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A.S.No.342 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.12.2023

PRONOUNCED ON : 03.01.2024

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

A.S.No.342 of 2017
and C.M.P.No.12934 of 2017

Lakshmi

...Appellant

Vs.

S.Pasuvarasu

...Respondent

PRAYER: Appeal Suit filed under Section 96 of C.P.C., praying that the Judgment and Decree in O.S.No.183 of 2013 dated 29.04.2017, on the file of the Principal District Court, Namakkal, may kindly be set aside and the appeal be allowed with costs throughout.

For Appellant : Mr.C.Jagadish
For Mr.S.Senthil

For Respondent : Mr.N.Manokaran

JUDGMENT

The appeal suit has been filed as against the judgment and decree dated 29.04.2017, passed by the learned Principal District Judge, Namakkal, in O.S.NO.183 of 2013, thereby dismissing the suit for specific performance.



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2. The plaintiff is the appellant and the defendant is the respondent. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The suit is for specific performance. The case of the plaintiff is that the suit property belonged to the defendant. He agreed to sell the property to the plaintiff for the sale price of Rs.1,100/- per sq.ft., to the total extent of 1453½ sq.ft., comprised in survey No.30/2F-2 situated at Kondichettipatti Village, Namakkal Taluk. Accordingly, they entered into agreement for sale on 03.11.2008 and paid a sum of Rs.2,00,000/- as an advance. The time fixed for the performance of contract was three months from the date of the agreement for sale. The defendant also agreed and handed over the original parent deeds.

3.1. Subsequent to the sale agreement, the plaintiff had paid various amounts viz., on 05.12.2008 a sum of Rs.2,00,000/- was paid to the defendant and a sum of Rs.1,00,000/- was paid on 19.02.2009, by way of cheque. Thereafter, on 03.04.2009, the plaintiff had paid a sum of Rs. 5,00,000/- by way of cheque. While pending final decree application in O.S.No.1649 of 2004 on the file of the District Munsif Court, Namakkal,



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another sum of Rs.3,00,000/- was paid on 31.05.2009. On receipt of the same, the defendant assured that the sale deed will be executed within a period of two months from the date of final decree in O.S.No.1649 of 2004. Finally, on 18.02.2010, further sum of Rs.2,00,000/- was paid in favour of the defendant. Except the last payment, other payments were endorsed in the agreement for sale. In total, the plaintiff paid a sum of Rs.15,00,000/- as part of the sale consideration to purchase the suit property. However, suppressing the said fact, the defendant attempted to sell property to the third party. Therefore, the plaintiff caused notice on 05.11.2013 and thereafter filed the present suit.

4. Resisting the same, the defendant filed written statement stating that, the defendant is doing bike mechanic and consulting business. After purchasing the suit property, he obtained loan and constructed a house. He had acquaintance with the husband of the plaintiff who is having lorry body building business and also poultry form in front of the defendant's shop. The defendant used to borrow money from the husband of the plaintiff for his business purpose. While borrowing loan in the year 2008, the defendant signed blank pronote, Cheques and other blank stamp papers. While borrowing loan, he also handed over the



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original sale deed for security purpose. In the stamp paper, the plaintiff also obtained left thumb impression of the defendant. In fact, the defendant came to understand about the final decree application pending in O.S.No.1649 of 2004, only on receipt of the summon in the final decree application from the District Munsif Court, Namakkal. Therefore, in order to grab the property in the name of the plaintiff, her husband colluded and fabricated the agreement for sale and filed the suit. At no point of time, the defendant offered to sell the suit property to the plaintiff.

5. After completion of pleadings, the trial Court framed the following issues :-

(i) Whether the plaintiff is entitled for a decree of specific performance directing the defendant to execute the sale deed as per agreement dated 03.11.2008 for Rs.15,98,850/- by receiving the balance sale amount of Rs.98,850/- & put the plaintiff in possession of the suit property?

(ii) On failure of the same, whether the court has to execute the sale deed?

(iii) Whether the signature of the defendant is obtained fraudulently for the debt borrowed from the



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plaintiff's husband on various dates?

(iv) Whether the sale agreement is a forged one?

(v) to what relief?"

6. On the side of the plaintiff, she examined P.W.1 to P.W.4 and marked documents in Ex.A.1 to Ex.A.16. On the side of the defendant, he himself examined as D.W.1 and no documents were marked. The Court documents were marked as Ex.X.1 to Ex.X.5. On considering oral and documentary evidences, the trial Court dismissed the suit for specific performance. Aggrieved by the same, the plaintiff preferred this appeal suit before this Court.

7. The learned counsel appearing for the appellant/plaintiff submitted that the defendant offered to sell his undivided share of 1453½ sq.ft., in the total extent of the suit property. In order to partition of the suit property, a suit was filed in O.S.No.1649 of 2004 on the file of the District Munsif Court, Namakkal, for partition and the preliminary decree was passed. When the final decree application was pending, the defendant offered to sell his undivided share. The price was fixed at Rs.1,100 per sq.ft. On the date of agreement a sum of Rs.2,00,000/- was



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paid and subsequently, on various dates the plaintiff paid different amounts in total sum of Rs.15,00,000/-. All the amount were paid through cheques. Further, the plaintiff had taken specific stand that the amount was borrowed by the defendant and he entered into agreement for sale to sell the suit property. Only on the insistence of the defendant, there was a delay in filing the suit.

7.1. He further submitted that admittedly, the suit for partition was pending in O.S.No.1649 of 2004 on the file of the District Munsif Court, Namakkal. Therefore, the present suit was filed in time. Though the defendant had taken specific stand that it was loan transaction, he failed to prove the same. Though the plaintiff was not examined, her own husband was examined as P.W.1, since her husband only prepared the agreement for sale in the name of the plaintiff and as such, the plaintiff is only a name lender and her husband's witness is the best witness to prove the case.

7.2. He also submitted that even assuming that it was loan transaction, the defendant failed to produce any piece of evidence to show that he paid any interest to the plaintiff for the loan borrowed by him. It



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cannot be simply said that it was loan transaction, when the defendant categorically admitted his signature in the agreement for sale. He further submitted that the relief of specific performance is an equitable discretion in nature and the discretion must be exercised in accordance with sound and reasonable judicial principles. However, the trial Court without considering the same dismissed the suit.

7.3. In support of his contention, the learned counsel appearing for the appellant relied upon the judgment reported in **(2015) 1 SCC 705** in the case of **Zarina Siddiqui Vs. A.Ramalingam**, in which the Hon'ble Supreme Court of India held as follows :-

“33. The equitable discretion to grant or not to grant a relief for specific performance also depends upon the conduct of the parties. The necessary ingredient has to be proved and established by the plaintiff so that discretion would be exercised judiciously in favour of the plaintiff. At the same time, if the defendant does not come with clean hands and suppresses material facts and evidence and misled the Court then such discretion should not be exercised by refusing to grant specific performance.

34. In the instant case, as noticed above, although defendant no.2 held a registered power of attorney on



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behalf of defendant no.1 to sell and dispose of the property, but the defendants not only made a false statement on affidavit that the power of attorney had authorized the second defendant only to look after and manage the property but also withheld the said power of attorney from the Court in order to misguide the Court from truth of the facts. Further, by registered agreement the defendants agreed to sell the suit premises after receiving advance consideration but they denied the existence of the agreement in their pleading. Such conduct of the defendants in our opinion, disentitle them to ask the Court for exercising discretion in their favour by refusing to grant a decree for specific performance. Further, if a party to a lis does not disclose all material facts truly and fairly but states them in distorted manner and mislead the Court, the Court has inherent power to exercise its discretionary jurisdiction in order to prevent abuse of the process of law.”

7.4. He also submitted that the defendant having been executed the agreement for sale, he cannot plea in the written statement contrary. In support of his contention, he relied upon the judgment of the Hon'ble Supreme Court of India reported in **(2000) 10 SCC 636** in the case of ***A.Abdul Rasid Khan and ors Vs. P.A.K.A.Shahul Hamid & ors.,*** as



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follows :-

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“5. At the outset, we may consider the case of the Appellants, as contained in the additional written statement that it was understood between the parties that plaintiff would obtain the signatures of Respondent Nos. 2 and 3 and that the sale deed would be executed as one composite sale deed of the entire property. On the contrary, the case of the Respondent No. 1 is that Appellants undertook to get the signatures of their sisters. They are all plea and contentions, which are not born out of the agreement and sale. These are pleas by both the parties beyond the said written agreement. The law in this regard is well settled, in view of Section 92 of Indian Evidence Act, where any contract which is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or what is apart from the said contract would be admissible in law. It is not in dispute in the present case, the agreement of sale was reduced in writing which was for an immovable property. Hence, these pleas, both of the Appellants and Respondent No. 1, as aforesaid being beyond the written agreement of sale cannot be taken into consideration.”

8. Per contra, the learned counsel appearing for the



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respondent/defendant submitted that so called agreement for sale is an unregistered one. The defendant never agreed to sell his property. Even according to the plaintiff, it is an undivided share and the partition suit is also pending in O.S.No.1649 of 2004 on the file of the District Munsif Court, Namakkal. Therefore, no prudent man would agree to purchase the undivided share that too when the suit for partition is pending. It is completely loan transaction and the plaintiff converted the same as agreement for sale. In fact, total sale consideration was not mentioned in the agreement for sale.

8.1. He further submitted that according to the plaintiff, she alone entered into the agreement for sale and paid a sum of Rs.15,00,000/-. However, the plaintiff failed to get into the box in order to prove her case. Therefore, the trial Court rightly has taken adverse inference for non-examination of the plaintiff. The plaintiff's witness is the best witness to prove the case. He also pointed out that the alleged agreement for sale dated 03.11.2008, whereas, the twenty rupees stamp paper, which was used for the said agreement, was purchased on 13.10.2008. Though the plaintiff had taken specific stand that she is only name lender and only her husband taken care of the business, the relevant stamp paper was



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purchased in the name of the plaintiff that too 20 days before the agreement. Therefore, it is nothing but concocted and fabricated document.

8.2. He also submitted that normally, when the agreement for sale entered into the parties, no original document would be handed over that too for meager amount of advance. A copy of the document would be produced for verification of title, etc. Only for the loan transaction, for the security purpose, normally original title deeds would be handed over. Therefore, it is only loan transaction and at the time of borrowal of loan, the defendant handed over the original parent deed of the property. Further, when the suit property is an undivided share, the suit for specific performance cannot be filed without the relief of partition. Further, the suit itself barred by limitation, since it is filed after the period of three years, after the alleged last payment viz., on 18.02.2010. In support of his contention, he relied upon the following judgments:-

(i) 2022 SCC Online SC 71 – Shenbagam Vs. KK.Rathinavel

(ii) 2022 SCC Online SC 840 – U.N.Krishnamurthy Vs.

A.M.Krishnamurthy

(iii) 2020 (3) SCC 280 – CS Venkatesh Vs. ASC Murthy



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(iv) 2018 (1) CTC 701 – M.Jayaprakash Nagrayanan Vs.

Santhammal

(v) 2021 (4) CTC 330 – M.Kumar Vs. Balan

(vi) 2023 (2) MWN Civil 1 – Pungodi Vs. Dhamotaran

(vii) 2017 5 MLJ 273 – Venkata Rao Vs. G.Nirmala

(viii) 2002 SCC Online Ker 71 – K.Bhaskaran Nair Vs. Habeeb

Mohammed

(ix) 2023 (3) SCC 714 – Desh Raj Vs. Rohtash Singh

9. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

10. Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this appeal :-

(i) Whether Ex.A.1 agreement for sale dated 03.11.2008 was executed by the defendant?

(ii) If it is loan transaction, the defendant proved the same by paying any interest for the loan availed by him?

(iii) Whether the plaintiff filed suit within reasonable time for specific performance?



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(iv) Whether the non examination of plaintiff is fatal to the case of the plaintiff, that too in the suit for specific performance?

(v) Whether the plaintiff proved her readiness and willingness to perform her part of the contract?

(vi) Whether the plaintiff is entitled to refund of advance amount.

11. The specific case of the plaintiff is that defendant offered to sell the suit property for the sale consideration of Rs.1,100/- per sq.ft., for the total extent of 1453½ sq.ft., comprised in survey No.30/2F-2, situated at Kondichettipatti Village, Namakkal District and entered into agreement for sale, on 03.11.2008. On the date of agreement for sale, he received a sum of Rs.2,00,000/- as advance. Subsequent to the agreement, the defendant on different dates received total sum of Rs.15,00,00/- and accordingly made endorsement in the agreement for sale dated 03.11.2008. Final payment was received by the defendant on 18.02.2010.

12. On perusal of Ex.A.1 revealed that, it was entered on 03.11.2008, whereas the stamp paper was purchased on 13.10.2008, that



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too in the name of the defendant. Further, admittedly the plaintiff's husband is running finance business along with other businesses. Normally, the persons doing finance business are in possession of stamp papers, pronotes, and other revenue documents. Further, the plaintiff is not doing any business however, she issued cheques in favour of the defendant.

13. It is also seen that one Kaliyannan filed suit in O.S.No.1649 of 2004 on the file of the District Munsif Court, Namakkal, for partition and separate possession in respect of the suit property. He intended to purchase the suit property, however, it was purchased by the defendant. Therefore, in order to reconvey the suit property from the defendant, the said Kaliyannan and the plaintiff's husband were in ulterior motive created and concocted the sale agreement by using the empty stamp paper signed by the defendant at the time of borrowal of loan from the plaintiff's husband.

14. On perusal of records also revealed that in O.S.No.1649 of 2004, already an preliminary decree was passed on 20.03.2003. It was marked as Ex.A.10. The brother of the said Kaliyannan had sold out the suit property to the defendant by the registered sale deed dated



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07.03.2003 and the same was marked as Ex.A.9. Therefore, it is clear that it was only loan transaction between the plaintiff's husband and the defendant and utilizing the said situation, they created and concocted the sale agreement dated 03.11.2008.

15. Further in the alleged agreement for sale, nowhere stated about the original document viz., the parent deeds were handed over to the plaintiff. Nowhere stated about the total sale consideration in the agreement for sale, though the rate was fixed as per square feet. When the total area of land, to be purchased by the plaintiff, was mentioned, there is absolutely no difficulty to mention the total sale consideration in the agreement for sale. That apart, in order to prove the case, the plaintiff failed to step into the witness box. Instead of plaintiff, her husband was examined as P.W.1. Therefore, the plaintiff failed to prove that, Ex.A.1 is genuine one and to be treated as an agreement for sale.

16. That apart, even according to the plaintiff the suit property is an undivided share and there is pendency of partition suit filed by one Kaliyannan. The defendant's vendor is none other than the brother of the said Kaliyannan. Even before passing of final decree and division of



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property, no prudent man would pay substantial sale consideration. It is also seen that the amount which was received by the defendant on various dates. Therefore, it is clear that all the transactions are loan transactions and the defendant never agreed to sell the suit property.

17. All these clearly probabilise the defence theory of the plaintiff that original documents relating to the title of the suit property came into her possession only on the above circumstances. Therefore, merely because the title deed of the suit property came into possession of the plaintiff that itself cannot be sufficient for alleged execution of sale agreement. Further, there must be evidence to show that the sale agreement is made out on free consent of parties and there is a lawful consideration in the above agreement. Only when the plaintiff established that there was a consensus *ad idem* between the parties and a valuable consideration, then the above contract can be termed as a valid contract capable of enforcing before the Court of law. When the two elements namely, the free consent and lawful consideration are absent in the document, such document cannot be considered for lawful consideration in the eye of law. Therefore, Ex.A.1 is not established as true document.



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18. Insofar as the limitation is concerned, the alleged agreement for sale was entered into between the parties on 03.11.2008. The time fixed for the contract was three months. However, subsequently on various dates, payments were made and the final payment was made on 18.02.2010. But the plaintiff caused notice only on 05.11.2013. Thereafter, the suit was filed only on 06.12.2013. Even as per the Ex.A.1 viz., the agreement for sale, the time for contract was fixed as three months. The last payment was made on 18.02.2010. After the period of nearly three years, the suit was laid by the plaintiff for specific performance. When there is specific time fixed in the contract, the period cannot be calculated for three years in the suit for specific performance.

19. No doubt, law is settled to the effect that time is not essence of a contract in respect of the contract for sale. Section 16(c) of the Specific Relief Act, requires the plaintiff to prove that she was ready and willing to perform her part of the contract. It imposes a personal bar on the plaintiff to seek relief for specific performance in the absence of proof for readiness and willingness. Even in the absence of a defence, the plaintiff has to establish that she was ready and willing to perform her



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part of the contract. The readiness and willingness must be demonstrated by the plaintiff throughout the period of the contract. However, if the plaintiff fails to establish that she was ready and willing to perform her part of the contract, she is debarred from getting the relief of specific performance. Mere delay in filing the suit for specific performance cannot be a ground to non-suit the plaintiff, if she is otherwise shown to be ready and willing to perform her part of the contract. The plaintiff had issued notice after the period of five years from the date of contract, since the subsequent transactions were treated as loan transactions. Therefore, the plaintiff failed to establish that she was ready and willing to perform her part of contract, through out the period of contract.



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20. Further while exercising discretion in suits for specific performance, the Court 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. Therefore, the suit for specific performance cannot be decreed merely because it is filed within the period of limitation by ignoring the time limits stipulated in the agreement. The courts will also "frown" upon suits which are not filed immediately after the breach/refusal. The fact that limitation of three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance. The three-year period is intended to assist the 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 purchaser.

21. In the case on hand, as stated supra, it was only loan transaction and even assuming that it was sale agreement, the suit is hopelessly barred by limitation. The plaintiff caused notice only on 05.11.2013 and it is after the period of five years from the date of the agreement. Even from the date of last payment, which was made by the



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plaintiff on 18.02.2010, the notice was sent after the period of three years. Therefore, the suit was not filed within the reasonable time. It is relevant to extract the judgment reported in **2023 (3) SCC 714** in the case of ***Desh Raj Vs. Rohtash Singh***, as follows:-

“C.1 .Whether time was the essence of the contract?

20. Before venturing into the aforementioned issue, we must highlight that throughout the entire dispute, Appellants have taken a consistent stand of timebound performance being an essence of the contract. They have maintained that sale deed was needed to be executed necessarily on the Date of Execution as agreed between the parties. It is unfortunate that all the courts below have failed to render a finding on this aspect despite the fact that this was one of the key defenses taken by the Appellants in respect of the prayer seeking specific performance.

21. In this respect, we must now take note of Section 55 of Contract Act which stipulates the aftermath in case of failure to perform contractual obligations at fixed time. The provision states –

55. Effect of failure to perform at fixed time, in contract in which time is essential. - When a party to a contract promises to do a certain thing at or before a



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specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon:- If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

22. The Sale Agreements in the present case clearly indicate the intention of the parties to treat timebound performance as an essential condition. They stipulate that



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in case the sale deed was not executed on the Date of Execution, the Sale Agreements were liable to be treated as cancelled, and the earnest money was to be forfeited. Even in the legal notices dated 18.08.2004, through which last opportunity was extended to Respondent to execute the sale deed, the factum of time being an essential condition for performance was reiterated. On the other hand, no evidence or communication has been brought on record by the Respondent to contradict the defense of timebound performance taken by the Appellants.

23. At this juncture, we must note the decision of this Court in Citadel Fine Pharmaceuticals v Ramaniyam Real Estates Private Ltd and Saradamani Kandappan v S. Rajalakshmi wherein it was held that defense under Section 55 of Contract Act is valid against anyone who is seeking the relief of specific performance. The facts of the instant case make the observations in Saradamini Kandappan even more pertinent, which are to the following effect

“36. The principle that time is not of the essence of contracts relating to immovable properties took shape in an era when market values of immovable properties were stable and did not undergo any marked change even over a few years (followed mechanically, even when value ceased to be stable). As a consequence, time for



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performance, stipulated in the agreement was assumed to be not material, or at all events considered as merely indicating the reasonable period within which contract should be performed. The assumption was that grant of specific performance would not prejudice the vendor defendant financially as there would not be much difference in the market value of the property even if the contract was performed after a few months. This principle made sense during the first half of the twentieth century, when there was comparatively very little inflation, in India. The third quarter of the twentieth century saw a very slow but steady increase in prices. But a drastic change occurred from the beginning of the last quarter of the twentieth century. There has been a galloping inflation and prices of immovable properties have increased steeply, by leaps and bounds. Market values of properties are no longer stable or steady. We can take judicial notice of the comparative purchase power of a rupee in the year 1975 and now, as also the steep increase in the value of the immovable properties between then and now. It is no exaggeration to say that properties in cities, worth a lakh or so in or about 1975 to 1980, may cost a crore or more now.

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43. Till the issue is considered in an appropriate



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case, we can only reiterate what has been suggested in *K.S. Vidyadnam* [(1997) 3 SCC 1]:

(i) *The 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) *The 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 timelimits stipulated in the agreement. The 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 that a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The threeyear period is intended to assist the 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 purchaser.”*

Thus it is clear that when the parties intended to treat the time as the



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essence of the contract and that there was an undue delay to institute the suit, the relief of specific performance cannot be granted.

22. Insofar as the refund of advance amount is concerned Ex.A.1 cannot be treated as an agreement for sale. Therefore, whatever the payment made under the said document is only loan transaction and the refund of advance amount does not arise. If at all, the defendant failed to repay the loan, the plaintiff can always seek remedy for recovery of money as against the defendant in the manner known to law. Though the learned counsel appearing for the plaintiff contended that the defendant suppressed material facts by making distorted statement to mislead the Court, the plaintiff failed to substantiate the same. Further, the defendant never admitted that Ex.A.1 is the agreement for sale. Therefore, the judgments cited by the learned counsel appearing for the appellant are not helpful to the case on hand.

23. Accordingly, all the points raised in this appeal are answered in favour of the defendant and the appeal suit is liable to be dismissed. In fine, the Appeal Suit stands dismissed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.



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To

1. Principal District Judge,
Namakkal.

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