



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **21.03.2023**

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S(MD)NO.168 OF 2014

and

M.P(MD)No.1 of 2014

Murugesan

:Appellant/Plaintiff

.VS.

Habeeb Rahman

:Respondent/Defendant

PRAYER:First Appeal filed under Section 96 of the Civil Procedure Code against the judgment and decree made in O.S.No.1 of 2013, dated 11.08.2014, on the file of the Principal District Judge, Ramanathapuram.

For Appellant

:Mr.S.Srinivasaraghavan

For Respondent

:Mr.D.Senthil

JUDGMENT

Challenging the dismissal of the suit for specific performance, the present Appeal Suit came to be filed.

2.During the pendency of this appeal suit, an application has been filed to amend the plaint seeking alternative relief of return of



advance amount paid by the plaintiff to the defendant, by order dated 21.12.2022. According to the plaintiff, the prayer is amended for the alternative relief of refund of the advance amount already paid by the plaintiff.

3.The brief facts leading to the file of the above appeal is as follows:

The defendant being the owner of the suit property, agreed to sell the same for a total sale consideration of Rs.11 lakhs and entered into a sale agreement on 29.01.2010 and received a sum of Rs.10,000/-as advance amount, on the date of sale agreement.. Thereafter, the defendant received a sum of Rs.3 lakhs on 10.2.2010 and another sum of Rs.3 lakhs on 26.1.2010, totally a sum of Rs.6,10,000/- towards sale consideration. It is agreed between the parties that the sale should be completed within a period of three months from the date of the sale agreement. The plaintiff approached the defendant to receive the balance sale consideration, but he refused to receive the same. On the contrary, the defendant sent a legal notice, dated 6.3.2012 with false information stating that the sale agreement was cancelled and also agreed to refund the advance amount already received by him. The plaintiff has also sent a reply notice to the defendant that he is



alleged by the defendant?

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5. Whether the plaintiff is entitled to specific performance of contract?

6. On the side of the plaintiff, P.W.1 was examined and Ex.A1 to Ex.A4 were marked. On the side of the defendant, the defendant was examined as D.W.1 and Ex.B1 to Ex.B3 were marked.

7. The trial Court has found that though the recitals completely indicated that the time limit for execution of the sale however, the parties never intended that time is the essence of contract. However, the trial Court, on evidence, found that the plaintiff was never ready and willing to perform his part of contract and hence, rejected the suit for specific performance. Challenging the same, the present appeal suit is filed.

8. Now the learned counsel for the appellant mainly contended that there is no dispute with regard to the execution of the sale agreement and receipt of part of the balance sale consideration of Rs.6,10,000/-. Though there was some delay on the part of the plaintiff to perform his part of contract, the defendant himself has sent a legal notice marked under Ex.A1, dated 6.3.2012 that he was prepared to return the part of the sale



consideration. Therefore, it is his contention that once the part of sale consideration is admitted to be returned to the plaintiff, the appellant/plaintiff certainly is entitled to the alternative relief if the Court come to the conclusion that the plaintiff has not established the readiness and willingness on the part of the plaintiff. The learned counsel for the respondent would submit that as the defendant himself had cancelled the sale agreement by issuing a legal notice marked under Ex.A2, after two years of the time period, without challenging the cancellation of sale agreement, refund cannot be granted and the plaintiff is not entitled to refund of advance amount. It is his further contention that the trial Court has rightly found that the plaintiff is not ready and willing to perform his part of contract. Hence prayed for dismissal of the suit.

9. In the light of the above facts, the point for consideration arose in the above appeal is as follows:

1. Whether the appellant/plaintiff is entitled for the relief of return of advance amount paid by him to the defendant?

2. Whether without challenging the cancellation of sale agreement executed by the defendant, the plaintiff is entitled to claim refund of the advance amount paid by him?

3. To what other relief, the plaintiff is entitled to?



10. It is not in dispute that Ex.A1-Sale agreement was entered into between the parties for the sale of the suit property for a total sale consideration of Rs.11 lakhs. On the date of sale agreement, Rs.10,000/- was paid as advance amount. Thereafter another Rs.6 lakhs was paid in part and totally, a sum of Rs.6,10,000/- was received by the defendant/respondent. Though the parties agreed in the sale agreement that the sale shall be completed within a period of three months, but in the evidence, it is admitted that time stipulated in the sale agreement is only for namesake and they never intended that time is the essence of the contract. In such view of the matter, the trial Court has rightly found that the time is not the essence of contract between the parties. Be that as it may, the suit is laid for the relief of specific performance as well as for the alternative relief of refund of the advance amount already paid by the plaintiff. Now the plaintiff has amended the prayer for the alternative relief for refund of the advance amount. Though the time was never the essence of contract, the parties never intended that time is the essence of contract and that will not absolve the plaintiff to prove the willingness and readiness at the very inception of the suit and the present claim is an equitable relief which is discretionary in nature and the plaintiff has to prove the readiness and willingness from the very inception of the sale agreement till the same culminated into a sale deed. The overall



reading of the evidence would indicate that the plaintiff was never ready and willing to perform his part of contract. Though the parties are not intended to complete the sale within a period of three months and though it has been agreed in the agreement, it does not mean that the plaintiff can sleep over the issue for ever. Having paid the part of the sale consideration within a month, ie., on 10.2.2010 and 26.2.2010, after execution of the sale agreement, the plaintiff thereafter has not shown his readiness and willingness to perform his part of obligations. Further, there is no evidence to show that the plaintiff has the capacity to mobilise the remaining balance consideration and that he had sufficient means or capacity to mobilise the same, whereas, the defendant has issued a legal notice marked under Ex.A2, after two years indicating his mind that as the plaintiff has not paid the balance sale consideration for more than two years, he intend to cancel the sale agreement and also agreed to pay the advance amount already received by him. Only after issuance of Ex.A2 on 6.3.2012 to the plaintiff, the plaintiff suddenly wake up and issue the reply notice, dated 13.3.2012. This fact itself clearly indicates that the plaintiff has slept over the issue for more than three years without taking any steps to complete his part of contract as per the terms of the sale agreement.



11.The readiness and willingness are two distinct acts. The readiness is the capacity to mobilise the fund or raise the fund. Willingness is the mental attitude to complete the transaction. In the absence of both go together or the plaintiff failed to establish any one of the acts of readiness and willingness, is not entitled to the relief of specific performance. Therefore, the trial Court has rightly rejected his case for specific performance, which does not require any interference.

12.As far as the refund of advance amount, on a perusal of Ex.A2-Legal Notice, the defendant himself had admitted that he has received that amount and he has called upon the plaintiff to receive the sale consideration. Therefore, merely because the sale agreement could not be completed within the stipulated time and there was breach on both sides. Somehow or other, one cannot contend that the amount received towards sale consideration cannot be refunded. The defendant, having received the part of sale consideration, now cannot go back on his stand to the effect that since the sale agreement has been cancelled by issuance of a legal notice, he is not liable to pay the said amount. This Court, is of the view that such a stand will give unfair advantage to the defendant to keep the money of some one and will make him unjust enrichment at the cost of the plaintiff's money. In such view of the



matter, this Court is of the view that the transaction has failed for some reasons and the plaintiff has failed to pay the balance sale consideration and the same will utmost lead to the declining the grant of relief in his favour to enforce the part of contract and the same will not lead to undue advantage or unjust enrichment to the defendant. In such view of the matter, this Court is of the view that, the defendant, having admitted to pay the advance amount back to the plaintiff, the plaintiff is certainly entitled to refund of the advance amount paid to the defendant to the tune of Rs.6,10,000/- with reasonable rate of interest at 6% pa., from the date of suit.

13.For the reasons stated above, the appeal suit is partly allowed, decreeing the suit for the alternative relief of refund of part of sale consideration already paid by the plaintiff to the defendant and accordingly, the defendant/Respondent herein is directed to refund the part of sale consideration to the tune of Rs. 6,10,000/-with interest at the rate of 6% p.a from the date of suit till the date of realisation.Till such time, there shall be charge on the suit property.

14.It is now submitted by the learned counsel for the respondent/defendant that already the part of sale consideration has already been deposited before the trial Court and hence, the



learned counsel for the appellant/Plaintiff seeks permission of this Court to withdraw the same. The plaintiff/appellant is entitled to withdraw the same, on filing necessary application before the Tribunal. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

21.03.2023

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

To

- 1.The Principal District Judge,
Ramanathapuram.
- 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
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