



S.A.No.251 of 2016

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2022

CORAM

THE HONOURABLE MRS. JUSTICE **T.V.THAMILSELVI**

S.A.No.251 of 2016

A.Loganathan

...Appellant

Vs.

1.K.Ponnammal
2.K.Panchalingam
3.K.Palanisamy (Died)
K.Subramaniam (Died)
4.K.Shanmugam
5.Kalaivani
6.Sivabakkiam
7.Nagarathinam
8.Kanagamani

... Respondents

(R3 died, R7 & R8 as LR's of the deceased R3 vide Court order dated 08.04.2022 made in C.M.P.Nos.6241, 6244 & 6245/2022 in S.A.No.251 of 2016)

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 12.08.2014 passed in A.S. Nos.32/2010 & 38/2011, on the file of the II Additional District cum Sessions Court, Tiruppur, reversing the decree and judgment dated 29.01.2010 passed in O.S. No.46 of 2006, on the file of the Subordinate Court, Udumalpet.



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For Appellant : Mr.S.Parthasarathy, Sr. Counsel for
Mr.S.Mukunth for
M/s.Sarvabhauman Associates
For R1 : Mr.Mr.L.Mouli
For R2, R4, R5, R7 & R8 : Mr.S.Subbiah, Sr. Advocate
For R6 : Mr.C.Selvaraj

JUDGMENT

The appellant herein is the plaintiff in O.S. No.46 of 2006, on the file of the Subordinate Court, Udumalpet, filed against the respondent/defendants 1 to 6 herein for the relief of declaration of the sale deed executed by the defendants 1 to 5 in favour of the sixth defendant is null and void. Consequently, directing the defendants 1 to 6 to execute the sale deed in his favour as per sale agreement or alternative remedy of refund the advance amount.

2.The defendants 1 to 5 contested the suit by submitting that they have not executed the sale agreement in favour of the plaintiff and as security for a loan transaction, the said document came into force and denied the plaintiff's claim. The sixth defendant contended that, as



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bonafide purchaser he purchased the property from the defendants 1 to 5 without any encumbrance for valid consideration.

3.On considering both side submissions, the Trial Court framed two issues. Considering the evidence adduced on both sides and documents, the trial Judge concluded that the sale agreement between the plaintiff and the defendants 1 to 5 is valid and the plaintiff proved his readiness and willingness to perform his part of the contract. But the defendants failed to execute the sale deed and hence, directed the defendants to execute the sale deed in favour of the plaintiff and also concluded that the purchase of the sixth defendant from defendants 1 to 5 is not a bonafide purchase. Accordingly, granted both relief declaration and specific performance granted in favour of the plaintiff.

4.Aggrieved over the same, the defendants 1 to 5 and sixth defendant filed two separate appeals in A.S. Nos.32/2010 & 38/2011, on the file of the II Additional District cum Sessions Court, Tiruppur. Both the appeals were heard jointly by the Lower Appellate Judge and



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independently analysed the facts and evidence and held that the sale agreement between the parties are valid one and disbelieved the defence taken by the defendants 1 to 5 that it was executed for the purpose of loan transaction, but concluded that the plaintiff not proved his readiness and willingness till filing of the suit and hence, thus he is not entitled for both the reliefs and also concluded that the purchase made by the sixth defendant is valid by setting aside the findings of the trial Court and granted alternative relief to refund the advance to the plaintiff with interest.

5. Challenging the said findings, the plaintiff preferred this appeal by contending that the Lower Appellate Court failed to see that time is not an essence of contract and also failed to consider the conduct of the defendants 1 to 5 not to get legal heirship certificate as they promised in time, erroneously concluded that the plaintiff was not proved his readiness and willingness are totally against the evidence and also improper appreciation of the both law and facts. Apart from that the sixth defendant purchased the property for lesser value and the same was also



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not appreciated by the Lower appellate Judge and hence, entire findings are sustained unjust and hence, prayed to set aside those findings by allowing this appeal.

6.This appeal is admitted on the following substantial questions of law :

- (a) "Is the Lower appellate Court right in dismissing the suit for specific performance on the ground that the appellant had not issued legal notice before the expiry date of the sale agreement and therefore, is not willing to perform the contract?
- (b) Is the Lower Appellate Court justified in coming to the conclusion that the sixth respondent is a bonafide purchaser overlooking the fact that the evidence of D.W.4 who is supposed to corroborate the evidence is running contrary to the evidence of the sixth defendant (DW6), exposing collusion between the defendants 1 to 5 and the 6th defendant?"

7.The brief facts of the case is as follows:

The suit property originally belongs to one Kandasamy



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Gounder and on his death his legal heirs defendants 1 to 5 became absolute owners of the property and agreed to sell the same to this plaintiff on 28.12.2005 for a sum of Rs.2,63,000/- and on the same date, Rs.50,000/- was paid as advance and remaining balance amount has to be paid by the plaintiff within five months. The defendants 1 to 5 on receipt of the sale consideration, execute the sale deed in favour of the plaintiff with default clause, the sale agreement (Ex.A1) was executed between the parties. Meanwhile, from 29.04.2006 to 04.06.2006 the plaintiff went to abroad with the knowledge of the defendants 1 to 5 after his arrival he approached the defendants 1 to 5 but they expressed that they are awaiting to get legal heirship certificate. But surprisingly the plaintiff came to know that the defendants 1 to 5 executed the sale deed in favour of the sixth defendant on 16.06.2006 for lesser value and hence, he filed the suit to declare the sale deed as null and void and also prayed to direct the defendant to execute the sale deed by specific performance. The defendants 1 to 5 denied the execution of the sale deed in favour of the plaintiff contended that they borrowed a loan of Rs.50,000/- from the plaintiff and as a security for the loan, they executed a promissory note



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and handed over the title deed and also blank signed stamp papers, blank pronotes, after repayment he returned the pronote and title deed but not returned the stamp papers and the same was manipulated as the sale agreement. Hence, they are not liable to execute the sale deed. Further more, the sixth defendant, as a bonafide purchaser, purchased the property for valuable consideration and the same was contended by the sixth defendant also.

8.On considering both oral and documentary evidence, the trial Court concluded that with the knowledge of the defendants 1 to 5, the plaintiff went to abroad and after his arrival, he expressed his readiness and willingness the defendants 1 to 5 refused and it also concludes that the sale agreement is a valid one between the parties and not executed for the purpose of loan transaction and also gave finding that the purchase made by the sixth defendant is not a bonafide one. Accordingly, the suit is decreed.



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9.Before the Lower Appellate Court the defendants 1 to 5 contended assuming even if it is valid sale agreement, plaintiff bound to prove that within a stipulated period he was ready to perform his part of contract but he failed nor he expressed his willingness. But the trial Judge failed to appreciate this aspect thereby, he disputing the findings of the trial Court. On analysing the facts and evidence, the Lower Appellate Judge independently arrived conclusion that within a stipulated period the plaintiff not proved his readiness and willingness. Accordingly, the relief was declined in favour of the plaintiff, granting alternative remedy to refund the advance and also concluded that purchase made by the sixth defendant is bonafide one by setting aside the findings of the trial Court.

10.Challenging the said finding, the plaintiff approached this Court by contending that the plaintiff proved his readiness and willingness to perform his part of the contract. But the Lower Appellate Judge totally ignored his evidence and without appreciating the conduct of the defendants 1 to 5, who sold the property to the sixth defendant for



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lesser value by colluding each other, erroneously dismissed his claim.

That apart time is not an essence of contract. with no such issue was framed before the Courts below. The findings of the Lower Appellate Judge that within a stipulated period the plaintiff not proved his readiness and willingness totally misconception of law and facts. Accordingly, prayed to set aside the same by relying on the following authorities :

(a) *"Govind Prasad Chaturvedi Vs Hari Dutt Shastri and Another"*
reported in *"1977 (2) SCC 539"*

"Specific Relief Act, 1963 - Section 9 - Defence of time being the essence of the contract - Nature of - Applicability to contracts for sale of immovable property - Held, High Court cannot make the essence of the contract an issue if it was not an issue in the trial Court, the defendant not having raised such a defence in his written statement.

The fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract.

Also the language used in the agreement is not such as



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to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by the circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract".

(b) "V.Udayakumar and 7 others Vs Navaneethammal and 5 Others"

reported in "2002 (1) CTC 334"

"Specific Relief Act, 1963— Suit for specific performance — Readiness and willingness — Plea regarding — No specific issue raised with regard to readiness and willingness on part of plaintiff to perform his part of contract — No discussion by courts below on such plea — Defendant cannot raise that plea in letters patent appeal —

10.From the pleadings, no issues were framed either by the trial Court or by the learned Single Judge with regard to the readiness and willingness of the plaintiff in respect of the performance of his part of the contract. If really such plea has been raised, the parties ought to have insisted for framing of the specific issue with regard to that question. When there is no specific issue with regard to the readiness and willingness on the part



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of the plaintiff and when there is no discussion, it is not open to the learned senior counsel for the appellants to raise such a plea before this Court".

(c) "Murugesu Naicker (Died & 3 Others Vs Govindaraja Nattar & Another" reported in "2005-1-L.W.472"

"18.It is not as if there is complete absence of pleading and proof of Readiness and Willingness. In the factual scenario of the case as to how Ex.A.1 was entered into between the parties is to be pointed out. As noted earlier, the averments regarding Readiness and Willingness in Para (7) of the plaint and the evidence of Plaintiffs are sufficient compliance of S. 16(c) Specific Relief Act. When there was no specific defence on the question of Readiness and Willingness, non-framing of the issue on the Readiness and Willingness does not vitiate the concurrent findings and the decision of the Courts below".

The learned counsel for the appellant/plaintiff argued that before the lower Court no specific issue with regard to readiness and willingness on the part of the plaintiff and the findings rendered by the Courts below totally erroneous and liable to be set aside.



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11.By way of reply, the learned counsel for the respondents submits that before the trial Court no separate issue with regard to readiness and willingness was framed but the trial Judge elaborately discussed about the plaintiff's readiness and willingness and granted relief in his favour and the same is accepted by the plaintiff and he has not raised any such objection before the trial Court. When the Lower Appellate Court reversed the findings, the plaintiff first time raised his objection, such objection before this Court is not permissible one.

12.Considering submissions on either side a perusal of the trial Court findings the trial Judge framed two issues :

- a) Whether the sale agreement is valid ?
- b) Whether the plaintiff is entitled for the relief of specific performance ?
- c) To what other relief ?



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13. On discussing the issue No.1 the trial Judge arrived a conclusion that the defense taken by the defendant with sale agreement was came into force by manipulation of the documents which was handed over at the time of the loan transaction is false and concluded that the sale agreement was signed by all the parties with full knowledge and thereby, gave the finding that the sale agreement is a valid one. While discussing the issue No.2, the trial Judge elaborately discussed about the conduct of the parties and decided that the plaintiff was always ready and willing to perform his part of the contract. But the defendants 1 to 5 evaded and created a document in favour of the sixth defendant. As rightly point out by the defendants' counsel, the plaintiff has not submitted any additional issues before the trial Court. With regard to framing issues about the readiness and willingness and even if Court not framed same issues option is given to the parties to submit fair issues even at the time of the trial. But having known about only two issues were framed by the trial Judge, the plaintiff has not taken any steps to submit additional issues on their side. Having failed before the trial



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Court, the plaintiff is not entitled to raise objections with regard to framing of the issues before this Court. Even though no issue was framed, the evidence with regard to readiness and willingness of the plaintiff was considered by the Courts below.

14. Another arguments contested by the learned counsel for the appellant that after entering into the sale agreement, the plaintiff went to abroad and after his arrival he approached the defendants 1 to 5 evaded, apart from that they were not obtained legal heirship certificate in time. Such conduct of the defendants was not appreciated by the Lower Appellate Court and erroneously concluded that he was not ready and willing to perform his part within five months, which is totally misconception of the fact.

15. Per contra, the learned counsel for the respondents contended that the sale agreement is a valid one within five months the plaintiff ought to have to get sale deed by tendering the balance amount. But he failed and not even issued any notice expressing his readiness and



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willingness and after completion of five months he approached the defendants and the same was rightly appreciated by the Lower Appellate Judge which needs no interference. It was further contended that there was no agreement between the parties to obtain legal heirship certificate as alleged by the plaintiff, but for the purpose of his convenience he raised such plea before the Court without any agreement to that effect between the parties. To substantiate his arguments the respondents relied on the following authorities :

- a) *"Ajaib Singh and Others Vs Tulsi Devi (SMT)"* reported in "(2000) 6 SCC 566"

"B.Equity - Equitable Relief - Person making averments as per convenience without regard for truth, held, would be precluded from getting equitable relief

It is clear that the respondent-plaintiff is making averments as are convenient to her without any regard for truth. This conduct would preclude the respondent from getting any equitable relief. However in this case even otherwise it is clear that the respondent had not performed her part of



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the agreement. Thus there never was any readiness and willingness. She could thus not get specific performance."

b) "*Saradamani Kandappan Vs S.Rajalakshmi & Others*" reported in "*2011 (4) CTC 640*"

"Specific Relief Act, 1963 (36 of 1963), Section 20 - Whether time is essence of contract relating to immovable property - When parties prescribe time/period for taking certain steps for for completion of transaction such stipulation must have some significance and cannot be ignored - Court while granting or refusing to grant specific performance should apply greater scrutiny and strictness whether purchaser was ready and willing to perform his part of contract-

19. The legal position is clear from the decision of a Constitution Bench of this Court in *Chand Rani v. Kamal Rani* [(1993) 1 SCC 519] wherein this Court outlined the principle thus: (SCC p. 525, para 19)



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"It is a well-accepted principle that in the case of sale of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed".



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c) "*P.Rajaram and another Vs. T.R.Maheswaran*" reported in "2015

(1) *TLNJ 497 (Civil)*"

Specific Relief Act 1963 - Section 16(c) - Specific performance - Agreement - readiness and willingness to perform his part of the contract - suit decreed - appeal - pre condition / clause / essential terms stipulation incorporated in the sale agreement - non compliance of - effect - in case plaintiff failed to pay the balance consideration and get the sale deed executed in his favour, he would lose the advance consideration. Similarly, in the event of the failure of defendants to execute the sale deed in spite of tendering the balance consideration by the plaintiff, liberty was granted to the plaintiff to deposit the balance consideration in Court and to file a suit for specific performance - deposit the balance consideration in Court and to file a suit for specific performance is a one of essential terms and pre condition - not complied with - plaintiff was guilty of violation of a material term of contract, the said fact was a bar for granting the relief of specific performance - suit dismissed - appeal allowed."



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16. On considering the rival submissions on either side, the case of the plaintiff is that as per Ex.A1/sale agreement the defendants 1 to 5 bound to execute the sale deed by receiving the balance amount within five months immediately, after completion of the five months the plaintiff approached, but they refused and also transferred the property to the sixth defendant with ulterior motive. But the defendants 1 to 5 claimed that between them there was loan transaction and totally denied the Ex.A1 agreement and also contended that for valuable consideration the property was sold to the sixth defendant and also claimed himself as bonafide purchaser. The defendant admits his signature but denied the contention of Ex.A1. So the burden is on him to prove that Ex.A1 was executed for the purpose of loan transaction, but before the trial Court there is no contra evidence adduced on the side of the defendant to establish the loan transaction. So the agreement deemed as a valid one. To avail specific relief, one such condition which mandate the plaintiff to establish that he was always ready and willing to perform his part of the



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agreement as per the terms, within five months the plaintiff has to pay balance sale consideration to the defendants 1 to 5. On seeing the pleadings after completion of the five months he approached the defendants 1 to 5 but no pre-suit notice was issued within five months the plaintiff has to prove his readiness and willingness to perform his part of the contract. There is no evidence that he expressed his willingness to get the sale deed from the defendants 1 to 5 by paying balance sale consideration. On the other hand, the plaintiff contended that the defendants agreed to get the legal heirship certificate evaded to submit the legal heirship certificate and hence, he was not able to get the sale deed in time. It is admitted fact that no such recital was executed in the agreement with regard to obtaining the legal heirship certificate. As rightly pointed out by the defendants' counsel, as per the terms of the agreement he agreed to pay the balance amount to all legal heirs of KandasamyGounder. While that being so, there is no necessity arise for the defendant to get the legal heirship certificate for the reason that all the legal heirs were already parties in the sale agreement / Ex.A1. Therefore, without any recital in the agreement, the reasons stated by the plaintiff



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that the delay caused by the defendants to get the legal heirship certificate is not acceptable one and he took that plea for his convenient sake without any terms of contract the specific relief and equity, conduct of the plaintiff also be fair and just.

17.In the instant case, without any terms with regard to the legal heirship certificate the reasons stated by the plaintiff to that effect is not acceptable one and the same also rightly appreciated by the Lower Appellate Judge. Thus plaintiff would be precluded from getting equitable relief which need no interference.

18.With regard to readiness and willingness on the part of the plaintiff, he always ready to tender the amount but the defendants alone evaded. As discussed above nor there is no proof that he expressed his willingness to the defendants 1 to 5 to get the sale deed executed within five months. The admitted fact that the plaintiff is a document writer and he is also doing finance and other works and hence, he had sufficient amount in his hand. But he has not tendered the amount to the defendants



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within a stipulated period. The readiness and willingness on the part of the plaintiff is to be from the date of the agreement till filing of the suit.

19.As discussed above within a stipulated period, the plaintiff has not expressed his readiness and willingness nor there is no proof that he deposited the amount in the Court. P.W.1 also admits that he is also a partner in the finance company and he had sufficient source of income, but within five months he could have get the sale deed executed by paying the balance amount but he has not done so. So the conduct of the plaintiff proves that he was not ready and willing to perform his part of the agreement. The Lower Appellate Judge independently analysed all the evidence and circumstance and rightly concluded that the plaintiff failed to prove his part of readiness and willingness.

20.The ratio laid down in *"His holiness Acharya Swami Ganesh Dassji V. Sita Ram Thapar, 1996 (2) CTC 158 (SC) 1996 (4) SCC 526, ION which the Apex Court observed as follows :*

"There is a distinction between readiness to perform the contract and willingness to perform the contract. By



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readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price, for determining his willingness to perform his part of the contract, the conduct has to be properly scrutinized

squarably applicable to the fact of the case and therefore, the plaintiff failed to prove his readiness and willingness. Apart from that for the sake of his convenience he included certain terms which were not agreed between the parties itself. The plaintiff not stated the correct facts before this Court to get equitable remedy and conduct of the plaintiff also considered. Apart from readiness and willingness, the first appellate Court rightly concluded that the plaintiff not proved his case. Accordingly, the substantial question of law 'A' is answered.

21. With regard to purchase made by the sixth defendant, he purchased the property after completion of the alleged stipulation period of five months. As per Ex.A1, admittedly, he paid valid consideration and get the sale deed executed from the defendants 1 to 5. When the plaintiff failed to establish his case, he cannot question the purchase



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made by the sixth defendant, who is the bonafide purchaser. The Lower Appellate Court also rightly appreciated this aspect and hence, objection raised by the plaintiff that the defendants 1 to 5 colluded with the sixth defendant and created the sale deed and the same is proved by the evidence of fourth defendant, is not acceptable one because the evidence of the fourth defendant also reveals that they were not aware of the alleged agreement with the plaintiff. On verifying the land value prevailing nearby lands, the sixth defendant purchased the property and there is no contra evidence on the side of the plaintiff to prove the value of the property. Hence, the findings rendered by the Lower Appellate Judge with regard to purchase of the sixth defendant is acceptable one which needs no interference.

22.The suit is dismissed with regard to relief of a declaration and specific performance and the suit is decreed with regard to alternative relief to refund the amount with interest at the rate of 12% per annum from the date of the suit till the date of the decree and at the rate of 6% per annum from the date of the decree till realization.



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23. Accordingly, the second appeal is dismissed as no merits, confirmed the findings of the Lower Appellate Court thereby, with regard to 1 & 2 relief the suit is dismissed with regard to alternative remedy the defendants 1 to 6 directed to refund the advance amount with interest. No costs.

11.08.2022

Index: Yes/No
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T.V.THAMILSELVI, J.
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To

- 1.The II Additional District cum Sessions Court, Tiruppur.
- 2.The Sub Court, Udumalpet.
- 3.The Section Officer, VR Section, High Court, Madras.

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