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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.03.2022

Delivered on : 06.04.2022

CORAM :

THE HONOURABLE MRS. JUSTICE S. KANNAMMAL

A.S.No.866 of 2014

Vijay Chandrakanth Shah ... Appellant/Plaintiff

Vs.

1.Dhanapalan
Jagannathan (died)
2.Tamilselvi
3.Soundappan
4.Nirmala

... Respondents/Defendants

Prayer : Appeal Suit filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 25.07.2014, passed in O.S.No.462 of 2006 on the file of the II Additional District-cum-Sessions Court at Tiruppur.

For Appellant : Mr.Mukund for
M/s.Sarvabhauman Associates

For Respondents : Mr.S.Kaithamalai Kumaran

J U D G M E N T

The appeal has been filed against the judgment and decree, dated 25.07.2014, passed in O.S.No.462 of 2006 on the file of the II Additional District and Sessions Court at Tiruppur.

2.The plaintiff, who failed in his suit for specific performance before the trial Court, is the appellant herein.

3.For the sake of convenience, the appellant shall hereinafter be referred to as "plaintiff" and the respondents 1 and Late Jagannathan (2nd defendant before trial Court) shall be referred to as "defendants".



7. On the side of the plaintiff, P.Ws.1 and 2 were examined and Exs.A1 to A17 were marked. The 1st defendant examined himself as D.W.1, however, no document was marked on the side of the defendants.

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8. Pending the suit, the 2nd defendant died on 28.12.2012 and his legal representatives were brought on record as defendants 3 to 5.

9. The trial Court, on considering the oral and documentary evidence on record, came to a conclusion that the deed of extension of time (Ex.A6) is true and valid; that time was essence of the sale agreement; that the plaintiff was not ready and willing to perform his part of the contract, and therefore, by a judgment and decree dated 25.07.2014, partly allowed the suit by denying the relief of specific performance, but decreeing the alternative prayer for refund of advance amount of Rs.4,00,000/- with interest @ 9% p.a. from the date of filing of suit till the date of decree and @ 6% p.a. from the date of decree till the date of realisation.

10. Challenging the judgment and decree dated 25.07.2014, passed by the trial Court, the plaintiff has filed the present appeal before this Court.

11. The learned counsel appearing for the appellant/plaintiff made the following submissions before this Court :

- The plaintiff was always ready and willing to pay the balance sale consideration and get the sale deed executed in his favour. The plaintiff has proved his financial capacity by way of Exs.A12 to A14, showing his bank balance in respect of Savings and Fixed Deposit Accounts and also the sale deed in favour of the plaintiff and his wife.
- The plaintiff has always been orally enquiring with the defendant about the probate proceedings, however, the defendants evaded from replying as well as performing their part of the contract.
- Having received the plaintiff's legal notice as early as on 12.11.2005 and 14.11.2005, the defendants have sent their reply notice only on 06.03.2006, after a delay of more than three months.



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- D.W.1 has admitted in his cross-examination that their sister had filed a suit against the defendants for partition in respect of the suit property in the year 1992 itself, however, they have deliberately suppressed the same to the plaintiff.
- The defendants have failed to inform about the fate of the probate proceedings well in time and hence, the delay is attributable to the defendants and not the plaintiff.
- D.W.1 has admitted the execution of the deed for extension of time in the cross-examination, however, has taken contradictory stand in written statement and reply notice.

12.The learned counsel for the appellant/plaintiff, by relying upon the decision of the Hon'ble Supreme Court in R.Lakshmikantham v. Devaraji [(2019) 8 SCC 62], submitted that, mere delay in filing the suit after accrual of cause of action, cannot be inferred against the plaintiff that he was not ready and willing to perform his part, when the suit is filed within the period of limitation. He also relied on the judgment of Hon'ble Supreme Court in Ferrodous Estates (Pvt.) Ltd. v. P.Gopirathnam (dead) and others [Civil Appeal No.13516 of 2015, dated 12.10.2020] and submitted that the suit for specific performance filed within limitation cannot be dismissed on the sole ground of delay or laches, and it is within the discretion of the Court, as to whether some additional amount ought or ought not to be paid by the plaintiff once a decree of specific performance is passed in his favour even at the appellate stage. The learned counsel further relied on the judgment of the Hon'ble Supreme Court in the case of Zarina Siddiqui v. A.Ramalingam alias R.Amarnathan [2014 (6) CTC 319] and submitted that, if the defendant does not come with clean hands and suppresses the material facts and misleads the Court, then, Court should not exercise its discretion to deny relief of specific performance to the plaintiff. He further relied upon the judgment of the Hon'ble Supreme Court in Silvey and others v. Arun Varghese and others [(2008) 11 SCC 45] and submitted that the conduct of the defendant also has to be taken into account while decreeing or denying a decree for specific performance.

13.The learned counsel concluded his arguments by submitting that the plaintiff was always willing and ready to execute his part of the agreement and the trial Court ought to have granted the relief of specific performance, hence, prayed for allowing the appeal with costs.



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15.The learned counsel concluded his arguments by submitting that the plaintiff was not at all ready and willing to perform his part of the sale agreement, and hence, the trial Court has rightly denied the relief of specific performance and prayed for dismissal of this appeal.

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

17.The execution of the sale agreement, dated 31.12.2002 (Ex.A2), for a sale consideration of Rs.14,00,000/- fixing three months' time limit for payment of balance sale consideration and execution of sale deed, is admitted by both the parties. The receipt of Rs.2,00,000/- as advance on the same day, i.e. on 31.12.2002 by the defendants from the plaintiff, is also admitted. Though the learned counsel on either side before this Court have only placed much emphasis on the readiness and willingness, this Court, being an appellate Court, has to render an independent finding on all aspects, based on oral and documentary evidence on record.

18.Accordingly, based on the rival submissions and pleadings, the points arising for consideration are :

- i. Whether the defendants have received a further sum of Rs.2,00,000/- from the plaintiff on 06.01.2003 ?
- ii. Is the deed of extension of time dated 29.03.2003 (Ex.A6) true and valid ?
- iii. Is time the essence of the sale agreement ?
- iv. Whether the plaintiff has shown his readiness and willingness to perform his part of the contract ?
- v. Whether the plaintiff is entitled to the relief of specific performance ?
- vi. To what other relief, the plaintiff is entitled to ?

Point No.1 :

"Whether the defendants have received a further sum of Rs.2,00,000/- from the plaintiff on 06.01.2003 ?"

19.The endorsement for the receipt of further advance amount of Rs.2,00,000/- from the plaintiff made on the reverse side of the 1st page of sale agreement Ex.A2 is marked as Ex.A5. D.W.1, on confrontation of Ex.A5 in the cross-examination, has admitted his signature on Ex.A5. He has also admitted the signatures of the witnesses to Ex.A5, viz., Balasubramaniam and R.Shanmugam. It is pertinent to note that the defendants, in their written statement as well as in the reply notice (Ex.A10),



have admitted the receipt of further advance amount of Rs.2,00,000/- on 06.01.2003. Therefore, this Court finds that the defendants have received a further amount of Rs.2,00,000/- on 06.01.2003, totally, a sum of Rs.4,00,000/- as advance from the plaintiff. Point No.1 is answered accordingly.

Point No.2 :

"Is the deed of extension of time dated 29.03.2003 (Ex.A6) true and valid ?"

20.D.W.1, in the cross-examination, has admitted his signature and the 2nd defendant's signature in the extension deed (Ex.A6). He has also admitted the signature of witnesses to Ex.A6, viz., Mohammed Farook and Mahendra Kumar Je Shah (P.W.2). P.W.2, in his evidence, has clearly narrated about the execution of the deed of extension of time (Ex.A6). It is pertinent to note that the defendants, in their written statement as well as in the reply notice (Ex.A10), have admitted the execution of deed of extension of time (Ex.A6). Therefore, this Court finds that the deed of extension of time Ex.A6, entered into by the defendants with the plaintiff, is true and valid. Point No.2 is answered accordingly.

Point No.3 :

"Is time the essence of the sale agreement ?"

21.It is the case of the plaintiff that time is not the essence of the sale agreement. However, P.W.1 and P.W.2, in their evidence, have clearly spoken about the execution of sale agreement (Ex.A2) and have admitted that three months' time period has been fixed for payment of balance sale consideration and execution of sale deed. Further, it is found that, at the verge of expiry of three months' time, the parties have entered into the deed of extension of time on 29.03.2003 (Ex.A6), which in turn, again stipulates the time limit as six months or till the termination of probate proceedings, for payment of balance sale consideration by the plaintiff. From the intention of the parties to renew the sale agreement before its expiry and again to stipulate a new time limit and in view of the dictum upheld by the Hon'ble Supreme Court in Saradamani Kandappan (supra) that Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored, it can be inferred that time is the essence of the contract in the present case on hand. Point No.3 is answered accordingly.



Point No.4 :

"Whether the plaintiff has shown his readiness and willingness to perform his part of the contract ?"

22.The plaintiff has marked the statement of his Savings Account with City Union Bank Ltd., Tiruppur Branch (Ex.A12), from which, it can be seen that the plaintiff has maintained more than Rs.9 Lakhs from 19.02.2003 till 21.04.2003 and on 22.04.2003, the balance fell down to Rs.16,316.92 and thereafter, till 11.12.2004, it did not go beyond a maximum of around Rs.1 Lakh. The plaintiff has also marked the Balance Certificate showing various Fixed Deposits maintained by him with Oriental Bank of Commerce, Tirupur, (Ex.A13) to show that he had more than Rs.11 Lakhs in the form of Fixed Deposits as on 25.08.2009. However, the date of opening of such accounts and their holding term have not been mentioned in Ex.A13. P.W.1, in his cross-examination, has stated that he could be able to produce it, but he has not produced the same before the Court. The plaintiff has also produced the sale deed in favour of him and his wife, for a sale consideration of Rs.13,00,000/- (Ex.A14). Relying on these documents, the plaintiff (P.W.1) has stated in his evidence that he has sound financial capacity to pay the balance sale consideration. However, on a perusal of the above documents Exs.A12 to A14, at the most, this Court can infer that the plaintiff was ready in his financial capacity till April, 2003, however, beyond that, his financial readiness is not sharp enough and the documents produced by him do not sufficiently disclose his readiness throughout till the hearing of the suit.

23.Even assuming for the sake of arguments that his financial capacity is sound throughout, insofar as the aspect of willingness is concerned, it can be seen that the payment of further advance amount of Rs.2,00,000/- on 06.01.2003 was not made voluntarily, and even according to the plaintiff, it was made only at the instance of the defendants to meet their urgent expenses; the plaintiff has not sent any communication within the three months' time stipulated in Ex.A2, showing his readiness or willingness to perform his part of the contract and admittedly, it is the defendants who have approached the plaintiff at the verge of expiry of three months and have sought for extension of time for a period of six months or till the termination of probate proceedings.



24. Added to that, after execution of deed of extension of time (Ex.A6) on 29.03.2003, the plaintiff became inactive for more than two years till he sent a legal notice to the defendants on 11.11.2005 (Ex.A7). Except merely deposing that he made oral enquiry with the defendants with regard to the probate proceedings, there appears to be no reliable written communication sent by the plaintiff to the defendants in this regard for more than two years. Though the deed of extension of time (Ex.A6) stipulates "or till the termination of probate proceedings" as an alternative, it initially and more specifically stipulates a time frame of "six months". However, after the expiry of six months from the date of deed of extension (Ex.A6), there is no communication to the defendants either showing his readiness and willingness to perform his part or at least enquiring about the fate of the probate proceedings. Such a conduct of the plaintiff itself shows that the plaintiff has put the sale agreement in cold storage for more than two years. After two years, on one fine day, the plaintiff suspected that the defendants were making alteration to the suit property in order to induct third parties, based on which, the plaintiff sent a legal notice on 11.11.2005 (Ex.A7), but, such an allegation remains unproved on the side of the plaintiff.

25. In the legal notice (Ex.A7), it is stated that "Please take notice that if you fail to comply with the above demand within a week of the receipt of this notice by you both, my client will initiate necessary Court proceedings against you both". It can be seen from the acknowledgment cards (Exs.A8 and A9) that the legal notice was received by the defendants 1 and 2 on 12.11.2005 and 14.11.2005 respectively. However, after receipt of notice by the defendants, the plaintiff has presented the suit for specific performance only on 27.09.2006, i.e., after a delay of ten months, for which, no plausible explanation has been given by the plaintiff.

26. The judgment relied upon by the learned counsel for the plaintiff in in R.Lakshmikantham (supra), holding that a short delay in filing the suit cannot be put against the plaintiff, is distinguishable on the facts of the case, inasmuch as the plaintiff therein takes a stand that he was under the impression that the legal notice was not at all served on the defendant. Whereas, in the present case on hand, the plaintiff, after having received the Acknowledgment Cards (Exs.A8 and A9), has not taken any steps for more than ten months to file a suit, which is not acceptable.



27. In *Saradamani Kandappan (supra)* and *Padmakumari and others v. Dasayyan and others* [2015 (6) CTC 545], wherein, the Hon'ble Supreme Court, while accepting the broad proposition of law that the time is not an essence of the contract in relation to contracts relating to immovable property, has upheld the dicta in *K.S. Vidyanadam and others v. Vairavan* [1997 (1) CTC 628] and held that the plaintiff will have to show continuous readiness and willingness. If the plaintiff is shown to be not ready and willing even for a particular period, that by itself would be a ground to non-suit the plaintiff, particularly, in a suit for specific performance relating to land, where prices are always in the raise. Even though time is not essence of the contract in respect of the agreement for sale of immovable property, the plaintiff must exhibit readiness and willingness and approach the Court within a reasonable time. The period of 3 years prescribed under Article 54 of the Limitation Act is only an outer time limit and the plaintiff ought not to wait till the expiry of 3 years period to file the suit almost at the end of the term claiming that he is ready and willing to perform his part of the contract.

28. For all the above reasons, this Court finds that the plaintiff has not shown continuous readiness and willingness to perform his part of the contract. Point No.4 is answered accordingly.

Point No.5 :

"Whether the plaintiff is entitled to the relief of specific performance ?"

29. The Hon'ble Supreme Court, in the case of *Kamal Kumar (supra)* has laid down the material questions which are required to be gone into for grant of relief of specific performance, which are as follows :

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



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grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff; and lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money, etc. and, if so, on what grounds."

30. Having found that the plaintiff has not shown his continuous readiness and willingness throughout to perform his part of the contract, which is a mandatory requirement for grant of relief of specific performance, as cited supra, this Court is not inclined to grant the relief of specific performance to the plaintiff and accordingly, the judgment of the trial Court insofar as the denial of the relief of specific performance, stands confirmed. Point No.5 is answered accordingly.

Point No.6 :

"To what other relief, the plaintiff is entitled to ?"

31. Though this Court has found that the plaintiff is not entitled to the relief of specific performance, as the receipt of Rs.4,00,000/- by the defendants from the plaintiff has been proved, this Court is of the opinion that the plaintiff is entitled to refund of advance amount of Rs.4,00,000/-.

32. However, this Court cannot lose sight of the condemnable conduct of the defendants for more than one reason :

- The defendants have completely suppressed the pendency of suit filed by their sister as early as in the year 1992 for partition in respect of the suit property, while entering into the sale agreement (Ex.A2) with the plaintiff, whereas, D.W.1 has expressly admitted the said fact in the cross-examination.
- Admittedly, the defendants have extended the time limit vide Ex.A6 for initiation of probate proceedings, whereas, D.W.1 has admitted in the cross-examination that they have withdrawn the probate proceedings, which they have not fairly informed the plaintiff.
- The defendants have initially admitted the receipt of further amount of Rs.2,00,000/- on 06.01.2003 and execution of extension deed (Ex.A6) in their reply notice (Ex.A10), whereas, D.W.1 has denied both in his proof affidavit, but later on, during the cross-examination, he has conceded the above information to be true.



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➤ Having received the legal notice (Ex.A7) sent by the plaintiff as early as on 12.11.2005 and 14.11.2005 vide Exs.A8 and A9, the defendants have sent their reply only on 06.03.2006 (Ex.A10), i.e., after a delay of three months, for which no tangible explanation has been given.

33.In *Silvey and others* (supra), the Hon'ble Supreme Court has held that, in a suit for specific performance, the conduct of the defendants has also to be taken into account.

34.In *Zarina Siddiqui* (supra), the Hon'ble Supreme Court, after finding that the defendant has suppressed material facts and misled the Court, held as follows :

"Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of Law."

35.In a suit for specific performance, the Court is vested with a discretion to do justice. In the light of the aforesaid decisions of the Hon'ble Supreme Court and also having regard to the conduct of the defendants, as discussed supra, this Court is of the considered opinion that the portion of the decree of the trial Court granting interest needs modification. It will be in the fitness of things to direct the respondents/defendants to pay the interest @ 12% p.a. on the advance of Rs.4,00,000/- from the date of the suit till the date of decree, and to pay the interest @ 9% p.a. thereafter, till realisation.

36.Considering the facts and circumstances of the case, this Court is not inclined to grant the prayer of creating charge over the suit property for the payment of the above said amount. Point No.6 is answered accordingly.

37.As a result, so far as the judgment and decree of the trial Court granting refund of advance amount is concerned, the same is modified to the following effect :

There shall be a decree that the defendants shall refund the advance amount of Rs.4,00,000/- (Rupees Four lakhs only) to the plaintiff 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 9% per annum from the date of the decree till the date of realization.



38. In fine, this appeal is partly allowed, confirming the judgment and decree of the trial Court, with the above modification in the interest portion alone. There shall be no order as to costs.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR

Copy to :

1. The II Additional District and Sessions Judge,
Tiruppur.

2. The Section Officer | with a direction to send back the
(V.R. Section), | original records to the Court below,
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+1cc to Mr.S.Kaithamalai Kumaran, Advocate Sr.23591

+1cc to M/s.Sarvabhauman Associates, Advocate Sr.23725

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