



A.S.No.371 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.09.2022

PRONOUNCED ON : 28.10.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

A.S.No.371 of 2017
and C.M.P.No.14086 of 2017

1. K.Anwarul Hug
2. V.M.Abdul Waheed (Deceased)
3. K.Anjumhara
4. Shabeerma
5. Noor Ahmed
6. Reyaz Ahmed
7. Mubeen Taj

... Appellants

(A3 already on record. A4 and A7 brought on record as legal heirs of the deceased 2nd appellant viz., (V.M.Abdul Waheed) vide Court order dated 05.09.2022 made in C.M.P.No.9075 of 2022 in A.S.No.371 of 2017 by SSJ)

Vs

1. P.Mohammed Hussain

2. The Sub Registrar,
Tirupattur Town,
Vellore District.

... Respondents



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Prayer: First Appeal filed under Section 96 read with Section 41(1) of Civil Procedure Code, praying to allow the appeal and to set aside the judgment and decree passed in O.S.No.107 of 2007 dated 04.07.2016 on the file of the learned Sub Ordinate Judge, Thirupattur, Vellore District and to dismiss the suit with costs.

For Appellants : M/s.L.Prabakar
for M/s.Kothandaraman

For R1 : M/s.C.D.Sugumar

For R2 : M/s.Dr.S.Suriya
Additional Government Pleader

J U D G M E N T

(Judgment of the Court was delivered by **S.SOUNTCHAR, J.**)

The unsuccessful defendants 1 to 3 who suffered a decree for specific performance have come up with this appeal. Pending appeal, the 2nd appellant passed away and hence his legal representatives were brought on record as appellants 4 to 7.



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2. Averments found in the plaint:

The 1st respondent herein filed a suit for specific performance of the contract dated 11.04.2007 marked as Ex.A1. As per the terms of said contract, the 1st appellant agreed to sell the plaint schedule property to 1st respondent for a sale consideration of Rs.3,30,000/-. The sale consideration was calculated at the rate of Rs.27.50 per square feet. The 1st respondent paid an advance amount of Rs.51,000/- and agreed to pay the balance amount within three months and get sale deed executed. According to the 1st respondent, as per the terms of agreement, the 1st appellant agreed to measure the suit property before registration and if the extent of the agreement mentioned property was found to be less than the extent mentioned in the agreement, 1st appellant agreed to receive a lesser consideration. But, however, if the extent was found to be in excess 1st appellant agreed not to claim higher sale consideration. The 1st respondent further claimed that he was ready and willing to perform his part of the contract. But the 1st appellant failed to measure the agreement mentioned property and execute the sale deed after receiving balance sale consideration as agreed. It was further averred in the plaint that well



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before expiry of the time limit, 1st respondent issued a pre suit notice to 1st appellant on 10.07.2007 and the same was received by him. The 1st appellant failed to send any reply for the pre suit notice sent by the 1st respondent. It was also stated in the plaint that 1st respondent agreed to get sale deed registered by the end of the September and also had written a letter dated 22.07.2007 expressing his willingness to get sale deed executed before the end of September. It was also averred that the 1st respondent instructed the 1st appellant to be present at the Sub Registrar's Office on 28.09.2007 to receive the balance sale consideration and get the sale deed executed, but the 1st appellant failed to turn up at Sub Registrar Office as demanded by him. On these pleadings, the 1st respondent laid the suit for specific performance of agreement in O.S.No.107 of 2007 on the file Sub Court, Thirupathur. During the pendency of the suit, 1st appellant had executed a power of attorney deed in favour of second appellant and in pursuance of the same, the second appellant as a power of attorney of 1st appellant, sold the agreement mentioned property in favour of 3rd appellant by a sale deed registered at the office of 2nd respondent. Therefore, the appellants 2, 3 and 2nd respondent were impleaded as defendants 2 to 4 in the suit.



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3. Averments found in written statement of the 1st appellant.

The 1st appellant agreed that he entered into an agreement of sale on 11.04.2007 and received an advance amount of 51,000/-. It was also submitted by the 1st appellant that time was essence of contract as the marriage of 1st appellant's daughter was fixed on 12.08.2007. The 1st appellant specifically denied in the written statement that he agreed to measure the agreement mentioned property as claimed by 1st respondent. The 1st appellant also denied the plea of readiness and willingness raised by the 1st respondent in his plaint. It was also averred that agreement was entered into to sell the property to meet the marriage expenses of 1st appellant's daughter and the 1st respondent did not possess sufficient funds at his hands and hence he was postponing the completion of the contract. The 1st appellant also averred that after issuance of pre suit notice by the 1st respondent, he approached him for completion of sale transaction, but he requested time till September 2007 and had written a letter dated 22.07.2007 expressing his willingness to get sale deed executed before expiry of September 2007. On these pleadings, the 1st appellant sought for dismissal of the suit. The appellants 2 and 3 who are



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the power of attorney and subsequent purchaser filed a separate written statement and supported the plea raised by the 1st appellant.

4. On these pleadings, the parties went to the trial. The 1st respondent was examined as P.W.1 and the 2nd witness in the Ex.A1 sale agreement was examined as P.W.2. The 1st respondent marked Ex.A1 to A5 on his behalf. On the side of the appellants, 1st appellant was examined as D.W.1, the 2nd appellant was examined as D.W.2, one of the witness to letter executed by 1st respondent in favour of the 1st appellant marked as Ex.A4 equal to B7 was examined as D.W.3. The other witness to Ex.A4 equal to Ex.B7 was examined as D.W.4.

5. The Trial Court on appreciation of oral and documentary evidence came to the conclusion that the 1st respondent proved his readiness and willingness to perform his part of the contract and decreed the suit. Aggrieved by the same, the appellants have come up with this appeal.



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6. The learned counsel for the appellants, contended that as per the terms of agreement, if extent of agreement mentioned property was found to be less, the 1st appellant agreed to receive a lesser amount and in case the extent is found to be in excess, the 1st appellant agreed not to demand more amount. Therefore, the said terms of the agreement is for the benefit of the 1st respondent and consequently it is for him to measure the suit property and find out what is the exact extent. Having failed to measure the property, it was he, who committed default and it is not open to him to turn around and to blame on the appellant. He further contended that the agreement was entered into for celebrating the marriage of 1st appellant's daughter, as he was in urgent need of money and therefore the time was treated as essence of the contract. The learned counsel vehemently contended that plaintiff has not let in any evidence to show that he was in possession of sufficient funds at the relevant point of time and hence he failed to prove the readiness and willingness to perform his part of the contract. The learned counsel by relying on judgement reported in *2011 (4) CTC 640, Saradamani Kandappan versus S.Rajalakshmi & Ors*, submitted that when an agreement consist of the reciprocal promises to be simultaneously performed, no promisor need to



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perform his promise, unless the promisee is ready and willing to perform his reciprocal promise. It was contended that the 1st respondent having failed to perform his promise and find out exact extent as agreed is not entitled to seek for specific performance of the contract.

7. Per contra, the learned counsel for the 1st respondent submitted that the 1st respondent/plaintiff proved his readiness and willingness by sending pre suit notice Ex.A2 whereunder he called upon the 1st appellant to measure the agreement mentioned property and get the sale deed executed by expressing his readiness and willingness to perform his part of the contract. However, the 1st appellant who received the notice, failed to send any reply. It proves notwithstanding the fact that the 1st respondent was ready and willing to perform his part of the contract, it was the 1st appellant who evaded completion of the agreement mentioned transaction. The learned counsel further submitted that the 1st appellant who was examined as D.W.1 admitted the financial capacity of the 1st respondent and the said admission coupled with his failure to send a reply to pre suit notice clinchingly proves readiness and willingness on the part of the 1st respondent. The learned counsel further submitted that



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pending suit the 1st appellant sold the agreement mentioned property to 3rd appellant and the said conduct of the 1st appellant shows his real intention to wriggle out of the agreement.

8. Based on the pleadings of the parties, evidence available on record and contentions of the learned counsel appearing for both the parties, the following points are arising out for consideration.

1. Whether the 1st respondent/plaintiff proved his readiness and willingness to perform his part of the agreement?
2. Whether the 1st respondent/plaintiff is entitled to specific performance of the agreement?

9. Points 1 and 2:

Both the parties agreed that there was an agreement between the parties on 11.04.2007 and the time fixed for performance was three months. The controversy is only with regard to the readiness and willingness of the 1st respondent. The agreement was entered into on 11.04.2007. The time fixed for performance was three months. Therefore,



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the time for performance of the agreement expires on 10.07.2007. On the last day fixed for performance, the 1st respondent issued an Advocate notice calling upon the 1st appellant to measure the suit property as agreed and receive the balance sale consideration and complete the sale transaction. The 1st appellant having received the notice failed to send any reply. If really the 1st appellant was in need of money for performance of his daughter's marriage immediately on receipt of legal notice, he ought to have issued a reply explaining the same to the 1st respondent. Further when legal notice was issued by the 1st respondent asking the 1st appellant to measure the suit property as per the terms of agreement and complete the sale transaction, he failed to send any reply. Therefore, the contention of the learned counsel for the appellants that the recitals in the agreement regarding the measurement of the agreement mentioned property was for the benefit of the 1st respondent and hence it is the duty of the 1st respondent to measure the suit property cannot be accepted. If there was an understanding between the parties that 1st respondent should measure the suit property, the 1st appellant ought to have issued a reply notice calling upon him to measure a property and give a report. The failure of the 1st appellant to send a reply to the pre suit notice, certainly



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proves the reluctance on the part of the 1st respondent to act in accordance with the terms of agreement.

10. Further under Ex.A4 equal to ExB7, a letter written by 1st respondent in favour of 1st appellant agreeing to get a sale deed executed before end of September also proves the time was not the essence of the contract. If really the 1st appellant was in need of money for performance of his daughter's marriage as alleged in written statement, certainly he would not have agreed for extension of time. The original letter was produced by the 1st appellant and marked as Ex.B7. Only the copy of the same was marked by 1st respondent as Ex.A4. Therefore, the contention of the appellant that time was not essence of the contract as agreement was entered into to meet the marriage expenses of daughter of 1st appellant cannot be accepted. It was specifically mentioned in the written statement of the 1st appellant that marriage of 1st appellant's daughter was fixed on 12.08.2007. The very fact 1st appellant agreed for an extension of time till end of September proves time was not essence of the contract.

11. As far as the financial capacity of the 1st respondent to pay the sale consideration is concerned, D.W.1 himself admitted during his cross examination as follows:



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"வசதி இல்லாத காரணத்தினால், கிரயம் செய்து
கொள்ள முன்வரவில்லை என்று சொல்ல முடியாது.
ஆவணத்தை கிரயம் செய்து கொள்ளாததால் தான்
அந்த சமயத்தில் அவரிடம் பணம் இல்லை என்று
சொல்லுகிறேன்."

Therefore the 1st appellant himself admitted it cannot not be stated that the 1st respondent was not a person of means. Further, the 1st respondent proved his readiness and willingness by issuing a notice under Ex.A2 well before the expiry of the time fixed for performance. Subsequently, the time was extended till expiry of September month. When the 1st appellant failed to execute the sale agreement as demanded by the 1st respondent till the last week of September 2007, immediately the suit was filed on the last week of September. There is no delay on the part of the 1st respondent in approaching the Court seeking for specific performance. Therefore, on consideration of evidence available on record, this Court finds nothing to defer with the findings of the Trial Court that the 1st respondent proved the readiness and willingness to perform his part of the contract. Having regard to the fact that there is no delay on the part of the 1st appellant in approaching the Court seeking specific performance of



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the contract and also the fact that balance sale consideration had also been deposited by 1st respondent before the Court below, this Court has no hesitation in confirming the findings of the Court below that the 1st respondent/plaintiff is entitled to specific performance as prayed for, hence appeal stands dismissed.

12. In Nut Shell

1. The appeal stands dismissed by confirming the judgement and decree passed in O.S.No.107 of 2007 on the file of the Sub Ordinate Judge, Thirupattur, Vellore District.
2. In the facts and circumstances of the case, there shall be no order as to costs.
3. Consequently, connected Civil Miscellaneous Petition is closed.

28.10.2022

Internet : Yes / No

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S.SOUNTHAR, J.
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To

1. The Subordinate Judge,
Thirupattur,
Vellore District.

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