IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	05.10.2023
Pronounced on	30.11.2023

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

Appeal Suit.No.426 of 2013

and M.P.No. 1 of 2013

1.T.Meenakshi (died)

2.T.Rangasamy

3.Hariharan

4.Divya

5.T.Rajan

6.Nivedha

7.Karthick

8.R.Poongothai

9.Jayanthi

A1 died, Appellants 2, 5, 8 and 9 are already on record, as legal heirs of deceased 1st appellant, vide order of Court dated 11.09.2023 made in A.S.No.426 of 2013 memo dated 28.08.2023 [RSMJ & RKMJ]

Appellants 3, 4, 6 and 7 are declared as major and appellants 2 and 5 are discharged from Guardianship, vide order of Court dated 11.09.2023 made in C.M.P.Nos.20015, 20016, 20019 and 20020/2023 in A.S.No.426 of 2013 [RSMJ & RKMJ].

....Appellants/Defendants

Vs.

1.M.Gurusamy
2.N.V.Rajan ....Respondents/Plaintiffs

Prayer: First Appeal has been filed under section 96 of CPC read with order 41 Rule 1 Civil Procedure Code, against the Judgement and Decree dated 17.01.2013 made in O.S.No.148 of 2011 on the file of the Principal District, Namakkal.

For Appellants : Mr.T.R.Rajagopalan
Senior Counsel
For Mr.T.R.Rajaraman

For Respondents : Mr.N.Manokaran

JUDGMENT

(Judgment of the Court was delivered by K.GOVINDARAJAN THILAKAVADI,J.)

This appeal has been preferred against the judgement and decree dated 17.01.2013 made in O.S.No.148 of 2011 on the file of the Principal District, Namakkal.

2. The Appellants 1 to 9 are the Defendants 1 to 9 in O.S.No.148 of 2011 and Plaintiffs 1 and 2 in the above suit are the respondents herein.

3. For the sake of convenience, the parties herein are referred to as they are ranked before the trial Court as Plaintiff and Defendant.

4. The suit is for specific performance of contract dated 19.03.2008 directing the defendants to execute the sale deed by receiving the balance sale price, and alternatively to return back the advance sum of Rs.30 lakhs

and the development expenses, a sum of Rs.5 lakhs together with the interest at the rate of 24% p.a. and for Permanent injunction restraining the defendants, from encumbering the suit property.

5. The averments in the plaint is as follows:

The suit property originally belonged to one Thandavan, who died intestate. The defendants are the legal heirs of the said Thandavan. The defendants on 19.03.2008 entered into a sale agreement to sell the suit property and the same was signed by the defendants 1, 2, 5, 8 and 9. The second defendant signed the agreement for himself and for the minor defendants 3 and 4. The 5th defendant signed the agreement for himself and for the minor defendants 6 and 7. The sale price agreed was, Rs.96 lakhs and on the date of agreement a sum of Rs.30 lakhs was paid as advance. It was agreed that the balance sale consideration was to be paid within a period of 6 months and the defendants within the said period of 6 months have to measure the property, and without any encumbrance hand over the same to the plaintiff. It was agreed that, during measurement if the property is less, then proportionately the price will be reduced. After agreement dated

19.03.2008 the defendants subsequently, executed a declaration deed and handed over possession of property. The property was handed over to the plaintiff for him to develop the site into plots and to divide the same. In the declaration deed the defendants also promised to remove the Angalaman Temple, Periyandichi Temple from the suit premises.

6. Further, the defendants also promised to clear the bank loan. Since the defendants were unable to clear the encumbrance within the stipulated period and the defendants extended the period of performance till 31.12.2008 and further, till 30.01.2009 and further, till 28.02.2009. On behalf of all the defendants, the defendants 2 & 3 endorsed their signatures, BUT to their surprise, the defendants failed to discharge the bank loan, clear the encumbrance, failed to measure the property, and also failed to remove the temples from the suit premises as agreed. The plaintiffs after taking possession of property, spent nearly Rs.5 lakhs and developed the land in to a house site and divided the same into house plots. When the defendants dodged the execution of the sale deed, the plaintiff issued a notice on 6.12.2010. The defendants received the same and issued false reply on

11.12.2010. Further, the plaintiff issued a telegram on 05.09.2011 as to the plaintiffs' readiness and willingness to perform their part of the contract. To the said telegram, the defendants never replied and further, the plaintiffs issued notice, to the defendants to appear before the register office on 12.9.2011 to register the sale deed. The plaintiffs were waiting there but the defendants failed to come to register the sale deeds. Hence in such circumstances, the plaintiff filed the suit for specific performance of the contract dated 19.03.2008 directing the defendants to execute the sale deed by receiving the balance sale price and alternatively, to return the advance, sum of Rs.30 lakhs + development expenses Rs.5 lakhs together with the interest at the rate of 24% p.a.

7. Per contra, the contention of the defendants in their written statement is that, the defendants agreed to sell the suit property on 19.03.2008 for a sum of Rs.96 lakhs and on the day of the sale agreement a sum of Rs.30 lakhs advance was also paid and it was agreed that within 6 months, the sale is to be completed is true. But, other allegation that, within 6

months period, the plaintiff was ready to execute the sale deed and the defendants were not ready is false.

8. It is stated that, as per the agreement dated 19.03.2008 within 6 months period, the plaintiffs were not ready to get the sale deed executed. But the plaintiff wanted to get the sale deed executed by unlawful means. As far as the declaration deed is concerned, the plaintiffs wanted to grab the property and took the defendants to the police station and the plaintiffs threatened the defendants and made them to affix their signatures in the stamp papers. It is further stated, the defendants, never executed, any declaration deed, and the declaration deed is out of imagination and fabricated. It is stated that, the Periyandichi Temple in the suit properties is the defendant's family deity and belonged to more than 100 families. The temple cannot be removed and the same is not in their hands.

9. It is stated that, within 6 months period, the plaintiff was not ready and willing to get the sale deed executed and hence, the suit is not maintainable and is liable to be dismissed.

10. On consideration of the pleadings and materials on the record the trial Court framed the following issues and additional issue :-

1) *Whether the plaintiff is entitled to Specific Performance of contract dated 19.03.2008 between the plaintiff and the defendants?*

2) *To what relief if any the plaintiff is entitled to?*

Additional Issue :-

1) *Whether the plaintiff was ready and willing to perform his part of the contract within 6 months?*

On the side of the plaintiffs P.W.1 to P.W.4 were examined and Ex.A1 to Ex.A13 were marked. On the side of the defendants the second defendant was examined as D.W.1 and no documents were produced.

11. After perusal of both documentary as well as oral evidence the trial Court concluded that the plaintiff is entitled to specific performance of the contract dated 19.03.2008 and the defendants were directed to execute the

sale deed, by receiving the balance sale price Rs.66,00,000/-. And time to deposit the balance sale price was one month.

12. The aggrieved Appellants are before this Court.

13. We have heard the learned Counsel for respective parties and perused the documents produced on record.

14. Mr.T.R.Rajagopalan, learned Senior Counsel for the Appellants, contended as below:

Firstly, the trial Court failed to note that time was the essence of contract as per the sale agreement under Section 55 of the Indian Contract Act, 1872,(*hereinafter, 'Contract Act').* He submitted that the contractual performance of Ex.A1 Sale agreement needed to be mandatorily effectuated by the respondent/plaintiff within stipulated period of 6 months from the date of executing the sale agreement. He further stated that the Appellants reiterated the same stance in Ex.A3 legal notice, intimating the respondents/plaintiffs that they were not ready and willing to perform their part of contract and the Appellants/defendants not only forfeited the advance amount but also rescinded the contract.

Secondly, the trial Court completely overlooked the fact that the defendants in their written statement categorically denied the execution of Ex.A2-declaration deed and the endorsements made in Ex.A1-agreement for extension of time on three different occasions. He submitted that no evidence was let in by the plaintiffs to establish the execution of Ex.A2 declaration deed and the endorsements made in Ex.A1 agreement. He further submitted that the trial Court failed to advert to the candid admission made by P.W.1 that all the three endorsements were made on the very same day in Ex.A.1-Agreement. He would further submit that the signatures found in Ex.A2 declaration deed and in the endorsement for extension of time do not belong to the defendants. No steps were taken by the plaintiffs to establish that the disputed signatures belonged to the defendants.

Thirdly, the trial Court failed to note that no prudent man would execute a deed of declaration on the very same day of the execution of sale agreement especially when the law mandates that handing over possession should be in writing in the document itself.

Fourthly, the trial Court erroneously observed that D.W.1 admitted in his evidence that the plaintiffs have spent a sum of Rs.5,00,000/- for developing the suit property, when no such admission was made by D.W.1. He would submit that the trial Judge failed to consider the evidence of D.W.1 in a proper perspective.

Fifthly, the trial Judge ought to have held that the plaintiffs failed to establish that they were always ready and willing to perform their part of contract. He submitted that the trial Court ought to have seen the conduct of the plaintiffs through out the transactions with regard to readiness and willingness. He further submitted that the suit was filed on 16.09.2011 after lapse of three years and 6 months from the date of the agreement which clearly shows that the plaintiffs were never ready and willing to perform their part of the contract. Therefore, as per law of Equity, the plaintiffs are not entitled to the relief of specific performance and moreover, granting of decree for specific performance is subject to rules specified under the Specific Relief Act, 1963.

15. The composite essence of all the above mentioned arguments by Mr.T.R.Rajagopalan, learned Senior Counsel is that non-performance of contractual obligations on the part of the plaintiffs within the stipulated time resulted in lawful exercise of right of termination by the defendants and the consequent forfeiture of earnest money as stipulated under the sale agreement which was in-accordance with the settled law.

16. On the contrary, Mr.N.Manokar, learned Counsel for the respondents argued as follows:

Firstly, the defendants failed to perform their contractual obligations, especially to measure the property, and handover the same without any encumbrance, to the plaintiffs as per the agreement.

Secondly, the defendants, after agreement dated 19.03.2008 subsequently executed Ex.A2 declaration deed and handed over possession of property to the plaintiff to develop the same into plots and to divide the same. In the declaration deed, the defendants promised to remove the temples from the suit properties. The defendants also promised to clear the bank loan. Since the defendants were unable to clear the encumbrance the defendants further extended the period for performance of contract on three different dates ie., on 31.12.2008, 30.01.2009 and further till 28.02.2009. The defendants affixed their signatures in Ex.A1 agreement for the said endorsements.

Thirdly, the plaintiffs after taking possession of the property, spent nearly Rs.5,00,000/- for developing the land and to divide the same into house plots.

Fourthly, since the defendants failed to execute the sale deed as per the agreement, the plaintiffs issued a legal notice on 06.12.2010 for which the defendants issued a reply notice on 11.12.2010 with false allegations.

Fifthly, the findings of fact recorded by the trial Court on readiness and willingness on part of plaintiff, was only on appreciation of evidence on record. The trial Court has exercised its discretionary jurisdiction in accordance with sound and reasonable judicial principles. The trial Court is justified in granting the relief of specific performance. Since the suit was filed within period of limitation, it cannot be inferred against plaintiffs that they were not ready and willing to perform their part of the contract. Furthermore, he would submit that the insistence by plaintiffs on measurement of land and production of all document making out a complete chain of title by defendants, before paying balance consideration does not militate against readiness and willingness of plaintiffs to perform their part of the contract. He would submit that without any pleadings in the written statement, the question of hardship to the defendant if decree for specific performance is passed long after execution of sale agreement is impermissible at the time of hearing the appeal. He would further contend that the execution of Ex.A2 declaration deed was not specifically denied in the written statement. Therefore, the defendants cannot deny the execution of declaration deed at the time of examination. The learned counsel for the respondents/plaintiffs would submit that no specific defence had been taken in respect of Ex.A1 and A2 except denying the plaint averments. P.W4, witness to Ex.A1 and A2 was not cross examined by the defendants with regard to the signatures found in Ex.A1 and A2. To support his contention, he has relied upon the following decided cases reported in 2017 (4) CTC 734 (DB) - Para Nos. 54 to 59; 2016 (12) SCC 288 Para Nos. 14 – 16; 2017 (4) CTC 734 (DB) Para No.52.

17. The learned counsel further submitted that, time is not the essence of contract in respect of immovable property and that the suit is well within the period of limitation. He would further contend that the new amendment to the specific relief Act is a guiding factor and therefore, when the plaintiffs proved their readiness and willingness and the defendants have caused the delay, discretion has to be exercised in favour of the plaintiffs. To support

his contention he has relied upon the cases reported in AIR 2019 SC 4251; 2019 (6) SCC 233; 2008 (4) SCC 464; 2015 (1) SCC 597; 2021 (8) MLJ 576.

18. The sum and substance of the above arguments are,

That the appellants herein who are the defendants in the above suit, agreed to sell the suit property for a sale consideration of Rs.96 lakhs and a sum of Rs.30 lakhs was paid a advance on the date of agreement.

That it was agreed by the parties to complete the sale transaction within a period of 6 months from the date of agreement after receiving the balance sale consideration and hand over the property without any encumbrance.

That the defendants herein were unable to measure the property and hand over the same without any encumbrance within the stipulated period.

That the defendants also executed Ex.A2 declaration deed,on the same day of executing the sale agreement and handed over the possession of property to the respondents to develop the site into plots and to divide the same.

That the plaintiffs have spent a sum of Rs.5 lakhs to develop the properties into plots.

That in the declaration deed the defendants promised to remove the Angalaman Temple, Periyandichi Temple from the suit property.

That the defendants also promised to clear the bank loan.

That the defendants were unable to clear the encumbrance and therefore, the time was extended for performance of contract on three different occasions by the defendants making endorsements in Ex.A1 sale agreement.

That the defendants failed to perform their part of contract, the respondents filed the above suit for specific performance.

The defendants filed their written statements denying the endorsement for extension of time and execution of the declaration deed.

19. Based on the above, the following points for consideration arises which are as follows:-

1. Whether time was the essence of the contract?
2. Whether the signatures found in Ex.A1 sale agreement and Ex.A2 declaration deed belong to the appellants?

3. Whether the respondents were ready and willing to perform their part of contract under the suit sale agreement?
4. Whether the trial Court was right in granting the relief of specific performance to the respondents?
5. Whether the respondents have established that they have spent a sum of Rs. 5 lakhs for developing the suit property into plots?
6. To what other relief the respondents are entitled too?

Point Nos.1 to 4

20. The plaintiffs have alleged that they did not pay the balance consideration as the defendants failed to remove the encumbrance from the suit property.

21. We have considered the submissions on behalf of the parties and have also been taken through the trial Court judgement under appeal. As per the agreement, the sale deed was to be executed on or before 19.09.2008. The trial Court arrived at the finding of readiness and willingness on part of the plaintiffs solely on the basis of the endorsements found in Ex.A1 sale

agreement alleged to have been made on three occasions by the defendants and by stating that the defendants failed to clear the encumbrance as per Ex.A1 agreement and Ex.A2 declaration deed. The trial Court failed to analyse the genuineness of the above document in a proper perspective.

22. The plaintiffs failed to establish the signatures found in the above documents belong to the defendants. The defendants in their written statement have categorically denied not only the execution of Ex.A2 declaration deed but also the endorsements made in Ex.A1 agreement. However, the trial Court failed to frame necessary issues and put the onus on the plaintiffs to establish that Ex.A2 declaration deed and the endorsements found in Ex.A1 agreement are genuine. First of all, we note that the agreement to sell the suit property did not specifically record the mortgage over the property and removal of the temples from the suit property. As per the plaintiffs, the defendants have executed Ex.A2 declaration deed in which the defendants have agreed to clear the mortgage loan and agreed to remove the temples from the suit property. However, the defendants have specifically denied the execution of the declaration deed in their written statement and in

their evidence. While so, the plaintiffs ought to have proved the execution of the declaration deed by the defendants. The plaintiffs failed to prove the signatures found in declaration deed that the same belongs to the defendants. Therefore, the version of the plaintiffs that the defendants agreed to clear the mortgage loan and remove the temples from the suit property by executing Ex.A2 declaration deed cannot be accepted. It is more significant to note that the said declaration deed was alleged to have been executed on the same day of executing Ex.A1 sale agreement. It is not spoken by the plaintiffs, the need for executing the declaration deed on the same date and why the said conditions mentioned in the declaration deed were not mentioned in the sale agreement. The trial Court failed to consider the admission made by P.W.1, that all the endorsements were made on the very same day. The trial Court failed to analyze the evidence of P.W.1 in this regard. P.W.1 also admitted in his evidence that he did not take any steps to establish the disputed signatures found in the above documents are made by the defendants. When the plaintiffs failed to prove the endorsements and the execution of Ex.A2 declaration deed by the defendants, the findings of the trial Court that the defendants failed to perform their part of the contract and the plaintiffs cannot be blamed for not performing their part of contract cannot be accepted.

23. Now it has to be examined whether time is essence of contract and whether the plaintiff was always ready and willing to perform his part of contract.

24. Though time is not essence of contract for sale of immovable property, while deciding to grant the relief of specific performance, especially in suits relating to sale of immovable property, the Courts must be cognizant of the conduct of the parties and see whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, especially when they are not at fault.

25. In this respect, we must now take note of Section 55 of Contract Act which stipulates the aftermath in case of failure to perform Contractual obligations at fixed time. The provision states:-

"Effect of failure to perform at fixed time, in Contract in

which time is essential – When a party to a Contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the Contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that should be of the essence of the Contract.

Effect of such failure when time is not essential – If it was not the intention of the parties that time should be of essence of the Contract, the Contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than agreed upon. – If , in case of Contract voidable on account the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed,

the promisee cannot claim Compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promiser of his intention to do so."

26. This ratio was dealt with by the Hon'ble Supreme Court in ***K.S.Vidyanadam and others vs. Vairavan, [1997 (1) CTC 628 (SC) : (1997) 3 SCC 1]***, in the following manner:

> *"10.It has been consistently held by the courts in India, following certain early English decisions, that in the case of Agreement of Sale relating to immovable property, time is not of the essence of the Contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for Specific Performance of the Agreement (which does not provide specifically that time is of the essence of the Contract) should be Decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the Court by both Sections 10 and 20. As held by a Constitution Bench of this court in Chand Rani v.*

Kamal Rani: (SCC p.528, para 25)

> *"it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident) (1) From the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."*

21. In K.S.Vidyanadam's case (supra), the facts involved was that 6 months period was specified in the sale agreement therein for completion of the sale transaction and on expiry of such period, the plaintiff had waited for more than 2 ½ years for issuing the notice. Even though it was held therein that time was not the essence of the contract, the plaintiff must perform his part of the contract, within a reasonable time based on the surrounding circumstances and the nature of the property.

22. The decision in **K.S.Vidyanadam's case**(supra), came to be relied on by the Hon-ble Supreme Court in a recent decision in **Kolli Satyanarayana (dead) by Lrs. vs. Valuripalli Kesava**

Rao Chowdary (dead) through Lrs. And others Civil Appeal No.1013 of 2014, dated 27.09.2022, in the following manner:

> *"12.In the case of K.S.Vidyanadam and others v.Vairavan, this Court has held that the court should look at all the relevant circumstances including the time limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. It has been held that in case of urban properties, the prices have been rising sharply. It has been held that while exercising its discretion, the court should bear in mind that when the parties prescribe certain time limit(s) for taking steps by one or the other party, it must have some significance and that the said time limit(s) cannot be ignored altogether on the ground that time is not the essence of the contract."*

27. Therefore, the corollary issue that arises for consideration is that, merely because time was not the essence of the contract, the suit for specific performance cannot be automatically decreed and that, the relevant circumstances including the time limit specified in the agreement is required

to be looked into and the contract should be performed within the reasonable time.

28. In the present case, the terms of the agreements stipulated that the plaintiffs were to pay the balance sale consideration within a period of 6 months and on receipt of balance consideration, the defendants were to execute the sale deed pertaining to the property free from all encumbrances. It is evident from the agreement that the liability to deliver the property free from any encumbrance was on the defendants. However, this obligation is prefaced by the condition that the defendants would be required to execute the sale deed free from encumbrance on the receipt of the balance consideration. Thus, the agreement did not specify when the defendants should discharge their mortgage and remove the temples whether before the expiry of 6 months or after receipt of the advance amount, or after receipt of balance consideration. It only obligated them to ensure that after the balance consideration is received, the sale deed executed should be free from encumbrances. Based on a plain reading of the agreement, we are unable to accept the respondents plea that they were willing to perform their

obligations under the contract. It is evident that the plaintiffs were required to pay the remaining consideration and only then they could have sought the specific performance of the contract. The agreement required the plaintiff to pay the balance consideration. It clearly provided that the balance consideration would be paid and then the sale deed would be executed. The plaintiffs have to prove their readiness and willingness to perform the contract. Section 16 (c) of the Act, mandates the plaintiffs to prove their readiness and willingness to perform the essential terms of the contract.

29. We shall now advert to the plaintiffs conduct through out the sale transaction. The plaintiffs have failed to provide any documents or communications which would indicate that he called upon the defendants to perform their obligations within the time period stipulated in the contract. In fact, the defendants issued a legal notice under Ex.A3 on 05.03.2009 rescinding the contract and also intimated the plaintiffs that the defendants had forfeited the advance amount. Only then the plaintiffs issued a reply notice under Ex.A4 dated 10.03.2009 calling upon the defendants to perform their part of contract. Again the plaintiffs issued a legal notice under Ex.A5 only on 06.12.2010 calling upon the defendants to clear the mortgage loan

and also to take steps to measure the property. Therefore, only in response to the legal notice issued by the defendants, the plaintiffs demanded the performance of their obligations. Merely averring that the plaintiffs were waiting with the balance consideration and believed that the defendants would clear the encumbrance is insufficient to prove the plaintiffs were willing to perform their obligations under the contract Act. Moreover, the sale agreement was executed in the year 2008. However, the plaintiffs did not institute the suit for specific performance until 2011. The plaintiffs have taken plea that since the defendants failed to discharge the mortgage loan, measure the property and remove the temples from the suit property, they did not take steps to file a suit for specific performance. We are unable to accept this submission. By extending the plaintiffs arguments, if the defendants failed to remove the above encumbrances, the plaintiffs could not have filed a suit for specific performance of the contract at all. The inconsistency in the plaintiffs conduct, the lack of communication with the defendants urging them to clear the encumbrances and showing their willingness to pay the balance consideration, and the delay of above 3 years in filing the suit, are all indicative of the plaintiffs lack of will to perform the contract.

30. In a suit for specific performance the plaintiffs must demonstrate readiness and willingness though out to perform their obligations. For ascertaining readiness and willingness, conduct of parties must be determined having regard to entire attending circumstances of each case. Merely because the suit is filed within prescribed period of limitation it does not absolve the plaintiffs from showing as to whether they were ready and willing to perform their part of agreement. If there was non-performance, the question would be whether that obstacle was put up by the seller or otherwise. The Court has to see all attendant circumstances including if the plaintiffs conducted themselves in a reasonable manner under the agreement.

31. Though there can be no straight jacket formula with regard to readiness and willingness, it will have to be construed on the facts and circumstances of each case in the light of all attending facts and circumstances. Though the sale agreement was on 19.03.2008 the suit was filed only in the year 2011. No explanation is forthcoming as to why the plaintiffs had not taken action immediately. Merely because a suit is filed

within the prescribed period of limitation, it does not absolve the plaintiffs from showing as to whether they were ready and willing to perform their part of their contract. In ***Umabai v. Nilkanth Dhondiba Chavan*** **reported in *(2005) 6 SCC 243,*** it has been observed as follows:

> *"30.It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the respondent-plaintiffs were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the respondent-plaintiffs must be judged having regard to the entirely of the pleadings as also the evidence brought on record."*

32. The plaintiffs herein failed to demonstrate that they were always willing to perform their part of contract. The trial Court failed to frame an issue as to whether the plaintiffs were ready and willing to perform their obligations under the contract and instead assessed whether the plaintiffs are

entitled to the relief of specific performance. The reason given by the plaintiffs that the defendants failed to perform the obligations to hand over the property without encumbrance and the plaintiffs were waiting for the defendants to discharge the bank loan, measure the property and remove the temples from the suit property are untenable. The conduct of the plaintiffs proves their lack of will to perform the agreement. As discussed above, the factum of readiness and willingness to perform the plaintiffs part of the contract is to be adjudged with reference to the conduct of the party and attending circumstances. The Court may infer from the facts and circumstances whether the plaintiffs were always ready and willing to perform their part of contract. In spite of the fact that the defendants issued the legal notice on 19.03.2009, rescinding the contract and also intimating the plaintiffs that they had forfeited the advance amount, the suit has been filed only in the year 2011 after lapse of three years and 6 months from the date of agreement, which clearly goes to show that the plaintiffs were never ready and willing to perform their part of the contract. On a overall consideration of the legal position discussed above, we are of the view that the plaintiffs were never ready and willing to perform their part of contract and though time was not the essence of the contract, the plaintiffs were legally bound to perform their part, within the reasonable time. The findings of the trial court that the plaintiffs were ready and willing to perform their part of contract requires interference. As per law of equity, the plaintiffs are not entitled to the relief of specific performance.

Point Nos.5 and 6

33. Now it has to be considered whether the plaintiffs have spent a sum of Rs.5 lakhs to develop the suit property into house sites. In this regard, the cross examination of D.W.1 is extracted as here under:

> “தாவா சொத்து, நெல் விளையக்கூடிய களிமண் என்று சொன்னால் சரிதான். தாவா சொத்து களிமண் பூமியாக இருப்பதால், பிலாட்டு போட்டு வீடு கட்டுவது சிரமம் என்பதால், தாவா சொத்தில் இரண்டு அடி உயரத்திற்கு வாதிகள் மண் போட்டு நிரப்பினார்கள் என்று சொன்னால் சரிதான். வாதிகள் மேற்படி இரண்டு அடி உயரத்திற்கு மண் போட்டு நிரப்பிய வகையில் ரூ.5 லட்சம் செலவானது என்று வாதிகள் எனக்கு நோட்டிஸ் கொடுத்தார்கள். நான் அதற்கு பதில் எதுவும் சொல்லவில்லை என்று சொன்னால் சாட்சி வாதிகள் எவ்வளவு செலவு செய்தார்கள் என்று எனக்கு தெரியாது என்று சொல்கிறார்.”

34. Therefore, from the evidence of D.W.1 it is understood that the plaintiffs have spent for developing the suit property to convert it into house plots. The plaintiffs have also issued a legal notice to the defendants stating that they have spent a sum of Rs.5 lakhs for the same. The defendants by way of reply did not resist the claim made by the plaintiffs. Hence, it is assumed that the plaintiffs have spent the said amount for developing the property. Therefore, the plaintiffs are entitled for a sum of Rs.5 lakhs as development expenses.

35. True enough, generally speaking, time is not of the essence in an agreement for the sale of immoveable property. In deciding whether to grant the remedy of specific performance, especially in suits relating to sale of immovable property, the courts must be cognizant of the conduct of the parties, the escalation of the price of the suit property, and whether one party will unfairly benefit from the decree. The remedy provided must not cause injustice to a party, specifically when they are not at fault. In the present case, three decades have passed since the agreement to sell was entered into between the parties. The price of the suit property would have undoubtedly

escalated. Given the blemished conduct of the respondents/plaintiffs in indicating his willingness to perform the contract, we decline in any event to grant the remedy of specific performance of the contract. Though in this case a situation is brought about where it would be inequitable to give the relief of specific performance to the plaintiff, however there will be a decree for refund.

36. In the result, the Appeal Suit is allowed. The defendants are directed to refund a sum of Rs.30 lakhs to the plaintiffs along with Rs.5 lakhs as development expenses together with interest at the rate of 6% per annum, from the date of filing of the suit, till the date of actual payment, within a period of 6 months from the date of receipt of a copy of this judgment. No costs. Consequently, connected miscellaneous petition is closed.

(R.S.M.,J.) (K.G.T.,J.)
30.11.2023

vsn/mac
Internet:Yes/No
Index:Yes/No
Speaking/Non-speaking order

R.SUBRAMANIAN,J.
and
K.GOVINDARAJAN THILAKAVADI, J.

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Copy to

The Principal District Court, Namakkal.

PRE- DELIVERY JUDGEMENT MADE IN

Appeal Suit.No.426 of 2013

and M.P.No. 1 of 2013

30.11.2023