



A.S.No.211 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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RESERVED ON : 27.11.2023

PRONOUNCED ON : 21.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

A.S.No.211 of 2017

1.Kamalam

2.G.Baghiyalakshmi

... Appellants

Vs

1.M.A.Abdul Rahman

2.K.H. Ismail

3.A.P.Faizal

4.S.Kithapuddin

5.Noor Jahan

6.Ayisamma

7.Balkees

8.Ariba

9.Sameema



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10.Saleemabivi (Died)

11.K.A.Hussain

... Respondents

(R10 Died, R5 to R9 brought into record as LR's of the deceased 10th Respondent as per memo recorded dated 10.02.2020, SR.No.4480 vide Court order dated 29.07.2020 made in A.S.No.211 of 2017)

Prayer:- Appeal Suit is filed under Section 96 of Civil Procedure Code, praying to set aside the judgement and decree dated 22.11.2016 in O.S.No.21 of 2016 on the file of the IV Additional District Court, Coimbatore.

For Appellants : Mr.D.Shivakumaran

For R1 to R9 : Mr.K.R.Sankaran
for M/s.K.S.Karthik Raja

For R10 : Died

For R11 : No Appearance

J U D G M E N T

The unsuccessful defendants 1 and 2 are the appellants. The respondents 1 to 4 herein and one V.M.Abdul Wahab/plaintiffs filed a suit for specific performance and the same was decreed. Aggrieved by the same, the present appeal has been filed by the defendants 1 and 2.



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2. For the sake of convenience, the parties are referred to as per the ranking in the suit.

Plaint Averments:-

3. The defendants 1 and 2 are the absolute owners of the suit property, which is 1.58 acres of vacant land. The plaintiffs entered into a registered Sale Agreement with defendants 1 and 2 and husband of 1st defendant and father of 2nd defendant-Muthu on 08.04.2005 agreeing to purchase the suit property for a total sale consideration of Rs.11,50,000/-. On the date of agreement, an advance amount of Rs.6,00,000/- was paid to the defendants 1 and 2. The time fixed for completion of sale transaction was six months. The plaintiffs have been always ready and willing to perform their part of the contract. Whiles, 3rd defendant (11th respondent herein) sent a legal notice on 21.06.2005 claiming that he was agreement holder in respect of the very same property and he filed a suit for specific performance against the defendants 1 and 2 in O.S.No.142 of 2001 and the same was dismissed. He further claimed that he preferred an appeal in A.S.No.1016 of 2004 on



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the file of this Court and obtained a *status quo* order on 14.10.2004 in C.M.P.No.16726 of 2004. Thus, he claimed that present agreement entered into by the plaintiffs was hit by doctrine of *lis pendens*. The plaintiffs further claimed that earlier agreement with 3rd defendant was suppressed by defendants 1 and 2 and immediately after receipt of notice from the 3rd defendant, plaintiffs sent a fitting reply notice dated 13.07.2005 to the 3rd defendant. The plaintiffs also sent a separate notice dated 13.07.2005 to defendants 1 and 2 for which they sent a cryptic reply stating that detailed reply will be sent after perusal of records from their counsel. Thereafter, the plaintiffs sent a telegram to defendants 1 and 2 on 04.10.2005 informing them that time stipulated in the Suit Sale Agreement expires on 08.10.2005 and they were ready and willing to perform their part of the contract by paying balance sale consideration and enforce the Suit Sale Agreement subject to the outcome of proceedings before the High Court. The defendants 1 and 2 failed to respond to the said telegram. Thereafter, the plaintiffs sent a notice dated 04.10.2005 reiterating their readiness and willingness to perform their part of the contract as mentioned in the



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telegram. The defendants 1 and 2 failed to give any reply for the said notice.

In these circumstances, the plaintiffs were constrained to file a suit for specific performance of agreement with alternative prayer for return of advance amount.

Averments found in the Written Statement of the Defendants 1

and 2:-

4. The defendants 1 and 2 admitted the execution of Suit Sale Agreement. They claimed that Suit Sale Agreement was entered into by the plaintiffs with full knowledge of pending litigation with 3rd defendant. Therefore, they denied the allegation in the plaint as if, they suppressed the earlier agreement with the 3rd defendant. It was specifically averred by the defendants 1 and 2 that plaintiffs themselves withdrew their demand for specific performance in their notice dated 13.07.2005 and demanded only return of advance amount of Rs.6,00,000/-. Therefore, the plaintiffs are estopped from seeking specific performance of the agreement. They also claimed that in view of the breach of contract committed by the plaintiffs,



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the defendants 1 and 2 are not liable to repay the advance amount. It was also claimed by the defendants 1 and 2 that due to death of 1st defendant's husband and 2nd defendant's father Muthu, they could not get necessary papers from their counsel and give any reply to plaintiffs' notice. It was also claimed that after withdrawing the right of specific performance and demanding return of advance amount, the plaintiffs are not entitled to maintain a suit for specific performance. The claim of readiness and willingness by the plaintiffs was specifically denied. It was further averred in the written statement that plaintiffs having demanded refund of advance amount cannot claim that they were ready and willing to perform their part of the contract.

Averments found in the Written Statement of the 3rd Defendant:-

5. The 3rd defendant in his separate written statement averred that the Suit Sale Agreement was *non-est* and void *ab-initio* document in the eye of law in view of the order of *status quo* passed by the High Court in C.M.P.No.16726 of 2004 in A.S.No.1016 of 2004. The 3rd defendant already



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issued a paper publication on 13.06.2005 informing to the General Public about the *status quo* order passed by the High Court. Therefore, the plaintiffs and defendants 1 and 2 had no right to deal with the property pending disposal of appeal suit before the High Court. It was also claimed by the 3rd defendant that the act and conduct of plaintiffs and defendants 1 and 2 would amount to act of cheating and the Suit Sale Agreement itself was a fraud played against the order of the Court.

Evidence Before the Trial Court:-

6. Before the Trial Court, the 2nd plaintiff was examined as PW.1 and 28 documents were marked on behalf of the plaintiffs as Exs.A1 to A28. The defendants 1 and 2 were examined as DW.1 and DW.2 and 2 documents were marked as Exs.B1 and B2.

Findings of the Trial Court:-

7. The Trial Court on appreciation of oral and documentary evidence available on record, came to the conclusion that the plaintiffs proved their



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continuous readiness and willingness to perform their part of the contract and granted decree for specific performance. Aggrieved by the same, the defendants 1 and 2 have come by way of this first appeal.

Submissions of the Learned Counsel appearing for the Appellants/Defendants 1 and 2:-

8. The learned counsel appearing for the appellants vehemently contended that the plaintiffs by issuing Ex.A16-Legal Notice dated 13.07.2005 and demanding return of advance amount, abandoned their right to specific performance of the agreement. The learned counsel further submitted that having issued a notice calling upon the defendants 1 and 2 to return the advance amount of Rs.6,00,000/- together with interest at the rate of 24% per annum and also claiming compensation to the tune of Rs.6,00,000/-. The plaintiffs had withdrawn their right of enforcing specific performance of the contract and therefore, the suit prayer for specific performance is not maintainable. The learned counsel by referring to the subsequent notice issued by the plaintiffs, the willingness expressed by the



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plaintiffs to get the sale deed executed subject to the result of the appeal pending before the High Court would amount to expression of conditional willingness and the same is impermissible in law. The learned counsel further submitted that when a person entitled to two rights which are inconsistent with each other, having exercised the option of election in respect of one kind of right he cannot turnaround and insist enforcement of other right. In support of his contentions, the learned counsel relied on the following judgements:-

- (i) ***Chand Rani vs. Kamal Rani*** reported in ***(1993) 1 SCC 519***.
- (ii) ***Mademsetty Satyanarayana vs. G.Yelloji Rao and others*** reported in ***1965 AIR (SC) 1405***.
- (iii) ***K.S.Sundaramayyar vs. K.Jagadeesan*** reported in ***AIR 1965 (Mad) 85***.
- (iv) ***T.Thangamuthu vs. A.Gowrishanker*** reported in ***1983 (2) MLJ 215***.
- (v) ***Surjit Singh Bhatia and others vs. Tej Raj Singh Goel*** reported in ***2014 (0) Supreme (Del) 1592***.
- (vi) ***U.Venkatesan vs. Susila and others*** reported in ***2023 (5) CTC 283***.



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Submissions of the Learned Counsel appearing for the

Respondents 1 to 9/plaintiffs:-

9. Per contra, the learned counsel appearing for the respondents 1 to 9 submitted that pre-suit notice issued by plaintiffs calling for refund of advance amount cannot be read in isolation. The learned counsel further submitted that in the Suit Sale Agreement-Ex.A5, the defendants 1 and 2 covenanted that there was no encumbrance in the agreement mentioned property and agreed to clear encumbrances, if any. Therefore, at the time of entering agreement knowing fully well about the earlier agreement and pendency of litigation, the same was deliberately suppressed by defendants 1 and 2. Further, the learned counsel submitted that in an appeal filed by 3rd defendant an *status quo* order was passed on 14.10.2004 against the defendants 1 and 2. However, violating the same, the Suit Sale Agreement was entered into on 08.04.2005. The learned counsel further submitted that the *status quo* order passed by the High Court against the defendants 1 and 2 was vacated on 24.01.2006 and immediately, suit was filed by plaintiffs on 25.01.2006. He further submitted that when plaintiffs issued pre-suit notice



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on 13.07.2005 calling upon the defendants 1 and 2 to repay the advance amount, the defendants 1 and 2 failed to give any reply either accepting the request of the plaintiffs or rejecting the same. Therefore, the pre-suit notice of the plaintiffs dated 13.07.2005 cannot be treated as abandonment of their right to enforce the contract. The learned counsel further submitted that conduct of the defendants 1 and 2 in suppressing the material fact while entering into the agreement disentitled them from opposing suit for specific performance. In support of his contention, the learned counsel relied on the following judgements:-

- (i) ***Manickam vs. Ramaswamy Gounder*** reported in ***(2002) 2 M.L.J. 11***.
- (ii) ***Balasaheb Dayandeo Naik vs. Appasaheb Dattatraya Pawar*** reported in ***MANU/SC/0841/2008***.
- (iii) ***Silvey and others vs. Arun Varghese and others*** reported in ***MANU/SC/7223/2008***.
- (iv) ***Motilal Jain vs. Ramdasi Devi and others*** reported in ***MANU/SC/0438/2000***.



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10. Based on the pleadings of the parties and contention of the learned counsel for either side, the following points are arising for consideration in this appeal.

- (i) Whether the respondents 1 to 4 herein and one V.M.Abdul Wahab/plaintiffs proved their continuous readiness and willingness to perform their part of the contract?*
- (ii) Whether the demand for return of advance amount in the pre-suit notice issued by the plaintiffs would amount to abandonment of right to claim of specific performance of the agreement?*

Discussions on Points Nos.1 and 2:-

11. The plaintiffs and defendants 1 and 2 entered into a registered Sale Agreement on 08.04.2005. The agreed sale consideration was Rs.11,50,000/- and plaintiffs paid a sum of Rs.6,00,000/- as advance on the date of agreement itself. The time for performance was six months. These are all the admitted facts. Subsequent to execution of Suit Sale Agreement, 3rd defendant issued a notice informing the plaintiffs about the earlier Sale



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Agreement between him and defendants 1 and 2 and the litigation for specific performance of said agreement. Immediately, plaintiffs issued a notice to defendants 1 and 2 on 13.07.2005 under Ex.A16 accusing defendants 1 and 2 of guilty of suppression of facts and called upon them to return the advance amount of Rs.6,00,000/- together with interest at the rate of 24% per annum. The plaintiffs also called upon the defendants 1 and 2 to pay a further sum of Rs.6,00,000/- towards compensation for pain, mental agony and sufferings. It was further averred in the notice that if the defendants 1 and 2 failed to pay a sum of Rs.12,00,000/- with interest at the rate of 24% per annum within a week time from the date of receipt of notice, a civil suit would be filed against them for recovery of the said amount apart from criminal prosecution for breach of trust and cheating.

12. A reading of above notice issued by plaintiffs clearly establish that at the time of issuance of notice they were not interested in purchasing the property covered by the agreement or enforcing the specific performance of the agreement. A demand for return of advance amount manifestly proves



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the intention to abandon the right to purchase the property under the agreement. Moreover, the plaintiffs also claimed compensation for pain, mental agony and sufferings by them. The notice further reads that if defendants 1 and 2 failed to return the advance and compensation amount as demanded with interest at the rate of 24% per annum, a civil suit will be filed for recovery of the said amount. Consciously, the plaintiffs failed to whisper anything about the specific performance of the agreement. Therefore, it is clear that the plaintiffs abandoned their right to seek specific performance of the contract and on the date of issuance of notice they were only interested in getting return of advance and compensation amount. In this context, it would be appropriate to refer to certain decisions regarding the abandonment of rights under the contract.

13. In ***K.S.Sundaramayyar vs. K.Jagadeesan*** reported in ***AIR 1965 (Mad) 85*** while dealing with a similar situation, this Court observed as follows:-

“6. Even assuming that time was not the



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essence of the contract and that the first respondent was guilty of breach, it is clear from the above letter that the appellant had decided not to keep the contract subsisting but, on the other hand, had put an end to it and demanded damages for an alleged breach by the first respondent. Such a demand for return of the advance paid is quite inconsistent with the subsistence of the contract. It cannot be said, therefore, that the appellant was ready and willing to perform his part of the contract.

... ..

... ..

9. The appellant had, as we said, put an end to the contract and demanded a return of the advance amount paid by him and made a further claim for damages. If the contract were to be held as subsisting, he would have no right to insist upon a return of the advance amount.”

14. The law laid down in the above mentioned case law squarely applicable to the facts of the present case. The plaintiffs by issuing a notice demanded return of advance amount and also compensation from the defendants 1 and 2. The demand of compensation by the plaintiffs would



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amount to expression of their unwillingness to purchase the agreement mentioned property as per the terms of agreement. For all purposes, they treated the agreement as terminated one and as a consequence demanded compensation. A reading of notice issued by the plaintiffs clearly underlines their intention to put an end to the contract and abandon their right to enforce the same.

15. It is settled law in a suit for specific performance, the plaintiff must prove his continuous readiness and willingness from the date of agreement down to the date of filing of the suit. In the case on hand, on the facts established the readiness and willingness on the part of the plaintiffs got snapped on 13.07.2005 by their own notice. Therefore, it cannot be revived by them by issuing a telegram on 04.10.2005 expressing their willingness to purchase the property on same terms. Absolutely, there is no evidence available on record to show the readiness and willingness of the plaintiffs from 13.07.2005 to 04.10.2005. Further, a person, who abandoned his right to purchase the property under the agreement by demanding return



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of advance amount and compensation, is not entitled to claim that he has been ready and willing to purchase the property from the inception down to the date of filing of the suit.

16. In *Motilal Jain vs. Ramdasi Devi and others* reported in *MANU/SC/0438/2000* relied on by the learned counsel for the respondents 1 to 9, the Hon'ble Apex Court said merely because plaintiffs claimed damages in a suit for specific performance as an alternative relief, it could not be said that he was not entitled to main relief of specific performance. In the case on hand, the facts are entirely different. Even before filing of the suit, the plaintiffs issued notice demanding advance amount and compensation. Therefore, their readiness and willingness got snapped by issuance of such notice long prior to filing of the suit. Hence, the said decision is not applicable to the facts of the present case.

17. In *Silvey and others vs. Arun Varghese and others* reported in *MANU/SC/7223/2008* relied on by the learned counsel for the respondents



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1 to 9, the defendants had taken a plea that plaintiffs abandoned the agreement. However, the defendants' side witness in that case admitted that they never met the plaintiffs, did not support the said plea and hence, the Hon'ble Apex Court held the plea of abandonment raised in pleadings was in fact abandoned in evidence and rejected the same. Therefore, the Hon'ble Apex Court said false plea raised by the defendants as if, plaintiffs informed them about abandonment of agreement would disentitle the defendants from opposing the suit for specific performance. In the case on hand, the defendants 1 and 2 specifically raised a plea that by virtue of notice dated 13.07.2005, the plaintiffs withdrew from the agreement and hence, they could not enforce specific performance. The same was reiterated by the 1st and 2nd defendants' side witnesses in their evidence. Therefore, the said case law is not applicable to the facts of the present case.

18. In *Manickam vs. Ramaswamy Gounder* reported in (2002) 2 *M.L.J. 11*, the Division Bench of this Court on the facts of that case held latches on the part of the Vendee in coming to the Court would not be a



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ground to refuse specific performance. However, in the case on hand, Vendee wriggled out of agreement by demanding the advance amount back. In such circumstances, the above said case law is also not applicable to the facts of the present case.

19. In view of the discussions made earlier, this Court comes to the conclusion that by issuance of notice dated 13.07.2005 demanding the refund of advance money and payment of compensation, the plaintiffs abandoned their right to seek enforcement of specific performance of the contract and their readiness and willingness to perform their part of the contract got snapped on the date of issuance of such notice. Therefore, the plaintiffs failed to prove the continuous readiness and willingness from the date of agreement and down to the date of filing of the suit and consequently, they are not entitled to the relief of specific performance. The Points Nos. 1 and 2 are answered accordingly.

20. There is no dispute as to the fact of execution of agreement and



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receipt of advance amount of Rs.6,00,000/- by defendants 1 and 2 on the date of agreement. The defendants 1 and 2 are bound to return the said amount with reasonable interest. This Court is conscious of the present low interest regime. But agreement was entered into in the year 2005, when bank interest rates were high. Further, defendants 1 and 2 suppressed the pendency of litigation and entered into suit agreement violating status quo order passed by this Court. Taking into consideration all these facts and circumstances, I deem it appropriate to direct the defendants 1 and 2 to return the advance amount of Rs.6,00,000/- to the plaintiffs with interest at the rate of 9% per annum from the date of agreement (i.e., 08.04.2005) to the date of actual realisation.

21. Therefore, the judgement and decree passed by the Trial Court is set aside and the appeal suit is allowed by directing appellants/defendants 1 and 2 to return the advance amount with interest at the rate of 9% per annum. In view of above said conduct of appellants, they shall pay cost of appeal as well as suit to the respondents 1 to 9/plaintiffs.



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In Nutshell:-

- (i) The Appeal Suit is allowed by setting aside the judgement and decree passed by the Trial Court.
- (ii) The suit filed by the plaintiffs in O.S.No.21 of 2006 is dismissed with regard to main relief of specific performance.
- (iii) The suit is decreed in respect of alternative remedy by directing appellants/defendants 1 and 2 to pay a sum of Rs.6,00,000/- to respondents 1 to 9/plaintiffs with interest at the rate of 9% from 08.04.2005 to the date of actual realisation.
- (iv) In the facts and circumstances of the case, the appellants are directed to pay the cost of appeal as well as suit to the respondents 1 to 9/plaintiffs.

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Index : Yes
Speaking order : Yes
Neutral Citation : Yes
dm

To

The IV Additional District Court, Coimbatore.



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S.SOUNTHAR, J.

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Pre-delivery judgement in
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