**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**DATED : 26.08.2022**

**CORAM**

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN**

**A.S.(MD) No.70 of 2000**

1.R.M.Subramanian Chettiar (Died)
2.M.Kalaiselvi
3.M.Vijaya Rani
4.SP.Vijayakumar

Appellants 2 to 4 have been impleaded as per order dated 16.11.2018 in C.M.P.(MD).Nos.5379 to 5381 of 2018 in A.S.No.70 of 2000. ... Appellants

-Vs-

1.S.Chockalingam Chettiar (Died)
2.Matheswari
3.Shanmugarajan
4.Sivakamasundari

Respondents 2 to 4 are brought on record as LRs. of the deceased 1st respondent vide order of the Court, dated 25.06.2009 made in C.M.P.(MD).Nos.1254 to 1256 of 2006.

R4 is declared as major and R2 is discharged
from her guardianship as per order dated 16.11.2018
in C.M.P.(MD).No.6399 of 2017.

5.SP.Ramamoorthy

5th respondent has been impleaded vide order
dated 16.11.2018 in C.M.P.(MD).Nos.5379 to
5381 of 2018.

... Respondents

**PRAYER:** Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 12.10.1999 made in O.S.No.43 of 1996 on the file of Subordinate Judge, Pudukottai.

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|---|---|
| For Appellants | : M/s. N.Krishnaveni, Sr. counsel for Mr.P.Thiagarajan |
| For R1 | : Died |
| For R2 to R4 | : Mr.S.Ramesh |
| For R5 | : Mr.AR.L.Sundareshan Senior counsel |

**JUDGMENT**

The first respondent is the plaintiff. He filed a suit in O.S.No.43 of 1996 before the Subordinate Court, Pudukottai, against the first appellant for the relief of specific performance or in alternative to refund the advance amount of Rs.4,20,000/- with interest at 12% from the date of plaint till the date of deposit.

2. The trial Court after trial, decreed the suit as prayed for by the plaintiff for the relief of specific performance with further direction to the plaintiff to deposit the balance sale consideration of Rs.3,00,000/- into the Court within a period of two months. Challenging the said judgment and decree, the defendant has filed the present appeal.

3 (i). The brief facts of the case are as follows:

The suit schedule property came to the possession and enjoyment of the defendant through the registered sale deed dated 17.06.1982. The defendant agreed to sell the suit property to the plaintiff for a sum of Rs. 7,20,000/-. The defendant received a sum of Rs.2,20,000/- as advance / part consideration and agreed to receive the balance amount at the time of executing the sale deed. In this regard, the plaintiff and the defendant have entered into a sale agreement on 14.09.1995. At the time of agreement, the defendant produced only copy of the sale deed dated 17.06.1982, stating that he had obtained a loan by mortgaging the property. He further assured that at the time of sale, he will discharge the mortgage by settling the loan amount and hand over the original sale deed dated 17.06.1982 to the plaintiff. He also assured to produce the income tax certificate from the Income Tax Office and execute the sale deed in favour of the plaintiff or the person identified by the plaintiff. The 'two months time' stated in the sale agreement is not considered as important by both the plaintiff and the defendant. The defendant is well aware of the fact that the plaintiff is capable of paying the balance sale consideration and get the sale deed at his expenses on the date of agreement and on the subsequent days as the plaintiff is financially well due to his business. But, on 24.10.1995, the defendant approached the plaintiff and stated that he is unable to discharge the loan and get the income tax certificate and if the plaintiff pays a further consideration of Rs.2,00,000/-, the defendant will discharge the loan and get the income tax certificate and execute the sale deed.

3(ii). The plaintiff was always ready and willing to pay the balance sale consideration and get the sale deed in his favour at his expenses and paid Rs.2,00,000/- to the defendant towards part consideration of the sale and obtained an endorsement in the sale agreement in order to enable the defendant to settle the debt and execute the sale deed without any encumbrance. Thereafter, on 03.11.1995 and on 12.11.1995, the plaintiff approached the defendant personally and asked him to execute the sale deed after receiving the balance sale consideration. However, the defendant requested three more weeks time to execute the sale deed as the Income Tax Department has conducted raid in his house and he is unable to settle the due and get the certificate from Income Tax Office. Again, on 03.12.1995, when the plaintiff met the defendant to execute the sale deed, the defendant for the reasons best known to him refused to execute the sale deed and asked him to get the sale deed through Court, if possible. Hence, on 04.12.1995, the plaintiff sent a legal notice to the defendant to execute the sale deed after receiving the balance sale consideration.

3(iii). On coming to know about the legal notice by the plaintiff, the defendant on the same day sent a notice, which was pre-dated as 27.11.1995, with false allegations. Denying the same, the plaintiff has sent a reply through his advocate on 06.12.1995. For the notice dated 04.12.1995, the defendant has also sent a reply with false averments. For the two notices sent by the defendant, the plaintiff sent a detailed reply on 14.12.1995 to the defendant, to which the defendant sent a false reply on 16.12.1995. As informed to the defendant, the plaintiff waited at Sub Registrar Office, Aranthangi from 10.00 a.m. to 6.00 p.m. along with the balance consideration and witnesses, so as to pay the balance sale consideration to the defendant and get the sale deed executed. However, the defendant did not come. Hence, the suit.

4(i). The written statement filed by the defendant reads as follows:

The suit property is the absolute property of the defendant. The plaintiff agreed to purchase the suit property from the defendant for a sum of Rs.7,20,000/-. On 14.09.1995, an agreement of sale was entered into between the plaintiff and the defendant. The time fixed under the document for completion of the sale is two months. It was agreed between the parties that the time was the essence of the contract as the plaintiff promised to complete the contract within the prescribed time. On 14.09.1995, the plaintiff has paid a sum of Rs.2,20,000/-. Thereafter, on 23.10.1995, the plaintiff again paid a sum of Rs.2,00,000/- only part of the sale price and left the balance of Rs.3,00,000/-. Since the plaintiff did not fulfil his obligations, the defendant issued a notice on 27.11.1995, calling upon the plaintiff to pay the balance sale amount and complete the sale transaction. Even after that the plaintiff was not ready and issued a notice on 04.12.1995.

4(ii) As per the request of the plaintiff, the original sale deed of the property had already been given to him on 14.09.1995 itself. Unless the plaintiff gives a draft sale deed, the defendant cannot approach the Income Tax Department for getting clearance. Even after the exchange of notices, the defendant wanted to complete the transaction and as per his notice dated 06.12.1995, the defendant again gave a chance to the plaintiff and called upon him to pay the balance of Rs.3,00,000/- and to get the sale deed executed and registered on 15.12.1995 and he has clearly stated that he would be ready in the Sub Registrar's Office, Arantangi for completing all the formalities on 15.12.1995. But the plaintiff never came to the Registrar's Office at all.

4(iii). The allegation that the plaintiff was always ready and willing to pay the balance sale consideration and get the transaction completed is specifically denied. The allegation that the plaintiff was present in the Registrar Office on 15.12.1995 is false and he never came to the Registrar Office. Hence, the plaintiff is not entitled for the relief of specific performance or for return of the advance amount paid by him.

5. On the basis of the above pleadings, the learned trial Judge has framed the following issues for consideration:

> *(i) Whether the plaintiff is entitled to the relief of specific performance or in the alternative entitled to get refund of the advance amount paid by him?*
>
> *(ii) To what other relief the plaintiff is entitled to?*

6. In order to substantiate the case, on the side of the plaintiff, three witness were examined as P.Ws.1 to 3 and 17 documents were marked as Exs.A1 to Ex.A17. On the side of the defendant, one witness was examined as D.W.1 and no document was marked on the side of the defendant.

7. After completing the trial and on hearing of arguments advanced on either side, the learned trial Judge, considered the evidence available on record, decreed the suit in favour of the plaintiff. Challenging the said judgment and decree, the defendant has filed the present appeal.

8(i). The learned Senior counsel appearing for the appellant/defendant would submit that the suit property belonged to the appellant/defendant. The respondent/plaintiff entered into an agreement under Ex.A1, dated 14.09.1995, with the appellant/defendant and the total sale consideration was fixed at Rs.7,20,000/-. On the date of agreement / Ex.A1, dated 14.09.1995, a sum of Rs.2,20,000/- was paid as an advance and agreed to pay the balance sale consideration of Rs.5,00,000/- within two months. Therefore, on or before 14.11.1995, he would pay the balance sale consideration and get the sale deed executed.

8(ii). The time stipulated in the agreement is the essence of contract and as per the agreement, the respondent/plaintiff has not completed his part of the contract by paying the balance sale consideration and get the sale deed executed. The appellant/defendant was always ready and willing to perform his part of the contract. Since the time is the essence of the contract, the respondent has not proved that within the stipulated time, he was ready and willing to perform his part of the contract. Therefore, it is the duty of the plaintiff to aver and prove that he was ready and willing to perform his part of contract and if he failed to establish that within the stipulated time he was ready and willing to perform his part of the contract, he will lose the discretionary remedy, whereas, in this case, the appellant/defendant has failed to prove the same.

8(iii). She would further submit that even in the Pass Book filed by the respondent/plaintiff as Ex.A9, there was no amount prior to 14.11.1995 and he make a belief by depositing the amount on 14.11.1995 and he withdrew the same on 16.11.1995. The relief under the Special Relief Act is an equitable and discretionary remedy. The person, who seeks a remedy under the above said Act, should come to the Court with clean hands. The deposition of the respondent/plaintiff would clearly disprove the same. There is no averment in the agreement and also in the pleadings that the appellant/defendant has stated that the appellant/defendant is related and he is an income tax assessee and that he did not inform that there is a debt created against the suit property. Further, the respondent/plaintiff has stated that the appellant/defendant did not inform him for how much amount he has mortgaged the suit property and he also did not ask him about any encumbrance. The respondent/plaintiff has admitted that he used to purchase the property only after obtaining encumbrance certificate. Having admitted in his evidence that there was no encumbrance over the suit property at the time of agreement, the respondent/plaintiff cannot change his case to suit his convenience which amounts to suppression of material facts and also not coming to the Court with clean hands. The respondent/plaintiff clearly admitted that time was the essence of contract and that mere extension of time for two weeks by the appellant/defendant will not in any way be stated as time is not the essence of contract. If at all the respondent/plaintiff was ready and willing to perform his part of the contract, he should have sent a draft sale deed to the appellant for obtaining income tax clearance certificate. The appellant/defendant has valued the suit for Rs.4,20,000/- on the basis of the market value, which would clearly show that the appellant/defendant did not want the income tax official to know the value of the property sought to be purchased at Rs.7,20,000/-. Though the appellant/defendant has produced the evidence to show that he was ready and willing to perform his part of contract and wanted the appellant/defendant to be present in the Registrar Office on a particular date, the fact that he never had the draft sale deed, purchased stamp paper and that he had not kept any amount except the alleged Rs.3,00,000/- by way of cheque, which would clearly show that the respondent/plaintiff was not ready and willing to perform his part of contract. When the respondent/plaintiff proclaims himself to be an assessee, he has not produced any record to show that he had the necessary amount for completion of contract from the date of the agreement till the filing of the suit.

8(iv). The respondent/plaintiff having not proved his readiness and willingness was also not entitled to return of advance amount. The respondent/plaintiff has not examined the Sub Registrar to the effect that he was present on the particular day before the Sub Registrar Office. The evidence clearly proved that the parties wanted time as essential for performance of contract and the respondent/plaintiff was not ready and willing. As such, the suit should have been dismissed. But the trial Court failed to appreciate the oral and documentary evidence, erroneously decreed the suit which warrants interference of this Court.

8(v). In support of her submissions, the learned counsel for the appellant/defendant relied on a decision of the Hon'ble Supreme Court in the case of ***Shenbagam and others vs. K.K.Rathinavel*** (***2022 (0) Supreme SC (54)).***

9(i). The learned counsels appearing for the respondents 2 to 4 and 5 would submit that though they entered into an agreement on

14.09.1995 under Ex.A1, two months time was stipulated for completing the sale agreement and the appellant/defendant has received a sum of Rs. 2,20,000/- on the date of agreement under Ex.A1. Before completing the stipulated time, the appellant/defendant has approached the respondent/plaintiff on 24.10.1995 and received a sum of Rs.2,00,000/- and the same was mentioned in the reverse side of the agreement and the same was also marked as Ex.A2. As per Exs.A1 and A2, the appellant/defendant has received a sum of Rs.4,20,000/- as an advance amount, out of the total sale consideration of Rs.7,20,000/-. Therefore, the balance sale consideration of Rs.3,00,000/- has to be paid by the respondent/plaintiff within two months from the date of sale agreement.

9(ii). Though the agreement does not mention about the mortgage, subsequently the appellant/defendant informed that there was a loan due and he has to clear the dues. But the appellant/defendant has not done within the stipulated time. Therefore, from the contact of the appellant/defendant, the time was not the essence of the contract.

9(iii). Further, they would submit that even after lapse of time on 14.11.1995, the appellant/defendant sent a notice under Ex.A4, dated 27.11.1995, calling upon the respondent/plaintiff to pay the balance sale consideration, which clearly shows that though in the agreement time stipulated, the time was not the essence of the contract, by the contact of the appellant/defendant. In the instant case, the time was not the essence of the contract. Further, they would submit that for sale of immovable property normally time was not essence of the contract. But however, the parties agreed with certain terms and conditions, because of the necessity and the reason for the time stipulated then from the contact of the party, the time may be essence of the contract. But, in this case, both the parties admitted that the time was essence of the contract. However, the subsequent contact of the parties, in the instant case, the time was not the essence of the contract. Therefore, the trial Court has rightly rejected the contention of the appellant/defendant.

9(iv). As far as the readiness and willingness is concerned, the respondent/plaintiff has averred and proved that he was ready and willing to perform his part of the contract. Though total sale consideration is Rs. 7,20,000/-, on the date of agreement under Ex.A1, on 14.09.1995, the respondent/plaintiff paid a sum of Rs.2,20,000/-. Subsequently, within the stipulated time, as requested by the appellant/defendant, the respondent/plaintiff has also paid further sum of Rs.2,00,000/- on 24.10.1995 under Ex.A2. Therefore, out of the total sale consideration of Rs.7,20,000/-, he paid a sum of Rs.4,20,000/-. The respondent/plaintiff is always ready and willing to pay the balance sale consideration of Rs. 3,00,000/- within the stipulated time and perform his part of the contract. Though the agreement does not stated that the appellant/defendant has mortgaged the property and he will clear the dues and execute the sale deed, subsequently, the appellant/defendant has informed the respondent/plaintiff that he has mortgaged the property and he will clear the dues. That is the reason why, the respondent/plaintiff also given a sum of Rs.2,00,000/- even prior to the stipulated time, on 24.10.1995 itself, believing that the appellant/defendant would clear the loan. Whereas, the appellant/defendant has not acted upon as per the promise. Thereafter, the appellant even after the expiry of the stipulated time of two months, issued a notice under Ex.A4 on 27.11.1995, which clearly shows that he has given further time. But the respondent/plaintiff informed the appellant/defendant that he would come to the Registrar Office on 15.12.1995 and he has deposited a sum of Rs. 3,00,000/- in the Bank account on 14.11.1995 and also he went to the Registrar Office on 15.12.1995 and waiting from morning to evening. The respondent/plaintiff has also marked the certificate obtained from the Registrar that the respondent was all along present in the Registrar Office. The person, who denied the facts has to establish the same, when the respondent/plaintiff has clearly stated that he intimated the appellant/defendant to be present on 15.12.1995 and also under Ex.A9, he was having Rs.3,00,000/- and he deposited into the Bank account. Though the learned Senior counsel for the appellant/defendant would submit that for the other incidental charges like for purchasing stamp paper and registration charge there is no evidence. It is settled proposition of law that the person need not possess ready cash in hand and it is enough to prove that he is a man of means to make arrangements to do the same. Though the learned Senior counsel for the appellant/defendant would submit that the respondent/plaintiff has not prepared the draft sale deed and he has not purchased the stamp paper and he has not deposited the same before the Registrar and the respondent/plaintiff was not ready and willing to perform his part of the contract, for getting the remedy of specific performance, preparing the draft sale deed and also purchasing of stamp paper and deposited the same before the Registrar are not the condition precedent.

9(v). The only condition precedent is that the plaintiff should aver and prove that he was always ready and willing to perform his part of the contract. The appellant/defendant has not denied the financial capacity of the respondent/plaintiff. Therefore, now, the appellant/defendant cannot say that the respondent/plaintiff was not having sufficient fund to pay the balance sale consideration and also for purchasing the stamp paper and registration charge and etc., etc. Now, the core question is whether the respondent/plaintiff was ready and willing to perform his part of the contract. Since the respondent/plaintiff averred and proved it, the trial Court has rightly appreciated the same and decreed the suit and there is no merit in the appeal and the appeal is liable to be dismissed.

9(vii). In support of his submissions, the learned counsel for the respondents 2 to 4 relied on a decision of the Hon'ble Supreme Court in the case of ***Secretary, Taliparamba Education Society vs. Moothedath Mallisseri Illath M.N.*** reported in ***(1997) 4 SCC 484***.

10. The learned counsel for the respondents 2 to 4 and 5 would submit that he is the bona fide purchaser without notice. The respondent was not ready and willing to perform his part of the contract. The respondent has not proved that he had a sufficient fund to pay the balance sale consideration. Though he deposited only Rs.3,00,000/- on 14.09.1995, however he withdrew the same on 16.09.1995 itself. Therefore, he has not

proved that from the date of agreement till filing of the suit, even after filing suit till passing of decree, he was ready and willing to perform his part of contract. As a *bona fide* purchaser, he is entitled to get equitable remedy. Therefore, the appeal has to be dismissed as against this respondent.

11. Heard the learned counsel for the appellant/defendant and the learned counsel for the respondents 2 to 4 and 5 and perused the materials available on record.

12. The brevity of contract between the appellant/defendant and the respondent/plaintiff is not in dispute and the agreement under Ex.A1, dated 14.09.1995 is not in dispute. The total sale consideration fixed at Rs. 7,20,000/- is also not in dispute. On the date of agreement, the appellant/defendant has received a sum of Rs.2,20,000/- as an advance amount is also not in dispute and the time fixed is two months for executing the sale deed is also not in dispute. Subsequently, on 24.10.1995, the appellant/defendant has received further sum of Rs.2,00,000/- and made an

endorsement under Ex.A2 also not in dispute. Subsequently, the appellant/defendant has also sent a notice under Ex.A4 dated 27.11.1995 also not in dispute.

13. The only dispute according to the appellant/defendant is that the time is the essence of the contract and the respondent/plaintiff was not ready and willing to perform his part of the contract within the stipulated time, whereas the appellant/defendant was always ready and willing to perform his part of the contract within the stipulated time. Since the respondent/plaintiff has not come forward to pay the balance sale consideration and prepare the draft sale deed within the stipulated time, he has not performed his part of the contract within the stipulated time. Therefore, he has last his right, since the time is the essence of the contract.

14. As far as the point for consideration regarding the time is the essence of the contract is concerned, the agreement dated 14.09.1995 under Ex.A1 shows that the sale has to be completed within two months ie., before

13.11.1995. However, within the stipulated time, the appellant/defendant has also received further sum of Rs.2,00,000/-, on 24.10.1995 under Ex.A2. Though the agreement is silent about the mortgage or encumbrance or regarding income tax clearance, according to the respondent/plaintiff, when the appellant/defendant has received a sum of Rs.2,00,000/-, on 24.10.1995, he has stated that he will clear the mortgage and also get the certificate from the Income Tax Department and it has not been done.

15. Though the agreement is silent, from the contact of the parties, this Court finds that the appellant/defendant has received further sum of Rs. 2,00,000/-, on 24.10.1995 under Ex.A2 and also he sent Ex.A4 notice, dated 27.11.1995. Even though Ex.A2 is within the stipulated time, under Ex.A4, he sent a notice on 27.11.1995, calling upon the respondent/plaintiff to pay the balance sale consideration and execute the sale deed, which clearly shows that even after the stipulation of time also the appellant/defendant was ready to execute the sale deed. Therefore, the time has been extended by the appellant/defendant/defendant. Therefore, from the contact of the

parties, this Court finds that the time is not the essence of the contract. Even otherwise, it is a settled proposition of law that ordinarily regarding the sale of immovable property time is not the essence of the contract. Though both the parties admitted during the evidence that the time mentioned in the agreement was essence of the contract, subsequent contact of the parties clearly shows that they have given up the said condition. Therefore, this Court finds that in the instant case, the time is not essence of the contract.

16. The next point for consideration is that whether the respondent/plaintiff was ready and willing to perform his part of the contract. In this regard, it is settled proposition of law that the person, who seeks remedy under Specific Performance Act has to aver and prove that he was ready and willing to perform his part of the contract. In the instant case, the respondent/plaintiff has averred in his plaint that he was ready and willing to perform his part of the contract. Therefore, now, this Court has to see as to whether the respondent/plaintiff has proved his readiness and

willingness. In this regard, though the appellant/defendant would submit that the respondent/plaintiff was not ready and willing to perform his part of the contract, he has not proved that the respondent/plaintiff was not having sufficient fund in his hand or in his account only the balance sale consideration of Rs.3,00,000/- and also required further incidental charges like for purchasing stamp papers and registration charge and charge for document writing and etc., etc.,

17. Ex.A9 only shows that the respondent/plaintiff deposited the amount on 14.11.1995 and the same was withdrawn on 16.11.1995 itself and only for three days he kept Rs.3,00,000/- in his account. The respondent/plaintiff has stated that he was present in the Registrar Office all along from morning to evening on 15.12.1995. But however, he does not show he had a cash in hand for met out all the expenses. Further agreement clearly shows that he has to pay the ready cash. Therefore, mere depositing of fund in the Bank itself is not sufficient to prove his readiness. The respondent/plaintiff has not proved that he was ready and willing to perform

his part of the contract and he has also not prepared the draft sale deed. Therefore, the respondent/plaintiff was not ready and willing to perform his part of the contract. Though he averred in the plaint, but he never proved. A reading of the entire materials, out of total sale consideration of Rs. 7,20,000/-, on the date of agreement under Ex.A1, the respondent/plaintiff paid a sum of Rs.2,20,000/- and also he paid another sum of Rs.2,00,000/-, on 24.10.1995 and he has to pay a sum of Rs.3,00,000/- as balance sale consideration. Though there was an exchange of notice between the appellant/defendant and the respondent/plaintiff, Ex.A2 clearly shows that there was a contact between the appellant/defendant and the respondent/plaintiff. In this case, both the parties very frequently had the contact.

18. According to the respondent/plaintiff, the appellant/defendant told that there was a due and he will clear the same within the stipulated time. The sale agreement is silent about it and there is also no document to prove the same. The contact of the respondent/plaintiff is that he informed

the appellant/defendant to be present before the Registrar Office on 15.12.1995 and he will be present on the same day with balance sale consideration and they would complete the contract. When the respondent/plaintiff present in the Registrar Office, the appellant/defendant did not turn out. The respondent/plaintiff came with the cheque, though the agreement shows that he should pay ready cash. As already stated that the financial capacity of the respondent/plaintiff was never denied by the appellant/defendant and the balance sale consideration is only Rs.3,00,000/- and even that Rs.3,00,000/- also as per Ex.A9, the respondent has deposited into his account and the period between 14.11.1995 to 16.11.1995, there was a sum of Rs.3,00000/- in his account, in order to prove his readiness. It is settled proposition of law that the plaintiff need not always possess the ready cash in his hand and it is enough to prove that he is a man of means and he is able to mobilise the fund for paying the balance sale consideration and meet out the expenses.

19. In this case, as already stated, the appellant/defendant never

denied the financial capacity of the respondent/plaintiff, more so when the respondent/plaintiff has also paid a sum of Rs.4,20,000/- as an advance amount on two dates and also kept the balance sale consideration of Rs. 3,00,000/- in his account, during the relevant point of time. Therefore, the respondent/plaintiff has proved his readiness.

20. As far as the willingness is concerned, though the respondent proved that he went to the Registrar Office on 15.12.1995 and he was waiting, the appellant/defendant never turned up and in order to prove the same, the respondent/plaintiff obtained a certified copy from the Registrar. Therefore, he was present on that day. Though the appellant/defendant vehemently contended that the respondent/plaintiff not summoned the Registrar to prove the same, once the Registrar sent the certificate, the presence of the respondent before the Registrar was proved, then it is for the appellant/defendant has to disprove the same. Therefore, the respondent/plaintiff was always ready and willing to perform his part of the contract .

21. Though the appellant/defendant seriously disputed that on 15.12.1995, the respondent/plaintiff was not present in the Registrar Office and the respondent did not have the cash in hand on that day and the money was only in the Bank and he has to pay the cash in hand, he has not proved that the respondent/plaintiff was having ready cash on that day for paying balance sale consideration, stamp cost and registration charge and other incidental expenses. Therefore, he was not ready and willing to perform his part of the contract. Moreover, though the appellant/defendant has stated that on that day, the appellant/defendant was present in the Registrar Office and the respondent only did not turn up, he has not proved that on that day he went to the Registrar Office. When the appellant/defendant has not proved that he was present in the Registrar Office on the particular date, he cannot say that the respondent has not come with cash and he was not having sufficient funds and he was not ready and willing to perform his part of the contract. As already stated, it is settled proposition of law that in order to prove the readiness, one need not possess the ready cash in his hand

and it is enough to prove that he is able to mobilise the fund. Since the appellant/defendant has not disputing the financial capacity of the respondent, he cannot take that stand. Therefore, the contention of the learned counsel for the appellant/defendant is rejected in this regard.

22. As far as the willingness is concerned, the respondent has averred and proved that he was ready and willing to perform his part of the contract. From the oral and documentary evidence and from the contact of the parties, the respondent has proved his readiness and willingness with pleadings and cogent evidence. Therefore, the trial Court has rightly appreciated that the respondent was ready and willing to perform his part of the contract, more so when the appellant/defendant only has not proved that he was ready and willing to perform his part of the contract.

23. As the appellate Court is the fact finding Court, this Court has re-appreciated the entire evidence and as already stated, the agreement is not in dispute and receipt of the advance sale consideration is also not in dispute

and only the dispute is whether the time was essence of the contract. As already discussed, from the contact of the parties, in the instant case, the time was not essence of the contract and also ordinarily regarding the sale of immovable property, the time is not essence of the contract.

24. As far as the readiness and willingness is concerned, from the oral and documentary evidence, the respondent has proved that he was ready and willing to perform his part of the contract. Though the appellant/defendant has stated that he was ready and willing and the respondent was not ready and willing, the appellant/defendant has not proved the same. Since the remedy under the Specific Relief Act is an equitable and discretionary remedy, the Court has to see the contact of the parties also.

25. A reading of the entire materials, this Court finds that the respondent/plaintiff averred and proved with cogent evidence and this Court does not find any perversity in the finding of the trial Court and there is no

interference required with the decision of the trial Court.

26. Considering the facts and circumstances, oral and documentary evidence and pleadings, the decision referred by the learned Senior counsel for the appellant/defendant is not applicable to the present case on hand. Moreover, in this case, the contact of the parties very clearly shows that there were several communications between both the appellant and the respondent and both of them were very conscious about the agreement and also the performance of the agreement, time and condition stipulated in the agreement. Therefore, the respondent/plaintiff has averred and proved with cogent evidence and this Court finds that the decision referred to by the learned Senior counsel for the appellant is not identical to the case on hand. Therefore, the same is not applicable to the present case on hand.

27. Mere non-production of the draft sale deed and non -purchasing of the stamp paper on the particular date may not be a sole

ground to disallow the remedy under Specific Relief Act and only the law requires that the plaintiff has to aver and prove it. Moreover, the appellant/defendant has also not disputed the financial capacity of the respondent/plaintiff. Therefore, the appellant/defendant cannot say that the respondent was not having sufficient fund on that day. Exchange of notice between the parties and they were very conscious about the agreement and stipulation and other conditions. The contact of the parties shows that the time was not essence of the contract and the respondent/plaintiff was always ready and willing to perform his part of the contract. Therefore, the Appeal Suit fails and the same is liable to be dismissed.

28. In the result, the Appeal Suit is dismissed and the judgment and decree passed by the learned Subordinate Judge, Pudukottai in O.S.No. 43 of 1996, dated 12.10.1999 is confirmed. No costs.

**26.08.2022**

akv

To

1. The Subordinate Judge,
   Pudukottai.

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

**P.VELMURUGAN,J.**

akv

**A.S.(MD) No.70 of 2000**

**26.08.2022**

**A.S.No.70 of 2000**

**P.VELMURUGAN, J.**

The matter has been listed today under the caption 'for being mentioned' at the instance of the learned counsel appearing for the fifth respondent.

2. It is pointed out that in paragraph 9(i) of the first line of the order there is a typographical error that instead of mentioning "the learned counsels appearing for the respondents 2 to 4" it has been mentioned as "the learned counsels appearing for the respondents 2 to 4 and 5".

3. This inadvertent error is directed to be corrected and replaced as "the learned counsels appearing for the respondents 2 to 4" in paragraph (i) of the order.

11.01.2023

**Office to Note:**
Issue corrected order copy forthwith.
pbn