



AS No.373 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 05.07.2023	Delivered on 17.07.2023
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CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MRS.JUSTICE **R.KALAIMATHI**

A.S.No.373 of 2017
and CMP No.14244 of 2017

Periasamy ... Appellant

Vs

1. S.Manickam

2. Deepalakshmi ... Respondents

This appeal is filed under Section 96 of the Code of Civil Procedure, to set aside the judgement and decree dated 29.04.2017 passed in O.S.No.51 of 2015 on the file of the III Additional District Judge, Salem.

For Appellant : Mr.R.Yashodvardhan, Senior Counsel
for Mr.K.Moorthy

For Respondents : Mr.N.P.Vijayakumar, for R1

Mr.T.Murugamanickkam, Senior Counsel
for Ms.Zeenath Begum, for R2



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J U D G E M E N T

(Judgment of the Court was delivered by R.SUBRAMANINA, J.)

The unsuccessful plaintiff in OS No.51 of 2015 on the file of the III Additional District Court, Salem, is the appellant. The said suit was filed by the appellant seeking specific performance of an Agreement of Sale dated 20.05.2013 entered into between the plaintiff and the first defendant as the power agent of the second defendant.

2. The plaintiff claims that the first defendant as the power agent of the second defendant agreed to sell the suit property for a consideration of Rs.30,00,000/- and entered into an agreement for sale with the plaintiff on 20.05.2013. On the date of the agreement an advance of Rs.5,00,000/- was paid and the period of 15 months was fixed for performance. It was also claimed that the original documents were handed over to the plaintiff at the time of agreement. A sum of Rs.20,00,000/- was paid by the plaintiff on 07.07.2014 and a receipt was issued by the first defendant. The time for performance was also extended.

3. The second defendant had cancelled the power executed in favour of the first defendant on 01.09.2014. It is the complaint of the



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plaintiff that defendants 1 and 2 had colluded together and had brought about the cancellation in order to deny the plaintiff's right under the Agreement. The plaintiff claimed that he was always ready and willing to perform his part of the contract and sought for specific performance of the contract. The suit was filed on 04.03.2015.

4. The first defendant filed written statement supporting the case of the plaintiff. The second defendant, actual owner of the property filed written statement denying the agreement and contended that the suit agreement is a creation of the defendants 1 and 2. It was contended that the first defendant's husband C.R.Senthilkumar and the first defendant are doing Real Estate Business and they had purchased various properties in Kuthampady Village of Athur Taluk, in the year 2013. Since the first defendant's husband wanted to purchase some other property for the Real Estate Business, he had approached the first defendant for borrowing a sum of Rs.20,00,000/-.

5. The first defendant insisted that the second defendant and her husband executed a power of attorney as a security for repayment of the loan. It is also claimed that the said loan was repaid, only after the



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repayment of the loan, since there were disputes between the defendants

1 and 2 the first defendant and the plaintiff have come up with the agreement which according to the second defendant is not binding on her.

It is also seen that certain police complaints have been lodged by the parties. The sum and substance of the written statement is that the power of attorney was executed in favour of the first defendant only as a security for the loan availed by her husband.

6. On the above pleadings, the Trial Court framed the following issues:

1. *Whether the General Power of Attorney deed dated 15.05.2010 was executed by the 2nd defendant for the loan borrowed from the first defendant?*
2. *Whether the plaintiff is entitled to get specific performance as prayed for?*
3. *Whether the plaintiff is entitled to get return of advance amount as prayed for?*
4. *To what relief?*

7. At trial, the plaintiff was examined as P.W.1 and one Rajendran, a witness to the agreement, was examined as P.W.2. Exhibits A1 to A21 were marked. On the side of the defendants the husband of the second



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defendant was examined as D.W.1 and two other witnesses were examined as D.Ws. 2 and 3. Exhibits B1 to B5 were marked. The Police complaints and other proceedings before the Police were marked as Exs.X1 to X10.

8. The Trial Court after hearing the parties and after analyzing the evidence on record concluded that the plaintiff has not approached the Court with clean hands and the agreement itself has been created by the plaintiff and the first defendant in collusion with each other. On the said findings, the learned Trial Judge dismissed the suit. Hence this Appeal.

9. We have heard Mr.R.Yashodvardhan, learned Senior Counsel appearing for M/s.K.Moorthy for the appellant, Mr.N.P.Vijayakumar, learned Counsel appearing for the first respondent and Mr.T.Murugamanickkam, learned Senior Counsel appearing for M/s.Zeenath Begum, for the second respondent.

10. The following points emerges for consideration in Appeal:

1. Whether the suit agreement is created by the



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plaintiff in collusion with the first defendant.

2. *Whether the conclusion of the Trial Court that the plaintiff has not come to court with clean hands is right.*

11. Points 1&2: Mr.R.Yashodvardhan, learned Senior Counsel appearing for the appellant would vehemently contend that the Trial Court erred in concluding that the appellant has not come to Court with clean hands. Inviting our attention to the fact that Ex.A1 viz. the Sale Agreement dated 20.05.2013 is a registered instrument and that it has been entered into validly when the power of attorney executed by the second defendant in favour of the first defendant was in force, the learned Senior Counsel would submit that once the agreement is proved and the readiness and willingness of the plaintiff is proved, the Court ought not to have refused the performance. The learned Senior Counsel would also draw our attention to the oral evidence to point out that the plaintiff has shown his bonafides and has proved his readiness and willingness to perform his part of the agreement.



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12. Contending contra Mr.T.Murugamanickam, learned Senior

Counsel appearing for the second respondent would contend that the entire agreement is a result of a scheme framed by the first defendant in collusion with the plaintiff to deprive the second defendant of her valuable property. Drawing us to the inconsistencies in the evidence of P.W.2 the attesting witness as well as the evidence of P.W.1 in cross-examination, the learned Senior Counsel would submit that the entire transaction is shrouded in mystery. He would also contend that these inconsistencies in the evidence would probablise the case of the second defendant that the power of attorney itself was executed with a view to secure a borrowing. The learned Senior Counsel would also draw our attention to the documents filed viz. Exs. B1 to B5 which would go to show that it is the *modus operandi* of the first defendant to take power of attorney documents and sale agreements as security for the advances made by him and thereafter cancel them on repayment of the monies.

13. We have considered the rival submissions.

14. The learned Trial Judge has come to a specific conclusion on the basis of the evidence to the effect that the plaintiff has not come to



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Court with clean hands. The fact that the first defendant had not entered the box has also been commented upon by the Trial Court.

15. In a suit for specific performance, the plaintiff is expected to come to Court with clean hands and he is also expected to prove that he was always ready and willing to perform his part of the contract. The evidence let in by the plaintiff should be cogent and convincing so as to enable the Court to grant a decree for specific performance. Specific performance being a discretionary relief need not be granted for the mere asking. The Court can weigh the preponderance of probabilities and based on the effect a decree can be granted. The Court can exercise its discretion to refuse performance. If we are to examine the evidence of the plaintiff in the light of the law as stated above, we find that the evidence of P.W.1 lacks credibility and acceptability.

16. P.W.1 in his evidence has said that he had not inspected the property. While answering certain questions regarding the property P.W.1 had admitted that he had not inspected the property and he has not entered the property. To explain the longer period of 15 months that is fixed for performance of the contract, P.W.1 would submit that he wanted



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a longer time to collect his monies that was with various persons. He would also admit that he had only required the first defendant to execute the sale deed. He would also state that the first defendant had shown a receipt to him and claimed that he has paid the entire amount that has to be paid. The said receipt was marked as Ex.A20. Curiously the said receipt is said to have been executed by the second defendant in favour of the first defendant and it reads that the power of attorney dated 15.05.2013 was executed by the second defendant in favour of the first defendant, after receipt of the entire sale consideration. But what surprises us is the fact that nowhere in the receipt the exact amount of sale consideration is mentioned.

17. Curiously, P.W.2 Rajendran who is the attesting witness to the sale agreement is also an attesting witness to the said receipt. The power of attorney has been cancelled on 01.09.2014. The evidence of P.W.2 assumes significance at this juncture. P.W.2 is an attesting witness to Ex.A1 Agreement, Ex.A20 receipt, Ex.A8 the endorsement dated 07.07.2014 has deposed in his evidence as follows:

“நீ.20 லட்சத்தை 2014ம் வருடம்



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வாதி பெரியசாமி 1ம் பிரதிவாதி
மாணிக்கத்திடம் கொடுத்தார்.
பெத்தநாயக்கன்பாளையம் பத்திர
எழுத்தர் அலுவலகத்தில் வைத்து
பணம் கொடுக்கப்பட்டது. பத்திர
எழுத்தர் பெயர் நாகராஜன். மேற்படி
தேதியில் ரூ.20 லட்சம்
கொடுக்கப்போகும் விவரத்தை 1ம்
பிரதிவாதி மாணிக்கம் என்னிடம்
சொன்னார். செந்தில்குமார் பவர்
பத்திரத்தை ரத்து செய்துவிட்டதாக
சொன்னார். அதனால்
காலநீட்டிப்புக்காக பணத்தை
கொடுப்பதாக மாணிக்கம்
சொன்னார். ரூ.20 லட்சம் பணத்தை
எப்படிக்கொண்டுவந்தார் என்பதை நான்
பார்க்கவில்லை.”

18. The above evidence of P.W.2 would indicate that the parties are aware of the impending cancellation of the power of attorney by the second defendant and her husband. Despite such knowledge an endorsement has been created on 07.07.2014, as if the plaintiff had paid Rs.20,00,000/- to the first defendant on the said date. Moreover, in his



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cross-examination P.W.2 had deposed that the stamp papers for the agreement dated 20.05.2013 was purchased only after their arrival he also concedes that he did not purchase the stamp papers. His evidence in this regard reads as follows:

“20.5.2013 அன்று நாங்கள் வந்தபிறகுதான் முத்திரைத்தாள் வாங்கி பத்திரம் தயார் செய்யப்பட்டது. முத்திரைத்தாளை நான் சென்று வாங்கிவரவில்லை. எத்தனை மணிக்கு பதிவு தாளை தாக்கல்செய்யப்பட்டது என்று நேரம் குறிப்பிட்டு கூறமுடியாது. பதிவு முடிந்தபிறகு நான் தனியாக வீட்டிற்குசென்றுவிட்டேன். கிரய ஒப்பந்தம் ஏற்படும் முன்பு நானும் வாதியும் ஒன்றாக சேலம் வரவில்லை. சாட்சி மீண்டும் கூறகிறார் 15.05.2013 அன்று நானும் வாதியும் சேலம் வந்தோம். அந்த தேதியில் 2ம் பிரதிவாதி 1ம் பிரதிவாதி பெயருக்கு பவர் பத்திரம் எழுதிக்கொடுத்தார். சாட்சி மீண்டும் கூறகிறார் அன்று நான் வாதியுடன் வரவில்லை. 1ம்



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பிரதிவாதியுடன் தான் வந்திருந்தேன்.

அன்றைய தினம் வாதி பெரியசாமி
சேலம் வரவில்லை. முன்பணம் ரூ.5
லட்சத்தை பதிவாளர் முன்னிலையில்
கொடுக்கவில்லை. பத்திர எழுத்தர்
அலுவலகத்தில் வைத்து முன்பணம்
கொடுக்கப்பட்டது. அந்த சமயத்தில்
நான் வாதி பெரியசாமி, 1ம் பிரதிவாதி
மாணிக்கம் மற்றும் பத்திர எழுத்தர்
இருந்தோம்.”

19. The stamp papers that have been used for Ex.A1 Agreement has been purchased even on 16.05.2013 from a stamp vendor at Salem. The evidence of P.W.1 and P.W.2 are poles apart on this issue. The above discrepancies in the evidence of the plaintiff had impelled the Trial Court to conclude that the entire plaintiff's case is a concocted story and the plaintiff has come to Court with a false case. We do not see any reason to disagree with the conclusions of the Trial Court particularly on the appreciation of evidence made by it. Once we conclude that the plaintiff has not come to Court with clean hands and the claim that there was an agreement which is followed by a receipt are concocted. The suit for specific performance has to necessarily fail.



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20. For the foregoing reasons, the Appeal is **dismissed**. However in the circumstances of the case, we make no order as to costs. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (R.KALAIMATHI, J.)
17.07.2023

jv

Index : No
Internet : Yes
Speaking order
Neutral Citation:No

To

The III Additional District Judge,
Salem.



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R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

jv

Pre-delivery judgment in
A.S.No.373 of 2017
and CMP No.14244 of 2017

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