

Judgment Reserved on: 20.04.2017

Judgment Pronounced on: 02.05.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Coram:

The Hon'ble Mr. Justice N.SATHISH KUMAR

Appeal Suit No. 571 of 2010

and

C.M.P.Nos.1 and 2 of 2010

1.T.Vasantha

2.T.Vijaya

3.T.Devi

... Appellants/Defendants 1 to 3

Versus

1.A.Jayaseelan

2.A.Karuppusamy

3.T.Narayanan (Deceased)

4.N.Thenmozhi

5.N.Leena (minor)

... Respondents 1 & 2/Plaintiffs 1 & 2

... Respondents 3 to 5/4th Defendant and
Lrs of 4th defendants

RR4 & R5 brought on record as

LRs of the deceased 3rd respondent

vide order of court dt.27/3/17 by NSKJ

made in CMP.Nos.5585,4429 to 4431/2017

in AS.No.571/2010.

Appeal Suit filed under Section Order 41 Rule 1 Read with
Section 96 of Civil Procedure Code against the Judgment and
decree passed by the Additional District Judge Fast Track
Court No.1, Chengalput, in O.S.No.303 of 2006 dated
12.01.2010.

For Appellant ... Dr.R.Sampathkumar

For Respondents ... Mrs.Hema Sampath,
Senior Counsel for
M/s S.Jayakumar for R1 & R2

JUDGMENT

Aggrieved over the decree and judgment of the learned
trial Court, decreeing the suit filed for specific
performance, the present appeal came to be filed by the
Defendants. For the sake of convenience, the parties are
arrayed as per their own ranking before the trial Court.

2. Brief facts of the plaintiff's case is as follows:- The first defendant, the mother of the other defendants, has entered into an agreement with the plaintiffs on 01.12.2005 for sale of the suit property for a total sale consideration of 12.00 lakhs. On the date of the agreement, the defendants have received Rs.40,000/- towards advance sale consideration. The second and fourth defendants also signed in the agreement as witnesses and consented for the sale of the property. As the third defendant was not available on the date of agreement, the other defendants assured that they will obtain her signature. The third defendant also has given her consent on 15.12.2005. Thereafter, the first defendant has also settled the property in favour of the fourth defendant on 15.12.2005 and handed over the settlement deed to the plaintiffs. In the settlement deed the second and third defendants have signed as the witnesses. Thereafter, the defendants changed their intention to sell the property and issued a legal notice on 25.01.2006 to the plaintiffs with false allegations, which was suitably replied by the plaintiffs. Thereafter, the third defendant has filed a suit in O.S.No.24 of 2006 on the file of the District Munsif Court, Tambaram against the plaintiffs and defendants 1, 2 and 4 for not to alienate the property. In the above suit the third defendant has also admitted the sale agreement. Similarly, the first, second and fourth defendants have also filed a suit in O.S.No.77 of 2006 against the plaintiffs for a direction to the plaintiffs to return the settlement deed and sale agreement. The plaintiffs also made several requests with the defendants through personally and also through mediation for execution of the sale deed after receiving the remaining sale consideration. But the defendants did not come forward to execute the sale deed. Hence the plaintiffs issued a legal notice to the defendants on 19.02.2006 calling upon them to execute the sale deed in favour of this plaintiffs. But the defendants refused to do so through the reply dated 23.02.2006. Hence, the suit.

3. It is the case of the defendants 1, 2 and 4 is that the suit property was originally owned by one Thangavelu, husband of the first defendant and father of the other defendants. After his death the property was devolved upon them and they are in joint possession and enjoyment of the same. As the defendants 2 to 4 were minors at that time of death of Thangavelu, the property tax and other records stand in the name of the first defendant as she was the natural guardian for them. Defendants were in need of some amount to meet out their urgent requirements for settling some hand loans and also for treatment of the fourth defendant. In the month of November-December 2005 the plaintiffs were introduced by one Harivaharan and according to his advice for borrowing loan, the defendants 1, 2 and 4 signed documents prepared by the plaintiffs which was only for the purpose of security. The defendants signed the documents without knowing the contents

but on the presumption that it is only the document for repayment of the borrowed amount. Though the borrowed amount is Rs.50,000/-, the plaintiffs were given only Rs.40,000/- after deducting Rs.10,000/- towards interest for 10 months from December 2005 to September 2006. A settlement deed was executed by the first defendant in favour of the fourth defendant as per the advice of the plaintiffs for safety and security. The alleged agreement is not intended for sale. It is only for the purpose of money transaction. In the meanwhile the defendants were threatened by the plaintiffs to execute sale deed immediately. The defendants issued notice dated 25.01.2006 explaining the circumstances under which the document came into existence. Hence, it is the contention of the defendants that the suit is not maintainable and prays for dismissal of the suit.

4. On the basis of the above pleadings, the following issues were framed by the learned trial Court:-

1. Whether the plaintiff is entitled for the suit for specific performance as prayed for?
2. Whether the alleged agreement is true and valid?
3. Whether the alleged borrowing pleaded by the Defendant is true?
4. To what relief if any?

5. On the side of the plaintiffs P.W.1 and P.W.2 were examined and Exhibits A1 to A22 were marked. On the side of the defendants D.W.1 and D.W.2 were examined and no document has been marked.

6. On the basis of the evidence and materials, the learned trial Judge has decreed the suit for specific performance. Aggrieved over the same, the appeal came to be filed by the defendants.

7. According to the learned counsel appearing for the appellants the plaintiffs are practicing advocates and the persons signed the documents are totally illiterate and in fact the defendants were in dire need of funds to meet out certain personal necessities. Under such circumstances Ex.A1 agreement was obtained by the plaintiffs who are practicing advocates taking advantage of the illiteracy of the defendants. They have purchased stamp paper at Thoothukudi on 18.11.2005, whereas the sale agreement was prepared on 01.12.2005. The evidence of P.W.2 the scribe witness of the so called alleged agreement shows that he has purchased the stamp paper at the High Court campus. All these facts clearly create serious doubt about the execution of Ex.A1 agreement. In fact the third defendant was incarcerated at the relevant time. Whereas the document was prepared as if she is also agreed to sell the property at the relevant time. The first defendant issued a legal notice under Ex.A10 on 25.01.2006 itself only on coming to know about the alleged agreement. The suit itself

is the outcome of the exploitation of the illiteracy. The evidence of the plaintiffs is totally contrary to their pleadings. Several aspects have been introduced by the plaintiffs in the proof affidavit of P.W.1. All these facts clearly show that Ex.A1 cannot be given any importance in the eye of law that too for enforcing the document for granting a specific performance. Hence prayed for allowing the appeal.

8.It is the contention of the learned Senior Counsel for the respondents that though it is the contention of the defendants that the document was executed only for the security of money transaction, the defence taken by the defendants clearly show that they have not approached the Court with clean hands. The conduct of the defendants clearly belie their stand. The defendants have admitted signing of the documents and the third defendant also immediately filed a suit for bare injunction restraining the sale of the property wherein also admitted execution of the agreement and other defendants and also aware of the fact that they have executed the document. It is further contention of the learned Senior Counsel that after execution of the agreement, the first defendant also executed a settlement deed in favour of the fourth defendant and handed over the settlement deed to the plaintiffs besides the tax receipts and other documents. All these facts clearly show that Ex.A1 was intended only for sale and handing over the settlement deed is also admitted by the first defendant. In every stage the defendants have improved their case. Therefore, the conduct of the defendants clearly show that the defence set up by them is untrue. It is further contention of the learned Senior Counsel for the respondents that defendants 2 to 4 are not illiterate as contended by them. Hence submitted that learned trial Court has considered the entire aspects and rightly granted the decree for specific performance. The plaintiffs were always ready and willing to perform their part of contract and also filed the suit immediately. Hence prayed for dismissal of the appeal. In support of her submissions, the learned Senior Counsel for the Respondents placed reliance upon the judgment reported in Syscon Consultants Private Limited v. Primella Sanitary Products Private Limited [(2016) 10 SCC 353]

9.In the light of the above submissions, now the points that arise for consideration are:-

1. Whether Ex.A1 agreement dated 01.12.2005 is not intended for sale?
2. Whether the plaintiffs are always ready and willing to perform their part of contract?
3. To what relief?

10.The case of the plaintiffs is that the first defendant has executed an agreement for sale of the suit property for a total consideration of Rs.12.00 lakhs on 01.12.2005 and received Rs 40,000/- as advance and defendants 2 and 4 also

signed in the agreement being the witnesses in the agreement and also given their unconditional consent for sale of the property. Whereas the defendants denied the execution of the sale agreement and it is the contention of the defendants that while they were in dire need of funds to meet out certain pressing family necessities they met the plaintiffs through one Harivaharan for availing loan. Only at the time of availing the loan of Rs.50,000/- the plaintiffs paid Rs.40,000/- after deducting Rs.10,000/- towards interest for 10 months and obtained signature of the defendants 1, 2 and 4 in the agreement. It is the contention of the defendants that only at the request of the plaintiffs to create the documents in respect of the property first defendant has executed a settlement deed in favour of the fourth defendant and also handed over the same to the plaintiffs.

11. In the light of the above pleadings, it can be seen that Ex.A1 agreement was executed by the first defendant on 01.12.2005 for sale of the suit property wherein defendants 2 and 4 also signed as witnesses. Whereas the recitals in Ex.A1 agreement show as if all the defendants have agreed to sell the property. The recitals further show that the defendants have to get the title deeds with regard to the property and after getting the title deeds the sale shall be completed within four months. Further, the recitals also clearly show that Rs.40,000/- was paid as advance to the defendants on the date of agreement itself. Normally when a party to the contract sets up a plea of money transaction the burden lies on him to establish such a plea. For proving such transaction there need not be direct evidence. The circumstances under which the document came into existence is also relevant to assess the nature of transaction between the parties.

12. In the light of the above settled position when the endorsement on Ex.A1 agreement when carefully seen, the stamp paper was purchased on 18.11.2005 in the name of the first plaintiff from the stamp vendor at Thoothukudi. In this regard the evidence of P.W.1 in the chief examination when carefully seen it is the specific evidence of P.W.1 that the agreement was finalized prior to 01.12.2005 and at the instruction of both the parties one Harivaharan agreed to type the documents and bring the documents on 01.12.2005. Accordingly, on the date of agreement i.e., on 01.12.2005 the defendants 1, 2 and 4 came to the house of Harivaharan, who examined as P.W.2 where the defendants received Rs.34,999/-. It is the evidence of P.W.1 that prior to that in the middle of November, 2005 itself they paid token advance of Rs.5,001/-. Thereafter, on the date of agreement they paid Rs.34,999/- to the defendants 2, 3 and 4 in the house of Harivaharan. This part of evidence introduced for the first time about the payment of Rs.34,999/- in the house of P.W.2 is never found in the pleadings. Similarly, Ex.A1 recitals also show that the entire advance amount of Rs.40,000/- was paid on the date of agreement itself i.e., 01.12.2005. Therefore, this particular evidence of P.W.1

about the payment of Rs.34,999/- in the house of P.W.2 create some doubt about the very nature of the transaction pleaded by the plaintiff. It is further to be noted that payment of Rs.34,999/- with correct denomination giving 999 rupees in the house of P.W.2 is highly improbable and create serious doubt.

13. Further the evidence of P.W.1 in the cross-examination when carefully read it shows that he came to know of the defendants only through P.W.2 and he does not know the survey number of the property and according to P.W.2 the property is classified as Natham Poramboke land. According to P.W.1 the entire transaction was finalized by P.W.2. It is further evidence of P.W.1 that Ex.A1 was prepared only by P.W.2 at the instruction of P.W.1. However, he does not know who has prepared the document who has drafted the agreement and further he does not know where the stamp paper was purchased. Whereas it is the specific evidence of P.W.1 that on 01.12.2005 on the date of agreement only he has instructed P.W.2 to draft the agreement. If this part of evidence is taken into consideration along with Ex.A11 reply notice sent by the plaintiffs to the notice sent by the defendants on 25.1.2006, in the reply notice it is specifically stated by the plaintiffs that since the third defendant was incarcerated the other defendants have offered to sell the property mentioned in the schedule for consideration of Rs.12.00 lakhs. The above reply notice dated 6.2.2006 when read along with the evidence of P.W.1 that he instructed P.W.2 to prepare the document on the date of agreement i.e., on 01.12.2005 itself create serious doubt about the sale agreement. Admittedly, under Ex.A11, the plaintiff was aware of the fact that third defendant was already incarcerated in some other criminal case. That being so, drafting of sale deed as if all the defendants including the third defendant agreed to sell the property to the plaintiffs is also create serious doubt about the transaction. Further cross-examination of P.W.1 shows that on the date of agreement he came to know about the third defendant's custody at the time only.

14. When the evidence of P.W.2 one of the witnesses to the document Ex.A1 who is said to have finalized the transaction when carefully analyzed, according to him the sale was finalized on 15.11.2005 itself for a sum of Rs.12.00 lakhs and on the same date token advance of Rs.5,001/- was paid to the defendants. Thereafter, on the date of agreement remaining Rs.34,999/- was paid, and as per the instructions of the plaintiff and defendants he has purchased the stamp paper from the High Court campus and prepared the document and obtained signature of the defendants and he has signed the document as witness to the document. In the cross-examination also he has asserted that he has purchased the stamp paper only at the High Court campus after three days from 15.11.2005. His categorical admission with regard to the purchase of stamp paper at the High Court campus also falsified by the endorsement found in Ex.A1. As per the endorsement found in

Ex.A1 it was purchased from the stamp vendor at Thoothukudi District. Therefore, the manner in which the stamp paper was purchased for preparing this Ex.A1 agreement is also create serious doubt about the sale agreement.

15. Admittedly, the first defendant is the widow of one Thangavelu. The manner in which the signature found in Ex.A1 also shows that she is an illiterate. The plaintiffs who are having legal background also said to be practicing advocates. The property sought to be purchased is only Natham Poramboke lands. On the date of agreement no title deed whatsoever was available. It is the case of the defendants that only at the instruction of the plaintiffs to create documents they executed the settlement deed in favour of the fourth defendant and handed over the settlement deed and other tax receipts to the plaintiffs. It is not disputed with regard to the handing over of the settlement deed and other tax receipts to the plaintiffs. The settlement deed Ex.A2 when carefully seen the first defendant has executed a settlement deed in favour of the fourth defendant on 15.12.2005. In the settlement deed P.W.2 was in fact stood as identifying witness. This fact in fact show that P.W.2 was present in the Registrar's Office along with D.W.1 and was taking active part in getting the settlement deed registered, in fact these facts probabalize the defence theory that only at the instruction of the plaintiff and Harivaharan in order to create some documents the settlement deed itself came to be executed. Of course signing the document by defendants 1, 2 and 4 is not denied. The only contention that the agreement signed by them is not intended for sale and it is only as security for loan transaction.

16. The manner in which Ex.A1 was executed and the stamp paper purchased clearly probabalise the case of the defendants that they signed the documents only for security of the loan transaction. It is also propabalise the case of the defendants that taking advantage of the adversity of the defendants the plaintiffs plaintiffs who are having legal background also said to be practicing advocates have taken advantage to get the so called sale agreement Ex.A1. Admittedly, at the relevant time one of the daughters of the first defendant also incarcerated. All these facts lead to only interference that adversity of the defendants was taken advantage to get the so called sale agreement Ex.A1. Of course, Ex.A17 copy of the plaint in O.S.No.24 of 2006 filed by the third defendant to show that she has also admitted that she has filed a suit for injunction against the other defendants not to alienate the suit property. She has also admitted the sale agreement.

17. Similarly, the other defendants also filed a suit in O.S.No.77 of 2006 under Ex.A20 for return of the documents handed over to the plaintiffs would indicate that the defendants also not disputed the signing the documents. Though filing of the suits by the third defendants and also admitting the signing of the documents by the other defendants, that

itself cannot be a ground to hold that Ex.A1 was in fact intended only for the sale. For valid sale agreement there must be consensus-ad idem between the parties. In this case the plaintiffs who are having legal background also said to be practicing advocates. The first defendant is a widow and illiterate. The third defendant at the relevant point of time was incarcerated. All these facts in fact clearly show that the document is in fact tainted with influence that apart the plaintiffs were dominant position at the relevant time as the defendants were in fact in financial adversity. All these facts lead to only inference that the document is not as a result of free mind of the defendants.

18. Therefore, this Court is of the view that even though admission of signing the documents by the defendants made in the pleadings as well as other documents that itself is not sufficient to hold that Ex.A1 is only intended for sale of the property. The manner in which the stamp paper was purchased and the evidence of P.W.2 totally contrary to the endorsement found in the document as to the place of purchase of stamp paper create serious doubt. That apart the nature of the advance amount said to have been paid to the defendants also inconsistent. Without any pleadings in the plaint different aspect has been spoken by P.W.1 in the chief examination with regard to the payment of advance. All these facts also create doubt about the genuineness of the document Ex.A1. Similarly, the manner in which P.W.2 signed the document in Ex.A2 settlement deed also probabilise the defence theory only for the purpose of creating some documents in respect of Natham Poramboke lands, settlement deeds came to be executed. Hence, this Court having regard serious doubt which is inherent with regard to Ex.A1 is of the view that the same is not intended for sale of property. Accordingly, this point is answered.

19. Even assuming that Ex.A1 is taken in to consideration, now the point arise for consideration is: Whether the plaintiffs have proved their readiness and willingness to perform their part of contract? Ex.A1 stated to have been executed on 01.12.2005 paltry sum of Rs.40,000/- alone said to have been paid as advance. The remaining sale consideration of Rs.11,60,000/- was to be paid by the plaintiffs. To show that they were all along ready and willing to purchase the property from the inception of the agreement, there must be some evidence in this regard. The readiness and willingness is a continuous process from the very inception of the agreement till the end i.e. until the contract is culminated into sale. The readiness and willingness is not only be pleaded but also be proved by convincing evidence before the Court of law. The evidence of P.W.1 itself shows that in fact he was depending his relatives to mobilize the funds. That itself clearly indicate that at the relevant time he had no capacity to pay the remaining sale consideration. Readiness in fact is the capacity to raise funds and willingness is a mental attitude to get documents registered.

20.Only when the readiness and willingness go together and proved, the person seeking to enforce the sale agreement can succeed in getting equitable relief of specific performance. But even in the plaint pleadings except stating that after filing the suit by defendants the plaintiffs made several requests to the defendants through personally and through mediators, no specific plea has been made to infer their ready and willing. The evidence of P.W.1 in the cross-examination also shows that after D.W.2 filed a suit under Ex.A1, he never had any mediation with regard to the suit agreement. This admission also clearly go against the very pleadings of the plaintiffs. Further no documents whatsoever has been filed to show that the plaintiff all along had ready cash on hand to pay the remaining sale consideration. In that regard no document whatsoever has been filed. Further, the alleged balance sale consideration also not deposited in to Court. Of course the deposit of the balance sale consideration is not sine qua non, for filing suit for specific performance. But the factum of non deposit of remaining sale consideration is also relevant to assess the readiness and willingness. Ex.A3 reply notice itself shows that the plaintiffs in fact were depending to their relatives for arrangement of the alleged funds. All these facts clearly establish the fact that the plaintiffs were never ready and willing to perform their part of contract. Accordingly, these points are answered.

21.Absolutely there is no dispute with regard to the propositions laid down in the judgment cited by the learned Senior Counsel for respondents. Whereas the facts in this case is entirely different.

22.The learned trial Judge without appreciating the facts, has granted a decree for specific performance. Even in the judgment there is no direction with regard to the payment of balance sale consideration. Admittedly, the suit property is only Natham Poramboke land, and it is the only property of the defendants. All these facts cannot be ignored altogether. Hence, the judgment and decree of the learned trial Court is liable to be interfered with.

23.Accordingly, the appeal stands allowed with costs. The judgment and decree of the trial Court is set aside and the suit filed by the plaintiffs is hereby dismissed. However, in view of the admission of the defendants that they have received only Rs.40,000/- as loan from the plaintiffs, this Court is of the view that though there is no prayer for alternative relief for recovery of amount from the defendants, in the interest of justice, taking into consideration of principles of equity and good conscience directs the

defendants to refund a sum of Rs.40,000/- with interest at the rate of 7.5% per annum from the date of payment i.e. 01.12.2005 till the date of realisation to the plaintiffs. Consequently, M.P.Nos.1 and 2 of 2010 are closed.

Sd/-

Asst.Registrar (CS IV)

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Sub Asst. Registrar

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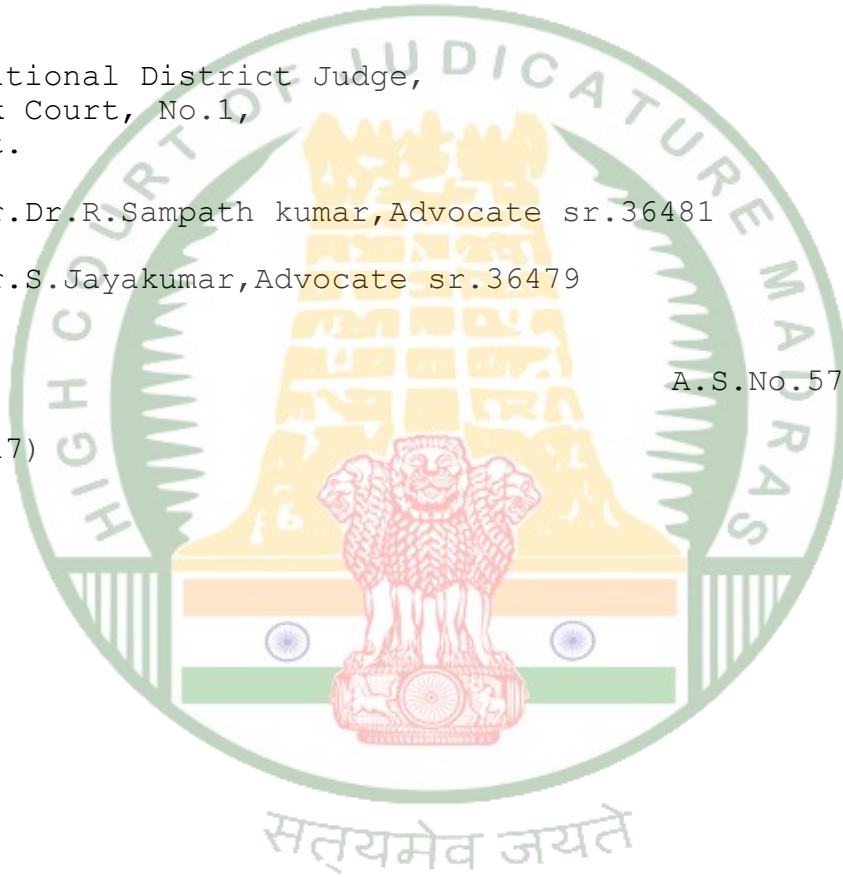
1.The Additional District Judge,
Fast Track Court, No.1,
Chengalput.

+1cc to Mr.Dr.R.Sampath kumar,Advocate sr.36481

+2cc to Mr.S.Jayakumar,Advocate sr.36479

A.S.No.571 of 2010

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