



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **19.04.2023**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S(MD)NO.204 OF 2009

and

M.P(MD)No.1 of 2009

S.P.Sundaram

:Appellant/Plaintiff

.VS.

1.B.Ashok Babu

2.Malarselvi

3.A.Lakshmikanth

4.A.Vinodh Balaji

5.K.Rajamoorthy

:Respondents/Defendants

PRAYER: Appeal Suit filed under Section 96 of the Civil Procedure Code against the judgment and decree made in O.S.No.3 of 2005, dated 21.4.2009, on the file of the Additional District Court(Fast Track Court , Dindigul dismissing the suit filed by the appellant in O.S.No.3 of 2005.

For Appellant

:Mr.S.Anand Chandrasekar
for M/s.Sarvabhauman Associates

For Respondents
1 and 2

:No appearance



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For Respondents 3 and 4 :No appearance

For Respondent-5 :Mr.R.Sundar

JUDGMENT

Aggrieved over the dismissal of the suit filed for specific performance and granting only the alternative relief of refund of the advance amount, the present Appeal Suit came to be filed by the unsuccessful plaintiff.

2.The parties are referred to herein as per their ranking before the trial Court.

3.The brief facts leading to the filing of the appeal suit is as follows:

The suit properties are originally allotted to the first defendant in a partition deed, dated 28.04.1992. Eversince such allotment, the defendants 1 and 2 were in enjoyment of the properties. They agreed to sell the properties to the plaintiff for a total sale consideration of Rs.12,00,002/- and received a sum of Rs. 1,50,000/- as advance amount on 2.6.2003 and also handed over possession of the suit property to the plaintiff in part performance of the contract. It is agreed between the parties that the sale shall



be completed within a period of four months from the date of sale agreement. The Plaintiff is also ready and willing to pay the remaining sale consideration, however, the defendants have demanded extra amount to clear certain debts and evaded the sale. When the matter stood thus, on 10.10.2003, the first defendant received a sum of Rs.1 lakh in order to clear the debt of one Fathima and on 23.10.2003, he has received another sum of Rs.50,000/- from the plaintiff. When the matter stood thus, the first defendant has filed a suit in O.S.No.143 of 2003 for permanent injunction against the plaintiff. The Plaintiff is always ready and willing to perform his part of contract. The defendants, however, evaded the execution of the sale. The defendants also issued a legal notice on 2.12.2003 with false allegations and the same was replied by the plaintiff on 13.03.2003. The defendants 3 and 4 has also filed a suit for partition and obtained an exparte decree which is not binding on the plaintiff. Hence the suit.

4.It is the further case of the plaintiff in the reply statement that the defendants 2 and 3 also aware of the sale agreement and only with their consent, the sale agreement was executed and they stood as witnesses. Having stood as witnesses, they filed a suit for partition and obtained a decree and it is not open to the defendants 1 and 2 to dispute the suit agreement.



5.The defendants admit the suit agreement stating that they sent a notice on 2.12.2003 repudiating the contract. Further the allegation that payment of Rs.1 lakh to clear the debt of one Fathima is also denied. The defendants also filed a suit and also denied the allegation that defendants claimed extra amount. Hence the defendants prayed for dismissal of the suit.

6.The defendants 3 and 4 filed a suit to the effect that they have share in the suit property and the plaintiff has conveniently omitted to make them as a party in the suit. They already filed a suit in O.S.No.271 of 2002 and obtained a decree in respect of their share. Hence opposed the suit.

7.The fifth defendant had purchased the property on 6.3.2006 from the defendants 1 and 2 and according to him, he is a bonafide purchaser for value, without notice and he is enjoying the property.

8.Based on the above pleadings, the following issues are framed for consideration:

1.Whether the fifth defendant is a bonafide purchaser for value without notice?



2. Whether the properties are joint family properties of the defendants 3 and 4?

3. Whether the first defendant had executed an agreement for sale with the consent of defendants 3 and 4?

4. Whether the suit is barred by limitation as against the defendants?

5. Whether the suit is maintainable without setting aside the decree and judgment in O.S.No.271 of 2004?

9. Before the trial Court, on the side of the plaintiff, P.W.1 to P.W.4 were examined and Ex.A1 to Ex.A14 were marked. On the side of the defendants, D.W.1 to D.W.3 were examined and Ex.B1 to Ex.B4 were marked.

10. Based on the evidence and materials, the trial Court has come to the conclusion that the suit property is a joint family property of defendants 3 and 4. They also obtained a decree in their favour. Therefore, Ex.A1 cannot be enforced in respect of the suit properties, besides the plaintiff has not exhibited his readiness and willingness to perform the part of his contract from the date of



inception of the sale agreement and hence, dismissed the suit for specific performance and granted the alternative relief of refund of advance amount. Challenging the same, the present appeal suit came to be filed by the unsuccessful plaintiff.

11.The learned counsel for the appellant mainly contended that the execution of the agreement namely, Ex.A1 is not disputed. Though four months time is stipulated to pay the remaining sale consideration, the conduct of the parties assumes significance in this matter. The first defendant having executed the document and also received the subsequent payments of Rs.1 lakhs on 1.10.2003 and another Rs.50,000/- on 23.10.2003.Ex.A2 filed really show that the amount has been paid in order to clear the debt of one Fathima. As the first defendant demanded extra amount, the sale could not be completed within the time stipulated and there were negotiations between them. Therefore, merely the sale is not completed within the time agreed in the sale agreement, the same may not be a ground to non suit the plaintiff. The very conduct of the defendants filing a suit for permanent injunction against the plaintiff and another for partition of the alleged share of the defendants 3 and 4 clearly exhibit the very intention of the defendants to defeat the sale agreement. It is the contention that the defendants 3 and 4 also signed as witnesses in the contract.



Therefore their contention that the properties are joint family properties cannot be countenanced. Hence his contention is that the plaintiff has shown his readiness and willingness from the date of the sale agreement and hence, entitled for the relief of specific performance. Further, the fifth respondent has purchased the suit property during the pendency of the suit and his purchase is not valid and hit by the doctrine of lis pendens. He is not a bonafide purchaser for value without notice. Hence prayed for allowing the appeal.

12.The learned counsel for the fifth respondent according to him, the trial Court has analyzed the entire evidence and found that the plaintiff has never exhibited the readiness and willingness from the date of the sale agreement. Further, the defendants 3 and 4 have impleaded themselves as parties in the suit. According to him, admittedly, the suit properties are joint family properties which was allotted to the first respondent in a partition deed. Therefore, one of the co owner, the first defendant is not entitled to sell the property. Be that as it may, the defendants 3 and 4 have also filed a suit for partition and obtained a decree for 2/3rd share in the properties. Therefore, when the competent Civil Court already granted a decree determining the share of the defendants 3 and 4, the suit agreement cannot be enforced and further, his



contention that despite a legal notice was sent by the defendants on 2.12.2003, repudiating the agreement on the ground of time and time got expired and even then, the plaintiff has not taken steps to pay the balance sale transaction. The defendants have also filed a suit for permanent injunction against the plaintiff. Even then, the suit has been filed by the plaintiff with much delay ie., more than one year. This conduct of the plaintiff shows that he has not shown his readiness and willingness to perform his part of contract. Hence the trial Court has rightly held that the plaintiff is not entitled for the relief of specific performance and accordingly negated the relief of specific performance and granted the alternative relief of refund of advance amount.

13. In the light of the above submissions, now the point that arose for consideration in the appeal are as follows:

1. Whether the suit properties are joint family properties of the defendants 3 and 4?

2. Whether the time as agreed between the parties to the contract, is the essence of the contract?

3. Whether the plaintiff was always ready and willing to



perform his part of contract?

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4.If so, whether the plaintiff is entitled for the relief of specific performance?

Points 1 to 4:

14.The suit agreement- Ex.A1, dated 2.6.2003 is executed by the defendants 1 and 2. The execution of the agreement is not disputed. On a careful perusal of the same and the recital found in the document makes it very clear the suit properties are originally allotted to the first defendant in a partition effected among his brother and father on 28.4.1992. Further, the recitals would show that the parties agreed to sell the properties for a total sale consideration of Rs.12,00,002/- and an advance amount of Rs. 1,50,000/- has been paid. Though it is recited that the possession was handed over to the plaintiff on the date of sale agreement itself, on a perusal of the entire evidence shows that there is no material whatsoever available to show that the plaintiff is in possession of the suit property. On the other hand, the first defendant filed a suit for permanent injunction against the plaintiff in O.S.No.154 of 2003 on 22.12.2003. It is further to be noted that the sale agreement is only an unregistered document.



15. To claim part performance of contract on the possession on the basis of an unregistered document is not permissible in view of the amendment brought in under Section 17(1A) of the Registration Act. The same reads as follows:

Section 17 in The Registration Act, 1908

17. Documents of which registration is compulsory.

—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a)

(b)

(c)

(d)

²⁴ [(e).....]

²⁷ [(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the



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commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

Therefore, admittedly, there is no material available on record to show that possession was handed over to the plaintiff on the date of sale agreement. When the document is compulsorily registered for claiming right on the basis of the alleged possession, merely on the basis of recital in the contract about the possession, possession of the plaintiff cannot be presumed.

16. Be that as it may, it is specifically agreed between the parties to the contract that the remaining sale consideration shall be paid within a period of four months from the date of sale agreement and further, it is also agreed between the parties that in the event of the remaining sale consideration not paid, the amount paid as advance is forfeited. Accordingly, such a clause of forfeiture makes it very clear that the parties have intended to make the time as the essence of the contract. Though in general, as far as the immovable properties are concerned, time is not the essence of the contract, but the time agreed specifically between the parties to the contract, cannot be ignored altogether. In this case,



the parties have not only agreed for specific time to complete the entire sale transaction but has also agreed for forfeiture clause forfeiting the advance amount in the event of non-complying with the conditions stipulated in the sale agreement. Therefore, time is really the essence of contract in this case.

17. The suit has been filed against the defendants 1 and 2 and the suit agreement is executed by the first defendant and his wife. Though the defendants 3 and 4 is also shown as a witness in the documents, it is relevant to note that mere citing as a witness in the contract, it cannot be taken as execution of the contract itself by them. At the most, when a person having tangible interest in the immovable property and signing as a witness in the contract relating to such property, such party is estopped from taking a different stand that he has no knowledge about the contract. But certainly, signing as a witness will not amount to execution of the contract. It is the specific stand of the defendants 3 and 4 who have impleaded themselves at a later point of time and took a stand that the properties are joint family properties and they have share along with father. In fact, they filed a suit for partition and also the said suit is decreed in their favour. This has been spoken to by them in their evidence and pleadings. Further, the sale agreement- Ex.A1 itself clearly shows that only through partition, the property



has been allotted to the first defendant and pursuant to the same, decree has also been obtained by the defendants 2 and 3 from a competent Civil Court. Unless the judgment of the Civil Court is set aside, it has to be necessarily to be held that the properties are joint family properties in which the defendants 2 and 3 have share in the property.

18.Now, it has to be seen that whether the plaintiff has exhibited readiness and willingness from the date of the contract till the filing of the suit?

19.Admittedly, as discussed above, four months time has been agreed between the parties. Four months time will expire on 1.10.2003. On the last day of expiry of time, it is stated that a sum of Rs.1 lakh was paid to the first defendant. The payment of the amount is also not disputed. Apart from that, another sum of Rs. 50,000/- was paid on 23.10.2003. Though these two payments may lead to the inference that the time is not the essence of contract, the fact remains that the defendants have issued a legal notice on 2.12.2003, which was marked as Ex.A4, stating that though the defendants are ready and willing to execute the sale deed on receipt of the balance sale consideration, the plaintiff has not chosen to purchase the property and not performed his part of



obligation. Hence, the notice repudiating the agreement has been sent on 2.12.2003. The same has been replied by the plaintiff under Ex.P5, dated 13.12.2003, wherein, it is stated that though time stipulated in the agreement got expired, as the defendants have demanded extra amount other than the agreed amount to settle the various debts, sale could not be completed within four months. Having sent the reply notice on 13.12.2003, the plaintiff has slept over the matter and has not taken any steps, except giving a publication in this regard on 17.05.2004, marked as Ex.A6. Just giving a publication, the plaintiff has not taken any further action. It is further to be noted that the defendant No.1 also filed a suit for permanent injunction against the plaintiff. The said suit has been not pressed by the defendant No.1 on 27.4.2006. Even after such action initiated by the defendants 1 and 2 not only to repudiate the contract, but also filing a suit against the plaintiff which was pending till 2006, the plaintiff still has not taken any effective steps to perform his part of contract.

20.It is relevant to note that the suit has been filed for the first time on 1.2.2005, with a delay of more than a year, that too, after the notice has been sent by the defendants repudiating the very contract also has shown their intention acting against the plaintiff. The plainiff has filed the suit only on 1.2.2005 with a



delay. These facts clearly indicate that the plaintiff was never ready and willing to perform his part of contract from the date of the sale agreement. When the plaintiff came to know about the defendant's attitude in repudiating the contract, his immediate reaction should have been to file a suit for specific performance by depositing the balance sale consideration. But sleeping over the issue for more than a year and filing a suit with an inordinate delay of one year, makes it clear that the plaintiff was never ready and willing to perform his part of contract.

21. Readiness means the capacity to mobilise the fund. Willingness is the mental attitude to purchase the property or to complete the transaction. Both readiness and willingness has to go together, to seek for the specific relief of execution of the contract. Even if any of the act is absent, discretionary relief of specific performance cannot be granted to the plaintiff. Even after the hostile attitude shown by the defendant by sending legal notice as early as on 2.12.2003, followed by a suit for permanent injunction, the lethargic attitude on the part of the plaintiff in approaching the Court not in time clearly exhibit his conduct that he was never ready and willing to perform his part of contract. Further, even after filing of the suit, he has not chosen to take any steps to pay the remaining balance sale consideration. Further, the



plaintiff has also not taken any steps whatsoever to deposit the remaining sale consideration into the Court. Cumulative effect of all these would show that the plaintiff is disentitled to seek the relief of specific performance.

22. Much emphasise is also made with regard to the sale made in favour of the fifth respondent during the pendency of the suit. Admittedly, the fifth respondent had purchased the property on 6.3.2006 during the pendency of the suit. An alienation during the pendency of the suit would be subject to the decision of the suit. As the plaintiff has failed to establish his readiness and willingness to enforce his part of contract. Mere purchase made by the fifth respondent during the pendency of the suit will not make any difference.

23. In such view of the matter, this Court holds that the plaintiff is certainly not entitled to the relief of specific performance as sought for. The trial Court, has rightly rejected the main prayer for specific performance and this Court for the discussions as stated supra, confirmed the same. In fact, the trial Court has granted the alternative relief of refund of the advance amount with interest at the rate of 12% p.a., and the same is confirmed.



24. In the result, the appeal suit is dismissed, confirming the judgment and decree made in O.S.No.3 of 2005, dated 21.4.2009, on the file of the Additional District Court(Fast Track Court), Dindigul. No costs. Consequently, connected Miscellaneous Petition is closed.

19.04.2023

Index:Yes/No
Internet:Yes/No
NCC:Yes/No
vsn

To

1. The Judge,
Additional District Court,
Fast Track Court,
Dindigul.
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SATHISH KUMAR, J.

vsn

JUDGMENT MADE IN
A.S(MD)NO.204 OF 2009
and
M.P(MD)No.1 of 2009

19.04.2023