
(2010) 11 MAD CK 0449

In the Madras High Court

Case No : Second Appeal No. 45 of 2002

Marudakkal and Kaliasammal

APPELLANT

Vs

K. Prakash and K.V. Giri

RESPONDENT

Date of Decision : 12-11-2010

Acts Referred:

Citation : AIR 2011 Mad 90 : (2011) 4 MLJ 410

Hon'ble Judges : R. Subbiah, J

Bench : Single Bench

Advocate : C.R. Prasanan, for the Appellant; P.T. Asha, for Sarvabhauman Associates, for the Respondent

Final Decision : Allowed

Judgement

R. Subbiah, J.—Defendants 2 and 3, the legal heirs of the deceased 1st Defendant, are the Appellants, who filed this Second Appeal aggrieved over the decree and judgment dated 17.09.2001 passed by the learned II Additional District Judge, Coimbatore in A.S. No. 183 of 2000, whereby the decree and judgment dated 27.04.2000 passed by the learned I Additional Subordinate Judge, Coimbatore, in O.S. No. 1364 of 1992 were affirmed.

2. The Respondents herein filed the suit in O.S. No. 1364 of 1992 on the file of the I Additional Sub Court, Coimbatore, against the Defendant Kaliappa Gounder (deceased 1st Defendant) for specific performance of an agreement of sale dated 09.09.1991.

3. The case of the Plaintiffs, in brief, is as follows:

The Defendant is the absolute owner of the suit property and on 09.09.1991, the Defendant entered into an agreement with the Plaintiffs to sell the suit property for a sum of Rs. 1,85,000/- and received a sum of Rs. 30,001/- as advance from the Plaintiffs by acknowledging the same in the agreement itself. Time for completion of the sale was fixed as one year from the date of agreement. Since the Plaintiffs wanted to convert the suit property into house sites to various

parties, pursuant to the sale agreement, they spent more than Rs. 10,000/- for levelling the ground, laying the road, fixing the boundary stones, etc. The Plaintiffs subsequently paid Rs. 85,001/- on various dates to the Defendant and they entered into agreements with the third parties to sell the sites. On 12.02.1992, when the Plaintiffs offered another sum of Rs. 50,000/-, the Defendant refused to receive the same at the instance of his son-in-law and he demanded higher price, but they have not done so. Under such circumstance, the Defendant was purposely avoiding to execute the sale deed with ulterior motive, in spite of repeated demands. The Plaintiffs are ready and willing to purchase the property and they have got sufficient means and they sent a legal notice on 07.09.1992 calling upon the Defendant to execute the sale deed and for which, the Defendant sent his reply with false allegations. Thereafter, on 30.09.1992, the Defendant sent a notice cancelling the agreement and it was suitably replied by the Plaintiffs. Hence, the suit.

4. The case of the Plaintiffs was denied by the Defendant by filing a written statement, denying all the allegations in respect of the sale agreement, demand of higher price by him and the readiness of the Plaintiffs in executing the agreement. In fact, even after receiving the Plaintiffs' notice dated 07.09.1992, the Defendant, in his reply notice dated 14.09.1992, expressed his willingness to execute the sale deed, on receipt of the balance amount from the Plaintiffs. Even then the Plaintiffs have not come forward to pay the balance amount till 30.09.1992, which resulted in the cancellation of the sale agreement. Hence, he prayed for the dismissal of the suit. Pending suit, the sole Defendant died and his legal heirs were impleaded as Defendants 2 and 3.

5. Defendants 2 and 3 filed a written statement, denying the allegations made in the plaint, stating that the Plaintiffs had no sufficient funds to purchase the property and they were not ready and willing to perform their part of the contract.

6. On the basis of the above said pleadings, the trial court framed four issues and two additional issues and in order to prove the case of the Plaintiffs, the 1st Plaintiff examined himself as P.W.1 and marked Exs.A-1 to A-12 and on behalf of the Defendants, the 2nd Defendant examined herself as D.W.1 besides examining one Sellappan as D.W.2, but no document was marked. The trial court, after considering the entire evidence on record, both oral and documentary, had decreed the suit. As against the judgment of the trial court, Defendants 2 and 3 filed an appeal in A.S. No. 183 of 2000 on the file of the II Additional District Court, Coimbatore, and the appellate court had also dismissed the appeal by confirming the decree and judgment of the trial court. Being aggrieved, the legal representatives of the deceased Defendant have filed the present second appeal.

7. At the time of admission of the second appeal, this Court has framed the following substantial questions of law for consideration:

(1) Whether, in law, the Courts below erred in overlooking the clauses in Ex.A-1 agreement to the effect that the Plaintiffs can seek another sum of Rs. 30,001/- in addition to the advance amount of Rs. 30,001/- as damages for not performing the part of the contract on the side of the deceased 1st Defendant and decreeing the suit, without following the dictums reported in A.I.R.1979 SC 1242 and Dadarao and Another Vs. Ramrao and Others, .

(2) Whether, in law, the Courts below erred in overlooking that the Plaintiffs were not entitled to an equitable relief of specific performance as they were not ready and willing throughout the proceedings right from the date of agreement and during the pendency of the suit and at all times before the disposal of the suit, as laid down in the dictum reported in Indravathi Vs. Kamala, .

8. Learned Counsel appearing for the Appellants/the legal representatives of the deceased 1st Defendant would submit that right from the date of the agreement, the Respondents/Plaintiffs were not ready and willing to perform their part of the contract, though the time limit was fixed as one year for completing the agreement. The Respondents, the real estate agents, had entered into an agreement with the deceased 1st Defendant under Ex.A-1, in which, it has been specifically stated that the property was purchased for the purpose of forming a layout and selling the plots to third parties. But, in his cross examination, the 1st Respondent(P.W.1) had admitted that he had not moved the Panchayat Board to get the approval of the layout of the subject land. Moreover, absolutely, no documentary proof was produced by the Respondents to show that they had entered into agreements with third parties. Though P.W.1 had deposed that in respect of plot No. 1, the property was sold to one Shanmugam, no sale deed was produced before the trial court, more so, when D.W.1 had denied the allegation put forth by the Respondents that when they offered a sum of Rs. 50,000/- as advance on 12.02.1992, the same was refused by the deceased. The learned Counsel further submitted that just two days prior to the expiry of the agreement, a notice was sent by the Respondents by falsely stating as if they offered a sum of Rs. 50,000/- as further advance, but the same was not received by the deceased. Though in the reply notice dated 14.09.1992, further time was granted to pay the entire amount, even then the Respondents had not paid the amount. Therefore, after awaiting upto 30.09.1992, the deceased Defendant had cancelled the agreement. Even in the written statement, the deceased Defendant had asserted his readiness and willingness to execute the sale deed on deposit of entire amount within a week by the Respondents. The learned Counsel submitted that all these facts would show that right from the beginning of the sale agreement, the Respondents had no means and they were not ready and willing to perform their part of the contract; but the courts below, without looking into those aspects, decreed the suit merely on the reasoning that time was not the essence of the agreement and as such, the judgment and decree of the courts below are liable to be set aside. The learned Counsel has relied on the judgments reported in the case of Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others, , His Holiness Acharya Swami Ganesh Dassji Vs. Shri Sita Ram

Thapar, , Dadarao and Another Vs. Ramrao and Others, , Kabirdass v. Vinothambal 2002 (3) CTC 428, S. Krishnamurthy v. Venkateswara Rao @ M.V. Rao (Died) and Ors. 2009(4) CTC 639 and A.K. Lakshmipathy (Dead) and Others Vs. Rai Saheb Pannalal H. Lahoti Charitable Trust and Others, .

9. Per contra, the learned Counsel for the Respondents/ Plaintiffs submitted that as per the agreement Ex.A-1, it was agreed by them to pay the advance amount only on completion of each sale. When the further advance of Rs. 50,000/- was offered to the Defendant, he demanded higher price and refused to receive the same, which forced the Respondents to send a legal notice on 07.09.1992; but in the reply dated 14.09.1992, the Defendant had demanded 24% interest per annum for the balance amount and since no provision was made in the agreement for payment of interest, the Respondents did not pay any further amount. On the other hand, they were negotiating with the Defendant. In the meantime, the Defendant had cancelled the agreement by a notice dated 30.09.1992. Before the trial court, though the amount was not deposited within a week from the date of filing of the written statement, the entire amount was deposited nine months later i.e. on 05.07.1993 since the time is not the essence of the contract, which cannot be found fault with. Both the courts below have deeply gone through the factual aspects and decreed the suit and as such, there is no need to interfere with the concurrent findings.

10. Heard the learned Counsel for the parties.

11. It is the case of the Respondents/Plaintiffs that they had entered into an agreement on 09.09.1991 with the deceased 1st Defendant to sell the suit property for a sum of Rs. 1,85,000/-. Pursuant to the agreement, he had also received a sum of Rs. 30,001/- as advance. Subsequently, on two occasions, the deceased 1st Defendant had received a further amount of Rs. 25,000/- and Rs. 30,000/-, in all Rs. 85,001/-. According to the Respondents, the purpose of the purchase was to plot out the agricultural land and to sell the same to the third parties. The time limit for completing the agreement was fixed as one year from 09.09.1991. According to the Respondents, when they offered a further sum of Rs. 50,000/- to the deceased 1st Defendant on 12.02.1992, he instructed the Respondents to prepare necessary endorsement in the agreement for the receipt of the same and accordingly, when the Respondents had written the necessary endorsement in the agreement and approached the 1st Defendant to receive the amount and put a signature in the endorsement, the deceased 1st Defendant refused to do so. Hence, the Respondents were forced to issue a notice on 07.09.1992 calling upon the 1st Defendant to receive the balance amount and execute the sale deed. But, according to the 1st Defendant, on 12.02.1992, no further amount was offered by the Respondents and only just two days prior to the expiry of the sale agreement, they issued a notice stating as if a further amount of Rs. 50,000/- offered by them was refused to receive by the 1st Defendant. Thus, it is the submission of the Appellants/Defendants 2 and 3 that right from the beginning, the Respondents were not ready and willing to perform

their part of the contract. It is the further submission of the Appellants that in the reply dated 14.09.1992 marked as Ex.A-8, the deceased Defendant had expressed his willingness to perform his part of the contract after receipt of the balance amount; but in spite of that, the Respondents did not come forward to pay the amount. It is yet another submission of the Appellants that even in the written statement, the 1st Defendant had expressed his willingness to execute the sale deed in favour of the Respondents provided the deposit of the entire amount due to the 1st Defendant is made within a week by the Respondents. Therefore, in short, it is the submission of the Appellants that right from the beginning, the Respondents had no means and were not willing to perform their part of the contract. Therefore, the question that has arisen in this appeal is, whether the Respondents were ready and willing to perform their part of the contract.

12. It is the case of the Respondents that though they offered a further sum of Rs. 50,000/- by making necessary endorsement in the sale agreement, the deceased 1st Defendant had refused to receive the same. It is the common knowledge had the deceased 1st Defendant refused to receive the further sum of Rs. 50,000/-, the Respondents would have sent a legal notice immediately; whereas in the instant case, just two days prior to the expiry of the agreement, on 07.09.1992, Ex.A-7 legal notice was sent accusing the deceased Defendant as if despite the offer of Rs. 50,000/- by the Plaintiffs, the 1st Defendant refused to receive the same. But, immediately, on 14.09.1992, Ex.B-8 reply was sent by the 1st Defendant expressing his willingness to execute the sale deed provided the Appellants pay the interest for the balance amount at the rate of 24%. The relevant passage from the said notice is as follows:

You are aware that the period mentioned in the Agreement is one year and that the period is already over even on 9.9.1992. My client is not bound to receive the amount from your clients on instalments. Final notice is hereby given to you to inform your clients to take the Sale Deed with immediate effect on paying the balance, failing which my client has no other option than to cancel the Agreement. As the period mentioned in the Agreement is already over, your clients are bound to pay interest for the said amount of Rs. 1,00,000/- at the rate of 24 per cent per annum from 9.9.1992. Your clients are given only one week time to comply with the terms of the Agreement, failing which your clients have no remedy of anything on the basis of the Agreement referred to above

13. The contents of the said reply notice would show that the 1st Defendant was ready to perform his part of the contract. But, now the submission of the Respondents is that as per the original agreement, there was no provision for paying any interest and because of the demand of 24% interest in the reply notice, the Respondents did not pay the balance amount and hence, it cannot be construed that the Respondents were not ready and willing to perform their part of the contract. But, I am not inclined to accept the said submission of the Respondents for the reason that if the demand of interest is contrary to the

terms of the agreement, immediately the Respondents would have sent a letter to get a clarification from the 1st Defendant in this regard. Moreover, in the reply notice Ex.B-8, it has been specifically stated that since one year period was over, he claimed the interest at 24% per annum. But the courts below, without looking into this aspect, had erroneously come to the conclusion that the 1st Defendant, by not accepting the further sum of Rs. 50,000/- from the Respondents, had breached the terms and conditions of the agreement. As observed above, had the deceased Defendant denied to receive the further amount, immediately the Respondents ought to have issued a notice to the 1st Defendant; but, in the instant case, the conduct of the Respondents in sending the legal notice just two days prior to the deceased Defendant as if the 1st Defendant had refused to receive the further amount, which would raise a grave doubt as to whether the Respondents had really offered Rs. 50,000/- as the further advance to the 1st Defendant. Under such circumstances, the courts below ought not to have come to the conclusion that the deceased Defendant had failed to perform his part of the contract by not accepting the sum of Rs. 50,000/-. Above all, in the written statement, the deceased Defendant had expressed his willingness to execute a sale deed provided the entire amount is paid within a week and even after that, the Respondents had not paid the amount within a week but paid the same after a period of nine months. All these facts would cumulatively show that the Respondents were not ready and willing to perform their part of the contract.

14. In a suit for specific performance, even if the time is not the essence of the contract, the Plaintiff ought to have proved that he/she was ready and willing to perform his/her part and the readiness and willingness of the Plaintiff could be inferred only from the conduct of the Plaintiff. In the instant case, the conduct of the Respondents/Plaintiffs would show that they were not ready and willing to conclude the agreement. In this regard, a reference could be placed on the judgments relied on by the learned Counsel for the Appellants. In *Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and Others*, , the Supreme Court enunciated the principles for granting the relief of specific performance and laid down that one of the relevant questions would be, while examining the readiness and willingness of the party seeking the performance of specific relief to perform his/her part of the contract whether he/she did have the necessary wherewithal with him/her to pay the consideration or the balance thereof, if any.

Specific performance of contract for sale of immovable property " Principles for granting decree for " Decree may be refused even if time was not essence of contract " Purchaser put into possession " Does not automatically entitle him to decree for specific performance " Purchaser's readiness and willingness to be considered " Whether purchaser had necessary funds is a relevant consideration

15. In 2002 (3) CTC 428 (supra), this Court has held as follows:

6. The Plaintiff has not demonstrated his readiness and if truly there was a document writer by name Subbiah, the Plaintiff should have examined him to show that the Defendant did not have the encumbrance certificate or the title

deeds ready. The Plaintiff has not done this either. In the aforesaid judgment several salient points for enforcement of a contract for specific performance have been given. Some of these are very relevant in this case:

1. Both parties to the contract should have performed their respective parts of the contract, all conditions precedent, the express and essential terms the implied and essential terms all representations made at the time of the contract on the faith of which it was entered into.

2. Both the parties must show their readiness and willingness to do all matters and things on their part to be done by them after the contract.

3. The purchaser should be ready with either the funds or should be possessed of the capacity to generate funds within the time stipulated. He should also have the necessary willingness of mind to complete the sale from the inception.

4. The vendor should be equally ready and willing to perform his part of the obligations from day one. eg., clearing the encumbrance if any on the property, procuring the encumbrance certificate, Income Tax clearance, steps to get the tenant, if any, in the occupation of the property out, getting consent from other shares, etc.

5. If time is not of essence originally, it can be made of essence even subsequently by serving notice on the party.

7. ...The fact that the Plaintiff did not reply or react to Ex.A.2 promptly and also the fact that in spite of receiving Ex.A.4 reply stating that he did not possess sufficient funds, the Plaintiff did nothing to demonstrate his possession of funds and his willingness to take the sale deed are all relevant in this regard. They show that exercise of discretion in favour of the Plaintiff is not warranted. Therefore, questions 1 to 3 are answered against the Appellant. As regards question-4, the appellate Court has held that the decree for specific performance cannot be enforced against the legal representatives. The appellate Court has clearly committed an error in arriving at this finding....

16. A reading of the above judgments would show that even if the time is not the essence of the contract, the Plaintiff has to establish his readiness and willingness to perform his part of the contract. As already stated, in the instant case, the circumstances would show that right from beginning, the Respondents were not ready and willing to perform their contract. Though it is not necessary for the Respondents to prove their financial status, the fact that whether the Plaintiff was ready and willing to buy the property could be inferred from their conduct. In the instant case, on two occasions, time was granted to conclude the agreement, but the Respondents had not shown their readiness to do so. Moreover, according to the Respondents, the agreement was entered into only for the purpose of laying out the plots and selling the same to third parties; but P.W.1 has admitted that he has not obtained permission to lay out the plots, which would show that right from the beginning the Respondents were not willing

to perform their part of the obligation. Though the learned Counsel for the Respondents submitted that as per the agreement, the amount has to be paid only on each sale, on a reading of the same, I find that no such meaning was conveyed in the said agreement. Therefore, I am of the opinion that the findings arrived at by the courts below are not legally sustainable and are liable to be interfered with and the substantial questions are answered accordingly.

For the reasons stated above, the second appeal is allowed and the judgment and decree of both the courts below are set aside and the suit is dismissed. However, the Appellants are directed to refund the advance amount of Rs. 85,001/- to the Respondents within a period of two months from the date of receipt of a copy of this judgment. No costs.