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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.04.2022

CORAM :

THE HONOURABLE MR.JUSTICE M.DURAI SWAMY
AND
THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

O.S.A.NO.101 OF 2018

S. Ravichandran

... Appellant/
Plaintiff

Vs

1.S.K.Nizamuddin(died)
2.S.K.Sharfuddin
3.S.K.Shahabuddin
4.S.K.Shamshuddin
5.S.K.Ilamuddin
6.S.K.Alimudeen
7.Mohammed Aquil
8.L.Shabana Jabeen
9.K.A.Nazreen Banu
10.K.N.Ahmed Zaki Ameen
11.K.N.Ahmed Shaik Fahad

...Respondent/
defendants

(R9 to R11 brought on record as legal heirs of the deceased 1st respondent viz. S.K.Nizamuddin vide order dated 17.09.2021 made in CMP.Nos.11862 of 2021, CMP.No.11870 of 2021 and CMP.No.11866 of 2021 in OSA.No.101 of 2018)

PRAYER :

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the letters patent Act, prayed to set aside the Judgment and decree dated 04.12.2017 made in C.S.No.428 of 2008 on the file of this Court.



For Appellant : Mr.V.Manohar
For Respondents : Mr.G.R.M.Palaniappan

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J U D G M E N T

(Judgment of the Court was passed by T.V.Thamilselvi, J)

Challenging the Judgment and decree dated 04.12.2017 passed in C.S.No.428 of 2008, the plaintiff has filed the above appeal.

2. The appellant/plaintiff filed the suit for specific performance in respect of the agreement for sale dated 24.10.2007 against the respondents-defendants. After contest, the suit was dismissed. Aggrieved over the same, the plaintiff has preferred the above original side appeal.

3. For the sake of convenience, the parties are referred to as plaintiff and defendants.

4. The Brief facts of the case are as follows:-

(i) According to the plaintiff, defendants 1 to 6, who are the owners of the suit property, offered to sell the same for consideration of Rs.30,00,000/- (Rupees Thirty Lakhs Only) to the plaintiff, who is also a tenant, for commercial purposes, of a portion of the suit property in the ground floor and they entered into a sale agreement on 24.10.2007. As per the terms of the agreement, the defendants paid an advance of Rs.5,10,101/- on the date of the agreement and a period of 3 months was fixed for performance of the contract. The sale agreement also contemplated delivery of vacant possession of the first floor of the premises and also to close the entrance/ways to the adjacent building from the first floor by the vendors.

(ii) The plaintiff would further contend that though the defendants 1 to 3, 5 and 6, who are the brothers, had agreed to get the signature of the 4th defendant in the suit agreement or to get an authority from the 4th defendant for sale of the property in favour of the plaintiff, however, failed to keep up their promise and the 1st defendant being the eldest, agreed to obtain the signature of the 4th defendant, at the time of the execution of the sale deed. Believing the words of the 1st



defendant, the plaintiff did not press hard for the 1st defendant signing the sale agreement. Since the defendants did not come forward to comply with the terms of the contract, viz. to evict the tenant in the first floor and to close the ways and entrances to the adjacent building, the plaintiff had issued a notice on 19.02.2008 calling upon the defendants to comply with the terms of the agreement by executing the sale deed within three days.

(iii) The defendants 1 to 3, 5 and 6 sent a reply notice dated 22.02.2008, contending that the plaintiff has not come forward to pay the balance sale consideration within the time stipulated under the agreement dated 24.10.2007, despite the fact that they have taken steps to comply with Clauses 5 and 6 of the agreement of sale. In the reply notice, the defendants further stated that in view of the failure on the part of the plaintiff to comply with the terms of the agreement, the defendants called upon the plaintiff to receive a sum of Rs.4,00,000/- after deducting 25% from and out of the said advance amount as per the Clause 8 of the said agreement and to cancel the sale agreement within three days. A demand draft for a sum of Rs.4,00,000/-, dated 22.02.2008 was also enclosed with the said reply notice. The plaintiff sent a re-joinder to the said reply on 26.02.2008, returning the demand draft. Thereafter, the plaintiff filed the suit for specific performance of the agreement of sale dated 24.10.2007. During the pendency of the said suit, the defendants 1 to 6 sold the suit property to the defendants 7 and 8 on 30.05.2008 and they were also impleaded as defendants in the suit.

(iv) In the written statement filed by the defendants 1,2,3,5 and 6, they have admitted the execution of the sale agreement and receipt of advance amount of a sum of Rs.5,10,101/-. According to the defendants, time is the essence of the contract as per the agreement dated 24.10.2007. Further they have contended that the plaintiff is not entitled for the relief of specific performance, as he has not come forward to pay the balance sale consideration within the stipulated time and they denied the allegation that they promised to get the signature of the fourth defendant, who is living abroad. Further, they claimed that the plaintiff was not ready and willing to perform his part of the contract within the stipulated time. Hence, they rescinded the contract by way of reply notice stating that the plaintiff is not entitled to the relief of specific performance.

(v) Though the defendants 7 and 8 have filed separate



written statement, being the subsequent purchasers and the defence raised by them is similar to that of defendants 1 to 3, 5 and 6, they are not entitled to put up any other defence.

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5. Considering the submissions made by the learned counsel on either side, the learned Single Judge found that the plaintiff has not established his readiness and willingness to pay the balance sale consideration and get the sale deed executed in his favour and dismissed the suit.

6. Aggrieved over the same, the plaintiff-appellant has preferred this Original Side Appeal.

7.1 Mr.V.Manohar, learned counsel appearing for the appellant/plaintiff submitted that though the 4th respondent/4th defendant has not signed in the sale agreement, the respondents 1 to 3, 5 and 6/ defendants 1 to 3, 5 and 6 being co-owners of the property had consented with the appellant/plaintiff for the sale of the property and hence, it has no impact on the performance of the terms of the contract for the reason that the 4th defendant is represented by other co-owners of the property. Further the learned counsel submitted that the respondents have not taken any steps to fulfil their part of the agreement with regard to the eviction of the tenant as well as the closure of the entrance leading to the first floor, thereby, committing breach of terms. The learned counsel also submitted that the appellant was always ready and willing to perform his part of the contract.

7.2 The learned counsel further submitted that as per the terms of the contract, defendants 1 to 3, 5 and 6 have not complied with Clauses 4 and 6, viz, to vacate the tenant in the first floor and to close the ways and entrance to the adjacent building. Hence, a notice dated 19.02.2008 was issued calling upon the defendants to comply with the terms of the agreement and also to execute the sale deed within three days from the receipt of that notice. But, instead of complying with the said terms, the defendants sent a reply notice dated 22.02.2008 enclosing the Demand Draft for a sum of Rs.4,00,000/- after deducting 25% out of advance amount of Rs.5,00,000/- by rescinding the contract stating that the appellant-plaintiff was not ready to perform his part of the contract within the stipulated period of three months.

7.3 The learned counsel appearing for the appellant, in



support of his contentions, has relied upon the following judgments:-

(i) 2020 (3) SCC 280: (SC) [C.S.Venkatesh v. A.S.C. Murthy], wherein the Hon'ble Supreme Court held as follows:-

" 17. In N.P. Thirugnanam (Dead) by LRs. v. Dr. R. Jagan Mohan Rao and Others¹, it was held that continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant of 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 to 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 necessarily be proved to be available.

18. In Pushparani S. Sundaram and Others v. Pauline Manomani James (deceased) and Others², this Court has held that inference of readiness and willingness could be drawn from the conduct of the plaintiff and the totality of circumstances in a particular case. It was held thus:

"5..... So far these being a plea that they were ready and willing to perform their part of the contract is there in the pleading, we have no hesitation to conclude, that this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same. Now examining the first of the two circumstances, how could mere filing of



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this suit, after exemption was granted be a circumstance about willingness or readiness of the plaintiff. This at the most could be the desire of the plaintiff to have this property. It may be for such a desire this suit was filed raising such a plea. But Section 16 (c) of the said Act makes it clear that mere plea is not sufficient, it has to be proved." 1995 (5) SCC 115 2002 (9) SCC 582

19. Similar view has been taken by this Court in Manjunath Anandappa URF Shivappa Hanasi v. Tammanasa and Others [2003(10) SCC 390] and Pukhraj D. Jain and Others v. G. Gopalakrishna [2004(7) SCC 251].

(ii) AIR 2021 Supreme Court 5581 [Sughar Singh v. Hari Singh (Dead) Through LRS and Others] wherein the Hon'ble Supreme Court held as follows: -

" 5.1. At the outset it is required to be noted that the appellant herein - original plaintiff instituted the suit for specific performance of the agreement to sell dated 10.10.1976. The learned Trial Court as well as the learned First Appellate Court decreed the suit in favour of the plaintiff. Both, the learned Trial Court as well as the learned First Appellate Court held all the issues in favour of the plaintiff including the issue that the plaintiff was always ready and willing to perform his part of contract. However, the High Court in exercise of powers under Section 100 of the CPC has reversed the concurrent findings recorded by both the Courts below on readiness and willingness, mainly / solely on the ground that there are no specific averments in the plaint which are required as per section 16(c) of the Act. The High Court has also allowed the appeal and consequently dismissed the suit for specific performance on the ground that the relief of specific performance is the discretionary relief under Section 20 of the Act and that even though the execution of the agreement to sell is proved and even the plaintiff was found to be always ready and willing to perform his part of the obligation under the agreement to sell, the



decree of specific performance is not automatic and such grant of decree is dependent upon the principles of justice, equity and good conscience.

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7. Even otherwise it is required to be noted that as such there were concurrent findings of fact recorded by the learned Trial Court as well as the learned First Appellate Court on readiness and willingness on the part of the plaintiff, which were on appreciation of evidence on record. Therefore, in exercise of powers under Section 100 of the CPC the High Court ought not to have interfered with such findings of fact unless such findings are found to be perverse. Having gone through the findings recorded by the learned Trial Court as well as the learned First Appellate Court on readiness and willingness on the part of the plaintiff, we are of the opinion that findings recorded cannot be said to be perverse and/or contrary to the evidence on record. On the contrary High Court has ignored the necessary aspects on readiness and willingness which are stated herein above including the conduct on the part of the parties."

8. Countering the submissions made by the learned counsel for the appellant, Mr.G.R.M. Palaniappan, learned counsel appearing for the respondents/defendants submitted that within the stipulated period of three months, the appellant-plaintiff had not expressed his readiness and willingness to perform his part of the contract by tendering the balance sale consideration. Instead, he issued notice calling upon the respondents-defendants to perform their part of the contract. Hence, as per Clause 8 of the agreement, the respondents had returned the amount, by rescinding the contract.

9. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, it could be seen that the appellant-plaintiff had issued a lawyer's notice dated 19.02.2008 i.e. after 90 days of the period mentioned in the agreement calling upon the defendants to comply with the terms of the agreement and to execute the sale deed within three days. The plaintiff, who was examined as P.W.1 admitted that he had deposited the amount only in the month of January 2008 i.e., after expiry of



90 days, as stipulated in the sale agreement. Since the appellant-plaintiff was not ready and willing to perform his part of the contract, the sale could not be completed and this fact was appreciated by the learned Single Judge and rightly concluded that the appellant-plaintiff was not ready and willing to perform his part of the contract and mere possession of amount in the account is not sufficient to prove that he was ready and willing to pay the balance sale consideration. It is pertinent to note that the amount deposited in the appellant-plaintiff's account after three months was withdrawn by him subsequently. Taking note of the said fact, the learned Single Judge rightly observed that the appellant-plaintiff has not established his readiness and willingness to pay the balance of sale consideration and get the sale deed executed in his favour.

10. Another contention put forth by the learned counsel appearing for the appellant that the respondents-defendants failed to comply with Clauses 4 and 6 of the agreement with regard to the eviction of the tenant as well as the closure of the entrance leading to the first floor, the learned counsel appearing for the respondents-defendants submitted that already the first floor was lying vacant and there was no need to evict the tenant. Even during the cross examination of D.W.1, he had categorically admitted that the tenant in the first floor had vacated the premises even prior to the execution of Ex.P1 agreement of sale and the suggestion made to the said witness was also answered in the affirmative. Clause 4 of the agreement reads as follows:-

" 4. Vendors agreed to vacate and hand over vacant possession of the first floor to the purchaser before registering the sale deed."

11. On a reading of the Clause 4, it is clear that before registering the sale deed, the defendants agreed to hand over the vacant possession of first floor. Therefore, vendors/defendants are actually in the possession of the first floor, and the same is not in the occupation of the tenant. Hence, the objection raised by the appellant-plaintiff that the respondents-defendants have not taken any steps to vacate the tenant is not acceptable one and the same is rightly appreciated by the learned Single Judge which needs no interference.

12. As per Clause 4 and 6 of the agreement, the vendors agreed to close the entrance/ways to adjacent building from the



suit schedule building. Thus, before registering the sale deed, all these conditions are required to be fulfilled by the respondents-defendants. But, as discussed above, within the stipulated time, the appellant-plaintiff has not expressed his readiness and willingness to perform his part of the agreement by tendering the balance sale price, hence by invoking Clause 8 of the agreement the defendants returned the balance amount by rescinding the contract through their reply notice (Ex.P.4). Clause 8 of the agreement reads as follows:-

"8. Both the parties are entitled to the remedies available under the specific relief act, for specific performance of the terms of this agreement of the sale deed. If the vendors failed to perform this agreement of sale, the vendors shall return the advance of Rs.5 lakhs, plus 25% of the said advance of Rs.5 Lakhs together to the purchaser and if the purchaser failed to perform this agreement of sale in the stipulated time, the vendor shall return the advance of Rs.5 lakhs, after deducting 25% of the said advance to the purchaser."

13. The effect of Clause 8 is that if the vendors failed to perform their part of the contract they will have to return the advance plus 25% of the advance amount and in default on the part of the purchaser/plaintiff, he would be entitled to refund of amount less 25%. Accordingly, the respondents-defendants returned a sum of Rs.4,00,000/- after deducting 25% of the advance amount of Rs.5,00,000/-. Therefore, the objection raised that clauses 4 and 6 have not been complied with by the respondents- defendants as per the terms of the agreement, is not acceptable. Considering all these facts, the learned Single Judge rightly rejected the relief of specific performance in favour of the plaintiff.

14. Though the learned counsel for the appellant submitted that the 4th respondent/4th defendant had agreed for the sale, there is nothing on record to show that there was any such agreement or assurance made by the 4th respondent/4th defendant. A perusal of the agreement reveals that the 4th defendant had not signed the agreement. This fact was also admitted by both the parties. Hence the learned Single Judge rightly concluded that the agreement could not be enforced against the co-sharers, who were not signatory of the agreement and it shall not amount to breach of terms. Hence, the learned Single Judge rightly concluded that the agreement could not be enforced against the



co-sharers, who were not signatory of the agreement. Hence, the objection raised by the appellant/plaintiff that the agreement signed by other co-sharers would bind the absentee co-sharer/fourth defendant, is liable to be rejected.

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15. The contention of the appellant that in order to evade his claim, the respondents 1 to 6/defendants 1 to 6 sold the property to respondents 7 and 8/ defendants 7 and 8 during the pendency of the suit, cannot be agreed for the reason that the respondents 7 and 8/ defendants 7 and 8 being pendente lite purchasers, their impleading shall not alter the position. Since the appellant-plaintiff failed to prove his case by adducing oral and documentary evidences, the learned Single Judge had rightly dismissed the suit for specific performance. Further, the subsequent sale made by the other defendants shall not bind the plaintiff in any manner whatsoever for the reason that they are not signatories to Ex.P1 sale agreement.

16. Though there is no dispute with regard to the ratio laid down in the Judgments of the Hon'ble Supreme court relied upon by the learned counsel appearing for the appellants, since the facts and circumstances of the case differs from the case on hand, the said Judgments are not applicable to the present case.

17. The appellant-plaintiff, who approached the Court for the relief of specific performance neither proved that he was ready and willing to perform his part of the contract, nor proved that he complied with all the terms of the agreement on his part. The learned Single Judge rightly concluded that the plaintiff is not entitled for the relief of specific performance. We do not find any ground to interfere with the judgment and decree passed by the learned Single Judge. Accordingly, the Original Side Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

pb1/Rj



To

The Sub Assistant Registrar,
Original Side Section,
High Court, Madras.

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+1cc to Mr.V.Manohar, Advocate, S.R.No.26213

+1cc to Mr.G.R.M.Palaniappan, Advocate, S.R.No.26486

O.S.A.No.101 of 2018

PA (CO)

PM/16/06/2022