

SUPREME COURT OF INDIA

P.Meenakshisundaram

Vs.

P.Vijayakumar

C.A.No.3353-3354 of 2018

(R.Banumathi and Uday Umesh Lalit,JJ.,)

28.03.2018

JUDGMENT

Uday Umesh Lalit,J.,

SLP (Civil)No. 22018-22019 of 2014

1. Leave granted.
2. These appeals by special leave challenge the correctness of the judgment and order dated 07.01.2014 passed by the High Court of Madras in Appeal Suit (MD) Nos. 218-219 of 2010.
3. The facts leading to the filing of these appeals in brief are as under :-

A. The property in question is a plot admeasuring about 3708 sq.ft., with a marriage hall (“Suit Property”, for short) situated in Village Parasuramanpatti, Madurai North Taluk, Tallakulakam sub-Division, Madurai North. The appellant had mortgaged the suit property with the Catholic Syrian Bank (later Federal Bank Ltd.) and the bank had initiated recovery proceedings, namely, O.S. No.40 of 1996 before 3rd Additional Sub-Court, Madurai which was later transferred to DRT, Coimbatore and renumbered as Transfer Application No.1441 of 2002.

B. On 30.06.2000 the appellant entered into an agreement (Ex.A1) intending to sell the suit property to respondent No.1. The consideration agreed was Rs.19 lakhs out of which Rs.1 lakh was paid by way of advance. This agreement recited an assurance on the part of the appellant, “...that there is no encumbrance over the Schedule mentioned property” but went on to state:-

“The 2nd Party says that the original Parent Document in respect of the property is not available with the 2nd party and it is in the bank. In case, there is any loan availed by the 2nd party either on the schedule property or on other property, then the 2nd party has to pay the said loan amount by getting it from the 1st party and to get the

Original Parent Document and other supportive records in respect of the schedule property and the 2 nd party has to hand over the same to the 1st party.”

C. The cheques issued thereafter by respondent No.1 were dishonored (as evident from Notice Ex.A-2 dated 18.09.2000) but the parties entered into a subsequent agreement on 20.09.2000 (“the suit agreement”, for short) under which the consideration was fixed at Rs.37.5 lakhs. As per this agreement, even the movables utilized for marriage hall were also included. Over and above Rs.1 lakh which was already received as advance, additional sums of Rs.2 lakhs by way of cheque and Rs.3 lakhs by way of demand draft were paid on the same day. The suit agreement recited that the remaining amount had to be paid and the sale deed to be registered by 20.03.2001 in following terms:-

“ the 1st party has to pay the remaining amount of sale consideration of Rs.26,50,000/- (Rupees twenty six lakhs and fifty thousand only) within 20.03.2001 either before the Sub Registrar or in person and the 2nd party has to receive the same and give proof to that effect and the said Sale Deed has to be registered by the 2nd party without any encumbrance and that there is no other person except the 2nd party to have title over the same.”

D. Though the relevant terms in the suit agreement were identical to those in agreement (Ex.A1), the understanding between the parties as on the date when the suit agreement was entered into was captured in the subsequent communication of respondent No.1 dated 22.09.2001 (Ex.A6) as under :-

“That on further persuasion and negotiations between the parties, it was agreed to have a fresh sale agreement with reference to the said Kalyana Mandapam and annexe. As your client wanted to clear the entire loan in the Catholic Syrian Bank only by himself, the sale price of the said property was agreed for Rs.37,50,000/- only and a sum of Rs.5,00,000/- (Rupees five lakhs only) through D.D. and Cheque was paid additionally to your client by making the total advance of Rs.6,00,000/- including the cash advance of Rs.1,00,000/- already paid on the earlier agreement dated 30.06.2000. Therefore in supersession of the earlier agreement dated 30.06.2000 a fresh sale agreement was made on 20.09.2000 with the parties concerned.”

E. On 21.02.2001 a further sum of Rs.2 lakhs was paid by way of cheque by respondent No.1. Though the transaction was to be completed by 22.03.2001 the record is silent about any communication between the parties around that time towards completion of transaction. However, amount of Rs.10 lakhs was paid by cheque on 22.09.2001, which according to respondent No.1 was made over to the appellant so that the dues of the bank could be settled.

F. The record is again silent about any developments after 22.09.2001 till 29.07.2002 when a legal notice was issued by respondent No.1 through his advocate.

According to respondent No.1 this was responded by the advocate for the appellant and in the ensuing discussion it was agreed that possession of the suit property be handed over to respondent No.1. According to respondent No.1, out of the balance amount of Rs.19.5 lakhs, Rs.13.5 lakhs was to be made over by respondent No.1 to the bank directly and the remaining sum of Rs.6 lakhs was agreed to be paid to the appellant in cash on the day the document was to be registered. According to respondent No.1, possession of the suit property was handed over to him by the appellant on 03.08.2002. The aforesaid case set up by respondent No.1 is disputed and denied by the appellant and according to him, with the intervention of local police and other hirelings, the possession was forcibly taken by respondent No.1 on 16.09.2002.

G. On 01.09.2002, a telegram was sent by the advocate for respondent No.1 to the appellant. Immediately thereafter i.e. on 02.09.2002 an IA No.126 of 2002 was preferred by respondent No.1 to implead himself in the Transfer Application No.1441 of 2002 before DRT, Coimbatore. In his reply telegram dated 03.09.2002 appellant denied all the assertions made by the advocate for respondent No.1 and cancelled the agreement dated 20.09.2000. The appellant also complained to DIG of the relevant range and sought police protection and preferred OP No.226 of 2002 in the High Court of Madras against respondent No.1, Inspector of Police, Oomachikulam and Deputy Superintendent of Police of the concerned Division. According to the appellant, he was threatened by the hirelings employed by respondent No.1 and possession of the suit property was taken over by respondent No.1 on 16.09.2002. This prompted the appellant to prefer an appropriate petition before the Superintendent of Police, Madurai, Rural.

H. In the aforesaid background, on 19.02.2002, respondent No.1 filed OS No.764 of 2002 seeking specific performance of the agreement dated 20.09.2000. The plaint was later amended and the Federal Bank Ltd. through its Branch Manager was added as second defendant. As regards arrangement under which respondent No.1 was put in possession, it was averred:

“ Meanwhile, as necessary steps have to be taken for settlement of the loan availed on the suit property, the advocates of both the sides have held a meeting on 29.07.2002 to execute the Sale Agreement made on 20.09.2000 and it was agreed that this defendant has to execute the Sale Deed in respect of the suit property on the 18th day of Aadi month of this year (3.08.2002); that the remaining sale consideration of Rs.13,00,000/- out of Rs.19,50,000/- has to be paid by the plaintiff to settle the case which is being conducted at Debts Recovery Tribunal; that the remaining amount of Rs.6,50,000/- (Rupees six lakhs and fifty thousand only) has to be given to the 1st defendant as cash”

In respect of readiness and willingness on the part of respondent No.1 to perform his obligations under the suit agreement, Para 7 of the amended plaint was as under:

“(7) While this plaintiff was ready to fulfill the sale agreement on 3.8.2002 as per the above said arrangement, as agreed to execute the Sale Deed either on the 3rd day of Aavani Month (19.8.2002) or on 5th day of Aavani (21.8.2002) and that there is some difficulty according to religious custom in registering the sale deed in the month of Aadi and to give consent to this plaintiff to take the possession of the marriage hall, this plaintiff took the possession of the suit property on the 18th day of Aadi Month on 3.8.2002 and he has been enjoying the same. The marriage functions which were being booked by the 1st defendant are being conducted by this plaintiff under his supervision.”

I. In his written statement, the appellant denied relevant assertions made by respondent No.1. As regards readiness and willingness on the part of respondent No.1, it was stated:-

“It is submitted that in spite of defendant’s repeated demands the plaintiff has not come forward either to pay balance sale price or to complete the sale immediately. Even though specific condition to complete the sale on or before 20.03.2001 is mentioned in the sale agreement and time is mentioned as essence of the contract, the plaintiff has not completed the sale within the stipulated time.

The plaintiff was not ready and willing to perform his part of contract even though the defendant was ready to clear the encumbrance over the suit property.”

The matter regarding handing over of possession was elaborated as under:

“On 16.09.2002, the plaintiff came with his men and threatened the defendant that why he had cancelled the sale agreement and if he did not execute sale deed in his favour he would not permit the defendant to enjoy the suit property. The defendant immediately went to the office of the Police Commissioner, Madurai City wherein he was asked to come tomorrow. On 17.09.2002 he presented a petition to the Police Commissioner, Madurai City and it was forwarded to SP, Madurai Rural. When the defendant was in the office of the SP, Madurai Rural, at the instigation of the plaintiff one Karthick Muniasamy of Pudur with his men namely Rajesh, Kannan, Muniasamy and other attacked the watchman of the suit property and illegally trespassed into the suit property and damaged the property and took illegal possession of the suit property. On coming to know about the illegal taking over possession of the suit property by the plaintiff’s men, the defendant immediately told this matter to the SP, Madurai Rural who made endorsement on the petition directing the Inspector of Police, Oomachikulam to register F.I.R. against the plaintiff and his men ”

J. In his Additional Written Statement-cum-Counter Claim the appellant submitted:

“The application in I.A. No.126/2002 filed by the plaintiff in T.A. No. 1441/2002 pending before the DRT, Coimbatore was dismissed on 03.01.2003. In the meantime

the defendant has also paid Rs.13 lakhs to the Federal Bank, Madurai after the filing of the suit till date.”

He further submitted:

“It is submitted that the plaintiff has taken illegal possession of the suit property as stated above and his possession is unlawful. He has been in receipt of unlawful gains on account of being in illegal possession and receiving income from the suit property. The suit property used to be booked for a minimum of 30 Muhoorthams per year. After deducting all expenses the year income from the suit property is Rs.1,80,000/-. From 17.09.2002 to till filing of this counter-claim approximately the past mesne profits would be Rs.5,40,000/-. The plaintiff is liable to pay Rs.5,40,000/- as past mesne profits from 17.09.2002 to the date of filing of this Additional Written statement cum counter claim. In these circumstances a decree for mandatory injunction and for mesne profits is to be granted, where the 1st defendant would be put to irreparable loss and damage.”

The appellant in the circumstances prayed for delivery of possession of the suit property, past mesne profits of Rs.5,40,000/- and future mesne profits as well.

K. The Presenting Officer of the Federal Bank Ltd. filed a memo on 08.12.2009 in the proceedings before DRT Coimbatore that the appellant had remitted a sum of Rs.13,42,173/- on 16.11.2009 towards full and final settlement of the account. It was therefore prayed by the Presenting Officer that satisfaction of the claim be recorded.

L. The trial court by its judgment and decree dated 01.10.2010 decreed OS No.764 of 2002 and dismissed the counter claim preferred by the appellant. All the issues were answered in favour of respondent No.1. The appellant was directed to execute the sale deed in respect of the suit property and register the same in favour of respondent No.1 after receiving the balance sale consideration within three months and the appellant was further directed to pay to respondent a sum of Rs.3,23,038/- towards the costs of the suit. It was observed that time was not the essence of the contract. As regards readiness and willingness on the part of respondent No.1, it was observed as under:

“While considering the readiness and willingness of the plaintiff as to purchase the suit properties it was submitted by the counsel for the plaintiff that as agreed the plaintiff did issue the legal notice to the 1st defendant to come forward to register suit properties after getting full consideration and also the plaintiff was waiting on 03.08.2002 in the suit Sub-Registrar office as to register the suit properties as agreed and also the plaintiff was ready to pay the full amount and willing to purchase the suit properties.”

M. The matter was carried further by filing Appeals by the appellant in the Madras High Court, Madurai Bench. According to the High Court before the execution of suit agreement the appellant had not disclosed about the existence of encumbrance which

fact came to the knowledge of respondent No.1 subsequently. Relying on the decision of this Court in *S.P. Chengalvaraya Naidu (Dead) by LRs v. Jaganath (Dead) by LRs and Others*¹. it was observed as under:

“Since the first defendant has suppressed the fact that he obtained loan by way of encumbering the suit property and also pendency of Original Suit No.40 of 1996 at the time of execution of Ex.A3, it is pellucid that the entire defence put forth on the side of the first defendant is based upon falsehood.

But for the reasons best known to him, schemingly, deliberately suppressed the existence of mortgage over the suit property and further stated in Ex.A3 to the effect that there is no encumbrance over the same. Therefore, the entire defence put forth on the side of the first defendant is purely based upon falsehood and as per the dictum given by the Hon’ble Apex Court the defence put forth by the first defendant in the present case can summarily be thrown out.”

The High Court found that the readiness and willingness on the part of respondent No.1 stood established. The High Court, thus, by its judgment and order dated 07.01.2014 dismissed the appeals, namely, Appeal Suit Nos.218-219 of 2010 preferred by the appellant.

4. This Court issued notice on 25.08.2014 in petitions for special leave to appeal. The parties exchanged the pleadings and also filed documents on record. We heard Ms. V. Mohana, learned Senior Advocate in support of the appeals and Mr. V. Prabhakar, learned Advocate for respondent No.1. After conclusion of hearing, written submissions were filed by respondent No.1 submitting inter alia:-

“Apart from having averred regarding the readiness and willingness, respondent No.1 by his conduct had proved the same which are as below:-

- i) Payment of an advance of Rs.6,00,000/- on 20.09.2000.
- ii) Further advance of Rs.2,00,000/- paid on 21.01.2001.
- iii) Further advance of Rs.10,00,000/- paid on 22.09.2001.
- iv) Notice dated 22.09.2001 issued by the respondent to the petitioner to execute the sale deed.
- v) Holding a meeting of the petitioner, his counsel with the respondent and his counsel for determining the manner of performance of the Agreement. The said factum of the meeting and the outcome thereof as set out in the Plaint in Para 6 at Page 136 of Volume II stood admitted by the respondent in the Notice dated 29.07.2002 issued on his behalf which had been marked as Exhibit A15.
- vi) Taking possession of the property on 03.08.2002.

vii) Seeking impleadment in the Debt Recovery proceedings with a view to settle the debt due from the Respondent.

viii) Filing of the Suit within 9 days after the telegram dated 03.09.2002 issued by the petitioner cancelling the agreement.

Suit had been filed on 12.09.2002. The non deposit of the balance consideration by respondent No.1 cannot be put against respondent No.1 inasmuch as the encumbrance came to light after the agreement to sell which ought to have been cleared by the petitioner by demanding the amount for the discharge in terms of the recital at page 37 of the **SLP paper book**² which was never done by the petitioner. As per the recital in the Agreement to sell the petitioner had to handover the original parent title deed and other supportive documents which was again not done despite having received nearly half of the sale consideration. Since the parent title deed had not been given as required under the agreement, possession was given to respondent No.1.”

5. In *Gomathinayagam Pillai and Others v. Pallaniswami Nadar*³ after referring to the observations of the Privy Council in *Ardeshir Mama v. Flora Sassoon*⁴, this Court laid down that in a suit for specific performance of an agreement, the plaintiff must plead and prove that he was ready and willing to perform his part of the contract since the date of the contract, right upto the date of the hearing of the suit. The observations by this Court in that behalf were as under- cut the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail. As observed by the Judicial Committee of the Privy Council in *Ardeshir Mama v. Flora Sasson* [L.R. 55 I.A. 360, 372]

“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.”

6. Similarly in *J.P. Builders and Another v. A. Ramadas Rao and Another*⁵, it was observed by this Court in paragraphs 21 and 25 as under :-

“21. Among the three clauses, we are more concerned about clause (c). “Readiness and willingness” is enshrined in clause (c) which was not present in the old Act of 1877. However, it was later inserted with the recommendations of the 9th Law

Commission's Report. This clause provides that the person seeking specific performance must prove that he has performed or has been ready and willing to perform the essential terms of the contract which are to be performed by him.

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff."

7. The assurance given by the appellant at the time when the agreement dated 30.06.2000 (Ex.A1) was executed that there was no encumbrance over the suit property was not a correct statement of fact. The further recital that the "Original Parent Document" was in the Bank again was not a fair and complete disclosure. It is true that these averments were copied in the subsequent suit agreement dated 20.09.2000. However the communication dated 22.09.2001 (Ex.A6) emanating from respondent No.1 records that by the time the suit agreement was entered into the existence of the encumbrance was a well known fact. For the purposes of the present matter what is important is the common understanding with which the parties had entered into the transaction. If respondent No.1 was well aware about the existence of encumbrance over the suit property at the time when suit agreement was entered into, he cannot thereafter submit to the contrary. In the face of such clear understanding under which the suit agreement was entered into, the High Court was completely in error in observing that the entire case put forth on the part of the appellant was required to be summarily thrown out. Further, reliance on the decision in S.P. Chengalveraya Naidu (supra) was also misplaced. That case did not arise from a suit for specific performance and more over the plaintiff in that case was found to have withheld relevant documents and as such the judgment rendered by the trial Court dismissing his claim was restored by this Court. The principle laid down therein cannot apply either on facts or in law to the present case.

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., right from the date of the contract till the date of hearing of the suit. If respondent No.1 was well aware about the encumbrance and the parties had chosen that the balance consideration be paid to the appellant before 20.03.2001 so that the sale deed could be registered without any encumbrance, it was for respondent No.1 to have taken appropriate steps in that behalf for completion of transaction. The facts on record disclose that the first step taken by respondent No.1 after the suit agreement was well after four months, when further amount of Rs.2 lakhs was paid on 21.01.2001. Thereafter nothing was done till 20.03.2001 by which the transaction had to be completed. The record is completely silent about any communication sent around 20.03.2001 towards completion of transaction. As a matter of fact the first step thereafter was six months after the deadline namely on 22.09.2001 when the communication (Ex.A6) was sent along with amount of Rs.10 lakhs. The written submissions filed on behalf of respondent No.1 also do not indicate any steps till this time so as to say that he was all the while ready and willing to complete the transaction.

9. The assertion made by respondent No.1 in paragraph 7 of the plaint is a mere assertion without any relevant details as to what exactly he had done towards fulfillment of his obligations and completion of the transaction. The factual aspects as detailed above are quite clear that respondent No.1 had completely failed in his obligations and was not ready and willing to perform his part of the contract. Even going by the case set up by respondent No.1, that around 29.07.2002 an arrangement was arrived at, under which out of the balance amount Rs.19.5 lakhs, Rs. 13.5 lakhs were to be made over by respondent No.1 to the Bank directly and rest of the sum of Rs.6 lakhs was to be paid to the appellant in cash, the facts do not indicate any observance of these conditions. Beyond filing an application for impleadment which came to be dismissed, respondent No.1 did not take any step. The amount of Rs.13.5 lakhs was independently deposited and discharge was obtained by the appellant.

10. If respondent No.1 was put in possession of the suit property pursuant to the arrangement as suggested by him, his corresponding obligation under such arrangement was also twofold namely to pay off the dues to the Bank directly and pay rest of the sum to the appellant. There is nothing on record which could be consistent with discharge of such obligation on the part of respondent No.1.

11. The case put up by respondent No.1 that he was put in possession pursuant to an arrangement arrived at on or around 29.07.2002 is not free from doubt. In a matter where Rs.19.5 lakhs were still outstanding, it is not possible to accept that the vendor may put the purchaser in possession when the original agreement did not contemplate handing over of the possession even before execution of the sale deed. The contemporaneous facts including the aspects that the appellant had initiated criminal proceedings and made complaints to various authorities about forcible possession having been taken by respondent No.1, also indicate falsity in the claim of respondent No.1. Be that as it may the basic issue is whether respondent No.1 was ready and willing to perform his part of the contract which in our considered view has to be answered against him. We are conscious that two Courts have arrived at a finding of fact but in our view such finding is completely opposed to and contrary to the facts on record and is completely unsustainable.

12. We, therefore, reject the claim of respondent No.1 and hold that the suit for specific performance preferred by respondent No.1 is required to be dismissed. At the same time we accept the counter claim made by the appellant and hold that he is entitled to recovery of possession. It appears that the assertions in the counter claim that the Kalyana Mandapam was fetching Rs.1,80,000/- per annum were not disputed or denied by respondent No.1. On the score that the appellant was wrongfully denied and deprived of the earnings from Kalyana Mandapam for the last 16 years, he would be entitled to reasonable return. But at the same time he had retained and enjoyed sum of Rs.18 lakhs which he had received by way of advance from respondent No.1. In the circumstances, though we would direct refund of the sum of Rs.18 lakhs, we further deem it appropriate to direct that in the circumstances neither would respondent No.1 be entitled to any interest on the sum of Rs.18 lakhs which was given by way of advances under the suit agreement to the appellant nor would appellant be entitled

to any sum by way of mesne profits for last 18 years of wrongful possession of the suit property by respondent No.1.

13. Allowing the appeal, we therefore direct:-

(a) The suit for specific performance filed by respondent No. 1 is dismissed. Respondent No.1 shall be entitled to the refund of sum of Rs.18 lakhs paid by way of advance under the suit agreement. Said sum shall be refunded by the appellant within three months from the date of this judgment. No interest shall be payable on said sum. However, if the said sum is not paid within three months from today as directed, it shall carry interest @ 7per cent from the date of expiry of said period of three months.

(b) Counter claim preferred by the appellant is allowed. Respondent No.1 shall deliver vacant and peaceful possession of the suit property to the appellant within one month from the date of this judgment. The appellant shall however not be entitled to any mesne profits in respect of wrongful possession of the suit property by respondent No.1.

(c) The decree passed by the trial court and affirmed by the High Court stands modified accordingly. Each party shall bear his own costs throughout.

14. The appeals stand allowed in the aforesaid terms.

Judgment Referred.

¹(1994) 1 SCC 0001

²As quoted in Paragraph 3(B) above

³(1967) 1 SCR 0227

⁴L.R. 55 I.A. 0360

⁵(2011) 1 SCC 0429