

Kabirdass Vs. Vinothambal,

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Court : Chennai

Decided On : Jul-10-2002

Reported in : (2002)3MLJ244

Judge : Prabha Sridevan, J.

Acts : Specific Relief Act - Sections 15

Appeal No. : Second Appeal No. 1511 of 1991

Appellant : Kabirdass

Respondent : Vinothambal, ;ganapathy, ;balasubramanian and Revathi

Advocate for Def. : R. Subramanian, Adv. for ;K.R. Krishnan, Adv.

Advocate for Pet/Ap. : Vidya, Adv. for ;S. Rajagopalan, Adv.

Disposition : Appeal dismissed

Judgement :

Prabha Sridevan, J.

1. The plaintiff and the defendant entered into an agreement of sale on 15.12.1983 in respect of some agricultural lands in Karaikal. Out of the sale consideration of Rs.27,191/-, Rs.5,000/- was paid and the balance was intended to be paid at the time of completing the sale transaction. The defendant was bound to obtain the

encumbrance certificate and the title deeds at the time of the sale deed and also hand over possession immediately after the registration of the sale deed. In case the defendant failed to complete the sale transaction within the time stipulated i.e., six months from the date of agreement, the advance of Rs.5,000/- must be refunded together with a sum of Rs.5,000/- as compensation. Briefly these are the terms of the agreement. On 30.5.1984 under Ex.A.2, the defendant issued a notice indicating to the plaintiff that he is ready with encumbrance certificate and the title deeds of the property and he is also ready to hand over possession of the property and that inspite of several oral demands made by the defendant, the plaintiff was delaying the matter. Ex.A.2 was issued to remind the plaintiff that the last date for the performance of the sale is nearing. On receipt of the notice, the plaintiff alleged that he went to the defendant's residence on 4.6.1984 and informed him that he had the balance consideration ready and requested the defendant to produce the necessary documents. The plaintiff also alleged that he was asked by the defendant to come after a couple of days. But when he went, he found that the defendant was admitted in the General Hospital, Karaikal for Paralytic attack and that because of this, nothing further could be done. To show his readiness and willingness, he purchased stamp papers for Rs.1,600/- on 11.6.1984. He waited for the defendant to return from the hospital to complete the transaction of sale. Though the defendant came back on the first day of August 1984 since he was in poor health, the plaintiff was asked to wait and finally in March 1985, the plaintiff realised that the defendant was adopting delaying tactics to get a higher price. After issuing Ex.A.3 notice dated 12.3.1985, which is Ex.A.3, the suit was filed. The defendant died and the respondents who were the legal representatives were impleaded. The trial Court rejected the claim for specific performance but ordered refund of advance. This was confirmed in appeal. Therefore the plaintiff has filed this second appeal, and the Cross Objection No.55 of 1992 has been filed against the decree for refund of amount.

2. The learned counsel for the appellant would submit that the plaintiff had been ready and willing and it was only because of the illness of the defendant that the sale deed could not be executed and registered. She submitted that the plaintiff had done everything within his power to get the sale deed registered and had even purchased the stamp paper. The Court below failed to see that the agreement

obliged the defendant to produce the encumbrance certificate and the title deeds. So the plaintiff cannot be faulted with for not performing his part of the contract. According to the learned counsel, the following substantial questions of law arise for consideration:-

1. Whether the lower appellate Court erred in law in holding that time is essence of contract overlooking the fact that in any agreement for sale of immovable properties, time is not regarded as the essence of contract?
2. When the seller for the property has disabled himself from performing his part of the contract within the time stipulated, whether the lower appellate Court is right in negating the relief of specific performance?
3. Whether the lower appellate Court erred in holding that the plaintiff must prove his actual possession of funds, when it is sufficient for him to prove his readiness and willingness as he could have raised funds at any time and complete the transaction?
4. Whether the lower Court erred in law in holding that as the original contracting party died, the same cannot be enforced against the legal representatives in the teeth of Section 15(b) of the Specific Relief Act, which enables the enforcement of the contract by the representatives in interest of the party?

The learned counsel for the respondent would however submit that though normally time is not the essence of a contract for sale of immovable property, recent judgments of the Supreme Court as well as this Court, are to the effect that parties can by their conduct and by consensus, agree that time shall be the essence of the contract. In this case, the Ex.A.2 notice would show that time was the essence of the contract. Ex.A.2 is also pointed out by the learned counsel to show that the defendant had performed his obligations. Even thereafter the plaintiff had not demonstrated his readiness or willingness. The evidence of PW.1 that the defendant did not produce the encumbrance certificate is proved false by Ex.A.2. It is also submitted by the learned counsel that if the case of the plaintiff that the encumbrance certificate and the title deeds were not produced by the defendant is true, he ought to have examined Subbian, the document writer, who is referred to

in the oral evidence. According to PW.1, he had called on the document writer, Subbian to ask whether the defendant had produced the encumbrance certificate and the original title deeds and the said Subbian was not ready. If the said Subbian had been examined, it would have shown that the defendant had not performed his part of the contract. But the plaintiff did not produce the evidence that was available with him. The learned counsel also submitted that the very fact, the suit was filed only on 12.7.1985, long after the date fixed for the performance of the contract would also deny him the discretionary relief. According to the learned counsel, the concurrent judgments of the Courts below are not to be interfered with. Reliance was placed in K. Jayakumar v. Robert and 6 others 2002 2 L.W. 422 where this Court has considered in detail, the various judgments relating to time being the essence of the contract and the issue of readiness and willingness and had also crystallised the salient features in a suit for specific performance.

3. On 15.12.1983, Ex.A.1 was entered into wherein six months' time is stipulated and clause-6 stipulates that, if the six months' period is not adhered to by either party, they would suffer the penalty mentioned therein. On 30.5.1984, Ex.A.2 notice had been issued stating, 'as per the terms of agreement, my client is ready with encumbrance certificate to and with the documents of, the property agreed to be sold. He is also ready to hand over possession of the property agreed to be sold completion of sale.

Inspite of several oral calls from my client for the performance of the sale of the property, you are dragging on the same telling some reasons or others. Since the last date for the performance of the sale is nearing, my client wants to remind you in writing'.

4. From Ex.A.2, it is seen that the plaintiff had been informed not only that the encumbrance certificate and the title deeds were ready but also that the defendant was ready to hand over possession and that he specifically reminded him that the last date for performance of the sale is approaching. No action was taken by the plaintiff thereafter. Much later on 12.3.1985, Ex.A.3 reply is given stating that he received Ex.A.2 on 1.6.1984, met the defendant at his residence at Karaikkal on

4.6.1984 and informed him that he had the balance of sale consideration ready and asked for production of the documents. According to him, the defendant represented to the plaintiff that he had the encumbrance certificate and asked him to come after a couple of days and when he went on 6.6.1984 at 6.30 in the evening, he found that the defendant had suffered a paralytic stroke and that he had been making enquiry about his health ever since and also that he had purchased stamp paper on 11.6.1984 itself. To this the defendant sent the reply Ex.A.4 dated 4.4.1985 pointing out that Ex.A.2 was neither replied to nor complied with, and the meeting on 4.6.1984 and the subsequent attempt made on 1.6.1984 were all false. The following allegations were specifically made in Ex.A.4:-

'My client after his treatment and return from Madras is alright in every respect. For the past six months, he has been attending to his day to day works with the help of his sons. Your client has never been tried to meet my client all these days. It is only because of shortage of fund. After 8 months after the elapse of the agreement period, now he come out saying he has been ready with fund.'

5. This is on 4.4.1985. After this, there is again silence for a three months' period and it is only on 12.7.1985 that the suit is filed. PW.1, in his evidence said that he went to the defendant's house on 4.6.1984 and called upon him to produce the encumbrance certificate, to hand over the same to the writer. For the first time this statement is made. It neither finds a place in Ex.A.3 nor in the plaint. PW.1 would also say that he went to Subbian the document writer to ask whether the defendant had produced the encumbrance certificate and that he got a negative answer. This has also not been either mentioned in Ex.A.3 or in the plaint. In his own evidence, it is seen that the appellant visited the defendant on 10.8.1984 and his son who has given evidence as PW.1 said that as soon as he recovered from the illness, the sale transaction will complete, and that, even as late as 1.3.1985 he had been going to the house of the defendant to negotiate the sale and that only thereafter DW.1 had asked for increase in the sale consideration. It is difficult to believe the case of the plaintiff. A person who had purchased stamp papers on 1.6.1984 with intention to complete the sale would immediately intimate the same to the defendant especially because Ex.A.2 had been issued, informing the plaintiff that the encumbrance certificate and the title deeds were ready. With the stamp

papers in hand the ordinary reasonable man will not wait till 12.3.1985 the date of Ex.A.3. But there is a long silence from 1.6.1984, (the date of receipt of Ex.A.2) till Ex.A.3 dated 12.3.1985. This casts a serious doubt on the bona fides of the plaintiff. Even after receiving Ex.A.4 dated 4.4.1985 where the plaintiff has been charged with lack of readiness and willingness, no attempt is made by the plaintiff to show that he had funds ready. It is true that the plaintiff need not produce cold cash to show readiness but he should establish that he was always ready and willing to pay the balance sale consideration and get the sale deed executed. If evidence to this effect is available that would be sufficient. In fact, this is what was held in Rathinam Chettiar v. Embar Naidu referred to in K. Jayakumar v. Robert 2002 2 L.W. 422 cited supra.

6. The plaintiff has not demonstrated his readiness and if truly there was a document writer by name Subbian, the plaintiff should have examined him to show that the defendant did not have the encumbrance certificate or the title deeds ready. The plaintiff has not done this either. In the aforesaid judgment several salient points for enforcement of a contract for specific performance have been given. Some of these are very relevant in this case:

1. Both parties to the contract should have performed their respective parts of the contract, all conditions precedent, the express and essential terms the implied and essential terms all representations made at the time of the contract on the faith of which it was entered into.
2. Both the parties must show their readiness and willingness to do all matters and things on their part to be done by them after the contract.
3. The purchaser should be ready with either the funds or should be possessed of the capacity to generate funds within the time stipulated. He should also have the necessary willingness of mind to complete the sale from the inception.
4. The vendor should be equally ready and willing to perform his part of the obligations from day one. eg., clearing the encumbrance if any on the property, procuring the encumbrance certificate, income-tax clearance, steps to get the tenant, if any, in the occupation of the property out, getting consent from other

sharers, etc.

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

7. The defendant has demonstrated his readiness and willingness to perform his part of the contract as agreed upon by him. Even as regards the importance of the time factor fixed one has to bear in mind that even if time is not the essence of the contract, the plaintiff should perform his part of the contract within a reasonable time and the surrounding circumstances should be borne in mind by the Court, while exercising its discretion. The fact that the plaintiff did not reply or react to Ex.A.2 promptly and also the fact that inspite of receiving Ex.A.4 reply stating that he did not possess sufficient funds, the plaintiff did nothing to demonstrate his possession of funds and his willingness to take the sale deed are all relevant in this regard. They show that exercise of discretion in favour of the plaintiff is not warranted. Therefore questions-1 to 3 are answered against the appellant. As regards question-4, the appellate Court has held that the decree for specific performance cannot be enforced against the legal representatives. The appellate Court has clearly committed an error in arriving at this finding. The persons, who inherit the estate of the original owner are bound by the obligation under the sale agreement entered into by the original owner and therefore this question of law is answered in favour of the appellant. As regards the cross objection, there is no merit in the same since the parties have agreed for the return of the advance, and they are bound to do so. The second appeal and the cross objection are dismissed. No costs.

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