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S.A.No.549 of 2010 & C.R.P (NPD).No.772 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.09.2023
PRONOUNCED ON : 20.10.2023

CORAM:

THE HON'BLE MR. JUSTICE V.LAKSHMINARAYANAN

**S.A.No.549 of 2010 &
M.P.Nos.1 & 2 of 2010 &
C.R.P (NPD).No.772 of 2016 &
CMP.No.4251 of 2016**

In S.A.No.549 of 2010

- 1.Paramasivam (Died)
- 2.P.Pavunambal
- 3.P.Tamilvanan
- 4.P.Dharmaraj
- 5.Dhanalakshmi
- 6.Thangamani

... Appellants

(A2 to A6 are brought on record as LR's of the deceased A1 vide court order dated 07.09.2023 made in CMP.Nos.2879, 2880 and 2882 of 2021 and 8885 of 2023 in S.A.No.549 of 2010)

vs.

Rajamanickam

... Respondent

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure against the Judgment and Decree dated 28.08.2009 in A.S.No.49 of 2008 on the file of the Principal District Judge, Perambalur confirming the Judgment and Decree dated 17.09.2007 in O.S.No.95 of



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2004 on the file of the Subordinate Judge, Ariyalur.

For Appellants : Mr.S.Ramachandran

For Respondent : Mr.M.Aswin

In C.R.P (NPD).No.772 of 2016

1.Paramasivam (Died)

2.P.Pavunambal

3.P.Tamilvanan

4.P.Dharmaraj

5.Dhanalakshmi

6.Thangamani

... Petitioners

(Petitioners 2 to 6 are brought on record as lrs of the deceased sole petitioner vide court order dated 07.09.2023 made in CMP.Nos.2989, 2994 and 2996 of 2021)

vs.

Rajamanickam

... Respondent

Prayer : Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the order of dismissal passed by the learned Subordinate Judge at Perambalur in E.A.No.51 of 2015 in E.P.No.46 of 2014 in O.S.No.95 of 2004 dated 28.01.2016.

For Petitioners : Mr.B.S.Sundaramoorthy

For Respondent : Mr.M.Aswin



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COMMON JUDGMENT

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The disposal of the second appeal will automatically dispose of the revision.

2. Second Appeal arises against the judgment and decree in A.S.No.49 of 2008 dated 28.08.2009 on the file of the learned Principal District Judge, Perambalur in confirming the judgment and decree in O.S.No.95 of 2004 on the file of the learned Subordinate Judge, Ariyalur dated 17.09.2007.

3. The Civil Revision Petition arises against the execution proceeding initiated pursuant to the judgment and decree in O.S.No.95 of 2004 on the file of the learned Subordinate Judge, Ariyalur dated 17.09.2007.

4. When the matter was listed before this court, Dr.Justice S.Vimala was pleased to direct the Registry to get orders from My lord Hon'ble The Chief Justice to post the Civil Revision Petition and the Second Appeal together. Pursuant thereto, both the matters are listed



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before me.

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5. O.S.No.95 of 2004 is a suit for specific performance of an agreement of sale dated 19.07.2002. The sale consideration that the plaintiff and the defendant agreed was Rs.1,80,000/-. According to the plaintiff, he had paid Rs.1,75,000/- on 19.07.2002 itself and this has been recited in the sale agreement. For the balance sale consideration of Rs.5000/-, the plaintiff had sought for **2 years** time for completing the sale transaction.

6. According to the plaintiff, since the defendant was dodging the receipt of balance of Rs.5000/- and to execute the sale deed, he issued a lawyers notice on 30.06.2004. To the said notice, a reply had been sent by the defendant on 21.07.2004 containing false averments. Since there was a refusal, he presented the suit on 30.07.2004. The plaintiff had pleaded that he was always ready and willing to convert the sale agreement into sale deed.

7. On receipt of the summons, a written statement was presented pleading that the defendant had borrowed a sum of Rs.1,75,000/- from



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the plaintiff as loan and as per the common practice prevailing in their locality, the defendant had executed a sale agreement. This sale agreement was only by way of security instead of a demand promissory note. He alleged that the document is not a sale agreement in its true purport, but only a security for the repayment of the said loan. He would further state that he never entered into an agreement of sale at all and that, there was no contract of sale between the parties and hence, there is no question of relationship of vendor and agreement holder.

8. The parties went to trial and the plaintiff examined himself as PW1 and examined two other witnesses as PW2 and PW3. He had marked three documents namely Ex.A1 the sale agreement, Ex.A2 the suit notice and Ex.A3 the reply. The defendant entered the witness box and deposed as DW1 and did not mark any evidence.

9. The trial court after perusal of the plaint and the written statement, framed the following issues:

“1. தாவாச் சொத்தை கிரையம் செய்து கொடுக்க வாதிக்கு,
பிரதிவாதி 19.07.2022 ஆம் தேதி ரூபாய்.1,75,000/- முன்பணம்
பெற்றுக்கொண்டு ஒரு கிரைய ஒப்பந்தப் பத்திரம்



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எழுதிக்கொடுத்துள்ளார் என்பது சரியா?

2. வாதிக்கு கிடைக்கக்கூடிய பரிகாரம் என்ன?”

10. The trial court returned a finding that the sale agreement is true and genuine and further, as the defendant did not deny the readiness and willingness of the plaintiff, it is deemed to have been proved. The said judgment and decree was confirmed by the lower appellate court. Hence, this second appeal.

11. The following substantial questions of law were suggested by the Appellants:

“ 1. Whether the Lower Appellate Court was correct in coming to the conclusion that the sum of Rs.1,75,000/- received by Appellant from the Respondent is only towards the Sale of the property and not towards loan.

2. Whether the Lower Appellate Court was correct in holding Ex.A-1 is real Sale Agreement and was executed for the Sale of the Property.

3. Whether the Lower Appellate Court was correct in holding that the Appellant did not borrow any Loan from the respondent.”



WEB COPY 12. I framed the following substantial questions of law and heard the appeal on those questions:

“1. Whether the courts below are correct in decreeing the suit for specific performance, without any proof of readiness and willingness on the part of the plaintiff.

2. Whether the courts below are correct in holding that Ex.A1 is the sale agreement.”

13. Taking up the first question of law, in a suit for specific performance as per Section 16(c) of the Specific Relief Act, it is the duty of the plaintiff to plead and prove that he was ready and willing. This is the mandatory requirement as per Section 16(c) of the Specific Relief Act. The said provision reads as follows:

“16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

(a)...

(b)...

(c) who fails to prove that he has performed or has always been ready and willing to perform the essential



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terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.”

14. It has now been settled in a series of judgments starting from ***Ram Awadh vs. Achhaibar Dubry*** reported in **(2000) 2 SCC 428** that it is the duty of the plaintiff not only to plead that he was ready and willing but also to substantiate the same by giving appropriate proof. The courts have also held that even if the defendant did not plead about the lack of readiness and willingness on the part of the plaintiff, it is still the duty of the plaintiff to prove that he was ready and willing, in order to convince the court to grant a decree for specific performance. For ready reference, I am extracting the relevant portions of the judgments.

15. The Supreme Court in the case of ***Ram Awadh vs. Achhaibar Dubry*** reported in **(2000) 2 SCC 428** has observed as follows:

“6. The obligation imposed by Section 16 is upon the Court not to grant specific performance to a plaintiff who has not met the requirements of Clauses (a), (b) and (c) thereof. A Court may not, therefore,



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*grant to a Plaintiff who has failed to aver and to prove that he has performed or has always been ready and willing to perform his part of the agreement the specific performance whereof he seeks. There is, therefore, no question of the plea being available to one Defendant and not to another. It is open to any Defendant to contend and establish that the mandatory requirement of Section 16(c) has not been complied with and it is for the Court to determine whether it has or has not been complied with and depending upon its conclusion, decree or decline to decree the suit. We are of the view that the decision in *Jugraj Singh v. Labh Singh* is erroneous.”*

16. The Supreme Court in the case of ***Umabai vs. Nilkanth Dhondiba Chavan (Dead) by LRS.*** reported in ***(2005) 6 SCC 243*** held as follows:

“It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined



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having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

.....

It was for the plaintiff to prove his readiness and willingness to pay the stipulated amount and it was not for the appellants to raise such question.”

17. A learned Single judge of the Allahabad High Court held in ***Mahboobur Rahman vs. Ahsanul Ghani*** reported in ***2007 SCC Online All 2510*** as follows:

*“29. The contention of the learned counsel for the appellant that the defendant also did not raise such a plea does not help the plaintiff-appellant because under Section 16(c) of the Act it is for the plaintiff to aver and prove this fact. This is what was observed by the Supreme Court in *Umabai (supra)*. The Trial Court, while deciding issue No. 5 merely observed that certain sections of the Act including section 16(c) of the Act was not applicable because the plaintiff has been ready and willing to perform his part of*



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the contract. This finding has been arrived at without any discussion. The Lower Appellate Court, on the other hand, has elaborately dealt with this issue. It has observed that under the alleged agreement dated 16/17-4-1975 permission was required to be taken within one month of the agreement and then the sale-deed was required to be executed but the plaintiff not only failed to make any specific averment in the plaint about readiness and willingness but also failed to prove the same. In the light of the discussion made above, the finding recorded by the Lower Appellate Court is correct.”

I should add, this view of the learned Single Judge has been confirmed by the Supreme court in the case of ***Mahboob-ur Rahman vs. Ahsanul Ghani*** reported in ***(2019) 19 SCC 415***:

“ Even in the plaintiff's testimony as PW 1, it is difficult to find a categorical assertion that he had performed or has always been ready and willing to perform his part of the contract. The testimony of the plaintiff as PW 1 is essentially directed towards the existence and validity of the alleged agreement and the surrounding dealings of the parties; but is lacking in those material assertions on readiness and willingness on his part, which remain essential for grant of the relief of the specific performance.”



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WEB COPY 18. A learned Single Judge of this Court in **Balamurugan vs.**

Arumugam reported in **2010 (23) CTCOL 535** held as follows:

“19. A pertinent argument was advanced by the learned Counsel for the 1st Respondent that despite the averment made by the Plaintiff in the plaint expressing his readiness and willingness, there was no denial by the Defendants, more particularly by the Defendants 1 and 2 and therefore, there was no occasion for him to lead any evidence to prove his readiness and willingness.

20. In a suit for specific performance, it is for the plaintiff to plead and prove his readiness and willingness to perform his part of the contract. That being a mandatory requirement, the Court before passing judgment against the Defendant has to scrutinise the facts set out in the plaint to find out whether the said requirements, specially those indicated in Section 16(1)(c) of the Act have been complied with or not.”

19. Similarly, in **S.Kalianna Gounder and others vs.**

S.Periyasamy and others reported in **(2017) 5 LW 265**, this court held



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as follows:

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“30. Therefore, it is clear that de hors the conduct of the defendants in a suit for specific performance, it is incumbent on the plaintiff to prove continuous readiness and willingness. If such readiness and willingness is absent the whole suit would have to fail and there cannot be a decree against some of the defendants alone in such a suit for specific performance. In my considered opinion in as much as the bar contemplated under Section 16 are personal bars as against the plaintiffs in a suit for specific performance, whether or not there is a plea on the part of the defendants, the plaintiff will have to plead and prove that he or she is always ready and willing to perform his or her part of the contract. A negative finding on the readiness and willingness will entail the dismissal of the entire suit and there cannot be a partial decree.”

20. The legal principles that arise out of the aforesaid judgments are that

(i) the plaintiff must prove his readiness and willingness;



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(ii) It does not matter whether the defendant denies the readiness and willingness of the plaintiff or not.

(iii) If the plaintiff does not prove his readiness and willingness by giving appropriate proof, the Court cannot decree the suit for specific performance.

21. As to what is the meaning of readiness and willingness, has already been settled by the judgment of the Supreme Court in ***J.P.Builders and another vs. A.Ramadas Rao and another*** reported in ***(2011) 1 SCC 429***. The court had pointed out the difference between readiness and willingness. It held that insofar as readiness is concerned, it refers to the financial capacity of the plaintiff and insofar as willingness is concerned, it refers to the conduct of the plaintiff in seeking for specific performance. The Supreme Court was pleased to opine that readiness should be backed by willingness.

22. Let us now apply the principles laid down in the aforesaid judgements by the Supreme Court to the facts of this case.

23. It is the specific case of the plaintiff that an agreement of sale was entered into on 19.07.2002. As to show his readiness i.e., his



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financial capacity, he has not produced any document before the trial court. As pointed out above, only three documents were presented for the courts consideration. They are the sale agreement, the suit notice and the reply. None of these point out the financial capacity of the plaintiff. When there is no proof of financial capacity, the Court could not have decreed the suit for specific performance.

24. This lack of readiness has been compounded by the fact that the plaintiff has also not let in any proof to show his willingness. The agreement had been entered into on 19.07.2002 and the plaint itself admits that the defendant had been dodging the receipt of the balance of sale consideration to convert it into a sale deed. The plaint is deliciously vague as to the dates on which the plaintiff had approached the defendant for the said purpose.

25. Apart from that, there is absolutely no explanation from the plaintiff as to what transpired for two long years between 19.07.2002 and 30.06.2004. These two dates are relevant because 19.07.2002 is the date on which the agreement had been entered into and 30.06.2004 is the date



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on which the notice was issued. For the period of two years, there is absolutely no explanation from the plaintiff.

26. Apart from that, I also have to see one further aspect of the evidence from PW1. PW1 has specifically stated in his evidence that he did not have the balance amount to enter into a sale deed on the same day. The balance amount that the plaintiff had to pay to get the sale deed was Rs.5,000/- only. If the plaintiff was not in a position to generate Rs.5,000/- on 19.07.2002, that speaks volumes on his willingness.

27. This is clear from the evidence of PW1 and the relevant portion is extracted hereunder:

“ வா.சா.ஆ.1 எழுதப்பட்ட தேதியன்று ரொக்கமாக பிரதிவாதிக்கு ரூ.1,75,000/- பணம் கொடுத்தேன். மீதி தொகை இல்லாததால் உடனடியாக கிரயம் செய்துகொள்ளவில்லை.”

28. The case was given away by PW2. PW2 was a witness who was brought in by the plaintiff to support his case. PW2 has deposed that the document, he attested, was a sale deed and not a sale agreement. He



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has also stated that he did not appear before the court on several occasions, because if he had appeared he would be constrained to depose the truth. I am extracting the evidence for ready understanding:

“சுத்தகிரையம் என்று பத்திரத்தில் எழுதப்பட்டது
அதனால் நான் சாட்சி கையெழுத்து போட்டேன். உண்மையை
சொல்ல வேண்டியதுவரும் என்ற காரணத்தினால்தான் பல
வாய்தாவிற்று நான் கோர்ட்டிற்கு வரவில்லை என்றால் சரிதான்.”

29. In the light of the fact that the plaintiff has not proved his readiness and willingness, I have to come to the conclusion that even though the defendant did not deny the same, in the light of the specific bar under Section 16(c) of the Specific Relief Act, the suit for specific performance ought to have been dismissed.

30. Apart from these two facts, I have to take note of the legal error committed by the courts below. The trial court did not even frame the issue with regard to the readiness and willingness of the plaintiff. A bare perusal of Section 16(c) of the Specific Relief Act shows that it is a mandatory requirement of the courts below to frame such an issue.



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Further when the Specific Relief Act specifically mandates that unless and until, readiness and willingness is proved, the Court should not decree the suit for specific performance, it is the duty of the trial court to frame such an issue and answer the same. Deciding the same without framing such an issue is fatal to the suit. Therefore, the first conclusion that I have arrived is that the plaintiff has not proved his readiness and willingness.

31. Insofar as the second question of law is concerned, whether the transaction is a loan transaction, I have to look at the dates and amounts specified in the agreement. As per the transaction, the sale consideration was Rs.1,80,000/-. It is the case of the plaintiff that even on that date, he had paid a sum of Rs.1,75,000/- and that left out only a balance of Rs.5,000/-. As per Section 114 of the Indian Evidence Act, 1872, the Court can presume certain events which occur in the natural course of things.

32. No prudent person after paying Rs.1,75,000/- will take two years time for the purpose of paying the balance of Rs.5,000/-. That is to



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say when a person is able to pay a huge sum of Rs.1,75,000/-, the necessity for him to take two years time to pay the balance is not only artificial, but is not natural in the course of things.

33. The reason that has been given by the plaintiff for taking two years time is that he did not have Rs.5,000/- with him to get a sale deed. Even if I were to accept that Rs.5,000/- was not available with him on 19.07.2002, he has not let in any evidence to show as to why he took two years between 19.07.2002, till he issued the suit notice on 30.06.2004. In this regard, I would respectfully follow the judgment of this Court in the case of *Durairaji and another vs. Nadarajan* reported in (2020) 3 CTC 520. In the said judgment, My brother Justice Krishnan Ramasamy was pleased to hold that such a transaction reeks of a loan transaction and therefore, a suit for specific performance cannot be decreed.

34. The judgements of the courts below have not dealt with the mandatory requirement of Section 16(c) of the Specific Relief Act and also they had failed to appreciate the artificial nature of evidence that has been given by the plaintiff and the admission made by PW2. Hence, they



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are erroneous. Ignoring the mandatory provision of law and not concentrating on evidence let in before the court, renders both the judgments perverse. Hence, I am constrained to interfere with the judgments in exercise to the powers vested in this Court under Section 100 of the Code of Civil Procedure.

35. In fine, I answer the two substantial questions of law in favour of the appellants. The judgment and decree of the court of the Principal District Judge, Ariyalur in AS.No.49 of 2008 dated 28.08.2009 in confirming the judgment and decree in O.S.No.95 of 2004 on the file of the Subordinate judge, Ariyalur dated 19.09.2007 are set aside.

36. Having come to this conclusion, there remains yet another task for me. The defendant has agreed that he borrowed a sum of Rs.1,75,000/- from the plaintiff. Therefore, the suit for specific performance is dismissed. While **allowing the second appeal**, by dismissing the suit for specific performance, I pass the following directions:

(i) The appellants shall refund a sum of Rs.1,75,000/- to the



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respondent/plaintiff together with interest at the rate of 9% per annum from the date of borrowal i.e., on 19.03.2002 till the date of payment.

(ii) Time for payment is three months from the date of receipt of a copy of this Order.

(iii) A charge is created over the suit property for the amounts due as per clause (i).

37. Since I have dismissed the suit for specific performance, I now turn to the Civil Revision Petition. The Civil Revision Petition is based on the decree for specific performance that was obtained in O.S.No.95 of 2004. The sale deed having been executed by this Court pending the second appeal, the sale deed is set aside. The plaintiff is entitled for refund of the stamp duty that he has paid pursuant to the decree.

38. In fine, the second appeal is allowed with costs throughout and the Civil Revision Petition is disposed of with the directions contained above. Consequently, connected miscellaneous petitions are closed.

20.10.2023

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Index: Yes/No

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Internet: Yes/No

Speaking Order/Non-Speaking Order

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To

1. The Principal District Judge, Perambalur
2. The Subordinate Judge, Ariyalur.



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V.LAKSHMINARAYANAN, J.

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