



S.A(MD).No.474 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.07.2022

CORAM: **JUSTICE N.SESHASAYEE**

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M.Balakrishnan(Died) ...Appellant/Appellant/Plaintiff
2.Pushpavalli
3.Balasubramani
4.Sakthivel
5.Rajalingam
6.Kalaiselvan
7.Thangapandian
(Appellants 2 to 7 are impleaded vide order dated 01.07.2022 in
CMP(MD).Nos.5153, 5154 and 5156 of 2022 in SA(MD).No.242 of 2011)

.... Appellants

Vs.

1.B.Ranjani
2.K.Santhalakshmi
3.Dravida Munnetra Kazhagam
through its General Secretary
Anbazhagan, Chepauk, Chennai-05.

... Respondents/Respondents/Defendants

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree in A.S.No.49 of 2006 dated 22.01.2009 on the file of the Principal Subordinate Court, Dindigul confirming the judgment and decree in O.S.No.176 of 2004 dated 27.03.2006 on the file of the District Munsif cum Judicial Magistrate, Veda sandur.



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For Appellants : Mr.Antony Arul Raj
For Respondents : Mr.Veera Kathiravan(for R3)
Senior Counsel for Veera Associates
No representation (for R1 & R2)

J U D G M E N T

The plaintiff, who lost successively both before the trial Court as well as before the first appellate Court in his suit for specific performance, is the appellant herein. For narrative convenience, the parties shall be referred to as per their rank before the trial Court.

2.1 The plaintiff has come with a straight forward case:

- The suit property is a vacant site measuring six cents in which, both the first defendant and the second defendant have separate title for three cents each. While so, on 02.03.1995, vide Ext.A1, the plaintiff and the defendants 1 and 2 had entered into a sale agreement by which, the plaintiff agreed to purchase three cents each belonging to defendants 1 and 2 for a consolidated consideration of Rs.46,000/- (Rupees Forty Six Thousand only). He had paid Rs.5,000/- (Rupees Five Thousand only) as advance. The agreement stipulated two months time for performance of mutual contractual obligation. On 27.05.1995, the plaintiff issued Ext.A2, suit notice and this was responded to jointly by the defendants 1 and 2 with their Ext.A3,



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reply, dated 09.06.1995. In their reply notice, they admitted the execution of Ext.A1, but refused performance on two scores: (a) that time is the essence of the contract; and (b) that the plaintiff was not ready and willing to perform his part of the contract.

2.2 The suit for specific performance was promptly laid.

2.3. In the written statement, the defendants 1 and 2 have taken an identical line of defence, which they have already outlined in their Ext.A3, reply notice. To expatiate it, they alleged that the time for performance was of essence of the contract. The first defendant would contend that she had proposed to buy a property in Trichy with the sale consideration, and that was defeated by the plaintiff by not performing the contract in time. The second defendant, on her part, would plead that her husband was desperately in need of a two-wheeler and she proposed to sell the property only to help her husband to have a two-wheeler.

2.4 After due trial, on 16.06.1997, the suit came to be dismissed. Within about few months thereafter, on 20.10.1997 to be precise, the vendor of the property had sold the property to a third party, who was to be impleaded as



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the third defendant later, vide Ext.B.1, sale deed, dated 20.10.1997. After this, the plaintiff had preferred an appeal against the decree of the trial Court in A.S.No.60 of 1998 and in this appeal, the third defendant came to be impleaded and owing to this, the first appellate Court remanded the matter back to the trial Court to consider the case of the third defendant vide its judgment, dated 29.06.2000. By this time, the pecuniary jurisdiction of the civil Court underwent a change and the suit was taken on record by the District Munsif Court, Vedasanthur in O.S.No.176 of 2004.

2.5 The third defendant now entered appearance and filed his written statement, wherein he would contend: (a) that it is the *bona fide* purchaser; (b) that the plaintiff knew about the sale by the defendants 1 and 2 in its favour; and (c) since as on the date of Ext.B.1, sale, there was no suit pending and the said purchase is not hit by the Rule of *lis pendens*.

3. The trial Court endeavoured to appreciate the evidence yet again, and chose to dismiss the suit. Its reasoning essentially was pivoted on the failure of the plaintiff to prove that he was ready and willing to perform his part of the contract. The trial Court would state that while Ext.A.1, agreement, had stipulated 2 months time for performance of contract, the



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plaintiff would say that he had borrowed the balance sale consideration payable from his brother-in-law and that the plaintiff was not even familiar with the avocation of the said brother-in-law and chose to disbelieve the said version. It also held that Ext.B.1, sale deed, is not affected by the Rule of *lis pendens*. This decree of the trial Court was futilely challenged by the plaintiff in A.S.No.49 of 2006 and having been unsuccessful successively before the trial Court and the first appellate Court, the plaintiff had approached this Court with this appeal. As of today (i.e., 05.07.2022), the plaintiff has passed away and his legal representatives are prosecuting this second appeal.

4. This second appeal was admitted on the following substantial questions of law:

“1.Whether the Courts below erred in applying the principle that time is essence of contract for non-suiting the plaintiff?

2.Whether the Courts below applied the correct principles of law relating to grant of specific performance?

3.Whether the Courts below ought to have held that the purchase by the third defendant is hit by doctrine of lis pendens?

4.Whether the Courts below failed to note that the plaintiff was ready and willing to perform his part of contract through out?”



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5. Mr.Antony Arul Raj, learned counsel for the plaintiff argued that the findings of the Courts below that Ext.B.1 will not be affected by the Rule of *lis pendens* since an appeal is only a continuation of a suit and anything had happened in the interregnum between the decree of the trial Court and the filing of the appeal, will necessarily hit by *lis pendens*. He also relied on the judgment of the Hon'ble Supreme Court in ***Shenbagam and Ors. Vs., KK Rathinavel*** reported in [2022 (2) Supreme 415].

6. Turning to his focus on the facts of the case, the learned counsel would argue the general presumption that the time is not essence of the contract in any sale of immovable property and that the plaintiff had issued Ext.A.2, suit notice and also laid the suit without any undue loss of time.

7. The learned counsel for the contesting third defendant/third respondent argued justifying the line of reasoning of the Courts below. It is not so much about whether time is of essence of the contract or whether Ext.B.1, sale agreement, is hit by Rule of *lis pendens*, which passed the scrutiny of the Courts below as much as its preference for the conduct of the plaintiff in a suit for specific performance.



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8. In every suit for specific performance prior to the amendment of the Specific Relief Act, 1983, it is necessary for the plaintiff to plead and prove his readiness and willingness to perform his part of the contract in terms of Section 16(c) of the Specific Relief Act. Both the trial Court and the first appellate Court have found that the plaintiff did not possess the requisite funds at that time stipulated for performance of the contract. Indeed, they rely on the testimony of the plaintiff as P.W.1, wherein he would say that he did not possess money, but had borrowed the money from his brother-in-law. Though the money need not jingle before the Court, yet when the plaintiff created a situation for himself with his statement that he did not possess money, then it is equally important for him to establish that he indeed had mobilised the amounts as he claimed. This plaintiff did not attempt to establish, which got the notice of the Courts below and this Court does not find any need to deviate from the said findings, essentially because it is a finding on mere fact and this Court does not consider that the approach of the Courts below is perverse. Though the substantial questions of law touch upon few aspects other than readiness and willingness necessary for seeking specific performance, yet the plaintiff is ultimately pinned down to his failure to establish the same. This Court cannot overlook it, nor considering some of the substantial questions of law would tilt the



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case in favour of the plaintiff ignoring the defect of the plaintiff's failure to prove his readiness to perform his part of the contract.

9. The third defendant voluntarily made a statement that he is willing to pay advance amount of Rs.5,000/- (Rupees Five Thousand only) to the plaintiff even though it is not liable to pay it. This Court is informed that the plaintiff has deposited the balance sale consideration before the first appellate Court and this is directed to be returned to the appellant/plaintiff.

10. The conclusion is written well on the wall: This Court does not find merit in the appeal. Accordingly, this Second Appeal is dismissed. No costs.

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Index : Yes/No

Internet: Yes/No

Rmk



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To

- 1.The Principal Subordinate Judge, Dindigul.
- 2.The District Munsif cum Judicial Magistrate, Veda sandur.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.,

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