



A.S.No.293 of 2016

+IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :13.06.2022

PRONOUNCED ON :22.06.2022

CORAM :
THE HONOURABLE MS.JUSTICE V.M.VELUMANI
AND
THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.S.No.293 of 2016
and CMP.No.5598 of 2016

T.P.Ponnusamy @ P.Jacob

... Appellant/defendant

Vs

R.Devaraj

... Respondent/plaintiff

Prayer: First Appeal filed under Section 96 of Civil Procedure Code, R/w Order 41 Rule 1 of CPC, praying to set aside the judgment and decree dated 22.12.2015 made in O.S.No.44 of 2013, on the file of the learned III Additional District and Sessions Judge at Coimbatore and this appeal with costs.

For Appellant : Mr.M.Sugan
for M/s.L.Mary Pushparani

For Respondent : Mr.V.Anandhamurthy
for M/s.D.R.Arunkumar for S/R



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JUDGMENT

S.SOUNTHAR.J.,

The unsuccessful defendant in a suit for specific performance is the appellant. The respondent filed a suit for specific performance of agreement of sale dated 28.08.2011 along with extension agreement dated 29.06.2012 with alternative prayer for return of advance amount in O.S.No.44 of 2013, on the file of the III Additional District and Sessions Judge, Coimbatore. The suit was decreed by the trial Court granting the main relief of specific performance of the agreement and aggrieved by the same, the defendant has filed this appeal.

2. PLAINT AVERMENTS:

It was contended by the plaintiff that the respondent was the original owner of the suit property and there was an agreement between him and the respondent, on 28.08.2011, whereunder he agreed to purchase 1.05 ½ acres of land situated in S.Nos.441/3 and 441/4 in Otthakalmandapam



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Village, Coimbatore Taluk. The sale consideration was fixed at

Rs.41,50,000/- and time fixed for performance was three months. The plaintiff has paid an advance of Rs.20,00,000/- to the defendant on the date of agreement. The balance of Rs.21,50,000/- was agreed to be paid within three months. On his part, the respondent/defendant agreed to demarcate the land covered under the sale agreement, clear the encumbrances, hand over the title deeds and vacant possession of the property to the appellant. It was also contended by the plaintiff that inspite of several requests by him, the defendant failed to perform his part of the contract namely demarcation of land, delivery of title deeds etc. Later on, both the parties mutually agreed to extend the time by 13 months and entered in to a written agreement on 29.06.2012, whereunder time was extended by further period of 13 months. The plaintiff was also paid an additional advance of Rs.5,000/- on that day. Later on, the plaintiff sent a registered letter dated 03.11.2012 (marked as Ex.A3) and another letter dated 12.12.2012 (marked as Ex.A4) calling upon the defendant to receive the balance amount from the plaintiff and execute the sale deed and there was no reply for the same by appellant/defendant. The defendant delayed the completion of the sale transaction as he failed to



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demarcate the subject matter of the agreement and clear the encumbrance etc.

Finally on 19.12.2012, Ex.A5 - legal notice was issued to the defendant calling upon him to be present on 24.12.2012, before the Sub Registrar Office, Kinathukadavu, for execution of sale deed in pursuance of the suit agreement and the same was received by the appellant/defendant on 20.12.2012 (Ex.A7-Postal acknowledgement card). In spite of the legal notice issued by the respondent/plaintiff, the appellant/defendant failed to execute the sale deed as agreed and hence the plaintiff was constrained to file the suit for the above said reliefs.

3. AVERMENTS OF THE DEFENDANT IN THE WRITTEN STATEMENT:

The defendant admitted the execution of original sale agreement dated 28.08.2011 and subsequent extension agreement dated 29.06.2012. He contended that time of three months fixed in original agreement was essence of contract and hence agreement was determined on 27.11.2011 by efflux of time. It was also contended by the defendant that the original agreement got lapsed on 27.11.2011 and any subsequent agreement between the parties for



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extension of time was not valid in the eye of law. The defendant further contended that he was always ready and willing to perform his part of the contract but the plaintiff was not ready and willing to perform his part of the contract and hence he was not entitled to the relief of specific performance.

4. FINDINGS OF TRIAL COURT:

On these pleadings, both the parties went to the trial and the plaintiff examined himself as PW.1 and he deposed about his readiness and willingness and his financial capacity. An independent witness, namely the attester of Ex.A1-agreement and A2-extension of time agreement was examined as PW.2, on behalf of the plaintiff. He deposed about due execution of original agreement and also the agreement for extension of time. He also elaborately deposed about the continuous readiness and willingness of the plaintiff to perform his part of the contract from the inception of the agreement to the date of plaint. On behalf of the defendant, he examined himself as DW.1 and he deposed that the plaintiff was not ready and willing to perform his part of the contract and hence he was not entitled to seek specific performance. He also deposed about his readiness to perform his part of the contract.



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5. The trial Court found that the time of three months fixed in the original agreement was not essence of contract by virtue of the subsequent agreement of extension of time between the parties. It also found that the plaintiff has proved his readiness and willingness to perform his part of the contract and the defendant failed to perform his part of the contract by clearing the encumbrance and by demarcating the property, even after series of letters and legal notice issued by the plaintiff and hence decreed the suit for the main relief of specific performance.

6. Heard the arguments of Mr.M.Sugan for M/s.L.Mary Pushpa Rani learned counsel appearing for the appellant and Mr.V.Anandhamurthy for M/s.D.R.Arunkumar, learned counsel appearing for the respondent.

7. ARGUMENTS OF APPELLANT COUNSEL:

The learned counsel appearing for the appellant assailed the judgement of the trial Court by raising following two points:

(i) As per the original agreement dated 28.08.2011, the time fixed for performance was three months and the said period got expired on



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27.11.2011. On expiry of the time, forfeiture clause found in the agreement got operated and the advance amount paid by the respondent/plaintiff got forfeited. Therefore, after lapse of the original agreement, there cannot be an extension of time fixed for the performance. Even though, under Ex.A2, both the parties mutually agreed to extend the time by 13 months, the same cannot be held to be valid in the eye of law;

(ii) The plaintiff failed to prove his readiness and willingness throughout i.e., from the inception of the agreement to the date of plaint and by referring to Exs.A10 and A11, he has submitted that at no point of time, the plaintiff was in possession of balance amount of Rs.21,50,000/- and hence, it should be presumed that the plaintiff was not ready and willing to perform his promise. It was also submitted that on the date of extension agreement (Ex.A2), the plaintiff paid a paltry amount of Rs.5,000/- and the said fact per se is sufficient to come to a conclusion that the plaintiff was not in possession of sufficient funds on that date.



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8. ARGUMENTS OF RESPONDENT COUNSEL:

In response to the contentions of the learned counsel for the appellant, learned counsel for the respondent submitted as follows:

(i) Ex.A2-Extension of time agreement is a bilateral documents.

Both the parties by mutual consent extended the time by further period of 13 months and hence the time was not essence of original agreement. After mutually agreeing for extension of time for further period of 13 months, it is not open to the appellant/defendant to contend that the original agreement already got lapsed and advance amount got forfeited.

(ii) He also contended that the defendant failed to demarcate the subject matter of the property and clear the encumbrance over the agreement mentioned property as agreed by him and therefore, he failed to perform his part of the contract. He elaborated the same by taking the Court through various admissions of appellant as DW.1 in this regard.

(iii) The learned counsel for the respondent also contended that the appellant proved that he possessed sufficient funds to pay the balance sale



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consideration by producing statement of accounts of the bank marked as Exs.A10 and A11 and consequently, prayed for dismissal of the above appeal.

9. POINTS ARISING FOR CONSIDERATION:

Upon going through the pleadings of the parties, the oral and documentary evidences, judgement passed by the trial Court and on hearing arguments of the respective counsel, the following points arise for consideration in this Appeal:-

- (a) Whether the agreement for extension of time entered between the parties under Ex.A2 is valid in eye of law?
- (b) Whether the respondent/plaintiff proved his readiness and willingness to perform his part of the contract?

Point (a): WHETHER THE AGREEMENT FOR EXTENSION OF TIME ENTERED BETWEEN THE PARTIES UNDER EX.A2 IS VALID IN THE EYE OF LAW:

10.1. The appellant and respondent entered into a sale agreement on 28.08.2011 and fixed the time for performance as three months.



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As per the terms of agreement, the appellant/defendant undertook to demarcate the subject matter of the sale agreement and clear the encumbrance over the same. It is settled law that in case of sale agreement concerning immovable property, the time is not essence of the contract. Whenever the question arises, whether the time is essence of the contract, the same has to be decided based on the conduct of the parties and totality of the circumstances and mere existence of forfeiture clause itself would not make time essence of contract. It is useful to refer to the observations of five member Bench of the Apex Court reported in AIR 1993 SC Page.1742 in Smt.Chand Rani (dead) by Lrs, Vs. Smt.Kamal Rani (dead) by Lrs in this regard. The observation of Apex Court is as follows:

“It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable : it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or



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before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.”

10.2. It is pertinent to note that the appellant/defendant was examined as DW.1 and he made a categorical admission that on the date of agreement, original title deed was not available with him and it was with the mortgagee. He further deposed that subsequent to the agreement he redeemed the mortgage and got the original title documents back. However, there is no evidence available on record to show when he redeemed and after redemption when he intimated the same to the plaintiff. Secondly, DW.1, admitted that total extent of the property belonged to him in the survey numbers covered by Ex.A1-sale agreement is two acres and 11 cents and out



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of which, he agreed to sell only 1 acre and 5 ½ cents. He further admitted that the entire extent of property belonged to him was enclosed with fence which means 1 acre and 5 ½ cents agreed to be conveyed under suit sale agreement was not demarcated as agreed by him. Therefore, these fatal admissions of DW.1 clearly demonstrates that the appellant miserably failed to perform his part of the contract as agreed by him. The party, who puts a brake on the performance of the contract by his failure to honour his part of the obligation under the agreement cannot say that time was intended to be essence of the contract and therefore the original agreement got lapsed.

10.3. The appellant as DW.1 has also admitted the execution of original sale agreement, Ex.A1 and the execution of time extension agreement, Ex.A2. His wife is the attesor to the said documents. After admitting the execution of Ex.A2-extension agreement, DW.1, deposed that he signed Ex.A2 agreement, on compulsion employed by the respondent/plaintiff. It is settled law that the parties cannot lead evidence without the support of plea. In the written statement filed by the appellant, there is no whisper about the alleged compulsion by the plaintiff. Therefore,



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the evidence of DW.1 in the witness box as if he signed Ex.A2 on compulsion made by the plaintiff deserves to be rejected as an afterthought.

It is also pertinent to mention that DW.1 also admitted that he did not make any complaint to police or private complaint to Magistrate, regarding alleged compulsion employed by plaintiff. The execution of Exs.A1 and A2 have been proved by the plaintiff by his own evidence and also that of the attesor PW.2. Nothing had been culled out from their cross examination to doubt their evidence. Therefore, this Court has no hesitation in holding that both the parties out of free will, mutually agreed to extend the time and entered into time extension agreement under Ex.A2. Therefore, the contention of the learned counsel for the appellant that Ex.A2-extension agreement is not a valid document in eye of law is rejected. Once we come to the conclusion Ex.A2-time extension agreement is valid in eye of law, the time limit of three months fixed in the earlier original agreement pales in to insignificance.

Point No(b): WHETHER THE RESPONDENT/PLAINTIFF PROVED HIS READINESS AND WILLINGNESS TO PERFORM HIS PART OF THE CONTRACT:

11.1. In order to prove his readiness and willingness, the



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plaintiff examined himself as PW.1 and an independent witness as PW.2.

The evidence of PW.1 and PW.2 are complementary to each other. The plaintiff also produced the bank statement of accounts issued by Indian Bank, R.S.Puram Branch, Coimbatore as Exs.A10 and A11. A look at Exs.A10 and A11, make it clear that the respondent/plaintiff has got over drawing power up to Rs.1 Crore. The cursory look at Exs.A10 and A11 proves that during the period from 02.08.2011 to 31.01.2013, the respondent had over drawing balance of more than Rs.21,00,000/- at most of the time except on few days. Therefore, from Exs.A10 and A11, it is very clear that the respondent possessed sufficient means to pay the balance sale consideration of Rs.21,45,000/-, at any point of time from the date of agreement to the date of filing of the suit. When it come to the financial capacity of the parties, it is not necessary that the party should physically possess the balance amount with him from the date of agreement to the date of plaint. If it is shown that the party had sufficient means to mobilize the balance amount required within a short span of time, the same is sufficient. Hence the financial capacity of the respondent/plaintiff has been established beyond any doubt.



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11.2 Exs.A3 and A4, dated 03.11.2012 and 12.12.2012 are letters issued by the plaintiff to defendant calling upon him to come forward and execute the sale deed as per the agreement. The receipt of the same was admitted by DW.1. In response to these letters, the appellant/defendant has neither come forward to execute the sale deed nor issued any suitable reply explaining his inability to execute the sale deed. Subsequently, on 19.12.2012, the respondent/plaintiff issued a legal notice to the defendant, calling upon him to appear before the concerned Sub Registrars Office on 24.12.2012 for execution and registration of the sale deed, as per the agreement and the same was received by him on 20.12.2012. The defendant failed to honour his part of the contract and make himself available before the Sub Registrar for execution of sale deed as demanded by the plaintiff. The said legal notice was issued well within the time of 13 months mutually agreed between the parties. Contrarily he issued a reply stating that the agreement got lapsed and the advanced amount paid by the plaintiff was forfeited. It is not open to the appellant/defendant to invoke forfeiture clause of the original agreement, after executing Ex.A2 by mutually agreeing to extend the time limit. The forfeiture clause found in Ex.A1-agreement was



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not available to the defendant on 20.12.2012, when he sought to invoke the same. The moment parties entered into an agreement under Ex.A2 for extension of time of 13 months, the time limit of three months fixed under earlier agreement and the forfeiture clause found therein got erased by terms of subsequent agreement. The trial Court after taking into consideration, various fatal admission of DW.1 and the evidence of PW.1 and PW.2 and also material documents namely Exs.A3, A4, A5, A10 and A11 correctly came to the conclusion that the respondent/plaintiff proved his readiness and willingness to perform the contract from the inception of the agreement to the date of suit and said findings is confirmed.

11.3. The learned counsel for the appellant relied on the following judgments in support of his contention that in a suit for specific performance, the plaintiff must plead and prove his readiness and willingness to perform his part of the contract from the date of agreement to the date of the suit.

(i) N.P.Thirugnanam Vs. R.Jagan Mohan Rao and Others reported in AIR 1996 SC 116;



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WEB COPY (ii) Sita Ram and others Vs.Radhey Shyam reported in 2008 (1) CTC

86;

(iii) S. Andal and another Vs. K. Chinnasamy, reported in (2009) 7 MLJ 640.

11.4. We have no quarrel with regard to the above said proposition and as we discussed earlier, on appreciation of oral and documentary evidence, we have given a factual finding that the respondent/plaintiff has been ready and willing to perform his part of the suit agreement throughout from the date of inception to the date of plaint and hence Section 16(c) of the Specific Relief Act has been meticulously complied. Therefore, the decisions relied on by the learned counsel for the appellant will not be helpful to him.

11.5. The learned counsel for the respondent relied on the judgment of the Apex Court in R. Lakshmikantham Vs. Devaraji reported in 2019 (6) CTC 859, wherein, the Apex Court held that in cases where

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agreement of sale required completion of sale transaction within three months and subsequent clauses in the agreement required redemption of mortgage and retrieval of title deeds from mortgagee, the period of three months stipulated in the agreement start only after the redemption of the mortgage. It was also further held that in such cases, the time was not essence of the contract. The relevant observations of the Apex Court in this regard is as follows:

“ It is stated that at the time of the sale agreement, the suit property was worth roughly a sum of Rs. 6 lakhs, but the parties finally agreed and the Defendant, in particular, agreed to sell the aforesaid property for Rs. 3.65 lakhs. A perusal of the agreement to sell would show that though Clause 3 requires that the balance sale consideration will be paid within three months from the date of the agreement and that the seller will execute the sale deed on the date on which balance sale consideration was paid yet, clauses 5 and 8 clearly show that the original title deeds which are with the mortgagee had yet to be handed over and the mortgage had yet to be redeemed. It is only when this is done that Clause 3 would kick in, showing that the time of three months is obviously not of essence.”

11.6. The ratio of the above case in R.Lakshmikantham



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Vs.Devaraji (cited supra) is directly applicable to the facts of the present

case. In the case on hand, though in the original agreement time was fixed as three months, there is a subsequent clause in the agreement which require that the appellant/defendant should demarcate the land, clear the encumbrance and deliver the original title deeds to the respondent. As discussed earlier, the appellant as DW.1 admitted that he redeemed mortgage only subsequent to the agreement. But there is no evidence available on the record to show when he redeemed the mortgage and when it was intimated to the respondent/plaintiff. In fact, even to prove the very fact of redemption of mortgage except oral testimony of the appellant, there is no documentary evidence available on the record. The Supreme Court of India in P.D.Souza Vs. Shondrilo Naid reported in 2004 (6) SCC page 649, while considering question of readiness and willingness observed as follows:

19. It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of the contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No straitjacket formula can be laid down in this



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21. The readiness and willingness on the part of the plaintiff his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement.

In these circumstances, it can be safely concluded that time was not treated as essence of agreement. Further by virtue of subsequent agreement, under Ex.A2, the time for performance was extended by mutual agreement and Exs.A3, A4, and A5 marked by the respondent/plaintiff clinchingly proved his readiness and willingness and hence the point (b) is answered accordingly in favour of the respondent and against the appellant. Therefore, we find no merit in this appeal and the same is liable to be dismissed. However, in the circumstances of the case, there will be no order as to costs.



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12. CONCLUSIONS:

In nutshell,

(i) the appeal is dismissed, confirming the judgement and decree passed by the trial Court.

(ii) there shall be no order as to costs.

(iii) Consequently connected Miscellaneous Petition is Closed.

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

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Internet : Yes / No

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To
The III Additional District and Sessions Judge,
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