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S.A.No.498 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.10.2023

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.No.498 of 2017
and
CMP.No.12063 of 2017

S.Chellamuthu (Died)
R.Ponnusamy

... Appellant

Vs.

1. P.Subramani
2. A.Balasubramaniam
3. Karpagam
4. Raja
5. Santhiya

... Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree of the Principal District Judge's Court at Namakkal, dated 03.04.2017 in A.S.No.31 of 2015 confirming the Judgment and Decree of the Subordinate Judge's Court at Tiruchengode, dated 24.07.2015 in O.S.No.140 of 2010.

For Appellant : Mr.P.Valliappan
Senior Advocate
for Mr.S.M.S.Shriram Narayanan



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For Respondents : Mr.P.Mani for R1

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JUDGMENT

The sixth defendant in the suit is the appellant. The suit for specific performance filed by the first respondent was decreed by the trial Court. The appeal filed by the defendants 1 & 6 was dismissed. Aggrieved by the same, the sixth defendant filed this Second Appeal.

2. According to the first respondent/plaintiff, the respondents 2 to 5 are the owners of the property covered by the sale agreement. They executed a general power of attorney in favour of the deceased first defendant Chellamuthu and he entered into a sale agreement with the first respondent on 27.01.2006 agreed to sell the property covered under the agreement for a sale consideration of Rs.1,25,000/-.

3. The first respondent paid an advance amount of Rs.1,00,000/- on the date of agreement itself and the balance of Rs.25,000/- was agreed to pay within 1 ½ years (on or before 26.07.2007). The first respondent/plaintiff issued a pre-suit notice on 16.06.2010 calling upon the deceased first



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defendant to execute the sale deed as per the sale agreement. The first defendant issued a reply claiming that the suit sale agreement is a sham and nominal document and the first respondent had got no right under said agreement. Therefore, the first respondent was constrained to file a suit for specific performance on 26.07.2010. Subsequent to filing of the suit, the plaintiff acquired knowledge that the suit property was sold by deceased first defendant in favour of the appellant on 30.06.2010 and therefore, he was arrayed as sixth defendant in the suit.

4. The deceased first defendant filed a written statement claiming that the suit agreement was only a sham and nominal document and therefore, the first respondent was not entitled to specific performance. The deceased first defendant also raised a plea that the first respondent failed to prove his readiness and willingness and consequently, he was not entitled to specific performance. The sixth defendant also filed written statement after his impleadment in the case claiming that he was a bonafide purchaser. The appellant also raised a plea that the suit sale agreement was only a sham and nominal document and therefore, the suit was filed by the first respondent with huge delay.



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5. Before the trial Court, the first respondent/plaintiff was examined as PW1. The attestor of Ex.A1 and scribe were examined as PW2 & PW3. The deceased first defendant was examined as DW1. The appellant was examined as DW2. Yet another witness namely, A.S.Venkatachalam was examined as DW3. On behalf of the first respondent, five documents were marked as Ex.A1 to A5. On behalf of the appellant and deceased first defendant 9 documents were marked as Ex.B1 to Ex.B9.

6. The trial Court on appreciation of oral and documentary evidence available on record came to the conclusion that the first respondent was entitled for specific performance of the suit sale agreement and granted decree. Aggrieved by the same, the deceased first defendant Chellamuthu and the appellant filed an appeal in A.S.No.31 of 2015 before the Principal District Court, Namakkal. The first Appellate Court confirmed the judgment of the trial Court and aggrieved by the same, the sixth defendant has filed this Second Appeal.



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7. At the time of admission, this Court formulated the following substantial questions of law:

“1. When Ex.A1 alleged sale agreement dated 27.01.2006 and the time fixed for execution of the sale deed expired on 26.07.2006, is the suit filed on 26.07.2010, barred by limitation as prescribed under Article 54 of the Limitation Act, 1963?

2. When the first respondent had failed to prove his continuous readiness and willingness from the date of alleged sale agreement on 27.01.2006 till the date of filing the suit on 26.07.2010 for over 4 ¼ years except issuing legal notice dated 16.06.2010, are the Courts below justified in granting the discretionary relief of specific performance in contravention of the previous of Sections 16 (c) and 20 of the Specific Relief Act, 1963?”

8. Mr.P.Valliappan, learned Senior Counsel appearing for the appellant submitted that as the last date for filing of the suit namely 25.07.2010 was a holiday, the suit was filed on next working day on 26.07.2010 and hence suit was well within time. Hence the first question of law framed in the Second Appeal answered against the appellant.



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9. The learned Senior Counsel for the appellant submitted that the suit agreement was entered into between the first respondent and the power agent of the original owners of the property on 27.01.2006. As per the terms of agreement, out of the entire sale consideration of Rs.1,25,000/-, an advance of Rs.1,00,000/- was paid and for the payment of balance amount, 1 ½ years time was fixed. The time limit in the agreement expired on 26.07.2007. However, the first notice seeking specific performance was issued by the first respondent only on 16.06.2010 and there is a huge delay of three years in issuance of pre-suit notice. The learned Senior Counsel for the appellant further submitted that the first respondent/plaintiff failed to show the readiness and willingness to perform his part of the contract, which is evident from the date of pre-suit. The learned Senior Counsel further submitted that the first respondent having failed to issue pre-notice within the expiry of time limit fixed under agreement and having waited for three years time for issuing pre-suit notice, cannot be heard to say that he was ready and willing to perform his part of the contract. In support of his submission, the learned Senior Counsel relied on the following judgments:



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1) In ***Ram Awadh (Dead) by Lrs and others Vs. Achhaibar Dubey and another***, reported in (2002) 2 SCC 428.

2) In ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and Others***, reported in 2021 SCC Online SC 365.

3) In ***M.Kumar Vs. V.Balan***, reported in 2021 (4) CTC 330.

4) In ***P.Arumugam Vs. M.Shanmugam Pillai***, reported in 2013 (3) MWN (Civil) 110.

5) In ***Balakrishnana and others Vs. B.Veni and others***, reported in 2017 (5) CTC 249.

10. Per contra, Mr.P.Mani, learned counsel for the first respondent submitted that the appellant herein is only a subsequent purchaser and therefore, first respondent is only entitled to raise the question of readiness and willingness. The learned counsel for the first respondent by taking this Court to the plea of the first respondent and evidence of PWs submitted that the first respondent proved his continuous readiness and willingness from the date of agreement and date of suit. In support of his contention, the learned counsel relied on the following judgment in ***M.M.S. Investments, Madurai***



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and others Vs. V.Veerappan and others, reported in (2007) 9 SCC 660.

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11. Admittedly the suit agreement was entered into between the first respondent and the deceased first defendant, who was the power agent of original owners, on 27.01.2006. The time fixed in the agreement was only 1 year 6 months and the said period expired on 26.07.2007. The first notice issued by the first respondent seeking performance was dated 16.06.2010. Therefore, it is clear that after expiry of time limit fixed for performance, the first respondent waited for nearly three years to issue a pre-suit notice. Though the first respondent in his pleadings had averred that he was ready and willing to perform his part of the contract, to prove the same his mere averment regarding readiness and willingness is not sufficient. There is no clear cut evidence available on record to show that he has been continuously ready and willing to perform his part of the contract from the date of agreement to the date of filing of the suit.

12. In order to prove the plea of readiness and willingness the first respondent examined himself as PW1 and deposed he had been ready and willing to perform his part of the contract. Except the interested testimony of



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PW1, there is no other evidence available on record to show the continuous readiness and willingness of the first respondent. The exhibits filed on behalf of the first respondent would indicate that there was a long delay of nearly three years from the date of expiry of time limit fixed for performance and filing of suit. Absolutely, there is no explanation on the part of the first respondent to explain the long time gap of three years. Though the first respondent in his evidence deposed that he had been requesting the deceased Chellamuthu to execute a sale deed in pursuance of agreement orally, such a statement of the first respondent cannot be acceptable in the absence of any supporting of oral or documentary evidence. Even on facts, as substantial sale consideration said to have been paid by the first respondent on the date of agreement itself, in such circumstances, absolutely there is no justification of the first respondent to wait for nearly 4 ½ years to file a suit from the date of agreement.

13. Section 16 (3) of the Specific Relief Act as it stood on the date of present suit, reads as follows:

16. Personal bars to relief.

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(c).who fails to aver and prove that he has performed or has always been ready and willing to

perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation – For the purposes of clause (c).

- i. where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the Court;*
- ii. the plaintiff [must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.*

14. A perusal of the provision would make it clear that any person, who is seeking specific performance of the contract has to plead and prove the continuous readiness and willingness from the date of agreement and date of filing of the suit. In the case on hand, as discussed earlier except the interested testimony of the first respondent, there is no evidence available on record to show the continuous readiness and willingness for nearly 4 ½



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years. Both the Courts below without taking into consideration the fact that the first respondent failed to produce any acceptable evidence to prove his readiness and willingness had come to the conclusion that he was entitled to the relief for specific performance.

15. One of the main contention made by the learned counsel for the first respondent is that the appellant being a subsequent purchaser is not entitled to raise the plea of readiness and willingness. Even otherwise, it is the contention of the learned counsel for the first respondent that plea of readiness and willingness is available only for the party to the agreement and the same is not available to the subsequent purchaser. The said issue has been considered by the Hon'ble Apex Court in ***Ram Awadh (Dead) by Lrs and others Vs. Achhaibar Dubey and another***, reported in (2002) 2SCC 428 and the relevant observation of Hon'ble Apex Court in this regards reads as follows:

“ 6. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore, grant to a plaintiff who has failed to aver and prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks.



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There is, therefore, no question of plea being available to one defendant and not to another. It is open to any defendant to contend and establish that he mandatory requirement of Section 16 (c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and, depending upon its conclusion, decree or decline to decree the suit [emphasis supplied]. We are of the view that the decision in Jugraj Singh case is erroneous.

16. In the subsequent judgment, the two members of the Hon'ble Apex Court in ***M.M.S. Investments, Madurai and others Vs. V.Veerappan and others***, reported in (2007) 9 SCC 660, have taken a different view and the relevant observation reads as follows:

“6. Questioning the plea of readiness and willingness is a concept relatable to an agreement. After conveyance the question of readiness and willingness is really not relevant. Therefore, the provision of the Specific Relief Act, 1963 (in short “the Act”) is not applicable. It is to be noted that the decision in Ram Awadh case relates to a case where there was only an agreement. After the conveyance, the only question to be adjudicated is whether the purchaser was a bonafide purchaser for value without notice. In the present case the only issue



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that can be adjudicated is whether the appellants were bonafide purchasers for value without notice. The question whether the appellants were ready and willing is really of no consequence. In Ram Awadh case the question of the effect of a completed sale was not there. Therefore, that decision cannot have any application so far as the present case is concerned. Once there is a conveyance the concept would be different and the primary relief could be only cancellation.”

17. In *Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and others*, reported in 2021 SCC Online SC 365, the another three member of Bench of the Hon'ble Apex Court after referring to *Ram Awadh (Dead) by Lrs and others Vs. Achhaibar Dubey and another and M.M.S. Investments, Madurai and others Vs. V.Veerappan and others* has taken a view that the defence of readiness and willingness is available to the subsequent purchaser. The relevant observation of Apex Court reads as follows:

“10. However, the fact remains that the entire perspective with which the matter was considered by the High Court was clearly erroneous and as the observations made by the High Court in paragraph 76 disclose, the High Court went on the footing that it was not open to the appellant i.e., subsequent purchaser to raise any submissions on the issue of



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readiness and willingness. Thus, the judgment under challenge clearly fell in serious error."

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Therefore, the three member Bench of the Hon'ble Apex Court in ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and others***, concurred with the earlier view of ***Ram Awadh (Dead) by Lrs and others Vs. Achhaibar Dubey and another***.

18. In such circumstances, this Court has no difficulty in coming to the conclusion that the defence of readiness and willingness is available to the subsequent purchaser of the suit property also. In the case on hand, the defence of readiness and willingness was specifically raised by the deceased first defendant, who is the power agent of the original owner. The appellant herein is the subsequent purchaser of the suit property and he is only stepping into the shoes of the original owners. Therefore, as per the law laid down by the Hon'ble Apex Court in the cases of ***Ram Awadh (Dead) by Lrs and others Vs. Achhaibar Dubey and another*** and ***Kadupugotla Varalakshmi Vs. Vudagiri Venkata Rao and others***, the appellant, who is the subsequent purchaser, is entitled to question the readiness and willingness of the first respondent.



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19. In view of the discussion made earlier, the question of law No.2 framed at the time of admission is answered in favour of the appellant and against the first respondent. Accordingly, the Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below granting a decree for specific performance. However, the first respondent is entitled to the refund of advance amount of Rs.1,00,000/- at the rate of 7.5% from the date of suit to the realization of amount.

20. a) In the result, the Second Appeal is allowed by setting aside the judgment and decree passed by the Courts below with regard to the main prayer of specific performance relief.

b) The first respondent/plaintiff is granted the alternative prayer for return of advance amount of Rs.1,00,000/- with 7.5% interest from the date of suit to till date of realization.



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