



A.S(MD)No.102 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

and

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

A.S(MD)No.102 of 2013

and

M.P(MD)No.1 of 2013

J.Dhanapal

... Appellant/Plaintiff

Vs.

1.V.Manimala

2.T.Kannadasan

... Respondents/Defendants

PRAYER: Appeal filed under Section 96 of Civil Procedure Code, against the judgment and decree passed by the learned II Additional District Judge, Thoothukudi in O.S.No.35 of 2011 dated 06.09.2012.

For Appellant : Mr.J.Antony Arul Raj

For R-1 : Mr.K.Sekar

For R-2 : Mr.D.Srinivasaragavan



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to the first defendant, who had agreed to sell the property to the plaintiff for a sale consideration of Rs.26,20,000/- and accordingly, the first defendant had received a sum of Rs.5,00,000/- on 25.05.2008, towards advance.

4.2. On 12.07.2008, an unregistered sale deed was executed between the first defendant and the plaintiff for sale of the suit property, with a clause that the transaction of sale shall be concluded within 45 days from the date of sale agreement. The first defendant had received a sum of Rs.3,00,000/- on the date of execution of the sale agreement.

4.3. The time for execution of the sale deed was not the essence of the contract. According to the plaintiff, he was always ready and willing to perform his part of the contract and that, the first defendant had evaded the execution of the Sale Deed.

4.4. On 06.10.2008, the first defendant had received a further advance amount of Rs.60,000/-, the receipt of which was endorsed in the sale agreement.



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4.5. Since the first defendant had not come forward to execute the sale deed, he had sent a legal notice on 31.03.2011 calling upon her to execute the sale deed, to which the first defendant had given a reply dated 12.04.2011 stating that the first defendant had sold the suit property to the second defendant on 03.10.2010. According to the plaintiff, the sale deed executed in favour of the second defendant is not valid and not binding on the plaintiff since he was always ready to render the balance of the sale consideration to the first defendant. In this background, he has sought for the relief of specific performance of the sale agreement.

5. The first defendant in her written statement had stated that though a time limit of 45 days was stipulated in the sale agreement for execution of the sale deed, the plaintiff was not ready and willing to perform his part of the contract. According to her, time was the essence of the contract. The first defendant had also denied that the plaintiff had approached her seeking for execution of sale deed and that, there was no collusion between the first and second defendant. Since the plaintiff failed to perform his part of the contract, within the time stipulated in the sale agreement, she had sold the suit property to the second defendant for a valid sale consideration, to meet the marriage expenses of her daughter



and hence, he is not entitled for the relief of specific performance.

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6. On the above pleadings, the trial Court had framed the following issues:

“1. Whether the 1st defendant has entered into a sale agreement with the plaintiff on 12.07.08 agreeing to sell the schedule properties in favour of the plaintiff or not?

2. Whether the 1st defendant has received any advance towards sale agreement?

3. Whether the plaintiff was always ready and willing to perform his part of contract?

4. Whether the 2nd defendant is a bonafide purchaser or not?

5. Whether the plaintiff is entitled to the decree for specific performance as prayed for or not?

6. To what relief?”

7. During the course of trial, the plaintiff examined himself as P.W.1 and marked Exs.A1 to A3, in which, the sale agreement was marked as Ex.A1. The first defendant had examined herself as D.W.1 along with D.W.2, who was witness to the sale agreement and marked Exs.B1 to B4.



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8. The trial Court after analysing the oral and documentary evidences, had come to the conclusion that though the time was not the essence of the contract, the plaintiff was not always ready and willing to perform his part of the contract and that, the second defendant was a bonafide purchaser and therefore, held that the plaintiff is not entitled to the relief of specific performance and accordingly, dismissed the suit. Challenging the order of dismissal, the plaintiff has filed the present appeal.

9. The main argument advanced by the learned counsel appearing for the appellant/plaintiff is that, time was not the essence of Ex.A1 since the first defendant had received a sum of Rs.60,000/-, as additional advance amount on 06.10.2008, which is after the expiry of 45 days and therefore, the trial Court ought not to have dismissed the suit. He further submitted that though the plaintiff had not sought for an alternate prayer for refund of the advance sale amount, he would be entitled for refund of the advance amount.

10. Per contra, the learned counsel appearing for the first respondent/first defendant submitted that the plaintiff was never ready and willing to perform his part of the contract, in spite of several requests



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made and that, he was evading payment of the balance of the sale consideration. Furthermore, since there was no prayer for an alternate relief, the plaintiff is not entitled for refund of the advance sale amount.

11. Heard Mr.J.Antony Arul Raj, learned counsel for the appellant, Mr.K.Sekar, learned counsel for the first respondent and Mr.D.Srinivasa Ragavan, learned counsel for the second respondent.

12. Ex.A1/sale agreement was executed by the first defendant on 12.07.2008 for sale of the suit property to the plaintiff. As per the terms of the sale agreement, both the parties were required to conclude the sale, within a period of 45 days. Prior to execution of Ex.A1, the plaintiff had paid a sum of Rs.5,00,000/- as an advance payment. On the date of the sale agreement, the first defendant had received a sum of Rs.3,00,000/- as additional advance amount and after expiry of 45 days, on 06.10.2008, he had also received further advance amount of Rs.60,000/-, to which an endorsement has been made in Ex.A1 itself, acknowledging the receipt of this payment. Thereafter, the plaintiff herein had remained dormant for more than two years and ultimately, had sent the legal notice only on 31.03.2011(Ex.A2). There is absolutely no explanation for this long period of wait between 06.10.2008 and 31.03.2011. Likewise, though



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the first defendant had sent Ex.A3/reply notice to the plaintiff on 12.04.2011, he had waited till 24.08.2011 for filing the suit. The evidences adduced by the plaintiff also does not explain this delay. Likewise, when the first defendant had sent her reply stating that the plaintiff was not always ready and willing to perform his part of the contract and that, she had sold the suit property to the second defendant, it had taken more than four months for the plaintiff to file the suit for specific performance. The trial Court had taken into account all these delay and had ultimately come to the conclusion that the plaintiff was not ready and willing to perform his part of the contract and thereby answered the issues in favour of the defendants.

13. The two crucial factors that emerge for consideration, from and out of the pleadings of the parties to the suit, are:

“(a) Whether the plaintiff was ready and willing to perform his part of the contract?; and

(b) Whether time was the essence of the contract?”

14. Section 16(c) of the Specific Relief Act, 1963(hereinafter referred to as "the Act"), provides that a specific performance of the contract, cannot be enforced in favour of a person, who fails to aver and



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prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. For the purpose of this provision, one of the requirements is that the plaintiff must aver performance of, or readiness and willingness to perform the contract, according to its true construction.

15. In the plaint filed before the trial Court, the averments in this regard are to the effect that the plaintiff had paid a sum of Rs.8,00,000/- at the time of execution of Ex.A1/sale agreement and on expiry of 45 days period, he had paid an additional advance amount of Rs.60,000/- on 06.10.2008. The further averments are that in spite of having received the additional advance amount of Rs.60,000/- after the expiry of 45 days period, though the plaintiff had been approaching the first defendant to execute the sale deed, she had evaded to do so. During the course of trial, the plaintiff examined himself as P.W.1 and let in evidence stating that the suit property did not have a proper approach road and therefore, had sought for setting right this anomaly from the first defendant. This evidence has been brought in without any pleadings. Even in the averments in Ex.A2/legal notice, such a stand was not taken by the



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plaintiff with regard to the absence of an approach road to the suit property, which resulted in a delay of more than two years. The attesor to the sale agreement was examined by the plaintiff as P.W.2, who claims to be a broker to the sale, has also not stated about the absence of a pathway to the suit property, which resulted in a delay of two years in sending the legal notice.

16. Section 16(c) of the Act, mandates averments in the plaint to substantiate that the plaintiff was ready and willing to perform the essential terms of the contract. While that being so, the plaintiff cannot seek for enforcement of a specific performance of a contract without such averments. Further, the plaintiff failed to let in any other evidence to show that he was ready with the balance of sale consideration for the purpose of concluding the sale agreement.

17. In the case of *Syed Dastagir vs. T.R.Gopalakrishna Setty* reported in (1999) 6 SCC 337, the Hon'ble Supreme Court has held as follows:

“9. So whole gamut of issue raised is, how to construe a plea specially with reference to [Section 16\(c\)](#) and what are the obligations which the plaintiff has to comply with in reference to his plea and whether the plea of the plaintiff could not be



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construed to conform to the requirement of the aforesaid Section, or does this section require specific words to be pleaded that he has performed or has always been ready and is willing to perform his part of the contract. In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence aforesaid difference of pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in [Section 16](#) (c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical production of the exact words of a statute is to insist for the form rather than essence. So absence of form cannot dissolve an essence if already pleaded.



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10.....It is true in the pleading the specific words “ready and willing to perform” in this nomenclature are not there but from aforesaid plea, could it be read that the plaintiff was not ready and willing to perform his part of that obligation? In other words, can it be said he has not pleaded that he is “ready and willing” to perform his part? Courts cannot draw any inference in the abstract or to give such hypertechnical interpretation to defeat a claim of specific performance which defeats the very objective for which the said Act was enacted. The Section makes it obligatory to a plaintiff seeking enforcement of specific performance that he must not only come with clean hands but there should be a plea that he has performed or has been and is ready and willing to perform his part of the obligation. Unless this is there, [Section 16](#) (c) creates a bar to the grant of this discretionary relief. As we have said, for this it is not necessary to plea by any specific words, if through any words it reveals the readiness and willingness of the plaintiff to perform his part of obligation then it cannot be said there is non-compliance of the said Section.

18. In the case of **Pukhraj D.Jain and Others vs. G.Gopalakrishna** reported in (2004) 7 SCC 251, the Hon'ble Supreme Court had dealt with the scope of 16(c) of the Act and held that in the absence of any averments by the plaintiff showing his readiness and willingness to perform his part of the contract, the equitable remedy of specific performance, cannot be invoked. The relevant portion of the decision in **Pukhraj D.Jain's case** (supra) reads as follows:



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“6. Section 16(C) of the Specific Relief Act lays down that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation (ii) to this sub-section provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The requirement of this provision is that plaintiff must aver that he has always been ready and willing to perform the essential terms of the contract. Therefore not only should there be such an averment in the plaint but the surrounding circumstances must also indicate that the readiness and willingness continue from the date of the contract till the hearing of the suit. It is well settled that equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness of the plaintiff to perform his contract in terms of Forms 47 and 48 of CPC.....”

19. The time limit prescribed in the Ex.A1/sale agreement, dated 12.07.2008, for execution of sale deed, was 45 days ie., by 26.08.2008. However, after a month, on 06.10.2008, the plaintiff had tendered a further advance amount of Rs.60,000/-, which the first defendant had accepted. If time was the essence of the agreement and the plaintiff was not ready and willing to pay the balance of sale consideration by 26.08.2008, the first defendant could have refused to receive further additional advance amount towards the sale transaction. However, the



first defendant's conduct in receiving this amount of Rs.60,000/- after expiry of 45 days, would only indicate that the time was not the essence of the contract. The trial Court had also taken note of this aspect and had held that the time was not the essence of the contract.

20. The corrolary issue that arises for consideration is that, merely because time was not the essence of the contract, the suit for specific performance cannot be automatically decreed and that, the relevant circumstances including the time limit specified in the agreement required to be looked into and the contract should be performed within a reasonable time. This ratio was dealt with by the Hon'ble Supreme Court in ***K.S.Vidyanadam and others vs. Vairavan*** reported in ***(1997) 3 SCC 1***, in the following manner:

“10.It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the [Limitation Act](#) for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement



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have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the Court by both [Sections 10](#) and [20](#). As held by a Constitution Bench of this court in [Chand Rani v. Kamal Rani](#): (SCC p.528, para 25)

"it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident)? : (1) From the express terms of the contract; (2) from the nature of the property; and(3) from the surrounding circumstances, for example, the object of making the contract."

21. In ***K.S.Vidyanadam's case***(supra), the facts involved was that six months period was specified in the sale agreement therein for completion of the sale transaction and on expiry of such period, the plaintiff had waited for more than 2 ½ years for issuing the notice. Even though it was held therein that time was not the essence of the contract, the plaintiff must perform his part of the contract, within a reasonable time based on the surrounding circumstances and the nature of the property.



22. The decision in ***K.S.Vidyanadam's case***(supra), came to be relied on by the Hon'ble Supreme Court in a recent decision in ***Kolli Satyanarayana (dead) by Lrs. vs. Valuripalli Kesava Rao Chowdary (dead) through Lrs. And others*** in ***Civil Appeal No.1013 of 2014, dated 27.09.2022***, in the following manner:

*“12.In the case of **K.S.Vidyanadam and others v.Vairavan**, this Court has held that the court should look at all the relevant circumstances including the time limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. It has been held that in case of urban properties, the prices have been rising sharply. It has been held that while exercising its discretion, the court should bear in mind that when the parties prescribe certain time limit(s) for taking steps by one or the other party, it must have some significance and that the said time limit(s) cannot be ignored altogether on the ground that time is not the essence of the contract.”*

23. On an overall consideration of the legal position discussed above, we are of the view that the plaintiff was never ready and willing to perform his part of the contract and though time was not the essence of the contract, he was legally bound to perform his part, within a



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reasonable time. When the plaint averments do not establish the reasons for the delay between 06.10.2008 and 31.03.2011 and the evidence let in by the plaintiff takes contradictory stand from the pleadings, the findings of the trial Court that the plaintiff was not ready and willing to perform his part of the contract, requires to be upheld.

24. Thus, we do not find any infirmity in the findings of the trial Court in this regard and therefore, no interference is required to the judgment and decree of the trial Court.

25. The learned counsel for the appellant submitted that though the plaintiff had not sought for an alternate relief for refund of the advance amount paid under Ex.A1, he would be entitled for refund of the advance sale amount. This argument has been answered by a coordinate Bench of this Court in the case of *N.Sekaran and another vs. C.Rajendran* reported in *AIR 2018 Mad 67*, in which, reliance was placed on a decision of the Hon'ble Supreme Court in the case of *Thiruveedhi Channaiah v. Gudipudi Venkata Subbarao (D) by LRS* reported in *(2009) 17 SCC 341*, wherein it was held that even though the plaintiff has not asked for alternate relief for the return of advance sale amount, the Court is empowered to mould the relief to render complete justice



between the parties. The relevant portion of *N.Sekaran's case*(supra) reads as follows:

“13. The legal position enumerated above would only indicate that in an agreement of sale, where money is paid only as part of sale price, the forfeiture clause will be treated as having the effect of penalty. Further, even in the absence of a prayer for refund of the advance sale amount by the plaintiff, with a view to render complete justice, the Court is empowered to mould the relief and to issue appropriate direction to the defendant for refund of the advance sale price.”

26. The aforesaid extract is self-explanatory. Thus, even though the plaintiff had not prayed for an alternate relief for refund of the advance sale amount, by applying the ratio laid down above, we are of the view that the plaintiff would be entitled for refund of the advance amount, together with interest. Since the plaintiff had not immediately approached the Court seeking for specific performance and also by taking note of the fact that there was considerable delay between the expiry of the sale period and issuance of notice, the interest on the refund of the advance amount could be fixed from the date of filing of the suit.



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27. Accordingly, there shall be a direction to the first respondent herein/first defendant, to refund a sum of Rs.8,60,000/-, to the plaintiff, together with interest at the rate of 6% per annum, from the date of filing of the suit, till the date of actual payment, within a period of six weeks from the date of receipt of a copy of this judgment. Apart from this, no other interference is required to the judgment and decree of the trial Court in O.S.No.35 of 2011 on the file of the II Additional District Judge, Thoothukudi, dated 06.09.2012.

28. This appeal stands partly allowed. No Costs. Consequently, connected miscellaneous petition is closed.

[M.S.R.,J.] & [N.A.V.,J.]

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Internet : Yes/No

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To

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1. The II Additional District Judge,
Thoothukudi.
2. The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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M.S.RAMESH, J.
AND
N.ANAND VENKATESH, J.

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JUDGMENT MADE IN
A.S(MD)No.102 of 2013

10.11.2022