



A.S. (MD) No.21 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :11.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.21 of 2012

A.Shanmugavel

:Appellant/Plaintiff

Vs.

1.V.Nandagopal

2.Parimala

... Respondents/Defendants

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, 1908 against the judgment and decree made in O.S.No.149 of 2008, dated 12.8.2011, on the file of the Fast Track Judge(Additional District Court),Dindigul.

For Appellant : Mr.M.P.Senthil

For Respondents : Mr.V.P.Rajan



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JUDGMENT

The Appeal Suit is directed against the judgment and decree made in O.S.No.149 of 2008, dated 12.08.2011, on the file of the Fast Track Judge(Additional District Court),Dindigul.

2.The appellant is the plaintiff and the respondents are the defendants in O.S.No.149 of 2008, dated 12.08.2011, on the file of the Fast Track Judge(Additional District Court), Dindigul.

3.The appellant/plaintiff has filed a suit for specific performance directing the defendants to execute the sale deed as per the sale agreement entered between them and to hand over the possession of the property with nil encumbrance to the plaintiff as agreed between them and in alternative, to direct the respondents/defendants to return the advance amount paid by the plaintiff to the respondents/defendants towards advance amount with interest at 18% p.a. The trial Court, after trial, dismissed the suit with costs



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Challenging the said judgment and decree passed by the trial Court, the plaintiff has filed the present appeal suit.

4.For the sake of convenience, the parties are referred to herein as per their own ranking before the trial Court.

5.The brief facts of the plaint reads as follows:

The suit property originally belonged to the defendants and they are in possession and enjoyment of the same. While-so, the plaintiff and defendants have entered into a sale agreement in respect of the sale of the suit property on 21.3.2008 for a valuable sale consideration of Rs. 11,77,200/- and on the same date, the defendants have received a sum of Rs.2 lakhs as advance amount and also agreed to execute the sale deed with nil encumbrance on or before 21.9.2008, on payment of balance sale consideration of Rs.9,7,200/- to the defendants with a condition that when the plaintiff is ready to perform his part of contract and when the defendants



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have failed to execute the sale deed as per the sale agreement, the plaintiff is entitled to get the sale deed executed through Court by filing a suit for specific performance. The Plaintiff is always ready and willing to perform his part of contract and that the defendants have delayed the said process. Then the plaintiff came to know that the defendants have created encumbrance on the suit property by mortgaging the same with Canara Bank, Madathukulam Branch and failed to clear the said encumbrance by paying the mortgaged amount to the bank. The plaintiff has requested the defendants several times in person and through mediators to execute the sale deed as per the sale agreement, however, the defendants have delayed the same, for one reason or other. Hence the plaintiff has sent a legal notice to the defendants on 7.11.2009 and the defendants have replied for the same by their reply notice, dated 18.11.2009. Since the defendants have failed to perform their part of contract on receipt of the legal notice, the plaintiff has filed the above suit for the relief stated supra.



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6.The first defendant has filed a written statement and the brief facts of the same, reads as under:

The suit filed by the plaintiff is with false averments and a fraudulent one. The sale agreement, dated 21.3.2008 is admitted. The suit property was in absolute possession of this defendant was denied and it was an ancestral property. It was agreed that the plaintiff has to perform his part of contract by paying the balance sale consideration on or before 21.09.2008, failing which, he has to forfeit the advance amount and that if the defendants failed to perform their part of contract, the plaintiff is entitled to get the sale deed executed through Court proceedings. But the plaintiff is not ready and willing to perform his part of contract at any point of time. Since the plaintiff has failed to take steps to get the sale deed executed by the defendants within six months from the date of sale agreement, he is in forfeiture of the advance amount. The plaintiff is aware of the fact that the property in question is under mortgage in Canara Bank, Madathukulam Branch. The plaintiff has to see about the encumbrance when he purchased



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the property for valuable consideration of Rs.12 lakhs from the defendants.

The first defendant has sent a reply notice to the plaintiff's legal notice, dated 21.09.2008. Since the plaintiff has failed to pay the balance sale consideration within six months as agreed between them, the first defendant has been subjected to mental torture, agony and unwanted travelling. Hence the plaintiff is not entitled for any relief as sought for in the plaint and therefore, the suit has to be dismissed.

7.The second defendant has filed a written statement and the averments of the same, in brief reads as under:

The suit property is in absolute possession and enjoyment of the first defendant ancestrally. The said property was given to the second defendant by way of settlement and it is not mentioned as to how the suit property is said to be in enjoyment of the first defendant. The suit property was inherited ancestrally by the first defendant's father on partition that took place on 23.11.1975 and then it was inherited by the first defendant



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ancestrally. The first defendant in order to cheat the plaintiff has wrongly mentioned the survey number and the extent of the suit property which was the subject-matter of the suit and has given in settlement the suit property to the second defendant/his wife. Hence, the settlement made by the first defendant is null and void and hence, the suit filed by the plaintiff has to be decreed as prayed for.

8. On the above said pleadings, the trial Court has framed the following issues:

1. Whether the plaintiff is always ready and willing to perform his part of contract?
2. whether it is true that the fact averred by the defendants that the time is the essence of contract?
3. Whether the plaintiff is entitled to get the relief of specific performance as prayed for?
4. Whether the plaintiff is entitled to get the alternative relief as prayed for in the plaint?
5. To what relief, the plaintiff is entitled to?
6. Whether the second defendant is a proper and



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necessary party to the suit as per the additional issues framed on 3.2.2011?

9. In order to substantiate the case of the parties, during trial on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and Ex.A1 to A6 were marked. On the side of the defendants, the first defendant was examined as D.W.1 and Ex.B1 was marked. After trial and upon hearing the arguments advanced on either side, the suit was dismissed, with costs.

10. Challenging the same, the plaintiff has filed the present appeal suit on the following grounds:

The plaintiff has filed the suit on the facts referred to above in his plaint and that the plaintiff is always ready and willing to perform his part of contract and the defendants have delayed the said process for one reason or other. The defendants have not mentioned about the mortgage in the sale



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agreement and has also failed to clear the mortgage by using the advance amount of Rs.2 lakhs paid by the plaintiff, as advance amount. The defendant has also, under these circumstances, failed to sent any notice to cancel the sale agreement. It is false defense to state that time is the essence of contract as per the agreement and the same has not been mentioned in the agreement. The first defendant has not taken any steps to measure the suit property and a combined reading of all the conditional clauses in the sale agreement reveals that the time is not the essence of contract and it is in total violation of the settled principles as per the dictum laid down by the Honourable Supreme Court. As per the decisions of the Honourable Supreme Court, when forfeiture clause is incorporated in the sale agreement, then time is not the essence of contract. The trial Court has wrongly mentioned as time is the essence of contract on going through the first clause with regard to the period of six months for completing the sale transaction and for execution of the sale deed. Further the condition of nil encumbrance over the suit property should be given as a condition in the sale agreement and the condition to measure the suit property for adjustment



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before completing the transaction should be given as a condition to the plaintiff and these clauses would reveal that time was not the essence of contract. The fact that time is the essence of contract is not rebutted by the first defendant/vendor. The judgment given by the trial Court is totally against the ratio decedendi and the decision of the Honourable Supreme Court of India in various decisions. The plaintiff has issued a legal notice to the defendants and has also filed the suit in time and hence there is no delay or laches on the part of the plaintiff and the judgement of the trial Court is against the settled principles of the Honourable Supreme Court and also against the provisions of Section 55 of the Indian Contract Act, 1872 and also against the provisions of Section 16(c) and 20 of the Specific Relief Act, 1963. The reasons given by the trial Court for dismissal of the suit are not sustainable in law. Therefore the judgement of the trial Court has to be set aside by allowing the appeal suit filed by the appellant.

11.The learned counsel for the appellant would submit that on 21.3.2008, the first defendant has entered into sale agreement for sale of his



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immovable property with the plaintiff agreeing to sell his agricultural lands situated at Andipatti Village, Dindigul District, for a total sale consideration of Rs.11,77,200/- and he received a sum of Rs.2 lakhs, as advance amount from the plaintiff. On the date of agreement on sale, the first defendant has agreed to execute the sale within a period of six months from the date of execution of the sale agreement on payment of the balance sale consideration of Rs.9,77,200/- by the plaintiff. It has been specifically agreed by the vendor, the first defendant in the agreement that the vendor executed the sale deed without any encumbrance over the suit property and would hand-over the un-interrupted possession of the suit property to the plaintiff. He would further submit that the plaintiff was always ready and willing to perform his part of contract and to pay the balance sale consideration to the first defendant, but the first defendant had only postponed the registration of the sale deed in favour of the plaintiff. But on some reason or other, finally the appellant came to know that the suit property was mortgaged with Canara Bank, Madathukulam Branch and the said mortgage liability was not cleared by the first defendant . Therefore the



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first defendant has wantonly and wilfully refused to execute the sale deed in favour of the plaintiff. The first defendant has to perform his part of contract and execute the sale deed with nil encumbrance over the suit property to the plaintiff. Subsequently, the first defendant has executed a settlement deed in favour of the second defendant and the plaintiff impleaded the second defendant in this case. The learned counsel would submit that though the agreement entered between the parties is admitted, however, one of the condition mentioned in the agreement is that the first defendant has to measure the suit property and after measurement, the sale deed to be executed by the first defendant after receiving the balance sale consideration. Though the time stipulation is six months, the plaintiff has approached the first defendant several times and orally made request, but the first defendant did not come forward to measure the property and to execute the sale deed. After waiting for six months period, since the first defendant failed to execute the sale deed, the plaintiff sent a legal notice to the first defendant, for which, the first defendant sent a reply with false averments. Further the first defendant has also executed a settlement in



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favour of the second respondent/his wife and therefore the plaintiff filed the present suit for specific performance or otherwise for alternative relief of return of advance amount paid by the plaintiff. The trial Court had failed to consider the fact that time is not the essence of contract. Within the stipulated time, though the plaintiff is ready and willing to perform his part of contract and since the first defendant did not come forward to measure the property and that he already encumbered the property by mortgaging the same with Canara Bank, Madathukulam Branch and did not execute the sale deed as agreed between them and hence the plaintiff filed the suit, which clearly shows that the first defendant has not come forward to measure the property and hand-over the property and the first defendant has failed to perform his part of contract. Therefore the sale agreement is admitted, payment of advance amount is admitted and payment of balance sale consideration within six months is also admitted. As per the sale agreement, the first defendant has to execute the sale deed by measuring the property and receiving the balance sale consideration. Even though the appellant has paid Rs.2 lakhs to the first defendant, he has not paid the same to the Bank



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to clear the mortgage, but the first defendant had executed a settlement deed in favour of his wife, the second respondent. The said act itself show that the first defendant is not ready and willing to perform his part of contract. Therefore, the plaintiff is entitled for a decree of specific performance and the appeal has to be allowed and the order of the trial Court is to be set aside.

12.The learned counsel for the respondents would submit that the plaintiff never proved his readiness and willingness and he has not come forward to perform his part of contract. Within the six months time stipulated in the agreement, the plaintiff never shows his readiness and willingness. The plaintiff has also no means to pay the balance sale consideration mentioned in the sale agreement. Even though the plaintiff has stated that he is ready and willing to perform his part of contract within the time stipulated, he never contacted the first defendant and expressed his readiness and willingness,whereas, the plaintiff was not having the balance sale consideration and to execute the sale deed. Therefore, the trial Court



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has rightly decided that the plaintiff has not proved his readiness and willingness within the stipulated time in the agreement and therefore dismissed the suit.

13.Heard the submissions made by the learned counsels appearing on either side and perused the materials placed before this Court.

14.The sale agreement is admitted. The payment of advance amount is also admitted. Fixing of sale consideration is also admitted. According to the plaintiff, the first defendant has to measure the property within six months and execute the sale deed with nil encumbrance and get the sale deed executed by receiving the balance sale consideration. Though the plaintiff has stated that he is ready and willing to perform his part of contract within the time stipulated in the agreement ie. Six months, the plaintiff has not produced any evidence to show that he approached the first defendant within the time stipulated in the agreement. Though the plaintiff has taken advantage of the contract of the first defendant that the first



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defendant has mortgaged the property and has also settled the suit property to the second defendant/his wife. But all these things happened after the stipulated time of six months. The settlement deed is executed after six months and the mortgage with the Bank is not the subject matter of the agreement. Within the stipulated time of six months, both the parties are not ready and willing to perform their part of contract and one of the conditions in the sale agreement is that if the first defendant failed to perform his part of contract and executed the sale deed, the plaintiff can approach the Court and get the sale deed executed by paying the balance sale consideration and get the sale deed through Court and yet another clause is that if the plaintiff failed to perform his part of contract within the stipulated time, then he has to forfeit the advance amount. Therefore, as already stated, both the parties have not proved to show that both were ready and willing to perform their part of contract. However, as per one of the conditions stipulated in the agreement, the plaintiff had approached the Court and filed the suit and he should have deposited the money into the Court. Though the non-deposit of the balance sale consideration before the Court at the time of



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filing of the suit is not a ground to disallow the claim made by the plaintiff, it is not mandatory at the time of filing the suit that they have to deposit the money before the Court, whereas, in this case, one of the condition stipulated in the agreement is that if the plaintiff failed to perform his part of contract, then he has to forfeit the advance amount and that if the first defendant has refused to perform his part of contract, then the plaintiff can approach the Court and get the sale deed executed through Court by depositing the balance sale consideration. After six months before the expiry of limitation period, the plaintiff has no doubt, has filed the suit and has come to the conclusion that the first defendant has refused to perform his part of contract by knowing fully well that he had mortgaged the suit property.

15. Thus, when the plaintiff has filed the suit, he should have deposited the balance sale consideration before the Court below and when there was no measurement of the property was done by the first respondent, the plaintiff should have filed a petition and take steps to measure the



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property by way of appointing an Advocate Commissioner with the help of a qualified surveyor and measure the property and deposit the entire sale consideration as per the extent of land mentioned in the measurement and in this case, though the plaintiff filed the suit within six months from the date of agreement, he has not deposited the balance sale consideration before the Court and even after the disposal of the appeal and during the pendency of the appeal, the plaintiff has not deposited the balance sale consideration into the Court to show his genuineness and therefore, this Court finds that the plaintiff has not proved his case, even though he has pleaded in the plaint that he was ready and willing to perform his part of contract. Though the date of agreement is 21.3.2008 and the time stipulation of six months expires on 21.9.2008, the plaintiff has not produced any communication or letter or examined any witness to prove that he approached the first defendant at any point of time and expressed his readiness and willingness to the first defendant despite the first defendant had refused to comply with the same, as per the contract and execute the sale deed.



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16. Therefore, in the absence of the same, this Court does not find any materials to show that the plaintiff had proved that within the time stipulated, he is ready and willing to perform his part of contract. The stipulation mentioned has not made the time as the essence of the Contract. The settled proposition is that for selling of immovable properties, the time is ordinarily not the essence of the contract. Though the time is not the essence of the contract and limitation for filing the suit is within three years from the date of refusal, it does not mean that the plaintiff can wait till the end of the date of limitation. Therefore the plaintiff has not proved that except he sent notice to the first defendant after the period of six months stipulated in the sale agreement, he has not produced any evidence or proof to show that he is ready and willing to perform his part of contract and even otherwise, assuming that he is ready and willing to perform his part of contract within the stipulated time and that the first respondent has refused to perform his part of contract, then as per one of the conditions mentioned in the sale agreement, the plaintiff could have approach the Court and got the relief from the court by paying the balance sale consideration, whereas,



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he filed the suit within the two months, but till the disposal of the suit, he has not deposited the balance sale consideration into the Court and he has not taken any steps to measure the property and get the sale deed executed from the Court and even after the disposal of the suit, the plaintiff has not proved his readiness and willingness and from the conduct of the parties, even though the plaintiff has pleaded in the pleadings, from the evidence and conduct of the plaintiff, he has not proved his case of readiness and willingness from the date of agreement till the disposal of the suit. The past, present and future conduct should be proved, though the plaintiff is ready and willing to perform his part of contract. Therefore, in this case, the plaintiff has not proved that he is ready and willing to perform his part of contract even during the pendency of the suit or appeal and therefore he is not entitled for the discretionary relief of specific performance

17.As far as the return of advance amount is concerned, though the plaintiff pleaded that in case, this Court finds that the plaintiff is not entitled for the main relief of specific performance, he has also sought for



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the relief in alternative, for refund of the advance amount paid by him . But in this case, as per the sale agreement, one of the condition is that if the plaintiff failed to perform his part of contract within the time stipulated, then he has to forfeit the advance amount or otherwise if the first defendant failed to perform his part of contract, then the plaintiff has to approach the Court and get the relief from the Court by paying the balance sale consideration. Admittedly, in this case, as on the date of agreement, the property was mortgaged with the Canara Bank, Madathukulam Branch and this was not shown in the agreement or any communication. Further, though the first defendant received the advance amount of Rs.2 lakhs, he never remitted the amount to the Bank for clearing the mortgage loan and and get the sale deed and further in this case, the yet another fact is that after agreement and even before filing of the suit, the first defendant executed a settlement deed in favour of the second defendant/his wife. If that be the case, it is already stated that the first defendant has not proved his case of readiness and willingness and that already there was an encumbrance regarding the mortgage subsequently made in favour of his wife. Therefore



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both the plaintiff as well as the defendants have not come to the Court with clean hands and therefore the plaintiff is not entitled for the main relief of specific performance and at the same time, the first defendant has also not come to the Court with clean hands and hence, he is not entitled for retaining the advance amount and therefore, he is liable to refund the advance amount paid by the plaintiff. Therefore, in these circumstances, this Court is of the view that the plaintiff is not entitled for the main relief of specific performance and this Court dismissed the claim of the plaintiff for specific performance. Since the first defendant has not come to the Court with clean hands, he is not entitled to retain the advance amount received from the plaintiff. However, considering the facts and circumstances and the conduct of the parties, the plaintiff is not entitled for any interest on the advance amount paid by him.

18.In fine, the appeal suit is partly allowed by disallowing the claim of the plaintiff in respect of the relief of specific performance and by allowing the claim of the plaintiff for refund of the advance amount of Rs.2



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lakhs paid by him to the first defendant, however, the plaintiff is not entitled for any interest on the advance amount. The first defendant is directed to refund the advance amount of Rs.2 lakhs to the plaintiff within a period of three months from the date of receipt of a copy of the judgment. No costs.

Index : Yes / No

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Internet: Yes/No

vsn

To

1. The Fast Track Judge,
Additional District Court,
Dindigul,.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

vsn

JUDGMENT MADE IN

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