

(2000) 12 MAD CK 0029
In the Madras High Court

Amalorpava Mary Ammal (Died) and Others
Vs

APPELLANT

S. Gopalarathinam

RESPONDENT

Date of Decision : 21-12-2000

Acts Referred:

Citation : (2001) 1 MLJ 282

Hon'ble Judges : C. Nagappan, J

Bench : Division Bench

Judgement

C. Nagappan, J.—This appeal is preferred against the judgment of the Subordinate Judge, Tiruchirapalli passed in O.S.No. 1 of 1984 dated

27.2.1987. The defendants are the appellants.

2. The plaint averments are summarised. The defendants professed to be the owners of the suit property and they derived title to suit property

under the Will executed by Sornathammal in favour of her daughter, the first defendant herein for life and to be taken by her four sons, the

defendants 2 to 5 herein absolutely. Defendants entered into a sale agreement with the plaintiff on 11.7.1983 to sell the suit land to the plaintiff for a

sum of Rs. 2,62,500 and after the execution, the plaintiff paid a sum of Rs. 1,40,000 in cash and the defendants received the same. As per the sale

agreement, the defendants have to receive the balance of sale price, namely, Rs. 1,22,500 from the plaintiff and execute the sale deed. Since the

defendants derived title to the suit land under the Will of the Christian lady, they promised to get the probate of the Will before the execution of the

sale deed. The defendants also promised to get Income Tax Clearance Certificate before the registration. But, they have not done any of the two

things. Still the plaintiff wanted them, as an alternative course, to get the

consent letters of any four of the five in favour of the fifth person to enable the fifth person to proceed with the sale deed since all of them are happened to be the heirs at law under the Indian Succession Act, but they did not do that also. The plaintiff was ready and willing to get the sale deed executed in his favour or in favour of his nominee Deepak Real Estate at any time within the period of three months and he was keeping the money ready with him to pay the defendants. Pursuant to the sale agreement, the plaintiff was placed in possession of the Suit land since the advance itself is more than 40% of the sale price to enable the plaintiff to survey the land for preparing a lay-out and to plant the boundary stones. The plaintiff is actually dealing in real estate and so, he has prepared the lay-out converting the land into house-sites. The defendants seemed to have been offered an enhanced price for the land by some third party and they abruptly sent a notice to the plaintiff stating that the agreement is cancelled. The plaintiff sent a reply stating that the agreement is still subsisting and he can specifically enforce the agreement. The plaintiff prays for judgment and decree against the defendants for specific performance of the agreement dated 11.7.1983 by directing the defendants to execute the sale deed either in favour of the plaintiff or in favour of his nominee Deepak Real Estate and in default to cause the sale deed to be executed by the court.

3. The fifth defendant, in his written statement and additional written statement filed on behalf of the defendants, contended that the existence of the agreement dated 11.7.1983 is true and and three months" time was granted to the plaintiff to pay the balance. The plaintiff never insisted for obtaining a probate of the Will and the defendants never agreed to get it probated and the getting of Income Tax Clearance Certificate was also not made as a condition precedent and they do not find a place in the agreement. The averment in the plaint that an alternative course was suggested to get consent letter of four persons in favour of the fifth defendant and the defendants have not done so are all false. The plaintiff was not ready and willing to perform his part of the contract. The defendant issued a notice to the plaintiff on 5.12.1983 cancelling the agreement and prior to that, the plaintiff never gave any notice to the defendants about his alleged readiness and willingness to perform his part of the contract. The name Deepak Real Estate is not found in the agreement and no possession was

given in the agreement to the plaintiff and admittedly, there was no such recital in the agreement to that effect. Only a permission was promised to be given for demarcating the plots while preparing the lay-out and that has not been done by the plaintiff. The plaintiff has not acted as per the terms of the agreement in paying the balance of sale consideration and he committed wilful breach and he is not entitled to any relief. The fifth defendant has got the suit property in the family partition and he is not going to sell the same. The fifth defendant is the exclusive owner of the suit property.

4. The plaintiff in the reply statement has stated that no suspicion arose in the mind of the plaintiff, that the defendants would go back against the terms of the agreement and so, there was no necessity to send notice in advance. The plaintiff is a dealer in real estate and he had already plotted out the land and put stones. The defendants were keeping a silent watch over the activities of the plaintiff and they did not raise any protest. So the plaintiff had no occasion to suspect the intention of the defendants. The plaintiff is in actual possession of the suit land. The defendants have no right to cancel the agreement and it is valid and binding.

5. The trial court framed ten issues and on a consideration of the matter came to the conclusion that the plaintiff was ready and willing to perform his part of the contract and he is entitled to, the specific performance of the contract and decreed the suit as prayed for. Aggrieved by the judgment, the defendants have preferred this appeal. In this judgment, the parties are described as arrayed in the suit.

6. The points for determination in the appeal are:

1. Whether the plaintiff was ready and willing to perform his part of the contract.
2. Whether the time was the essence of the contract.
3. Whether the plaintiff has committed breach of the contract as contended by the defendants.

7. Points. 1 to 3; Ex.A-1 is the Agreement for sale dated 11.7.1983 admittedly executed by the defendants in favour of the plaintiff under which the defendants agreed to sell 1.50 acres of Nanja land to the plaintiff for a consideration of Rs. 2,62,500 and the plaintiff paid a sum of Rs. 1,40,000 out of the sale consideration on the date of the sale agreement to the defendants and there is no dispute about the same. As per the

recital in the Sale Agreement Ex. A-1, the plaintiff agreed to pay the balance of sale consideration of Rs. 1,22,500 within three months from the date of the agreement and get the sale deed executed by the defendants. According to the defendants, the plaintiff did not pay the balance of consideration within three months as agreed and had committed wilful breach of the same and they issued Ex.A-5 notice on 5.12.1983 cancelling the agreement. The plaintiff, in his reply in Ex.A-6 dated 9.12.1983, denied the breach and requested the defendants to probate Ex.A-3 Will under which they derive title to the property. Immediately thereafter, the plaintiff has filed the suit for specific performance on 2.1.1984.

8. Ex.A-3 is the registration copy of the Will executed by Sornathammal, a Christian lady, on 27.6.1953 bequeathing the suit property along with the other properties in favour of the defendants and as per the recital, the first defendant has to enjoy the properties till her life-time and after that, the other defendants to get it absolutely in equal shares. Admittedly, the above Will has not been probated and nothing is mentioned about probating the same in Ex.A-1 agreement for sale. The plaintiff called upon the defendants to probate the Will only in his Ex.A-6 reply and in the plaint, he has averred the same. The defendants contend that the obtaining of the probate was not a condition precedent for paying the balance of consideration and it was not mentioned in Ex.A-1 sale agreement.

9. The learned Counsel for the appellants/defendants Thiru Rajaram contends that the defendants derived title to the suit property through the Will executed, by late Sornathammal and as a Will of Christian, it has to be necessarily probated and since it was not probated, the defendants' right to the suit property cannot be recognised and the sale agreement cannot be enforced.

10. The first decision relied on by the learned Counsel for the appellants is Pravin Kumar Vs. P. Rajeswaran and Others, , in which this Court has held that in a suit for recovery of possession on the basis of the Will executed by a Christian, the plaintiff would be precluded from establishing any right under Will before probate is granted. The next decision relied on is Mrs. Hem Nolini Judah (since deceased) and after her legal representative Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, ,

in which the Supreme Court has held that whoever wishes to establish right, whether it be a legatee or executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the Will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration.

11. In both the above decisions, the Will executed by a Christian, which was not probated, came up for consideration and it was held that the Will cannot be looked into without a probate and the parties cannot establish any right under that Will. In the present case, the Will executed by the Christian lady, Sornathammal viz., Ex.A-3 is not probated and it cannot be looked into. As per the plaint averments, the plaintiff wanted, as an alternative course, to get the consent letters of any four of the five defendants in favour of fifth person to enable the fifth person to proceed with the sale deed since all of them happen to be the heirs at law of Sornathammal under the Indian Succession Act, but they did not do that also.

Admittedly, the defendants 1 to 5 are the only legal heirs of late Sornathammal and they are entitled to the suit property and all of them have executed Ex.A-1 sale agreement in favour of the plaintiff. Hence the above contention of the appellants cannot be accepted.

12. The next contention raised by the learned Counsel for the appellants is that the suit agreement cannot be enforced for the reason that there was a prior agreement for sale between one Saroja and the appellants with regard to the suit property and he relied on the decision in Md. Ziaul Haque Vs. Calcutta Vyaper Pratisthan, . The Calcutta High Court, in the above decision, held that where the plaintiff specifically pleads two agreements of sale, the latter one superseding the earlier one, and fails to prove the latter agreement, he cannot successfully ask for specific performance of the earlier agreement even though there is an admission of the earlier agreement by the other party.

13. In this case, according to P.W.1, the plaintiff, prior to Ex.A-1 sale agreement, with regard to the suit property, the defendants have entered into an agreement for sale with one Saroja and that Saroja entered into Ex.A-2 unregistered sale agreement with one Mohan on 2.3.1983 and the

plaintiff, by payment to Mohan, obtained his right before the execution of Ex.A-1 sale agreement. From the above, it is clear that on the date of

execution of Ex.A-1 sale agreement i.e., on 11.7.1983, there was no prior sale agreement in force with regard to the suit property. Hence, the

above decision of the Calcutta High Court do not apply to the facts of the present case.

14. The other contention of the appellants is that the plaintiff did not pay the balance of sale consideration as per the terms of the agreement and he

has committed wilful breach of the same. The learned Counsel for the respondent contends that the appellants have taken the plea that the time is

the essence of the contract for the first time in the memorandum of grounds of appeal and there is no whisper about it in their written statement and

D.W.1 also has not stated so in his deposition.

15. The question now arises for consideration is whether time is the essence of the contract as per Ex.A-1 sale agreement. The relevant clause in

Ex.A-1 is as follows:

As per it, the plaintiff has to pay the balance of sale consideration of Rs. 1,22,500 within three months from the date of the agreement to the

defendants and get the sale deed executed. The learned Counsel for the respondent contends that the time is not the essence of the contract

relating to the sale of immovable property and there is no express stipulation in Ex.A-1 sale agreement making time as the essence of the contract

and he relied on the following decisions.

16. The first decision relied on by the learned Counsel for the respondent is Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and Another, . The

Supreme Court has held as follows:

The relevant clause is Clause 4 which provides that the appellant must get the sale deed executed within two months i.e., upto 24th May, 1964,

and in case the appellant did not get the sale deed registered within two months then the earnest money amounting to Rs. 4,000 paid by the

appellant shall stand forfeited without serving any notice. The clause further provides that in case the respondents in some way evade the execution

of the sale deed then the appellant will be entitled to compel them to execute the sale deed legally and the respondents shall be liable to pay the

costs and damages incurred by the appellant. It is settled law that the fixation of

the period within which the contract has to be performed does not make the stipulation as to time is the essence of the contract, When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. (Vide: Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, at 871). It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakeable terms that the time is the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

17. The next decision cited is Vairavan v. K.S. Viayanandam and three others (1995) 2 L W. 50. This Court has held as follows:

10...Regarding the first question whether for this sale agreement time was the essence of the contract, we must first point out that it is settled law

that the presumption in such agreements to sell immovable property is that time is not the essence of the contract. The relevant observation in

Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar,

One of us (Abdul Hadi, J.) has also followed the said Supreme Court decision in Y.A. Kader Vs. Muthulakshmi Ammal (deceased by L.R's), . In

the present case, admittedly, there is no express stipulation in Ex.A-1 sale agreement saying that time is the essence of the contract. No doubt it

says that within six months from the date of the agreement, that is, before 15.6.1979, the performance must be completed by executing and

registering the sale deed and paying the balance price. Ex.A-1 also stipulates that if within the abovesaid six months" period, the plaintiff-purchaser

fails to carry out his part of the contract, he cannot get the advance of Rs. 5,000 paid and if the vendors-defendants fail to perform their part of the

contract, within the said period, they must, apart from returning the aforesaid sum of Rs. 5,000 received from the plaintiff, also give another sum of

Rs. 5,000. But, this stipulation would not make time as the essence of the contract, even according to the Supreme Court decision.

18. In the above decisions, it is clearly laid down that it will normally be presumed in a contract relating to sale of immovable property that the time

is not the essence of the contract and the intention to treat time as the essence

of the contract may be evidenced by the circumstances mentioned in the agreement. In the present case, there is no express stipulation in Ex.A-1 agreement making time as the essence of the contract. No doubt, it is stated that within three months from the date of the agreement the balance of sale consideration has to be paid by the plaintiff and get the sale deed executed. This stipulation would not make time as the essence of the contract as laid down in the above decisions.

19. The learned Counsel for the appellants/defendants has cited the decision in M/s. P.R. Deb and Associates Vs. Sunanada Roy, , and in that case, the plaintiff was required to make part payment of Rs. 4 lakhs within five months of the agreement of sale dated 24.10.1977 and that payment was required to purchase alternative residential accommodation for the defendant to carry out her obligation under the agreement of sale to deliver vacant possession of the property and she also gave notice dated 12.4.1978 to the plaintiff to pay this amount within a week since the time for payment had already expired and the plaintiff did not make payment within a reasonable time thereon and in those circumstances, the Supreme Court held that time was the essence of the agreement. That decision will not apply to the facts of this case.

20. Similarly, the next decision cited on behalf of the appellants is His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, and in that case, the defendant was in dire need of money to celebrate his daughter's marriage and he entered into an agreement for sale on the condition that the draft sale deed should be finalised within seven days and the sale deed registered. In those circumstances, the Supreme Court held that the defendant was in dire need of cash to celebrate the marriage of his daughter and time was, therefore, the essence of the contract. The clear stipulation made time as the essence of the contract in the above case and the decision will not help the appellants in the present case.

21. The plaintiff did not issue any notice to the defendants calling upon them to obtain the probate of the Will or Income Tax Clearance Certificate within three months" period contemplated under Ex.A-1 sale agreement. It is the evidence of P.Ws.1 and 2 that in the first week of December, 1983, the plaintiff offered the balance of sale consideration to D.W.1, the fifth defendant herein and the latter asked for further sum of Rs. 75,000

and the plaintiff was not agreeable for that. There is no pleading to this effect and it cannot be accepted. As already seen, time was not the essence of the contract and it is enough if the plaintiff satisfies the court that he was ready and willing to perform his part of the contract for being entitled to the relief of specific performance. There is no default clause in Ex.A-1 sale agreement and the defendants did not issue any notice calling upon the plaintiff to perform his part of the contract within a reasonable time and they have abruptly terminated the contract by Ex.A-5 notice. The Supreme Court in the decision in Gomathinayagam Pillai and Others Vs. Pallaniswami Nadar, has held that as time was not the essence of the contract, a party issues notice making time as the essence and requires other party within a reasonable time fixed in the notice to carry out the terms of the contract and the party served with the notice fails to comply with requisition, then only default occurs. The defendants did not do so and their Ex.A-5 notice abruptly terminating the contract is not valid and proper in the circumstances of the case.

22. It is contended by the appellants that the respondent does not have sufficient means to pay the balance of sale consideration. There is no pleading to that effect and D.W.1 also has not stated so in his deposition and this is taken up for the first time in the grounds of appeal. There is ample proof produced by the plaintiff in this regard. Ex.A-7 is the Pass Book of the wife of the plaintiff showing that on 24.10.1983, there was a balance of Rs. 50,000 in her account in the bank. Ex.A-8 is the Partnership Deed of Deepak Real Estate in which the wife of the plaintiff is one of the partners. Ex.A-9 is the Solvency Certificate issued by the Tahsildar, Trichirapalli dated 19.12.1981 to the effect that the plaintiff had immovable properties worth Rs. 3 lakhs. Ex.A-10 is the certificate issued by Trichy Steel Rolling Mills Limited showing that the plaintiff had undertaken a contract worth of Rs. 7 lakhs. Exs.A-11 and A-12 are the Certificates showing that the plaintiff had completed works to the value of Rs. 6 lakhs in the year 1982-83. Exs.A-13 to A-16 are the bills issued by the Indian Steel Rolling Mills Limited showing that the plaintiff had received a Draft for a sum of Rs. 96,331.32 for the work done by him. Besides this, the plaintiff, in his deposition, has stated that he had Over Draft facilities with the banks. The above documents clearly show that the plaintiff had sufficient means to pay the balance of sale consideration.

23. The plaintiff had paid more than half of the sale consideration to the defendants on the date of Ex.A-1 sale agreement viz., 11.7.1983 and it

cannot be contended that there was any lack of readiness or willingness on his part. In this context, the decision of this Court in N.B. Namazi v.

Central Chinmaya Mission Trust, by its trustee, Mrs. Leela Nambiar 100 L.W. 582, is relevant:

It is worthwhile to remember that out of the sale consideration of Rs. 3,20,000 if the respondent-plaintiff had paid Rs. 2,70,000 it cannot even be

contended that there was any lack of readiness or willingness on the part of the respondent-plaintiff. Therefore, we should hold that the

respondent-plaintiff was always ready and willing to complete the sale transaction.

24. The plaintiff has filed the present suit for specific performance of the agreement of sale within six months from the date of the agreement and he

has deposited the balance of sale consideration in the court. As per the sale agreement, the defendants must execute the sale deed in favour of the

plaintiff or his nominee and it is clear from the evidence that the defendants knew the Deepak Real Estate, as the nominee of the plaintiff.

Therefore, the plaintiff is entitled to the relief of specific performance of the agreement of sale as prayed for in the plaint.

25. In the result, the appeal fails and it is dismissed. No costs.