

indravathi Vs. Kamala

indravathi Vs. Kamala

SooperKanoon Citation : sooperkanoon.com/801573

Court : Chennai

Decided On : Jun-09-2000

Reported in : 2000(4)CTC278

Judge : Prabha Sridevan, J.

Acts : [Specific Relief Act, 1963](#) -- Sections 16, 20; [Indian Contract Act, 1872](#) -- Sections 55

Appeal No. : A.S. No. 373 of 1987

Appellant : indravathi

Respondent : Kamala

Advocate for Def. : Mr. D. Dharamachand Jain, Adv.

Advocate for Pet/Ap. : Mr. Sampath Kumar and Associates, Adv.

Judgement :

ORDER

1. This appeal has been filed against a decree for specific performance.
2. According to the plaint, there was an agreement dated 8.11.1979 between the plaintiff and the defendant to sell the suit property at 28, Hanumantharoyan Kovil Street, Chennai-3 for a consideration of Rs.1,00,000. The agreement is Ex.A-1. As per clause 2 of the said agreement, Rs.10,100 was paid and received on the same

date and the plaintiff agreed to pay a sum of Rs.10,000 on 15.11.1979 and Rs.20,000 on 15.12.1979 and the balance of Rs.60,000 at the time of registration. It was stipulated that time was essence of the contract and that the sale shall be completed within three months of the said date i.e., on or before 31.1.1980. The plaintiff offered Rs.10,000 on 15.11.1979 to the defendant's counsel but thereafter the defendant refused to receive any amount and Rs.10,000 was also returned by the defendant's counsel. On 13.12.1979, the plaintiff wrote a letter to the defendant offering to pay the amount. The defendant replied admitting the transaction but requesting for a copy of agreement for sale. On 23.1.1980, the plaintiff sent the suit notice to which a reply was sent by the defendant containing untenable averments. The plaintiff thereupon also sent the rejoinder. Plaintiff therefore filed the suit for specific performance. Since inspite of repeated demands and reminders, the defendant refused to register the sale deed.

3. According to the defendant, plaintiff did not pay the second and the third instalments and the tender of Rs.10,000 to the counsel for the defendant was not a proper tender since the counsel was not authorised to receive the amount. The plaintiff never had sufficient money nor did she take any action to purchase the property. Plaintiff had no money to pay the second and the third instalments and had obviously abandoned the agreement. Since the plaintiff had not paid the second and the third instalments, there was neither readiness nor willingness on her part and hence she was not entitled to specific performance.

4. Further it was agreed that in order to obtain the income-tax clearance certificate the plaintiff had to furnish a copy of the draft sale deed which was not produced by the plaintiff until the date of the suit. It was also agreed between the parties that time was essence of the contract, since the defendant wanted to sell her properties and to purchase another at Annanagar on account of her husband's health. Because of the default committed by the plaintiff, the defendant could not do so and the real estate prices shot up thereby the defendant had to abandon the idea of purchasing an alternate property, and the defendant, as per the agreement forfeited the advance amount. Therefore, according to the defendant, the suit had to be dismissed.

5. The trial court framed to issues and on a consideration of oral and documentary evidence, came to the conclusion that the payment of Rs.10,000 to the defendant's counsel was a valid payment and the failure to pay the second instalment on 15.12.1979 was only because the defendant's counsel had refunded the first instalment. The trial court also found that the defendant had failed to perform his part of the obligation as per Ex.A-1 agreement and held that the plaintiff had all along been ready and willing to perform his part of the contract and that further more, the contention of the defendant the time was essence of the contract was also rejected by the trial court. Therefore, the trial court decreed the suit. The defendant has filed this appeal.

6. When the matter came up for hearing, the counsel for the respondent Mr.Dharamchand Jain filed C.M.P.No.4864 of 2000 for amendment of the plaint by adding the words regarding 'readiness' and 'willingness'. According to the counsel for the respondent this was inad-vertently left out. He referred to the decision reported in Lakhi Ram v. Trikha Ram, 1998 1 C.T.C. 726, where the Supreme Court allowed an application to amend the plaint to incorporate averments regarding "readiness' and 'willingness'. The Supreme Court had held in this case that insertion of such averment will not change the cause of action and it was also legally permissible and should be allowed even at the appellate stage.

7. The learned counsel for the appellant filed his counter to this application for amendment and stoutly opposed it. But on a perusal of the pleadings and the evidence both oral and documentary, it is clear that though there are no specific pleadings to this effect, both the parties have been conscious that the plaintiff has to establish 'readiness' and 'willingness'. In the chief-examination P.W.1 states that the plaintiff was willing to purchase the property. The learned trial Judge also gives a finding that the plaintiff has proved that she was ready and willing to purchase the property. This being so, the C.M.P. for amendment must be allowed; since it cannot be said that the plea of readiness and willingness is sought to be introduced for the first time.All the materials for deciding whether there was 'readiness' and 'willingness' on the pan of the plaintiff is already before the Court. Therefore, in the interest of justice C.M.P.No.4864 of 2000 is allowed and the amendments shall be carried out.

8. The learned counsel for the appellant argued that the respondent was not entitled to specific performance, since readiness and willingness had neither been pleaded nor proved, the respondent did not have sufficient funds and since time was the essence of the contract, the delay caused by the respondent disentitle her from getting a decree for specific performance. The rise in prices of real estate should have been a relevant factor while deciding the case and also the refund of advance by the appellant having been received by the respondent amounted to waiver of her right for specific performance.

9. The learned counsel for the appellant pointed out to clause 2 and clause 7 of Ex.A-1, the agreement, they are the relevant clauses for determining when the instalments should be paid. According to the learned counsel, since these amounts were not paid, there can be no decree for specific performance.

10. The learned counsel for the appellant stated that there was no justification for the respondent to pay the second instalment to the counsel Mr.Nandalal, when both the parties live close to each other in the same street and therefore, the statement that Rs.10,000 was paid as advance on 15.11.1979 is not correct. Next there was a default in payment of the third instalment, after which some time before Christmas 1979 the amount paid as second instalment to the defendants counsel was also returned. Even thereafter, the respondent did not make any efforts to make the payment as per clause 2 of the agreement. Clause 7 of the agreement stipulated that the sale shall be completed within three months from the date of agreement ' i.e. on or before 31.1.1980', since the respondent even till date had not produced the draft sale deed to enable the appellant to get the income tax clearance, the appellant cannot seek specific performance. According to the learned counsel for the appellant, there was a clear condition that time was essence of the contract. But the respondent did not come forward to perform her part of the contract on or before 31.1.1980. On the other hand, the appellant was always ready, provided the time schedule had been adhered to by the plaintiff.'

11. As regards readiness and willingness, the counsel for the appellant referred to the evidence of P.W.1

'At that time I was willing to purchase the property. I am having funds for the same. I am willing to purchase the property even today.'

According to the learned counsel, this does not show that there is a continuous readiness and willingness from the date of agreement till date of suit. In the cross examination also P.W.1, states.

'I have no documentary evidence to prove that in 1979 I had financial capacity to purchase the property. He also states that apart from the notice I have no other document to show that I was having Rs.20,000 on that day.'

12. From all this, the counsel for the appellant would submit that the only conclusion that can be drawn is that the respondent had neither money nor the willing to purchase the property. The counsel for the appellant also stated that Ex.A-6, the reply by the appellant to the respondent was issued as early as 27.12.1979, asking for a copy of the agreement and stating that the appellant was prepared to sell the property after seeing the conditions the respondent did not send the agreement, on the other hand one year thereafter/the suit notice ExA-2 is issued. On 23.1.1980, to which Ex.A-3 reply was sent by the appellants counsel informing the respondent that as per clause 7 of the agreement the time had expired on 31.12.1979 itself and since the respondent had not adhered to the time schedule nor paid the second and third instalment. The agreement had been terminated and the advance has been treated as a deposit and forfeiture. Even this letter was sent on 9.2.1980, a reply on the same date, wherein it is stated that the appellant refused to abide by the terms and conditions and had returned the sum of Rs.10,000. So the learned counsel for the appellant stated, knowing fully well that the advance was refunded and the contract had been treated as terminated the suit was filed only on 8.11.1982 just before the period of limitation expired and the laches on the part of the respondent should be taken note of, since this is a factor which would disentitle the respondent from getting equitable relief of specific performance.

13. The counsel for the appellant relied on various decisions to support his case. To show that readiness and willingness must be proved to obtain a decree of specific performance, the learned counsel for the appellant referred to

N.P.Thirugnanam v. R.Jagan Moha Rao, : AIR 1996 SC116 :

'Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract.' Jugraj Singh and another v. Labh Singh and others, A.I.R. 1995 S.C. 945: '(A) Specific Relief Act (47 of 1963), Sec. 16(3) - Suit for specific performance of contract - Ready and willingness of plaintiff continuous readiness and willingness at all stages and willingness at all stages from date of agreement till date of hearing of suit must be proved.'

Krishnasamy Naidu v. Ambrose : (1996)1MLJ566 :

'If really the plaintiff was ready and willing to perform his part of the contract, there is no reason as to why he has not come forward with a suit for specific performance immediately after the period contemplated under the agreement and extended by the power of attorney of the first defendant expired.'

P.Lazarus v. Johnson Edward, A.I.R.1976 A.P. 243:

'It is well-settled that a plaintiff, who seeks specific performance must, in his turn, perform all the terms of the contract which he expressly or by implication ought to have performed at the date of the action.'

According to the learned counsel since the respondent had not shown by either oral and documentary that he was ready and willing to perform his part of the contract nor had he performed those acts namely paid the instalments which he ought to have performed at the relevant dates as per the agreement, he cannot get specific performance as per the decisions referred to above.

14. As regards the requirement of proof of availability of funds, the learned counsel for the appellant referred to Swami Ganesh Dassji v. Sita Ram Thapar, : AIR 1996 SC2095 :

'Time essence of contract purchaser not having enough funds to pay consideration - Draft sale deed not returned by him after being duly approved within seven days as stipulated . Relief of specific performance - Rightly refused.'

According to the learned counsel for the appellant, there was no sufficient proof regarding availability of funds and therefore, one of the essential conditions for a decree for specific performance is missing in this case.

15. The learned counsel also referred to several decision where courts have come to the conclusion that specific performance cannot be granted when time is the essence of the contract or when there is inordinate delay. S.S.Chokkalingam v. R.B.S. Mani and five others, 1994 (2) M.L.J. 76 : 1994 (1) L.W. 321:

'No doubt, ordinarily in contracts relating to immovable property, time is not the essence of the contract. But in the facts and circumstances of each case, the court can come to a conclusion that in a particular case, time has been made the essence of the contract.'

Periabillai v. Somayan, 1993 (2) M.L.J. 272 (D.B.):

'Where this Hon'ble Court held that in the unexplained delay in seeking the remedy among other reasons was enough to deny the remedy of specific performance.' Sandhyarani v. Sudha Rani, : [1978]2SCR839 :

'(D) Specific Relief Act (47 of 1963), Sec. 16(b) and (c) - Specific performance of contract - Bars to relief- Inordinate delay on the part of plaintiff to perform her part of contract - Decree for specific performance refused.'

K.S. Vidyanandam and others v. V. Vairavan, : AIR 1997 SC1751 :

'The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.' SeeniAmmalv. V.Veerayee, : 1997(1)CTC360 :

'Under such circumstances, the general rule that ordinarily any contract relating to immovable property time is not the essence of the contract is not applicable in this case.'

The Kancheepuram Kamakshi Amman Silk Handloom Weavers' Co-operative Production and Sale Society limited v. Yamuna Bai and others : (1993)1MLJ618 :

'This is a case of unexplained silence and wanton delay and the society cannot escape the consequence of the same by saying that mere delay in seeking specific performance would not disentitle them to get the relief.'

Vasantha and three others v. M.Senguttuvan, 1997 (2) L.W. 820:

'Even if for a single day, plaintiff-agreement holder is not ready to take the sale deed, the equitable remedy should not be granted.' Chokkalingam v. Mani : (1994)2MLJ78 :

'...the court can come to a conclusion that in a particular case, time has been made the essence of contract.'

Kalianna Gounder (Died) v. Kalianna Gounder, 1988 (2) L.W. 292:

On the terms of Ex.B-1, we have no doubt that the parties had stipulated that time was of essence of the contract and had also incorporated a clause to that effect and further had understood the transaction as a time bound one.'

16. The learned counsel for the appellant would draw support from the decision cited above and submitted that there was a clear understanding between the parties that time was the essence of the contract and the respondent having failed to perform his part of the contract cannot ask for specific performance. Moreover, she had dragged her feet throughout the time from the date of agreement till the date of filing the suit which showed that she was really not interested in enforcing the agreement and if specific performance were to be ordered, it would put an inequitable burden on the appellant.

17. The learned counsel for the appellant drew the attention to the fact that even after the advance of second instalment was refunded making it clear that the appellant was not prepared to condone the default on the part of the respondent in payment of instalments the respondent waited for one month before issuing the suit notice and then two years thereafter to file the suit. This according to the learned counsel really does not reflect the conduct of the person who is bona fide interested in purchasing the property. Therefore, the learned counsel for the appellant would submit that specific performance ought not be granted. He

referred to the decision reported in *K.S.Vidyanandam v. Vairavan*, : AIR 1997 SC1751 , to show that rise in prices of immovable property was a relevant factor that should be taken into account when parties prescribe time limit for taking steps. The Supreme Court has held that time limit cannot be ignored altogether on the principle that time is not the essence of the contract relating to immovable property.

18. He also referred to the decision in *Krishna Reddy and Co. v. Thimmiah*, : AIR1983 Mad169 to demonstrate what the legal effect of acceptance of refund of advance.

'In the context, therefore the mere conditional acceptance by the use of the words 'without prejudice' to his rights, under the contract for sale cannot in any manner derogate from the fact that he had acquiesced in the breach of the contract committed by the second respondent. As was observed in *Doed Morecraft v. Meux*, what was of importance was what the first respondent did and not what he said. The first respondent had received the money back and the effect of it cannot be taken away by the word 'without prejudice' which he said.' Therefore, once it is admitted that the second instalment of Rs.10,000 which was refunded by the counsel for the appellant was received without any demur by the respondent she is admitted to have been waived to enforce the contract.

19. The learned counsel for the appellant also submitted that income-tax clearance had to be obtained before any sale can be registered and for that purpose, the draft sale deed had to be furnished by the respondent to the appellant and since she had not done so, she cannot claim specific performance.

20. The counsel for the respondent on the other hand would submit that there was no default on his part and that the respondent had paid the second instalment of Rs.10,000 on 15.11.1959 to the counsel for the appellant. According to the counsel for the respondent this was proper payment since at all times and even at the time of the agreement the counsel for both parties were present and assisting the parties. Therefore, the appellant cannot take the stand that her counsel was not authorised to receive the payment. According to the learned counsel for the respondent, the respondent had been pressing for receipt to acknowledge the

payment of Rs.10,000 from the advocate and Ex.A-7 is evidence thereto and there is also a categorical averment in Ex.A-7 dated 13.12.1979 that the purchaser who was ready to purchase the property.

21. According to the learned counsel for the respondent the reply Ex.A-6, dated 27.12.1979 is only a hedging tactic adopted by the appellant to avoid the agreement. That is why the respondent was constrained to issue the suit notice on 23.1.1980. According to the learned counsel for the respondent the original agreement was only with the appellants counsel and to ask for production of a copy of the sale agreement to peruse the condition is a ruse adopted by the appellant to avoid the sale. The learned counsel for the respondent also stated that it was not necessary to produce a draft sale deed for obtaining the income tax clearance and therefore, there was no default at all on the part of the respondent.

22. According to him the respondent was always ready and willing to perform her part of the contract and it was the appellant who refused to accept the payment and therefore, she cannot be now heard to complain that the respondent is not ready to perform contract.

23. The learned counsel for the respondent referred to the decision reported in *Syed Dastagir v. T.R. Gopalakrishna Shetty*, 2000 (1) M.L.J. 1, to show that readiness and willingness cannot be treated as strait-jacket formula but has to be determined from the entirety of facts and circumstances.

24. The learned counsel for the respondent therefore stated that the trial court had rightly held that the respondent was always ready and willing to perform the contract and the default in payment of the instalment arose only because the appellant refused to receive the amounts with an oblique motive.

25. As regards, the complaint of the appellant that the respondent had come to court at the very last stage. The learned counsel for the respondent would refer to the decision reported in *Rathinam Chettiar v. Embar Naidu and others*, 1993 (3) L.W. 702, where this Hon'ble Court held:

'No law prohibits filing of a suit on the last day of limitation.'

Therefore, according to him there was nothing wrong in filing the suit on the last date and that the ground alone the suit cannot be dismissed. Therefore, the learned counsel for the respondent submitted that the trial court had rightly judged the case and decreed the suit and that the decree had to be confirmed in appeal.

26. The question that arises for consideration is whether the plaintiff is ready and willing to perform his part of contract and whether there are circumstances to disentitle her from obtaining a decree.

27. A reading of Ex.A-1 shows that the parties understood time to be the essence of the contract. Sec. 2 clearly stipulates two dates for paying the second and third instalment of Rs.10,000 and Rs.20,000 respectively and Rs.60,000 to be paid at the time of registration. Clause 7 of the agreement states that time was to be the essence of the contract which fixes date for performance as three months from the date of the contract that is on or before 31.1.1980. No doubt there seems to be some confusion in this regard, because if 8.11.1979 is taken to be the date of ExA-1 then three months from the said date should be 8.2.1980, but since even as per Ex.A-2 dated 23.1.1980, which is the suit notice there is reference to 31.1.80 as the time for performance which is repeated in Ex.A-4 as the date of expiry of the agreement, it can be taken that 31.1.1980 as the date which was agreed by the parties for performance of the agreement. In the written statement at para 8 there are averments to show why time was made essence of the contract. Even P.W.1 the husband of the respondent admits in cross examination that 'time was essence of contract as per Ex.A-1'. According to D.W.1, the husband of the appellant it was understood by the parties that the agreement would expire if the amounts are not paid on the stipulated dates. This clearly means that the parties understood that time was essence of the contract and this is borne out by pleadings and oral and documentary evidence.

28. The question that arises next is whether the plaintiff was ready and willing to pay the amount.

29. As per the agreement Ex.A-1, the second and third instalment had to be paid on 15.11.1979 and 15.12.1979 respectively. On 15.11.1979, respondent had paid a sum of Rs.10,000 to the appellant's counsel Mr.G.Nandalal. No reason is given

as to why the respondent did not pay to the appellant directly. From the exhibits it is seen that though the respondent requested the appellant's counsel to produce acknowledgment receipt of Rs.10,000, the same was not given. On 13.12.1979 Ex.A-7 was issued by the respondent calling upon the appellant to acknowledge the receipt of Rs.10,000. The amount of Rs.10,000 was refunded by the appellant's counsel on 24.12.1979 as per Ex.A-3, dated 9.2.1980 which is the reply to Ex.A-2.

P.W.1 also admits in the cross examination that after 13.12.1979 this amount of Rs.10,000 was returned to him by the appellant's counsel. In fact in the evidence, P.W.1 states as-follows:

'In Ex.A-1, the advocate was not authorised to receive any advance. I have paid Rs.10,000 on 15.11.1979 to Mr.Nandalal. He did not give me any receipt. Mr.Nandalal asked me to come for the receipt after four days. I went to him after one week and Advocate Mr.Nandalal told me that the owner was not willing to sell the property and she refused to pass any receipt.'

Therefore, the second instalment of Rs.10,000 was neither properly paid by the respondent, at any rate the payment made to the counsel was returned and the counsel had also informed the respondent some time in the last week of November, 1979 itself, that the respondent was not willing to go through with the agreement.

30. As regards the payment of the third instalment of Rs.20,000 to be paid on 15.12.1979, the respondent has given different versions. In ExA-7, dated 13.12.1979 which is just two days before the third instalment is due, there is no mention of the readiness to pay Rs.20,000 on 15.12.1979. On the otherhand under this notice, the appellant is called upon to give the acknowledgment for Rs.10,000 paid and there is a bald statement that the respondent is ready to purchase the property and nothing more.

31. Even in Ex.A-2, dated 23.1.1980 the respondent has not stated as to why the third instalment of Rs.20,000 was neither paid nor offered. There is a reference to return of Rs.10,000 but as regards the further advance, the notice stated as

follows:

'My clients state that till date you have not come forward to receive the further advance as per the agreement.'

32. When the second instalment of Rs.10,000 had been returned, any reasonable person interested in purchasing the property would have gone to the vendor and offered the second instalment along with the instalment of Rs.20,000 to show her readiness and willingness. The complaint of the respondent's counsel that the appellant have not come forward to receive the further advance is unnatural, to put it mildly. It only speaks of the fact that the respondent was not ready and willing to pay the two instalments as stipulated in clause 2 of Ex.A-1. To this notice, Ex.A-2 the appellant sent a reply Ex.A-3, dated 9.2.1980 where the default in payment of the instalments of Rs.20,000 is referred to and it is stated that in view of the failure on the part of the respondent to comply with clause 7 of the agreement, the advance was forfeited and the agreement was treated as cancelled. To this Ex.A-4 rejoinder is sent by the respondent where it is stated as follows:

'It is false to state that the third instalment was due on 5.12.1979 and my client did not tender the same. As stated above, the three instalments fell due on 15.12.1979. And on 13.12.1979 my client expressed her willingness to pay the amount. But their client refused to receive the same.'

If the reference to 13.12.1979 is to Ex.A-7, there is nothing in the said exhibit to show the respondent's willingness to pay the third instalment and it is not sufficient to show willingness about the respondent must have also been ready to pay the amount and must have offered it to the appellant While in Ex.A-2, the respondents stated that the appellant has not come forward to receive the next advance, in Ex.A-4 it is stated that the respondent refused to receive it. In chief examination P.W.1 has stated as follows:

'I went to the defendant with cash of Rs.20,000. He refused to receive.'

In the cross-examination he has stated as follows:

'The third instalment had to be paid on 15.12.1979. I paid the amount on that date.' and again he states.

'I tendered third instalments to husband of the defendant on 15.12.1979. He refused to sign the receipt I do not know whether it is mentioned in the plaint. Apart from the notice, I have no other document to show that I was having Rs.20,000 on that date'.

33. So there are four different versions regarding the payment of the third instalment of Rs.20,000 on 15.12.1979. But the plaint is totally silent about the offer of Rs.20,000 or refusal thereof and the prayer in the plaint is, to execute the sale deed on receipt of balance of Rs.90,000. Therefore, the respondent herself has given credit only to the payment of Rs.10,000 which is the sum paid on the date of the agreement referred in clause 2 of Ex.A-1. The entire balance of Rs.90,000 out of the agreed sale consideration of Rs. 1,00,000 has obviously not been paid.

34. It is clear from a consideration of all the facts and circumstances of the case that the respondent was neither ready nor willing to pay the third instalment of Rs.20,000 and in fact he had not paid it. What is the effect of the failure of a purchaser to make part payment within the time stipulated in the agreement? The answer to this according to the learned counsel for the appellant is given in the decision reported in *M/s.P.R.Deb & Associates v. Sunanda Roy*, : [1996]3SCR163

'The present case is similar. The clause relating to payment of various amounts under the contract including the sum of Rs.4 lakhs states that the time is of the essence.... As the respondent did not comply and was unwilling and/or unable to comply with this term of the agreement, he cannot be considered as ready and willing to perform his part of the contract.... The respondent had failed to comply with the term of the agreement relating to payment of this amount. In these circumstances, in any case, a decree for specific performance cannot be granted as it would be unfair and unreasonable to do so. The High Court, therefore, was not right in setting aside the judgment and order of the trial court.'

35. It has already been seen that time was agreed to be an essence of the contract and since a specific deed had been agreed upon for the payment of the third instalments, the respondent ought to have complied with that condition without any default. The respondent has not only committed default in payment of third instalment but it is also evident that she was not ready and willing to pay the sum of Rs.20,000. To cover up for the absence of readiness and willingness at least four versions have been given regarding the payment of this amount. No acceptable reason is given for the non-payment of the third instalment on the other hand inconsistent versions are offered in the pleadings and the oral evidence. A suitor who comes to court with mutually conflicting versions in the pleadings and evidence cannot claim or obtain an equitable remedy. It is the duty of the persons seeking specific performance to make payments on the dates agreed upon and when the respondent has not made proper tender on 15.12.1979, the Trial court ought not to have taken notice of the absence of any reference in non-payment in Ex.A-6. There is a clear reference in Ex.A-3, dated 9.2.1980 that the third instalment was not paid. In any event, the purchaser ought to pay the instalments as per the agreement. The respondent has failed to pay the instalment and to prove the readiness and willingness to comply with the payment schedule as per Ex.A-1.

36. With regard to the delay in filing of the suit, the conduct of the respondent leaves much to be desired. It is stated in Ex.A-2 there is an apprehension on the part of the respondent that the appellant might be avoiding the transaction this is supported by the evidence of P.W.1 which is extracted above that the learned counsel Mr.Nandalal said that the owner is not willing to sell the property. Not only did the respondent not pay the instalments on the stipulated dates but even after coming to know that the appellant might resile from the agreement waits for two years thereafter and has filed the suit on 8.11.1982. No person who is genuinely interested in purchasing a property and is ready with the funds will procrastinate the matter this long. There is no reason given as to why there should be a delay of two years and ten months from the date of the suit notice in filing the suit. A person, who seeks an equitable remedy ought to demonstrate conduct which is fair and above board. As held by this Hon'ble Court in *Periabillai v. Somayan*, 1993 (2) M.L.J. 272 and *The Kancheepuram Kamakshi Amman Silk Handloom Weavers*

Co-operative Production and Sale Society Ltd. v. Yamuna Bai : (1993)1MLJ618 , this delay itself is sufficient to deny the respondent the relief of specific performance.

37. As held in Vasantha v. M.Senguttuvan : (1997)2MLJ576 , referred to above 'even if for a single day, the plaintiff is not ready to take the sale deed specific performance cannot be ordered.' Readiness and willingness should be there continuously from the date of agreement till date of suit. No acceptable reason has been given by the respondent as to why the second instalment and the third instalment were not properly paid on the stipulated dates and why the balance of Rs.60,000 was not offered on 31.1.1980. Time was clearly agreed to be the essence of the contract and the P.W.1 also admits it to be so. The respondent who has failed to prove readiness and willingness cannot claim specific performance.

38. From the various decisions referred to above, it is clear that there cannot be a sweeping conclusion in contracts relating to immovable property that time cannot be said to essence of the contract. It depends upon the consensus between the parties to the contract. The decision reported in K.S. Vidyanandam v. Vairavan, : AIR 1997 SC1751 is clearly applicable. Specific performance cannot be ordered merely because they are filed within the period of limitation, especially where time limits have been stipulated in the agreement for performance of certain obligations. To disregard the time stipulation would amount to ignoring the understanding between the parties as though it is of no significance or value.

39. Here is a purchaser who had agreed to pay the two instalments on stipulated dates and the balance within three months from the date of the agreement. But the stipulation regarding the payment of two instalments is given a go by. When even the part-payment of instalments has not been made the purchaser is clearly not entitled to have the sale deed registered in her name.

40. In this case an added factor is the receipt of advance which was refunded by the counsel for the appellant. The appellant's counsel Mr.Nandalal refunded the advance sometime before Christmas of 1979 and even before that he had informed the respondent that the owner was not interested in going through the sale. After this, the refund of advance had been accepted by the respondent

without demur. The decision reported in Krishna Reddy v. Thimmiah, : AIR1983 Mad169 is one where the advance was received without prejudice. The Division Bench of this Hon'ble High Court held that, it would amount to waiver of right to enforce the contract. Any reasonable person who intends to purchase a property would take steps to make sure that the instalments are paid to the prospective vendor on the correct dates especially when as in the instant case, the advance is refunded. The respondent who had received the refund of advance and had not taken any steps to send the instalments to the appellant immediately thereafter can only be taken to have waived his right to enforce the contract for sale. Having received the refund of advance sometime before Christmas 1979, the respondent has waited almost three years to file the suit. The cumulative effect of the respondent default in paying the second and third instalments as per the agreement, the delay in filing the suit inspite of the knowledge or atleast apprehension that the appellant might resile from the agreement, the acceptance of the refund of advance without any demur, and the conflicting versions in respect of the third instalments; is that the respondent cannot claim specific performance. She is the person, who seeks the equitable remedy of specific performance, she has failed to satisfy the Court that she deserves equity.

41. Therefore, the judgment of the trial court is set aside and the appeal is allowed, with costs. The C.M.P.No.4864 of 2000 is ordered as prayed for.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com