IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 02.11.2022
Pronounced on : 11.2022

CORAM:

THE HONOURABLE **MS.JUSTICE V.M.VELUMANI**
and
HE HONOURABLE **MR.JUSTICE SUNDER MOHAN**

A.S.No.495 of 2017
and C.M.P.Nos.15690 of 2017 and 12076 of 2022

S.Mohanasundaram ... Appellant

Vs.

1.H.Rosan Hasan
2.S.Saira Banu
3.Mallika Banu
4.Palanisamy
5.Thangamani
6.Venkateshkumar ... Respondents

Prayer: This First Appeal is filed under Section 96 C.P.C against the Judgment and decree dated 11.04.2017 made in O.S.No.651 of 2010 on the file of the II Addtional District Sessions Judge, Tirupur.

For Appellant : Mr.S.Parthasarathy
For R1 to R3 : Mr.V.Srinivasan
For R4 to R6 : No appearance

JUDGMENT

(Judgment of the Court was delivered by SUNDER MOHAN, J.)

The above Appeal has been filed challenging the Judgment and Decree dated 11.04.2017 made in O.S.No.651 of 2010 on the file of the II Addtional District Sessions Judge, Tirupur, dismissing the suit for specific performance and the alternative prayer for refund of the advance amount paid by him.

2. The averments in the plaint are that the suit schedule property belongs to the respondents 1 to 3 herein. The respondents 1 and 3 appointed the 2nd respondent as a power agent on 31.01.2008. The 2nd respondent on behalf of the respondents 1 and 3 entered into a sale agreement on 05.08.2008. The

Respondents 1 to 3 agreed to sell the suit schedule property for a sale consideration of Rs.29,02,380/-. As per the terms of the sale agreement, appellant had to pay an advance amount of Rs.10,00,000/-. Out of the said sum Rs.7,00,000/- has to be paid on the date of agreement and Rs.3,00,000/- on or before 08.08.2008. The balance sale consideration was to be paid within four months i.e. 04.12.2008. As per the terms of the sale agreement, the appellant had paid Rs.7,00,000/- on the date of agreement and Rs.3,00,000/- on 08.08.2008 to the 2nd respondent herein. The appellant was ready and willing to make the balance sale consideration and get the sale deed executed. The respondents were delaying the execution of the sale deed. However, on 30.01.2009 the respondents 1 to 3 sent a notice through their counsel stating that they were ready and willing to execute the sale deed and asked whether the appellant was ready and willing to purchase the property. They had further stated in the said notice that they would be waiting at the office of the Registrar on 04.02.2009. The appellant had sent a reply on 31.01.2009 expressing his readiness and willingness to get the sale deed executed on 04.02.2009. However, the respondents did not turn up on the said date. Once again the appellant sent a telegram on 05.02.2009 stating that he was waiting in Registrar Office on 04.02.2009 and expressed his readiness and willingness to pay the balance sale consideration and get the saledeed executed. However, the respondents did not respond to the said notice. The appellant amended the plaint impleading respondents 4 to 6 after he came to know that the respondents 1 to 3 sold the property to respondents 4 to 6.

3.The respondents 1 to 3 filed a written statement denying the averments. They had admitted the receipt of the advance amount. However, they had denied that the appellant was ready and willing to pay the balance sale consideration. They were forced to issue a legal notice on 30.01.2009 calling upon the appellant to come forward to pay the balance sale consideration. They had waited at the Registrar Office on 04.02.2009 from Morning at 10.30 a.m to Evening at 5.30 p.m. The appellant failed to turn up on that day. The appellant has come up with the false claim that he was waiting at the Registrar's Office. The appellant has not established readiness and willingness. Since he had delayed the payment of balance sale consideration, the respondents were forced to sell the property in favour of the respondents 4 to 6 on 10.12.2010 as they were in urgent need of money. Since the appellant has not taken any steps for more than two years, the appellant is not entitled to alternative relief of refund of the advance amount, as per the terms of the agreement.

4.The 4th respondent filed a written statement on behalf of himself and the respondents 5 and 6. The respondents were not aware of the sale agreement between the appellant and the respondents 1 to 3. They bought the property after due verification of the title deeds and they were bonafide purchasers. Hence, prayed for dismissal of the suit.

5.The trial Court framed the following issues:

1. Whether the plaintiff is entitled to get relief to specific performance as prayed for ?

2.ToWhat other relief?

Before the Trial Court, the appellant examined three witnesses viz., PW1 to PW3 and marked 18 documents viz., Ex.P.1 to Ex.P.18. The respondents examined two witnesses viz., RW1 and RW2 and marked 6 documents viz., Ex.R1 to Ex.R6.

6.The trial Court on examination of the pleadings and documents on record found that the appellant is not entitiled for the relief of specific performance and also for the alternative relief of refund of advance amount and hence dismissed the suit.

7. Mr.S.Parthasarathy, learned senior counsel appearing for the appellant submitted that the appellant was always ready and willing to purchase the suit schedule property. In fact, he had subsequently purchased a portion of the suit property from the respondents 4 to 6 and this would establish that he was ready and willing to purchase the suit schedule property. The learned counsel submitted that on 04.02.2009 he was present at the office of the Registrar and has produced a document in which he has signed as witness in the said Registrar's Office. It is the respondents 1 to 3 who failed to execute the sale deed with intention to sell the property for a higher price to a third party. The respondents 1 to 3 made a false statement that they were available on the Registrar Office on 04.02.2009. The appellant in order to show his bonafide on 05.02.2009 sent a legal notice mentioning that the respondents 1 to 3 did not turn up for registration on 04.02.2009. The conduct of the appellant in paying Rs.10,00,000/- as advance

being one third of the total sale consideration would show that he was ready and willing to purchase the property. The learned Judge ought to have atleast considered the alternative prayer for refund of the advance amount. The learned Judge erred in not framing a specific issue with regard to the alternate prayer made by the appellant.

8. The learned counsel appearing for the respondents 1 to 3 submitted that the appellant had not established readiness and willingness. In any event, he was not entitled to discretionary relief of specific performance. As per the terms of the agreement, the appellant ought have paid the balance sale consideration on or before 04.12.2008. The respondents 1 to 3 waited for the said date patiently and ultimately sent the legal notice only on 30.09.2009 communicating to the appellant that they would be waiting at Udumalpet Sub-Registrar Office on 04.02.2009. They had in fact waited at the office between 10.30 a.m to 5.30 p.m. The appellant if he had really waited at the Registrar's Office on 04.02.2009 for execution of the sale deed, ought to have produced the stamp papers necessary for registration, but no such documents were produced before the Court. The appellant though had issued a telegram on 05.02.2009 with false statements did not choose to file a suit

for more than 21 months. The respondents 1 to 3 were in urgent financial need and the very purpose of selling the propery to meet their urgent requirement got defeated by the action of the appellant. The respondents 1 to 3 were therefore forced to sell the suit schedule property to the respondents 4 to 6. The conduct of the appellant in filing the case almost two years after the date of agreement, would show that he was not ready and willing to purchase the property. The appellant had in order to falsely establish readiness came up with the new story that the appellant and his brother planned to jointly purchase the property. However, it was an after thought and it was not the case of the appellant earlier. Though P.W.2 was examined by the appellant to show that his son-in-law had a balance of Rs.10,00,000/- in the account he would admit that he had no written authority from his son-in-law to spend that money. P.W.2 was examined to show that he along with the appellant wanted to purchase the property however it was not the case for the appellant in his pleadings. After the filing of the appeal the appellant and respondents 4 to 6 entered into compromise dated 01.07.2021 wherein it is stated that the respondents 4 to 6 sold 15.5 acres of land out of 23.079 acres to the appellant. The learned counsel relied upon the following judgements in support of his submissions:

a. The judgment of the Hon'ble Supreme Court in the case of ***Chand Rani v Kamal Rani*** reported in ***(1993)1SCC 519***

b. ***(2011) 4 Supreme Court cases 741*** (BEFORE R.V.RAVEENDRAN AND A.K.PATANAIK, JJ) ***Pramod Building and Developers Private Limited vs Shanta Chopra***

c. ***(1994) 4 Supreme Court cases 18*** (Before K.Ramaswamy and N.Venkatachala,JJ) ***Sardar Singh Vs. Krishna Devi (SMT) and another.***

*d****.*** ***(1997 3 Supreme Court Cases 1*** (Before B.P.Jeevan Reddy and S.B.Majmudar, JJ) ***K.S.Vidyanadam and Another Vs. Vairavan.***

e. ***(2013) 15 Supreme Court Cases 27*** *(Before G.S.Singhvi and V.Gopala Gowda, JJ)* ***I.S.Sikandar (dead) by LRS Vs.K.Subramani and others.***

f. ***(2002) 12 Supreme Court Cases 18*** (before V.Ravenndran and K.S.Radhakrishnan, JJ***) Saradamani Kandappan Vs. S.Rajalakshmi and others***.

9. Heard, the learned counsels appearing on either side, considered the pleadings, evidence and documents on record.

10.Points for Consideration:

1.Whether the appellant was ready and willing to perform his part of contract?

2.Whether the appellant is entitled to alternate relief of refund of advance amount?

Point:1

The admitted facts are the appellants and the respondents 1 to 3 entered into an agreement of sale on 05.08.2008. The appellant paid Rs.10,00,000/- in two instalments before 08.08.2008. The appellant had to pay the balance sale consideration of Rs.19,02,280/- on or before 04.02.2008. There was exchange of notices between the appellant and the respondents in January 2009. It is the case of the appellant that he was waiting at the Registrar’s Office on 04.02.2009. However, the respondents 1 to 3 claimed that the appellant did not turn up on 04.02.2009. On the other hand, they were present the whole day at the Registrar's Office. In order to establish the readiness and willingness the appellant had not produced the stamp paper necessary for the registration of the sale deed. If the appellant was really ready and willing to have the sale deed executed on 4.02.2009 he ought to have purchased the necessary stamp papers for the sale deed and produced it before Court. However, the appellant has not produced the same. The appellant would submit that he had signed another document that was registered in the said Registrar's Office namely Ex.P.8 wherein he had signed as witness on 04.02.2009. This in our view would not establish readiness and willingness. The appellant ought to have produced the stamp papers. That apart, we find that the appellant had not filed a suit for nearly 21 months after the respondents 1 to 3 had allegedly refused to execute the sale deed in his favour. It is the case of the appellant, that on 05.02.2009 he had sent a legal notice mentioning that he was present at the Registrar’s Office on 04.02.2009. In such circumstances, there was no reason why the appellant waited for almost two years to file the suit. This conduct alone is enough to refuse the discretionary relief of specific performance. This position is well settled and has been reiterated by the Hon’ble Supreme court and this Court in several cases. Though the respondents 1 to 3 relied upon several judgements it is suffice to refer two judgements which are directly on the issue. The Hon’ble Supreme Court in the case of ***Saradamani Kandappan v. S. Rajalakshmi*****, reported in (2011) 12 SCC 18** has held as follows:

***"43.** Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in K.S. Vidyanadam [(1997) 3 SCC 1] :*

(i) The 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.

(ii)The courts will apply greater scrutiny and strictness when considering whether the purchaser was "ready and willing" to perform his part of the contract.

Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three-year period is intended to assist the purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part-performance, where equity shifts in favour of the purchaser.

In **P. Daivasigamani Vs. S. Sambandan (12.10.2022 - SC) : MANU/SC/1309/2022** reiterated the above view in the following term:

" 20. Time, it is stated, is not the essence of the contract in the case of immovable properties, unless there are grounds to hold to the contrary. This doctrine is applied, without being unfair and inequitable to the Defendant/seller, as the court should not ignore that a person sells the property when he needs money, and, therefore, expects the money in the stipulated or reasonable time, which would meet the purpose of the sale. The purpose of sale can vary from the need for liquid cash to be invested to earn interest, medical, educational, child's marriage or purchasing another property. To save capital gains, the seller has to purchase another immovable property, unless the proceeds are exempt. There has been a steep rise in the prices of land in the last quarter of the 20th Century in India. With the rise in property value, the value of money has fallen. At times, delay in payment would defeat the Defendant/seller's purpose. Therefore, the offer of the Plaintiff/purchaser in writing and the time and occasion when the offer to pay the balance amount to the Defendant/seller is an important factor which would matter when the court examines the question of discretion, that is, whether or not to grant a decree of specific performance. While examining these aspects, the quantum of money paid by the Plaintiff/seller to the Defendant/purchaser may become a relevant fact that merits due consideration. There is a distinction between limitation and delay and laches. Limitation

is a ground for dismissing a suit even if the Plaintiff is otherwise entitled to specific performance, while delay operates to determine the discretion and exercise Under Section 20 of the Specific Relief Act, even if the suit is not dismissed on account of limitation. However, not one but several aspects have to be considered when the court, in terms of Section 20 of the Specific Relief Act, exercises discretion, guided by judicial principles, sound and reasonable."

11.That apart, it is also well settled that the relief for specific performance is discretionary. The Court is not bound to grant the relief merely because it is lawful to do so. The discretion of the Court has to be guided by Judicial principles. In the instant case, we find that the appellant besides filing the suit belatedly has also not established readiness and willingness. The appellant who examined himself P.W.1 deposed that he along with P.W.2 proposed to purchase the property. However, there was no such plea in the plaint. Further, P.W.2 was able to produce only the bank statements of his son-in-law. All these facts would show that the appellant has not established even readiness. The appellant's contention that he had subsequently purchased a portion of the suit schedule property from respondents 4 to 6 and that itself would show that he was always ready and willing to purchase the property cannot be countenanced. The appellant had purchased the property two years after sale agreement. That cannot establish the readiness and willingness in the year 2008.

Point : 2

The next question is whether the appellant is entitled to the alternate relief of refund of the advance amount. We find that that though there were pleadings on this aspect the trial Court has not framed any specific issue with regard to the alternate prayer. This in our view is not the correct approach. The trial Court ought to have framed a specific issue and answered it. The trial Court erred in holding that the appellant was not entitled to the alternative relief. Though the terms of the agreement suggest that if the appellant did not pay the balance sale consideration within 04.12.2008 the advance amount shall stand forfeited, the right to forfeit the advance amount is subject to Section 73 and 74 of the Contract Act. As per Section 73 of the Contract Act the party who suffers as a result of the breach committed by the other party to the contract is entitled to receive from the party who has broken the contract compensation for any loss or damage caused him thereby which naturally arose in the usual course of things from such breach. In short Section 73 implies that only such loss or damage suffered by the party not in breach may be recovered from the party in breach as the consequence of the breach. Therefore in our view, in the absence of any evidence let in by the respondents 1 to 3 as to the actual loss suffered by them on account of the breach the appellant is entitled to the refund of advance money. In this regard a Division Bench of this Court has earlier considered this issue in the Judgment reported in **2021 SCC OnLine Mad 5639** in **"Shanmugavelu Vs Authorised Officer"** and in Paragraph 10 it has been held as follows:

> ***10.*** *Section 74 of the Contract Act, 1872 provides for compensation for breach of contract where the penalty is stipulated. Section 73 of the Contract Act is the general rule that provides for compensation for loss or damage caused by breach of contract and Section 74 is where the quantum is specified. What Section 73 of the Contract Act mandates is that a party who suffers as a result of a breach committed by the other party to the contract "is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it". Any detailed discussion on such provision would be beyond the scope of the present lis and may require many more sheets that may be conveniently expended in*

the present exercise. Indeed, Section 73 of the Contract Act is in the nature of a jurisprudential philosophy that is accepted as a part of the law in this country. In short, it implies that only such of the loss or damage suffered by the party not in breach, may be recovered from the party in breach, as a consequence of the breach. It is possible that as a result of the breach, the party not in breach does not suffer any adverse impact. It is also possible, as in the present case, that as a consequence of the breach, the party not in breach obtains a benefit. In such cases, where no loss or damage has been occasioned to the party not in breach, such party cannot extract any money merely on account of such breach, as the entitlement in law to compensation is not upon the commission of breach, but only upon any loss or damage being suffered as a consequence thereof.

Further the Constitutional Bench of the Hon'ble Supreme Court in ***Fateh Chand Vs. Balkishan Dass*** reported in ***AIR 1963 SC 1405.*** has held as follows:

*"**15.** Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it*

merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

The Hon'ble Apex Court in ***Kailash Nath Associates v. DDA, reported in (2015) 4 SCC 136*** had an occassion to consider scope of Section 74 of Indian Contract Act and had summarized the principles as follows:

*"**43.** On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

***43.1.** Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

***43.2.** Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.*

***43.3.** Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*

***43.4.** The section applies whether a person is a plaintiff or a defendant in a suit.*

43.5. *The sum spoken of may already be paid or be payable in future.*

43.6. *The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.*

12. The clause which provides for forfeiture of the enire advance paid by the appellant in the event of breach of the terms of the agreement is a penalty clause. The Hon'ble Supreme Court has observed in the aforesaid decision that whether the contract spells out liquidated damages or provides for penalty, the said amount shall only be the upper limit and reasonable compensation can be fixed on well known principles applicable to Law of Contract found *inter alia* under

Section 73 of the Indian Contract Act. The respondents 1 to 3 have not proved the exact loss suffered as a consequence of the breach. On the other hand they had sold the properties in favour of Repondents 4 to 6. The Respondents in their written statement have stated that they had suffered loss on the account of delay in the execution of the sale deed. Section 74 of the Contract Act states that reasonable compensation can be awarded whether or not actual loss has been proved to be caused, if any amount is specified in the contract as the amount to be paid in case of breach. The Hon'ble Apex Court in the case of ***Jaswinder Kaur vs. Gurmeet Singh and others*** reported in ***(2017) 12 SCC 810*** as held that the litigation expenses can be awarded as compensation:

> *"24. Reliance had rightly been placed by the appellants on the decision of Privy Council in Graham case [Graham v. Krishna Chunder Dey, 1924 SCC OnLine PC 63 : (1924-25) 52 IA 90 : AIR 1925 PC 45] in which it had been laid down that it is not for the High Court to make out a new contract, when specific performance is possible with respect to the entire contract. It has to be ordered for the entire contract not for part as has been ordered in this case by the High Court. However, in the instant case as earnest money has been paid i.e. initially Rs 50,000 (Rupees fifty thousand only)*

and subsequently advance of Rs 14,50,000 (Rupees fourteen lakhs and fifty thousand only). In our opinion, forfeiture of the amount paid as earnest money of Rs 50,000 had rightly been made as the plaintiffs were delaying to perform their essential part of contract which was enjoined upon them. Remaining money paid in advance on 31-1-1990 is ordered to be refunded with simple interest at the rate of 6% per annum to the plaintiffs within three months from today. However, the plaintiffs shall bear the cost of the appellants of courts below and the cost of the appeal in this Court which is quantified at Rs 5,00,000 (Rupees five lakhs only). The amount of cost payable to the defendants shall be adjusted out of the amount which has to be paid along with interest to the plaintiffs."

In that case, the Hon'ble Supreme Court fixed Rs.5,00,000/- as compensation. In the facts of the instant case, we are of the view that the appellant can be directed to pay compensation of Rs.2,00,000/- on account of the breach committed him. The appellant is therefore entitled to refund of the advance amount less the compensation payable which is Rs.8,00,000/-. The Respondents 1 to 3 shall refund the said sum of Rs.8,00,000/- together with interest at the rate of 6% per annum from 08.08.2008 till repayment.

13.With the above observations the Appeal is partly allowed. This Appeal is dismissed as against the Respondents 4 to 6. No Costs. Consequently, connected miscellaneous petitions are closed.

(V.M.V.,J) (S.M.,J)

.11.2022

Index : Yes / No
vsn

To

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

2.The Section Officer
V.R.Section,Madras High Court,
Chennai.

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