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A.S.NO.273 OF 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 16 / 04 / 2024

JUDGMENT DELIVERED ON: 13 / 06 / 2024

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR. JUSTICE R.SAKTHIVEL

A.S.NO.273 OF 2017

AND

CMP NO.10462 OF 2017

1.A.L.Deivanathan

2.K.Dhanapal

... Appellants /
Plaintiffs 1 and 2

Vs.

1.R.Rajavarman (Died)

2.R.Rajasekaran

3.R.Jeyanthi

4.R.Indhumathi

... Respondents /
Defendants 1 to 4

PRAYER: First Appeal filed under Section 96 read with Order XLI Rule 1 of Code of Civil Procedure, 1908, praying to set aside the judgment and decree dated 18.01.2017 passed in O.S.No.191 of 2011 by the learned III Additional District Judge, Salem.



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For Appellants /
Plaintiffs 1 and 2 : Mr.C.P.Sivamohan

For Respondents 2 to 4 /
For Defendants 2 to 4 : Mr. V.Sekar

J U D G M E N T

R.SAKTHIVEL, J.

The appellants herein are the plaintiffs in *O.S.No.191 of 2011* on the file of 'III Additional District Judge, Salem' (henceforth 'Trial Court').

2.For the sake of convenience, henceforth, the parties will be referred to as per their array in the suit *i.e.*, the appellants herein and the respondents herein will be referred to as plaintiffs and defendants respectively.

3.Feeing aggrieved with the judgment and decree dated *January 18, 2017*, passed by the Trial Court in *O.S.No.191 of 2011*, the plaintiffs have preferred this Appeal under Section 96 read with Order XLI Rule 1 of the 'Code of Civil Procedure, 1908' (henceforth 'CPC'), praying



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to set aside the aforementioned judgment and decree. It is brought to our

notice that the 1st respondent in this appeal died pending appeal. The other

3 respondents are his children they are recorded as his legal representatives.

Plaintiffs' case

4.The case of the plaintiffs is that, the 1st defendant is the father, the 2nd defendant is his son, and the 3rd and 4th defendants are his daughters. Defendants acquired the Suit Propriety measuring an extent of 46 Cents under a registered Partition Deed dated *June 13, 1985*.

4.1.According to the plaintiffs, on *April 24, 2008*, the defendants entered into an agreement of sale with the plaintiffs to sell the Suit Property on or before *September 30, 2008* and the sale price was fixed at Rs.240/- per sq.ft., which totally comes to a sum of Rs.48,13,440/- (Rupees Forty Eight Lakh Thirteen Thousand Four Hundred and Forty only). While executing the sale agreement on *April 24, 2008*, the plaintiffs



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paid a sum of Rs. 10,00,000/- (Rupees Ten Lakhs Only) as advance. A

further sum of Rs. 1,00,000/- was paid on *July 7, 2008* towards the sale consideration. Thus, in total, a sum of Rs.11,00,000/- (Rupees Eleven Lakhs Only) had been paid to the defendants by the plaintiffs as advance towards purchase of the Suit Property. The defendants duly acknowledged the receipt of said sum in the presence of Mr.V. Pal Arumugam and Mr. M.Mohan.

4.2.According to the plaintiffs, on *June 25, 2007*, the first defendant entered into a sale agreement with K. Sugavaneswaran to sell the Suit Property, after receiving an advance of Rs.1,00,000/- (Rupees One Lakh only) as part of total sale consideration. The agreed sale price was Rs. 165 per sq. ft. However, the first defendant failed to honour the agreement and did not execute the sale deed in favour of K. Sugavaneswaran. Consequently, K. Sugavaneswaran issued a legal notice to the first defendant and the plaintiffs. In response, the first defendant approached the plaintiffs, received Rs. 1,00,000/-, and settled the matter



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with K.Sugavaneswaran in the presence of the plaintiffs. This clearly

demonstrates the defendants' greed and unwillingness to execute the sale deed in favour of the plaintiff.

4.3.Despite the repeated demands from the plaintiffs, the defendants did not come forward to execute sale deed in favour of the plaintiffs. The defendants openly proclaimed to sell the Suit Property to 3rd parties for a higher price. Hence, the plaintiffs issued a legal notice to the defendants on *February 14, 2010* calling upon them to execute sale deed by enforcing the agreement of sale dated *April 24, 2008*. On *February 17, 2010*, the defendants sent a reply notice denying the execution of sale agreement as well as the receipt of sale advance of Rs.11,00,000/-

4.4.On *March 22, 2010*, the 2nd defendant sent a reply notice denying the execution of the sale agreement as well as the receipt of sale advance of Rs.11,00,000/-. Hence, the plaintiffs filed a suit for specific performance of contract. The plaintiffs also made an alternate prayer for return of advance amount.



Defendants' case

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5. The 1st defendant filed a written statement, which the 3rd and 4th defendants adopted. They denied executing the sale agreement on *April 24, 2008*. They denied the receipt of Rs.10,00,000/- (Rupees Ten Lakh only) on *April 24, 2008* as sale advance and the further sum of Rs.1,00,000/- (Rupees One Lakh only) on *July 7, 2008*. They also denied handing over possession of the property to the plaintiffs, claiming they are still in possession and that no improvements were made by the plaintiffs. Defendants' case is that the 2nd plaintiff approached the 1st defendant to purchase the Suit Property at Rs. 240 per Sq.ft. The 1st defendant demanded an advance of Rs. 20,00,000/- (Rupees Twenty Lakh only), imposed a condition that the sale shall be completed on or before *September 30, 2008* and gave a photocopy of the registered Partition Deed dated *June 13, 1985*, to show the title to the Suit Property. The 2nd plaintiff agreed to the conditions.



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5.1. On *April 24, 2008*, the 2nd plaintiff brought an agreement

of sale on a Twenty Rupees Stamp Paper, showing both plaintiffs as purchasers and all defendants as sellers. When questioned by the 1st defendant, the 2nd plaintiff informed that he's purchasing the property jointly with the 1st plaintiff. The 2nd defendant was unavailable due to employment in North India. The 1st defendant informed the 2nd plaintiff that the 2nd defendant would be back at Salem around *May 17, 2008*. Hence, it was agreed that the other defendants would sign, and the 2nd plaintiff would pay Rs. 5,00,000/- (Rupees Five Lakh only), with the remaining advance of Rs. 15,00,000/- (Rupees Fifteen Lakh only) payable upon the 2nd defendant signing the agreement. To that effect, the 2nd plaintiff executed a letter dated *April 25, 2008*. Accordingly, the three other defendants signed the agreement on *April 25, 2008*, and received Rs. 5,00,000/- (Rupees Five Lakh only).

5.2. In *May 2008*, when the 2nd defendant returned to Salem for the 4th defendant's marriage, the 1st defendant asked the 2nd plaintiff to



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pay the remaining advance of Rs. 15,00,000/-, but the 2nd plaintiff stated they had no money and were no longer interested in purchasing the property. The plaintiffs never paid Rs. 20,00,000/- (Rupees Ten Lakh only) as advance as stated in the agreement, nor did they pay the advance of Rs. 10,00,000/- (Rupees Ten Lakh only) as alleged in paragraph no.4 of the plaint. No advance was subsequently paid by the plaintiffs. The alleged payment of Rs. 1,00,000/- (Rupees One Lakh only) on *July 7, 2008*, is also false.

5.3.The defendants detailed these facts in their reply notice dated *February 17, 2010*, which the plaintiffs have not refuted in their plaint. The suit agreement is an inchoate and incomplete one since the 2nd defendant has not signed it and therefore, it is not admissible in evidence, not enforceable in law and it is an invalid agreement.

5.4.As far as the agreement with K.Sugavaneswaran is concerned, since he was not able to perform his part of the contract, he had issued a notice with false allegations to the 1st defendant. However, the 1st



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defendant with a view to settle the matter, returned the advance amount and cancelled the said agreement. The claim that the 1st defendant used plaintiffs' money to refund Sugavaneswaran is incorrect.

5.5.The framing of suit and valuation of the reliefs are all not correct. Since there are conflicting pleadings regarding advance paid, it is absolutely necessary that the amount due has to be specifically pleaded. The alternate relief is not valued at all. So, the suit is not properly valued for the purpose of court fees and proper court fee has not been paid.

5.6.The plaintiffs are entitled neither to the relief of specific performance nor to the alternate relief of return of advance, both in law and on facts. The plaintiffs were never ready, able and willing to perform their part of the agreement within the time period fixed. The Suit is filed on the last day of limitation. The plaintiffs had no means or capacity to pay the balance of sale price within the time period fixed in the suit agreement. The plaintiffs have come forward with false allegations and unclean hand.



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5.7.The plaintiffs filed the suit in *O.S.No.866 of 2010* on the file of 1st Additional District Munsif court Salem for the relief of permanent injunction. The cause of action for filing suit for specific performance arose even before filing this suit. Hence, this Suit is barred under Order II Rule 2 of CPC.

5.8.The defendants have suffered huge loss as the plaintiffs breached the agreement. Hence, the defendants are entitled to adjust the loss from and out of the advance amount of Rs.5,00,000/-.

6. Upon considering of the plaint and other materials, the Trial Court framed the following issues:

- “1. Whether the alleged sale agreement dated 24.04.2008 is true, valid and enforceable?*
- 2. Whether the suit is barred under Order II Rule 2 of C.P. C.?*
- 3. To what relief?”*

6.1.Before the Trial Court, on the side of the plaintiffs, the 2nd plaintiff was examined as P.W.1 and the 1st plaintiff was examined as P.W.2



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and Ex-A.1 to Ex-A.16 were marked. And on the side of the defendants, 1st

defendant was examined as D.W.1 and Ex-B.1 and Ex-B.2 were marked.

6.2.The Trial Court, after hearing both sides, held that since P.W.1 in his evidence admitted that a sum of Rs.5,00,000/- alone was paid as advance under Ex.A.1 – Sale Agreement, the contra sum mentioned in the sale agreement and the plaint are not true and the plaintiffs did not approach the court with clean hands. Further, since the 2nd defendant has not signed Ex.A-1 – Sale Agreement, it is an incomplete document. Since the plaintiffs claim that they have been handed over with the possession, Ex-A.1 ought to have been registered and stamped duly. Since Ex.A-1 – Sale Agreement is not registered duly as per Registration Act, 1908 and not duly stamped as per the Indian Stamp Act, 1899, it is a legally invalid and unenforceable document. Accordingly, the Trial Court answered Issue No.1 in favour of the defendants.

6.3.Further held that, the cause of action urged for the suit was available to the plaintiffs at the time of filing the earlier suit in



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O.S.No.866 of 2010 on the file of 1st Additional District Munsif, Salem

itself. Accordingly, held that the suit is barred under Order II Rule 2 (3) of CPC and thus, answered Issue No.2 in favour of the defendants.

6.4.Furthermore, in view of the decision for Issue Nos.1 and 2, held that, the plaintiffs are not entitled to any other reliefs. Accordingly, Issue No.3 was answered in favour of the defendants.

6.5.In light of these findings, the Trial Court dismissed the Suit.

7.Feeing aggrieved with the judgment and decree, the plaintiffs have preferred this appeal.

Arguments

8.This Court has heard Mr.C.P.Sivamohan, learned counsel for the appellants / plaintiffs and Mr.V.Sekar, learned counsel for the respondents.

9.Learned Counsel for the appellants / plaintiffs submitted that, the Trial Court failed to consider the fact that, as there was a threat of



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alienation, the plaintiffs filed a suit for permanent injunction in

O.S.No.866 of 2010 on the file of 1st Additional District Munsif, Salem.

The said suit was not pressed and the present suit was filed seeking the relief of specific performance and the alternate relief of return of advance money on different cause of action, which is not barred under Order II Rule 2 of CPC. Further submitted that, the Trial Court failed to frame issues regarding the payment of advance money by the plaintiffs and that the Trial Court failed to note the conduct of the defendants in denying the execution of agreement of sale. The Trial Court did not consider the evidence properly and failed to apply the law in the right perspective. Accordingly, he prayed to allow the appeal.

10.In response to the above arguments, the learned counsel for the respondents / defendants submitted that as per Ex-A.1 – Sale Agreement, the sale has to be completed on or before *September 30, 2008*.

The plaintiffs were not ready and willing to purchase the property by paying the balance sale consideration. Further, the learned counsel invited



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the attention of this Court to Ex-A.1 – Sale Agreement and Ex-B.1 – Letter

dated *April 25, 2008* and submitted that the 2nd defendant has not signed it

as a party and the plaintiffs paid only a sum of Rs.5,00,000/- as advance.

Further submitted that, the plaintiffs were not ready and willing to pay the

balance advance amount of Rs.15,00,000/- as per Ex-A.1 and Ex-B.1.

Further submitted that, after exchange of notices, the plaintiffs filed a suit

in *O.S.No.866 of 2010* on the file of 1st Additional District Munsif, Salem

for the relief of permanent injunction on *August 27, 2010*, which means the

cause of action for a suit for specific performance was available to the

plaintiffs on *August 27, 2010* itself. Hence, this Suit is barred under Order

II Rule 2 of CPC. Further submitted that, the plaintiffs suppressed the true

facts and pleaded falsely as if the plaintiffs paid a sum of Rs.11,00,000/- as

advance and possession was handed over to them. Further, the defendants

intended to sell the property to meet the expenses of the 4th defendant/

D1's daughter's marriage. Since, the plaintiffs failed to perform his part of

the contract, the defendants had to borrow money for interest due to which



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the defendants suffered huge losses. Hence, the defendants are entitled to

adjust the losses from and out of the advance amount of Rs.5,00,000/-

received. Considering the facts and circumstances of the case, the Trial

Court dismissed the suit. There is no need to interfere with the same.

Accordingly, he prayed to dismiss the appeal.

Points for consideration

11.Heard on both sides. Perused the records. It was reported that respondent No.1 died pending the appeal and respondent Nos.2 to 4 are legal representatives of respondent No.1. The said submission was recorded by this Court on *November 8, 2023*. The points that arise for consideration in this appeal are as follows.

- i) Whether Ex-A.1 – Sale Agreement is a valid, admissible, and enforceable agreement?
- ii) Whether the plaintiffs paid a sum of Rs.11,00,000/- or Rs.5,00,000/- to the defendants as advance?



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- iii) Whether the plaintiffs are entitled to the relief of specific performance of the agreement dated *April 24, 2008*?
- iv) Whether the suit is barred under Order II Rule 2 of CPC?
- v) Whether the plaintiffs are entitled to the alternate relief of return of advance money with interest?

Discussion and Decision

Point No.(i) - *Whether Ex-A.1 – Sale Agreement is a valid, admissible, and enforceable agreement?*

12. Defendants acquired the Suit Property by way of a registered Partition Deed dated *June 13, 1985*. There is no dispute with regard to the said fact. Ex-A.1 – Sale Agreement dated *April 24, 2008* was executed between the plaintiffs and the defendants 1, 3 and 4. Though the 2nd defendant has been described as a party in Ex-A.1, he has not signed it. 1st, 3rd and 4th defendants have not denied the execution of Ex-A.1 – Sale Agreement. According to the defendants, on receiving a sum of



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Rs.5,00,000/- as advance, 1st, 3rd and 4th defendants signed in Ex-A.1 and it

was agreed between them and the plaintiffs that the remaining advance of

Rs. 15,00,000/- would be payable upon the 2nd defendant signing the

agreement. The said fact has been admitted by P.W.1 in his evidence.

Further, Ex-B.1 – Letter dated *April 25, 2008* would also prove the same.

13. This Court deems fit to note here that, for the purpose of admissibility of a document, it shall be the recital therein which shall hold the field and be decisive. However, the same shall not be conclusive. In Ex-A.1, there is no recital about handing over of physical possession to the plaintiffs. Moreover, there is nothing on record to show that possession has been handed over to the plaintiffs. Though the plaintiffs have pleaded that physical possession has been handed over to them, no relief / prayer has been sought to protect the alleged physical possession. Bare reading of Ex-A.1 would show that possession remains with the defendants.



14. Stamp Duty

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14.1.Ex-A.1 – Sale Agreement has been written on a Twenty

Rupees Non-Judicial Stamp Paper. It is apposite to mention here that, ‘the Registration and the Other Related Laws Amendment Act (Act No.48 of 2001)’ (henceforth ‘the said amendment Act’) inserted Serial No.23-A in Schedule 1 of the Indian Stamp Act, 1899. Notably, Tamil Nadu State Legislature has not brought in any amendment similar to that of Serial No.23-A. Hence, as far as Tamil Nadu is concerned, sale agreement is covered under Article 5 (j) of Schedule 1 of the Stamp Act, which prescribes Twenty Rupees as proper stamp duty for sale agreements. Coming to the case on hand, this Court is of the view that, in the absence of any recital about handing over of possession and in the absence of any claim under Section 53-A of Transfer of Property Act, 1882 as stated *supra* in paragraph no.13, Twenty Rupees is the proper Stamp Duty for Ex-A.1 – Sale Agreement. Since Ex-A.1 is written on a Twenty Rupees Non-Judicial Stamp Paper, this Court is of the view that it is duly stamped.



15.Registration

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15.1.The said amendment Act also inserted Section 17 (1-A) in the Registration Act, 1908; and further, amended Section 49 of the Registration Act, 1908 and Section 53-A of the Transfer of Property Act, 1882. In view of these amendments, if a person desires to protect his possession under Section 53-A of Transfer of Property Act, the agreement must be registered as per Section 17 (1-A) of the Registration Act. However, as stated *supra* in paragraph no.13, Ex-A.1 has no recital about the defendants handing over physical possession of the Suit Property. Hence, Section 17 (1-A) of the Registration Act and Section 53-A of the Transfer of Property Act, 1882 would not govern this case. In other words, it does not come into picture in view of the reasons stated *supra* in paragraph no.13.

15.2.Furthermore, the Tamil Nadu State Legislature brought in an amendment to substitute Section 17 (g) of the Registration Act, with



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effect from *December 1, 2012*, as a result of which, agreements relating to

sale of immovable property of the value of Rs.100 and upwards need to be

registered compulsorily. However, Section 49 of the Registration Act has

not been amended to align with the changes brought in by the newly

substituted Section 17 (g). Coming to the case on hand, the Suit Agreement

was executed on *April 24, 2008*. The Suit was filed on *September 30, 2011*.

Both are well before the newly substituted Section 17 (g) came into force.

Moreover, even after the commencement of the aforementioned Act, as per

the proviso under Section 49 of the Registration Act, an unregistered

document affecting the immovable property and required by the

Registration Act to be registered, may be received as evidence of a contract

in a suit for specific performance under Chapter II of Specific Relief Act,

1963 [*vide R.Hemalatha Vs. Kasthuri* reported in *2023 (10) SCC 725*]. In

short, there is no legal bar to enforce specific performance of contract

based on unregistered sale agreement.



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15.3. Hence, in view of the discussion in paragraph nos. 15.1

and 15.2 herein, this Court is of the view that Ex-A.1 need not be registered for the purpose of the present suit for specific performance.

16. To sum up, in view of the reasons stated *supra* in paragraph no. 14 and 15, Ex-A.1 is duly stamped as per Stamp Act and does not require registration for the purpose of this Suit filed for the relief of specific performance. Though the 2nd defendant has not signed in Ex-A.1, considering the nature and extent of the property and in view of Section 12 of the Specific Relief Act, 1963, this Court is of the view that Ex-A.1 is a legally valid, enforceable, and admissible document against the defendants 1, 3 and 4 subject to other provisions of the Specific Relief Act, 1963. Point No.(i) is answered accordingly in favour of the plaintiffs and against the defendants.

Point No.(ii) - *Whether the plaintiffs paid a sum of Rs.11,00,000/- or Rs.5,00,000/- to the defendants as advance?*



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17.In Ex-A.1 – Sale Agreement, it has been recited that a sum

of Rs.20,00,000/- (Rupees Twenty Lakh only) has been received by the defendants as advance. However, the plaintiffs allege that, at the time of execution of Ex-A.1, the plaintiffs paid a sum of Rs.10,00,000/- (Rupees Ten Lakh only) as advance; that, on *July 7, 2008*, plaintiffs paid a further sum of Rs.1,00,000/- (Rupees One Lakh only) towards sale consideration; and that the defendants duly acknowledged the receipt of said sums *i.e.*, Rs.10,00,000/- and Rs.1,00,000/-, in the presence of Mr.V. Pal Arumugam and Mr. M.Mohan. From the above pleadings, it can be safely inferred that the plaintiff did not pay a sum of Rs.20,00,000/- as advance as mentioned in Ex-A.1. Further, the plaintiff did not prove the factum of payment of the said sum of Rs.11,00,000/- by examining the said witnesses. While so, the categorical stand of the defendants is that, since the 2nd defendant was unavailable due to employment in North India, it was agreed by both the sides that the other defendants would sign and the 2nd plaintiff would pay Rs.5,00,000/-, with the remaining advance of Rs.15,00,000/- payable upon



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the 2nd defendant signing the agreement. The 2nd plaintiff issued Ex-B.1 -

Letter dated April 25, 2008 to that effect. Notably, Ex-B.1 has been marked

through P.W.1 during his cross-examination. Relevant extract of cross-

examination of P.W.1 reads thus.

“ . . . இந்த கிரய ஒப்பந்த பத்திரத்தில் 2ம் பிரதிவாதி ராஜசேகரன் கையொப்பம் செய்யவில்லை என்றால் சரிதான், வா.சா.1 கிரய ஒப்பந்த பத்திரத்தில் ரூ.20 லட்சம் அட்வான்ஸ் கொடுத்ததாக குறிப்பிடப்பட்டுள்ளது, நான் தாக்கல் செய்துள்ள வழக்குரையில் அட்வான்ஸ் தொகை ரூ.11 லட்சம் என எழுதப்பட்டுள்ளது, 24.04.2008ல் இரண்டாவது பிரதிவாதி ராஜசேகர் ஊரில் இல்லை, வேறு மாநிலத்தில் வேலை பார்த்து வந்ததாக சொன்னார்கள், அதன்பின்னிட்டு இரண்டாம் பிரதிவாதியிடம் கையொப்பம் பெற நான் நேரில் சென்று கேட்கவில்லை, என் தந்தை பெயர் குப்பாகவுண்டர் என்பதாகும், வா.சா.1 கிரய ஒப்பந்த பத்திரம் ஏற்பட்ட அன்றே நான் என் கைப்பட கடிதம் ஒன்றை எழுதிக்கொடுத்து உள்ளேன், அந்த கடிதத்தில் ரூ.5 லட்சம் அட்வான்ஸ் ஆக பெற்றுக்கொள்ளப்பட்டதாக குறிப்பிட்டு உள்ளேன், மீதி தொகை ரூபாய் 15 லட்சத்தை 15.07.2008 தேதியில் 2ம் பிரதிவாதி கையொப்பம் செய்த பிறகு பெற்றுக்கொள்ள வேண்டியது என்று குறிப்பிட்டு உள்ளேன், அந்த கடிதம் பி.த.சா.ஆ.1 ஆகும். . . ”



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17.1.Further, Ex-B.1 reads thus.

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“சேலம் மிட்டா அய்யம் பெருமாம்பட்டி சின்னக்கொல்லப்பட்டி, அண்ணாசாலையில் குடியிருந்து வரும் ராமலிங்கம் மகன் R.ராஜவர்மன் 1, சின்னக்கொல்லப்பட்டி. ஏற்காடு மெயின் ரோட்டில் ஆப்பிள் கிட்ஸ் ஸ்கூல் நடத்தி வரும் குப்பாக்கவுண்டர் மகன் தனபால் 2, ஆகிய நாம் இருவரும் பேசியபடி 1ஆம் நெம்பர் ராஜவர்மன் அவர்களுக்கு பாத்தியப்பட்ட 46 சென்ட் நிலத்தை 2ம் நெம்பர் தனபால் ஆகிய நான் சதுரஅடி ரூ.240க்கு விலை பேசி இன்றைய தேதி 25.04.2008-ந்தேதி வியாழக்கிழமை அன்று அட்வான்சாக ரூபாய் 20 லட்சம் (இருபது)க்கு ரூ.5,00,000/- பெற்றுக்கொண்டு பாக்கி 15. இலட்சம் ரூபாய் 17.05.2008 அன்று 1ம் நெம்பர் ராஜவர்மன் மகன் ராஜசேகர் கையொப்பம் போட்டபின்னால் பெற்றுக்கொள்ளவேண்டியது,

சாட்சிகள்

1.ஏ.ஆறுமுகம்

signed

சின்னக்கொல்லப்பட்டி.

சேலம் - 8,

(K.தனபால்)”

17.2.Further, as far as allegation of the plaintiffs about the payment of Rs.1,00,000/- (Rupees One Lakh only) as advance on July 7, 2008 for the purpose of enabling the defendants to refund K.Sugavaneswaran is concerned, the burden lies upon the plaintiff to



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establish the same before Court. The plaintiffs miserably failed to examine the said K. Sugavaneswaran as witness. On the other hand, the defendants marked Ex-B.2 through cross-examination of P.W.1. Ex-B.2 has an endorsement which reads thus.

“நான். K.சுகவனேஸ்வரன் இன்று எனது

Notice படி Settlement பேசி Rs.1.00.000/- (ஒரு லட்சம் மட்டும்) திரு.ராஜவரமனிடம் இன்று பெற்று கொண்டேன், இனி இது சம்மந்தமாக எனக்கும் மேற்குறிப்பிட்ட சொத்திற்கும் எந்த ஒரு சம்மந்தமும் இல்லை,

signed

7/7/2008”

17.3.Hence, the 1st defendant pleaded and proved that he himself returned the advance money and cancelled the agreement with K.Sugavaneswaran. The contra case of the plaintiffs has not been duly established. Hence, this Court concludes that the defendants received a sum of Rs.5,00,000/- (Rupees Five Lakh only) as advance from the



plaintiffs. Point No.(ii) is answered accordingly in favour of the defendants

and against the plaintiffs.

Point No.(iii) - *Whether the plaintiffs are entitled to the relief of specific performance of the agreement dated April 24, 2008?*

18.As per Ex-A.1 – Sale Agreement, total sale consideration is Rs.48,13,440/-. As stated *supra*, the plaintiffs paid a sum of Rs.5,00,000/- as advance. The balance sale price is Rs.43,13,440/-. As per Ex-A.1, date fixed for performance is on or before *September 30, 2008*.

According to the defendants, the plaintiffs were neither ready to pay the balance advance money of Rs.15,00,000 and obtain signature from the 2nd defendant in Ex-A.1 nor ready to conclude the sale after paying the balance sale price of Rs.43,13,440/-. The plaintiffs filed Ex-A.12 to Ex-A.14, bank certificates issued by the manager of the Swarnapuri Branch of Bank of India, to show their readiness to perform their part of the agreement. This court is of the view that Ex-A.12 to Ex-A.14, which sets



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out the bank balances of various accounts of the plaintiffs and

people/companies connected with the plaintiffs, alone are not sufficient to

prove their readiness and willingness to perform their part of the

agreement within the stipulated time period. Further, the plaintiffs have

issued Ex-A.5 – Notice dated *February 14, 2010* calling upon the

defendant to produce the original Partition Deed and measure the

boundaries of the property and execute sale deed after receipt of balance

sale consideration. The defendants issued Ex-A.7 - Reply to Ex-A.5,

interalia stating that the plaintiffs have not paid the balance advance

amount of Rs.15,00,000/- as agreed. Despite Ex-A.7 - Reply to Ex-A.5, the

plaintiffs did not come forward to pay the balance advance amount and

obtain signature of the 2nd defendant in Ex-A.1 – Sale Agreement. Further,

since the Partition Deed dated *June 13, 1985* is a registered one, the

plaintiffs need not call upon the defendants to produce the same.



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18.1.Further, the time period as per Ex-A.1, ended on

September 30, 2008, which is well before the exchange of these notices.

Hence, if really the plaintiffs were ready and willing to perform their part of the contract, they would have filed a suit for specific performance of contract and deposited the balance sale price before the competent court as per the terms of Ex-A.1 - Sale Agreement. To be noted, after the exchange of Ex-A.5 and Ex-A.7 notices, the plaintiff filed a suit for permanent injunction in *O.S.No.866 of 2010* on the file of 1st Additional District Munsif court Salem. Even in the said suit, the plaintiffs could have deposited the balance amount of Rs.43,13,440/-, which they failed to do. Further, the plaintiffs not pressed the said suit and filed the present suit. In the present suit also, the plaintiffs have not deposited the balance sale price in the Court. The conduct of the plaintiffs would show that the plaintiffs all along were not ready and willing to perform their part of the agreement within the time period fixed in Ex-A.1.



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18.2.The relief of specific performance is an equitable relief.

The plaintiff seeking equitable relief must approach the court with clean hands, presenting true events and particulars without suppressing any material facts. In this case, the plaintiffs' conduct reveals that they have not approached the court with clean hands; they have suppressed facts and pleaded contrary to the real events. Moreover, the suit has been filed on *September 30, 2011*, i.e., on the last date of limitation. Considering the terms of contract contained in Ex.A1 – Sale Agreement, this Court is of the view that time was essence of the Sale Agreement. It is apposite to cite here the judgment of the Hon'ble Supreme Court ***Saradamani Kandappan Vs. S.Rajalakshmi and others*** reported in ***(2011) 12 SCC 18***. The relevant paragraph nos.are 42 and 43. They are extracted hereunder:-

“....

42.Therefore there is an urgent need to revisit the principle that time is not of the essence in contracts relating to immovable properties and also explain the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from



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inflation and steep increase in prices. We do not propose to undertake that exercise in this case, nor referring the matter to larger bench as we have held on facts in this case that time is the essence of the contract, even with reference to the principles in Chand Rani and other cases. Be that as it may.

43. Till the issue is considered in an appropriate case, we can only reiterate what has been suggested in [K.S. Vidyadnam](#):

(i) The Courts, while exercising discretion in suits for specific performance, should bear in mind that when the parties prescribe a time/period, for taking certain steps or for completion of the transaction, that must have some significance and therefore time/period prescribed cannot be ignored.

(ii) Courts will apply greater scrutiny and strictness when considering whether the purchaser was “ready and willing” to perform his part of the contract.

(iii) Every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring the time-limits stipulated in the agreement. Courts will also “frown” upon suits which are not filed immediately after the breach/refusal. The fact that limitation is three years does not mean a purchaser can wait for 1 or 2 years to file a suit and obtain specific performance. The three



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year period is intended to assist purchasers in special cases, as for example, where the major part of the consideration has been paid to the vendor and possession has been delivered in part performance, where equity shifts in favour of the purchaser.

..... ”

18.3. In view of the cumulative facts and circumstances of this case, this Court decides that the plaintiff is not entitled to the equitable relief of specific performance. Hence, Point No.(iii) is answered accordingly in favour of the defendants and against the plaintiffs.

Point No.(iv) - *Whether the suit is barred under Order II Rule 2 of CPC?*

19. As per Ex-A.1 – Sale Agreement, the sale has to be completed on or before *September 30, 2008*. The cause of action for filing suit for specific performance arose on *1st October, 2008*. The plaintiffs instead of filing a suit for specific performance, filed a suit for permanent injunction on *August 27, 2010* in *O.S.No.866 of 2010* on the file of 1st



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Additional District Munsif Court Salem. In the said suit, plaintiffs filed a
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plaint containing 12 paragraphs including prayer.

19.1.The plaintiff in the present suit is nothing but a replica of the plaintiff's previous masterpiece, except this time they have tweaked the prayer part a little. Paragraph No. 11 of both complaints, dealing with the cause of action, is the same and reads thus.

“11) The cause of action for the suit arose on 24/04/2008 when the defendant entered a sale agreement with the plaintiff and on 14/02/2010 the plaintiff issued legal notice to the defendant and on 15/02/2010 when paper publication was given and on 16/02/2010 when protest petition was filed and on 17/02/2010, 09/03/2010 and 22/03/2010 when the defendants issued reply and on 02/08/10 the plaintiff lodged a police complaint. All of them are arising within the jurisdiction of this Hon'ble Court.”

19.2.Notably, the plaintiff marked Ex-A.12 – Copy of the complaint in O.S.No.866 of 2010 and Ex-A.11 – Copy of the Judgement and Decree passed in O.S.No.866 of 2010. Perusal of Ex-A.11 reveals that the



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said suit was dismissed as not pressed on *November 28, 2011*. This plaint

was filed on *September 30, 2011*. On the date of not pressing the earlier

suit, the present plaint was alive. The real test to check whether a suit has

been hit by Order II Rule 2 is whether the causes of action urged for the

present suit seeking specific performance were available at the time of

filing the earlier suit. As stated *supra*, in the present suit seeking specific

performance and the earlier suit seeking permanent injunction, the causes

of action urged are one and the same which means they were available to

the plaintiffs at the time of filing the earlier suit itself. Leave under Order

II Rule 2 was not obtained. Further, while not pressing the earlier suit in

O.S.No.866 of 2010, the plaintiffs have not obtained permission under

Order XXIII Rule 1 (3) of CPC for filing this present suit. Hence, the

present suit for specific performance is hit by Order II Rule 2 of CPC.

Point No.(iv) is answered accordingly in favour of the defendants and

against the plaintiffs.



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Point No.(v) - *Whether the plaintiffs are entitled to the alternate relief of return of advance money with interest?*

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20.As decided in Point No.(ii), the plaintiffs had paid a sum of Rs.5,00,000/- (Rupees Five Lakh only) to the defendants as advance. Perusal of pleadings would show that the defendants intended to sell the property to meet the expenses of the 4th defendant's marriage. The plaintiffs failed to perform his part of the contract. According to the defendants, due to the non-performance of contract, the defendants had to borrow money for interest and thus, suffered losses in the form of interest. However, the defendants have not produced any document or evidence in this regard.

20.1.From the plaint, it could only be 'inferred' that the plaintiffs are seeking return of advance money of a sum of Rs.11,00,000/- with interest. It is true that the plaintiffs ought to have also specifically valued the alternate relief under Section 22 of 'the Tamil Nadu Court Fees and Suits Valuation Act, 1955' (henceforth 'the Court Fees Act') for the purpose of court fees and jurisdiction. However, the plaintiffs have failed



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to do so. Be that as it may, the plaintiffs have valued the suit at

Rs.43,13,440/- and accordingly, paid the court fees under Section 42 of the

Court Fees Act. In other words, they have paid the highest court fees

chargeable upon them. At this juncture, this Court deems fit to extract sub-

section 3 of Section 6 of the Court Fees Act hereunder.

“(3)Where a suit embraces two or more distinct and different causes of action and separate reliefs are sought based on them, either alternatively or cumulatively, the plaint shall be chargeable with the aggregate amount of the fees with which plaints would be chargeable under this Act if separate suits were instituted in respect of the several causes of action :

Provided that, where the causes of action in respect of reliefs claimed alternatively against the same person arise out of the same transaction, the plaint shall be chargeable only with the highest of the fees chargeable on them.”

20.2.Hence, in view of the proviso to sub-section 3 of Section

6 of the Court fees Act, since the highest court fees chargeable upon the



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plaintiffs has been paid for the main relief, separate court fees need not be

paid for the alternate relief. Further, unpaid purchase money is a statutory

charge under Section 55 (6) (b) of Transfer of Property Act, 1882, and as

per Article 62 of the Limitation Act, 1963, 12 years limitation period has

been prescribed to secure the money back [*vide Delhi Development*

Authority v. Skipper Construction Co. (P) Ltd. and others reported in

2000 (1) CTC 507 and *K.Shanmugam v. C. Samiappan* reported in *2013*

(6) CTC 28]. Hence, part of the purchase money paid as advance can be

claimed within 12 years from when the money sued for becomes due.

Since it is an independent cause of action separate from that for the relief

of specific performance, it would not be hit by Order II Rule 2 of CPC.

Since the plaintiffs have failed to plead the specified quantum of advance

money sought to be refunded and the interests, the plaintiffs are not

entitled to pre-suit interests for the advance money. Considering the above

facts and circumstances, this Court is of the view that the plaintiffs are

entitled to the alternate relief of refund of advance amount of Rs.5,00,000/-



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along with interest at the rate of 9% per annum from the date of suit till the date of decree and post decree interest at the rate of 6% from the date of decree till the date of realisation. Point No.(V) is answered accordingly in favour of the plaintiffs and against the defendants 1, 3 and 4.

Conclusion

21.Resultantly, this Appeal Suit is partly allowed in the following terms.

(i)The plaintiffs are not entitled to the relief of specific performance of the agreement dated *April 24, 2008*; to this extent the Trial Court's decree is confirmed.

(ii)The defendants 3, 4 and the 2nd defendant out of the estate of the 1st defendant, if any, in his hands are directed to pay the plaintiffs a sum of Rs.5,00,000/- along with interest at the rate of 9% per annum from



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the date of suit till the date of decree and post decree
interest at the rate of 6% per annum from the date of
decree till the date of realisation; to this extent the
Trial Court's decree is set aside.

(iii)Both parties shall bear their own costs.

(iv)The connected Civil Miscellaneous Petition
is closed.

[R.S.M., J.]

[R.S.V., J.]

13 / 06 / 2024

Index : Yes
Internet : Yes
Neutral Citation : Yes
Speaking Order
TK/KRK

To

The III Additional District Judge
III Additional District Court
Salem.



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R.SUBRAMANIAN, J.

AND

R.SAKTHIVEL, J.

TK/KRK

PRE-DELIVERY JUDGMENT MADE IN

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