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A.S(MD)No.175 of 2010
and
C.R.P(NPD)(MD)No.273 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :25.08.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.175 of 2010
and
C.R.P(NPD)(MD)No.273 of 2013
and
C.M.P(MD)No.1691 of 2019

A.S(MD)No.175 of 2010

K.Shanthi :Appellant/Ist Defendant

Vs.

1.K.Selvam :Ist Respondent/Plaintiff

2.A.I.G. Home Finance Limited,
(Wiseman Homes Limited),
represented by its Branch Manager,
No.6, Head Post Office Road,
Kumbakonam Town,
Thanjavur District.

3.Abdul Kaboor :Respondents 2 and 3/Defendants
2 and 3



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K.Shanthi

:Petitioner/Ist Respondent/Ist
Defendant

Vs.

1.K.Selvam

:Ist Respondent/Petitioner/Plaintiff

2.A.I.G. Home Finance Limited,
(Wiseman Homes Limited),
represented by its Branch Manager,
No.6, Head Post Office Road,
Kumbakonam Town,
Thanjavur District.

3.Abdul Kaboor

:Respondents 2 and 3/Respondents
2 and 3/ Defendants 2 and 3

PRAYER in A.S(MD)No.175 of 2010: Appeal Suit filed under Section 96 and Order XL Rule 1 of the Civil Procedure Code, 1908 against the judgment and decree made in O.S.No.118 of 2008, dated 13.4.2010, on the file of the Additional District Judge(Fast Track Court No.I), Thanjavur.

PRAYER in C.R.P(NPD)(MD)No.273 of 2013: Civil Revision Petition filed under Article 227 of the Constitution of India praying this Court to set



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aside the Docket Order passed in E.P.No.27 of 2012 in O.S.No.118 of 2008, dated 22.1.2013, on the file of the Additional District Judge cum Fast Track Court, Thanjavur.

For Appellant/ : Mr.A.Haja Mohideen
Revision Petitioner

For Respondent-1 : Mrs.N.Krishnaveni
in both cases Senior Counsel
for M/s.P.Thiagarajan

COMMON JUDGMENT

The Appeal Suit is directed against the judgment and decree made in O.S.No.118 of 2008, dated 13.4.2010, on the file of the Additional District Judge(Fast Track Court No.I), Thanjavur.

2.C.R.P(NPD)(MD)No.273 of 2013 is filed seeking to set aside the Docket Order passed in E.P.No.27 of 2012 in O.S.No.118 of 2008, dated 22.1.2013, on the file of the Additional District Judge-cum-Fast Track Court, Thanjavur.



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3.The first respondent is the plaintiff and the appellant herein and the second and third respondents are the defendants in the suit in O.S.No.118 of 2008, on the file of Additional District Judge, Fast Track Court No.I, Thanjavur for the relief of Specific performance. The trial Court, after trial, decreed the suit with costs granting one month time to deposit the balance sale consideration into Court and two months time to the first respondent to execute the sale deed as per the sale agreement. Challenging the said judgment and decree passed by the trial Court, the first defendant has filed the present appeal suit.

4.During the pendency of the appeal suit, the the first defendant has filed E.P.27 of 2012 to get the sale deed executed and to register the same in the Sub-Registrar Office concerned. The trial Court after deposit of the balance sale consideration, registered the sale deed through Court and E.P was closed. Challenging the said order, the first defendant has filed the above Civil Revision Petition.



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

The suit property belongs to the first defendant. In respect of the suit property, there is an agreement between the plaintiff and first defendant on 3.1.2008. It was agreed that the sale consideration of the suit property is Rs.13,25,000/- and the plaintiff has paid a sum of Rs.3,25,000/- as advance amount to the first defendant on the date of sale agreement itself. Further it was agreed to hand over the plaintiff the suit property with nil encumbrance after receiving the balance sale consideration within a period of six months from the date of sale agreement. The first defendant has also agreed to execute the sale deed and hand over the possession of the suit property within the time stipulated above. The plaintiff is also ready and willing to perform his part of contract as per the sale agreement. When the parent deed of the suit property was claimed, it was stated that the suit property was mortgaged with the second defendant in Loan Nos.644 and 645. The first defendant told the plaintiff to remit a sum of Rs.20,000/- towards loan



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amount to the second defendant and accordingly, he remitted the same on 30.1.2008 and also obtained nil encumbrance certificate in respect of the suit property from the Sub-Registrar's Office concerned. The third defendant resided in the ground floor of the suit property as a tenant. The first defendant has assured the plaintiff that the third defendant should be vacated from the residence and hand over the vacant possession within the time stipulated in the sale agreement. In spite of repeated requests, the first defendant has evaded the execution of the sale deed by saying some reason or other and for that reason, the first defendant and her husband absconded from the said area. Hence the plaintiff has sent a legal notice to the first defendant on 2.7.2008 and as the residence of the first defendant was found locked, it was affixed on the door on 8.7.2008. In the meantime, the first defendant has sent a legal notice to the plaintiff with false averments. The plaintiff has deposited the balance sale consideration of Rs.9,50,000/- into the Bank on 2.7.2008 itself. Hence the plaintiff has filed the suit for specific performance with a direction to the first defendant to clear the



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loan with the second and third defendants with nil encumbrance and hand over the vacant possession of the suit property and the suit has to be allowed as prayed for.

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

This defendant had accepted the sale consideration of the suit property and the execution of the sale deed and the receipt of Rs.3,50,000/- as advance amount from the plaintiff and also the time stipulated for execution of the sale deed. The plaintiff is not ready and willing to perform his part of contract as per the sale agreement. The first defendant or her husband never requested the plaintiff to remit the loan amount to the Bank. This defendant never accepted to vacate the third defendant from the suit property and to hand over the vacant possession of the suit property. The plaintiff never approached the first defendant verbally requesting to execute



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the sale deed within the time stipulated. For the legal notice of the plaintiff dated 2.7.2008, this defendant sent a reply notice on 19.7.2008. While so, the first defendant had sent a legal notice on 4.7.2008, for which, the plaintiff failed to send any reply notice and filed the present suit. Since the plaintiff failed to perform his part of contract within the time stipulated, the first defendant is ready to repay the advance amount of Rs.3,25,000/- after deducting a sum of Rs.1 lakh. Further the first defendant is ready to repay the balance advance amount to the plaintiff. The suit filed by the plaintiff has to be dismissed.

7.The averments in the written statement filed by the second defendant reads as follows:

The first defendant's husband has obtained loan from the second defendant by mortgaging the suit property. Since the loan amount was not repaid, the second defendant was not in a position to return the parental



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deed. The second defendant has no knowledge about the sale agreement entered between the plaintiff and first defendant. The first defendant and the plaintiff in collusion has filed the present suit. Hence the suit has to be dismissed in respect of this defendant.

8.The averments in the Written Statement filed by the third defendant reads as follows:

This defendant is not a necessary party to the suit. It was accepted that this defendant resides in the suit property. This defendant is not a party to the sale agreement. Hence the suit has to be dismissed in respect of this defendant.

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



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1.Whether the defendants 2 and 3 are necessary parties to the suit?

2.Whether the plaintiff is entitled for the relief of specific performance as prayed for?

3.To what other relief the plaintiff is entitled to?

10. In order to substantiate the case of the parties, during trial on the side of the plaintiff, three witnesses were examined as P.W.1 to P.W.3 and Ex.A1 to A11 were marked. On the side of the defendants, one document was marked as Ex.B1 and no witness was examined. After trial, and upon hearing the arguments advanced on either side, the suit is decreed as prayed for as aforesaid, with costs. Challenging the said judgment and decree, the present appeal has been filed.

11.The learned counsel for the appellant would submit that the appellant is the first defendant. The first respondent is the plaintiff. There is



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an agreement purported to have been executed between the appellant and the first respondent on 3.1.2008 marked under Ex.A1. As per the sale agreement, time is the essence of contract and the first respondent has not come forward to pay the balance sale consideration and get the sale deed executed, within the stipulated time. Therefore, the first respondent, as plaintiff, has not proved that he was ready and willing to perform his part of contract within the time stipulated in the sale agreement. Therefore, the first respondent as plaintiff, has lost the right and subsequent to the agreement the appellant has no obligation to execute the sale deed. Further, he would submit that the first respondent has not proved the readiness and willingness to perform his part of contract within the stipulated time and the relief of specific performance is the discretionary relief. The plaintiff has to aver and prove his readiness and willingness and the conduct of the plaintiff is very important in a suit for specific performance. In this case, the first respondent had failed to prove his case that since the time was the essence of the contract within the stipulated time, he was willing to perform his part



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of contract. A perusal of the agreement itself shows that within the stipulated time, if the plaintiff failed to perform his part of contract, the failing party has to pay a sum of Rs.1 lakh as compensation to the other party. Further, the first respondent has failed to prove that he was ready and willing to perform his part of contract as alleged by him. The sale agreement is dated 3.1.2008 and the time for performing his part of contract is within six months and within the stipulated time of six months,ie, on or before 2.7.2008, the first respondent failed to perform his part of contract. Since he has not paid the balance sale consideration within the stipulated time which clearly shows that the first respondent was not ready and willing to perform his part of contract. Further the sale agreement itself is not genuine and even in ExB1, dated 31.12.2007, the amount paid by the first respondent to the husband of the appellant is much earlier to the sale agreement, which clearly shows that the appellant husband borrowed money from the first respondent and in order to repay the said amount, Ex.A1 Sale Agreement was executed as security for repayment of the amount borrowed by the



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husband of the appellant from the first respondent. As per Ex.A1, the said agreement, the total sale consideration is fixed at Rs.13,25,000/- and he paid a sum of Rs.3,25,000/- and remaining sale consideration of Rs.10 lakhs has to be paid within six months and by receiving the balance sale consideration and to get the sale deed executed free from encumbrance. Even in the agreement itself, it is stated that the time stipulated for execution of the sale deed is one of the essential condition and further failing which party who is in default has to pay a sum of Rs.1 lakh to the opposite party. Therefore, the recital in the sale agreement would clearly show that time is also the essence of the contract. Therefore, six months time is the essence of the contract. The six months time falls on 2.7.2008 and the first respondent has not proved that within the stipulated time ie., on or before 2.7.2008, he paid the balance sale consideration. Therefore, the trial Court failed to appreciate both oral and documentary evidence that the first respondent has failed to substantiate his case and is not entitled to the discretionary relief of equitable remedy. Therefore, the appeal suit has to



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be allowed and the Civil Revision Petition has to be allowed.

12.To substantiate her case, the learned counsel for the appellant placed reliance on the following Judgments:

1.The decision in *Pukhraj D.Jain and others .vs. G.Gopalakrishna reported in 2004(3) CTC 308(SC).*

2.The decision in *S.Thirugnanasambandam .vs. P.Kaliyaperumal and others reported in 2012(1)CTC46.*

3.The decision in *Shamsher Singh and others .vs. Rajinder Kumar and others reported in (2015) 5 Supreme Court Cases 531.*

4.The decision in *Jayakantham and others .vs. Abaykumar reported in (2017) 5 Supreme Court Cases 178.*

5.The decision in *Suresh Kumar*



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***Kankariya .vs.K.Ilgibai @ Pushpammal reported in
2022(3) CTC 501.***

13.The learned counsel for the first respondent would submit that the appellant has not disputed the agreement. The agreement is admitted and also the receipt of the advance amount of Rs.3,25,000/- is also admitted. Apart from that, he received a sum of Rs.20,000/- and Rs.5,000/- and receipt for the same are marked as Ex.A2 and Ex.B1 respectively and totally paid a sum of Rs.3,50,000/- and even prior to the time stipulated. The receipt of payment of Rs.3,50,000/- has not been denied and one of the conditions stipulated in the agreement is that the first respondent has to receive the balance sale consideration and to execute the sale deed free from encumbrance. The appellant had subsequently verified about the encumbrance and found that the first respondent has borrowed money from the third party and there is an encumbrance in the property and the appellant has not cleared the dues and cleared the encumbrance. Therefore,



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the first respondent plaintiff sent a legal notice to the appellant on 2.7.2008 itself and even after the receipt of notice also, the appellant has not come forward to perform his part of the contract. Though the appellant sent notice on 4.7.2008, he contacted over phone and he also urged the appellant to pay the balance sale consideration along with Rs.1 lakh and execute the sale deed. But the conduct of the appellant is otherwise. Further, the appellant sent another notice on 19.7.2008 and he reiterated the same. Further the first respondent must always be ready and willing to perform his part of contract and since the appellant has not acted and as per the contract and also she encumbered the property which has not been disclosed by the appellant even in the agreement also and subsequently the first respondent came to know about the encumbrance and failed to clear the same. Further the first respondent sent notice and expressed his readiness and willingness and she failed to execute the sale deed and therefore filed the suit for specific performance. The first respondent established his case. He averred in his pleadings and he proved the same in his evidence. The first



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respondent approached the appellant within the time stipulated in the agreement since, the appellant was not ready and willing to perform her part of contract within one month time from the date of the execution of the sale agreement for which he filed the suit and also after the decree, he deposited the entire balance sale consideration. Also the appellant filed the E.P and got the sale deed executed through Court. Therefore the conduct of the appellant clearly shows that he admitted the execution of the sale agreement and receiving of advance amount but during the trial she denied the execution of the sale agreement as if the agreement was executed only for surety. Therefore the conduct of the appellant itself clearly shows that she has not approached the Court with clean hands and the appeal is liable to be dismissed.

14.Further, she would submit that since at the time of the execution of the sale agreement, the third defendant has occupied in the ground floor of the property. The appellant agreed to vacate the third



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respondent and hand over the vacant possession. The appellant and her husband gave assurance that they would vacate the third respondent. Even later on, when he verified with the third defendant, who has not handed over the premise which has not been disclosed by the appellant and the appellant was not ready and willing to perform his part of the contract and also the appellant agreed to receive the consideration and clear the loan dues but he failed to clear the loan and therefore the conduct of the appellant is not bona-fide and therefore the appeal is to be dismissed.

15.Heard the learned counsel appearing on either side and perused the materials placed before this Court.

16.Though a reading of the plaint and the written statement, the appellant has not denied the execution of the sale agreement and receipt of the advance amount. Though the appellant raised the question that the time was the essence of the contract and the first respondent has not come



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forward within the time stipulated in the agreement. A reading of Ex.A1, it is stated that the advance amount has been paid on the date of the agreement dated ie., on 3.1.2008 a sum of Rs.3,25,000/- paid as advance and within six months balance sale consideration has to be paid and got the sale deed executed. Though the time is stipulated when there is no forfeiture clause and there is no specific reason or necessity has been recited in the agreement. It is settled proposition of law that normally the time is not the essence of the contract with reference to the sale of immovable properties concerned. Unless in the agreement it is stipulated and the reasons for stipulation of the agreement should be recited and subsequently it has to be established. Unless it is contrary from the normal, the time is not the essence of the contract in respect of immovable properties concerned. However in this case, the first respondent also approached within the time. Admittedly, the suit property is a building which was occupied by the appellant and the appellant has not proved that within the stipulated time, they have vacated the tenant and the property was kept as vacant and it was



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ready to hand over the same and further, a reading of the records, there was encumbrance and therefore, the appellant has not proved that within the stipulated time of six months, the property was free from encumbrance. Though she has sent notice under ExA8, but however, the facts remains otherwise on the expiry of six months, the property was not free from encumbrance and the third respondent was not vacated and the building was kept as vacant. Therefore the appellant was not ready to hand over the property and execute the sale deed after receipt of the balance sale consideration within the stipulated time. However, the first respondent has expressed his readiness and willingness and the appellant should come forward with free from encumbrance and vacant possession of the suit property. Further, there was exchange of notice between the appellant and first respondent and subsequently, the first respondent filed the suit immediately after expiry of the stipulated time. The main contention of the first respondent is that since the appellant has not acted upon and that he has not vacated the person who occupied the said premises and also he has



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not cleared the dues and the kept the property free from encumbrance. Therefore, in these circumstances, the first respondent has filed the suit within a reasonable time and the appellant also not established that there was a specific reason or necessity and because of that necessity, they fixed six months time. Therefore it is settled proposition of law that time is not the essence of the contract in respect of agreement of immovable properties concerned. Therefore, this Court finds that the appellant has not established the particular necessity or reason that the time is the essence of the contract. Therefore the contention of the appellant in this regard is rejected.

17.As far as readiness and willingness is concerned, the first respondent has averred in his plant and also has established that he was ready and willing to perform his part of contract. The appellant has not vacated the suit property and has not cleared the dues and not kept the property free from encumbrance within the stipulated time. Therefore the appellant was not ready and willing to perform her part of contract. Since



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the first respondent is always be ready and willing to perform his part of contract, the appellant has not questioned the financial capacity of the first respondent and also it is settled proposition of law that readiness means the vendor need not always have the money in his hand or showing the bank balance, but however, the vendor is able to substantiate that the vendor has got the financial capacity to mobilise the fund and to pay the balance sale consideration.

18.This fact has not been seriously challenged by the appellant. Therefore, as contended by the learned counsel for the first respondent and within the stipulated time, the appellant has not cleared the dues and vacate the person who was in occupation of the property If at all when the vendor has paid the money but the appellant immediately should receive it and execute the sale deed and hand over the vacant possession of the suit property. But the conduct of the appellant is otherwise. Therefore, in these circumstances, this Court finds that the first respondent as plaintiff has



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satisfied the requirements that he has proved his genuiness to get the discretionary relief. This Court finds that under Ex.A1-Sale agreement and also Ex.A3-Receipt and other exchange of notices and even the evidence established that the time was not the essence of the contract. The first respondent was always ready and willing to perform his part of contract within the stipulated time mentioned in the contract, whereas, the appellant has not established that she was ready and willing to perform her part of contract and by her conduct, she had failed to establish the same. On the other hand, the first respondent plaintiff established his case and subsequently, the first respondent deposited the balance sale consideration into Court and also filed E.P and got the sale deed executed. Hence the appeal suit has to be dismissed and accordingly, the same stands dismissed.

19.As against the order passed by the Executing Court, the appellant has filed C.R.P stating that the trial Court has not followed the mandatory provisions of Order 21 Rule 34 of Civil Procedure Code. The



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total endorsement on the adjudication order in the E.P proceedings does not show that the trial Court has followed the mandatory provisions before execution of the sale deed. The first respondent vendor should submit the draft sale deed and the copy of the draft sale deed should have been furnished to the judgment debtor/the appellant herein. After inviting the objections, the Court has to finalise the draft sale deed and has to be sent to the Registration Office for registering. In this case, the appellant claim that there is failure of the same and hence, the appellant has filed the C.R.P as against the order made in the E.P by the executing Court.

20.A perusal of the records, there is no doubt that the Executing Court had not followed the procedures and simply received the draft sale deed. It was second time called upon and then simply it was sent for registration. Since the first respondent has got the decree and also filed E.P, there was no stay in the appeal suit and therefore, the first respondent/Judgment-Debtor deposited the money before the trial Court and



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filed the E.P and got the sale deed executed. Therefore even though the mandatory provision is not followed, most probably, the appeal is pending for a quite long time and even otherwise, the appellant has not got any stay from the appellate Court in this appeal suit and further the appellant is not being prejudiced for the non compliance of the provisions under Order 21 Rule 34 of the Civil Procedure Code. Therefore the decree passed by the trial Court cannot be nullified on the said ground and further the executing Court already executed the decree and sent the draft sale deed for registration and after registration of the sale deed, the said E.P was closed. Since the appeal suit is also dismissed and even the reopening of the E.P will not serve any purpose for the appellant herein. Therefore, in these circumstances, this Court feels that the C.R.P become infructuous and hence, the C.R.P has to be dismissed and accordingly dismissed, in view of the subsequent development that had happened. This may not be a precedent for any other case.



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21.In the result, both the appeal suit as well as the Civil Revision
Petition stand dismissed. No costs. Consequently, connected Civil
Miscellaneous Petition is closed.

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vsn

To

1.The Additional District Judge,
Fast Track Court No.I,
Thanjavur..

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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COMMON JUDGMENT MADE IN

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