IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2023

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

A.S.No.48 of 2013

1. M.Murugesan
2. M.Srinivasan
3. Rajeswari
4. Sakthivel
   Raguraman (Died)
5. Indirani
6. Madhan
   (Cause title accepted vide order of this Court dated 31.01.2013 made in M.P. No.1 /2013 in A.S.SR. No.10795/2012) ... Appellants

-Vs-

1. N. Mani
2. P.Senthil
3. Vijaya
4. Devika
5. Sutha
6. Rathi
   Respondents 3 to 6 are impleaded vide order of this Court dated 25.08.2023 made in C.M.P.No. 19283/2023 in A.S.No.43/2013) ... Respondents

**PRAYER:** Appeal Suit filed under Section 96 of C.P.C., to set aside the judgment and decree passed in O.S.No.12 of 2011 dated 27.12.2011 on the file of the learned Additional District Judge (Fast Track Court No.1) Salem.

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|---|---|
| For Appellants | : Mr.V.V.Sriram |
| For Respondents | |
| For R1 & R2 | : Mr.S.Kalyanaraman |
| For R3 to R6 | : Mr.Pachaiyappan<br>For Mr.N.Vijaya Baskar |

**JUDGMENT**

This appeal is directed as against the judgment and decree dated 27.12.2011 passed in O.S.No.12 of 2011 by the learned Additional District Judge, Fast Track Court No.1, Salem, thereby allowing the suit filed by the respondents 1 & 2 for specific performance.

2. The suit is filed for specific performance. The appellants are the defendants and the respondents 1 & 2 are the plaintiffs. The respondent 3 to 6 are impleaded in the appeal suit, who claiming share in the suit property. For the sake of convenience the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff is that the suit property was purchased by late N.Marigounder, by the registered sale deed dated 22.10.1973. He has got three sons viz., Murugesan, the first defendant, Gopal and Mani. After demise of the said Marigounder, they inherited the

suit property. Thereafter, the two sons viz., Gopal and Mani died. The said Gopal died leaving behind the defendants 3 to 5 as his legal heirs and Mani died leaving behind the defendants 6 & 7 as his legal heirs. The second defendant is the son of the first defendant. They are being the legal heirs of the late Marigounder, they offered to sell the suit property to the plaintiffs for the total sale consideration of Rs. 15,75,800/-. The suit property is a land ad measuring 4 acre 38 cents. They entered into an agreement for sale on 21.08.2009 and received a sum of Rs.6,10,000/- as advance from the plaintiffs. The time for execution of sale deed was fixed as six months from the date of agreement for sale. The possession of the suit property was handed over to the plaintiffs. When the plaintiffs had approached the defendants on several occasions by tendering the balance sale consideration for execution of sale deed, the defendants have dodged by saying some lame excuses and evaded to perform their part of contract by executing sale deed.

3.1. Therefore, the plaintiffs had issued notice on 24.02.2010, thereby called upon the defendants to execute sale deed after receipt of the balance sale consideration. On receipt of the said notice, the first defendant said that his daughters are claiming share and therefore, they were not in a position to execute the sale deed and sought further time to settle the issue between his daughters. Thereafter on 29.04.2010, the daughters of the first defendant sent notice to the plaintiffs. Even then, the defendants failed to execute any sale deed in favour of the plaintiffs. Finally, the plaintiffs approached the defendants on 15.01.2011 and the defendants agreed to execute sale deed on 20.01.2011 and they also furnished copies of their photos and identification papers. When the plaintiffs went to the Sub Registrar Office on 20.02.2011, with balance sale consideration, the defendants failed to come to the Registrar Office and did not execute any sale deed as agreed by them. Hence, the suit.

4. Resisting the same, the defendants filed written statement stating that the suit property was offered for sale for the sale consideration of Rs.1,25,000/- and received a sum of Rs.1,00,000/- from the plaintiffs. However, the plaintiffs failed to pay the balance sale consideration as such, no sale deed was executed in favour of the plaintiffs. It was a registered agreement for sale. However, no possession was delivered to the plaintiffs as part performance of the agreement.

Even according to the plaintiffs, after the agreement for sale dated 21.08.2009, and on receipt of part of sale consideration of Rs.6,10,000/-, the plaintiffs did not take any steps to pay balance sale consideration. Further the time was fixed as four months for payment of balance sale consideration and execution of sale deed. The plaintiffs failed to pay the balance sale consideration as such the defendants could not able to execute any sale deed. In fact, the plaintiffs had sent notice only on 24.02.2010, after the period of six months from the date of agreement. Therefore, the suit for specific performance cannot be granted and prayed for dismissal of suit.

5. On completion of pleadings, the trial Court framed the following issues :-

> *"(i) Whether the plaintiffs are in possession and enjoyment of the suit property in pursuance of the sale agreement dated 21.08.2009?*
>
> *(ii) Whether the plaintiffs are ready and willing to perform their part of the contract?*
>
> *(iii) Whether the plaintiffs are entitled for the relief of specific performance or the alternative relief prayed for?*

*(iv) Whether the plaintiffs are entitled for the relief of permanent injunction prayed for?*

*(v) To what relief if any, the plaintiffs are entitled?"*

6. On the side of the plaintiffs, they examined P.W.1 & P.W.2 and marked documents in Ex.A.1 to Ex.A.17. On the side of the defendants, they examined D.W.1 to D.W.3 and marked documents in Ex.B.1 to Ex.B.3. After considering the oral and documentary evidences, the trial Court decreed the specific performance suit in favour of the plaintiffs. Aggrieved by the same, the defendants filed the present appeal.

7. While pending the appeal, the respondents 3 to 6 were impleaded themselves on the ground that, the respondents 3 & 4 are the two daughters of deceased Marigounder and the respondents 5 & 6 are the daughters of deceased Mani. Though they were not parties to the agreement for sale dated 21.08.2009, they have their respective shares in the suit property. They were also sailing with the appellants.

8. The learned counsel appearing for the appellants submitted that the suit property was a self-acquired property of one Marigounder. He had three sons and two daughters. After his demise, his three sons and two daughters are his legal heirs. His two sons viz., Gopal and Mani died and one son viz., the first defendant and two daughters viz., respondents 3 & 4 are alive. Though the first defendant along with legal heir of the deceased son Mani viz., Indirani and Madhan, who arrayed as defendants 6 & 7, had entered into agreement for sale, they left out other legal heirs viz., the respondents 5 & 6. They also left out the daughters of the deceased Marigounder viz., the respondents 3 & 4 in the agreement for sale with the plaintiffs. Therefore, they are having their respective shares in the suit property and as such they are necessary parties to the suit. When the parties have right and title over the property, they are necessary parties to the proceedings. But, the plaintiffs without adding them as parties, they filed suit and obtained decree of specific performance.

8.1. He further submitted that the defendants had entered into an agreement for sale vide registered document No.329/2009 dated 05.02.2009. But the plaintiffs failed to perform their part of contract.

Therefore, it was not acted upon. Subsequently, they had entered into agreement for sale dated 21.08.2009, which is an unregistered one. The time for execution of sale deed was fixed as six months from the date of agreement for sale. They failed to pay the balance sale consideration and as such, the agreement for sale is itself void.

8.2. He also submitted that the plaintiffs caused legal notice only on 24.02.2010, that too after the period of six months from the agreement for sale. The plaintiffs never visited the Sub Registrar Office for payment of balance sale consideration. They did not even offer at any time with regard to balance payment of sale consideration and also performance of their part of contract. Once they failed to pay the balance sale consideration, they cannot compelled the defendants to register sale deed in their favour. The relief of specific performance is based on equity and it cannot be granted automatically.

9. The learned counsel appearing for the respondents 3 to 6 contended that the possession and enjoyment of the suit property was never handed over to the plaintiffs. All the legal heirs are in possession

and enjoyment of the suit property. In fact, the plaintiffs had knowledge about the other legal heirs even at the time of agreement for sale. Even then, they did not add them as parties. The plaintiffs also suppressed the earlier agreement for sale, which was registered one dated 05.02.2009 and filed the suit.

9.1. He further submitted that the defendants alone are not the owners of the suit property. The respondents 3 to 6 herein are also have their respective shares in the suit property. Therefore, they are necessary party and they were also impleaded as parties to the suit. In support of his contention, he relied upon the following judgments :-

***(i) Civil Appeal No.7835 of 2014 dated 20.08.2014 in the case of Pemmada Prabhakar and ors Vs. YoungMen's Vysya Association & ors***

***(ii) W.P.No.1621 of 2022 dated 19.03.2023 in the case of Sri. Chinnasamy Gowda Vs. Shri Shivaramu & 59 ors.***

10. The learned counsel appearing for the respondents 1 & 2/plaintiffs submitted that admittedly, the defendants had ended into an agreement for sale with the defendants for the total sale consideration of Rs.15,75,800/- on 21.08.2009, and received a sum of Rs.6,10,000/- as

advance. They accepted to execute the sale deed within a period of six months. Though the plaintiffs had shown their willingness to pay the balance sale consideration, the defendants did not come forward to receive the same and execute the sale deed in their favour.

10.1. Therefore, the plaintiffs were constrained to issue notice on 24.02.2010. Thereafter, the daughters of the first defendant caused notice on 24.09.2010 to the plaintiffs. Hence, they approached the defendants and prepared to get the sale deed executed in their favour. The defendants also said that they will execute sale deed on 20.01.2011. On the date fixed by the defendants for execution of sale deed viz., on 20.01.2011, the plaintiffs were present in the Sub Registrar Office, Edappadi and also furnished copies of their photo and identification documents. Even then, the defendants failed to come to the Registrar office and did not execute any sale deed.

10.2. He further submitted that though the respondents 3 to 6 are having their respective shares in the suit property and they are not necessary parties to the suit, since they are not parties to the agreement for sale dated 21.08.2009. They have to workout their remedy individually by way of partition suit. In fact, on the date of allowing the application to implead the respondents 3 to 6, the learned counsel appearing for the plaintiffs were not present. Even then, this Court allowed them to impleade themselves as respondents 3 to 6. Therefore, the trial Court rightly decreed the suit and prayed for dismissal of this appeal.

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

12. Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal :-

(i) Whether the respondents 3 to 6 are necessary parties to the suit and they are having their respective shares in the suit property?

(ii) Whether the plaintiffs proved their readiness and willingness to perform their part of contract on 21.08.2009?

(iii) Whether the time is essence of contract or not?

13. Admittedly, the suit property is a land ad measuring 4.38 acres and the same was purchased by one Marigounder by the registered sale deed dated 22.10.1973. He died leaving behind his three sons viz., the first defendant and Gopal and Mani and two daughters viz., Vijaya & Devika. The said Gopal died leaving behind the defendants 3 to 5 as his legal heirs. The said Mani died leaving behind the defendants 6 & 7 and Sudha and Radhi as his legal heirs. The defendants alone had entered into the agreement for sale with the plaintiffs in respect of the suit property for the total sale consideration of Rs.15,75,800/-, by way of unregistered agreement dated 21.08.2009. On that day, the plaintiffs had paid a sum of Rs.6,10,000/- as advance.

14. In fact, the plaintiffs already had entered into registered agreement for sale with the same defendants on 05.02.2009 for the total sum of Rs.1,25,000/- and paid a sum of Rs.1,00,000/- as advance. However, it was not acted upon. Thereafter, both the parties again entered into unregistered agreement for sale on 21.08.2009. In the plaint, the plaintiffs did not even whisper about the registered agreement for sale

dated 05.02.2009. The plaintiffs did not even whisper about the fact of the registered agreement for sale dated 05.02.2009.

15. Further, the time for execution of sale deed was fixed as six months. However, after the period of six months, the plaintiffs caused legal notice on 24.02.2010 to the defendants, thereby called upon them to performance their part of the contract, on receipt of balance sale consideration. However, the plaintiffs did not file any suit for specific performance. After the period of seven months, viz., on 24.09.2010, once again the daughters of the first defendant cause another notice to the plaintiffs, thereby called upon them that they also having share in the suit property. Thereafter, the plaintiffs filed the suit for specific performance without alternative relief of direction to return the advance amount with interest. Therefore, the respondents 3 to 6 are also legal heirs of the deceased Marigounder. The respondents 3 to 4 have 2/5 share in the suit property and the respondents 5 & 6 have 12/25 share in the suit property. Therefore, they are necessary parties to the suit. But the defendants alone had entered into the agreement for sale with the plaintiffs without the knowledge of the respondents 3 to 6 herein.

16. In this regard, the learned counsel appearing for the respondents 3 to 6 relied upon the judgment reported ***2022 LiveLaw (SC) 802*** in the case of ***Moreshar Yadaorao Mahajan Vs. Vyanakatesh Sitaram Bhedi*** in which, the Hon'ble Supreme Court of India held as follows :-

> *"17. This Court, in the case of Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and Others [(2010) 7 SCC 417] , has observed thus:*
>
> *"15. A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided*

*against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.”*

*18. It could thus be seen that a “necessary party” is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. It has been held that if a “necessary party” is not impleaded, the suit itself is liable to be dismissed.*

*19. As already discussed hereinabove, the plaintiff himself has admitted in the plaint that the suit property is jointly owned by the defendant, his wife and three sons. A specific objection was also taken by the defendant in his written statement with regard to non-joinder of necessary parties. Since the suit property was jointly owned by the defendant along with his wife and three sons, an effective decree could not have been passed affecting the rights of the defendant’s wife and three sons without impleading them. Even in spite of the defendant taking an objection in that regard, the plaintiff has chosen not to implead the defendant’s wife and three sons as party defendants. Insofar as the reliance placed by Shri Chitnis on the judgment of this Court in the case of Kasturi (supra) is concerned, the question therein was as to whether a person who claims independent title and possession adversely to the title of a vendor could be a*

> *necessary party or not. In this context, this Court held thus:*
>
> *"7. …….From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are — (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; (2) no effective decree can be passed in the absence of such party."*

17. Thus, it is clear that for being a necessary party, the twin test has to be satisfied. The first one is that there must be a right to some relief against such party in respect of the controversies involved in the proceedings and the second one is that no effective decree can be passed in the absence of such party. Therefore, in the absent of the respondents 3 to 6 no effective decree could not been passed. Therefore, the relief of specific performance cannot be granted without the necessary parties viz., the respondents 3 to 6 herein in favour of the plaintiffs. Accordingly the first point is answered in favour of the respondents 3 to 6 herein.

18. Insofar as the point No.2 is concerned, though the plaintiffs

stated in their plaint that they had visited the Sub Registrar office on 20.01.2011, they failed to produce any the documents to prove their case. They failed to examine anybody and failed to produce any materials or registers in order to prove that they were present in the Sub Registrar office, Edappadi. It is also evident that the time was fixed as six months as per the agreement for sale 21.08.2009. Only after completion of six months period, the plaintiffs cause legal notice on 24.02.2010. They also failed to deposit the balance sale consideration any where to prove their readiness and willingness to perform their part of contract. In fact after receipt of notice from the daughters of the first defendant dated 24.09.2010, the present suit had been laid on 24.01.2011. After one month from the date of the suit, the plaintiffs had deposited the balance sale consideration before the trial Court. It shows that the plaintiffs were not ready to pay the balance sale consideration as agreed by them. Further, the relief of specific performance is being equity in nature, it cannot be granted in favour of the plaintiffs. Accordingly, the point No.2 is answered in favour of the defendants.

19. In respect of point No.3 is concerned, as per the agreement

dated 21.08.2009, the time was fixed for execution of sale deed is six months, on payment of balance sale consideration. However, the plaintiffs failed to take any steps to performance their part of contract. It is relevant to extract the provision under Section 55 of the Contract Act as follows :-

> *"55. 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 things at or before a specified time or certain things at or before specified times and failed 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 promise, if the intention of the parties was that time should be of the essence of the contract."*

Thus, the time is essence when a party to a contract promises to do a certain things within a time stipulated in the contract.

20. Admittedly, the plaintiffs filed suit only on 24.01.2011. As stated supra six months period, as per the agreement, was expired on 21.02.2010 itself. Therefore, the claim of the plaintiffs itself barred by limitation. The defendants and the respondents 3 to 6 are entitled to

rescind the contract as there was a breach of condition as time expired. Therefore, the agreement for sale was breached due to the contact of the plaintiffs who were failed to perform their part of contract as per the agreement. Therefore, the plaintiffs are not entitled for the relief of specific performance.

21. In any case, it is an admitted fact that the defendants had received a sum of Rs.6,10,000/- as advance, as part of sale consideration. Though there is no clause in the agreement, this Court is of the view, for rendering complete justice between the parties, it deemed to be proper to direct the defendants to repay the advance amount with interest.

22. Accordingly, the judgment and decree dated 27.12.2011 passed in O.S.No.12 of 2011 by the learned Additional District Judge, Fast Track Court No.1, Salem, is hereby set aside and the suit in O.S.No.12 of 2011 stands dismissed. The defendants/appellants are directed to repay the advance amount of Rs.6,10,000/- with interest at the rate of 7% per annum from the date on which the payment was made by the plaintiffs, till date within a period of twelve weeks (12) from the date

of receipt of a copy of this Order.

23. In the result, the Appeal Suit stands allowed. There shall be no order as to costs.

07.12.2023

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

rts

To

1. The Additional District Judge,
   Fast Track Court No.1,
   Salem.

**G.K.ILANTHIRAIYAN, J.**

rts

A.S.No.48 of 2013

07.12.2023