

S.Krishnakumar Vs. V.Arumugham

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Court : Chennai

Decided On : Feb-17-2011

Judge : C.Nagappan; M.M.Sundresh, Jj.

Acts : [Specific Relief Act, 1963](#) - Sections 20, 16(c)

Appeal No. : A.S. NO.907 OF 2008 AND M.P.NO.1 OF 2008

Appellant : S.Krishnakumar

Respondent : V.Arumugham

Advocate for Def. : Mr.R.Sampath Kumar, Adv.

Advocate for Pet/Ap. : Mr.V.Raghavachari, Adv.

Judgement :

J U D G M E N T

1. This Appeal has been preferred by the unsuccessful appellant/plaintiff being aggrieved against the judgment and decree dated 12.08.2008 rendered in O.S.No.87 of 2006 on the file of the Additional District cum Fast Track Court No.I, Chengalpattu, whereby the Suit filed for specific performance has been dismissed.

2.The case of the appellant/plaintiff is as follows:

2.1.An agreement was entered into between the appellant and the respondent on 31.12.2005 for the purchase of a house property bearing Old No.33,

corresponding to New No.24, situated in Chakravarthi Iyengar Street, East Tambaram, Chennai 600 059, Selaiyur Village, Tambaram Taluk, Kancheepuram District, with an extent of 2660 sq.ft. As per the said agreement, the sale consideration was fixed for a sum of Rs.20,50,000/-. A period of three months was fixed as the time for the execution of the sale deed. An advance amount of Rs.50,000/- was paid at the time of the execution of the agreement entered into under Ex.A-1.

2.2.In view of the refusal of the respondent/defendant in coming forward to execute the sale deed inspite of the readiness on the part of the appellant/plaintiff, a legal notice was issued on 14.03.2006 under Ex.A-2 requiring him to execute the sale deed within the time limit prescribed under Ex.A-1 agreement. The said legal notice was followed by publications in 'Malai Malar' and 'Deccan Chronicle' Newspapers on 22.03.2006 and 24.03.2006 respectively, intimating to the general public not to proceed with any sale transaction pertaining to the suit property. The respondent instead of coming forward to execute the sale deed, inspite of the readiness on the part of the appellant has chosen to send two Caveat notices in Exs.A-12 and 13, which have been acknowledged by the appellant on 25.03.2006. After the agreement for sale entered into under Ex.A-1, the appellant has sought for loan from the Union Bank of India. The loan was sanctioned on 22.03.2006 under Ex.A-9. Thereafter, on 04.04.2006, the appellant filed the Suit for specific performance on the ground, that the respondent is deliberately avoiding the execution of the sale deed inspite of the readiness on the part of the appellant to execute the sale deed.

2.3.Before the Trial Court, the appellant has marked 13 documents as Exhibits. Exs.A-5 and 6 are the Income Tax particulars of the appellant indicating his means to purchase the suit property. Exs.A-7 and 8 are the entries made in the Savings Bank Pass Book of the appellant. Exs.A-7 and 8 are also showing the bank balance of the appellant running to more than Rs.10,00,000/- as on March 2006. Ex.A-10 is the xerox copy of the deposit receipt in the name of the appellant. Ex.A-11 is the xerox copy of the cheque for a sum of Rs.20,00,000/-. The appellant has also deposited the said sum of Rs.20,00,000/- during the pendency of the Suit to show his bonafides.

2.4.The appellant has also examined 4 witnesses on his side. The appellant has examined himself as P.W.1 and examined the Bank Manager of Union Bank of India as P.W.4.

3.The case of the respondent/defendant is as follows:

3.1.A Written Statement was filed by the respondent/defendant primarily contending that, the appellant was not ready and willing to execute the sale deed. It was further contended that, what was executed under Ex.A-1 is only a token advance agreement and not a sale agreement. It is the further case of the respondent that, the issuance of the notice under Ex.A-2 is only an attempt to drag on the date of the execution of the sale deed to gain time. The appellant did not have the means to execute the sale deed. The legal notice issued did not enclose the Demand Draft for the sale consideration to show the bonafides.

3.2.Ex.B-1 reply notice was issued by the respondent on 17.04.2006 after the finding of the Suit stating that, the appellant has sought for the extension of time beyond 3 months which was rejected by the respondent. It was further stated therein that, the delay in giving the reply was due to illness resulting in a heart surgery to the respondent.

3.3.The respondent has marked 4 documents as Exhibits on his behalf. Ex.B-2 is the copy of the Demand Draft dated 15.04.2006 for a sum of Rs.50,000/- sent by the respondent to the appellant. Ex.B-4 is the xerox copy of the lodgement schedule for the payment of Rs.50,000/-. The respondent has examined himself and his son on his side as D.Ws.1 and 2. 3.4.The following issues were framed for consideration in the Suit:

"1.Whether the plaintiff is entitled for the suit for specific performance of contract as prayed for?

2.Whether the time is essence of the contract?

3.To what relief?"

3.5. After considering the arguments and the evidence available on record, the Trial Court has dismissed the Suit filed by the appellant. Challenging the judgment and decree of the Trial Court, the appellant has come forward to file this Appeal.

4. Findings of the Trial Court:

4.1. The Trial Court proceeded on the footing that, the appellant has not indicated the source for payment towards the sale, either in the sale agreement executed under Ex.A-1 or in the legal notice sent under Ex.A-2. It further proceeded on the footing that the agreement stipulates the entire payment before the execution of sale. The Trial Court further held that the time is the essence of the agreement inasmuch as the respondent wanted to sell the property for his urgent needs and on the failure of the appellant in coming forward to execute the sale deed, the discretionary relief of specific performance under Section 20 of the [Specific Relief Act, 1963](#) cannot be exercised in favour of the appellant. Yet another finding has been given by the Trial Court to the effect that there is no evidence to show that the appellant was in possession of Rs.20,00,000/- at the time of the expiry of the time mentioned under Ex.A-1. Further the evidence of P.W.4 was disregarded on the ground that, he was not the author of Ex.A-9 and he was not present at the time of the processing of the loan. Hence, on those circumstances, the Trial Court was pleased to dismiss the suit.

5. Submissions of the appellant:

5.1. The learned counsel for the appellant submitted that, the appellant was always ready and willing and that is the reason why a legal notice was given by the appellant under Ex.A-2. After coming to know the refusal of the respondent in executing the sale deed, the said legal notice was followed by the publications in the local dailies. The respondent has not given any reply immediately. The reply was given only after the filing of the Suit. The appellant has proved the means through Exs.A-6 to 11. The bonafides have been proved by depositing the amount in the Court. The conduct of the respondent is an important factor to be considered.

5.2.The respondent has made contrary statement to the effect that in the reply notice it has been stated that the appellant wanted extension of time, whereas, in the evidence it has been stated that he has not seen the appellant after the execution of Ex.A-1 agreement. There is no evidence regarding the illness and the mere fact that two caveat notices have been sent would dispel the case of the respondent that the appellant was not ready and willing. In support of the said contention, the learned counsel has made reliance upon the following judgments:

"1.SHRI RAMESHWAR PRASAD (D) BY LRS. vs. SHRI BASANTHI LAL [AIR 2008 SC 2050]

2.ANIGLASE YOHANNAN vs. RAMLATHA AND OTHERS [AIR 2005 SC 3503]

3.SILVEY AND OTHERS vs. ARUN VARGHESE AND ANOTHER [AIR 2008 SC 1568]

4.LAXMAN TATYABA KANKATE AND ANOTHER vs. TARAMATI HARISHCHANDRA DHATRAK [(2010) 7 SCC 717]"

6.Submissions of the respondent/defendant:

6.1.The appellant was not ready and willing to execute the sale deed. A legal notice was issued in order to gain time. The evidence of P.W.4 would show that the amount was not ready within the time limit. The processing fee has been paid only on 30.03.2006. The appellant has not shown his bonafides by making the payment by way of executing a demand draft along with the legal notice. The respondent could not give a reply due to illness. Time is the essence of the agreement. Therefore, considering the above said fact, the Trial Court has rightly rejected the discretionary relief and therefore, no interference needs to be called for. In support of the said contention, the learned counsel has made reliance upon the following judgment: "GARUDA CHIT AND TRADING CO.P. LIMITED, MADRAS AND OTHERS vs. CORAMANDEL INDAG PRODUCTS P. LIMITED, MADRAS [(2003) 1 M.L.J. 707]"

7.Points for consideration:

Point No.1.Whether the plaintiff is entitled for the suit for specific performance of contract as prayed for?

7.1.The facts involved in the present appeal are not in dispute. The appellant entered into an agreement on 31.12.2005 under Ex.A-1 with the respondent. A period of 3 months was fixed as the time of the execution of the sale deed. We have perused the sale agreement. The recital contained under Ex.A-1 are very clear that it is only an agreement for sale and not an advance agreement. Ex.A-1 clearly specifies that it is a pure agreement for sale. It is a settled principle of law that a document has to be read as a whole to understand the meaning. Ex.A-1 prescribes the remaining payment, within 3 months for a sum of Rs.20,00,000/- and on such payment a sale deed will have to be executed. Therefore, the contention of the respondent that it is only an advance agreement can never be accepted. It is also to be seen that even in the evidence D.W.1 clearly states that he was waiting for the sale deed to be executed within the time. The agreement further states that on the failure of the parties to execute the sale deed action can be taken based upon the agreement entered into Ex.A-1. Hence, we are of the firm view that Ex.A-1 is a pure and simple agreement for sale.

7.2.There is no necessity for the appellant to indicate his means under Ex.A-1. The Trial Court has committed a grave error in holding that Ex.A-1 does not disclose the means. The further reasoning of the Trial Court was that Ex.A-1 stipulates the payment has to be made in full and thereafter, the respondent will have to be called upon to execute the sale deed also cannot be sustained. We are afraid that such a construction cannot be made to Ex.A-1. Ex.A-1 merely states that on payment, the sale deed will have to be executed. It does not mean that the amount of Rs.25,00,000/- will have to be paid on a particular day and after the receipt of the same the sale deed will have to be executed thereafter. It merely says that the sale deed will have to be executed on the sale consideration. Therefore, the Trial Court has committed a grave error in totally misconstruing Ex.A-1.

7.3.The appellant has proved that he was ready and willing to execute the sale deed. Exs.A-7 and 8 clearly indicate the availability of more than a sum of

Rs.10,00,000/- in the account of the appellant. Under Ex.A-2 even before the expiry of the period the appellant had issued a legal notice requiring the respondent to complete the sale. The appellant has also applied for loan in pursuant to the agreement. The loan has been sanctioned under Ex.A-9 dated 22.03.2006. The evidence of P.W.4 is to the effect that in pursuant to the sanction of the loan the entire amount would be paid to the respondent at the time of the execution of the sale. The Trial Court has wrongly rejected the evidence of P.W.4 who is an Officer of the Bank. Ex.A-9 is not in dispute. The mere fact that the processing fee was paid on 30.03.2006 has no relevance to the case on hand. Ex.A-9 clearly spells that the sanction order has already been made and the amount would be dispersed.

7.4.It is also pertinent to note that even at the time of issuing Ex.A-2 legal notice, the respondent was not willing to execute the sale deed. He has also sent caveat notices which were served on the appellant on 25.03.2006. When that is the factual position, the question of payment for processing fee made on 30.03.2006 has no relevance, since in any case the respondent was not willing to execute the sale deed. The appellant showed his bonafides by depositing the entire amount during the pendency of the Suit. The mere fact that he has applied for the loan and which has been sanctioned coupled with the further fact that substantial amount of money was available in his account are clear factors in favour of the appellant. He has also produced Exs.A-5 and 6 to show that he is a man of means. Immediately, after the receipt of the caveat notices and the issuance of the notice under Ex.A-2 followed by the paper publications the appellant filed the Suit on 04.04.2006.

7.5.Therefore, from the above said facts, we are of the considered view that the appellant has proved that he is ready and willing to execute the sale deed.

8.The scope of Section 16(c) of the [Specific Relief Act, 1963](#) has been considered by the Honourable Division Bench of this Court in A.RAMADAS RAO vs. J.P.BUILDERS [(2010) 3 MLJ 870] the passage dealing with Section 16(c) in the said judgment has observed as follows: "17."Readiness and willingness":

We have given anxious consideration to the rival contentions. Section 16(c) of the Specific Relief Act postulates "readiness and willingness" on the part of the

plaintiff. It is a condition precedent for obtaining relief of grant of specific performance. In a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract to the time of hearing. The onus is on the plaintiff although in the absence of any evidence to the contrary it may be easily discharged. The requirement of law is two fold, (i) that the plaintiff must aver in the plaint and (ii) that he must prove by evidence that he has always been ready and willing to perform his part of the contract. 18. In *Manjunath Anandappa Urf. Shivappa Hanasi v. Tammanasa and Others* (2003) 3 MLJ 50 : (2002) 3 L.W.5, the Supreme Court held that "readiness and willingness" cannot be treated as a straight jacket formula by observing thus at p.55 of MLJ: 21...13. It was held in the case of *R.C.Chandlok v. Chunilal Sabharwal* AIR 1971 SC 1238 : (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight-jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. Finally, we have no hesitation to hold that the pleading as made by the plaintiff not only shows his "readiness and willingness" to perform his part of the obligation under the contract but by tendering the total amount shows he has performed his part of the obligation. We also construe such a plea to be a plea of "readiness and willingness" as required under Section 16(c)...." 19. In *V.Y.Rethinasabapathi Pillai v. T.R.Sriramulu Chettiar* 99 Law Weekly 239, Division Bench of this Court held as follows:

"The requirement under Section 16(c) of the Specific Relief Act has got a legal ethic behind it and that is, in a suit for specific performance, the plaintiff must have treated and is required by Court to treat the contract as still subsisting and it is only to bring out the stand of the plaintiff, he is enjoined to make the requisite averments that he is ready and willing to perform the essential part of the contract. Compliance with Section 16(c) of the Specific Performance Act is not an empty formality. It is a mandate of the statute. Irrespective of whether the opposite party raises a contention or not with regard to compliance with Section 16(c), it is the duty of the Court to advert to this aspect to find out compliance or otherwise, and when there is non-compliance with this statutory mandate, to decline to grant specific performance. Lack of plea by the other side and lack of formulating an issue over the same shall not absolve the Court from its duty to advert to this

statutory mandate to find out compliance or non-compliance with it, and in the latter case, the Court is left with no other alternative but to dismiss the suit. Readiness to perform, must be established throughout the relevant points of time."

20.It is well settled that pleading and proof of "readiness and willingness" is a mandatory requirement to obtain decree for specific performance. The words "readiness and willingness" to perform the part of the contract has to be determined from the conduct of the parties. The acts of performance of which or the readiness to perform must be shown by the plaintiff."

9.Hence, considering the ratio laid down by the Honourable Division Bench, we are of the view that the appellant has proved his 'readiness' and 'willingness' in executing the sale deed.

10.The Honourable Apex Court in *M/S.J.P.BUILDERS AND ANOTHER vs. A.RAMADAS RAO AND ANOTHER* [2010-5-L.W.673] while approving the judgment of this Court, referred supra has clearly drawn a distinction between 'readiness' and 'willingness'. A 'readiness' mentioned under Section 16(c) of the [Specific Relief Act, 1963](#) refers to financial capacity and 'willingness' refers to the conduct of the agreement holder in performing his part of the agreement. Considering the said ratio, the Honourable Apex Court has held as follows: "9.The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness. 10.In *N.P.Thirugnanam vs. Dr.R.Jagan Mohan Rao and Ors.*, (1995) 5 SCC 115 = 1996-1-L.W.239 at para 5, this Court held:

"....Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or

refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he 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. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract." 11.In P.D'Souza vs. Shondrilo Naidu, (2004) 6 SCC 649 paras 19 and 21, this Court observed:

"It is indisputable that in a suit for specific performance of contract the plaintiff must establish his readiness and willingness to perform his part of contract. The question as to whether the onus was discharged by the plaintiff or not will depend upon the facts and circumstances of each case. No strait-jacket formula can be laid down in this behalf.... The readiness and willingness on the part of the plaintiff to perform his part of contract would also depend upon the question as to whether the defendant did everything which was required of him to be done in terms of the agreement for sale." 12.Section 16(c) of the [Specific Relief Act, 1963](#) mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff. It has been rightly considered by this Court in R.C.Chandiok & Anr. vs. Chuni Lal Sabharwal & ors. (1970) 3 SCC 140 that "readiness and willingness" cannot be treated as a straight jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant

specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

11.Point No.2.Whether the time is essence of the contract?

11.1.In view of the discussion made above, we are of the view that the question of time being the essence of the contract is not required to be considered as it is the respondent who evaded the execution of the sale deed between the parties.

11.2.When we analyse the written statement, oral evidence, coupled with the documentary evidence, we find that the conduct of the respondent is not worth appreciation. In the written statement filed only two grounds have been raised namely, Ex.A-1 is not an agreement for sale and secondly, the appellant did not have the means. In the legal notice sent on 14.03.2006 after the filing of the Suit on 04.04.2006, it has been stated that the appellant was asking for extension of time for payment which was refused. However, when we perused the evidence of D.W.1 even in the chief-examination it has been stated that he has not met the appellant till 31.03.2006 and thereafter only a legal notice was sent on 14.03.2006.

11.3.In the cross-examination he has stated that he has not seen the appellant after the date of the agreement. It was further stated that the appellant has not approached the respondent after the agreement and not sought for extension. He also admits that he underwent a bye-pass surgery in the year 2003. Therefore, there is a serious contradiction between the legal notice given on behalf of the respondent and his oral evidence. Further, he himself admitted that the surgery was made in the year 2003. There is no evidence to show that he was very ill to the extent of preventing him from giving a reply immediately. If it is a case of the respondent that he was waiting for the appellant to execute the sale deed till 31.03.2006, it has not known what made him to send the caveat notices under Exs.A-12 and 13. If he is in a position to sign the caveat notices, nothing prevents him from giving a reply immediately and not after filing the suit. Further the mere fact that the caveat notices have been sent immediately after the receipt of the legal notice sent by the appellant under Ex.A-2 is an important factor to hold that

the respondent was not at all ready and willing to execute the sale deed.

11.4.The evidence of D.W.1 is totally contrary to the statement made in the written statement regarding the nature of the agreement. If Ex.A-1 is an advance agreement then there is no necessity for the respondent to wait till 31.03.2006 for the execution of the sale deed. Therefore, the above said factors would clearly establish the fact that the respondent was never interested in executing the sale deed and the appellant has made all endeavours to show his bonafides and was always ready and willing.

12.The Honourable Apex Court in SILVEY AND OTHERS vs. ARUN VARGHESE AND ANOTHER[(2008) 3 MLJ 951] on considering the conduct of the parties has held as follows:

"12.D.W.1 accepted that possession certificates could not be obtained by the defendants in view of the nature of the property involved in the context of Kerala Land Reforms Act, and the Kerala Private Forest (Vesting and Assignment) Act. The defendants never responded to the letter Exhibit A2 issued by the plaintiffs seeking performance of the contract. No response was also sent to the letters Exhibit A-2 to A-10. Exhibit A-6 was a letter sent through registered post which was refused. The lawyer's notice Exhibit A-11 was also not responded to."

13.The said ratio of the Honourable Apex Court was reiterated in a recent pronouncement in LAXMAN TATYABA KANKATE AND ANOTHER vs. TARAMATI HARISHCHANDRA DHATRAK [(2010) 7 SCC 717] wherein it has been held that in the absence of specific evidence, an adverse inference can be drawn against the defendant. It was further held that the conduct of the parties play an important role in a Suit for specific performance.

14.Therefore, considering the above said ratio, we are of the considered view that the conduct of the respondent is such that an adverse interference will have to be drawn against him more so when the appellant has proved his case with sufficient and substantial evidence.

15.We find in the present case on hand, the appellant has clearly established his case. The respondent in turn has failed to prove his case. We also find that there is no dispute regarding the execution of the agreement under Ex.A-1 and the value mentioned therein. Therefore, we find that it is a fit case where the discretion will have to be exercised in favour of the appellant and against the respondent.

16.Hence, for the reasons stated above, the appeal is allowed and the judgment and decree of the Trial Court is hereby set aside and the Suit is decreed as prayed for. Time for execution of sale deed is two months. However, considering the facts and circumstances of the case, there is no order as to costs. Consequently, connected miscellaneous petition is closed.

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