



S.A.No.317 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 25.07.2024

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

S.A.No.317 of 2021

S.Elumalai

...Appellant

Vs.

1.N.Govindasamy
2.G.Sasikumar
3.G.Delipkumar

...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure Code, 1908 to set aside the Judgment and Decree dated 23.01.2019 in A.S.No. 27 of 2014, on the file of the Additional District Judge (Fast Track Court), Villupuram reversing the well considered Judgment and Decree dated 30.04.2013 made in O.S.No.30 of 2008, on the file of the Sub-Court, Gingee.

For Appellant : Mr. Ravichander D.

For Respondents : Mr.M.A.Srinivasan
for R1
RR2 & 3 – No appearance



S.A.No.317 of 2021

JUDGMENT

The plaintiff filed the above Second Appeal against the reversing judgment of the lower appellate court in the suit filed by him for specific performance and in the alternative to pay the plaintiff Rs.88,400/- with interest at 18% per annum.

2. The parties will be referred to as per their litigative status in the trial court.

3. The case of the plaintiff was that he entered into a sale agreement with the 1st defendant under Ex.A1 dated 28.01.2008 for a sale consideration of Rs.2,56,000/- and paid an advance of Rs.80,000/-. The plaintiff agreed to pay the balance consideration within a period of six months. The plaintiff stated that he approached the defendant several times to complete the sale by receiving balance sale consideration of Rs.1,76,500/- The plaintiff stated that though he was ever ready and willing to perform his part of the contract, the defendant evaded performance and therefore the plaintiff issued a legal notice under Ex.A2 dated 29.07.2008 requesting the defendant to perform his part of the contract. The defendant issued reply notice dated 04.08.2008 under Ex.A4 denying the sale agreement and therefore the plaintiff filed the suit for specific performance and



S.A.No.317 of 2021

other reliefs.

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4. The defendant in his written statement stated that he never intended to sell the property to the plaintiff and the amount of Rs.80,000/- was only a loan borrowed from the plaintiff. According to the defendant, the plaintiff while advancing the amount of Rs.80,000/- towards loan, took some signed blank papers, manipulated the same and created the suit sale agreement. The defendant denied that plaintiff was ever ready and willing to perform his part of the contract. The defendant stated that time was the essence of contract. The defendant further stated that as the plaintiff sent legal notice after expiry of time stipulated under the contract, he was not entitled to any relief under the alleged contract. The defendant referred to the forfeiture clause in the contract and stated that as the plaintiff approached the court after the time specified under the contract, the plaintiff was liable to forfeit the advance amount of Rs.80,000/- in terms of the contract. The defendant therefore contended that the suit deserved to be dismissed.

5. Before the trial court, the plaintiff examined himself as P.W1 and



S.A.No.317 of 2021

examined two other witnesses on his side. The plaintiff marked Ex.A1 to Ex.A4 in support of his case and the defendant examined two witnesses on his side but did not adduce any documentary evidence.

6. The trial court on an appreciation of the entire facts and the evidence, decreed the suit holding that the suit agreement was proved and that the plaintiff was ready and willing to perform his part of the contract and hence entitled to the relief of specific performance. The defendant filed the appeal before the lower appellate court and the lower appellate court after discussing elaborately the evidence on record held that though the sale agreement was valid, the sale agreement, Ex.A1 was not intended to be acted upon and that the plaintiff was not always ready and willing to perform his part of the contract and therefore not entitled to the relief of specific performance. The lower appellate court on the basis of the admission of the defendant that he was ready to return the amount of Rs.80,000/- received by him from the plaintiff along with interest directed the defendant to refund the advance amount along with interest at 12% p.a from the date of sale agreement till date of the plaint and 9% p.a from the date of plaint till date of decree and 6% per annum from the date of decree and till date of



realization. Aggrieved by the judgment and decree of the lower appellate court in declining the relief of specific performance the plaintiff has filed the above Second Appeal.

7. At the time of admission, the Second Appeal was admitted on the following substantial questions of law:

“1. Whether the Lower Appellate Court is correct in law in reversing the judgment and decree of the trial Court on the ground that the plaintiff has not demonstrated his readiness and willingness to proceed with the sale particularly when the notice has been issued as soon as six months period had come to end and the suit has been filed within 18 days of the reply notice from the defendant?

2. Whether there exist borrower – lender relationship between the parties and in the light of the admission of the plaintiff that he has lent a sum of Rs.5000/- to the defendant under a promissory notice after the execution of the agreement of sale viz., Ex.A1 and not adjusting this amount towards balance sale consideration?”

8. The learned counsel for the appellant submitted that the second



S.A.No.317 of 2021

substantial question of law is not agitated because the court below concurrently found that the suit sale agreement was genuine and not a loan transaction as pleaded by the defendant. The learned counsel submitted that the only question that remained to be decided in the Second Appeal was whether the lower appellate court was right in non suiting the plaintiff on the ground of readiness and willingness. The learned counsel referring to the pleadings and the evidence of the plaintiff submitted that the plaintiff had not only pleaded but also deposed that he was ever ready and willing to perform his part of the contract and it was the defendant who evaded performance and therefore the judgment of the lower appellate court was unsustainable. The learned counsel therefore submitted that the lower appellate court ought to have granted the relief of specific performance.

9. The learned counsel for the 1st respondent on the other hand submitted that apart from the pleadings and the self-serving statement of the plaintiff in his evidence, there was absolutely no independent evidence to show that the plaintiff was ever ready and willing to perform his part of the contract. The learned counsel further submitted that lower appellate court having considered the entire evidence in proper perspective, this Court should not interfere with the findings of fact of the



S.A.No.317 of 2021

lower appellate court.

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10. I have heard both the learned counsels and I have perused the materials placed on records.

11. The plaintiff entered into a sale agreement under Ex.A1 dated 28.01.2008 with the defendant for sale of the suit property for sale consideration of Rs.2,56,000/- and paid an advance of Rs.80,000/- on the same day. The plaintiff had further agreed to pay the balance sale consideration within six months from the date of the agreement. Though the plaintiff approached the defendant several times to execute the sale deed by receiving the balance sale consideration, the defendant evaded performance and therefore the plaintiff issued the legal notice Ex.A2 dated 29.07.2008. The defendant sent a reply denying the sale agreement and therefore the plaintiff was constrained to file the suit for specific performance and other reliefs.

12. The defence of the defendant was that the sale agreement was actually a



S.A.No.317 of 2021

loan transaction. The defendant borrowed a sum of Rs.80,000/- from the plaintiff for which the plaintiff took some signed blank papers as security, manipulated the same and created the sale agreement. The defendant therefore contented that the suit sale Agreement was concocted one. The defendant even otherwise stated that the plaintiff did not act in strict terms of the contract and was also not ever ready and willing to perform his part of the contract and hence the plaintiff was not entitled to the discretionary relief of specific performance.

13. Both the courts below found that the suit sale agreement was valid and that it was not a loan transaction. The learned counsel for the appellant in view of the said findings submitted that the first substantial question of law alone remained for consideration in the Second Appeal (i.e) whether the plaintiff had established his readiness and willing to perform his part of the contract under Section 16(c) of the Specific Relief Act, 1963.

Section 16(c) of the Specific Relief Act reads as follows:

“16. Personal bars to relief.-

(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



S.A.No.317 of 2021

performance of which has been prevented or waived by the defendant....”

A reading of the aforesaid provision clearly shows that the readiness and willingness should not only be averred/pleaded but also proved by the plaintiff. Before entering into factual aspects on the plaintiff's readiness and willingness to perform his part of the contract, the law on the subject as enunciated by the Hon'ble Supreme Court in a few judgments is referred to.

i) One of the earliest judgments on readiness and willing is found as observed by the Judicial Committee of the Privy Council in *Ardeshir Mama v. Flora Sassoon*: (SCC OnLine PC: IA pp.372-73) held as follows:

“...In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit.’

The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuously between the date of the contract and the date of hearing of the suit.”



S.A.No.317 of 2021

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ii) The Hon'ble Supreme Court in the case of *P.Meenakshisundaram Versus P.Vijayakumar and another* reported in (2018) 15 SCC 80 at para 8 held as follows:

“8. As regards suit for specific performance, the law is very clear that the plaintiff must plead and prove his readiness and willingness to perform his part of the contract all through i.e. ready from the date of the contract till the date of hearing of the suit....”

iii) So also, the Hon'ble Supreme Court in the case of *U.N.Krishnamurthy (since deceased) through legal representatives Versus A.M.Krishnamurthy* reported in 2023(11) SCC 775 held as follows:

“33. There is a distinction between readiness and willingness to perform the contract and both ingredients are necessary for the relief of specific performance. In Acharya Swami Ganesh Dassji v. Sita Ram Thapar cited by Mr Venugopal, this Court said that there was a difference between readiness and willingness to perform a contract. While readiness means the capacity of the plaintiff to perform the contract which would include his financial position, willingness relates to the conduct of the plaintiff. The same view was taken by this Court in Kalawati v. Rakesh Kumar.”



S.A.No.317 of 2021

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14. Following the aforesaid judgments of the Hon'ble Supreme Court, it is to be seen whether on the facts of the case, the plaintiff was ever ready and willing to perform his part of the contract right from the date of the Agreement till the date of the suit.

15. Whereas readiness connotes the financial capacity of the plaintiff including his capacity to mobilise funds, the term willingness relates to the conduct of the plaintiff. In the present case on the readiness of the plaintiff to perform his part of the contract, except the pleading that he was ever ready and willing to perform his part of the contract, there is no iota of evidence. The balance sale consideration (Rs.1,76,000/-) payable was substantial and therefore it was incumbent on the plaintiff to establish by reliable evidence that he either had the money with him or that he was capable of mobilising the funds. The plaintiff has not filed any documentary evidence nor examined any person to establish the same. The mere pleading that the plaintiff was ready and willing without any proof cannot help the plaintiff. It is trite that pleading without proof is of no avail.

16. The learned counsel for the plaintiff relying on the terms of the contract



S.A.No.317 of 2021

contended that, the fact that the plaintiff issued legal notice immediately after expiry of the time stipulated under the contract and also filed the suit within 18 days of refusal by the defendant, showed that the plaintiff was ready and willing to perform his part of the contract.

17. I am afraid the said contention is unsustainable for the reason that readiness and willingness of the plaintiff is not according to his own whims and fancies but in terms of the Agreement. The plaintiff has not established that throughout the period he was ready and willing to perform his part and too in terms thereof. The terms of the contract obligated the plaintiff to pay the balance sale consideration of Rs.1,76,000/- in cash within a period of six months from the date of agreement failing which the plaintiff was to forfeit the advance amount of Rs.80,000/- paid by him. The contract also provided that, if the defendant failed to perform his part of the contract, the plaintiff would have to approach the Civil Court and deposit the balance sale consideration and get the sale deed through court. On the basis of the above terms, the learned counsel for the plaintiff submitted that time is not the essence of contract in case of immovable property and therefore the plaintiff having approached the Civil Court within the period of



S.A.No.317 of 2021

limitation, it should be presumed that the plaintiff was willing to perform his part of the contract. The direct answer to the plaintiff's counsel's contention is found in the judgment of the Hon'ble Supreme Court in *Saradhamani Kandappan's* case.

18. The Hon'ble Supreme Court in the case of ***Saradhamani Kandappan Vs. S.Rajalakshmi and others*** reported in **2011 (12) SCC 18** following the judgment of the constitution bench in the case of *Chand Rani Vs. Kamal Rani* reported in (1993) 1 SCC 519 and the judgment in the case of *K.S.Vidyanadam and others Vs. Vairavan* reported in (1997) 3 SCC 1, in para's 42 and 43 held as follows:

“42. Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.



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43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in *K.S. Vidyanadam (supra)* :

(i) Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was 'ready and willing' to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also 'frown' upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the



S.A.No.317 of 2021

purchaser.”

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19. From the judgment of the Hon'ble Supreme Court it follows that when time is stipulated under the contract, the same cannot be brushed aside but some sanctity has to be attached to the same and also that mere filing of the suit within the limitation period is not sufficient to decree the suit in favour of the plaintiff. Therefore the contention of the plaintiff in this regard is rejected.

20. The plaintiff having failed to establish by cogent evidence that he was ready and willing to perform his part of the contract from the date of the Agreement till suit, in my view is not entitled to the discretionary relief of specific performance.

21. In the light of the above discussions, I am of the view that the plaintiff has failed to establish that he was ever ready and willing to perform his part of the contract and that too in terms thereof and therefore I find no infirmity in the judgment of the lower appellate court in non suiting the plaintiff on the ground of readiness and willingness.



S.A.No.317 of 2021

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22. It is seen that the lower appellate court on the basis of the concession of the defendant that he was willing to repay the advance amount with interest partly allowed the appeal directing the defendant to refund the advance amount of Rs.80,000/- with interest at 12% p.a. from the date of the sale agreement till date of plaint and 9% p.a. from the date of the plaint till the date of decree and 6% p.a. from the date of decree till the date of realisation.

23. The aforesaid direction was issued on the basis of the concession made by the learned counsel for the defendant and the defendant's counsel has also not questioned the said direction.

In view of the above discussions, the Second Appeal is dismissed and the judgment and decree of the lower appellate court is confirmed. No costs.

25.07.2024

Index:Yes/No
Speaking Order:Yes/No
Neutral Citation:Yes/No

16/18



S.A.No.317 of 2021

To
1.Additional District Judge (Fast Track Court),
Villupuram.

2. The Sub-Court,
Gingee.



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S.A.No.317 of 2021

N.MALA,J.

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S.A.No.317 of 2021

25.07.2024