
- The plaintiff was always ready and willing to pay the balance sale consideration and get the sale deed executed in his favour, however, the defendant was reluctant in completing the transaction of sale and was avoiding the plaintiff.
- Therefore, the plaintiff caused a legal notice dated 17.02.2009, calling upon the defendant to receive the balance sale consideration and to execute the sale deed in his favour.
- The defendant sent a reply notice dated 18.05.2009, stating that the agreement, dated 04.02.2004, stood cancelled.
- The plaintiff issued a rejoinder on 28.05.2009, denying the cancellation, for which, there was no reply from the defendant.



5. The defendant filed his written statement, admitting the agreement dated 04.02.2004 and receipt of various amounts from the plaintiff as stated above, but taking his defence as follows :

6. On the above pleadings, the trial Court framed the following issues:

- 7.The following additional issue was also framed by the trial Court :

8. On the side of the plaintiff, P.W.1 and P.W.2 were examined and Exs.A1 to A10 were marked. The defendant



examined himself as D.W.1. No document was marked on the side of the defendant.

9. The trial Court, on considering the oral and documentary evidence on record, came to a conclusion that the suit is not barred by limitation; that the plaintiff has not committed any breach of the contract; that there is no mutual cancellation of the agreement dated 04.02.2004; the plaintiff was ready and willing to perform his part of the contract from the beginning and therefore, by a judgment and decree dated 21.09.2012, decreed the suit directing the defendant to execute and register the sale deed in respect of the suit property in favour of the plaintiff on receipt of balance sale consideration in pursuance of the agreement of sale, dated 04.02.2004, within two months from the date of decree.

10. Challenging the judgment and decree, dated 21.09.2012, passed by the trial Court, the defendant has filed the present appeal before this Court.

11. Mr. J. Kannan, learned counsel for the appellant/defendant, made the following submissions before this Court :

- The suit property belongs to the Temple and therefore, any alienation or transfer of the lease for a period of five or more than five years would require prior permission of the Commissioner of HR & CE Department, as contemplated under Section 34 of the Hindu Religious and Charitable Endowments Act, 1959 ("HR & CE Act" for brevity).
- Any such transfer of immovable property of the Temple or any sale deed executed without obtaining sanction of the Commissioner of HR & CE Department, including lease rights, is void ab initio. In the present case, no such sanction has been obtained from the Commissioner of HR & CE to sell the suit property to the plaintiff.
- Therefore, the defendant cannot be forced to execute the sale deed in pursuance of the sale agreement dated 04.02.2004.
- Since the defendant is only a lessee under the Temple, he cannot transfer either the lease or ownership of the leased suit property to any third party.
- Since the defendant was in urgent need of money, he had executed the sale agreement to the plaintiff, which cannot be acted upon in view of the bar under Section 34 of the HR & CE Act.
- The defendant is always ready to repay the advance amount received from the plaintiff.
- The agreement (Ex.A1) stipulates the time limit as July, 2004, therefore, the limitation has to be reckoned from 01.08.2004 and it expires on 01.08.2007. But the suit is filed in October, 2009, which is barred by limitation.
- The agreement Ex.A1 was orally cancelled by the parties with mutual consent, forfeiting the right of either



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parties to enforce the same.

- The plaintiff took three years' time to make payment of 50% of the sale consideration, that too in installments, as against the period of six months contemplated in the sale agreement dated 04.02.2004 (Ex.A1).
- The plaintiff has issued the pre-suit notice after a gap of two years from the date of last payment, i.e. on 17.02.2009.
- The plaintiff has not shown continuous readiness and willingness in performing his part of the contract.
- Ex.A1 is time bound and the parties have never extended the time.
- The suit property belongs to the Temple and therefore, the suit is bad for non-joinder of the Temple as a party.
- The intention of the plaintiff is only to grab the property at a lesser price than that mentioned in Ex.A1.

12.The learned counsel relied on the judgment of the Hon'ble Supreme Court in Shenbagam and others v. Rathinavel K.K. [2022 (1) TNLJ 104 (Civil)] and submitted that, mere averment of the plaintiff that he was waiting for discharge of the loan by the defendant, is not sufficient to prove his willingness, but the burden lies on the plaintiff to prove that he is ready and willing to perform the contract, and prayed to set aside the judgment and decree of the trial Court.

13.Per contra, Mr.C.Uma Shankar, learned counsel appearing for the respondent/plaintiff, made the following submissions before this Court :

- Though the suit property belongs to the Temple, lease rights can be transferred in favour of a third party without any sanction from the Commissioner of HR & CE Department.
- Therefore, the agreement Ex.A1 is valid and can be enforced without any sanction, whatsoever.
- Under Clauses 2 and 3 in Ex.A1, the defendant has agreed to discharge his loans with the aid of the advance amount paid by the plaintiff and produce the documents with regard to such discharge, but the defendant has not produced any such documents, so far.
- Such a breach of contract by the defendant has been admitted by himself (D.W.1) in the cross-examination.
- However, the plaintiff has always been ready and willing to perform his part of the contract, and to show his bona fide, he has deposited the balance sale consideration of Rs.6.85 Lakhs before the Court.
- The receipt of part payments till the last payment on 27.01.2007 itself proves that the parties never intended to make time as essence of the contract.
- D.W.1 has admitted that, in the mean time, he has handed over only two shops to the plaintiff, which shows that the agreement is still in force, however, D.W.1 has admitted that, still one shop is under rental occupation



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and he has not handed over vacant possession of the same within six months, which shows the non-willingness on the part of the defendant.

- There is no evidence on the side of the defendant to prove that Ex.A1 is cancelled, however, the defendant has taken such a false plea before the Court.
- Therefore, the trial Court has rightly decreed the suit and this appeal is liable to be dismissed.

14. Heard the learned counsel on either side and perused the entire materials available on record.

15. It is not in dispute that the suit property belongs to the Temple and the defendant is the lessee in the suit property under the Temple. The execution of the agreement dated 04.02.2004 (Ex.A1) is admitted by either of the parties. The payment and receipt of various amounts on various dates as tabulated supra, totally a sum of Rs.6,65,000/- is also admitted. Now, based on the rival submissions, the points arising for consideration are :

- i. Whether the agreement Ex.A1 is valid and enforceable or hit by Section 34 of the HR & CE Act ?
- ii. Whether the agreement Ex.A1 was cancelled ?
- iii. Whether time is the essence of the agreement Ex.A1 ?
- iv. Whether the suit is barred by limitation ?
- v. Whether the suit is bad for non-joinder of the Temple as a party ?
- vi. Whether the plaintiff has committed default in performing his part of the contract ?
- vii. Whether the plaintiff has shown his readiness and willingness to execute his part of the contract ?
- viii. Whether the plaintiff is entitled to the relief of specific performance ?
- ix. To what other relief, the plaintiff is entitled to ?

Point Nos.1 and 5:

16. It is admitted by both the parties that the suit property is the property of the Temple and the defendant is the lessee under the Temple and is in possession and enjoyment of the suit property till date.

17. The plaintiff (P.W.1), in his evidence, has deposed that the suit properties belong to Sri Thiyagarajaswamy Devasthanam Annadhana Kattalai, administered by Sri Thiyagarajaswamy Temple, Thiruvavur; the defendant's father accepted the pakuthi of the Temple and was paying the pakuthi to the Temple and after he expired, the defendant was serving as pakuthidharar to the Temple and he has been paying pakuthi to the Temple and he is residing and running his business in the suit property.



18.The defendant (D.W.1), in his evidence, has deposed that the suit properties belong to Sri Thiagarajaswamy Devasthanam Annadhana Kattalai, administered by Sri Thiagarajaswamy Temple, Thiruvavur; he is a pakuthidharar in the suit property; he has inherited the same from his father; he is running his business in the suit property and he is in possession and enjoyment of the suit property.

19.In the agreement dated 04.02.2004 (Ex.A1), it is stated that the defendant's father received the leasehold right of the suit property from one Thiruvavur Madappuram V.Krishnamurthy Mudaliar on 21.04.1980 vide a Transfer of Lease Right Document and he was in possession and enjoyment of the same; from 15.07.1981, it is in possession and enjoyment of the defendant and the defendant is residing and running business in the said property; after the defendant's father expired on 23.10.1981, the defendant is in independent enjoyment and possession of the suit property.

20.Whereas, there is not even an iota of documentary evidence on record to substantiate the lease rights of the original lessee, namely, Thiruvavur Madappuram V.Krishnamurthy Mudaliar, or the lease right obtained by the defendant's father or the lease right held by the defendant or the period of lease in all the cases or whether there is any clause in the lease agreements to transfer the same to other parties. In the absence of any such documents, the very locus standi of the defendant to execute an agreement for transfer of his leasehold rights, itself is doubtful. However, in a suit for specific performance, the said aspect not be gone into, and this Court has to decide only as to whether the parties can be directed to perform their part of the contract under question, or not. Therefore, even the Temple need not be a necessary party to this suit. In the case on hand, since both the parties have expressly admitted in their evidence, the leasehold rights of the defendant and his possession and enjoyment of the suit property which belongs to the Temple right from the lifetime of the defendant's father and since it is stated in Ex.A1 that the defendant has given the photocopies of such documents to the plaintiff for his perusal, assuming the defendant to be a leaseholder of the suit property under the Temple and he has locus standi to transfer the lease-hold rights, the question is whether the agreement Ex.A1 to transfer the leasehold rights of the defendant to the plaintiff for an unspecified period of time, is valid and enforceable without obtaining sanction from the Commissioner of HR & CE Department as per Section 34 of the HR & CE Act, which admittedly, has not been obtained.

21.Section 34 of the HR & CE Act reads as follows :

"34. Alienation of immovable trust property.-

(1) Any exchange, sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to, or given or endowed for the



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purpose of, any religious institution shall be null and void unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution :

Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in such manner as may be prescribed, inviting objections and suggestions with respect thereto; and all objections and suggestions received from the trustee or other persons having interest shall be duly considered by the Commissioner :

[Provided further that the Commissioner shall not accord such sanction without the previous approval of the Government]."

22. On a perusal of the above provision, it is clear that any lease for a term exceeding five years of any immovable property belonging to the religious institution shall be null and void, unless it is sanctioned by the Commissioner. On a perusal of the agreement in question (Ex.A1), there is no specific mention about the period of lease for which the transfer is intended, and the transfer is intended to be in entirety, which implies that it is for a period of more than five years, in which case, prior sanction from the Commissioner of HR & CE Department as per Section 34 of the HR & CE Act, is mandatory. Useful reference can be made to the judgment of this Court in the case of A. Shahul Hameed v. The Commissioner, HR & CE Department of Tamil Nadu [W.P.Nos.2740 & 2741 of 2014, dated 03.05.2018], and the relevant portions are extracted hereunder :

"6. Considering the arguments as advanced by the learned counsel appearing on behalf of the writ petitioners and the learned Special Government Pleader appearing on behalf of the respondents 1 and 2, this Court is of an opinion that the parties have admitted the fact that the lands belong to Arulmigu Chockanadhar Swamy Thirukoil (Kurichi), Palayamkottai, Tirunelveli District, there is no dispute in respect of the title and ownership of the lands which belong to the temple. Further, it is admitted by the writ petitioners that the original lessees were Mr. Veerabathiran and Mr. Muthu. The said two persons acquired the leasehold rights by way of deeds executed by the temple Authorities during the relevant point of time. However, the writ petitioners are claiming leasehold rights only on the basis of the transfer of lease deeds executed by the original lessees, namely Mr. Veerabathiran and Mr. Muthu. Thus, the writ petitioners themselves admitted the fact that they are not the direct leaseholders by the temple Authorities. There are no lease deeds executed by the temple Authorities in favour of the writ petitioners. Only on the basis of



the transfer of lease deeds executed by the original lessees, the writ petitioners are claiming leasehold rights.

7.This apart, the very object and purpose of the Hindu Religious and Charitable Endowment Act is to ensure that every lease and license granted in respect of the temple properties must be direct and the Authorities competent alone have to execute such lease deeds or grant permission or license. In the absence of any such valid document, all persons who are in occupation of the temple lands are to be treated as encroachers. Thus, a valid lease-hold right has to be established only through acceptable legal documents and mere execution of transfer of lease deeds by the original lessees cannot constitute or provide any lease-hold right to the writ petitioners.

...

14.In this view of the matter, this Court is of an opinion that the writ petitioners are not the original lessees. They claim rights only based on the transfer of lease deeds executed contrary to the terms and conditions of the Act and Rules. Further, even the lease period has not been mentioned in the transaction. This apart, even under Section 34 of the Act, the period of lease is to be mentioned and if the lease period exceeds five years, then necessary permission has to be obtained from the Commissioner of HR&CE Department as well as from the Government. In the absence of any such valid lease deed, the persons who are in occupation of the temple properties are to be treated as encroachers."

23.In the cases cited supra, the parties therein, who have acquired the lease from the original lease holders of the Temple property, without adhering to the conditions stipulated under Section 34 of the Act, were considered as encroachers, which renders the transfer of lease deeds as illegal.

24.Therefore, as per the conditions stipulated under Section 34 of the HR & CE Act and in the light of the decision of this Court extracted supra, this Court has no hesitation to hold that, any deed of transfer of leasehold right by the defendant in respect of the suit properties, which admittedly belong to the Temple, for an indefinite period, without obtaining prior permission from the Commissioner of HR & CE Department, as contemplated under Section 34 of the HR & CE Act, is null and void.

25.Pausing here for a while, it can be seen that the agreement Ex.A1 deals only with the transfer of leasehold rights of the defendant to the plaintiff for a valuable



consideration and it is not intended for sale of the suit properties which belong to the Temple. However, the relief sought for in the plaint is for execution of sale deed in respect of the suit properties, which reads as follows :

"(a) directing the defendant to execute and register the sale deed for the under mentioned property in favour of the plaintiff on receipt of balance of sale consideration in pursuance of the agreement of sale dated 04.02.2004, within a stipulated period failing which to direct the officer of the Court to execute and register the sale deed in favour of the plaintiff or refund of advance Rs.6,65,000/- with interest."

26.Surprisingly, the trial Court has also granted the relief as sought for in the plaint and the decree of the trial Court is as follows :

"1.The suit is decreed and the defendant is directed to execute and register the sale deed for the suit properties in favour of the plaintiff on receipt of balance of sale consideration in pursuance to the agreement of sale dated 04.02.2004 within two months failing which the officer of this Court will execute the sale deed in favour of the plaintiff."

27.Therefore, on this very ground itself, the decree of the trial Court issuing direction to execute and register the sale deed for the suit properties, is liable to be set aside.

28.Resuming back to the discussion, during the course of his arguments, the learned counsel for the plaintiff submitted that, in any event, a deed of transfer of lease rights alone can be said to be barred under Section 34 of the Act without prior sanction, but not an agreement for transfer of lease rights, i.e., Ex.A1, which is still valid and not barred under Section 34 of the Act, as this Court, being an Appellate Court, can very well pass a decree directing the defendant to obtain sanction from the competent authorities at any point of time before execution of a deed of transfer.

29.As Section 34 of the Act bars only a deed of transfer, but not an agreement for transfer of lease-hold rights, inasmuch as the sanction can be obtained even after entering into the agreement for transfer and before execution of transfer deed, and the agreement in question Ex.A1 is such an agreement for transfer of lease rights, it is valid, but enforceable only after obtaining necessary sanction as per Section 34 of the Act. Point Nos.1 and 5 are answered accordingly.

30.But, there is no specific prayer in the plaint to execute and register the deed of transfer or to direct the defendant to obtain sanction under Section 34 of the Act.



However, since the Courts are bound to decide the real controversies between the parties and give a quietus to all the issues on hand and also considering the extensive span of time the parties have spent before the Courts altogether right from the year 2009 and to avoid a second round of litigation, this Court does not want to throw away the suit merely for the mistake in the prayer portion, but proceeds to answer the rest of the issues to ultimately decide as to whether the plaintiff is entitled to the relief of specific performance based on Ex.A1.

Point No.2 :

31.It is the case of the defendant that, few days after the receipt of the last payment on 27.01.2007, the plaintiff told him that he was not willing to get the transfer of leasehold and said that the agreement stands cancelled and asked the defendant to return all the amounts paid by him; the defendant agreed to the same, but when he returned the amount, the plaintiff refused to get the same and demanded interest, however, since the plaintiff has committed breach in payment of balance sale consideration, the defendant denied interest; thereafter, the plaintiff kept quiet till he sent the legal notice; in any event, Ex.A1 remained cancelled by mutual consent.

32.Such an allegation of the defendant and any suggestion in that regard has been completely denied by the plaintiff in his evidence. Moreover, for the rejoinder sent by the plaintiff denying the cancellation of Ex.A1, the defendant has not chosen to send any reply. Further, there is no clause in Ex.A1 for automatic cancellation of the agreement after expiry of the time stipulated therein. It is trite that the burden is on the defendant to prove his allegation. However, there is no iota of evidence on the side of the defendant to prove that the agreement Ex.A1 was mutually and orally cancelled by the parties. However, D.W.1, in the cross-examination, has admitted that he did not refuse to receive any belated payment made by the plaintiff, nor had he sent any written communication or lawyer's notice to the plaintiff, stating that the agreement is cancelled or demanding him to get back his money. Therefore, this Court cannot countenance the allegation of cancellation of Ex.A1, put forth by the defendant and it remains unproved. Thus, the agreement Ex.A1 is not cancelled. Point No.2 is answered accordingly.

Point No.3 :

33.It is true that the agreement Ex.A1 stipulates a time of six months for payment of balance sale consideration by the plaintiff. Clause Nos.2 and 3 in Ex.A1 state that the plaintiff has to pay the balance sale consideration before July, 2004, and get the deed executed; the defendant has to clear all his liabilities with the advance amount paid by the plaintiff and deposit the relevant documents relating to such discharge, to the plaintiff. Clause No.8 stipulates that the



Point Nos.6 to 8 :

36.Clause No.2 of the agreement Ex.A1 casts two obligations on the plaintiff towards performance of the contract, viz., the plaintiff shall deposit a sum of Rs.1,50,000/- out of the balance sale consideration, to the defendant, before the end of February, 2004; further, the plaintiff has to pay the remaining balance sale consideration before July, 2004, and get the sale deed executed at his own cost.

37.Clause No.3 casts certain obligations on the defendant, viz., the defendant shall, out of the advance amount received from the plaintiff (Rs.2,00,000/- as on the date of agreement), discharge the loan availed by him in the name of his saw-mill from Thiruvavarur Vijayapuram Lakshmi Narayana Co-operative Bank and deposit the documents showing the discharge of loan with the plaintiff, forthwith. Further, out of the second installment of Rs.1,50,000/- to be received from the plaintiff, the defendant shall clear all his other debts and liabilities and deposit the documents regarding such discharge with the plaintiff before preparing the deed." The relevant portion of Ex.A2 is as follows :

"2. ... மீதமுள்ள கிரய தொகையில் ரூ.1,50,000/- (ரூபாய் ஒரு லட்சத்து ஐம்பதாயிரம் மட்டும்) பிப்ரவரி 2004 முடிவிற்குள் தாங்கள் எனக்கு கொடுத்துவிட வேண்டியது. அது போக பாக்கி உள்ள தொகையை ஜூலை 2004 தேதிக்குள் (6 மாத காலத்தில்) எனக்கு செலுத்தி, தங்கள் செலவில், கிரயத்தை முடித்துக் கொள்ள வேண்டியது. அதற்காக சட்டப்படி தங்களுக்கு தேவைப்படும் சகல பத்திரங்களையும், டாக்குமெண்டுகளையும் கடன் தீர்ந்த விவரங்களையும் நான் தங்களிடம் தந்துவிடவும், தேவையான பத்திரங்களை கையெழுத்து செய்து தரவும் சம்மதிக் கின்றேன் .

3.நான் தங்களிடமிருந்து பெற்றுக் கொண்டுள்ள அட்வான்ஸ் தொகையிலிருந்து முதலில் திருவாரூர், விஜயபுரம் லெட்கமி நாராயண கூட்டுறவ , வங்கியில் என்னுடைய வெங்கடேசுவரர் வார்ப்பட்டரை பெயரில் நான் பெற்றுக் கொண்டு நிலுவையில் உள்ள கடனை முழுதும் தீர்த்து அது குறித்த டாக்குமெண்டுகளை உடன் தங்களிடம் ஒப்ப,விக் க சம்மதிக் கின்றேன் . இது தவிர நான் தங்களிடமிருந்து பெறும் முதல் இரண்டாவது தொகையிலிருந்து என்னுடைய வியாபாரத்திற்காகவும், பையன்கள் படிப்ப, சிலவிற்காகவும், குடும்ப சிலவிற்காகவும் எனக்கு ஏற்பட்ட சகல கடன்களையும் என் பொறுப்பில் முழுதும் தீர்த்து விட நான் சம்மதிக் கின்றேன் . கடன்களை தீர்ந்தது குறித்த ஆவணங்களை கிரய சாசனம் எழுதும் முன் தங்களிடம் ஒப்ப,விக் க சம்மதிக் கின்றேன் . "

38.The plaintiff (P.W.1), in the cross-examination, has admitted that he has not paid the further amount of Rs.1,50,000/- before February, 2002, but he has paid the same only on 22.04.2004. He further admits that he had agreed to pay the entire balance sale consideration to the defendant within six months, however, he has not paid the balance sale consideration within July, 2004.



41. Even in the present case on hand, there is an unconditional promise by the plaintiff to pay the second installment of Rs.1,50,000/- before the end of February, 2004 and it does not depend upon the deposit of documents for discharge of loan by the defendant, and hence, nothing prevented the plaintiff from paying the second installment within February, 2004, even if the defendant had failed to deposit the documents. However, the same has not been done by the plaintiff, rather the second installment of Rs.1,50,000/- was paid by him only on 22.04.2004. Therefore, this Court finds that the plaintiff has committed default in paying the second installment.

42. Insofar as the payment of entire balance sale consideration before July, 2004 is concerned, the clause reads that the plaintiff has to pay the balance sale consideration before July, 2004, and get the deed executed at his own cost, for which, the defendant agrees to deposit the necessary papers and documents and details regarding discharge of loans and also agrees to sign in the necessary papers. This is an example of concurrent promises. Therefore, unless the defendant is ready and willing to come forward to execute the deed by depositing the documents as stated above, the question of payment of entire balance sale consideration by the plaintiff within stipulated time, cannot come into play. It is admitted by D.W.1 himself that he did not deposit any of the documents relating to discharge of loan, within six months. Therefore, this Court finds that the plaintiff cannot be said to have committed default in payment of the entire balance sale consideration, within the stipulated period.

43. Nevertheless, when it comes to question of grant of specific performance, the Hon'ble Supreme Court has laid down the material questions which are to be looked into, in Kamal Kumar v. Premlata Joshi and others [2019 (1) CTC 686], as under :

"First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property; Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract; Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract; Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly,



whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and, if so, on what grounds."

44. Having found a valid contract between the parties, the very important question to be answered is with regard to "readiness and willingness" of the plaintiff. The concept of "readiness and willingness" has been enlightened by the Hon'ble Supreme Court in the case of JP Builders v. A Ramadas Rao [(2011) 1 SCC 429], wherein, it has been held as follows :

"12. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

...

It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

45. In the light of the above principle, it is necessary to consider as to whether the plaintiff has performed his part of the contract in conformity with the terms of the contract and has shown his readiness and willingness at all relevant points of time.

46. Though the non-payment of entire balance sale consideration by the plaintiff within six months cannot be detrimental to his case, as found in the foregoing paragraphs, the plaintiff has defaulted in paying the second installment of Rs.1,50,000/- without any reason. Further, the plaintiff, who claims himself to be a man of means, could have very well paid the entire balance sale consideration irrespective of the laches on the part of the defendant, but has chosen to pay the balance consideration in installments, that too, for more than nearly three years after the expiry of time stipulated in the agreement. Such a conduct of the plaintiff in paying the balance sale consideration in installments, where there is no express clause in the contract to do so, would not come to the



aid of the plaintiff in establishing his readiness. Useful reference can be made to the judgment of this Court in Soundarrajan v. Vettobai (deceased) and others [2017 (4) SCC 225] under similar circumstances, wherein, this Court held as follows :

"Merely because an agreement was entered into between the parties and the 1st defendant has not chosen to exercise her option to repudiate her contract or waive the time stipulated in the contract, that itself cannot be a ground for the plaintiff to take undue advantage with the 1st defendant, by keeping the contract alive by paying paltry sum as and when required. The conduct of paying the amounts in piecemeal on various occasions, as seen from Ex.A12 to A15, clearly gives an inference that the 1st defendant being the widow, is under economic duress. The plaintiff has successfully kept the contract alive by making payments on various dates, including paltry amounts from the year 2002 to 2005. This conduct of the plaintiff paying paltry amount would also gives an inference that, in fact, he has made such payments only to keep the contract alive and to make himself enriched in the entire transaction."

Moreover, there is no document on record to substantiate that the plaintiff had sufficient financial capacity to pay the entire sale consideration at the relevant point of time. The plaintiff who avers readiness has not proved the same.

47.Insofar as the aspect of willingness is concerned, the conduct of the plaintiff comes into play. Though time is not an essence of contract for sale of immovable properties, that does not mean that the contract can be forgotten indefinitely, where the prices of land are skyrocketing. Such a view of this Court of this Court is emphasized by the Hon'ble Supreme Court in Saradamani Kandappan (supra), wherein, it has been held as follows :

"25.The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not



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because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees."

48.In Shenbagam and others (supra), the Hon'ble Supreme Court has held as follows :

"The respondent has failed to provide any documents or communication which would indicate that he called upon the appellants to perform their obligations or discharge the mortgage within the time period stipulated in the contract. Even after the expiry of the six months, the respondent did not reach out to the appellants. It is only in response to the appellants' legal notice that the respondent demanded performance of their obligations. Merely averring that he was waiting with the balance consideration and believed that the appellants would clear the encumbrance is insufficient to prove that the respondent-plaintiff was willing to perform his obligations under the contract."

49.In K.S.Vidyanadam and others v. Vairavan [1997 (1) CTC 628], the Hon'ble Supreme Court has held as follows :

"(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits



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that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing.

[...]

In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years?

[...]

There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11-7-1981. It is not the plaintiff's case that within six months', he purchased the stamp papers and offered to pay the balance consideration.

[...]

13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices – according to the defendants, three times – between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff."

52. On a perusal of the impugned judgment, it is seen that the trial Court has largely relied on the admission of default committed by the defendant (D.W.1) himself on his part, to grant the relief of specific performance to the plaintiff. In fact, on a reading of the Clauses 2 and 3 of Ex.A1, it can be



very well understood that the defendant had an obligation to deposit the documents relating to discharge of loan from Thiruvarur Vijayapuram Lakshmi Narayana Co-operative Bank alone immediately, whereas, the documents regarding discharge of other loans and liabilities were to be deposited by him only at the time of preparation of the deed, which was not time bound. Further, the trial Court lost sight of Clause No.5 of Ex.A1, wherein, it is stated that, till the plaintiff pays the entire sale consideration and gets the deed executed, the defendant is permitted to reside in the suit property and continue his business. Moreover, Clause 7 stipulates that, before registration, the defendant would hand over the vacant possession of his residential house and rental shops. The relevant portions of Ex.A1 is as follows :

“5.இந்த எக்ரிமெண்டின் படி தாங்கள் எனக்கு பூரா தொகையையும் கொடுத்து கிரயம் பெற்றுக் கொள்ளும் வரை, நான் மேற்படி சொத்தில் தொடர்ந்து வியாபாரம் செய்து வரவும், குடியிருந்து வரவும் எனக்கு உரிமை உண்டு.

...

7.ரிஜிஸ்டர் செய்யும் முன், நான் குடியிருந்து வரும் வீட்டையும், மற்றும் வாடகைக்கு உள்ள கடைகளையும் காலி செய்து ஏயுயவே “டிளளளளளளளளே தர சம்மதிக் கிறேன்.”

53.While these being the terms of the contract, the suggestions put forth by the plaintiff in the cross-examination of the defendant (D.W.1) is in such a manner as if the defendant has to hand over the possession of shops, deposit the documents, perform his part of the contract, all within six months stipulated in the contract. The relevant portion of the cross-examination of D.W.1 is as follows :

“ஒப்பந்தத்தில் கண்டுள்ள 6 மாத காலத்திற்குள் கிரைய ஒப்பந்த சொத்தில் இருக்கக் கூடிய ஒரு கடையையும், அதிலிருக்கும் தளவாட சாமான்களையும் எடுத்துக் கொண்டு என்னுடைய இதர கடன்களையும் தீர்த்து விட்டு அதற்கான ஆவணங்களை நான் வாதி வசம் ஒப்படைக்கவில்லை என்றால் சரிதான். .. கிரைய ஒப்பந்தத்தில் கண்டுள்ள சரத்துக்களின் படி என்னால் 6 மாத காலத்திற்குள் மேற்படி சரத்துக்களின் படி நடக்க இயலாததால் கிரைய ஒப்பந்தத்தை பூர்த்தி செய்வதற்கு என்னுடைய தவறுகை தான் காரணம் என்றால் சரிதான். 6 மாத கெடுவிற்குள் நான் ஒப்பந்தத்தில் கண்டுள்ளபடி செய்துகொடுக்கவில்லை என்றால் சரிதான்.”

54.When the plaintiff himself contends that time is not the essence of the contract, and when there are no express provisions in the contract fixing any time frame for the defendant's performance, the plaintiff cannot take advantage of the non-performance of the defendant to suit his own case, more particularly, when he has defaulted in one of his obligations, and has failed to voluntarily show his willingness to pay the entire sale consideration, not even a single communication, whatsoever, for more than five years.



As held in K.S.Vidyanadam and others (supra), Courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract. Not having shown any willingness for more than five years after the contract, suddenly, the plaintiff woke up from slumber, pulled out the contract from the locker and filed the suit. In cases of specific performance, a party who seeks equity, must first do equity. The plaintiff, having failed to show his continuous readiness and willingness and not having performed his part of the contract in conformity with the terms of the contract, which are the most important and essential ingredients to grant the relief of specific performance, is not entitled to the said relief as a matter of routine.

55. Therefore, this Court finds that the plaintiff has not shown his continuous readiness and willingness to execute his part of the agreement Ex.A1 and on this very ground itself, the plaintiff is not entitled to the relief of specific performance. Point Nos.6 to 8 are answered accordingly.

Point No.9 :

56. Though the plaintiff is denied of the relief of specific performance, he is entitled to the refund of Rs.6,65,000/-, which was admittedly received by the defendant. In a suit for specific performance, this Court is vested with discretion to do justice. Since the defendant had the benefit of the money for all these years and having regard to the default committed on the part of the defendant in not depositing the documents regarding discharge of loan availed from Thiruvavarur Vijayapuram Lakshmi Narayana Co-operative Bank, immediately after receipt of Rs.2,00,000/- from the plaintiff, as per Clause No.2 of Ex.A1, the amount of Rs.6,65,000/- shall bear an interest @ 9% p.a. from the date of the suit till the date of realization.

57. As a result, the judgment and decree of the trial Court is set aside. The suit in O.S.No.19 of 2009 is partly allowed. There shall be a decree in the suit as follows :

- i. The suit in O.S.No.19 of 2009 is dismissed insofar as the relief of specific performance is concerned.
- ii. The defendant shall refund the advance amount of Rs.6,65,000/- (Rupees Six lakhs and sixty five thousand only) to the plaintiff, with interest @ 9% p.a. from the date of the suit till the date of realization.
- iii. The parties shall bear their own costs in the suit.



58. Accordingly, this appeal is partly allowed. There shall be no order as to costs in the appeal.

59. The plaintiff is permitted to withdraw the balance sale consideration of Rs.6,85,000/- deposited by him before the trial Court, by filing an appropriate application.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

mkn

Copy to :

1. The District & Sessions Judge,
Thiruvarur.

2. The Section Officer | with a direction to send back the
(V.R. Section), | original records to the Court below,
High Court, Madras. | immediately

+1cc to Mr.J.Kannan, Advocate SR. No. 25611

+2ccs to Mr.C.Umashankar, Advocate SR. No. 25593

A.S.No.47 of 2013

GMR (CO)

PR (21/06/2022)