

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2017

CORAM

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

A.S.No.424 of 2012

P.Soundararajan ..Appellant/1st defendant
vs.
1. P.Baskaran .. 1st Respondent/Plaintiff
2. P.Venkatesan .. 2nd Respondent/2nd defendant

PRAYER: Appeal filed under Section 96 of Civil Procedure Code to set aside the judgment and decree passed in O.S.No.5 of 2009 dated 17.09.2010 on the file of Fast Track Court No.2, Additional District Court, Poonamallee.

For Appellant : Mr.S.Sadasharam
for Mr.K.Shajahan
For Respondents: Mr.S.Kalyanaraman
for Mr.M.Nagasubramanian for R1
Mr.D.Simon for R2

J U D G M E N T

The first defendant in O.S.No.5 of 2009 on the file of Fast Track Court No.2, Additional District Court, Poonamallee, is the appellant in this present Appeal. The said suit was filed by the first respondent herein, seeking a decree for specific performance of the agreement of the sale dated 26.12.2005 entered into between the plaintiff and the second defendant as the power agent of the first defendant.

2. According to the plaintiff, the wife of the first defendant had borrowed money from various persons to the tune of Rs.25,00,000/- and unable to re-pay the debts, had decided to part away the suit property to the plaintiff. Pursuant to the said agreement, a Memorandum of Understanding was entered into between the first defendant and the creditors, numbering 26. As per the said Memorandum of Understanding, the property, subject

matter in the present suit has to be sold and the debts due by the first defendant to the creditors should be discharged, apart from discharging the debt due to the Life Insurance Corporation Housing Limited and one Mr.Chandrasekara Reddy. The memorandum, also recites that on 25.11.2005, the first defendant had executed a power of attorney in favour of the second defendant authorizing him to sell the property.

3. Pursuant to the said power of attorney, the second defendant had entered into the suit agreement of sale with the first defendant on 25.11.2005. The plaintiff would claim that the second defendant had advertised for sale of the property in "the Hindu" daily on 24.12.2005 and upon seeing the same, the first respondent/plaintiff had contacted him and agreed to purchase the property for a consideration of Rs.11,00,000/-, apart from agreeing to pay a sum of Rs.12,00,000/- to the creditors, who were parties to the Memorandum of Understanding dated 25.11.2005. On the date of agreement, it is claimed, that the first respondent/ plaintiff had paid a sum of Rs.1,00,000/- as advance. The first respondent/plaintiff would contend that after arranging the balance of sale consideration, he had requested the second defendant viz., the power agent of the first defendant to execute the sale deed. But, the second defendant has been delaying with the execution of sale deed for one reason or the other. The first respondent/plaintiff would also contend that he came to know that the first defendant had cancelled the power of attorney executed in favour of the second defendant as early as on 30.12.2005.

4. Therefore, the first respondent/plaintiff was forced to send a telegraphic notice to the defendants 1 and 2 on 17.12.2008 seeking specific performance and the same was followed up in the suit on 22.12.2008. In the said notice, the first respondent/ plaintiff claimed that he has been all along ready and willing to perform his part of contract and the defendants 1 and 2 have failed to perform their part of contract. Hence, the first respondent/plaintiff has come forward with the suit for specific performance.

5. The first defendant would resist the suit contending that the Memorandum of Understanding as well as the power of attorney executed by the first defendant in favour of the second defendant were obtained by force and coercion made by the creditors of the first defendant with the help of Police. The contention of the first defendant is that, the Memorandum of Understanding dated 25.11.2005 was obtained by force in the Police Station and the Power of Attorney was also obtained by

threat of criminal proceedings. The first defendant would further claim that he executed a sale agreement in favour one Mr.Chandrasekara Reddy on 05.11.2005 and the said Mr.Chandrasekara Reddy had been put in possession of the property. It is also stated that the said Mr.Chandrasekara Reddy had filed a suit in O.S.No.6 of 2006 on the file of the District Munsif cum Judicial Magistrate, Thiruvettriur, in which, the second defendant/second respondent herein was impleaded as third defendant and the suit came to be decreed as ex-parte on 13.06.2006. The first defendant has also denied the claim that the first respondent/plaintiff was all along ready and willing to perform his part of contract. It is also contended that the plaintiff had not made payments to the creditors of the first defendant as agreed in the sale agreement dated 26.12.2005. It is also submitted that the property, subject matter of the suit was attached under the provisions of the Tamil Nadu Protection Interest of Depositors (In Financial Establishments) Act 1997. The said order of attachment has also been made absolute by the Special Court constituted under the Act and the proceedings are pending before the said Special Court with reference to the amounts due by the first defendant.

6. The second defendant had filed a written statement claiming that the power of attorney was one coupled with interest and therefore, the same cannot be canceled. He would also contend that the plaintiff is entitled to a decree of specific performance and he is ready and willing to execute the sale deed as the power of attorney of the first defendant. It is also submitted that the first defendant had not informed him of the cancellation of the power of attorney as well as the Memorandum of Understanding dated 25.11.2005.

7. On the above pleadings, the learned Additional District Judge, Fast Tract Court, Poonamallee, framed the following issues:-

- "i) Whether, the plaintiff is entitled to file a suit for specific performance as per the agreement dated 26.12.2005? and
- ii) To what relief the plaintiff is entitled to ?;"

8. On the side of the plaintiff, he himself was examined as P.W.1 and marked Exs.A1 to A11. On the side of the defendants, the first defendant was examined as D.W.1 and the second defendant examined as D.W.2. Exs.B1 to B4 were marked as exhibits on the side of the defendants.

9. On a consideration of both oral and documentary evidence on record, the learned trial Judge decreed the suit holding that the agreement had been entered into prior to the cancellation of the power of attorney and hence, the first defendant is bound to execute the sale deed in favour of the plaintiff.

10. It was also found that the claim of the first defendant that the Memorandum of Understanding dated 25.11.2005 which is marked as Ex.A2 and the power of attorney dated 25.11.2005 which is marked as Ex.A3, have not been established to have been obtained by coercion and completion. On the above findings, the learned trial Judge granted a decree directing the plaintiff to deposit a sum of Rs.10,00,000/- within a period of two months from the date of decree and on such payment being made, the defendants were directed to execute sale deed in favour of the plaintiff. Aggrieved by the said decree, the first defendant is before this Court with this First Appeal.

11. Heard Mr.S.Sadasharam, learned counsel appearing for the appellant, Mr.S.Kalyanaraman, learned counsel appearing for the first respondent and Mr.D.Simon, learned counsel appearing for the second respondent.

12. Mr.S.Sadasharam, learned counsel appearing for the appellant/first defendant would contend that the Memorandum of Understanding dated 25.11.2005 marked as Ex.A2 and the power of attorney marked as Ex.A3 were obtained by coercion and force in the police station on the basis of a complaint lodged on 16.11.2005 in Crime No.13 of 2005. The learned counsel would submit that the appellant/first defendant never knew about the sale agreement till he received the telegraphic notice dated 17.12.2008. The appellant had sent a reply notice on 21.12.2008, which was received by the plaintiff on 22.12.2008. Attacking the contents of Ex.A1 - the Memorandum of Understanding and Ex.A3 - the power of attorney, the learned counsel would further submit that it is clear from reading of those documents that they have been obtained by force and coercion. Even assuming that those documents are true, the agreement dated 26.12.2005 is not genuine and the agreement is said to have been entered between the second defendant and the

plaintiff is highly questionable. The learned counsel would also point out the fact that the plaintiff as P.W.1 has deposed that he had decided to approach the second defendant only after seeing the advertisement in "the Hindu" daily on 24.11.2005; he met the second defendant on 26.12.2005; finalized the agreement and thereafter, he purchased the stamp paper and the agreement was entered into. The learned counsel would point out that Rs.20/- stamp paper used in Ex.A5 was purchased on 23.12.2005, the sale agreement was entered on 26.12.2005.

13. The learned counsel for the appellant would further submit that the sale agreement would not have come into existence in the manner spoken to by P.W.1. He would also submit that the plaintiff, in a suit for specific performance, is expected to show his readiness and willingness throughout the period of contract. The obligations of the plaintiff under the agreement, according to the learned counsel are payment of Rs.11,00,000/- as sale consideration as well as the payment of Rs.12,00,000/- to the creditors referred in the Memorandum of Understanding dated 25.11.2005. Admittedly, the plaintiff has not paid debts due to the creditors till the date he deposed in the Court on 22.03.2010. Pointing out that the plaintiff in his cross-examination has admitted that he has not paid any money to the creditors referred in the Memorandum of Understanding dated 25.11.2005 - Ex.A2, the learned counsel would contend that the plaintiff has not proved his readiness and willingness to perform his part of contract.

14. The learned counsel for the appellant would further submit that, unfortunately, the learned District Judge not even framed any issue regarding the readiness and willingness of the plaintiff, in a suit for specific performance, to perform his part of contract which is a statutory requirement under Section 16 (c) of the Specific Performance Act.

15. Per contra, Mr.S.Kalyanaraman, learned counsel for the first respondent / plaintiff would contend that on the date of the agreement, the power executed by the first defendant in favour of the second defendant was in force and the plaintiff was never informed about the cancellation of the power. Therefore, he cannot be blamed for cancellation of the power of attorney executed in favour of the second defendant by the first defendant. According to the learned counsel, P.W.1/the plaintiff in his deposition, had spoken to the fact that he has been making demands to the second defendant and it is he who has been postponing execution of the sale deed. Only when he came to know about the cancellation of the power of attorney in December

2008, he realized that he should proceed against the first defendant and hence, he issued the telegraphic notice and followed it with the suit immediately thereafter. Therefore, according to the learned counsel, the plaintiff cannot be said to have been not ready and willing to perform his part of contract.

16. On the other contention of Mr.S.Sadasharam, learned counsel for the appellant relating to the contents of Ex.A5, the learned counsel for the first respondent/ plaintiff would submit that the manner in which Ex.A5 had come into existence cannot be questioned by the first defendant. He would further submit that the purchase of stamp papers cannot be said to be a vitiating factor. Parties depose nearly 3 or 4 years after the event and hence, due to fading memory they may not be in a position to depose exactly in respect of the dates and events.

17. Mr.D.Simon, learned counsel appearing for the second respondent would contend that the power of attorney executed by the first defendant in favour of the second defendant is one coupled with interest and hence, the first defendant could not have cancelled the power. Therefore, the power of attorney executed by the first defendant is still in force and the trial Court should have framed an issue relating to the validity of the cancellation of power of attorney. The learned counsel would seek a direction may be issued to the trial Court to go into the question of cancellation of the power of attorney.

18. In the light of the above submissions of the learned counsel on either side the following points are framed for consideration in the appeal:

"i)Whether the suit agreement dated 26.12.2005, has been proved to be a true and genuine document ?;

ii)Whether the plaintiff was ready and willing to perform his part of the contract throughout the period ? and

iii) Whether the trial Court was right in not considering the issue relating to cancellation of the power of attorney ?"

19. Mr.D.Simon, learned counsel appearing for the second respondent would also contend that in the typed set of papers

prepared by this Court, the dates have been wrongly given and seeks instructions to the Registry to see that such mistakes are not repeated.

(i) The sale agreement is dated 26.12.2005. It is admitted by the the first defendant that he executed a power of attorney on 25.11.2005. The contention of the first defendant regarding the execution of the power of attorney and Memorandum of Understanding dated 25.11.2005 marked as Ex.A2 & A3, is that they were obtained by undue influence and coercion.

20. The said contention cannot be believed. Admittedly, those documents (Ex.A.2 & A.3) were executed on 25.11.2005. The first defendant has not raised his little finger regarding the claim that those documents have been executed by undue influence and coercion, at any time, prior to the filing of suit. For the first time, in the reply notice dated 21.12.2008, he had raised the plea that those documents viz., Memorandum of Understanding (Ex.A.2) and the power of attorney (Ex.A.3) have been executed under the undue influence and coercion. Therefore, the claim of the first defendant that the Memorandum of Understanding (Ex.A.2) and the power of attorney (Ex.A.3) were obtained in coercion cannot be accepted.

21. On the execution of the sale agreement dated 26.12.2005 (Ex.A.5), the first defendant and the second defendant who are actual signatories to the document admit execution of the document. Of course, there are certain discrepancies in the manner in which the Ex.A5 sale agreement was entered between the parties. But I don't think the discrepancy namely the difference in the date of purchase of stamp papers and the date of execution of the sale agreement would vitiate the agreement. But at the same time, the question that whether the agreement could be enforced against the first defendant will have to be considered. In the Memorandum of Understanding dated 25.11.2005 there is a reference to the power of attorney executed in favour of the second defendant. The object of the Memorandum of Understanding is settlement of the amount due payable to the 26 creditors whose names are mentioned therein. The power agent Mr.P.Venkatesan, the second defendant, is not a party to the said contract. Memorandum of Understanding refers to the power of attorney executed in favour of Mr.P.Venkatesan. As per the Memorandum of Understanding, it is clear that the property subject matter of the suit has been handed over to the power of attorney towards the full and final settlement of the claims of the 26 named creditors; LIC Housing Finance Ltd., and a sum of Rs.2,00,000/- to Mr.V.Chandrasekara Reddy. Therefore, the object

of execution of Memorandum of Understanding is to settle the claims of the 26 creditors, LIC Housing Finance Ltd., as well as Mr.Chandrasekara Reddy. It should be taken that the power of attorney in favour of Mr.P.Venkatesan, the second defendant has been executed only in furtherance of the Memorandum of Understanding. The sale agreement, Ex.A5 shows that the purchaser namely the plaintiff had agreed to pay a sum of Rs.12,00,000/- towards the debts due to the 26 named creditors. Though there is a reference to the loan due to LIC Housing Finance Ltd., as well as private party, there is no provision made in the agreement for payment of moneys due to LIC Housing Finance Ltd., On the other hand, it is seen from the agreement that the vendor viz., the first defendant agrees to discharge the debts due to LIC Housing Finance Ltd., and Private party viz., Mr.Chandra Sekara Reddy. Agreement also states that the purchaser namely, the plaintiff would pay an amount of Rs.12,00,000/- to 26 named creditors as per the Memorandum of Understanding. The remaining amount, if any, has to be paid by the first defendant namely the vendor. These clauses in the agreement are opposed to the Understanding recorded by way of Memorandum of Understanding dated 25.11.2005. Therefore, though it is proved that the agreement was executed between the plaintiff and second defendant, the second defendant acting as the power agent of the first defendant, I find that the terms of agreement are not in furtherance of the object mentioned in the Memorandum of Understanding. The power was executed only with a view to perform the obligations of the first defendant under the Memorandum of Understanding dated 25.11.2005. In such view of the matter, I do not think, the sale agreement confirms to the conditions mentioned in the Memorandum of Understanding dated 25.11.2005. In my considered opinion, the sale agreement is unenforceable.

ii) The law is now well settled that in a suit for specific performance the plaintiff must show that he has been ready and willing to perform his part of contract throughout the period of the contract. In the case on hand, ofcourse, no time limit has been fixed in the agreement besides that the vendor has agreed to execute the sale deed as and when demanded by the purchaser. But the object of the very agreement is to discharge the debts due to the 26 named creditors mentioned in Ex.A2 - Memorandum of Understanding. Therefore, the plaintiff should have been ready, within a reasonable time, to perform his obligation under the agreement which does not end with paying of Rs.11,00,000/-. He is also expected to pay Rs.12,00,000/- in discharge of the debts due to the creditors.

Admittedly, the plaintiff has neither paid the creditors

nor offered to pay the creditors even as to the payment of the balance of sale consideration, the plaintiff has not claimed that he has been ready and willing to pay the balance of sale consideration for over a period of three years from 26.12.2005 till 17.12.2008 when he issued the notice demanding performance of the sale agreement for the first time. Of course, the plaintiff would contend that he did not know about the cancellation of the power of attorney by the first defendant. Such story is wholly unbelievable. The plaintiff has himself produced the document namely copy of the cancellation of power of attorney as Ex.A6 during trial. He would claim that the same was handed over to him by the second defendant, some time in December 2008, in his evidence. But from the copy produced, it is seen that the certified copy of the document obtained by the second defendant as early as on 18.01.2006. Therefore, the theory of the plaintiff that he came to know about the cancellation of power of attorney only in December 2008 cannot be believed. The in-action on the part of plaintiff for nearly a period of three years from the date of sale agreement creates doubt in the mind of the Court as to his claim regarding readiness and willingness.

22. The Hon'ble Supreme Court in the case of Saradha mani Kandappan Vs Rajalakshmi 2011 (6) MLJ 149 (SC) as well as in Padmakumari & Others Vs. Dasayyan & Others 2015 (8) SCC 695 held that the plaintiff in the suit for specific performance should prove that he had always been ready and willing to take part in the agreement throughout the period of contract. Whether the contract fixes time limit or not. The plaintiff is expected to express his readiness and willingness within a reasonable time and demand performance within a reasonable time. In this case, as could be seen from the evidence, the plaintiff has not sought for performance of sale agreement for nearly three years. Therefore, it cannot be claimed that the plaintiff has been ready and willing to perform his part of the contract.

(iii). Mr.D.Simon, learned counsel appearing for the second defendant would contend that the cancellation of the power of attorney by the first defendant is bad and the trial Court should have gone into the question and answer the issue.

23. I do not think that the said issue is relevant to the present suit at all. The plaintiff had accepted the cancellation of power of attorney during trial. In fact, the second defendant had filed a separate written statement. In the said written statement, except saying that the first defendant agreed not to cancel the power of attorney, he has not claimed that the power

of attorney is coupled with interest.

24. On a perusal of the document of the power of attorney, it is not shown that the same is one coupled with interest. Even assuming the power of attorney, coupled with interest and it cannot be cancelled, the said issue cannot be gone into in the present suit for specific performance filed by the plaintiff against the first defendant. The cancellation was made on 30.12.2005, and nearly 12 years have lapsed from the date of cancellation. The second defendant who is the agent has not taken any steps to challenge the cancellation. Therefore, I do not think the second defendant can be allowed to raise those questions in this appeal.

25. Hence, I do not propose to go into the question in the absence of any challenge to the cancellation by the agent viz., the second defendant/ second respondent. In view of the above conclusions, the Appeal is liable to be allowed.

26. It is quite unfortunate, that the learned District Judge did not frame any relevant issues in the suit for specific performance. The issue relating to readiness and willingness is conspicuously absent. Section 16(c) of the Specific Relief Act, mandates that the Court should go into the question of readiness and willingness even in the absence of plea in the written statement.

27. In view of the above, all the three points raised in the appeal is answered in favour of the appellant. The Appeal is allowed with cost throughout. The judgment and decree of the trial Court is set aside.

Sd/-

सत्यमेव जयते Assistant Registrar (CCC)

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Sub Assistant Registrar

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TO

THE ADDITIONAL DISTRICT JUDGE,
FAST TRACK COURT NO.2,
POONAMALLEE

COPY TO

THE SECTION OFFICER,
V.R. SECTION, HIGH COURT,
MADRAS.

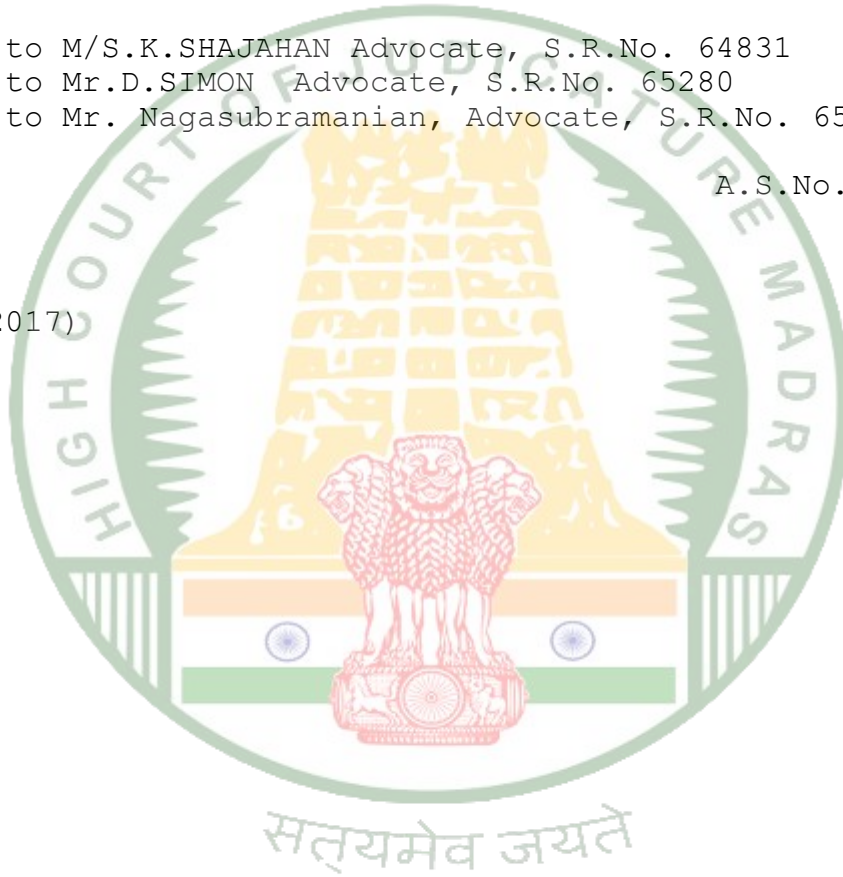
+1cc to M/S.K.SHAJAHAN Advocate, S.R.No. 64831

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