



OSA.No.296 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2023

CORAM

THE HONOURABLE Mr.JUSTICE **R.SUBRAMANIAN**
and

THE HONOURABLE Mrs.JUSTICE **R.KALAIMATHI**

Original Side Appeal No. 296 of 2017

Professional Management of Constructions
Represented by its Proprietrix
Mrs.Seeta Ramaraju,
10, First Floor,
829, Anna Salai, Chennai-600 002.

... Appellant

Versus

1. Estate of Irussammal
Rep. by her administer P.Anbuezhian
No.50, 59th Street, 10th Sector,
K.K.Nagar, Chennai-600 078.
2. Estate of Alamelu
Rep. by her administer P.Anbuezhian
No.50, 59th Street, 10th Sector,
K.K.Nagar, Chennai-600 078.
3. Kamatchi
4. C.Munusamy
5. Chinnammal
6. Govindammal
7. C.Radha
8. C.Krishnan
9. Anbuezhian
10. S.Perumal
11. R.Dhanasekaran
12. C.Shankar



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13. Vijaya
14. Chitra
15. Valli
16. Angammal

... Respondents

PRAYER: Original Side Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Clause 15 of the Letters Patent, against the judgment and decree dated 23.03.2017 made in C.S.No.41 of 2003.

For Appellant : Mr.R.Thiagarajan

For Respondents : Mr.I.Arokiasamy for RR1 to 9
Mrs.S.T.P.Kuilmozhi for R10
Ms.I.Malar Ravichandran for R11
R12 to R16- served – No appearance

J U D G M E N T

(Judgment of the Court was delivered by ***R.SUBRAMANIAN, J.***)

The plaintiff is on appeal aggrieved by the dismissal of the suit for specific performance on contract. The facts that led to the filing of the suit are as follows:-

- (i) The defendants 1 to 8 were the owners of the suit property and other properties situated in the vicinity of the suit property.



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They had entered into an agreement with one Perumal [10th defendant in the suit] for sale of the said properties. They had also entered into an agreement of sale with the plaintiff on 12.01.1998 through the 9th defendant, who is their power agent for sale of an extent about 1 acre out of 1 acre 43 cents situate in Survey Nos.171 and 172, Urapakkam Village. The total consideration that was agreed to be paid was Rs.17,00,000/-. A period of four months was fixed by the parties for performance of the agreement. On execution of the agreement, a sum of Rs.5,00,000/- was paid as advance and it was agreed that a further sum of Rs.3,50,000/- would be paid by 29.02.1998. The agreement also contains a clause enabling the purchaser to realign or change the road areas except 23 feet wide road meant for public and common use for the owners of the First Schedule property. Clause 10 of the agreement provides for construction of a Culvert or Bridge connecting GST Road with the Udayasurian Nagar Main Road, so as to enable the purchaser to have access to GST Road. It is not in dispute that the plaintiff paid a sum of Rs.3,50,000/- during March 1998 and 3 sale deeds were executed i.e., an extent of 22.25 cents was conveyed under Ex.P8,



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an extent of 13.20 cents was conveyed under Ex.P9 and an extent of 7.00 cents was conveyed under Ex.P10 on 27.03.1998. Thereafter, disputes arose between the parties and there were exchange of letters and legal notices. Ultimately, the 9th defendant-the Power of attorney wrote to the plaintiff on 19.08.2002 requiring the plaintiff to pay the balance of consideration of Rs.8,50,000/- (Rupees Eight lakhs and fifty thousand only) and take the sale deed. The plaintiff, however issued a legal notice on 23.09.2002 requiring further documents, encumbrance certificate etc., and also pointing out that there is a possibility of a suit that was dismissed for default on 05.07.2002 being restored. Claiming that the said legal notice was not complied with, the plaintiff has come up with the present suit contending that the plaintiff has always ready and willing to perform her part of the contract and it was the defendants, who had delayed the performance.

(ii) The 9th defendant filed written statement on behalf of the other defendants contending that the plaintiff was never ready and willing to perform her part of the contract. It was also claimed that



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the construction of the Culvert was not a *sine qua non* for performance of the suit agreement dated 12.01.1998.

2. It was further contended that the plaintiff had harped upon the insignificant litigation despite knowing that the 9th defendant was the power of attorney of the plaintiffs in that suit also. It was also contended that even after it was brought to the notice of the plaintiff that the suit in O.S.No.281 of 1993 was dismissed for default on 05.07.2002 it had not come forward to pay the balance consideration. It was also contended that the suit is barred by limitation.

3. On the above pleadings, the Trial Court framed the following issues:-

1. Whether the suit is barred by law of limitation?
2. Whether the plaintiff has always been ready and willing to perform its obligations as per the agreement of sale deed 12.01.1998?
3. Whether the time is the essence of the contract?
4. Whether the defendants have committed breach of the agreement of sale dated 12.01.1998?



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5. Whether the defendants 11 to 16 are not bound by the terms of agreement of sale dated 12.01.1998?
6. Whether the defendants are not liable to deliver the original title deeds pertaining to the suit schedule property for effectual implementation of the terms of the agreement for sale dated 12.01.1998?
7. Whether the plaintiff is entitled to the relief of specific performance?
8. Whether the 11th defendant is a *bona fide* purchaser of the suit schedule property for value and without notice of the sale agreement dated 12.01.1998?
9. Whether the plaintiff is entitled to the relief of mandatory injunction?
10. To what reliefs the parties are entitled?

4. While the plaintiff was examined as PW1 and Exs.P1 to P34 were marked, the 10th defendant-Perumal was examined as DW1 and Exs.D1 to D6 were marked. The 11th defendant, who is a subsequent purchaser contended that he is a *bona fide* purchaser for value without notice of the subsisting agreement. He, however, did not enter the box to depose.



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5. It was agreed before the Trial Court that the suit is within limitation. Therefore, the Trial Court did not go into issue no.1. However, on issue no.2, the Trial Court concluded that the plaintiff was not ready and willing to perform her part of the contract and it also concluded that the plaintiff has committed breach of contract and hence, she is not entitled to specific performance. Hence, the appeal.

6. We have heard Mr.R.Thiagarajan, learned counsel appearing for the appellant, Mr.I.Arokiasamy, learned counsel appearing for the respondents 1 to 9, Mrs.S.T.P.Kuilmozhi, learned counsel appearing for the 10th respondent and Mrs.I.Malar Ravichandran, learned counsel for the 11th respondent.

7. Mr.R.Thiagarajan, learned counsel appearing for the appellant would vehemently contend that in view of the conduct of the parties, time could not be considered as the essence of the contract. He would also point out that the defence on limitation has been given up before the Trial Court. The essence of the submissions of Mr.R.Thiagarajan are based on Clauses 6 & 10 of the agreement. While clause 6 permits the purchaser to realign and change the road areas, Clause 10 requires the respondents namely the



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vendors and the prior agreement holder to construct the Culvert connecting the Udayasurian Nagar Main Road and GST Road. According to Mr.R.Thiagarajan, a reading of clause 10 makes construction of the Culvert a *sine qua non* for the performance of the agreement. He would also point out that the pendency of the suit in OS.No.281 of 1993 was totally suppressed and therefore, till such time the encumbrance viz., the pending suit was cleared, he was not bound to perform his part of the agreement. The learned counsel would also submit that the conduct of the parties in this case particularly, the correspondence between the plaintiff and 9th defendant, which culminated in the letter dated 19.08.2002 would show that the 9th defendant, who is the power agent for defendants 1 to 8, the owners of the property had in fact waived the right to cancel the agreement upon the expiry of the time fixed under the agreement and had by his conduct extended the time fixed for performance of the agreement. Therefore, according to Mr.R.Thiagarajan, the Trial Judge was not right in dismissing the suit on the ground that the plaintiff was not ready and willing to perform her part of the contract. Mr.R.Thiagarajan, would also fault the defendants for not having examined the 9th defendant, who is the power agent or anyone of the owners namely defendants 1 to 8. The learned counsel would also point out the total



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absence of the evidences on the side the 11th defendant to establish that he is a *bona fide* purchaser for value without notice.

8. Inviting our attention to Section 19 of Specific Relief Act, learned counsel would submit that under Clause (b) of Section 19, only a person, who is a purchaser without notice of earlier agreement, that too in good faith, will have to prove that fact. In the absence of any evidence on the part of the 11th defendant, according to Mr.R.Thiagarajan would be fatal to the claim of the 11th defendant that he is a *bona fide* purchaser for value without notice of the contract.

9. Contending contra, Mr.I.Arokiasamy, learned counsel appearing for the respondents/defendants 1 to 8 would submit that the plaintiff was never ready and willing to perform her part of the contract. Inviting us to the various correspondence between the parties, which have been produced before the Trial Court as Exs.P12, P13, P14, P15, P16, P17, P18, P19, P20, P21, P22, P23, P24, P25 and P28, P29, P30, P31 & P32, Mr.I.Arokiasamy, learned counsel would submit that the conduct of the plaintiff for over a period of four years would show that the plaintiff was only interested in



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dragging on the proceedings and buying time. The learned counsel would point out that even after the letter dated 19.08.2002, wherein the 9th defendant namely, the power agent of defendants 1 to 8 had made it very clear that the plaintiff should pay the balance of consideration within 15 days. The plaintiff had not chosen to pay the balance consideration, but has again issued a legal notice on 23.09.2002 making untenable demands including a proof of title completely ignoring the fact that nearly half of the property that was agreed to be sold under the suit agreement has been purchased by the very plaintiff even in the year 1998.

10. He would also submit that in a suit for specific performance, it is for the plaintiff to aver and prove that she was always ready and willing to perform her part of the contract. He would submit that a plain reading of Clause 10 of the agreement would show that the construction of the Culvert was never intended to be a *sine qua non* for performance of the agreement. According to him, it is only a additional facility that has to be provided. Adverting to clause 6 of the agreement, the learned counsel would submit that clause 6 of the agreement enables the purchaser to realign the road, which has already been done by the purchaser from and out of the 42 cents that was conveyed to him under Exs.P8, P9 and P10.



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11. Substantially adopting the arguments of Mr.I.Arokiasamy, Mrs.S.T.P.Kuilmozhi, learned counsel appearing for the 10th defendant would submit that despite the fact that a long rope was extended by the 9th defendant, the plaintiff was never ready and willing to perform her part of the contract. Faulting the plaintiff for her conduct in only addressing letters and notices and not coming forward to take the sale deed, the learned counsel would submit that the plaintiff by her conduct has lost the right to have the agreement specifically enforced.

12. Mrs.I.Malar Ravichandran, learned counsel appearing for the 11th defendant would substantially adopt the arguments of the other two counsel and also reiterate that 11th defendant is the *bona fide* purchaser for value without notice of the agreement.

13. From the arguments advanced at the bar, the following points arise for consideration in this appeal:-

1. Whether the plaintiff has established that she was always ready and willing, in terms of Section 16(c) of the Specific Relief Act, to perform her part of the contract?



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2. Whether the 11th defendant is a *bona fide* purchaser for value without notice?

14. **Point No.1:-** The agreement is dated 12.01.1998. The total consideration fixed for Rs.17,00,000/-. In advance of Rs.5,00,000/- was paid on the date of the agreement and a further sum of Rs.3,50,000/- was paid subsequently and it is not in dispute that 42.45 cents of land out of 100 cents, which was agreed to be conveyed was conveyed to the plaintiff under three sale deeds dated 27.03.1998 and exhibited as Exs.P8, P9, P10. We should point out at this juncture though the total consideration for Exs.P8, P9 & P10 is only Rs.2,97,150/-, there is evidence to show that the agreed price was Rs.8,50,00/- for half of the property and the same is not disputed by any of the parties. The sale deeds were taken at the guideline value in order to avoid higher stamp duty. But the validity of the sale deeds is not in issue before us and both the parties do not dispute those sale deeds. The plaintiff would also concede that Rs.8,50,000/- was the price of the 42.45 cents that was conveyed. As far as the remaining property is concerned, clause 5 of the agreement states that the consideration should be paid within four months. Admittedly, the consideration was not paid within four months. The plaintiff



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raised the issue regarding pendency of the O.S.No.281 of 1993. The defendants had sent a legal notice even as early as 04.08.1998, which was marked as Ex.P15 pointing out that the time for performance had expired and calling upon the plaintiff to pay the balance within one week and take the sale deed and informing that failing payment the agreement would stand cancelled. To this, a reply was sent by the plaintiff on 12.08.1998 stating that the culvert work has not been completed. There is a rejoinder issued by the counsel on 29.08.1998 reiterating that the culvert work has been completed and the litigation in O.S.No.281 of 1993 has nothing to do with the property in question and in any event, the 9th defendant has got a power of attorney from the plaintiff in the suit also. The plaintiff sends a reply to that notice on 07.09.1998 vide Ex.P18, wherein the pendency of the suit is brought up again. The 9th defendant on 19.03.1999, under Ex.P20, informs the plaintiff to meet him before 27.03.1999 and get the details. He also points out that he has signed the papers for sanction by the DTCP even one year prior to the said letter. On 22.03.1999 vide Ex.P21, the plaintiff states that once the 9th defendant completes all the compliance as agreed, she would pay the balance of consideration within seven days and take the sale deeds. On 19.06.2000 the plaintiff writes to the 9th defendant, who is the



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power of attorney offering to return the land, which has already been sold and take back the money. The said offer reads as follows:-

“At this juncture, we have left with no other option except to pay you the balance and take the litigation of encumbrance free land from you or to take back our money calculated as said above. In the case of returning money, we are ready to register the lands back to you. There are two options left for you to act. It is now, you have to choose any one option and inform us to settle the matter once for all. Your are requested to reply back mentioning your choice within 15 days from the date of receipt of this communication.”

15. In his reply dated 27.07.2000 to the letter dated 19.06.2000, the 9th defendant accepts the offer subject to the condition that the expenses for re-conveyance should be borne by the plaintiff. Thereafter, the plaintiff issues another legal notice through a different lawyer dated 16.01.2001 raising the issues of non-compliance of the certain clauses of the agreement and non furnishing of the original documents. By the said notice, she calls upon the 9th defendant to produce undertaking letters from the defendants 1 to 8 stating that the power of attorney executed by them is still in force and also to hand over the original documents, which is agreed upon and to clarify the



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discrepancies in the extent of the schedule mentioned property, within 15 days from the receipt of this notice. He has also stated that in default, the plaintiff will be forced to institute a suit for specific performance and also initiate criminal case against the noticees for having suppressed the pendency of the civil proceedings. Again on 03.09.2001, the plaintiff writes to the 9th defendant stating that she has always been ready and willing to perform her part of the contract with a rider that the property should be free from encumbrance. The 9th defendant sends a reply to the counsel expressing the inability to get undertakings from the legal heirs. On 06.07.2002, the 9th defendant again requests the plaintiff to pay the balance consideration within 15 days and take a sale deed, to which the plaintiff sends a reply seeking 25 days time to verify the documents. In response to this, the 9th defendant by his letter dated 19.08.2002 marked as Ex.P32 requires the plaintiff to pay the balance of sale consideration within 15 days and take the sale deed. In the said letter, it is specifically pointed out that the demand for examination of documents by the lawyer is only a ruse adopted by the plaintiff to delay performance of the agreement and it is not *bona fide*, since the plaintiff has herself purchased 42.45 cents from the very defendants in the year 1998. Even thereafter, the plaintiff does not come forward to pay the money and



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take the sale deed, she chooses to issue a legal notice on 23.09.2002 again raising the question of the possibility of restoration of OS.No.281 of 1993, which was dismissed for default and so called defects in the title of the defendants. The cumulative effect of the entire correspondence between the parties, which we are referred to above, would show that the plaintiff has been intently and with a view to delay payment of the balance of sale consideration addressing letters raising one or the other issues. No doubt the conduct of the defendants cannot also be set to be free from flaws, we find that the plaintiff's conduct in harping upon the suit that was pending is fully unwarranted. It has been repeatedly pointed out by the 9th defendant that the plaintiffs in the suit have also given a power of attorney to the 9th defendant and the 9th defendant can act on their behalf also. Despite such clarifications, the plaintiff went on insisting that the pendency of the suit would amount to an encumbrance over the property and delayed execution of the contract. Even after being informed in very clear terms on 19.08.2002 that the plaintiff's insistence on proof of title is an attempt to delay the contract the plaintiff chose to issue a legal notice on 23.09.2002 calling upon the defendants to produce documents. We cannot ignore the fact that the plaintiff had purchased an extent of 42.45 cents out of 100 cents of land



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covered by the agreement from the very defendants 1 to 8 represented by their power of attorney, the 9th defendant.

16. No doubt time is not the essence of the contract in matters relating to specific performance of immovable property unless, the parties had specifically agreed that time would be the essence of the contract. Courts have held that despite there being clause in the agreement, the time would be the essence of the contract, if it is shown that the parties did not intend to be the essence of the contract, then the Courts can not non suit the plaintiff on the ground that the plaintiff has not offered to perform the contract within the period indicated in the agreement. We are in agreement with the contention of Mr.R.Thiagarajan that the conduct of the parties here would show that they never intended time to be the essence of the contract though the agreement said so. However, as a plaintiff in a suit for specific performance, it is for the appellant to establish that she was always ready and willing to perform her part of the contract. We do not see any *bona fides* in the claims made by the plaintiff on the pendency of the suit in OS.No.281 of 1993 and also requiring the defendants to prove their title and also produce encumbrance for a period of 30 years etc., after having purchased the part of the property from the very defendants in the year 1998. We are of the firm



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view that all these have been brought about only to delay the payment and gain undue advantage. We are therefore in entire agreement with the findings of the Trial Court in its conclusion that the plaintiff was never ready and willing to perform her part of the contract. Once it is found that the plaintiff was never ready and willing to perform her part of the contract, the suit has to necessarily fail.

17. Mr.R.Thiagarajan, learned counsel would also rely upon the fact that under Ex.P34, after obtaining orders from this Court, the plaintiff has deposited the balance of consideration. Once we find that the plaintiff was not willing to perform her part of the contract, the deposit made after three years after institution of the suit will not cure the defect. We find that the very application for deposit has been taken out in 2006.

18. **Point No.2:-** As far as the 11th defendant is concerned, though he has filed a written statement claiming that being the *bona fide* purchaser for value without notice, he has not gone into the box to establish his claim. We therefore, conclude that he would not be entitled to protection offered under clause (b) of Section 19 of The Specific Relief Act.



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19. In view of our finding on point no.1, the appeal has to be dismissed and it is accordingly, dismissed. We make it clear that the plaintiff would be entitled to take back the money deposited by her with any interest that has accrued so far. We however make no order as to costs in the appeal.

(R.SUBRAMANIAN, J.) (R.KALAIMATHI, J.)
26.07.2023

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Speaking order

To
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