



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.06.2022

Pronounced on : 18.07.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

S.A.No. 1131 of 2001

And

C.M.P.No. 12035 of 2001

A.Kamalammal

... Appellant/Appellant/Plaintiff

Vs.

K.R.Balasubramaniam (died)

... Respondent/Respondent/Defendant

2. B.Shanthi

3. B.Gavathiri

4. B.Ramakrishan

5. B.Kribakaran

... Respondents

RR 2 to 5 brought on record as LR's of the deceased sole respondent viz., K.R.Balasubramaniam vide order of Court dated 05.08.2019 made in C.M.P.Nos. 2975 to 2977 of 2018 in S.A.No. 1131 of 2001.

PRAYER: This Second Appeal is filed under Section 100 of Civil



Procedure Code, against the Judgment and Decree dated 29.09.2000 of the learned Additional District Judge, Chengalpet made in A.S.No. 5 of 2000 confirming the Judgment and Decree dated 24.09.1999 of the learned Subordinate Judge, Poonamallee in O.S.No. 8 of 1985.

For Appellant : Mr. V.R. Thangavel

For RR 2 to 5 : Mr. K. Prem Kumar

JUDGMENT

The plaintiff in O.S. No. 8 of 1985 on the file of the Sub Court, Poonamallee is the appellant herein.

2. O.S. No. 8 of 1985 had been filed seeking specific performance of an agreement dated 12.06.1981. The suit was decreed by judgment dated 17.07.1987.

3. The defendant then filed A.S. No. 1064 of 1987 before this Court. A Learned single Judge of this Court by judgment dated 12.08.1999, had allowed the appeal suit, set aside the decree dated 17.07.1987 and remanded the matter back to the trial court for fresh



disposal on analysis of the pleadings and oral and documentary evidence.

4. Arguments were heard afresh in O.S. No. 8 of 1985. By judgment dated 24.09.1999, the suit was dismissed.

5. The plaintiff then filed A.S. No. 5 of 2000 which came up for consideration before the Additional District Judge cum Chief Judicial Magistrate, Chengalpattu. By judgment dated 29.09.2000, the appeal suit was dismissed. The plaintiff then filed the present second appeal.

6. The second appeal had been admitted on the following substantial questions of law :

“ 1. *Whether the Courts below were right in dismissing the suit on the ground that time is the essence of the contract when the respondent/defendant deliberately evaded to execute the sale deed within the specified period ?*

2. *Whether the Courts below were right in dismissing the suit without appreciating the*



exhibits marked by the plaintiff ?

3. Whether the Courts below were right in concluding that the appellant had not deposited the balance consideration even after filing of the suit when the Court had not ordered the same and when the appellant had deposited the amount subsequent to the decree ?”

7. Pending the appeal, the respondent/defendant died and his legal representatives were brought on record as 2nd to 5th respondents.

O.S. No. 8 of 1985 (Sub Court, Poonamallee) :

8. The plaintiff, A. Kamalammal stated in the plaint that she had entered into an agreement on 12.06.1981 with the defendant K.R. Balasubramanyam to purchase the property at No.69, Bharathi Nagar Main Road, Zameen Pallavaram, Saidapet for a total consideration of Rs.40,000/-. She claimed that an advance of Rs.5,000/- had been paid on the date of the agreement. She stated that the defendant should produce a nil encumbrance. It was agreed that the sale transaction will be completed



within 3 months from the date of the agreement. The plaintiff claimed that she was ready and willing to pay the balance sale consideration. She further stated that she, along with her husband and others visited the defendant on 10.09.1981 and demanded performance of the agreement. The defendant postponed performance and stated that he would execute the sale deed on 21.09.1981. However, on 15.09.1981, the defendant caused an Advocate notice to be sent, wherein it was stated that since time was the essence of the agreement, and since the plaintiff had not come forward to pay the balance sale consideration, the agreement stood cancelled. The plaintiff issued a reply denying and disputing the contentions, and then filed the suit seeking specific performance.

9. In the written statement, the defendant admitted to the agreement. However, it was stated that time was the essence, since he had committed himself to purchase an Engineering Workshop. He specifically stated that the plaintiff had understood that time was the essence of the agreement. He denied the averments that the plaintiff was ready and willing to pay the balance sale consideration. He denied that the plaintiff visited him on 10.09.1981. He stated that on 12.09.1981, when the plaintiff



and her husband and others visited him, they had only offered to pay a sum of Rs.10,000/- towards the balance sale consideration and sought time to pay the total consideration. He stated that he caused a notice to be issued cancelling the agreement. He prayed that the suit should be dismissed.

10. On the basis of the above pleadings, the following issues were framed :

“1. Whether time was the essence of the agreement ?

2. Whether the plaintiff was ready and willing to perform her part of the agreement ?

3. Whether the facts stated in para 6 of the written statement were true ?

4. Whether the plaintiff is entitled for the relief of specific performance ?

5. To what other reliefs is the plaintiff entitled to ?”

11. During trial, the plaintiff examined herself as P.W.1, and also



examine4d two other witnesses as P.W.2 and P.W.3. She marked Exs. A1 to A5. Ex.A1 was their agreement of sale dated 12.06.1981, Exs. A2 and A3 were the legal notices exchanged, Ex. A4 was the bank pass book in the name of Arumugam and Ex. A5 was a letter from the Saidapet Sub-Collector.

12. The defendant examined himself as D.W.1 and two other witnesses as D.W.2 and D.W.3. He marked Exs. B1 to B3. Ex. B1 was a further notice issued by the defendant, Ex. B2 was an agreement between the defendant and D.W.3 and Ex. B3 was the encumbrance certificate of the property.

13. The Sub Judge, Poonamallee considered the pleadings and evidence adduced. It was found that P.W.1 had deposed that she did not have the money towards the sale consideration, but that her husband had it. She further stated that the marriage of one of her daughters took place after the agreement. She was dependent on her husband to provide her with money. She did not know in which bank account, the money was available.



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14. It was also found that the parties had specifically agreed that time was the essence of the agreement. In this connection, the evidence of D.W.3 and Ex. B2 were considered. That evidence was to substantiate the claim of the defendant that he had entered into an agreement with D.W.3 to purchase an Engineering Workshop and was dependent on the sale consideration agreed to be paid by the plaintiff to complete that sale transaction. The notice dated 15.09.1981, in Ex. A2 was also considered and it was held that the defendant had rescinded from the agreement after the date within which the agreement should have been performed by the plaintiff. The claim by the plaintiff that the defendant sought extension of time was disbelieved. Ex. A4, bank pass book was also examined and it was found that only on 19.09.1981, after the agreement had been cancelled by the defendant, did the husband of the plaintiff deposit a sum of Rs.35,000/- in the bank. It was thus held that the plaintiff was neither willing nor ready to perform the agreement and further that in the instant case, time was the essence of the agreement. The suit was therefore dismissed by judgment dated 24.09.1999.



A.S. No. 5 of 2000(Additional District Court cum Chief Judicial Magistrate, Chengalpet):

15. The plaintiff then filed the aforementioned appeal suit. This came up for consideration on 29.09.2000 before the Additional District Judge cum Chief Judicial Magistrate, Chengalpet. The Additional District framed the following points for consideration :

“1. Whether time was the essence of the agreement dated 12.06.1981 ?

2. Whether the appellant was ready and willing to perform her part of the agreement dated 12.06.1981 ?

3. Whether the appellant is entitled for specific performance of the agreement on the respondent receiving the balance sale consideration of Rs.35,000/- ?



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4. To what other reliefs is the appellant entitled to?”

16. The learned Additional District Judge found that though P.W.1 in her evidence stated that the defendant had demanded an additional Rs.10,000/-, this fact was not mentioned either in the reply notice or in the plaint. The plaintiff was also found fault with not paying the balance sale consideration within three months from the date of the agreement, as agreed. It was further found that the defendant had entered into another agreement with D.W.3 under Ex. B2 and was dependent on the balance sale consideration to honour that agreement. It was therefore held that in this, case, the parties had agreed specifically that time was the essence of the agreement. It was also found that the plaintiff had not produced any evidence to show readiness and willingness to pay the balance sale consideration. They had not offered to pay the balance sale consideration within the three months' period agreed. The evidence of the other witnesses on the side of the plaintiff was also discussed, but it was held that they do not advance the cause of the plaintiff. The plaintiff was the sister of the wife of P.W.3 and it was observed that he was an interested



witness. Though he stated that he had pledged jewels to make ready the balance sale consideration, no documents were produced to substantiate that statement. The fact that the balance sale consideration of Rs.35,000/- was deposited in the bank only on 19.09.1981, after the agreement time had expired was also noted. The appeal suit was dismissed.

S.A. No. 1131 of 2001 :

17. The plaintiff then filed the present second appeal. The 1st respondent/defendant died during the pendency of the appeal and his legal representatives had been brought on record as 2nd to 5th respondents. The second appeal had been admitted on the following substantial questions of law :

“1. Whether the Courts below were right in dismissing the suit on the ground that time is the essence of the contract when the respondent/defendant deliberately evaded to execute the sale deed within the specified period ?



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2. Whether the Courts below were right in dismissing the suit without appreciating the exhibits marked by the plaintiff ?

3. Whether the Courts below were right in concluding that the appellant had not deposited the balance consideration even after filing of the suit when the Court had not ordered the same and when the appellant had deposited the amount subsequent to the decree ?”

18. Heard arguments advanced by Mr. V.R. Thangavelu, learned counsel for the appellant and Mr. K. Premkumar, learned counsel for the respondents. Both the learned counsels had also filed their written arguments.

19. Mr. V.R. Thangavelu took the Court through the facts of the case and lamented that the suit was originally decreed, but that judgment was set aside in A.S. No. 1064 of 1987 by a learned Single Judge of this Court and the matter was remanded back for fresh consideration of the



evidence. The learned counsel stated that the Courts below have taken that remand to heart, and have proceeded to dismiss the suit with similar findings. Learned counsel reiterated the contention of P.W.1 in the evidence that the 1st respondent demanded an additional Rs.10,000/- and stated that failure to comply with that demand had led to this acrimonious litigation spanning more than 4 decades from the date of the agreement. Learned Counsel stated that time could not be the essence of an agreement with respect to immovable property and also stated that the appellant was always ready and willing to perform her part of the agreement. Learned Counsel urged that this Court should interfere with the judgments of both the Courts and allow the second appeal and decree the suit.

20. Learned Counsel relied on the observation of the Hon'ble Supreme Court regarding readiness and willingness as stated in *Madhukar Nivrutti Jagtap v. Pramila Bai Chandulal Parandekar*, (2020) 15 SCC 731:

“13.2. The question as to whether the plaintiff seeking specific performance has been ready and



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willing to perform his part of the contract is required to be examined with reference to all the facts and the surrounding factors of the given case. The requirement is not that the plaintiff should continuously approach the defendant with payment or make incessant requests for performance. For the relief of specific performance, which is essentially a species of equity but has got statutory recognition in terms of the Specific Relief Act, 1963 [Its forerunner being the Specific Relief Act, 1877.] , the plaintiff must be found standing with the contract and the plaintiff's conduct should not be carrying any such blameworthiness so as to be considered inequitable. The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the plaintiff in particular. In view of the contentions urged, we have scanned through the record to examine if the finding of the High Court in this regard calls for any interference.”



21. Learned Counsel also relied on the following observations regarding availability of funds by other members of the family as stated in

Bhavyanath v. K.V. Balan, (2020) 11 SCC 790 :

“41. Ext. A-1 contract is dated 25-4-2007. The plaintiff was, no doubt, 21 years of age. His father Gopinathan was a witness to Ext. A-1 agreement. Knowing these facts, the defendant entered into the agreement, and what is more, received Rs 2 lakhs on the date of the agreement. Further, a sum of Rs 3 lakhs was received under the agreement on 25-8-2007. The property is measured on 16-3-2008. On the third day from 24-3-2008, which was the last day for the execution of the sale deed i.e. on 27-3-2008, the suit came to be filed. After the advance paid by the plaintiff is deducted, the balance amount including the stamp duty and expenses would not exceed Rs 24 lakhs. There was the testimony of the plaintiff as to how he intended to pay the consideration on 24-3-2008. There was evidence of plaintiff having gold ornaments with him and family members worth about Rs 24 lakhs



and cash of about Rs 8 lakhs. It also appeared that one of the family members of the appellant had lands in her name. Even the appellant purchased other land during the period of contract. In regard to the statement by the plaintiff that gold ornaments worth about Rs 24 lakhs were held by him and family members and there was cash of about Rs 8 lakhs, the plaintiff is not cross-examined as such. At any rate, there is no serious dispute raised when he was cross-examined in this regard. There is no question raised about the family members not making available the gold ornaments or that it was not available with them. The non-availability of bills relating to the gold jewellery to prove ownership as such may not be in the facts of this case fatal to the plaintiff.”

22. Learned counsel pointed out that the plaintiff had adduced oral and documentary evidence to prove readiness and willingness by examining P.W.2, her brother-in-law who stated that he had gold jewellery available and in the form of Ex. A4, bank pass book reflecting availability of funds. Learned counsel therefore urged that the second appeal must be



23. Mr. K. Premkumar, learned counsel for the respondents however disputed the contentions raised. Learned counsel pointed out that both the courts have found as a fact that the appellant was not ready and willing to perform her part of the agreement and also that in the instant case, time was the essence of the agreement. Learned Counsel therefore stated that the said findings on facts have attained finality. Learned counsel pointed that though normally time is not the essence of an agreement relating to immovable property, still if the parties agree that time is indeed the essence of the agreement, then the sanctity of such agreement should be upheld by the Court.

24. In this connection, learned counsel relied on the judgment of the Constitution Bench in ***Chand Rani v. Kamal Rani, (1993) 1 SCC 519*** :

“25. From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is



not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are:

- 1. From the express terms of the contract;*
- 2. from the nature of the property; and*
- 3. from the surrounding circumstances, for example: the object of making the contract.”*

25. The learned Counsel also relied on ***N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)*, (1995) 5 SCC 115 :: AIR 1996 SC 116 :**

“5. It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963 (for short “the Act”). Under Section 20, the court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had 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 those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the



contract.”

26. Learned counsel pointed out that both the courts below had found against the appellant on readiness and willingness and had disbelieved the evidence adduced in that regard. Further both the Courts below have also held that in the instant case, time was the essence of the agreement. In view of such concurrent findings of facts, the learned counsel insisted that this court should dismiss the second appeal.

27. I have given my careful consideration to their arguments advanced and to the materials on record.

28. The first substantial question of law revolves around whether time was the essence of the contract in the instant case.

29. The appellant had filed the suit on the basis of Ex. A.1, dated 12.06.1981, whereby she agreed to purchase the suit property for a total consideration of Rs.40,000/-. She had paid a sum of Rs. 5,000/- as advance. It was agreed that the balance should be paid within three months. To examine whether time is the essence of the agreement, this



agreement has to be read in conjunction with Ex. B2 dated 15.05.1981 and the evidence of D.W.3. Ex. B2 is an agreement entered by the 1st respondent with D.W.2 to purchase an Engineering Workshop for Rs. 35,000/-. The 1st respondent had paid an advance of Rs.4,500/-. He was under compulsion to perform his part of that agreement, namely to pay the balance sale consideration of Rs.30,500/- on or before 14.09.1981. That could be done, only if the appellant herein had honoured her commitment to pay the balance sale consideration under Ex. A.1 on or before 12.09.1981. She failed to do so. On 15.09.1981, the 1st respondent caused an Advocate notice to be issued under Ex. A2, complaining nonperformance by the appellant and cancelling Ex. A1.

30. The Constitution Bench in *Chand Rani v. Kamal Rani*, (1993)

1 SCC 519 held as follows :

“ 25. From an analysis of the above case-law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it



is to be performed in a reasonable time if the conditions are:

- 1. From the express terms of the contract;*
- 2. from the nature of the property; and*
- 3. from the surrounding circumstances, for example: the object of making the contract.”*

31. In the instant case, the only object with which the 1st respondent entered into the agreement was to generate funds for his purchase of an Engineering Workshop from D.W.3, and for which he had already entered into an agreement on 15.05.1981, in Ex. B2. The sale consideration under Ex. B2 was Rs.35,000/-. The 1st respondent had paid a sum of Rs. 4,500/- as advance. The balance of Rs.30,500/- had to be paid on or before 14.09.1981. Thus viewed, time was the essence of the agreement, Ex. A1.

32. The second part of the first substantial question of law, presupposes that the 1st respondent deliberately evaded execution of the sale deed. There is no evidence on that regard, and the thin evidence



adduced by the appellant, was not supported by pleadings and had been rightly rejected by the Courts below.

33. I answer the first substantial questioning of law holding that the Courts below were correct in dismissing the suit holding that time was the essence of the agreement.

34. The second substantial question of law relates appreciation of the exhibits filed by the appellant.

35. Ex. A1 was the agreement, and it has been held that time was the essence of the agreement and that the appellant had failed to perform her part of the agreement within the agreed time. Ex. A2 was the notice dated 15.09.1981 sent on behalf of the 1st respondent, in which the 1st respondent had clearly stated that the agreement, Ex. A1 stood cancelled in view of failure by the appellant to perform her part of the agreement, namely to pay the balance sale consideration within the agreed time period of three months. Ex. A3 was the reply notice. No credence can be attached to it. The facts stated therein should be pleaded and proved by the



appellant in manner known to law. Both the Courts addressed that issue.

Ex. A4 was the bank pass book in the name of the husband of the appellant and it is seen that Rs. 35,000/- was deposited only on 19.09.1981 after the agreement had been cancelled by the 1st respondent.

36. In *Kurella Naga Druva Vudaya Bhaskara Rao v. Galla Jani*

Kamma, (2008) 15 SCC 150 it was held as follows :

“20. We find that both the courts have considered these two issues of fact in detail with reference to the evidence and recorded concurrent findings against the defendant. This Court will not convert itself into a third court of facts and re-examine the facts or disturb concurrent findings of facts. Neither any perversity nor omission to consider evidence nor any error of law has been pointed out with reference to consideration and appreciation of evidence by the trial court and the High Court. We do not therefore find any reason to re-examine the facts.”



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37. Even in the instant case, where there is a restriction placed in revisiting concurrent findings of facts in a second appeal, I hold there has been no perverse appreciation of facts nor error in law committed by both the courts below.

38. All the exhibits surround issues of facts, and I hold with respect to the second substantial question of law that the documents have been examined in their correct perspective by the Courts below.

39. The third substantial question of law relates to deposit of sale consideration into Court. To establish readiness and willingness, though it is not necessary that the appellant should have jingled the coins before the 1st respondent, the appellant should atleast prove availability of funds. In the instant case, the appellant had miserably failed to prove so. In a suit for specific performance, the burden is on the plaintiff, in this case, the appellant to prove readiness and willingness. The appellant should come out with all evidence to hold that she was ready and willing to part with the balance sale consideration. If the appellant were to expect the Court to



pass orders directing deposit, then she will have to fall on her own latches.

40. This position has been correctly stated by the Hon'ble Supreme Court in *N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)*, (1995) 5 SCC 115 :: AIR 1996 SC 116 referred supra. I answer the third question of law that the Courts below have correct in holding against the appellant in not depositing the balance sale consideration in Court.

41. The judgments relied by the learned counsel for the appellant do not advance the case of the appellant.

42. In *Madhukar Nivrutti Jagtap v. Pramila Bai Chandulal Parandekar*, (2020) 15 SCC 731 (referred supra), it had been held as follows:-



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“The requirement of readiness and willingness of the plaintiff is not theoretical in nature but is essentially a question of fact, which needs to be determined with reference to the pleadings and evidence of parties as also to all the material circumstances having bearing on the conduct of parties, the plaintiff in particular”.

43. The appellant has failed to prove readiness and willingness to the expected standards to grant the relief of specific performance. The learned counsel for the appellant had relied on ***Bhavyanath v. K.V. Balan, (2020) 11 SCC 790*** for the contention that P.W.3 had also spoken about availability funds, since had claimed that he had pledged jewels. The facts, though similar have one significant variance, which is obvious. P.W.3 had been examined as a witness. He claimed that he had pledged gold jewellery. He could have produced atleast one receipt to prove that statement. His evidence being direct, to substantiate that he should have been in possession of receipts given when gold jewellery are pledged. No documents have been filed. Details of the person to whom the jewellery had been pledged had not been given. Details of the jewellery so pledged



have not been given. He is an interested person, the plaintiff being his wife's sister. No credence can be attached to his evidence.

44. An overall assessment of the reasons given above makes it evident that only one conclusion can be arrived at, that the second appeal has no merits and has to be dismissed.

45. In the result, the second appeal is dismissed with costs. Consequently, connected Civil Miscellaneous Petition is closed. However, the advance amount of Rs.5,000/- received by the 1st respondent/legal heirs should be returned back to the appellant together with interest at 6% p.a., from the date of receipt of the said amount of Rs.5,000/- till the date of payment.

18.07.2022

Index :Yes/No
Internet:Yes/No
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To

1. Additional District Judge, Chengalpet.
2. Sub Court, Poonamallee.



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C.V.KARTHIKEYAN, J.

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Pre-Delivery Judgment made in
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