

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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| Date of Reserving Order<br>31.08.2017 | Date of Pronouncing Order<br>22.12.2017 |
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CORAM:

THE HON'BLE MR. JUSTICE D. KRISHNAKUMAR

SA.No.652 of 2015  
and MP.No.1 of 2015

R.Manokaran

..Appellant/Plaintiff

Vs.

R.Pari

..Respondent/Defendant

PRAYER:

The Second appeal has been filed under Section 100 of the Civil Procedure Code against the decree and judgment dated 20.11.2014 passed in AS.No.121 of 2008 on the file of the Principal Subordinate Judge, Salem reversing the decree and judgment dated 18.09.2008 passed in OS.No.951 of 2007 on the file of the Principal District Munsif, Salem.

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.B.Ravi for  
Mr.S.Kumaran

ORDER

Brief facts of the case is as follows:

The appellant / plaintiff has filed a suit in OS.No.951 of 2007 for specific performance and for permanent injunction. According to the plaintiff / appellant, he entered into an agreement of sale with the defendant on 21.06.2002 agreeing to purchase the property for a sum of Rs.75,000/- and the plaintiff paid a sum of Rs.50,000/- on the same day as advance and period was fixed for 11 months to execute the sale deed. Thereafter on 10.04.2003, the defendant received further advance amount of Rs.10,000/- from the balance of sale price from the plaintiff and on request of the defendant the time was extended for 30 months from 10.04.2003. Again on 15.09.2005, the defendant received further advance amount of Rs.10,000/- for the balance of sale consideration from the plaintiff and on request of the

respondent / defendant, the time was extended for 12 months from 15.09.2005. The respondent / defendant also made necessary endorsement on the backside of the sale agreement. As the period already extended was ended on 14.09.2006, the plaintiff made several demands expressing his readiness and willingness to perform his part of contract. But the defendant has not performed his part. Therefore, the appellant / plaintiff issued legal notice on 09.09.2006 and informed that he is ready to execute the sale deed and he would be waiting at the Office of Dadagapatty on 14.09.2006. On receipt of the notice on 11.09.2006, the respondent / defendant issued false reply to the appellant / plaintiff. The respondent / defendant filed written statement and denied the execution of sale agreement in favour of the appellant / plaintiff. It is the case of the respondent / defendant that the plaintiff is doing money lending business and the defendant borrowed a sum of Rs.75,000/- from the plaintiff on 21.06.2002 by executing a promissory note on the same day and agreed to repay the same with interest for Rs.1/-. At the time of borrowing, the defendant handed over all the title deeds of the suit property as security with the plaintiff. The plaintiff got signature and thumb impression of the defendant on the back and front side of stamp paper and green sheets. One, Jamunadevi borrowed a sum of Rs.1,00,000/- from one Mohan, the brother of the plaintiff on 26.01.2003 and executed a promissory note in favour of him. At the time, the defendant gave a guarantee letter to Mohan stating that his title deeds with plaintiff would also stand as security for the said borrowing. Further they got signature and thumb impression on the front and back side of stamp paper and green sheets. Further, one Mani borrowed a sum of Rs.1,20,000/- on 25.09.2003 from the plaintiff and executed a pronote in his favour for this also, the respondent / defendant gave title deeds of his property as security. The defendant also gave a letter stating that his title deeds with the plaintiff would also stand as security. The defendant discharged the loan amount of Rs.75,000/- on 26.10.2005 with interest. The plaintiff assured that the blank stamp papers and green sheets containing signature and thumb impression and the same shall be returned to the respondent / defendant after they are found. Accepting and believing the words of the plaintiff, the respondent did not insist upon returning of the said papers at that time. Therefore, only the said papers have been misused by the appellant / plaintiff.

2. The trial court framed issues. PW1 and PW2 were examined and Exs.A1 to A6 were marked on the side of the plaintiff, and DW1 to DW3 were examined and Exs.B1 to B16 were marked on the side of the defendant. After considering oral and documentary evidence, the trial court had come to a conclusion that Ex.A1 is a genuine document and rejected the case of the

defendant, that signature was obtained by the plaintiff in the blank papers and also rejected the contention that the said Ex.A1 was entered for the purpose of loan borrowed from the plaintiff. The case of the plaintiff was accepted that appellant / plaintiff has satisfied the conditions specified under Specific Relief Act that the plaintiff has been ready and willing to perform his contract. As the issues framed by the trial court were answered in favour of the plaintiff / appellant, the suit was decreed. Challenging the said Judgment and Decree, the defendant / respondent had preferred an appeal in AS.No.121 of 2008 before the Principal Subordinate Court, Salem. The Appellate court has considered the oral and documentary evidence of plaintiff and defendant. In the aforesaid appeal, the appellant has raised specific ground that execution of sale agreement marked under Ex.A1 was denied and also endorsement made on the back side of the sale agreement was also denied by the defendant. The appellant / plaintiff has contended before the Appellate court that the appellant has satisfied the condition specified in the Specific Relief Act that he has been ready and willing to perform his contract and the respondent / defendant has not established before the court below that endorsement made on the back side of the sale agreement under Exs.A2 and A3 are not genuine. The appeal was allowed by the lower appellate court by reversing the Judgment and Decree passed by the trial court. Challenging the aforesaid Judgment and Decree passed by the Appellate court, the appellant / plaintiff has filed the present Second appeal before this Court.

3. At the time of admission, the following questions of law were framed.

a) Whether the lower appellate court is correct in holding that Ex.A1, sale agreement is created one by considering Ex.B8 and Ex.B9 a promissory note and the endorsement alleged to have executed by the plaintiff which is not specifically whispered by the defendant in Ex.A1 reply notice?

b) Whether the endorsement on the sale agreement construed to be suspicious in the event of extending the time more than 2 years, more particularly the thumb impression as found in the agreement and the endorsement is not denied by the defendant?

c) Whether the court below is correct in holding that plaintiff is not ready and willing to perform his part of contract despite of the defendant herein not specifically pleaded in the written statement?

4. The learned counsel for the appellant would submit that as per the agreement, sale consideration was fixed at



Rs.75,000/- and on the same day of execution of sale agreement, an advance amount of Rs.50,000/- was received by the respondent / defendant from the appellant. Time fixed for execution of the sale deed is 11 months from the date of sale agreement. On 10.04.2003, the respondent has received further advance amount of Rs.10,000/- from the appellant and extended the period for performance of the agreement by 30 months from 10.04.2003. Later on 15.09.2005, the respondent received further advance amount of Rs.10,000/- from the appellant and extended time by further 12 months. For the extension of time, endorsements were made on the back side of the sale agreement and the respondent / defendant has signed in the said endorsements on 10.04.2003 and 15.09.2005. The aforesaid documents are marked as Exs.A2 and A3. Further, it is contended by the learned counsel for the appellant that the appellant / plaintiff was always ready and willing to perform his part of contract. On the request of the respondent / defendant, the period was extended further. According to the learned counsel for the appellant, the court below has mainly relied upon Ex.B4, the signature of one, Prasanna who was working in the shop belongs to the appellant, in the said document. The aforesaid document was not accepted by the lower appellate court. Further, the lower appellate court has held that there is a loan transaction under Exs.B4 and B10 to B13. Therefore, the lower appellate court has not accepted the genuineness of Ex.A1. As far as Ex.B9 document is concerned, the author of the said document was not examined and without comparing the signature of the appellant, accepting the Ex.B9 is contrary to law. The appellant also examined the attesting witness of Ex.A2 namely, PW2 and proved that Ex.A1 is genuine. The reason stated by the Appellate court is perverse and contrary to law. Therefore, the lower appellate court has erroneously allowed the appeal. In support of his contention, the appellant has relied upon the decision of this Court in the case of Jayalakshmi Ammal and 8 Others Vs. Chinnaasamy Gounder and another reported in 2007 (1) CTC 449. According to the learned counsel for the appellant, the respondent / defendant has specifically pleaded that the appellant / plaintiff has not returned stamp papers and green sheets and the appellant created the document Ex.B9 and filed the above suit. The appellant has relied upon the reply notice, named under Ex.A5, the contents of the notice are as follows:

"My client states that the true facts are that my client borrowed a sum of Rs.75,000/- from your client on 21.06.2002 and agreed to repay the same with interest at 12% per annum and executed a promissory on 21.06.2002 in favour of your client, at that time your client got signature in two unfilled up stamp paper and two blank green sheets as

security in addition to the promissory note. My client discharged the pro-note debtfully in the October 2005. Your client returned promissory note only executed by my client in favour of your client. When my client questioned about the signed two unfilled up stamp paper and two blank green sheets for that your client stated that he misplaced the above papers in some where in his house and he would return the same after he found it. Because of the friendship my client accepted the same and did not take any serious action against your client."

5. Further, the respondent / defendant has not denied the signature and thumb impression as found in Exs.A1 to A3. Under such circumstances, the initial burden in the suit for specific performance on the plaintiff has shifted to the defendant and he has to establish that Ex.A1 is created one and further he has to prove that the signature as found in Ex.B9 is that of the appellant / defendant. But, the lower appellate court, without considering Section 102 of the Evidence Act has allowed the above appeal and the same is not sustainable. In support of his contention, he has relied upon the decisions reported in 2011 (1) LW 1002, 2007 (1) CTC 449 and 2001 (7) SCC 705.

6. According to the learned counsel for the appellant, the respondent had not taken any steps to send for Ex.B9 to the expert opinion to find out as to whether the signature as found in Ex.B9 is that of the appellant. The court below also has not taken any steps to find the signature of the appellant as found in Ex.B9. The court can peruse the signature as found in Ex.A1 along with Ex.B9 in a naked eye and can come to conclusion that Ex.B9 is forged one. Therefore, in the reply notice, Ex.A5, sent by the respondent / defendant has not whispered about endorsement in Ex.B9 alleged to have been made by the appellant and also not specifically denied the execution of Ex.A1. Hence the burden is on the defendant to establish that the signature of the appellant as found in Ex.A5. Further, Exs.B4 and B10 to B13 shall not be given any weightage, since the authors of the documents were not examined before the court below. Further, the contention of the respondent / defendant is that there is no denial in the written statement by the respondent / defendant with regard to readiness and willingness. Therefore, the said contention of the respondent / defendant is liable to be rejected.

7. The learned counsel for the respondent / defendant would submit that the appellant has relied upon the unregistered sale agreement under Ex.A1. In the aforesaid sale agreement,

extended period had expired on 14.09.2006. The suit was filed on 11.08.2007 nearly after a gap of 12 months from the date of endorsement on the sale agreement dated 21.06.2002. There is no reason for readiness and willingness have been pleaded in the aforesaid plaint for the aforesaid period. Therefore, the Appellate court has considered the defence raised by the respondent / defendant and allowed the said appeal.

8. According to the learned counsel for the respondent / defendant, the Appellate court has considered the Ex.A1 and observed that the contents in the sale agreement was typed above the thumb impression and therefore, it is a created one. Further, the lower appellate court in para 15 has referred to the deposition of PW1 and PW2 which is contrary to each other while PW1 has deposed that Ex.A2 and A3 has been written by hand by the defendant and that no one was present there other than his uncle's son. Whereas, PW2 has clearly stated in his cross examination that the respondent / defendant approached the appellant / plaintiff for the sale of his land after 10.06.2002. Whereas, the stamp paper has been purchased on 24.05.2002 in the name of the appellant R.Manoharan. Therefore, there is a doubt upon the appellant / plaintiff how he has purchased a stamp paper, 20 days in advance, in the name of a purchaser whom he had approached for the first time only on 10.06.2002. In the decision of this Court reported in 2017 (3) CTC 711, this Court has held that when the court entertains even a slightest doubt with regard to execution of agreement of sale, specific performance of such document cannot be maintainable in the eye of law. In the Judgment reported in CDJ 2011 APHC 125, the High Court of Andhra Pradesh, after referring to catena of decisions that mere admission of signatures do not amount to admission of contents of documents, has held that "in view of the above decision, the approach of the lower appellate court in placing the burden on the defendant by mere admission of the signatures on Ex.A1 and A2 is not correct and the party seeking specific performance has to prove the terms of the contract, the contents of the agreement and also the passing of the consideration. Evidently, as per the law of evidence, the burden is on the person who fails if the evidence is not adduced to prove the fact in issue".

9. Further, in 2011 (5) SCR 587, the Hon'ble Supreme Court has held that the trial court could not proceed in such an unwarranted manner for the reason that the respondent had merely admitted his signature on the photocopy of the Power of Attorney and did not admit the contents thereof. More so, the court should have borne in mind that admissibility of a document or contents thereof may not necessary lead to drawing any inference unless the contents thereof have some probative value.



10. Further, it is contended by the learned counsel for the respondent that DW2, Saravanan who was the witness in Ex.B8 and B9 had deposed that the Ex.B8 and B9 have been executed by the plaintiff in his presence. Thus, onus of proving the endorsement of Ex.B9 has been discharged by the respondent herein. The onus automatically shifts to the plaintiff to rebut the same which he has failed to do. In AIR 2003 SC 4548, the Hon'ble Supreme Court, following the decision in AIR 1964 SC 136, held that there is an essential distinction between burden of proof and onus of proof, burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

11. The learned counsel for the respondent has further contended that the appellant / plaintiff has pleaded readiness and willingness only from 9 months before 14.09.2006, the alleged extended expiry date of the agreement. Admittedly the suit was filed on 11.08.2007 about a year after the expiry of the alleged agreement period and no reasons have been assigned. Mere statement that the plaintiff has always been ready and willing to perform his part of the contract would not be sufficient. As per the conditions of the Specific Performance Act, it should also prove readiness and willingness. Therefore, in the absence of any proof, the Appellate court has rightly considered the decision report in 2005 (1) LW P 686, this Court has found that except the line "the plaintiff was always been ready and willing to perform his part of the contract" nothing was said how he had performed the obligation or how he was always ready and willing, which was thwarted or avoided by the other party to the contract and held that as contemplated under Section 16 ( c ) of the Specific Relief Act, a contract cannot be enforced in favour of a person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him other than terms the performance of which has been prevented or waived by the defendant.

12. The learned counsel for the respondent has further contended that in the Judgment reported in 2010 (10) SCC 512, the Hon'ble Supreme Court has held that "Even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the part of plaintiff is something which need not be proved, if the plaintiff is able to establish that defendant refused to

execute the sale deed and thereby committed breach, is not correct." Further, in the case of M/s.J.P.Builders & Anr Vs. A.Ramadas Rao & Anr. Reported in 2011 (1) SCC 429 in para 27, the Hon'ble Supreme Court has held that "It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that plaintiff has to comply with Section 16 ( c ) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined / ascertained from the conduct of the parties". Following the decision, this Court has held that a person who seek specific performance should prove that he has been ready and willing to perform his part of the contract ever since its emergence. It is clear from the aforesaid facts, the appellant has not satisfied the conditions of the Specific Performance Act.

13. From the above Judgments, it is clear that the appellant / plaintiff has not proved the case for extending the sale agreement executed on 21.06.2002 and the same was extended for further period on payment of additional amount with an endorsement made on the sale agreement, and the said period has been extended for more than four years. The respondent / defendant has specifically denied the endorsements made on the back side of the agreement and the Exs.A8 and A9. Therefore, there a doubt has been cast on the execution of the sale agreement and hence, the appellant / plaintiff cannot seek discretion relief under Specific Relief Act.

14. Considering Exs.A1, B4, B6, B8 and B9, the burden of the proof on the appellant to prove execution of A1 is genuine and bonafide, in the absence of appellant having not proved, particularly when it is the specific case of the defendant that Ex.A8 and A9 is a promissory note for the amount borrowed by the respondent / defendant from the appellant / plaintiff. It proves the case of the respondent that Ex.A8 and A9 would show that there is a loan transaction between the appellant and defendant. In such circumstances, doubt has been cast upon execution of sale agreement under Ex.A1. Further, the other contention of the appellant that the sale agreement originally was executed on 21.06.2002 and the said sale agreement was extended for further period of 11 months and the endorsement also made on the back side on payment of further amount of Rs.10,000/- and thereafter, it was again extended. The appellant has not satisfied the court with the reasons for extension of time from the year 2002 to 2006. Admittedly, major amount was paid by the appellant / plaintiff for the execution



of the sale deed and extended time for more than three years only for the remaining meagre amount. The appellant / plaintiff nowhere stated that he is ready and willing to perform the contract for three years till filing of the suit.

15. It is useful to extract the decision of the Hon'ble Supreme Court in the case of Biswanath Ghosh (Dead) by Legal representatives and others Vs. Gobinda Ghosh alias Gobindha Chandra Ghosh and Others reported in (2014) 11 SCC 605, wherein the Hon'ble Supreme Court has held in paragraphs 22 and 28 as follows:

22. It is a well-settled proposition of law that in a suit for specific performance the plaintiff must be able to show that he is ready and willing to carry out those obligations which are in fact part of the consideration for the undertaking of the defendant. For the compliance with Section 16 ( c ) of the Act it is not necessary for the plaintiff to aver in the same words used in the section i.e. ready and willing to perform the contract. Absence of the specific words in the plaint would not result in dismissal of the suit if sufficient fact and evidence are brought on record to satisfy the court the readiness and willingness to perform his part of the contract. In Kedar Lal Seal v. Hari Lal Seal, this Court has held that the Court would be slow to throw out the claim on mere technicality of the pleading. The Court observed: (AIR p 52, para 51)

"51. I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

28. In sum and substance, in our considered opinion, the readiness and willingness of person seeking performance means that the person claiming performance has kept the contract subsisting with preparedness to fulfil his obligation and accept the performance when the time for performance arrives."

16. Hence, the statement made in the plaint for readiness and willingness nearly after four years would not substantiate the case of the appellant by satisfying the condition of the Section 16 (C ) of the Specific Relief Act and considering the evidence adduced by the parties, it is proved that there is a loan transaction between the appellant and the defendant under Ex.B8 and B9, therefore, the sale agreement under Ex.A1 is not genuine and valid. Therefore, there is no perversity or illegality in the Judgment passed by the lower appellate court. Hence, the Judgment and Decree passed by the Appellate court is perfectly valid and the same is confirmed.

17. In view of the above discussion, the question of law is answered against the appellant / plaintiff. Hence, the Second appeal fails and accordingly, the Second appeal is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

Sd/-  
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

- 1) The Principal Subordinate Judge,  
Salem
- 2) The Principal District Munsif,  
Salem.
- 3) The Section Officer,  
VR Section,  
High Court, Madras. (2 copies)

+1cc to Mr.R.Nelliyappan, Advocate Sr.NO.92256  
+1cc to Mr.S.Kumaran, Advocate SR.No.92353

SA.No.652 of 2015  
and MP.No.1 of 2015

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