

Maruthathal Vs. Ramathal

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Court : Chennai

Decided On : Mar-14-2014

Judge : R.Karuppiah

Appellant : Maruthathal

Respondent : Ramathal

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS Dated :

14. 03.2014 Coram THE HONOURABLE MR.JUSTICE R.KARUPPIAH
S.A.No.1819 of 2001 1. Maruthathal 2.Bagiyalakshmi 3.Kanchana .. Appellants
Vs. Ramathal .. Respondent Prayer:- Second Appeal filed under Section 100 of
Civil Procedure Code against the Decree and Judgment dated 26.10.1999 made
in A.S.No.13 of 1999 on the file of Principal District Court, Coimbatore, confirming
the Decree and Judgment dated 04.09.1998 made in O.S.No.424 of 1998 on the
file of II Additional Subordinate Court, Coimbatore. For Appellants 1 and 2 :
Mr.S.Krishnan, Senior Counsel for M/s.Sarvabhauman Associates For 3rd
appellant : Mr.A.Rajakumar for Mr.T.R.Rajaraman For Respondent :
Mr.B.Ramamoorthy

JUDGMENT

The appellants, who are the defendants in the suit filed this Second Appeal
against the Decree and Judgment dated 26.10.1999 made in A.S.No.13 of 1999

on the file of Principal District Court, Coimbatore, confirming the Decree and Judgment dated 04.09.1998 made in O.S.No.424 of 1998 on the file of II Additional Subordinate Court, Coimbatore.

2. For the sake of convenience, the defendants in the suit referred as appellants and the plaintiff in the suit referred as respondent hereafter.

3. The respondent/plaintiff filed the suit for directing the appellants 1 to 3 to execute the sale deed, in terms of agreement of sale dated 10.12.1986, with possession or directing the appellants 1 and 2 to convey 2/3 share of the suit property with decree for partition and possession and to pay compensation of Rs.62,956/- for unperformed part of contract and also for costs.

4. Briefly the case of the respondent/plaintiff is that the respondent entered into an agreement of sale with the appellants 1 and 2 in respect of the suit property on 10.12.1986. As per the above said agreement of sale, the respondent agreed to purchase the property to the extent of land measuring about 1 acre 87 cents (to be corrected on taking measurement) for sale price of Rs.1,01,000/- per acre from appellants 1 and 2 and advance amount was fixed as Rs.40,000/-. In terms of agreement of sale appellants 1 and 2 should assist the respondent to secure approval of layout plan and demarcation of boundaries, so as to enable the respondent to divide the land into plots and sell to various parties. The respondent requests the signatures of the appellants to submit the plan to authorities for approval but the appellants were postponing to sign the relevant papers and therefore, they did not fulfil the terms and conditions to be performed by them. It is also averred in the plaint that the respondent caused a notice dated 26.09.1987 calling upon the appellants to co-operate with the respondents in securing the approval of the layout plan. But the appellants sent reply dated 05.10.1987 in which, it is falsely stated as if the respondent failed to raise the balance sale consideration and to pay the amount within six months from the date of agreement and also failed to prepare layout plan and thus committed breach of agreement of sale. The respondent has sent another legal notice dated 11.11.1987 enclosing a copy of plan for signature of the appellants but the appellants refused to sign and also not send any reply. Further, the contention of the appellants stated in the

reply notice that the sale price has to be paid within six months from the date of agreement is not correct. The appellants, who put the respondent in possession for obtaining approval of layout plan but they did not act accordingly. Further, the appellants agreed for taking sale in one year subject to extension. Therefore, the respondent has sent another notice dated 06.12.1987, calling upon the appellants to execute the sale deed, but, the appellants failed to comply with. It is further case of the respondent is that the appellants agreed to extend the time for payment of sale price and hence, they did not make any demand for payment at the expiry of six months time. The appellants also admitted the extension of time but falsely claimed as the respondent agreed to pay interest. The respondent is ready and willing to take the sale but the appellants did not co-operate and postponing the execution of sale deed. Further the 3rd appellant is another daughter of the 1st appellant and hence, she is added as a party to the suit. The appellants 1 and 2 are bound to procure the concurrence of the 3rd appellant and executed the sale deed. If for any reason, the court comes to the conclusion that the agreement cannot bind the share of the 3rd appellant seeking a decree for specific performance of 2/3rd share with direction for partition and also compensation for the deficit in the property to be conveyed. Hence, the suit.

5. The appellants have admitted in their written statement that the respondent entered into an agreement of sale with the appellants 1 and 2 on 10.12.1986 to purchase the suit property, after fully satisfying about the title of the appellants 1 and 2 and also the appellants handed over all the copies of the title deeds to the respondent. According to the appellants, the sale price was fixed as Rs.1,01,000/- per acre but the respondent agreed to pay the entire sale price within six months from the date of agreement though time stipulated was one year to complete the sale. Despite the said agreement, the respondent did not pay the entire sale price as contemplated in the agreement. It is also averred in the written statement that the respondent did not have the money to pay the sale price and therefore, the respondent was postponing to complete the sale for several months. Further, the suit property to got potential value and it can be parcelled out into house sites and therefore, it was agreed that time is essence of contract since the value of the property was increasing. Further, the suit property was measured and demarcating stones were also fixed. The appellants demanding the respondent to pay the

balance sale consideration and get the sale deed executed but the respondent has not taken any steps to parcel out the land and get layout plan approved. The appellants have denied the contention of the respondent is that the respondent arranged to prepare a layout of the suit land into house sites and the respondent requested the signature of the appellants in the plan. The respondent issued a notice on 12.05.1987, containing false allegations as if the property has to be measured. The appellants issued reply notice on 23.05.1987, denying the allegation of the respondent and also clearly stated that the suit property was measured and demarcated with stones, but the respondent was avoiding to pay the sale consideration. The respondent requested further time to pay the sale price and also agreed to pay the interest at the rate of 18% per annum for sale consideration within four months in the presence of one Karuppusamy but, the respondent did not keep her promise. After several months, the respondent issued a notice dated 26.09.1987, containing false allegations and therefore, the appellants issued a reply notice on 05.10.1987. In the above said notice, the respondent has not stated regarding the approval of layout plan and further, the respondent clearly stated that the respondent did not submit any plan for signatures. Thereafter, the respondent issued another two notices dated 11.11.1987 and 06.12.1987 for which, the appellants issued a reply on 09.12.1987. Even after exchange of notices, the appellants are ready to execute the sale deed but the respondent did not perform her part of contract and the respondent was not having money to pay the balance sale consideration. During pendency of the suit, the appellants have filed an application in I.A.No.1209 of 1998 to advance the hearing of the suit and expressed that the appellants are ready to execute the sale deed provided that the respondent to pay the balance sale consideration together with interest. Since the respondent has not paid the balance sale consideration, she lost her right under the agreement of sale. Further, the 3rd appellant is not necessary party to the suit, she has no right over the property since the agreement was entered into between the respondent and the appellants 1 and 2. The claim of 2/3 share is unsustainable and therefore, the respondent is not entitled to any relief.

6. On perusal of the pleadings, the trial court has framed four issues for consideration. On behalf of the respondent/plaintiff, one witness was examined as

PW1 and marked seven documents as Exs.A1 to A7. On behalf of the appellants two witnesses were examined as DW1 and DW2 and marked two documents as Exs.B1 and B2.

7. The trial court has granted the relief of specific performance and directed the respondent to deposit the balance sale consideration within one month and directed the appellants 1 and 2 to execute the sale deed within two months thereafter as per Ex.A1 agreement of sale. Aggrieved over the above said finding, the appellants preferred the first appeal in A.S.No.13 of 1999. The first appellate court confirmed the above said decree and judgment passed by the trial court and dismissed the first appeal. Being aggrieved by the above said findings, the appellants who are the defendants in the suit preferred this second appeal.

8. The Second Appeal is admitted on the following substantial questions of law:
".1. Whether the courts below are right in interpreting the covenant that if the entire amount has not been paid within six months as agreed, the agreement in Ex.A1 would stand cancelled ?.

2. Whether the Courts below have totally overlooked the provisions of Section 16(c) of the Specific Relief Act which provides that the plaintiff should prove his continuous readiness and willingness from the date of the contract till date of hearing ?."

9. I have carefully considered the rival contentions made on either side and perused the materials available on record.

10. The trial court has discussed about the oral and documentary evidence and finally held that the appellants have not produced any documents to prove the property was measured with Surveyor except the oral and documentary evidence of DW1 and DW2 and the property was not measured and hence, the respondent has not paid the balance sale consideration and therefore, the respondent is entitled specific performance of contract as per Ex.A1 agreement of sale inspite of non-payment of balance sale consideration. The first appellate court has discussed about the oral and documentary evidence and came to a conclusion that in the above said agreement, it is stated that the balance sale consideration

should be paid within six months from the date of agreement but in the same agreement it is stated as the execution of sale deed to be completed within one year after measuring the property. Therefore, both the conditions are contradictory and hence, the six months time fixed for payment of balance sale consideration need not be complied with. Further, the appellants have failed to prove the measurement and demarcated the suit property as pleaded by them and therefore, confirmed the decree and judgment passed by the trial court.

11. The learned counsel appearing for the appellants mainly contended that as per the terms of conditions made in Ex.A1 agreement of sale, the appellants had measured and demarcated the property and there is no other obligations pending on the part of the appellants, but, the respondent has failed to perform her part of the contract. The learned counsel further submitted that the respondent has no means to pay the balance sale consideration from the date of agreement till today and only to delay the payment of balance sale consideration, the respondent issued several notices with false contentions and the appellants have duly replied to the above said false contentions.

12. Further, the learned counsel appearing for the appellants pointed out that the respondent has suppressed the material facts in the plaint particularly, the earlier legal notice Ex.B1 issued by the respondent to the appellants on 12.05.1987 and reply notice Ex.B2 issued by the appellants to the respondent on 23.05.1987 that itself sufficient to reject the discretionary relief of specific performance. The learned counsel appearing for the appellant would further submit that both the courts below have not considered the material facts that the suit property was measured immediately after Ex.A1 agreement of sale and the above said fact was intimated to the respondent under Ex.B2 on 23.05.1987 itself but after the above said receipt of Ex.B2 reply notice, the respondent has not demand the appellants to measure the property. But the appellants stated in the subsequent legal notice that the appellants have not affixed their signatures for approval of layout. The learned counsel submitted that both the courts below have wrongly held as if the appellants have not measured the property and for that reason, the respondent has not deposited the balance sale consideration and therefore, the respondent is not entitled to the relief and hence the findings of both the courts below are

perverse findings and also illegal.

13. Per contra, the learned counsel appearing for the respondent would submit that the appellants have failed to prove the fact that the suit property was measured and demarcated with stones and for that reason, the respondent could not pay the balance sale consideration to the appellants. The above said contention was discussed by this Court, while passing interim order in CRP and therefore, the suit property was not measured by the appellants till date and hence, the respondent has not paid the balance sale consideration. Further, the learned counsel for the respondent submitted that since the appellants failed to perform their part of contract and the respondent is ready and willing to perform her part of contract, both the courts below have correctly granted the relief of specific performance and therefore, the above said findings are not perverse or illegal.

14. Admittedly the respondent filed a suit, seeking the equitable relief of specific performance on the basis of Ex.A1 agreement of sale. It is settled principle of law is that if a plaintiff filed a suit seeking relief, it is the duty of the plaintiff to plead and prove the contentions and should not suppressed any material facts and the plaintiff has to come to the Court with clean hands. It is also as a condition precedent for obtaining a decree of specific performance that the plaintiff should comply with all the mandatory conditions as incorporated in the sale agreement. It is further settled law is that if the plaintiff seeking equitable relief of specific performance, he has to prove always ready and willing to perform his part of the contract from the date of agreement and also during the pendency of the proceedings.

15. The learned counsel appearing for the appellants would submit that as per terms of the agreement, the appellants have measured and demarcated the property and further, all the relevant documents have handed over to the respondent, even at the time of Ex.A1 agreement of sale and no obligation pending on the part of the appellants as per sale agreement, but only the respondent is not ready and willing to perform her part of contract from the date of agreement till today. Further, the respondent has no means to pay or deposit the

balance sale consideration till today. Therefore, the learned counsel pointed out that the respondent is not entitled to the discretionary relief of specific performance.

16. The learned counsel appearing for the appellants relied three decisions reported in i) 2011 (6) MLJ149(SC), ii) AIR1995(SC) 945, iii) 1997 (2) LW820 and contended that in view of the law laid down by the Hon'ble Supreme Court and this Court, the respondent is not entitled to the equitable relief of specific performance.

17. The learned counsel appearing for the respondent relied on a decision in 2012(3)MWN Civil 285 and contended that the respondent need not tender or deposit the balance sale consideration and in the instant case, the respondent has not deposited or tendered the balance sale consideration only for the reason that the appellants have not measured and demarcated the property and therefore, the respondent is entitled to the relief of specific performance as pleaded in the plaint.

18. It is relevant to extract the relevant provision (i.e.,) Section 16(c) of the Specific Relief Act 1963, reads as under. ".16.(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. Explanation.- For the purposes of clause (c),- (i) Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court, (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

19. The learned counsel appearing for the appellants would submit that the potential value of the suit property is very high and the respondent is intended to purchase the suit property only for parcelled out into house sites and sell the property and further, the value of the property increasing every day. The learned counsel further submitted that the respondent has not paid the balance sale consideration till date even though in the agreement, it is specifically stated as the balance sale consideration has to be paid within six months from the date of agreement and therefore, the respondent is not entitled to the relief of specific

performance. In support of his contention, the learned counsel relied on the recent decision of the Hon'ble Supreme Court reported in 2011(6) MLJ149(SC) Saradamani Kandappan and another v. S.Rajalakshmi and others, in which, relevant para 25 and 37 are extracted as under:

25. The reality arising from this economic change cannot continue to be ignored in deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and 'non-readiness'. The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for Rs.One lakh and received Rs.Ten Thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining Rs.Ninety Thousand, when the property value has risen to a crore of rupees.

37. The terms of the contract makes it clear that payment of sale price did not depend on execution of the sale deed. The sale deed was not required to be executed within any specific period. The purchaser had to fulfil her obligation in regard to payment of price as provided in clause 4 and thereafter vendors were required to perform their reciprocal promise of executing the sale deed, whenever required by the purchaser, either in her name or in the names of her nominees.

The sale deed had to be executed only after payment of complete sale consideration within the time stipulated. In these circumstances, section 52 of the Contract Act does not help the appellant but actually supports the vendors-respondents. Re: Question (iii).

20. The learned counsel appearing for the appellant also submitted that in cases where the plaintiff seeking relief of specific performance, the plaintiff should plead and prove the ready and willing to perform his part of contract as per terms of the contract. If fails to prove he is not entitled to equitable relief of specific performance. In support of his contention, the learned counsel relied on the following decisions of Hon'ble Supreme Court reported in (I) AIR 1995 SC945(Jugraj Sing and another v. Labh Singh and others) reads as under: ".4. The Privy Council in Ardeshir H.Mama v. Flora Sassoon, AIR 1928 PC208 has held that in a suit for specific performance the averment of readiness and willingness on plaintiff's part upto the date of the decree is necessary.

5. This Court in Gomathinayagam Pillai v. Palaniswami Nadar, AIR SC868 quoting with approval Ardeshir's case (AIR 1028 PC208 (supra) had held as follows (para 6): ".But 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".. ". (II) 1997 (2) LW820(Vasantha and 3 others v. M.Senguttuvan in which the relevant para 15 reads as under: ".15. In A.I.R.1967 H.S.C.W.R page 147 (Gomathinayagam Pillai and others v. Palani Swami Nadar), the Supreme Court held that in a suit for specific performance, plaintiff must prove readiness and willingness. The relevant portion of the said decision reads thus:- ".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 Sassoon:".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 in 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.". (Emphasis supplied) Even if for a single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted. Readiness and willingness must be there continuously from the date of agreement up to the date of hearing. In this case, the concurrent finding is that the appellant was not ready to take the sale deed and that is proved by Ex.A3.". (III) The decision of this Court reported in 2010 (2) MLJ253(T.Rajaram v. T.R.Maheswaran) in paras 31, 32 and 33 reads as follows: ".31. Remedy of specific performance is an equitable remedy. In order to obtain such discretionary relief, plaintiff has to come to the Court with clean hands. Entire facts of the case have to be pleaded. There should be no attempt on the part of the plaintiff to conceal the facts. As a condition precedent for obtaining a decree of specific performance, the plaintiff should comply with all the mandatory conditions as incorporated in the sale agreement. When the sale agreement stipulates a pre-condition so as to enable the plaintiff to obtain a decree of specific performance, the said condition has to be complied with in its letter and spirit. There should be no attempt on the part of the plaintiff to mislead the Court. Whether it be favourable or unfavourable, plaintiff was expected to disclose the entire details of the transaction. The conduct of the plaintiff should be trustworthy. The course of conduct adopted by the plaintiff should be fair and any suppression of material particulars would be treated as unfair, which would disentitle him from obtaining the equitable remedy of specific performance.

32. Readiness and willingness on the part of the plaintiff to perform his part of the contract has to be ascertained from the totality of circumstances. Mere reproduction of the wordings in Section 16(c) of the Specific Relief Act is not enough. It is true that the plaintiff was not expected to maintain liquid cash with him throughout the agreement period to discharge the obligation cast on him as per the agreement of sale. However, in case wherein the very financial capacity of the plaintiff to pay the balance sale consideration was under challenge, he was expected to produce some materials to show his financial position and the

availability of funds to honour the commitments made in the agreement of sale.

33. Since the remedy of specific performance is a discretionary remedy on equitable grounds, plaintiff has to produce materials with respect to his readiness and willingness at all point of time. The conduct of the plaintiff assumes significance in a case like this. Court was expected to weigh the materials produced by the plaintiff to come to a definite conclusion pertaining to the readiness and willingness to perform the contractual obligation voluntarily undertaken by the plaintiff. Any action on the part of the plaintiff to take undue advantage of the situation would give negative results and he would be denied the equitable remedy. The conduct of the plaintiff throughout should be taken note of to decide the issue regarding exercise of discretionary jurisdiction. In a matter relating to sale of property, Court was not bound to grant specific performance for a mere asking."

21. Per contra, the learned counsel appearing for the respondent would submit that it is well settled law is that the purchaser need not actually tender the balance of sale consideration and in the instant case, the appellants have not measured and demarcated the property and therefore, the respondent need not pay or deposit the balance sale consideration. In support of his contention, learned counsel relied on a decision reported in 2012 (3) MWN (Civil) 285 (G.Janobai and others v. V.N.Devadoss), in which, the relevant paras 67, 70 and 71 are extracted as follows:- ".67. It is well settled that the Plaintiff has to plead and prove the readiness and willingness. The Plaintiff must be ready to perform his part of the contract from the date of agreement till the date of filing of the Suit and even thereafter.

70. It is also well settled that the purchaser need not actually tender the balance of sale consideration but need to prove that he had or has resources to pay the balance consideration.

71. The readiness relate to the capacity of the purchaser having enough fund to purchase the property. The willingness relate to the conduct of the parties and more particularly in respect of the Plaintiff the steps taken by him to conclude the contract."

22. In the instant case, admittedly, as per Ex.A1 agreement of sale, the appellants 1 and 2 agreed to execute the sale deed in respect of Survey No.331/1 punja 1 acre 87 cents for sale consideration of Rs.1,01,000/- per acre on 10.12.1986. It is also not in dispute that as per the above said Ex.A1 agreement of sale, the date of payment of balance amount is six months i.e., expired on 10.06.1987 and time was granted for execution of sale deed as one year i.e., expired on 10.12.1987. But, in the instant case, the suit is not filed within six months or one year, but, filed only on 29.03.1988. A perusal of the documents adduced on either side revealed that after, Ex.A1 agreement of sale for the first time, the respondent has sent Ex.B1 legal notice on 12.05.1987 to the appellants 1 and 2, in which, it is stated that the appellants have not measured the property with the help of surveyor as per Ex.A1 agreement of sale and the appellants have not produced necessary documents to get plan approval and therefore, requested the appellants to measure the property within a week. The appellants have sent Ex.B2 reply notice dated 23.05.1987, in which, it is specifically denied the respondent's contention (i.e.,) the appellants have not measured the property with the help of surveyors as false. It is further stated in Ex.B2 reply notice that the entire property has been measured and demarcated with stones by the appellants. Further it is stated in the reply notice that all the documents have been already handed over to the respondent and the above said fact was already stated in the agreement itself. It is further stated in Ex.B2 reply notice that the appellants are ready and willing to perform their part of the agreement but, only the respondent has not come forward to perform her part of the agreement in spite of repeated request and demand and only with a view to gain time, the respondent has caused notice and therefore, requested to perform her part of contract.

23. After receipt of the above said Ex.B2 reply notice, the respondent has not sent any rejoinder denying the above said facts that the suit property was not measured as stated in Ex.B2 reply notice. The respondent has sent another legal notice- Ex.A2 on 26.09.1987 in which the respondent has not stated that the suit property was not measured or requested the appellants to measure the property as stated in Ex.B1, earlier legal notice. In Ex.A2 notice, it is only stated that the respondent has prepared the layout plan about six months ago but the appellants have been postponing to sign in the above said papers. It is also stated in Ex.A2 notice that

the respondent already entered into several agreements for sale of plots with intending purchaser of layout site and therefore, seeking co-operation to obtain approval of layout plan by signing necessary papers. The appellants have sent a reply notice-Ex.A3 on 05.10.1987 in which, it is denied the averments made in Ex.A2 notice and stated that at no point of time, the respondent demanded the appellants to sign in the necessary papers to seek approval. It is further stated in Ex.A3 reply notice that only due to inability to pay the sale price within the agreed period of six months, false averments made in the notice. Further, it is informed in the reply notice that if the respondent has not complete the transaction within the stipulated period, the agreement stand cancelled. It is also stated in Ex.A3 reply notice that after exchange of notices, the respondent has agreed to pay the sale consideration with 18% interest but not paid and therefore, advised to complete the transaction within time, failing which the respondent has no right to enforce the agreement. Ex.A4 notice dated 11.11.1987 pointed out the error in date of earlier notice issued by the respondent and for rectification. Further, on 06.12.1987, the respondent has sent Ex.A5 notice to the appellants to execute the sale deed as per agreement in favour of six other persons and also enquired about another daughter of 1st appellant. On 09.12.1987, the appellants have sent a reply notice Ex.A6 in which it is specifically stated the respondent has not paid the balance sale consideration within stipulated period and therefore, cancelled the above said agreement of sale and also informed that the respondent has no right to know about other daughter since the agreement stands cancelled and becomes non-est and unenforceable on account of breach of contract by the respondent. Ex.A7 copy of layout as plots marked by the respondent without any date and other particulars.

24. On perusal of the above said notices and reply notices between parties revealed that the respondents sent legal notice Ex.B1 dated 12.05.1987 to the appellants as if the property was not measured as per the terms of agreement. But, the appellants have sent a reply notice under Ex.B2 dated 23.05.1987 in which, it is clearly stated the property was already measured with surveyor. After the above said reply notice, the respondent has not at all stated in any one of the notices as the property was not measured as stated in Ex.B2 reply notice. In the plaint also not pleaded as the appellants have not measured the property with

Surveyor as per terms of the agreement of sale. In the subsequent notices and in the plaint, it is only stated as the appellants have not affixed signatures for obtaining plan approval. In the plaint the respondent has not seeking a relief of measurement of the suit property with Surveyor as per terms of the agreement of sale. But, only seeking the relief of specific performance to execute the sale deed in respect of the suit property namely 1 acre 87 cents. Therefore, the above said averments made in the legal notices, plaint, written statement and oral evidence of DW1 and DW2 clearly proved that the suit property was already measured with Surveyor as rightly pointed out by the learned counsel for the appellants.

25. The main contention of the respondent is that only due to not measuring the property, the balance amount has not been paid and also not able to execute the sale deed and the appellants alone not performed their part of the contract and therefore, the respondent is entitled to the relief of specific performance. The courts below have not properly considered the averments made in the notices, reply notices, pleadings and oral evidence of DW1 and DW2 about the measurement of the suit property. Without pleadings and evidence both the courts below have wrongly held that the property was not measured and hence, the respondent has not paid the balance sale consideration.

26. The learned counsel appearing for the respondent would submit that the appellants have filed an I.A.No.417 of 1989 before the trial court and in that application, the respondent requested to deposit the balance sale consideration and the trial court has directed the respondent herein to deposit the balance amount in terms of agreement. As against the above said order, the respondent herein preferred Civil Revision Petition in C.R.P. No.2195 of 1999 and in the above said revision petition, this Court has held that since the property has not been surveyed and demarcated and price also not ascertained and hence, no need to pay balance amount and dismissed the said petition filed by the respondent. The learned counsel appearing for the respondent further submitted that the above said facts would reveal that the suit property was not measured and demarcated and therefore, the respondent need not pay the balance sale consideration.

27. In the instant case, on the side of the appellants examined the first appellant as DW1 and clearly deposed in the chief examination that the property was already measured and handed over the possession to the respondent. At the time of cross-examination also DW1 has deposed as the property was measured with the help of one Surveyor namely Radhakrishnan and demarcated the property. To prove the above said facts, on the side of the appellants have examined one Karuppusamy as DW2 and the above said witness also deposed as the property was measured by Surveyor in his presence. As already discussed, after Ex.B2 reply notice, wherein, it is clearly stated as the property was already measured, after that, the respondent has not stated anywhere in the notices or in the plaint that the property was not measured and demarcated. The respondent has not taking any steps before the trial court for measurement and demarcation of the property and also not seeking relief of demarcation of the property. In the plaint, the respondent seeking only the relief of execution of sale deed in respect of 1 acre 87 cents alone. Further, the respondent himself contended that she had prepared the layout plan as per Ex.A7 and sent to the appellants. As rightly pointed out by the learned counsel for the appellants, without measurement, the above said lay out cannot be preferred. Therefore, the contention of the respondent that the suit property was not measured and demarcated by the appellants are not proved by reliable oral and documentary evidence.

28. As rightly submitted by the learned counsel for the appellants, both the courts below have not considered the pleadings and evidence properly and without any pleadings and proof, both the courts below have wrongly held that the suit property was not measured and demarcated and therefore, the respondent has not paid the balance sale consideration are all perverse finding and also illegal. Both the courts below have not properly interpreted the contention stated in Ex.A1. In the above said agreement, it is clearly stated that the balance sale consideration should be paid within six months from the date of agreement but one year time was granted for execution of sale deed, only on the ground that it is necessary to obtain the layout plan from concerned Government Authorities. Therefore, as per settled law laid down by Hon'ble Supreme Court, as already discussed, the respondent has failed to pay the balance sale consideration and the contention of the respondent is that the property was not measured and hence, the balance sale consideration

not paid cannot be accepted. Therefore, the respondent has miserably failed to perform her part of the contract as rightly pointed out by the learned counsel for the appellants.

29. The next contention of the appellants is that the respondent has no means to pay the balance sale consideration from the date of agreement till date and therefore, the respondent has not paid the balance sale consideration or deposited the balance sale consideration. Learned counsel also pointed out that the respondent has not even stated in the plaint or in the legal notices or at the time of evidence, as stated about his financial capacity to pay the balance sale consideration. A careful reading of the averments in the written statement and the reply notices issued by the appellants proved that the appellants have always stated that the respondent has no means to pay the balance sale consideration and therefore, delayed the execution of sale deed. In the plaint or in the legal notices, the respondent has not stated as the respondent has having sufficient means to pay the balance sale consideration or not given any particulars to prove the capacity to pay the balance sale consideration.

30. The learned counsel for the respondent only contended that the trial court has directed to deposit the above said balance sale consideration but this Court has set aside the order and held that need not deposit balance sale consideration in Civil Miscellaneous Appeal and therefore, the respondent need not deposited the balance sale consideration since the property was not measured. As already discussed in detail the property was already measured and demarcated, this Court has not discussed about the oral and documentary evidence adduced on either side at the time of orders passed in CMP. Only on the basis of the averments in the interim application and interim direction of the trial court, this Court has passed an order and held that the respondent need not deposit the above said amount. This Court has not stated that the respondent need not prove the means to pay the balance sale consideration. The contention of the respondent is that in view of the above said direction, the respondent need not prove the means to pay the balance sale consideration cannot be accepted. The decision relied on by the learned counsel appearing for the respondent itself (i.e.,) the judgment reported in 2012(3)MWN(Civil) 285, it is clearly held that the purchaser need not actually

tender the balance sale consideration but need to prove that he had resources to pay the balance sale consideration. The above said decision itself revealed that the purchaser need not tender the balance sale consideration but should prove the means to pay the sale consideration. In the instant case, absolutely no piece of evidence to prove that the respondent having sufficient means to pay the balance sale consideration in spite of denied the capacity by the appellants. Therefore, as rightly submitted by the learned counsel for the appellants, the respondent is not entitled to the discretionary relief of specific performance. Both the courts below have not at all considered the above said pleadings stated in the written statement and also not at all discussed about the averments made in the reply notices issued by the appellants.

31. From the above said discussion, it is clear that both the courts below fails to interpret correctly the terms of conditions stated in Ex.A1 agreement of sale regarding payment of balance sale consideration and further, both the courts below have totally overlook the provisions of Section 16(c) of the Specific Relief Act and therefore, the above said findings of both the courts below are perverse and also illegal findings and answered two substantial questions of law accordingly.

32. In view of the above said findings, the respondent is not entitled to the relief of specific performance as prayed for in the suit. Admittedly, the respondent has paid Rs.40,000/- as advance in terms of Ex.A1 sale agreement. From the evidence adduced on either side revealed that the appellants have already taken possession of the property since the balance sale consideration was not paid by the respondent in terms of agreement of sale. In the above said circumstance, (i.e.,) the possession of the property with the appellant and from the submission of both side counsels, this Court is of the view that the advance sale consideration paid by the respondent is to be refunded by the appellants 1 and 2 to the respondent.

33. In the result, the second appeal is allowed and the decree and the judgment passed by both the courts below are set aside and the original suit filed by the respondent is dismissed. The appellants 1 and 2 are directed to pay the advance

amount of Rs.40,000/- with interest at 9% per annum from the date of agreement till date of payment to the respondent within two months from the date of receipt of a copy of this judgment. No order as to costs. ssn To 1. Principal District Court, Coimbatore.

2. II Additional Subordinate Court, Coimbatore.

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