



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 29.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

AND

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD) No.195 of 2016 &
C.M.P(MD) .No.11952 of 2016
and
C.M.P(MD)No.1853 of 2017

M.Jayaprakash Narayanan : Appellant/Plaintiff

Vs.

1.Santhammal
2.G.Kumar
3.Velammal
4.Jothi

: Respondents/Defendants

PRAYER: Appeal filed under Section 96 of C.P.C. against the judgment and decree, passed in O.S.No.129 of 2010 on the file of the 1st Additional District Court, Tirunelveli, dated 10.08.2016.

For Appellant : Mrs.M.Krishnaveni
Senior Counsel for
Mr.T.Selvan

For Respondents : Mr.M.Shankar

Judgment Reserved on	17.08.2017
Judgment Pronounced on	29.08.2017

JUDGMENT

(Judgment of the Court was delivered by **N.SATHISH KUMAR, J.**)

Aggrieved over the dismissal of the suit filed for specific performance enforcing the contract, dated 29.11.2007 the present appeal came to be filed by the plaintiff. The parties are arrayed as per their own ranking before the Trial Court for the sake of convenience.

2. The brief facts of the plaintiff case is as follows;-

The defendants 1 to 3 being the owner of the 1st item of the suit property agreed to sell the suit property to the plaintiff at the rate of Rs.99,230/- per acre and executed an agreement of sale, dated 29.11.2007 and received Rs.40,00,000/- as advance. It



is also agreed that part of the remaining sale consideration shall be paid on 23.05.2008 and sale shall be completed before 25.05.2008. It is also stipulated in the agreement that the defendants should make marketable title by demarcating and identifying the property and also to evict the encroachers. On the date of agreement, the defendants 1 to 3 have handed over the title deeds relating to the suit properties to the plaintiff. In pursuant to the agreement, the defendants also sold an extent of 17 acres and 60 cents to the plaintiff's sister-in-law on the direction of the plaintiff on 30.11.2007. The plaintiff has always ready and willing to perform his part of the contract. However, the defendants 1 to 3 did not comply the conditions stipulated in the agreement. Whereas the defendants after the agreement sold item 6 to 8 to the fourth defendant, who being the daughter of the first defendant and item Nos.21 and 22 to the 3rd parties, thereby committing fraud on the plaintiff. Hence, the plaintiff issued a publication in Tamil daily namely Dinamalar, dated 16.04.2009, which was replied by the defendants with false allegations. The same is also replied by the plaintiff. Hence, the suit for specific performance.

3. The defendants 1 to 3 denying the execution of the agreement submitted that they never executed any agreement for sale in favour of the plaintiff. The original documents were given to the plaintiff's sister-in-law, during the pendency of a suit in O.S.No.150 of 2008 filed before the learned District Munsif, Nanguneri by the defendants 1 to 3 along with plaintiff's sister-in-law. While the defendants sold the part of the property to the plaintiff's sister-in-law on 30.11.2007 certain documents were obtained by the plaintiff's sister-in-law. Taking advantage of the same now agreement has been created as if the defendants have sold the entire property and prayed for dismissal of the suit.

4. Based on the above pleadings, the Trial Court framed the following issues:

1. Whether Suit Sale Agreement is valid and Agreement for contract?
2. Whether time is essence of contract?
3. Whether the plaintiff has performed his part of contract and he is ready and willing to perform contract?
4. Whether plaintiff is entitled for relief?
5. To what other relief the plaintiff is entitled to?

5. On the side of the plaintiffs PW1 and PW2 were examined and Exhibits Ex.A1 to Ex.A22 were marked. On the side of the defendants DW1 to DW3 examined and no document was marked. Ex.X1 was marked. On the basis of oral and documentary evidence, the learned Trial Judge dismissed the suit in entirety. Aggrieved over the decision, the present appeal came to be filed.



6. The learned Senior Counsel appearing for the appellant submitted that the defendants 1 to 3 infact entered into an agreement on 29.11.2007 for sale of 134 acres at the rate of Rs.99,230/- per acre and received Rs.40,00,000/- as advance. On the date of agreement itself original documents were also handed over to the plaintiff. Besides as per the terms of the contract, the defendants 1 to 3 also sold 17 acres and 60 cents to the plaintiff's sister-in-law on the direction of the plaintiff. That being so, the Trial Court has not considered all these aspects and has given undue importance to the contentions of the defendants that there was no agreement between the plaintiff and defendants. PW1 and PW2 in their evidence clearly proved not only execution of the agreement by the defendants 1 to 3, but also receipt of advance amount of Rs.40,00,000/-. Though six months has been stipulated in the agreement, there was a specific clause in the agreement, which directs the defendants 1 to 3 to make the marketable title by identifying the properties, by demarcating and also to evict the encroachers, etc., Without performing the obligation as agreed in the agreement, the defendants 1 to 3 has sold away certain properties to the third parties and also to the 4th defendant, who is none other than the 1st defendant's daughter. The conduct of the defendants clearly shows that they taken such a stand only to defeat the rights of the plaintiff. When execution and receipt of advance has clearly established, the defendants having taken a stand that there was no contract, has to discharge the burden to show that there was no agreement. No admitted signature was placed by the defendants for comparison to discharge their burden, whereas the Trial Court has compared the signature found in Ex.A1 agreement and vakalat, which is not according to law. Hence, submitted that the plaintiff not only established the execution of the agreement, but also ready and willingness to perform his part of the contract. Therefore, the Trial Court has not appreciated the evidence properly and dismissed the suit, which is not according to law. The conduct of the defendants 1 to 3 also assumes significance. When the defendants conduct show that there is suppression of material facts and defence is also not satisfactorily pleaded, the discretion cannot be exercised in favour of the defendants by refusing to grant a specific performance and submitted that the judgment of the Trial Court is not based on the proper appreciation of evidence and law.

7. The learned Senior Counsel also submitted that now she has filed an application for comparison of the disputed signature in Ex.A1 with admitted signature of the defendants by expert. Hence, she also prayed that the document may be sent to the expert evidence. In support of her contentions, the learned Senior Counsel relied upon the following judgments:

i) (2015) 1 SCC 705 (Zarina Siddiqui v. A.Ramalingam)

ii) 2006 (3) CTC 39 (Central Bank of India v. Antony Hardware Mart)



8. On the other hand, the learned counsel for the respondents submitted that entire agreement Ex.A1 is fabricated and that the defendants have not executed any agreement for sale of suit property. The plaintiff taking advantage of the fact that some portion of the properties were sold to his sister-in-law on 30.11.2007 and also to the fact that some documents were handed over to her while they filing the suit jointly against the encroachers and with the help of those documents they set up a sale agreement to knock out the entire property of more than 100 acres at throw away price. It is further contention of the learned counsel for the respondents that the alleged payment of advance has not been established. The evidence of DW2 clearly falsify the contention of the plaintiff. Further the contract itself is not valid according to law. The consideration paid in the contract has not been established. At any event, ready and willingness also not been established by the plaintiff. Hence prayed that the judgment of the Trial Court to be sustained.

9. In the light of the above submissions, now the points arise for consideration in this appeal are as follows:-

- 1) Whether Ex.A1 agreement dated 29.11.2007 is true and valid?
- 2) Whether the plaintiff was always ready and willing to perform his part of the contract?
- 3) Whether the plaintiff is entitled to specific performance?
- 4) To what relief?
- 5) Whether it is necessary to send Ex.A1 agreement of sale for comparison by expert with admitted signature of the defendants 1 to 3?

Point No.1

10. It is the main contention of the plaintiff that the defendants 1 to 3 have executed Ex.A1 agreement dated 29.11.2007 for sale of 134 acres of land at the rate of Rs.99,230/- per acre and received Rs.40,00,000/- advance and agreed to complete the sale on or before 25.05.2008. However, the defendants 1 to 3 failed to comply the conditions set out in the agreement and also sold some of the property to the fourth defendant and also some other properties to the 3rd parties. Hence, the suit. The defendants have totally denied the execution of sale agreement Ex.A1. It is well settled that once execution of the agreement itself is denied, the initial onus lies on the plaintiff to prove the execution of the document. It is also well settled that mere signing of the document itself is not amounting to execution, infact, execution implies reading out, understanding and signing the documents.

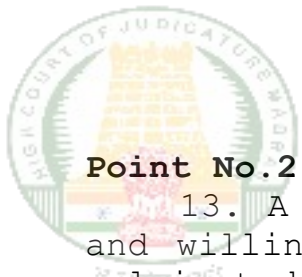
<https://hcservices.ecourts.gov.in/> <https://hcservices.ecourts.gov.in/> The plaintiff in his evidence has stated that on 29.11.2007 he has entered an agreement and paid Rs.40,00,000/- for purchase of the suit property. It is also the case of the



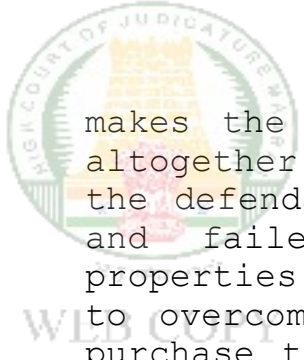
plaintiff that as per the stipulation contained in Ex.A1 agreement, an extent of 17 acres and odd was also sold to the plaintiff's sister-in-law by the defendants 1 to 3. PW2 one Shanmugavel was examined to prove the execution of the document by the defendants 1 to 3. PW2 though in his chief examination has stated as if he has witnessed the signing of the document by the defendants 1 to 3, his entire evidence in the cross examination when scanned, his evidence also creates some doubt about the contract itself. His cross examination shows as if the document was written in the 100/- rupees stamp paper, whereas Ex.A1 was infact written on 50/- rupees stamp paper. PW2 in his cross examination also stated that he did not know how Rs.40,00,000/- was mobilised by the plaintiff. Similarly, he also stated that at the time of execution of the document, the first defendant's husband is also very much present. Similarly he also admitted that he did not know other witnesses. It is also stated that the first defendant's husband was already died long back. Therefore, the evidence of PW2 that her husband was present at the relevant time is also create doubt about the entire transaction. Besides he is also admitted that at the time of handing over the cash of Rs.40,00,000/- one Jehangir and Sankar Babu were present. But their presence is not found in the agreement deed. It is further to be noted that DW2, income tax department officer was examined to show that the alleged Rs.40,00,000/- paid by the plaintiff to defendants 1 to 3 was not correct and the same also not reflected in the Income Tax Department statement. DW2 income Tax Inspector, evidence clearly show that at the relevant time of the agreement, the plaintiff income itself was shown as only about rupees four lakhs and odd. Therefore the alleged payment of Rs.40,00,000/- in the presence of PW2 is also doubtful, in view of DW2 evidence also.

12. Yet another strong circumstance available in this case makes Ex.A1 is more doubtful. The main contention of the plaintiff that as per the terms agreed in Ex.A1, the defendants 1 to 3 agreed to execute the sale in favour of the plaintiff or his nominee. Accordingly, the defendants 1 to 3 have sold 17 acres and odd at the instance of the plaintiff to his sister-in-law on 30.11.2007 i.e. the very next day of execution of Ex.A1. Ex.A17 sale deed in respect of sale of 17 acres and odd in favour of the plaintiff's sister-in-law by the defendants 1 to 3 when carefully scanned, infact, stamp papers for said sale was purchased on 28.11.2007 even much prior to the alleged agreement came into existence. These facts infact create serious doubt about the plaintiff's case and about the existence of agreement. If really the properties were sold to plaintiff's sister-in-law only on the basis of Ex.A1, stamp papers for the sale deed dated 30.11.2007 should have been purchased only subsequent to the alleged agreement. <https://hccourtsonline.org> the endorsement in Ex.A17 clearly shows that stamp papers were purchased even much before the Ex.A1 agreement. Thus, all the facts creates serious doubt about Ex.A1. Admittedly, 17

acres and odd sold to the plaintiff's sister-in-law as could be seen under Ex.A17. It is also admitted case that the purchaser under Ex.A17 namely, the plaintiff's sister-in-law and defendants 1 to 3 have also filed a suit for bare injunction against the third party in O.S.No.150 of 2008 in the year 2008 itself. These admitted facts infact clearly probabalise the defence theory that certain documents were handed over to the plaintiff's sister-in-law, who was joined in the suit O.S.No.150 of 2008 as against one Esakki muthu. The said suit is also decreed merely on the basis of the admission made by one of the defendants. Possibility of handing over the documents cannot be ruled out. Similarly, the plaintiff's sister-in-law has apparently in dominate position at the relevant time when she has purchased the property from the defendants 1 to 3. The possibility of retaining the documents under the guise of the suit is also cannot be ruled out. All these clearly probabalise the defence theory that the original documents relating to the title to the properties came into possession of the plaintiff only on the above circumstances. Therefore, we are constrained to hold that merely because the documents namely some of the title deed relating to the suit properties came into the possession of the plaintiff that itself cannot be sufficient for alleged execution of the Ex.A1 agreement. Though PW2 has supported the plaintiff in chief examination, his cross-examination has clearly shows that his evidence his totally unreliable. Infact, he has stated in his evidence that he has only attested the document alone, whereas he also stood as witness in Ex.A17. PW2 is involved in real estate business. His evidence clearly indicate that he is only an agent of PW1. Therefore merely because PW1 and PW2 have stated above the execution of document, taking into consideration the totality of the circumstances as discussed above, we are constrained to hold that the evidence of PW1 and PW2 does not satisfy the conscious of this Court to believe their evidence to presume the execution of Ex.A1 agreement, particularly the alleged consideration of Rs.40,00,000/- on the date of agreement is not been established at all. Therefore, mere signature of the parties were established on the basis of some interested witnesses of the parties, who wants to enforce the so called contract, in respect of the huge property, the execution cannot be infered merely on the basis of such witnesses, there must be evidence to show that Ex.A1 is made out of free consent of parties and there is a lawful consideration in the above agreement. Only when the plaintiff established that there was a *conseus ad idem* between the parties and a valuable consideration, then the above contract can be termed as a valid contract capable of enforcing before the Court of law. When the two elements namely, the free consent and lawful consideration are absent in the document. Such document cannot be considered for lawful consideration in the eye of law. **Therefore, we are constrained to hold that Ex.A1 is not established as a true document. Accordingly, this point is answered.**

**Point No.2**

13. A person seeking equitable relief must show his readiness and willingness from the inception of contract till the contract culminated into sale deed. Ready and willingness is a continuous process must be present through out the period of contract. Readiness is the capacity of a person to pay the remaining consideration. Willingness is a mental attitude to perform the part of his obligation. When both elements namely readiness and willingness are established by the plaintiff, then only the relief of specific performance can be granted. Though plaintiff in his plaint at paragraph 7 has stated that he was ready and willing to perform his part of the contract absolutely there is no pleading in the entire pleadings with regard to the nature of his performance of contract. Ready and willingness not only to be pleaded but also to be proved before the Court of law. Though the time has specified in the agreement to conclude the sale on or before 25.05.2008, the remaining sale consideration or part of the sale consideration has not been tendered by the plaintiff at any point of time. Nothing available even in the pleadings even to infer that any such attempt whatsoever made by the plaintiff in that aspect. It is further to be noted that having entered into the alleged agreement dated 29.11.2007, the plaintiff has issued only publication on 16.04.2009. Till such time he has not taken any steps to perform his part of obligation. PW1's oral and documentary evidence clearly shows that he was also aware of the fact that item Nos. 6 to 8 of the I item of the suit property was sold to the fourth defendant on 05.05.2008. Even then, he remained mute spectator, without performing any of the contract, whereas for the first time, he has issued a publication on 16.04.2009, which is marked as Ex.A12. Ex.A12 is only publication to the general Public not to deal with the properties. It is to be noted that Ex.A12 was issued in the year 2009. Even in the above advertisement the alleged advance amount of Rs.40,00,000/- stated to have been given to the defendants 1 to 3 has not found place. Further, Ex.A12, is only a warning to the Public not to deal with the properties and nothing available in Ex.A12 to infer the readiness and willingness on the part of the plaintiff. The above publication also replied by the defendants under Ex.A13. Again, rejoinder was given wherein the plaintiff first time introduced in the rejoinder about the original documents said to have been handed over to the plaintiff on the date of agreement and the rejoinder also silent about the advance amount. Even in the above rejoinder, the plaintiff has never expressed ready and willingness to perform his part of contract. Thereafter, he filed the suit straight away on 29.09.2010. It is to be noted that as per Ex.A1, the alleged agreement, time stipulated was on or before 25.05.2008. It is to be noted that even though as far as immovable property is concerned time is not an essence of contract, when specific time specifically agreed between the parties the same



makes the time as an essence of contract and cannot be ignored altogether. Though the plaintiff has made an attempt to show as if the defendants alone caused delay and not making marketable title and failed to demarcate the properties and identify the properties. Such stand of the plaintiff is nothing but an attempt to overcome the delay. If really the plaintiff was intended to purchase the property after proper identification and demarcation or after eviction of the encroachers, there was no reason as to why he has directed the defendants 1 to 3 to sell the property to his sister-in-law, the very next day of the alleged agreement. This fact also creates serious doubt about the plaintiff's contention. Even assuming that there are conditions agreed upon by the defendants to make the marketable title and they failed to do so, that itself will not relieve the plaintiff from taking some steps on his part. What would be the conduct of the parties who really intended to purchase the properties? Their conduct would be to take minimum steps to demarcate the properties, etc., In this case absolutely there is no evidence whatsoever on record to show that the plaintiff has taken steps on his part. Therefore the readiness and willingness cannot be inferred in this case. It is further to be noted that the plaintiff in his entire chief examination he is silent about his readiness and willingness. In the entire evidence, there is no piece of evidence even to infer readiness and willingness on his part. As already stated readiness and willingness must be established from the very inception and it is a continuous process. What are the sources for paying remaining consideration also absolutely there is no evidence. His capacity to mobilise the funds also not been established. **All these facts clearly show that the plaintiff has not at all ready and willing to perform his contract. Accordingly we hold that the plaintiff is not entitled to specific performance at all.**

3rd and 4th points

14. Though the plaintiff has claimed Ex.A1 agreement is a true one, as already discussed in point No.1, we have entertained serious doubt about Ex.A1 and that ready and willingness also not established as discussed above in point No.2, it is further to be noted that Ex.A1 allegedly entered for an extent of 134.57 acres. Now the suit has been filed to enforce the contract only for an extent of 89 acres and 96 cent. It is also pleaded by the plaintiff that items No.21 about 22 acres were already sold to the third parties. The name of the third party has not been mentioned. Those purchasers also not made as parties. Besides, it is also stated that Item Nos. 6 to 8 were already sold to defendant No.4 and Item No.1 of the property about 17 acres and 60 cents to plaintiff's sister-in-law. Though Ex.A17 is filed to show sale of 17 acres and 60 cents, the sale of 22 acres in favour of some third party has not been established, whereas now the plaintiff has filed the suit to enforce the part of the contract alone. In this regard it is useful to extract Section 12 of the Specific



Relief Act hereunder:-

"12. Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either -

(a) forms a considerable part of the whole, though admitting of compensation in money; or

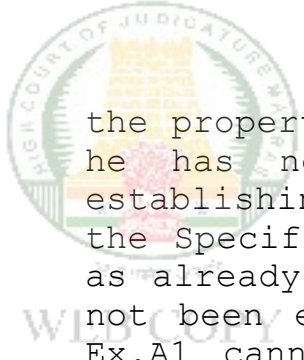
(b) does not admit of compensation in money; he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquished all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part."

Section 12(3) makes it very clear that unless the plaintiff ~~seeks to enforce his claim to remaining part of the contract and all rights to compensation, a part of the contract cannot be enforced.~~ Besides as per own pleadings of the plaintiff some of



the properties about 22 acres were already sold to third party and he has not been made them as a party. Therefore, without establishing the relinquishment as mandate under Section 12(3) of the Specific Relief Act, Ex.A1 cannot be enforced at all. Besides as already held Ex.A1 not true and ready and willingness has also not been established, we constrained to hold that suit document Ex.A1 cannot be enforced and the plaintiff is not entitled for specific performance. **Accordingly, these points are answered.**

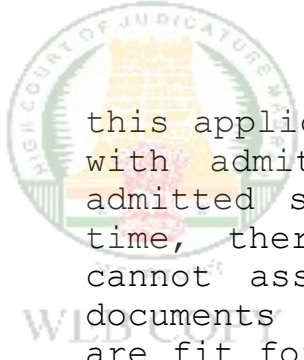
Point No.5

15. An application has been filed by the appellant in this regard and the learned Senior Counsel relied upon the judgment reported in **2006 (3) CTC 39, (Central Bank of India v. Antony Hardware Mart)** in support of her contention, wherein it is stated as follows:-

"If defendant denies his signature in guarantee deed, the burden is not cast on defendant but on plaintiff to establish his case. The Trial Court erred in observing that the Defendant ought to have summoned admitted signature from Bank and prove that it was not his signature."

Though there is no dispute with regard to the judgment of the Apex Court, but the fact remains in this case that genuineness of Ex.A1 itself is doubtful. Therefore, the question of exercising the discretion in favour of the plaintiff does not arise at all.

16. Petition has been filed by the appellant seeking expert to compare Ex.A1 with the admitted signature of the defendants. The petition has been filed during the appeal after taking into consideration of the fact that the lower Court has compared Ex.A1, namely the disputed agreement and Ex.A19 vakalat signed by the defendants 1 to 3. It is well settled that the admitted signature of the contemporary in nature alone are fit to comparison and atleast there should not be a long gap between the disputed and admitted signature, whereas the Trial Court in this regard has compared the signature of the defendants found in the vakalat. At the instance of the appellant himself only such comparison was made. The vakalat is also filed in the year 2010, of course the Trial Court assuming the role of expert may not be correct according to law. We are of the view that mere comparing the signature at this stage will not serve any purpose to either the appellant or defendants. Even the expert comes to the conclusion that the signatures found in the agreement are that of the defendants that itself is not a determining factor for proving the execution and lawful consideration as discussed above. Therefore, we are of the view that comparison of the disputed signature with admitted signature of the defendants by expert not at all necessary at this stage. It is further to be noted that though



this application has been filed by the appellant, to compare Ex.A1 with admitted signature of the defendants, what are all the admitted signatures of the defendants at the relevant point of time, there is no mention in the petition. Hence, this Court cannot assume the role of litigant to find out what all the documents which are admitted signature of the parties and which are fit for comparison. At any event, we are of the view that mere comparison of the signature will not have any purpose to decide the entire *lis* between the parties. **Accordingy, the petition C.M.P. (MD) .No.1853 of 2017 is dismissed.**

17. In the result, the appeal is dismissed and judgment and decree of the Trial Court made in O.S.No.129 of 2010, dated 10.08.2016 are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

The I Additional District Judge, Tirunelveli.

COPY TO:

The Section Officer, V.R.Section,
Madurai Bench of Madras High Court, Madurai.

+1cc to M/S.M.SANKAR, Advocate SR.No.74990

jikr

JS/SV-MMS/SAR1:14.09.2017:11P-4C

Judgement made in
**A.S. (MD) No.195 of 2016 &
C.M.P (MD) .No.11952 of 2016**
Dated: **29.08.2017**