

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON: 31.07.2017

JUDGMENT PRONOUNCED ON: 23.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

A.S.No.757 of 2008 & MP No.2 of 2008
and CMP Nos.19511 of 2016 and 1469 of 2017
and MP.No. 2 of 2008

R.Ramasamy

... Appellant/Defendant

Vs

1. R.Muthusamy (Deceased)
2. Mrs.Lakshmi Devi
3. Ms.Renuka Devi
4. Mr.Naveen Prabhu

...Respondents/Plaintiff

RR 2 to 4 brought on record as LRS of the deceased
sole Respondent vide order of Court dated 11/04/2017
made in CMP No.2787 of 2017 in AS No.757 of 2008.

Prayer : This appeal is filed under Section 96 of Civil
Procedure Code, against the judgment and decree dated 29.06.2007
made in OS.No.82 of 2005 on the file of the Additional District
Court, Fast Track Court No.2, Coimbatore.

For Appellant : Mrs. Chitra Sampath, Sr. Counsel
for M/s.Rajnish Pathiyil

For Respondents 2 to 4 : Mr.S.Gunalan

J U D G E M E N T

The defendant in OS No.82 of 2005 who is aggrieved by the
decree for specific performance granted in the said suit is on
appeal.

The sum and substance of the plaintiff's case is as
follows:-

2. The property which is the subject matter of the suit

originally belonged to one P.Ganesan and others. The plaintiff and the defendant who are the brothers had jointly purchased the property under a registered sale deed dated 28.08.1985. After purchasing the said property the plaintiff had executed a release deed on 14.09.1989 in favour of the defendant relinquishing his interest in the suit property for consideration. It is the claim of the plaintiff that the defendant agreed to sell the suit property to him for a total consideration of Rs.7,50,000/- on 20.10.2001 and had received an advance of Rs.6,50,000/- on the date of the agreement itself.

3. According to the plaintiff, a period of three years was fixed for payment of the balance sale consideration of Rs.1,00,000/-. It is also claimed that even at the time of agreement the plaintiff was in possession of the property running a work shop in the name and style of Muthu Auto Garage. The plaintiff would claim that he made several demands for execution of sale deed on or before 19.10.2004 when the period mentioned in the agreement was about expire and since the defendant did not come forward to receive the balance of sale consideration and execute a sale deed, the plaintiff was constrained to file the suit seeking specific performance.

4. The defendant resisted the suit contending that the agreement itself is a forged instrument and that he had never executed an agreement. He would also point out that the plaintiff had no wherewithal to pay a sum of Rs.6,50,000/- in the year 2001. The fixation of an unusually long period of three years was also pointed out by the defendant to show that the very agreement has been brought about by the plaintiff to suit his convenience. The plaintiff claims to have issued the suit notice on 21.08.2004 and had filed the suit on 18.02.2005, after a delay of nearly four months. The defendant would contend that he had sent a reply on 07.09.2004, setting out the real facts.

5. On the above pleadings, the learned trial Judge namely the Additional District Judge, Fast Track Court No.2, Coimbatore, framed the following issues.

1. Whether the suit agreement is not supported by consideration?

2. Whether the plaintiff is entitled to relief for specific performance?

3. To what other relief the plaintiff entitled to?

6. The plaintiff apart from examining himself as P.W.1,

examined one K.Palanisami as P.W.2 and Exhibits A.1 to A.13 were marked. The defendant examined himself as D.W.1, examined one M.Palanisami as D.W.2 and Exhibits B1 to B14 were marked.

7. On a consideration of oral and documentary evidence the learned Trial Judge concluded that the agreement is true and valid. He also concluded that the plaintiff was ready and willing to perform his part of the contract. On the aforesaid findings the learned Trial Judge decreed the suit as prayed for.

8. Aggrieved the defendant has come forward with this appeal.

9. I have heard Mrs.Chitra Sampath, learned Senior Counsel for Mr.Rajnish Pathiyil, learned counsel appearing for the appellant and Mr.S.Gunalan, learned counsel appearing for the Respondents 2 to 4.

10. The 1st respondent died pending appeal and his legal representatives have been impleaded as respondents 2 to 4.

11. Mrs.Chitra Sampath, learned Senior Counsel appearing for the appellant would contend that the very terms of the agreement disclose an unconscionable bargain. Pointing out that the agreement was said to have been entered on 20.10.2001 and an advance of Rs.6,50,000/- had been paid out of a total consideration of Rs.7,50,000/- on the date of the agreement itself. The learned Senior Counsel would contend that fixation of an unusually long period of three years for payment of balance of Rs.1,00,000/- would cast severe doubts on the genuineness of the agreement itself. The learned Senior Counsel would also point out that the parties are residents of Tirupur, but the stamp papers for the agreement has been purchased at Erode that too on 09.07.1999. Pointing out that the sequence of events namely the complaint by the defendant about the loss of the original documents on 05.08.2004 and the publication made by the defendant on 03.08.2004, the refusal notice published by the plaintiff on 18.08.2004, the issuance of suit notice by the plaintiff on 21.08.2004, the learned senior counsel would contend that having got into possession of the original title deed which was lost by the defendant the plaintiff hatched upon the conspiracy to create the suit agreement with the aid of the old stamp paper obtained by him and had conveniently shown a major portion of the sale price namely Rs.6,50,000/- said to have been paid as advance.

12. The learned senior counsel would also point out that the stamp duty payable for an agreement of sale was increased to Rs.20/- from Rs.10/- with effect from 11.07.2001 but the suit agreement has been stamped only at Rs.10/-, and contend that

the agreement itself has been prepared with the aid of stamp papers that were available with the plaintiff. The learned Senior Counsel would also point out that an application had been filed by the appellant in CMP No.1469 of 2017 seeking permission to file additional documents to show that the ten rupees stamp paper used to create the suit agreement bearing Sl. No.7343 has been purchased by some other person from the stamp vendor at Erode and not by the plaintiff. Relying heavily on the above circumstances, the learned senior counsel would contend that the trial Court erred in granting a decree for specific performance without advertting to the above facts as well as without even framing an issue with reference to readiness and willingness of the plaintiff.

13. Per contra, Mr.S.Gunalan, the learned counsel appearing for the respondents/plaintiff would contend that the attesting witness to the agreement in question had been examined and his evidence has not been discredited in any manner in cross examination. Therefore, it is for the appellant to have taken some steps to establish that the signature and thumb impression found in Ex.A1 are not his signature and thumb impression. Having failed to do so the appellant cannot be heard to contend that the agreement is a forgery.

14. On the question of readiness and willingness, the learned counsel would submit that even though the trial Court has not framed an issue, the trial Court had considered the relevant evidence as well as the judgments of this Court and the Hon'ble Supreme Court to conclude that the plaintiff has established that he was ready and willing to perform his part of the contract. Therefore, according to the learned counsel the trial Court was justified in decreeing the suit as prayed for.

15. The appellant has filed two applications in CMP Nos.19511 of 2016 and 1469 of 2017 seeking permission to let in additional evidence. Both the applications are opposed by the respondent. In CMP No.19511 of 2016, the documents that are sought to be produced are the alleged promissory note said to have been executed by the appellant in favour of the respondent on 27.03.2003, wherein one K.Palanisami, has signed as an attesting the witness. The other document that is sought to be produced his vardhamanam letter said to have been executed by the appellant in favour of the respondent wherein also the same K.Palanisami has signed as an attesting witness. Two other documents namely legal notice issued by the son of the appellant to the respondent as well as the reply thereto are sought to be filed as additional documents.

16. In CMP No.1469 of 2017, the appellants seek to produce

the letter dated 25.01.2017 from the District Registrar, Erode and the Register maintained by the stamp vendor namely M.Senthil, who had issued the stamp paper for the value of ten rupees bearing Sl.No.7343 on 09.07.1999 to show that the stamp paper with the said serial had been sold to one L.R.Thulasimani of Lakhapuram on 11.02.1999 and on 09.07.1999 a ten rupees stamp paper with a same serial number has been sold to one Mariappan of Erode. According to the learned counsel, these documents would show that the stamp paper on which the suit agreement has been written was not purchased by the appellant on 09.07.1999 from the stamp vendor M.Senthil of Erode.

17. Both the learned counsels have made their submissions on the documents, which are sought to be produced. On the above arguments the following points arise for determination in this appeal.

1. Whether the suit agreement is true and valid?
2. Whether the plaintiff was ready and willing to perform his part of the contract?
3. Whether the documents sought to be produced as additional evidence or relevant and are required determination of the question involved in this appeal?

Point No.1:

18. Contending that the agreement is not true and valid, Mrs.Chitra Sampath, learned Senior Counsel appearing for the appellant would point out the following circumstances as invalidating factors:

- The agreement is not properly stamped.
- The agreement dated 20.10.2001 has been written on a stamp paper purchased on 09.07.1999.
- A sum of Rs.6,50,000/- is shown to be paid as advance out of the total consideration of Rs.7,50,000/-.
- An unusually long period of three years is fixed for payment of the balance of consideration despite the fact that there was no other obligation to be performed by the contracting parties.
- The defendant issues an advertisement on 03.08.2004 complaining loss of original documents.
- The Plaintiff issues a refusal notice on 18.08.2004 and that is followed up by the suit notice on 21.08.2004.

19. The learned counsel would also point out that the attesting witness namely K.Palanisami, son of Karrupusami Gounder, who has been examined as P.W.2, appears to be a stock witness for the plaintiff, inasmuch as he is also shown to be a

witness in promissory note dated 27.03.2003, said to have been executed by the appellant in favour of the 1st respondent as well as the alleged vardamanam letter dated 27.03.2003 said to have been executed by the appellant in favour of the respondent. Contending that these circumstances by themselves would show that the agreement has been created by the plaintiff to suit his convenience, the learned Senior Counsel would also draw my attention to the evidence of P.W.1 relating to the payment of the advance amount of Rs.6,50,000/-. Drawing my attention to the conflicting version in the chief examination and the cross examination, the learned counsel would contend that the very payment of Rs.6,50,000/- is highly doubtful and therefore, the trial Court erred in holding that the agreement is true and valid.

20. Per contra, the learned counsel appearing for the respondent would contend that Palanisamy-P.W.2 has been examined as attesting witness and in the absence of his evidence having been discredited in the cross examination the agreement cannot be disbelieved. The stamp paper for the agreement has been shown to be purchased in the name of the appellant on 09.07.1999 from a stamp vendor in Erode. Admittedly, both the parties are residents of Tirupur, which itself is a major Town and it is not necessary for the parties to use the stamp paper purchased in the year 1999, nearly two years prior to the agreement. Further the stamp duty for an agreement of sale was revised to Rs.20/- with effect from 1st July 2001, but the suit agreement has been written only on ten rupees stamp paper, of course the same has been marked without any objection and as the Appellate Court, this Court cannot go into the question of insufficiency of stamp. But the said insufficiency can be taken into account while deciding the question of validity or otherwise of the agreement. Insofar as the evidence on the execution of Ex.A1 is concerned P.W.2 has been examined as attesting witness of the document. P.W.1 had deposed in cross examination that the said Palanisami is known to him for the past 15 years and he is also in the same profession as an Auto Mechanic. The said P.W.2 would however in his cross examination depose that it was the defendant who called him to attest the document. Though, there is no reference to the presence of an advocate during the execution of the said agreement Ex.A1 either in the chief examination of P.W.1 or P.W.2 strangely P.W.2 in his cross examination would depose that the lawyer had read out the document to the parties on the date of the agreement. Further, during his cross examination he would admit that he had come to depose at the invitation of the plaintiff, the evidence of P.W.1 in this regard is more revealing. Though the agreement recites that a sum of Rs.6,50,000/- paid as an advance, P.W.1 would depose as follows in his cross examination:-

" ரூ.6,00,000./ நான் சேர்த்து வைத்திருந்ததைக் கொடுத்தேன். அதை மொத்தமாக ஒரே தவணையில் கொடுத்தேன். "

" எனது தொழிலில் வருட வருமானம் ரூ.50,000./ ஆகும். எனக்கு ஓர்க்ஷிப் தொழில் தவிர வேறு தொழில் இல்லை. ஆனால் வேறு வருமானம் உள்ளது. எனது பெயரில் வேறுசொத்துகள் கிடையாது. "

" ரூ.6,00,000./ முன்பணம் கொடுக்கவில்லை என்று சொன்னால் சரியல்ல. 10 பேரிடமிருந்து கடன் வாங்கி ஒப்பந்தப் பணம் கொடுத்துள்ளேன். எந்தெந்தத் தேதியில் கடன் வாங்கினேன் என்று தேதி எனக்கு ஞாபகமில்லை. அந்து 10 நாட்கள் எனக்கு பழக்கமானவர்கள் தான் அவர்களுடைய பெயரோ முகவரியோ எனக்குத் தெரியாது.

21. The above is the evidence that is available on record to show that the payment of Rs.6,50,000/- as advance by the plaintiff on the date of the agreement. This evidence read as a whole cannot at all be believed. At one point, the plaintiff states that he had only income of Rs.50,000/- per annum and he has no other avocation as well as properties and he paid a sum of Rs.6,50,000/- out of the money he had with him, which by itself is wholly unnatural. At a later point of cross examination the plaintiff states he borrowed monies from ten persons to pay a sum of Rs.6,50,000/- to the defendant. But he would also add that he does not know the names and addresses of those persons, who lent the money. In my considered opinion the above evidence itself is sufficient to disbelieve the agreement. As rightly pointed out by the learned Senior Counsel for the appellant the sequence of events from 03.08.2004 to 21.08.2004 would show that the agreement has been prepared between that period. On 03.08.2004 the defendant inserts an advertisement regarding the missing documents, on 18.08.2004, the plaintiff inserts a rebuttal and the same is followed by the suit notice on 21.08.2004. This would very clearly demonstrate that the suit agreement has been prepared between 03.08.2004 and 18.08.2004. The very fact that an unusually long period of three years was fixed for payment of the balance of sale consideration of Rs.1,00,000/- also probablises the case of the defendant.

22. The documents filed along with CMP.No.19511 namely the promissory note and the Vardamanam letter dated 27.03.2003 also show that this K.Palanisami, son of Karuppusami Gounder has been a stock witness who had obliged the plaintiff whenever he wanted some kind of attestation of a document. It is also not in dispute that these two documents have been disbelieved by this Court in connected proceedings relating to the eviction of the plaintiff from the house belonging to the defendant and an order of eviction has been passed. The documents filed along with CMP No.1469 of 2017 namely the letter from the District Registrar, dated 25.01.2017 issued pursuant to the request made by the appellant under the Right Information Act, would show that the stamp paper with Serial No.7343 has been sold to one Mariappan of Erode. The concerned register maintained by the Stamp Vendor

has also been produced. Therefore, it is clear that the stamp paper on which the suit agreement has been written was not purchased by the defendant as alleged by the plaintiff from the stamp vendor on 09.07.1999. In view of the above circumstantial evidence which undoubtedly points out that the suit agreement has been created by the plaintiff, I am unable to subscribe to the conclusion of the trial Court that the suit agreement is true and valid. The trial Court had only relied upon the evidence of the attesting witness and overlooked the available circumstances which clearly point out that the agreement is a created document. The trial Court had failed to appreciate the evidence in the proper prospective and had mechanically upheld the agreement solely on the ground that P.W.2 has deposed that the agreement has been entered between the parties on the date it bares. Therefore, the first point is answered in favour of the appellant, and I conclude the suit agreement is not true and valid.

Point No.2:

23. Having found that the suit agreement is not true and valid. I do not see any necessity to go into the question of readiness and willingness of the plaintiff. However, it should be pointed out that the plaintiff, as P.W.1, has himself deposed that he never made a demand before sending the notice on 21.08.2004. This by itself would show that he was never ready and willing to perform his part of the contract. It should also be pointed out that the suit was filed on 18.02.2005 i.e. nearly after four months from the date of the suit notice. Hence, even assuming the agreement is true and valid, the plaintiff has not established he was always ready and willing to perform his part of the contract. Even though the learned counsel for the respondent/plaintiff would contend that the notice has been issued within the three year period i.e. on 21.08.2004, I do not find such claim could be countenanced particularly after the pronouncement of the Hon'ble Supreme Court in Saradamani Kandappan v. Rajalakshmi and others, [2011 (4) LW 97], wherein the Hon'ble Supreme Court has clearly pointed out that merely because long period is fixed for performance the plaintiff should not wait till the fag end of the period and seek specific performance.

Point No.3:

24. The additional documents that are sought to be produced are the promissory note and the Vardhamanam letter dated 27.03.2003 said to have been executed by the defendant in favour of the plaintiff. Those documents are produced only for the limited purpose of showing that the same person i.e. K.Palanisami-P.W.2 has attested those documents also. In fact

P.W.1 has admitted that P.W.2 is known to him for the past 15 years. Considering the limited purpose for which those documents are produced, I am of the opinion that those documents, being documents which would be of some use to decide the matter in controversy, the same should be received in evidence. Therefore, out of the four documents that are sought to be produced along with CMP No.19511 of 2016, the two documents namely the promissory note and the Vardhaman letter dated 27.03.2003 are alone received as additional evidence and are marked Exs.B15 and B16. Considering the fact that the existence of those documents or the genuineness of the same are not denied by the appellant, I do not see any reason to call for proof of those documents.

25. In CMP No.1469 of 2017 the appellants seeks to produce the following documents namely his letter dated 23.01.2017 to the District Registrar, Erode, the reply of the District Registrar dated 25.01.2017 and the register maintained by the stamp vendor M.senthil showing the sale of the stamp paper for the value of Rs.10/- bearing Sl.No.7343. I have already discussed the effect of the said document to show that the said document disproves, the claim of the plaintiff that the stamp paper was purchased by the defendant. This being official documents received under the Right Information Act, I do not see any reason to reject them. Therefore, the two documents namely letter dated 23.01.2017 and the reply dated 25.01.2017 along with enclosures are received in evidence and marked as Exs.B17 and B18. These documents being official documents and statutory registers maintained under the provisions of the Stamp Act, I do not see any need for separate proof of those documents by oral evidence. Hence both the Civil miscellaneous petitions are allowed to the extent indicated above.

26. In view of the above conclusions arrived at, the appeal stands allowed and the judgment and decree of the trial Court are set aside. The suit in OS.No.82 of 2005 will stand dismissed with costs throughout. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

jv

To

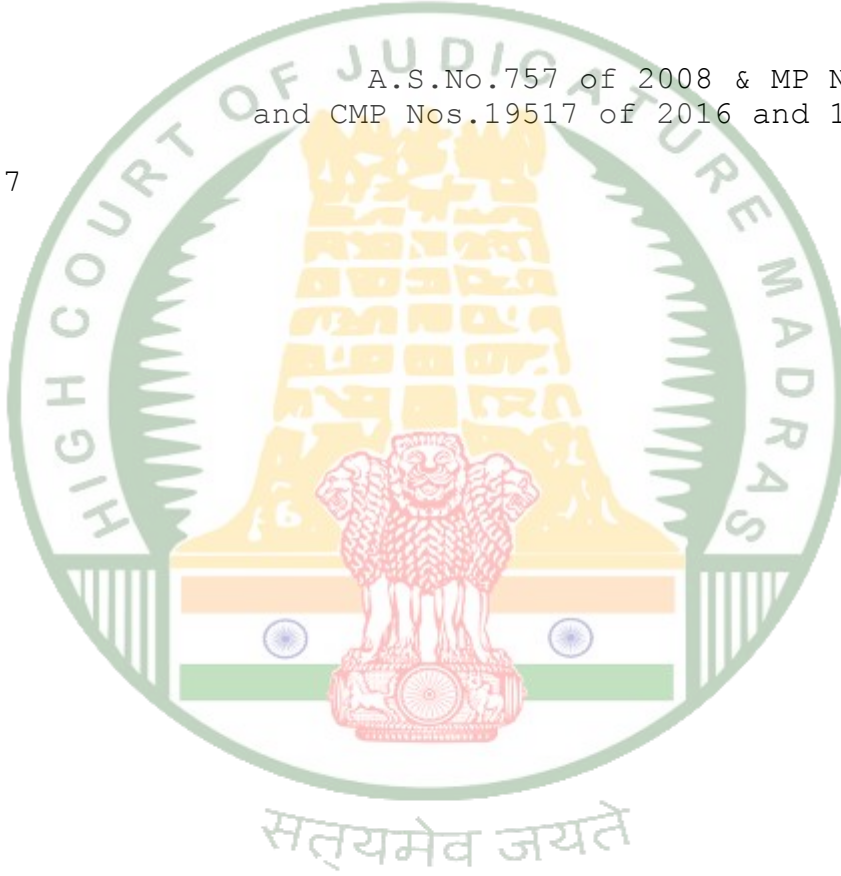
1. The Additional District Court,
Fast Track Court No.2,
Coimbatore.
2. The Section Officer,
VR Section, High Court,
Madras-104.

+lcc to Mr.S.Gunalan, Advocate, S.R.No.60914

+lcc to M/s.Rajnish Pathiyil, Advocate, S.R.No.61197

A.S.No.757 of 2008 & MP No.2 of 2008
and CMP Nos.19517 of 2016 and 1469 of 2017

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