

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 05.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH
and
THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

A.S.(MD) No.183 of 2011
M.P. (MD) No.1 of 2011

1.C.Subash Chandra Bose
2.C.Balakrishnan

... Appellants/Defendant

Vs.

1.M.Sundararajan
2.S.Chenthamarai Kannan

... Respondent 1/
Respondent 2/Plaintiff

(R2 impleaded vide Court order
dated 01.07.2013 made in M.P.
(MD) No.1 of 2013 in A.S.No.
183/2011)

Prayer: Appeal Suit is filed under Section 96 of CPC against the judgment and decree dated 30.05.2011 made in O.S.No.61 of 2007 on the file of the Additional District and Sessions Judge, Fast Track Court No.1, Tirunelveli.

For Appellants : Mr.S.Meenakshisundaram
Senior Counsel for
Mr.R.Manimaran

1st Respondent : Ms.J.Anantha Valli

For 2nd Respondent : Mr.K.N.Thampi

J U D G M E N T

(Judgment of this Court was delivered **M.M.SUNDRESH, J.**)

The first respondent being the plaintiff filed the suit in O.S.No.61 of 2007 for specific performance on the basis of Ex.A.1 dated 12.01.2004. An alternative prayer has been sought for return of money. The trial Court having found that Ex.A.1 as genuine, decreed the suit for specific performance. Challenging the same, the present appeal has been filed.

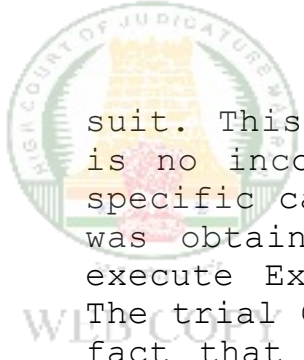


2.The suit property is a house in which appellant No.1 resides. In pursuant to a power deed executed by the appellant No.1, being the 1st defendant in favour of the second appellant who is none other than his brother, an agreement has been executed under Ex.A.1. As per Ex.A.1, the total sale consideration fixed was Rs.7,00,000/-. Out of the aforesaid amount, Rs.6,00,000/- has already been paid at the time of execution of Ex.A.1. The period fixed was two years, which expired on 11.01.2006. On 16.01.2005, the first respondent issued a notice through a lawyer. A reply was given by the first appellant on 30.01.2006 stating that Ex.A.1 is executed only as a security. Thereafter, the suit was filed by the first respondent on 14.09.2007, though the reply notice was given on 30.01.2006. Therefore, the suit filed after 20 months after expiry of the agreement period and 19 months from the date of receipt of the notice.

3.Before the trial Court, 9 issues have been framed. One of the issue is with respect to the genuineness of Ex.A.1 as an agreement of sale. An issue was framed with respect to payment of money, since according to the appellants only a sum of Rs.3,00,000/- was received. The further issue is with respect to the valuation of the property. Thus, it is to be seen that no issue with respect to readiness and willingness has been framed.

4.In the plaint, the first respondent has merely stated that he is always ready and willing to perform his part of the contract, but the defendants are not willing to execute the sale deed despite the requests made. Before the trial Court, the plaintiff marked Exs.A1 to A8 and examined himself as P.W.1. The appellants examined two witnesses including the first appellant and the Attestor of Ex.A.1. The trial Court decreed the suit by accepting A1 being a registered document. The valuation mentioned therein was also accepted as a correct one. However, when it comes to ready and willingness, it was held that merely because the plaintiff has not issued any notice earlier it cannot be stated that he was not ready and willing. It was also observed that considering the appellants' case it is not a money transaction and Ex.A.1 having been proved, the suit is liable to the decreed. A further finding has been given that merely because the notice was issued belatedly, the plaintiff cannot be stated to be not ready and willing to execute his part of the contract.

5.The learned Senior Counsel appearing for the appellants would submit that even in the other suit filed by their sister and sister's son in O.S.No.137 of 2004, on the file of Fast Track Court No.1, Tirunelveli, the 1st respondent herein was a party. In the said suit, the appellants have contended that Ex.A.1 has been executed as a security for the loan obtained. The valuation has been fixed about Rs.15,00,000/- to the suit property in the said



suit. This has not been objected to by the 1st respondent. There is no inconsistency in the stand of the appellants. It is their specific case that the 1st respondent was a money lender and money was obtained, for which the first appellant has been forced to execute Ex.A.1 through the second appellant as his power agent. The trial Court has not considered the evidence of D.W.2. The mere fact that a sum of Rs.6,00,000/- was already paid and two years was fixed for the remaining payment of Rs.1,00,000/- coupled with non-filing of the suit at the appropriate time would clearly show the nature of transaction. Section 92(1) of the Indian Evidence Act would not include a document which is sham and nominal and not intended to be given effect to. Insofar as ready and willingness is concerned, it is submitted that the conduct of the 1st respondent would clearly show that he was not ready and willing. There is no specific pleadings supported by evidence. As the facts are not in dispute, it has to be held that respondents have failed to satisfy the parameters enshrined in Section 16(c) of the Specific Relief Act. In support of his contention, he relied on the following decision:

- (i) Azhar Sultana v. B. Rajamani & Ors. (SC) [2009-3-L.W. 911] and
- (ii) Ishwar Dass Jain (Dead) v. Sohan Lal (Dead) (SC) [2000 (I) CTC 359].

6.The learned counsel appearing for the second respondent would submit that the well merited judgment of the trial Court does not warrant interference. Ex.A.1 has been registered. The appellants cannot be permitted to contend to the contrary. The suit was filed well within the period of limitation. The appellants have taken a contrary stand to the legal notice, written statement and the proof affidavit. The power of the second appellant to execute Ex.A.1 itself was disputed in the reply notice. Though it is stated that the loan was obtained for the usage of the first appellant, in the contrary it is stated that it was meant for second appellant. The question of ready and willing has to be seen contextually. Therefore, no interference is required in the judgment of the trial Court. In support of his contention, he relied on the following decision:

- (i) State of Punjab v. Shamlal Murari [AIR 1976 Supreme Court 1177] and
- (ii) Ponnammal v. K.V.Janarthanam [(2016) 8 MLJ 361].

7.Pending the appeal, an application was filed by the second respondent. It was stated that after the decree was passed by the lower Court, the first respondent has assigned the decree in favour of the second respondent under registered deed dated 02.08.2012. His application filed in M.P.(MD) No.1 of 2013 was allowed and accordingly, the assignee became a party respondent.

<https://hcservices.ecourts.gov.in/hcservices/>

8.Two issues arise for consideration in this appeal suit. The first one is with respect to Ex.A1 - Whether the appellants have



executed agreement for sale or a document for the loan obtained by the first appellant. The second issue is with respect to readiness and willingness.

9.A perusal of Ex.A.1 would show that the total consideration is fixed at Rs.7,00,000/-. Out of Rs.7,00,000/-, Rs.6,00,000/- has already been paid. Now D.Ws.1 and 2 in clear terms stated that it is only a loan transaction. The plaintiff has not let in evidence to show that actually Ex.A.1 has been executed as an agreement for sale. In the suit filed in O.S.No.137 of 2004, the property value has been fixed at Rs.15,00,000/-. It is a residential house. The plaintiff did not question the valuation fixed. The conduct of the plaintiff in not paying the remaining amount within a reasonable time goes to show that Ex.A.1 cannot be an agreement for sale. The facts as noted would show that there is no material available on the readiness and willingness. We do not find any substantial inconsistency in the stand taken by the appellants. They did admit execution of Ex.A.1. Their consistent stand is that Ex.A.1 is executed by way of security to the loan obtained. 1st appellant has stated that he only received the money. The question relating to usage of money is irrelevant. Merely because in the reply notice (Ex.A.5) it has been stated at one place that defendant No.2 was not authorised to enter into a sale agreement, it cannot be stated that the same would destroy the entire case of the appellants, more so when they agree with the execution. After all as, the defendants they are entitled to take inconsistent pleas.

10.Section 92(1) of the Indian Evidence Act cannot be pressed into service. It is a case, where the document executed under Ex.A.1 being sham and nominal document and thus not entitled to be acted upon. But it was executed only for collateral purpose. Therefore, the trial Court ought to have considered the entire evidence on record instead of proceeding with Ex.A1 as an agreement of sale.

11.The Hon'ble Apex Court in Ishwar Dass Jain (Dead) v. Sohan Lal (Dead) (SC) [2000 (I) CTC 359], taking note of the earlier judgment rendered in Gangabai v. Chhabubai [1982 (1) SCC 4] was pleased to hold as follows:

"16. This Court has held in Gangabai v. Chhabubai, 1982 (1) SCC 4 : 1982 (1) RCR 384; that in spite of Section 92(1) of the Evidence Act, it is permissible for a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. In the above case, it was observed by D.A. Desai J. as follows:

<https://hcservices.ecourts.gov.in/hcservices> The bar imposed by Section 92(1) applied only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a



party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties."

12. Thus, in the light of the above and coupled with the factual finding rendered especially the fact that Rs.6,00,000/- is said to have been given at the time of executing the agreement giving 2 years time for payment and in the absence of any evidence let in by the plaintiff to show that Ex.A.1 is only an agreement as against the evidence of D.Ws.1 and 2, we are constrained to hold that Ex.A.1 has been executed as a collateral security for the loan obtained.

13. Coming to the second issue, we do not find absolutely no evidence for readiness and willingness. As discussed above, Ex.A1 itself creates lot of doubts. Out of the total consideration of Rs.7,00,000/- Rs.6,00,000/- is said to have been paid under Ex.A.8. The period fixed for paying the remaining amount was 2 years. Except the assertion of the plaintiff, there is absolutely no evidence to show his readiness and willingness. A readiness is not the same as a willingness. Readiness would mean the capacity of the plaintiff to perform the contract with a specific pointer to his financial position and for willingness one has to see his conduct. The aforesaid aspect has been considered by the Hon'ble Apex Court in His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar [(1996) 4 SCC 526] through the following para:

"There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27.2.1975. The draft sale deed was not returned after being duly approved by the

The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and



the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract."

14. In the case on hand the plaintiff not only delayed the execution during the period mentioned under Ex.A.1, but also even thereafter. Strangely, even after issuance of the legal notice under Ex.A.4 and receipt of the reply notice Ex.A.5, the plaintiff took about 19 months to file the suit. In a suit for specific performance, there should be continuation of readiness and willingness. This position is reiterated by the Hon'ble Apex Court in Gomathinayagam Pillai and others v. Palani Swami Nadar [AIR 1967 - II - S.C.W.R. 147. The said position was once again reiterated in Azhar Sultana v. B.Rajamani & Ors. [2009-3-L.W. 911]. The following paragraph would be apposite:

"18. Section 16(c) of the Specific Relief Act, 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract. The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard and fast law can be laid down therefor.

The conduct of the parties in this behalf would also assume significance.

In Veerayee Ammal v. Seeni Ammal [(2002) 1 SCC 134 = 2002-1-L.W. 594] it was observed :

"11. When, concededly, the time was not of the essence of the contract, the appellant-plaintiff was required to approach the court of law within a reasonable time. A Constitution Bench of this Hon'ble Court in Chand Rani v. Kamal Rani held that in case of sale of immovable property there is no presumption as to time being of the essence of the contract. Even if it is not of the essence of contract, the court may infer that it is to be performed in a reasonable time if the conditions are (i) from the express terms of the contract; (ii) from the nature of the property; and (iii) from the surrounding circumstances, for example, the object of making the contract. For the purposes of granting relief, the reasonable time has to be ascertained from all the facts and circumstances of the case."

It was furthermore observed :

"13. The word "reasonable" has in law prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was



reasonable. It may be unreasonable to give an exact definition of the word "reasonable". The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of the "reasonable time" is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit. In P. Ramanatha Aiyar's The Law Lexicon it is defined to mean:

'A reasonable time, looking at all the circumstances of the case; a reasonable time under ordinary circumstances; as soon as circumstances will permit; so much time as is necessary under the circumstances, conveniently to do what the contract requires should be done; some more protracted space than 'directly'; such length of time as may fairly, and properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances; all these convey more or less the same idea.' "

15. Grant of specific performance of a contract is discretionary under Section 20 of the Specific Relief Act. Therefore, even when it is lawful, the Court is not bound to grant a decree. In the case on hand, the first appellant is residing in the suit property which is a house. Therefore, considering the discretion required to be exercised apart from the merits as discussed above we are of the considered view that the appeal deserves to be allowed.

16. There is one more question to be answered. Admittedly, the first appellant has not paid the amount said to have been received by him as loan. Rather it is the specific case that interest was being paid for some time. In fact he has asked the plaintiff to quantify the amount. Therefore, the first appellant cannot wriggle out of his own admission. Though D.W.2 also deposed in tune with the case of the appellants, we feel that insofar as the amount mentioned in Ex.A1 is concerned the rigour of Section 92 of the Indian Evidence Act would come into play. While there is admitted payment of Rs.3,00,000/- as against Rs.6,00,000/- mentioned in Ex.A.1, the appellants have not let in any evidence to substantiate it. Hence, we are of the view that the first appellant is duty bound to pay the amount. After all the powers of the Civil Court are plenary in nature. Therefore, the relief can very well be moulded. Further, we are of the view that in as much as the case of the appellants is that this is one of money ~~deposited in court only for security~~ they cannot be allowed to wriggle out of it. It is also to be noted that the plaintiff has also sought for alternative relief as well.



17. Accordingly, while setting aside the judgment and decree of the Court below, the following decree is passed:

(i) The respondent No.2 is entitled for the recovery of a sum of Rs.6,00,000/- from the first appellant with interest at the rate of 12% p.a. from the date of agreement under Ex.A.1 till the date of filing of the suit and thereafter 6% p.a. from the date of filing of the suit till date of realisation.

(ii) The respondent No.2 is permitted to withdraw Rs.1,00,000/- (Rupees One Lakh) deposited to the credit of O.S.No.61 of 2007 before the Court below in pursuant to the order passed by the Court below with accrued interest by filing appropriate application.

18. Accordingly, this Appeal suit is allowed in part. There is no order as to cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To

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

Copy to

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

+1cc to M/S. K.N.THAMPI, Advocate, SR.No.76747.

A.S.(MD) No.183 of 2011
05.09.2017

sj

SDS/KK/SAR 1/04.10.2017/8P/4C