

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : **31.01.2018**

JUDGMENT PRONOUNCED ON : **09.02.2018**

CORAM

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.S.No.611 of 2008

Mrs.P.Usha Rani ... Plaintiff

Vs

1. M.Thirunavukarasu (deceased)

2. George Town Co-operative Bank Ltd.,
Door No.2/62, Krishnappa Naicken
Agraharam Street,
Chennai 600 079.

3. Mrs.Sundari

4. Mrs.Selvi

5. Mrs.Amudha

6. Mr.Saravanan

7. Mr.Senthil

... Defendants

Defendants 3 to 7 brought on record
as legal representatives of deceased
M.Thirunavukarasu, 1st defendant as per
order dated 06.03.2014 in Appl. No.252 of 2014

Prayer : Complaint filed under Order IV Rule 1 of O.S. Rules read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

- (a) directing the 1st defendant to receive the balance sale consideration after discharge of the mortgage dues payable to the 2nd defendant

and execute the registered Sale Deed in favour of the plaintiff in respect the property more fully described in the schedule.

- (b) Directing the defendant to deliver vacant possession of the schedule mentioned property.
- (c) Or in the alternative to pass a charge decree on the schedule mentioned property in respect of the amounts received by the 1st defendant under the Sale Agreement dated 03.10.2007 of the sum of Rs.13,00,000/- together with interest at 18% p.a. from the date of plaint till the date of realization.
- (d) For a permanent injunction restraining the first defendant from in any manner alienating or altering the suit property.

For Plaintiff : Mr. P.K.Siva Subramanian

For Defendants : Mr.G.Chamki Raj
for D3 to D7

Mr.S.Ravi for D2

J U D G M E N T

Suit is for specific performance of an agreement of sale entered into between the plaintiff and the deceased first defendant on 03.10.2007.

2. The case of the plaintiff in brief is as follows:

The first defendant was the owner of the property situate at Old Door No.3-E, New Door No.43, Ethiraj Samy Salai, Erukkenchery, Chennai 118, having purchased the same under the sale deed dated 25.06.1975.

The first defendant had borrowed monies from the 2nd defendant, which is a Co-operative Bank by creating mortgage over the said property. In order to discharge the said mortgage loan, the first defendant had agreed to sell the property to the plaintiff for a total consideration of Rs.45,00,000/- and after having received a sum of Rs.7,50,000/- as advance had executed a sale agreement on 27.06.2007.

3. It is claimed that a further sum of Rs.3,50,000/- was also paid by the plaintiff to the first defendant. The period of three months fixed for performance under the agreement expired on 26.09.2007. The plaintiff had issued a notice on 24.09.2007 demanding performance. Since, the Sale Deed could not be executed within the time fixed under the agreement dated 27.06.2007, the first defendant executed another agreement on 03.10.2007, which is in fact a renewal agreement. On 03.10.2007, the plaintiff paid a further sum of Rs.2,00,000/- to the tenant, who was occupying the second floor and the plaintiff was put in possession of the second floor portion of the suit property. Thus, according to the plaintiff a sum of Rs.13,00,000/- was received by the deceased first defendant as advance. The receipt of the said sum of Rs.13,00,000/- was acknowledged in the agreement dated 03.10.2007. The said agreement provided for a period of three months for payment of the balance of sale consideration

and for execution of Sale Deed. Since the defendant did not come forward to execute the Sale Deed despite several demands, the plaintiff issued a notice on 27.03.2008, requesting the first defendant to discharge mortgage and execute the sale deed after receiving the balance of sale consideration. Despite receipt of the said notice, the first defendant neither came forward to execute the sale deed nor did he send any reply to the said notice dated 27.03.2008. Therefore, the plaintiff has come forward with the present suit seeking specific performance of the agreement of Sale dated 03.10.2007.

4. The first defendant had filed a written statement contending that neither the agreement dated 27.06.2007 nor the agreement dated 03.10.2007, were intended to be agreements of sale. According to the first defendant, they were only understandings under which the plaintiff had advanced monies to the first defendant for redemption of the mortgage in favour of the second defendant. According to the first defendant, he had requested the plaintiff's husband to lend a money to help him to redeem the mortgage, therefore, the plaintiff's husband had advanced a sum of Rs.7,50,000/- to the first defendant by way of cheque on 27.06.2007, in order to enable him to redeem the mortgage and insisted upon an agreement as a guarantee for repayment of the said sum of Rs.7,50,000/-.

Thus, according to the first defendant, the sale agreement dated 27.06.2007 was executed as an informal transaction only as an assurance to the husband of the plaintiff for repayment of the monies advanced by him.

5. The claim of the plaintiff that she had paid a sum of Rs.3,50,000/- by cash on 27.06.2007 was denied by the first defendant. It is also claimed that the understanding between the parties was that the sale agreement shall not be acted upon. The claim of the plaintiff that the first defendant undertook to furnish the original title deed after discharging the mortgage in favour of the second defendant was also denied and the receipt of a sum of Rs.2,00,000/- as further advance on 03.10.2007 was denied and it was claimed that the said sum of Rs.2,00,000/- was paid as advance for allowing the plaintiff to take possession of the second floor of the building. On the above contentions, the first defendant sought for dismissal of the suit.

6. The first defendant died pending suit and defendants 3 to 7 were impleaded as his legal representatives, by an order dated 06.03.2014. After impleading the Seventh defendant filed a separate written statement, reiterating the allegations that were made in the original

written statement filed by the first defendant. At trial, defendants 3 to 6 adopted the written statement of the Seventh defendant.

7. On the above pleadings, the following issues were framed for determination in the suit on 28.02.2013.

1. *Whether the plaintiff is ready and willingness to perform the contract as per the sale agreements 27.06.2007 and 03.10.2007?*
2. *Whether it is true that the first defendant has given sum of Rs.3,50,000/- by cash on 27.06.2007?*
3. *Whether the suit is barred by limitation?*
4. *Whether the plaintiff is entitled for specific performance as prayed for in the plaint?*
5. *To what relief the plaintiff is entitled to?*

8. At trial, the husband of the plaintiff Mr.Parthiban was examined as P.W.1 and the Seventh defendant, son of the deceased first defendant was examined as D.W.1. On the side of the plaintiff, Exhibits P1 to P11 were produced and no documentary evidence was produced on the side of the defendants.

9. After hearing the learned counsels for the parties, the issues are recast as follows:

1. *Whether the agreements dated 27.06.2007 and 03.10.2007 were not intended to be agreements of sale and where executed only as security for a loan transaction as claimed by defendants 1 and 3 to 7?*
2. *Whether the plaintiff has paid a sum of Rs.3,50,000/- by cash on 27.06.2007?*
3. *Whether the plaintiff was and is ready and willing to perform her part of the contract as per the Sale Agreement dated 03.10.2007?*
4. *To what other reliefs the plaintiff is entitled to?*

Issue No.1:

10. The execution of the agreement is admitted. The sum and substance of the defence is that the agreements were executed as a security for a loan transaction. Of course, it is open to the defendants to show that the agreements were never intended to be acted upon and were actually executed for securing a borrowing made by the defendants from the plaintiff. It is for the defendants to establish such a claim by cogent and convincing evidence. Except the oral evidence of D.W.1, the Seventh defendant there is no other evidence to buttress the claim of the defendants that the Sale Agreements were not intended to be acted upon.

There are at least two witnesses to the agreement dated 27.06.2007 and the Seventh defendant himself has signed as a witness to the agreement dated 03.10.2007. It is seen from Exs.P10 and P11, the plaintiff had called upon the first defendant would receive the balance of sale consideration and execute Sale Deed. The first defendant has not sent any reply to the 2 pre-suit notices, though both the notices have been received by the first defendant. In fact, it is after issuance of Ex.P10 on 24.09.2007 and after receipt of the same by the first defendant on 27.09.2007, the first defendant had executed the second agreement on 03.10.2007 and the Seventh defendant, viz. Senthilkumar has attested the said document. Even in the proof affidavit filed by D.W.1, the execution of the agreements is not denied.

11. It is claimed that the plaintiff did not pay a sum of Rs.3,50,000/- on 27.06.2007 and a sum of Rs.2,00,000/- that was paid on 03.10.2007 by the plaintiff was only towards advance for occupation of the second floor by the plaintiff and not towards the sale consideration as claimed by the plaintiff. In Cross-examination, the Seventh defendant as D.W.1 would admit that he was doing Real Estate Business even during the year 2007 and he had gone through the contents of the sale agreement. He would also admit the receipt of sum of Rs.3,50,000/- by cash under the agreement dated

27.06.2007 in Cross-examination. The following portion of the Cross-examination of D,W.1 would be relevant

“....Even in the year 2007, when Ex.P8 was executed I was doing real estate business. Ex.P8 was drafted in Tamil and I have gone through the contents of the Sale agreement. It is also mentioned in Ex.P8 that the suit property was agreed to be sold by D1 in favour of the plaintiff. Under Ex.P8, the Sale consideration amount is mentioned as Rs.45 lakhs. Rs.7,50,000/- was paid as an advance under Ex.P8. The second payment of Rs.3,50,000/- by cash was paid under the agreement, Ex.P8. As per the contents of Ex.P8, my father had received Rs.11,00,000/- towards advance under Ex.P8. In Ex.P8, a time limit of three months had been fixed for vacating the tenants in the suit property and completing the sale transaction. Pursuant to Ex.P8 the possession of the suit property was not handed over to the plaintiff by my father within the stipulated period of three months.”

12. The above evidence completely belies the case of the defendants set up as a defence to the claim of the plaintiff for specific performance. The evidence of D.W.1, with reference to Ex.P9 is as follows:

Q: Why was the second sale agreement under Ex.P9 was executed by the first defendant to the plaintiff?

A: Ex.P9 was executed in order to save the time limit of Ex.P8 which was about to be expired.

“In Ex.P9, I signed as a witness. Ex.P9 was also prepared by an advocate namely Mr.N.Manikandan. Ex.P9 is written in Tamil language and I have gone through the contents. In Ex.P9 it is stated that since D1 was unable to vacate and hand over the possession of the suit property within the stipulated period of three months, he was executing Ex.P9. Even in Ex.P9 the same sale consideration of Rs.45,00,000/- and also the advance payment of Rs.11,00,000/- which was already paid under Ex.P8 are also mentioned. Even in Ex.P9, it is also mentioned that Ex.P8 stands cancelled by mutual consent. Even in Ex.P9 it is also mentioned that the third payment of Rs.2,00,000/- towards advance sale consideration and total sum of Rs.13,00,000/-.”

13. The above evidence of D.W.1 would show that both Exhibits P8 and P9 were intended to be agreements of sale and intended to be security for the loan transaction. A perusal of both the documents would show that they have been prepared by a lawyer and signed by the first defendant. Of course both the agreements do not contain the signature of the plaintiff, however, the signature of the plaintiff/purchaser is not a must in order to have a complete sale agreement. In ***Alka Bose v. Parmatma Devi & Ors***, reported in **2009 (2) SCC 582**, the Hon'ble Supreme Court while considering a similar agreement where which was signed only by the vendor had observed as follows:

“16. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it.”

14. It should be pointed out that the defendants have not chosen to deny the execution of the agreements by the first defendant, the only plea that is taken by the defendants is that the agreement was not intended to be acted upon, but it is executed only as a security for the loan transaction. The above extracted oral evidence of D.W.1 does not in any way advance the case of the defendants, on the other hand, it only strengthens the case of the plaintiff. The evidence on record is wholly insufficient to conclude that the agreements dated 27.06.2007 and 03.10.2007 were executed by the first defendant only with an intention of providing a security for a loan transaction.

15. In view of the total lack of evidence, this Court is constrained

to hold that the defendants have not established their plea that the agreements were not intended to be acted upon as agreements of sale, but were executed only with an object of furnishing security for the borrowing allegedly made by the first defendant from the plaintiff's husband. In view of the above, Issue No.1 is answered against the defendants and in favour of the plaintiff.

Issue No.2:

16. Though in the written statement the defendants have denied the receipt of sum of Rs.3,50,000/- by cash on 27.06.2007, D.W.1 in his oral evidence extracted supra would admit the receipt of said sum. Apart from the above, the receipt of the sum of Rs.3,50,000/- is acknowledged by the first defendant not only in the agreement dated 27.06.2007, but the same is also re-affirmed in the agreement dated 03.10.2007. In fact the plaintiff had issued a legal notice on 24.09.2007 seeking performance of the agreement dated 27.06.2007. In the said notice, the plaintiff has categorically stated that a sum of Rs.11,00,000/- was paid on 27.06.2007 to the first defendant, out of the said sum of Rs.11,00,000/-, it is specifically averred in the said notice, that a sum of Rs.7,50,000/- was paid by way of cheque and a sum of Rs.3,50,000/- was paid in cash. It is after the receipt of notice dated 24.09.2007, the first defendant had executed the

agreement dated 03.10.2007.

17. The plaintiff has issued another notice on 27.03.2008 demanding specific performance and the same has been received by the first defendant on 01.04.2008. The suit came to be filed on 29.04.2008, till the filing of the suit or even after the filing of the suit, the first defendant did not send any reply, denying the agreements or denying the receipt of the sums of Rs.3,50,000/- and Rs.2,00,000/- under the agreements. In view of the above conduct on the part of the first defendant, coupled with the categorical admission of D.W.1 that a sum of Rs.3,50,000/- was in fact paid by the plaintiff on 27.06.2007, the 2nd Issue is answered in favour of the plaintiff and against the defendants to the effect that the plaintiff had in fact paid a sum of Rs.3,50,000/- in cash on 27.06.2007, apart from the cheque payment of Rs.7,50,000/-.

Issue No.3:

18. In the first agreement was dated 27.06.2007, a period of three months was fixed for performance of the contract within the said period the plaintiff had issued a notice on 24.09.2007, calling upon the first defendant to receive the balance of sale consideration and execute the sale deed. After the receipt of the said notice the parties have entered into the second

agreement on 03.10.2007 as per the second agreement dated 03.10.2007, the period for performance has been fixed as three months from the date of the agreement i.e., till 02.01.2008. The plaintiff had issued the second notice on 27.03.2008, demanding performance in the agreement. The said notice also requires the first defendant to discharge the mortgage loan payable to George Town Corporative Bank Ltd., and come forward to execute the sale deed. The plaintiff's husband as P.W.1 had deposed that he has been making repeated demands for execution of sale deed and the first defendant had failed and neglected to honour the agreement, the first defendant had not chosen to send any reply to the legal notice dated 27.03.2008 also.

19. Apart from the above, the plaintiff has produced a copy of her Income Tax Returns for the period from 2004 to 2012 as Ex.P2 series in order to show possession of funds. The plaintiff has also produced copies of Sale Deeds as Exs.P4, P5 and P6 to show that she and her husband are possessed of property and are capable of raising monies. In fact, the readiness and willingness or the ability of the plaintiff to raise monies to pay the balance sale consideration, has not been disputed by the defendants at any point of time. Hence, I conclude that the plaintiff is and has been always ready and willing to perform her part of the contract. Issue No.3 is

answered in favour of the plaintiff and against the defendants.

Issue No.4:

20. It remains to be considered as to whether the plaintiff is entitled to a decree for specific performance as prayed for. Of course all the issues in the suit have been answered in favour of the plaintiff, however, considering the fact that the relief for specific performance is a discretionary relief and it is open to the Court to modify the said relief in order to do complete justice between the parties, it has to be considered as to whether the defendants would be prejudiced by grant of the relief of specific performance as prayed for. The facts of the present case are a little different from the other suits for specific performance. On payment of Rs.13,50,000/- as advance out of the total sale consideration of Rs.45,00,000/-, which is about 29% of the sale consideration the plaintiff has been put in possession of the second floor of the building measuring about 1710 sq.ft. and the plaintiff is in enjoyment of the same for all these years. The sale agreement was entered into in the year 2007 and the suit came to be filed in the year 2008 and it is almost 10 years now. Of course the raise of prices of property during the pendency of the suit cannot be a ground to reject the relief of specific performance, but at the same time this Court cannot be oblivious to the spiralling increase in prices of real estate

in the past 10 years and decree of suit for specific performance on the basis of price fixed in 2007 almost 10 years prior to this date. It is also brought to my notice that the amount due under the Mortgage Deed as of today is about Rs.43,29,724/- and there is also an attachment over the property for a sum of Rs.6,30,000/-. Therefore, the liability of the family of the first defendant works out to around Rs.50,00,000/-. If the claim of the plaintiff is considered in the above factual back drop, I am of the considered opinion that it will be in the interest of justice to direct the plaintiff to pay a certain amount as additional consideration, while granting the discretionary relief of specific performance. I am also conscious of the fact that the pendency of the suit by itself cannot be a ground for directing the plaintiff to pay an additional consideration. As already pointed out that the fact that the plaintiff was put in possession of the portion of the property and has been enjoying the same for all these years impels me to work out equities, while granting the relief of specific performance. It is stated at the bar that the guideline value of the property as of today is about Rs.86,00,000/-. Of Course, the defendants have had benefit of Rs.13,00,000/- paid by the plaintiff for nearly 10 years now. In view of the above, I am of the considered opinion that the plaintiff could be favoured with the decree for specific performance, subject to her paying an additional consideration of Rs.10,00,000/- to the defendants apart from

discharging the liabilities, viz. the Mortgage amount due to the 2nd defendant as well as the decree debt for which, it is stated, that an attachment has been made over the property.

21. In fine the suit is decreed for specific performance subject to the condition that the plaintiff pays a sum of Rs.10,00,000/- to the defendants 3 to 7, within a period of six (6) weeks from today, discharges the mortgage due and payable to the 2nd defendant and also discharge the decree debt for which an attachment has been effected over the suit property.

22. The defendants 3 to 7 shall execute the sale deed in favour of the plaintiff on receipt of a sum of Rs.10,00,000/-. Considering the facts and circumstances, there will be no order as to costs.

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09.02.2018

jv

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Index: Yes
Internet: Yes
Speaking order

List of the Witnesses examined on the side of the Plaintiff:

P.W.1 P.Parthiban

List of Exhibits marked on the side of the Plaintiff:

Sl.No.	Exhibits	Description of documents	Date
1	Ex.P1	Authorisation letter signed by the plaintiff	27.03.2013
2	Ex.P2	Original statement of Income returns filed by the plaintiff for the Assessment year 2004-2005	-
3	Ex.P3	Xerox copy of renewal premium receipt	-
4	Ex.P4	Duplicate copy of sale deed registered as Doc. No.6027 of 1999 in the office of Sub Registrar of Sembium	09.09.1999
5	Ex.P5	Duplicate copy of sale deed registered as Doc. No.6028 of 1999 in the office of Sub Registrar of Sembium	09.09.1999
6	Ex.P6	Certified copy of Sale deed	25.06.1975
7	Ex.P7	Xerox copy of patta for the suit property	-
8	Ex.P8	Original Sale agreement entered into between the plaintiff and 1 st defendant	27.06.2007
9	Ex.P9	Original Sale agreement entered into between the plaintiff and 1 st defendant	03.10.2007
10	Ex.P10	Office copy of notice along with postal acknowledgement	24.09.2007
11	Ex.P11	Office copy of notice with postal acknowledgement	27.03.2008

List of the Witnesses examined on the side of the Defendants:

D.W.1 T.Senthilkumar

List of Exhibits marked on the side of the Defendants: Nil

09.02.2018

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.



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R.SUBRAMANIAN,J.

jv



Pre Delivery Judgment
C.S.No.611 of 2008

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