

K. Jayakumar Vs. Robert,

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Court : Chennai

Decided On : Mar-01-2002

Reported in : (2002)2MLJ112

Judge : K. Sampath, J.

Acts : Contract Act - Sections 55; Limitation Act - Schedule - Article 54; [Specific Relief Act, 1963](#) - Sections 16

Appeal No. : S.A. No. 1454 of 1989

Appellant : K. Jayakumar

Respondent : Robert, ;john Peter, ;jamuna, ;santhi, ;amalraj, ;geetha and ;nedila

Advocate for Def. : S. Balasubramanian, Adv. for ;T. Vadivelu, Adv.

Advocate for Pet/Ap. : Vanchinathan, Adv. for ;M.N. Muthukumaran, Adv.

Disposition : Appeal allowed

Judgement :

K. Sampath, J.

1. The defendant in O.S.No.879/83 on the file of the District Munsif, Gudiyatham, is the appellant in the second appeal. The respondents herein are the legal representatives of the plaintiff, who died pending the proceedings.

2. The case of the plaintiff was as follows:

On 30-6-1980 the defendant entered into an agreement with the plaintiff for sale of the suit property for Rs.6,500/-. On the same day the plaintiff paid a sum of Rs.500/- to the defendant as advance. As per the terms of the agreement the defendant was to receive the balance of sale consideration of Rs.6000/- and execute the sale deed in favour of the plaintiff. Though time was fixed as one year, i.e. 30-6-1980 to 29-6-1981 in the contract, the parties intended that the time was not the essence of the contract. If the purchaser failed to pay the amount within the stipulated time, the agreement would get not only cancelled, but the purchaser would also lose the advance and all rights to the property. The plaintiff paid a further sum of Rs.1000/- also to the defendant in the presence of Thiru Ramakrishna and Durai of Senguttai Village in 1981. The plaintiff was always ready and willing to perform her part of the contract. She approached the defendant several times to execute the sale deed in her favour after receiving the balance of sale consideration. The defendant was postponing the execution for reasons best known to him. Finally the plaintiff issued a registered lawyer notice on 21-7-1982 demanding execution of sale deed in her favour. The defendant sent a reply containing false allegations. The plaintiff was having enough money to perform her part of the contract. She was ready and willing to complete the sale as per the terms of the agreement from the date of the document till the filing of the suit. Only the defendant was postponing the execution of the sale deed and finally refused to do so through his reply. Hence she had to file the suit.

3. The defendant filed a written statement and an additional written statement. In the written statement it is stated as follows:

The agreement was true as also the payment of Rs.500/- as advance. However, it was false to state that time was not the essence of the contract. It was also equally false to state that the plaintiff was always ready and willing to perform her part of the contract and that she had enough money to complete the transaction. It was also false to state that the plaintiff approached the defendant several times to execute the sale deed and that the defendant was postponing to perform his part of the contract. Time was indeed the essence of the contract. The plaintiff

specifically agreed to perform her part of the contract on or before 19-6-1981 and that was the reason why time had been stipulated in the agreement. The suit filed by the plaintiff after the expiry of the time was hopelessly barred by limitation. The plaintiff was never ready and willing to perform her part of her contract. She did not have the wherewithal. There was no bona fide in filing the suit. If really she was having enough money to perform her part of the contract, she should deposit the balance sale consideration within a week from the date of the filing of the written statement. The defendant was repeatedly demanding the plaintiff to perform her part of the contract. She never came forward to purchase the property. She had abandoned the agreement for sale. Because she failed to perform her part of the contract, the defendant could not purchase some other property he wanted to. He had sustained heavy loss. The value of the property had increased. Having kept quiet for a long time, the plaintiff had filed the suit just a week prior to the expiry of the three year period from the date of the agreement. This would show that she had wanted to get an unfair advantage. In such change of circumstances the plaintiff was not entitled to a decree for specific performance of the contract. She must prove affirmatively that all throughout she was willing to perform her part of the contract. She was bound to prosecute without undue delay. Being an equitable relief, the Court could refuse to grant it in its discretion to a person who had been sleeping over her rights and who had made a stale demand. The plaintiff did not pay Rs.1000/- in the year 1981 in the presence of Ramakrishnan and Durai of Senguttai Village as claimed by her in the plaint. In the reply notice dated 24-7-1982 it had been clearly stated that time was the essence of the contract. Even after that, the plaintiff had taken eleven months to file the suit. The delay was wilful and wanton. The suit was liable to be dismissed.

4. In the additional written statement which was filed after the plaint was amended seeking the relief of recovery of possession, it is stated that the relief for possession prayed for was barred by limitation. The plaintiff was never ready and willing to perform her part of the contract. She might be directed to deposit the amount within a week from the date of the filing of the additional written statement. Since the plaintiff was not ready and she was not having the amount, she had filed an application to amend the plaint only with a view to drag on the proceedings. There were no merits or bona fides in the suit.

5. On the above pleadings, the following issues and additional issues were framed:

1. Whether the plaintiff was always ready and willing to perform her part of the contract as per the agreement?

2. Whether the defendant defaulted in the performance of his part of the contract?

3. Whether the plaintiff paid Rs.1000/- to the defendant in 1981?

4. Whether the suit is barred by limitation? and

5. To what relief the plaintiff is entitled to?

Additional Issue: Whether the plaintiff is entitled to possession as per the amended plaint?

6. On the side of the plaintiff, she examined herself as P.W.1 and her husband as P.W.2. Exs.A-1 to A-4 were marked. On the side of the defendant, the defendant examined himself as D.W.1 and one Kesava Mudaliar as D.W.2. Exs.B-1 and B-2 were marked.

7. The learned District Munsif, on the materials placed, held that time was the essence of the contract between the parties, that the plaintiff was never ready and willing to perform her part of the contract, that it was not necessary to give a finding as to whether the defendant was ready to perform his part of the contract, that the plaintiff had not proved that she paid a sum of Rs.1000/- to the defendant in 1981 and that it was not necessary to give a finding as to whether the plaintiff would be entitled to possession in view of the finding on the other issues. By judgment and decree dated 31-7-1987 the trial Court dismissed the suit. However, on appeal in A.S.No.190/87 the learned Additional District Judge, Vellore, allowed the appeal, set aside the dismissal of the suit by the trial Court and decreed the suit as prayed for on 27-4-1989. It is as against that, the present second appeal has been filed.

8. At the time of admission, the following substantial questions of law were framed for decision in the second appeal:

(1) Whether the lower Appellate Court overlooked the legal position that the plaintiff, who had come to Court with a false case, is not entitled to the discretionary relief of specific performance?

(2) Whether the plaintiff's suit on Ex.A-1 is maintainable in law in view of a fresh contract having been entered into between the parties superseding Ex.A-1? And

(3) Whether the plaintiff is entitled to specific performance since she had not proved and pleaded her readiness and willingness to perform her part of the contract?

9. Mr.N. Vanchinathan, learned Counsel for the appellant, submitted as follows:

The terms of the agreement were clear that time was the essence of the contract, that the plaintiff herself had accepted in the course of her evidence that the defendant was particular that the sale should be completed within a period of one year as stipulated in the agreement. The plaintiff had also come forward with a case of payment of a further sum of Rs.1000/- and the same had not been proved by her and that the relief being a discretionary one, the lower Appellate Court ought not to have granted the relief. The learned Counsel further submitted that the lower Appellate Court had totally misunderstood the challenge posed in the written statement calling upon the plaintiff to deposit the balance amount into Court within a week therefrom and interpreted it to mean that if the defendant was to be paid the balance amount, he would agree to execute the sale deed in favour of the plaintiff. According to the learned Counsel, the defendant had right through been maintaining that the plaintiff did not have the funds to complete the transaction and that was the reason why such a challenge was put forward both in the written statement and in the additional written statement. That would not mean that the defendant would agree to execute the sale deed, particularly when the terms of the agreement clearly stipulated a period of one year for completing the transaction. The learned Counsel made a point of the fact that after receipt of the reply notice clearly stating that time was the essence of the contract and that the plaintiff had lost her right to enforce the agreement, she had taken a further eleven months period to file the suit. The learned Counsel also relied on a number of authorities, which I will refer to during the course of the judgment.

10. Per contra, Mr.S. Balasubramanian, learned Counsel for the respondents, contended that the lower Appellate Court had properly understood the case between the parties that being a suit for specific performance of an agreement for sale, time could not be stated to be the essence of the contract. The learned Counsel further submitted that the plaintiff, who was the original owner of the property, entered into an agreement for reconveyance with the defendant, that she could not honour the terms of the reconveyance agreement, that the present suit agreement came to be entered into after the time fixed under the earlier agreement expired and that in as much as the property originally belonged only to the plaintiff, it was just and proper that she should get back her property. The learned Counsel referred to several decisions, which will also be noticed in the course of further discussion.

11. A reading of the suit agreement shows that the parties had agreed that time was the essence of the contract. It is not the legal position that in all cases pertaining to agreements for sale, time would not be the essence of the contract. As pointed out by the Supreme Court and our Court in several decisions, it would depend on the agreement between the parties. If we have a look at the agreement along with the plaintiff's deposition, it would be clear that time was indeed the essence of the suit contract. The plaintiff as P.W.1 has in an unmistakable terms stated that the defendant was particular that the transaction should be completed within a period of one year from the date of the agreement and it was so agreed. After this candid admission by the plaintiff, it would not be open to her to contend that time was not the essence of the contract. The lower appellate Court was clearly in error in holding that time was not the essence of the contract between the parties.

12. The learned Additional District Judge has adverted to the averments in the written statement calling upon the plaintiff to deposit the balance sale consideration into Court within one week from the respective dates. According to the learned District Judge, this would mean that the defendant was agreeable to have the sale completed, provided he received the balance sale consideration. In my view, the learned District Judge had misread the contents of the written statement and the additional written statement. What the defendant had meant

was that the plaintiff did not have the necessary wherewithal to complete the sale. It was a challenge posed by the defendant in the written statement. He knew that the plaintiff did not have the necessary funds to complete the sale and that prompted him to call upon her to deposit the balance sale consideration. That she did not have the necessary money to complete the sale would be evident from her own deposition.

13. Her evidence runs as follows:

'xU khjkhfg; gzk; U:gha; 6000-? bgl;oapy; itj;jpUf;fpnwd;/ vd; igad; kpypl;lhpapy; ,Uf;fpwhd;. nghdkhjk; te;jpUe;jhd; U:gha; 6000-? bfhLj;jhd;/ vd; jk;gp rpthde;jk; buapy;ntapy; ntiy bra;fpwhd;/ khjhkhjk; tUthd;. khjk; U:gha; 200 my;yJ U:gha; 300- ? bfhLg;ghd;/ xU khjj;jpw;F Kd;g[U:gha; 3000-? itj;jpUe;njd;/'

In another place she stated that she had Rs.6000/- on the date of the agreement, but this was given a go by stating that she had Rs.4000/- on the date of the agreement and for paying the balance of Rs.2000/- one year time was stipulated. The proper inference from the plaintiff's own evidence, in my view, would be that ever since the date of the agreement, she was not ready and willing to pay the balance sale consideration and complete the transaction. Rightly did the trial Court reject her evidence on the ground that it was bristling with inconsistencies. Though the plaintiff's husband, who was examined as P.W.2, claimed that he had funds in the bank to the tune of Rs.4000/-, the bank passbook was not produced to substantiate the same. The lower Appellate Court has clearly misread the evidence on the side of the plaintiff and tried to explain the inconsistency in the evidence on the side of the plaintiff by observing that she had deposed in that particular manner only to show that she was ready and willing to perform her part of the contract and nothing adverse could be inferred from that. I do not agree. The conclusion reached by the lower Appellate Court in this regard cannot at all be sustained.

14. One other aspect to be noticed in this connection is that to the notice issued under Ex.A-2 on 21-7-1982 by the plaintiff's Counsel to the defendant, under Ex.A-3 within three days on 24-7-1982 a reply had been sent on behalf of the defendant clearly stating that time was the essence of the contract between the parties, that

the period fixed under the agreement had expired long ago and whatever rights the plaintiff could claim under the agreement Ex.A-1 had been lost. At least if the plaintiff had rushed to the Court immediately thereafter, there could be some credibility attached to her case. However, she waited for nearly a year for filing the suit. Even after filing the suit, she further delayed by filing an application seeking recovery of possession, which had not been originally asked for. I am satisfied that the plaintiff has failed to show that time was not the essence of the contract, that she was always ready and willing to perform her part of the contract and that it was only the defendant, who was obstructing the completion.

15. One further aspect to be referred to in this connection is that in the plaint, the plaintiff had stated that a sum of Rs.1000/- was paid in the year 1981 in the presence of two persons towards part of the sale consideration to the defendant. No attempt was made to prove this case. It is the submission of the learned Counsel for the appellant that the plaintiff had come forward with a false case of further payment and the relief of specific performance being a discretionary one, the plaintiff was not entitled to a decree. There is substance in this contention. However, Mr.S. Balasubramanian, learned Counsel for the respondents, submitted that this by itself could not be put against the plaintiff. She did not pursue the case of further payment and on this score she could not be refused relief.

16. In my view, this specific averment in the plaint cannot be lightly brushed aside. If she had really made a further payment of Rs.1000/- as claimed in the plaint, she should have produced necessary evidence substantiating the same. If indeed she had made this further payment, it is inconceivable that she would have been willing to lose this amount, particularly when she had been finding it difficult to make up the balance sale consideration. Nobody in her right sense would be willing to lose Rs.1000/- which is a fairly large amount having regard to the impecunious circumstances in which the plaintiff was placed. It is in evidence that she as also her husband were doing coolie work.

17. Let us now go to the various authorities relied on by Counsel.

18. In GOMATHINAYAGAM PILLAI AND OTHERS VS . PALANISWAMI NADAR : a three Judges Bench of the Supreme Court dealing with the question as to when

time would be the essence of the contract, referred to Section 55 of the Contract Act where the consequences of failure to perform an executory contract at or before the stipulated time are set out, has held that,

'it is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified time, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.'

In so saying, the Supreme Court followed the decision in JAMSHED KODARAM IRANI VS. BURJORJI DHUNJIBHAI AIR 1915 PC 83 ILR 40 Bomb 289, which in turn referred to the language used by Lord Cairns in TILLY VS. THOMAS 1867 3 Ch.A 61. It would be worthwhile to extract the language used by Lord Cairns.

'The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in ROBERTS VS. BERRY 1853 3 De G.M.&G.; 284 there is nothing in the `express stipulations between the parties, the nature of the property, or the surrounding circumstances', which would make `it inequitable to interfere with and modify the legal right. That is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the

contract.'

The Privy Council, after extracting Lord Justice Turner's above words, further observed:

'..... Of the three grounds mentioned by Lord Justice Turner `express stipulations' requires no comment. The `nature of the property' is illustrated by the case of reversions, mines, or trades. The `surrounding circumstances' must depend on the facts of each particular case.'

Their Lordships of the Privy Council added to the statement just quoted the following observations:

'The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observation of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay as its foundation. Prima facie, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified.'

19. The Supreme Court further noted with approval the observations in *STICKNEY VS. KEEBLE* 1915 AC 386 where in a contract for the sale of land the time fixed for completion was not made of the essence of the contract, but the vendor had been guilty of unnecessary delay, the purchaser might serve upon the vendor a notice limiting a time at the expiration of which he would treat the contract as at an end. The Supreme Court stated:

'It is true that even if time was not originally of the essence, the vendor could by notice served upon the purchaser call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract would be treated as cancelled.'

20. The Substance of the decision of the Supreme Court is that fixation of period within which contract to be performed does not make stipulation as to time essence of contract, nor default clause in contract by itself evidences intention to make time of essence. Time is of essence if parties intend it to be so and such intention may be evidenced either by express stipulation or by circumstances which are sufficiently strong to displace ordinary presumption that in contract for sale of land stipulation of time is not of essence. If time is not of essence originally, it can be made of essence even subsequently by serving notice on other party.

21. The Supreme Court in NATHULAL VS . PHOOLCHAND : [1970]2SCR854 has following BANK OF INDIA LTD. AND OTHERS VS. JAMSETJI A.H. CHINOY AND MESSRS. CHINOY & CO. 3 LR 77 IA 76 AIR 1950 PC 90 held that the purchaser does not necessarily have to produce the money to vouch a concluded scheme for financing the transaction.

22. In SMT. INDIRA KAUR AND OTHERS VS a two Judges Bench of the Supreme Court held that in a suit for specific performance of contract for sale, in determining the question as to which party was not ready and willing to perform his part of the contract, the Court must examine the position of both the parties and it should not confine its findings to the plaintiff-purchaser's part of the contract alone, ignoring that of the defendant-seller's part. In that case, the plaintiff deposed that he deposited the requisite amount in bank, but did not produce passbook in respect of his bank account. This was held justified because neither the defendant nor the Court enquired about the name of the bank nor called upon the plaintiff to produce the passbook and therefore there could be no adverse inference drawn against him. In that case, the plaintiff sent to the defendant five days before the dead line a notice through his Advocate by registered post calling upon him to execute the sale deed in his favour as stipulated between the parties. He also sent a local telegram calling upon the defendant to remain present at the office of the

Sub Registrar on the dead line date. The defendant did not reply to either of those notices. The defendant never conveyed in writing to the plaintiff that he was ready and willing to convey the property to the plaintiff to discharge the obligation undertaken by him by the agreement to sell either in response to the registered notice sent through the Advocate or the local telegraphic notice. He maintained complete silence. On the crucial date the plaintiff remained present at the Sub Registrar's Office and made an application to the Sub Registrar to make a record of the fact that he was present. The defendant, according to the plaintiff, did not care to attend the Sub Registrar's Office, though the plaintiff was present throughout the day. On the next day, after the date of the deadline, the defendant sent a local telegram to the plaintiff that he was present at the office of the Sub Registrar, but that the plaintiff remained absent. Some one year later the plaintiff instituted the suit seeking specific performance. The most import feature of the written statement was that the defendant nowhere asserted that he had gone to the Sub Registrar's Office and had remained present there. His main defence was to the effect that the plaintiff had no funds and he was not ready and willing to perform his obligation. The trial Court did not record a specific finding on the question as to whether or not the defendant had remained present at the Sub Registrar's Office in pursuance of the requisition made by the plaintiff by registered notice and by telegram. The trial Court dismissed the plaintiff's suit holding that he could not have been possessed of the money on the deadline stipulated for performance mainly on the ground that he was a poor person, who was earning Rs.200/- or so per month and could not have made any saving and that he had not produced his passbook. The lower Appellate Court and the High Court successively dismissed the suit preferred by the plaintiff on the same pattern of reasoning. One of the questions debated by the parties before the Supreme Court was whether time was of the essence of the contract. The Supreme Court referred to the written statement of the defendant and observed that,

'the defendant had not even made an assertion in the written statement or in his evidence to the effect that time was of the essence of the contract and yet the Courts below had so concluded.'

In this connection, the Supreme Court referred to its earlier decision in GOVIND PRASAD CHATURVEDI VS and observed that, whether or not time was of the essence of the contract would also have to be judged in the context and circumstances of the case. It was also observed that the Courts below had shut their eyes to the question whether the defendant was ready and willing to perform his part of the contract and whether he had remained present at the Sub Registrar's Office on the appointed day.

23. In CHAND RANI VS the Constitution Bench of the Supreme Court held as follows:

'As a general proposition of law, in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are evident:

(i) from the express terms of the contract;

(ii) from the nature of the property; and

(iii) from the surrounding circumstances, for example: the object of making the contract.

On an interpretation of the relevant clause in the agreement in that case, the Supreme court held that, the intention of the parties was to make time as the essence of the contract and evidence also showed that there was no readiness and willingness on the part of the plaintiff to perform the contract.

24. The Supreme Court referred to its earlier decision in GOMATHINAYAGAM PILLAI's case . The Supreme Court referred to a passage from Halsbury's Laws of England 4th Edition Volume 4 para 1179 running as follows:

'The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim

payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed.'

No doubt, this statement of law in Halsbury's Laws of England relates to building and engineering contracts. However, the position is not any different in the case of contract for sale of immovable property. The Supreme Court has further observed:

'It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract.'

25. In *K.S. VIDYANADAM AND OTHERS VS* a two Judges Bench of the Supreme Court has held as follows:

'In dealing with the circumstances to be considered in exercising the discretionary power of Court to decree specific performance, there could be inference against readiness and willingness of the plaintiff to perform his part of the contract. Even

though time may not be the essence of the contract of sale of immovable property and suit can be filed within the period of three years provided under Article 54 of the Limitation Act, but it should be performed within a reasonable time having regard to the terms of the contract prescribing a time limit and nature of the property.'

In that case, the total inaction for 2-1/2 years after initial payment of a small amount as earnest money by the plaintiff was held to be a valid circumstance, which would weigh against exercise of discretion for grant of specific performance of an agreement in favour of the plaintiff.

26. The Supreme Court further held as follows:

'It has been consistently held by the Courts in India, following certain early English decisions, that in the case of agreement for sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. While exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time limits for taking steps by one or the other party, it must have some significance and that the said time limits cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties). In the case of urban properties in India, it is well known that their prices have been going up sharply over the last few decades - particularly after 1973. Court cannot be oblivious to this reality. It is

not possible to agree with the decision of the Madras High Court if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the Court of law. The rigour of the rule evolved by Courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, the Courts do so.'

27. While exercising its discretion, the Court should also bear in mind that when the parties prescribe certain time limits for taking steps by one or the other party, it must have some significance and that the said time limits cannot be ignored altogether on the ground that time has not been made the essence of the contract relating to immovable properties. In *INDRAVATHI VS . KAMALA* : 2000(4)CTC278 PRABHA SRIDEVAN, J. has referred to a number of authorities and observed:

'It is clear that there cannot be a sweeping conclusion in contracts relating to immovable property that time cannot be said to be the essence of the contract. It depends upon the parties to the contract. 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.'

28. In *RATHINAM CHETTIAR VS* it has been held by K. GOVINDARAJAN, J. that, 'the provisions of explanation to Section 16(c) of the [Specific Relief Act, 1963](#) made it clear that the purchaser need not actually tender price or deposit consideration in Court except when so directed by Court. If the plaintiff established that he was always ready and willing to pay balance consideration and get sale deed executed, that would be sufficient. He need not produce documents to show that he was having money with him to pay sale consideration.'

The learned Judge also held that there is no law prohibiting filing of suit on last date of prescribed period of limitation. The learned Judge followed the decision of the Supreme Court in *INDIRA KAUR VS* . In the case before the learned Judge,

the plaintiff was the assignee of the agreement for sale between the first and the second defendants. He also telegraphically contacted the first defendant to get the sale deed executed. He caused a legal notice also to be issued. But the first defendant did not send any reply. In those circumstances, the learned Judge held that the default was only on the part of the first defendant.

29. In MOTILAL JAIN VS it has been held that an averment of readiness and willingness in the plaint is not a mathematical formula that it should only be in specific words. The contract stipulated a period of five months. The purchaser/plaintiff issued last notice to the seller about 14 months after the expiry of five months period. Suit was filed nine months after last notice. It was held that it could not be said to be belated so as to deny relief of specific performance. The plaintiff had also parted with two thirds of the consideration at the time of the execution of the contract. The only obligation which he had to comply with was payment of balance of consideration. It was stated in the plaint that he demanded the defendant to receive the balance of consideration of Rs.8000/- and execute the sale deed. The defendant was out of town at the time of notices and when he came back to his place the plaintiff filed the suit against him. There was no reason why the plaintiff would not pay the balance of one third consideration of Rs.8000/- to have the property conveyed in his favour. It was held factually that the plaintiff had clearly indicated his readiness and willingness to complete the transaction.

30. The Supreme Court referred to the judgment in RAMESH CHANDRA CHANDIOK's case and observed that,

'readiness and willingness could not be treated as a strait jacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the parties concerned. It was held that in the absence of any material to show that the plaintiff at any stage was not ready and willing to perform his part of the contract or that he did not have the necessary funds for payment when the sale deed would be executed after the sanction was obtained. It was held that the plaintiff was entitled to specific performance. The compliance of readiness and willingness has to be in spirit and substance and not in letter and form. If the averments in the plaint as a whole do clearly indicate the readiness

and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract of sale.'

31. In V. PECHIMUTHU VS. GOWRAMMAL 2001 SAR (Civil) 745 it has been held that,

'it is not right to hold that it is a general principle of law that every agreement of sale by which the original owner agrees to buy back the property is a privilege or concession granted to such owner. Privilege is a particular and peculiar benefit or advantage enjoyed by a person. A concession is a form of privilege. The mere fact that an agreement for sale is described as a reconveyance does not by itself mean that it is an option to repurchase nor does it in any way alter the substance of the deed. No logical distinction can be drawn between an agreement to repurchase and an ordinary agreement of purchase just because the vendor happens to be the original purchaser and the purchaser happens to be the original vendor. Such agreement remains an agreement for sale of immovable property and must be governed by the same provisions of law.'

It has also been held in the said case that deposit of balance consideration is not essential except when so directed by the Court. The plaintiff can wait for an order of the Court to do so. It has been held in the same decision that concurrent finding of trial and first Appellate Court cannot be reversed in second appeal.

32. In VEERAYEE AMMAL VS. SEENI AMMAL it has been held that even if it is not essence of contract, for granting relief, reasonable time has to be ascertained from all the facts and circumstances of the case. It has been further held in that case that merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as a substantial question of law.

33. The statement of law that the parties to a contract for specific performance should be ready and willing to perform their obligations under the agreement from day one has baffled me over the years. It may appear trite. But then if the person

is ready with the money and willing to perform his part of the bargain on day one, where is the need for an agreement. The sale can straight away be completed. In case he is not ready with the money on day one, can it be said that he could not be granted a decree for specific performance even if the contract provides for a period within which the balance is to be paid and sale completed? Or does the expression 'readiness and willingness' refer to one's state of mind from day one? How do we find out? I have posed the question to many a counsel and like Omar Khayyam 'heard great Argument about it about: but ever more came out by the same Door as in I went.' The nearest I have got is the judgment of the Privy Council in ARDESHIR VS. FLORA SASSOON AIR 1928 PC 208 wherein it is stated that,

'in a suit for specific performance, the plaintiff must allege and where the fact is traversed to prove a continuous readiness and willingness to perform the contract on his part, from the date of the contract to the time of hearing.'

As pointed out in RAMESH CHANDRA CHANDIOK ETC. VS. CHUNNI LAL SABHARWAL ETC. : already referred to

'readiness and willingness cannot be treated as a strait jacket formula; these have to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.'

34. It has been held by the Supreme Court in JUGRAJ SINGH VS. LABH SINGH AIR 1995 SC 945 1995 2 SCC3 that 'the substance of the matter and the surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging continuous readiness and willingness to perform his part of the contract.'

35. In SWAMI GANESH DASSJI VS. SITA RAM THAPAR it has been held that 'by readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining the willingness, his conduct has to be properly scrutinised.'

36. In N.P. THIRUGNANAM VS. R. JAGAN MOHAN RAO it has been held that,

'the amount of consideration which the plaintiff has to pay to the defendant must of necessity be proved to be available. 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.'

37. It has been held in ABDULLAH BEY CHEDID AND OTHERS VS. TENENBAUM that,

'readiness and willingness to carry out his obligation is always a condition precedent to the plaintiff's right to recover damages in respect of breach of one of two concurrent obligations. In a suit by the purchaser for damages for the breach of a contract of sale of land, the purchaser must prove his own readiness and willingness to perform his part of the concurrent obligations. If it is proved that he was not in a position to pay the balance of the purchase price he cannot recover damages although the vendor may have committed breach. He is however entitled to recover the sum paid as a deposit or part of the price.'

38. In VASANTHA AND OTHERS VS. M. SEGUTTUVAN has observed:

'Even if it 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 upto the date of hearing. Even if the finding of the lower Court that the appellant has sufficient funds is accepted, that will not show his willingness. Willingness must be to implement the contract in accordance with the terms within the stipulated period or within a reasonable time thereafter. If he had the necessary funds, he has to explain why he did not offer or tender the balance sale consideration and get the sale deed. It is well settled that even if the appellant proved all the ingredients of the section, he cannot claim specific performance as of right. It is only a discretion and that discretion will have to be exercised on well established judicial principles.'

39. In VELLAYYAPPA PADAYACHI VS. SAMINATHA ASARI AND OTHERS PRABHA SRIDEVAN, J. talking about readiness and willingness, has observed:

'Readiness would indicate possession of funds or the capacity to generate funds to complete the sale and willingness indicates animus to complete the sale.'

40. From Commentaries on Specific Relief Act and the plethora of authorities of the Privy Council, the Supreme Court and this Court, I will make an attempt to piece together the salient points for enforcement of a contract for specific performance.

41. Whether it is an agreement for purchase or repurchase:

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

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

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

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

5. The position of both the parties should be examined not that of the purchaser alone.

6. Time may not be the essence of the contract. But, if time is to be construed as the essence of the contract, the parties should intend so.

7. If intended in writing, it should be unequivocal and unmistakable. It will not avail if some monetary penalty is imposed in case of default or if the contract provides for extension of time in certain contingencies. It should be specified that the

contract will stand cancelled if the contracting parties do not call upon each other to complete the transaction within the time stipulated, by expressing his/her readiness and willingness to honour the terms of the contract and conclude the sale.

8. Equally if not intended in writing, it should be capable of being inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances. Once it is so inferred, as for the cases intended in writing, further exercise should follow - either party to the contract should call upon the other party to complete the transaction making it known that he/she is ready and willing to perform his/her part of the arrangement.

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

10. Even if there is default in carrying out the contract within the specified time, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances it is not inequitable, the relief can be granted.

11. Even though time may not be the essence of the contract for sale of immovable property and suit can be filed within the period of three years, provided under Article 54 of the Limitation Act, it should be performed within a reasonable time having regard to the terms of the contract prescribing a time limit and nature of the property and the same cannot be ignored altogether on the ground that time has not been made the essence of the contract relating to immovable properties.

12. The purchaser need not jingle coins or produce the money unless called upon to do so by the Court.

42. In the instant case, it is clear without an iota of doubt that time was clearly agreed to be the essence of the contract between the parties. The reply notice, the written statement and the plaintiff's own evidence bear this out. It is further apparent from the materials on record that during the relevant time the plaintiff did not express her readiness and willingness to perform her part of the contract and call upon the appellant to complete the sale. Notice was issued more than one

year after the date fixed for executing the sale deed and after receipt of the reply notice stating that time was the essence of the contract and that the contract stood terminated, she waited for nearly a year to file the suit. She also did not take up the challenge by the defendant in his pleadings calling upon her to deposit the amount into Court. May be it was not necessary to deposit unless called upon by Court. But then she could have expressed her readiness and willingness to deposit. The challenge, as already noticed, has been misinterpreted by the lower Appellate Court. The defendant's stand that the plaintiff did not have the money to complete the sale appears to be correct.

43. Again, let us see if it would be equitable to grant relief to the plaintiff. No doubt, the plaintiff was the original owner of the property. There was a sale in favour of the defendant by her. There was an agreement for resale entered into between the parties. But the plaintiff did not honour her commitment. The agreement for repurchase lapsed. However, the defendant/appellant was gracious enough to enter into a fresh agreement, viz. the present suit agreement. But then this was also not honoured. Equity, in my view, is only against grant of relief to the plaintiff. This is not a case where on an appreciation of evidence, another view is possible. There is only one view possible. Time is the essence of the contract. The plaintiff was not ready and willing to perform her part of the contract at the relevant time. The plaintiff had also come forward with a false case of an additional payment of Rs.1000/- which she did not bother to substantiate.

44. For all the reasons stated above, the substantial questions of law are answered against the respondent and in favour of the appellant. The second appeal succeeds. The judgment and the decree of the lower Appellate Court are set aside and those of the trial court dismissing the suit are restored. There will be no order as to costs.

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