



S.A.No.689of 2023

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.12.2023

CORAM

THE HON'BLE Mr.JUSTICE C.KUMARAPPAN

S.A.No.689 of 2023
and
C.M.P.No.21982 of 2023

M.Mathi ... Appellant
- Vs -

1.Vijayakumar
2.V.Valarmathi
3.Pradheep
4.Sasikumar ... Respondents

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code against the Decree and Judgment dated 29.11.2022 passed in A.S.No.30 of 2020, on the file of the Additional District Court, Namakkal reversing the Judgment and Decree dated 12.11.2019 passed in O.S.No.42 of 2015 on the file of the Additional Sub-Court, Namakkal.

For Appellant : Mr.Krishna Prasad, R.
For Respondents : Mr.T.L.Thirumalaisamy



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JUDGMENT

This second appeal has been filed at the instance of the plaintiff.

The respondents herein are the defendants before the trial Court.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the trial Court.

The brief facts which gives rise to the instant second appeal is.

that:

3. There was a sale agreement dated 16.09.2013 between the plaintiff and the defendants, for a total sale consideration of Rs.1,98,000/- . On the date of the sale agreement, the plaintiff has paid a sum of Rs.80,000/- towards advance, and the time for performance of the contract was fixed as 11 months i.e., on or before 15.08.2014. According to the plaintiff, there was a specific recital in the agreement that within 11 months period, the defendants have to measure the property. Whereas, the defendants have failed to measure the property. Hence, immediately



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within a period of 15 days from the last date of performance period, the plaintiff has issued a legal notice calling upon the defendants to execute the sale deed. According to the plaintiff he was all along ready and willing to perform his part of the contract and the delay of 15 days in issuing the legal notice cannot be construed that the plaintiff was not ready and willing to perform his part of the contract, and the learned counsel for the plaintiff would also submits that the time is not the essence of contract. To substantiate his arguments, the learned counsel relied the following judgments:

- 1) *P.D'Souza v. Shondrilo Naidu [(2004) 6 SCC 649.*
- 2) *Gaddipati Divija and Another v. Pathuri Samrajyam and Others [2023 SCC OnLine SC 442].*

4. Per contra, the learned counsel for the defendants would submit that the recital in the agreement regarding measurement of suit property cannot be taken advantage by the plaintiff, as in the subsequent clause of the agreement, the plaintiff has admitted a clear and perfect title of the defendant. The learned counsel would also submit that the plaintiff



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during his cross examination has also admitted that he has visited the property and also found that the boundary stones exists on the property. To support his case, the learned counsel for the respondents/defendants relied the following judgments:

- 1) ***Nallaya Goundwer & Another v. P.Ramaswami Gounder etc & 3 others [1993 (3) LW 86].***
- 2) ***R.Kumar v.R.Sushilkumar [2011 SCC OnLine Mad 2089].***

5. Before the trial Court, the plaintiff himself was examined as PW1 and one Subramaniam was examined as PW2, and 6 documents were marked as Exs.A1 to A6. On behalf of the defendants, 1st defendant was examined as DW1 and no document was marked.

6. The trial Court, upon consideration of oral and documentary evidence, held that the plaintiff was ready and willing to perform his part of the contract, and granted decree for specific performance. Whereas, the First Appellate Court was of the view that since because the defendants have not measured the property, it will in no way benefit the plaintiff in getting the sale deed and has found that the plaintiff was not ready and



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WEB COPY willing to perform his part of the contract and ultimately reversed the findings of the trial Court.

7. The learned counsel for the appellant/plaintiff would submit that when there was a specific stipulation to measure the property, unless and until the property is measured by the defendants, the obligation of the plaintiff does not arise. They further contended that, when the defendants have not at all measured the property, the issuance of legal notice on completion of agreement period cannot be found against the plaintiff. The learned counsel for the appellant also relied on the judgment in ***P.D'Souza v. Shondrilo Naidu [(2004) 6 SCC 649] : [2004 SCC OnLine 752]***. The relevant para is extracted as follows:

"23. It appears from the records that the defendant herself did not produce the original documents nor redeemed the mortgage. If the mortgage was not redeemed and the original documents were not produced, the sale deed could not have been executed and in that view of the matter, the question of plaintiffs readiness and willingness to perform his part of contract would



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not arise."

Wherein, in the reported judgment, it was held that when an agreement specifies that the property has to be sold only after handing over of the original documents, unless and until the original documents handed over to the purchaser, the question of plaintiff's readiness and willingness to perform his part of the contract would not arise. Therefore, from the above said judgment, the learned counsel for the appellant would submit that when the agreement is specifically stipulates the defendants to measure the property, unless and until such measurement is done, the question of readiness and willingness to perform his part of the contract does not arise. But, it was agreed that though there is a such specific clause in the agreement that the property in the subsequent clause, the plaintiff himself has categorically admitted that unencumbered title of the defendants.

8. At this juncture, the learned counsel for the respondents would rely upon the admissions made by the plaintiff which was extracted by the First Appellate Court in paragraph 20 of the judgment. Wherein, the



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plaintiff has categorically admitted that the four boundaries are clearly mentioned and he has also seen the property, and that on the northern side, there is a boundary stone and there is no boundary stone on the southern side. He also admitted that, when he enquired with the defendants, he has informed that already he has paid necessary fees for the measurement of the property. Therefore, from the above admission, it is very much clear that the defendant has already initiated action to measure the property. If we look at the plaintiff's above admission, in the background of the defendants' pleading that they have already completed the measurement and it was only the plaintiff who delays in getting the sale deed registered, then the defence of the defendant is more probable.

9. At this juncture, this Court relied upon the judgment of the Hon'ble Supreme Court in **Man Kaur(Dead) By Lrs vs Hartar Singh Sangha** reported in **(2010) 10 SCC 512**. As per the above judgment, the Hon'ble Supreme Court has categorically stated that since because there is some breach of contract by the vendor, that will not ensure any benefit to the purchaser to delay the purchase of the property and that the purchaser



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should be ready and willing all along. If we apply the above ratio, here the plaintiff has categorically admitted in the agreement itself that the defendants are having unencumbered title over the property. Therefore, since because no measurement carried out on the part of the defendant will in no way benefit to the plaintiff's to delay the agreement.

10. As rightly contended by the learned counsel for the appellant, there was a delay of 15 days in issuing the legal notice. If we look in the agreement, time is specifically stated that the agreement should be executed on or before 15.08.2014. Therefore, in order to show the readiness and willingness of the plaintiff, the issuance of legal notice, after 15 days of the contract will not in any way helpful to the plaintiff. He ought to have shown the readiness and willingness even within 15 days period of agreement by issuing notice to the defendants to measure the property.

11. Therefore, this Court is of the view that even if there is some breach on the part of the defendants, that will not in any way benefit the



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plaintiff, apart from that, even in the judgment relied by the learned counsel for the appellant, in ***Gaddipati Divija and Another v. Pathuri Samrajyam and Others [(2023) SCC OnLine SC 442]***, there is a specific recital that the sale deed should be executed after the property is demarcated, but, such recital is not in our agreement and therefore, the fact of the case is not applicable to the facts of the present case. Even in the other reported judgment in ***P.D'Souza*** case, it is not applicable to the facts of the present case. Therefore, the finding of fact recorded by the First Appellate Court that the plaintiff has not proved his ready and willingness is based on merits and this Court does not find any Substantial Questions of Law.

12. In the result, this Second Appeal is dismissed and the Decree and Judgment dated 29.11.2022 passed in A.S.No.30 of 2020, on the file of the Additional District Court, Namakkal reversing the Judgment and Decree dated 12.11.2019 passed in O.S.No.42 of 2015 on the file of the Additional Sub-Court, Namakkal are hereby confirmed. There shall be no order as to costs. Consequently, connected miscellaneous petition is



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Index : yes/no

Speaking/Non Speaking Order

Neutral Citation Case: Yes/No

C.KUMARAPPAN, J.,

ssn

To

1. The Additional District Court,
Namakkal.

2. The Additional Sub-Court,
Namakkal.

S.A.No.689 of 2023

and



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