



A.S. (MD) No.66 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :20.07.2022

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.66 of 2011

R.Dhanushkodi

:Appellant/Plaintiff

Vs.

1.A.Lakshmana Perumal(died)

2.L.Gurugammal

3.Shanthi Elangovan

4.R.Alamelu Mangai

5.L.Shankar

: Respondents/Defendants

(Respondents 3 to 5 are brought on record as Legal representatives of the deceased first respondent as per order of this Court made in C.M.P(MD)No. 50 of 2022 in A.S(MD)No.66 of 2011, dated 4.3.2022)



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PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code, 1908 against the judgment and decree made in O.S.No.96 of 2008, dated 18.03.2011, on the file of the Ist Additional District Judge, Madurai.

For Appellant :Mr.M.P.Senthil

For Respondent-1 :Died

For Respondents :Mr.T.K.Gopalan
2 to 5

JUDGMENT

The Appeal Suit is directed against the judgment and decree made in O.S.No.96 of 2008, dated 18.03.2011, on the file of the Ist Additional District Judge, Madurai..

2.The appellant is the plaintiff and the defendants are the respondents herein and the appellant has filed a suit in O.S.No.96 of 2008, on the file of Ist Additional District Judge,Madurai for the relief of specific performance. 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 appellant/Plaintiff has filed the present appeal suit.

3.For the sake of convenience, the parties are referred to as per their ranking before the Court below.

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

The suit property is a Nanja land, measuring an extent of five acres and 20 cents originally belongs to the first defendant and by family arrangement, the second defendant had also claimed right over the same. The second defendant had authorized the first defendant to enter into a sale agreement with the plaintiff through his brother Gopalakrishnan. The first defendant entered into a sale agreement with the plaintiff on 04.12.2006 to sell the schedule mentioned property at the rate of Rs.2,700/- per cent and received a sum of Rs.1 lakh on the same day itself, as advance amount. Further, it was agreed between them to conclude the sale within three months and the total sale consideration is Rs.14,04,000/-.Subsequently, the



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first defendant received a sum of Rs.2 lakhs from the plaintiff on 17.12.2006 and the same was endorsed in the sale agreement. Another sum of Rs.50,000/- each in two occasions were received by the first defendant from Gopalakrishnan and hence a total advance amount of Rs.4 lakhs was received by the first defendant. The first defendant used to reside both in Madras and Madurai. The plaintiff is always ready and willing to perform his part of contract by paying the balance sale consideration and get the sale deed executed in his favour. The lands could not be measured since the first defendant often visiting Chennai and it was measured only during July 2007. After measuring the property in July 2007, from August 2007 onwards, the plaintiff had approached the first defendant to execute the sale deed by paying the balance sale consideration, however, the defendants have not come forward to execute the sale deed in favour of the plaintiff. Therefore the plaintiff issued a legal notice on 12.09.2007 both to Chennai and Madurai address and the same was served on 19.09.2007 and 20.09.2007. The first defendant knowing the content of the notice very well issued an anti-dated reply, dated 17.09.2007, as if the sale agreement was



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cancelled and the payment of advance amount of Rs.1 lakh by the plaintiff was forfeited. Since the first defendant attempted to sell the suit property to third parties through brokers, publication was made by the plaintiff in Dinakaran and Dinamalar on 5.6.2008 and 6.6.2008 respectively, for which, the first defendant gave publication on 8.6.2008. The three months period stipulated in the agreement to conclude the sale is not an essential condition, since the first defendant had received further amount towards sale consideration after measuring the suit property, after three months period mentioned in the sale agreement got expired. The defendants are bound to execute the sale deed in favour of the plaintiff, but the defendants are evading to do the same, for one reason or other. Hence the plaintiff has filed the suit for specific performance.

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

The agreement, dated 4.12.2006 is admitted and the period of three months for concluding the sale is very important. The plaintiff is not



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will be willing to pay the entire sale consideration and gave the amount then and there and obtained signature, which will show that the plaintiff is willing to purchase the land, however he is not having the sufficient funds in his hand. The first defendant's son is running a leather factory and for the necessity of the factory, the first defendant has agreed to sell the property, but due to the incompleteness of the sale deed, the first defendant's son was not able to execute the assurance given to the customers. Hence the first defendant informed Gopalakrishnan through phone on 5.8.2007 that the sale agreement, dated 4.12.2006 is cancelled. Even after that, the plaintiff had expressed his willingness that the first defendant would have executed the sale deed. So the first defendant issued a notice on 17.09.2007 and knowing the contents of the notice, the plaintiff had issued an anti-dated notice.. There is inconsistency between the notices issued by the plaintiff on 11.9.2007 and 21.6.2008 regarding the payment of a sum of Rs.50,000/- twice and also about the acknowledgment. The plaintiff has not filed any document to show that he is having the total sale consideration of Rs. 14,04,000/- from the date of sale agreement ie., from 4.12.2006 onwards.



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After ten months from the date of issuance of notice, the plaintiff has filed the suit with false averments. There is delay in filing the suit according to his whims and fancies and hence, the suit has to be dismissed with exemplary costs.

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

1. Whether the plaintiff is entitled to specific performance of contract, dated 4.12.2006 between the plaintiff and the defendants?

2. Whether the plaintiff was ready and willing to perform his part of the contract, dated 4.12.2006?

3. Whether the time three months is the essence of the contract, dated 4.12.2006?

4. To what relief, if any, the plaintiff is entitled to?



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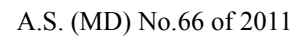
7. In order to substantiate the case of the parties, during trial on the side of the plaintiff, the plaintiff was examined as P.W.1 and Ex.A1 to A12 were marked. On the side of the defendants, two witnesses were examined as D.W.1 and D.W.2 and Ex.B1 was marked. After trial, and upon hearing the arguments advanced on either side, the suit filed by the plaintiff was dismissed with costs.

8. The learned counsel for the appellant/Plaintiff would submit that the suit schedule property belongs to the first defendant. The plaintiff and the first defendant entered into a sale agreement marked under Ex.A1 on 4.12.2006 and as per the sale agreement, they have to conclude the contract and execute the sale deed on or before 4.3.2007. On the date of sale agreement, it is agreed that the total sale consideration is Rs.14,04,000/- and the extent of the property covered under the sale agreement is 5 acres and 20 cents, at the rate of Rs.2700/- per cent. Out of which, a sum of Rs.1 lakh was paid as advance to the first defendant on the date of sale agreement itself. Consequently, the plaintiff paid a sum of Rs.2 lakhs on 17.12.2006



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and the plaintiff had also paid a sum of Rs.50,000/- each, on two occasions totalling to a sum of Rs.1 lakh on 10.5.2007 and towards the sale consideration, the plaintiff has totally paid a sum of Rs.4 lakhs to the first defendant. One of the condition in the sale agreement is that the first defendant has to measure the suit property and thereafter, after receiving the total sale consideration to execute the sale deed in favour of the plaintiff, whereas, the first defendant has not measured the suit property immediately, however, he measured the suit property only in the month of July 2007. The plaintiff sent a letter to the first defendant that on receipt of Rs.1 lakh on 10.3.2007 to execute the sale deed, but the first defendant replied that he is not well and that he is not in a position to execute the sale deed immediately and soon after recovering from the illness, he will execute the sale deed. But on receipt of the notice, dated 10.09.2007, the first defendant did not come forward to execute the sale deed. However, the first defendant had sent a reply with false averments on 17.09.2007 denying the receipt of Rs.3 lakhs on 7.12.2006 and 10.3.2007 and the first defendant had gone to the extent of saying that the sale agreement entered between them got



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execution of the sale deed is fixed as 4.3.2007, the conduct of the parties itself shows that the time was not the essence of the contract. Though the appellant sent notice on 10.09.2007, since the defendants have denied the receipt of Rs.3 lakhs towards advance and also because of the non-execution of the sale deed, there was a negotiation going on between the plaintiff and the defendants. Therefore the plaintiff did not file the suit immediately and subsequently, since the negotiation talk was not materialized, the appellant was constrained to file the suit for specific performance on 15.07.2008. Though in the reply notice, the first defendant had denied the receipt of Rs.3 lakhs as advance, however during the cross examination he had admitted the same, which itself shows the very conduct of the defendants. The plaintiff has filed the suit for specific performance and averred and proved his claim through his oral as well as documentary evidence. The trial Court has failed to appreciate the same in a proper perspective and dismissed the claim of the appellant.



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9.In support of this claim., the learned counsel for the appellant placed reliance on (1)decision of the Honourable Supreme Court of India in the case of *Silvey and others .vs. Arul Varghese and another reported in (2008) 11 SCC 45* (2) Decision of the Honourable Apex Court in the case of *Zarina Siddiqui .vs. A.Ramalingam reported in (2015) 1 SCC 705* and yet another decision of the Honourable Supreme Court in (3)*Ferrodous Estates Private Limited .vs. P.Gopirathnam(dead) and others reported in 2020(3) MWN(Civil) 667.*

10.The learned counsel for the respondents would submit that though he has admitted the execution of the sale agreement, but whereas he would submit that the time stipulated in the contract was very much essence of the contract. The appellant had never come forward to pay the balance sale consideration and get the sale deed executed and therefore the appellant sent a notice on 10.09.2007, for which, the respondents sent a reply on 17.09.2007 itself. Since the plaintiff failed to come forward to execute the sale deed within the time stipulated in the agreement, the purpose for which he entered into an agreement with the plaintiff for selling the suit property



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is defeated. So he was constrained to sell the other property. Further the first defendant cancelled the sale agreement on 17.09.2007 and from that date till 15.7.2008 for ten months, the plaintiff has not taken any steps either to deposit the amount into the Court or to file the suit immediately, which clearly shows the conduct of the plaintiff. Further, the appellant has not shown any proof that he is having sufficient funds and he was always ready and willing to perform his part of contract. Therefore the conduct of the Plaintiff has to be taken into consideration and that from the date of agreement till the date of deciding the suit, the plaintiff has not produced any document showing that he was having sufficient funds in his hand and thereby he was ready to pay the balance sale consideration and got the sale deed executed. Even after the cancellation of sale agreement, the appellant has not immediately deposited the amount into Court and filed the suit. Therefore this conduct of the plaintiff has to be taken into consideration and that the plaintiff is not fit for getting the discretionary relief of specific performance and therefore the trial Court has rightly dismissed the suit filed by the plaintiff and prayed for dismissal of the appeal suit



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11.In support of his contention, the learned counsel for the respondents placed reliance on the decision of the Honourable Supreme Court of India in the case of ***U.N.Krishnamurthy(since deceased) through LRS .vs. A.M.Krishnamurthy in Civil Appeal NO.4703 of 2022(reported in 2022 Live Law(SC) 588)***.

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

13.The execution of the sale agreement is not disputed. The receipt of advance amount of Rs.1 lakh is also not disputed. The subsequent payment of Rs.3 lakhs was disputed but subsequently admitted. Therefore, out of the total sale consideration of Rs.14,04,000/- already a sum of Rs.4 lakhs has been paid. The execution of the sale agreement and payment and receipt of Rs.4 lakhs have not been denied and the same is proved. However, the point for consideration in this appeal is :



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1. Whether the time was the essence of the contract?

2. Whether the trial Court has rightly appreciated the evidence and has given a correct finding?

14. The issue that the time is the essence of the contract is concerned, though in the sale agreement Ex.A1, it is stated that the agreement has to be completed on or before 4.3.2007, but considering the conduct of both the parties and also it is settled proposition of law that ordinarily regarding the sale of immovable properties, time is not the essence of the contract. However from the conduct of the parties and the circumstances, even in the agreement there is no forfeiture clause mentioned and further the outer time limit for execution of the sale deed is 4.3.2007, whereas, the defendants have admitted that they have received the amount even after the outer time limit ie., on 10.3.2007, a sum of Rs.1 lakh. Till the sending of notice by the plaintiff on 10.09.2007, the defendants have not sent any notice or cancelled the agreement and the very conduct of the parties would show that the time is not the essence of contract.



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15. Even though the time is not the essence of the contract, the next core question that has to be decided is whether the appellant was always ready and willing to perform his part of contract from the inception of contract till the deciding of the suit?

16. The learned counsel for the plaintiff stated that he is always ready and willing to perform his part of contract and only the defendants have delayed the process in measuring the property and subsequently they also denied the receipt of Rs.3 lakhs towards sale consideration from the plaintiff. Further the defendants have cancelled the sale agreement by way of sending reply notice and therefore, there was a negotiation going on between the appellant and the respondents. Therefore there was a delay, for which, the learned counsel for the defendants would submit that though the measurement of the suit property is not form and parcel of the sale agreement, even the measurement shows that the measurement is done regarding the property which was not covered under the sale agreement and it was done for some other property. Till the outer time limit fixed for



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execution of sale deed ie., till 4.3.2007, the plaintiff has not come forward to pay the entire sale consideration and get the sale deed executed and he has also not proved that he was having sufficient fund. It is settled proposition of law that when the plaintiff has come to the Court for the discretionary relief of specific performance, he has to aver the same in the plaint and prove through evidence about the readiness and willingness to perform his part of contract from the date of sale agreement till the date of deciding the suit, whereas, in this case, admittedly, the date of sale agreement is 4.12.2006 and the total sale consideration is Rs.14,04,000/- and the outer time limit stipulated in the agreement to execute the sale deed is 4.3.2007 and on 7.12.2006, the appellant had paid a sum of Rs.2 lakhs and on 10.3.2007, he had paid another sum of Rs.1 lakh. Though the defendants have denied that measurement is not a condition mentioned in the sale agreement, measurement was done whereas the plaintiff would state that in the month of July 2007 itself, the measurement has been completed. However, even in the subsequent dates also, the plaintiff has not proved that he was having sufficient funds in his hand. Though it is not necessary that



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the plaintiff should have the ready cash in his hand, the plaintiff should have proved the same neither by depositing the balance sale consideration into Court nor paid the balance sale consideration to the first defendant. The appellant has to show that he has the means to mobilise the fund and how the funds would be available to him and pay that amount within the stipulated time which has not been pleaded and proved by the appellant. The relevant portion of the decision of the Honourable Supreme Court in ***Civil Appeal NO. 4703 of 2022, dated 12.7.2022*** in the case of ***U.N.Krishnamurthy(since deceased) through Lrs .vs. A.M.Krishnamurthy*** reads as follows:

"24.Section 16(c) of the Specific Relief Act, 1963 bars the relief of specific performance of a contract in favour of a person, who fails to aver and prove his readiness and willingness to perform his part of contract. In view of Explanation (i) to Clause © of Section 16, it may not be essential for the plaintiff to actually tender money to the defendant or to deposit money in Court, except when so directed by the Court, to prove readiness and willingness to perform the essential terms of a contract, which involves



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payment of money. However explanation (ii) says the plaintiff must aver performance or readiness and willingness to perform the contract according to its true construction.

25.To aver and prove readiness and willingness to perform an obligation to pay money, in terms of a contract, the plaintiff would have to make specific statements in the plaint and adduce evidence to show availability of funds to make payment in terms of the contract in time. In other words, the plaintiff would have to plead that the plaintiff had sufficient funds ore was in position to raise funds in time to discharge his obligation under the contract. If the plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the plaintiff may aver and prove, by adducing evidence, an arrangement with a financier for disbursement of adequate funds for timely compliance with the terms and conditions of a contract involving payment of money."



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17. Though the plaintiff should not have the ready cash in his hand, however, he has to mention about the arrangements made for mobilizing the funds and therefore in this case the plaintiff has not proved that from 4.3.2007 till 10.09.2007, he was having sufficient funds in his hand and neither he deposited the balance sale consideration into Court while filing the suit or he would aver that he is having the means to arrange for money to pay the balance sale consideration and further, the yet another point for consideration is that the plaintiff sent notice on 10.09.2007 and received by the first defendant on 17.09.2007, in which, itself the first defendant had cancelled the sale agreement. When the plaintiff came to know about the specific denial of the sale agreement by the first defendant, the plaintiff ought to have filed the suit immediately. Though the as per the Limitation Act, the appellant can file suit within a period of three years from the date of refusal, it does not mean that the plaintiff can wait for all the three years and just one day before the expiry of the period of limitation, he can file the suit and get the decree. The basic principle is that the plaintiff has to aver and prove that he is always ready and willing to perform his



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part of contract from the date of inception of sale agreement till the date of suit or decree. Therefore in this case, though the sale agreement between the plaintiff and the first defendant was entered on 4.12.2006, till 10.09.2007, the date on which the plaintiff has sent notice to the first defendant, the plaintiff has not proved that he was ready and willing to perform his part of contract. Even after the receipt of reply on 17.09.2007 till 15.7.2008 also, the plaintiff has not proved that he was always ready and willing to perform his part of contract. Though the appellant counsel would submit that conduct of the defendants shows that they have not approached this Court with clean hands, the party who has filed the suit and approached the Court for the relief of specific performance should also come with clean hands. Since the relief of specific performance is a discretionary relief, the plaintiff has to aver and prove that he is always ready and willing to perform his part of contract. This Court and the Honourable Apex Court has time and again held that time was not the essence of the contract in agreement to sell the immovable property, the plaintiff has to prove that he was always ready and willing to perform his part of contract within the stipulated time by



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adducing both oral and documentary evidence and the same is lapsed in this case.

18. Therefore in this case, on re-appreciation of entire evidence both oral and documentary, this Court comes to an independent conclusion that the appellant has not proved the readiness and willingness by pleading the same in the plaint and proved the same by let in ample and cogent evidence. There is no quarrel over the proposition of law laid down in the decision of the Honourable Supreme Court referred to supra, however, considering the facts and circumstances of the present case, the facts of the above case differ from the present case and the same cannot be pressed into service, since the appellant has failed to prove that he is always ready and willing to perform his part of contract from the inception of sale agreement till the outcome of the suit and further the appellant has not deposited the balance sale consideration into Court to prove his genuineness. For all the reasons stated supra, this Court, on a perusal of the entire records, come to the conclusion that the appellant has not proved his readiness and



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williness. Therefore he is not entitled to get the relief of specific performance and hence this Court finds no reason to interfere with the judgment and decree passed by the trial Court.

19. Accordingly, the first appeal suit stands dismissed and the judgment and decree made in O.S.No.96 of 2008, dated 18.03.2011, on the file of the Ist Additional District Judge, Madurai are hereby confirmed. No costs.

20.07.2022

Index : Yes / No

Internet: Yes/No

vsn

To

1. The Additional District Judge,
Madurai.

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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