



A.S.(MD)No.205 of 2011

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

RESERVED ON : 19.07.2022

DELIVERED ON : 28.07.2022

CORAM:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S.(MD)No.205 of 2011

and

M.P.(MD)No.3 of 2011

Jayalakshmi

... Appellant / Defendant

-Vs-

P.Karuppiah

... Respondent / Plaintiff

PRAYER: Appeal Suit is filed under Section 96 of Code of Civil Procedure, to set aside the decree and Judgment dated 19.03.2010 made in O.S.No.58 of 2007, on the file of the learned Additional District Judge (Fast Track Court), Dindigul.

For Appellant : Mr.R.Sundar

For Respondent : Mr.M.Siddharthan

JUDGMENT

The respondent / plaintiff has filed O.S.No.58 of 2007 on the file of the learned Additional District Judge, Fast Track Court, Dindigul, seeking a relief of specific performance.



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2.The brief facts of the plaint are as follows:-

The suit property belongs to the defendant. The plaintiff and the defendant entered into an agreement dated 25.08.2005, wherein the defendant agreed to sell the property to the plaintiff for sale consideration of Rs.7,00,000/- (Rupees Seven Lakhs Only). On the same day itself, the defendant paid a sum of Rs.5,00,000/- (Rupees Five Lakhs Only) as an advance. Time period fixed for completion of the sale is two years. On payment of balance sale consideration, the defendant agreed to execute the sale deed, either in the name of the plaintiff or to his order, besides other terms. In the agreement, it is also mentioned that if the defendant refuses either to receive the balance sale consideration or evades to execute the sale deed, the plaintiff is at liberty to get the sale deed through Court of law at the cost and expenses of the defendant. The plaintiff is always ready and willing to perform his part of the contract by paying balance sale consideration and get the sale deed. Whenever the plaintiff tendered the balance sale consideration, the defendant has been evading to receive the same, on flimsy reasons, like since she has not secured alternative house for her family and her husband was bedridden, she was concentrating only on his health and she could



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not search for another house and assured to execute the sale deed within 4 months. Taking sympathy, the plaintiff also agreed to wait for some more time. In the 2nd week of August, 2007, after the death of the defendant's husband, when the plaintiff compelled the defendant to receive the balance sale consideration and execute the sale deed, the defendant demanded an excess amount of Rs. 2,00,000/-, stating that she spent much amount for her husband's treatment and she was in need of amount for paying advance for the new house and for her maintenance and expenses. However, the plaintiff refused to pay any excess amount. The defendant is bound to receive the actual balance sale consideration of Rs.2,00,000/- as per the sale agreement. Later, the plaintiff came to know that the defendant is attempting to create encumbrance over the suit property.

3.The brief facts of the written statement filed by the defendant are as follows:-

The defendant has denied the averments of the plaint and she obtained only a sum of Rs.3,50,000/- (Rupees Three Lakhs and Fifty Thousand Only) as loan for medical expenses to her husband, additional construction in the suit property, educational expenses for her son and marriage expenses for her



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daughter and the interest of Rs.3/- per Rs.100/- per month is fixed. Only on compulsion of the plaintiff, the defendant executed a sale agreement in respect of the suit property. Further, there is no occasion raised to sell the property, which is deriving income to the defendant. The suit is filed one day prior to last date of expiry of the agreement. The plaintiff has never approached the defendant to execute the sale agreement. The plaintiff is working as Engineer in cargo ship and doing usury business in Dindigul Town. The plaintiff got the agreement from the defendant for the purpose of security and subsequently, treated the same as sale agreement and filed the suit. Further, the plaintiff has not issued any pre-suit notice and has not deposited the money before the trial Court. Therefore, the plaintiff is not entitled to the relief of specific performance, hence, the suit is liable to be dismissed with costs.

4. Based on the above said pleadings, the trial Court framed the following issues:-

“1. Whether the contention of the defendant that the sale agreement was executed only for the loan borrowed from the plaintiff, is right or not?;

2. Whether the sale agreement was executed by the defendant



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WEB COPY on repayment of loan?;

3. Whether the plaintiff is always ready and willing to perform his part of the contract?;

4. Whether the plaintiff is entitled to the relief of specific performance?; and

5. To what relief the plaintiff is entitled?.

5. In order to substantiate the case, during the trial on the side of the plaintiff, the plaintiff has himself examined as P.W.1 and two witnesses were examined as P.W.2 and P.W.3 and 3 documents were marked as Exs.A.1 to A.3. On the side of the defendant, she herself was examined as D.W.1 and one document was marked as Ex.B.1.

6. On conclusion of the trial, after hearing the arguments advanced on either side, the trial Court decreed the suit, by its judgment and decree dated 19.03.2010 in favour of the plaintiff.

7. Challenging the same, the defendant has filed the present Appeal Suit before this Court.



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8.The learned counsel for the appellant would submit that the main ingredient of specific performance of sale agreement in question, namely, readiness and willingness on the part of the plaintiff has not been proved by the respondent at any point of time. The sale agreement in question has not been executed for the purpose of selling the suit property and the same has been executed as security for the purpose of getting loan. There was no occasion arose to the appellant to sell the suit property, since the appellant is deriving income from the suit property and it is the only property for the source of income to the appellant for running her livelihood. Therefore, she never intended to sell the property in favour of the respondent. The respondent has never approached the appellant and has not proved that when he tendered the balance sale consideration on particular date, the appellant refused to receive the same and execute the sale deed. Therefore, it is the bounden duty of the respondent to establish that he was ready and willing to perform his part of the contract.

9.He would further submit that the respondent did not issue any legal notice to the appellant prior to filing of the suit, calling upon her to execute the



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sale deed as per the clause mentioned in the sale agreement in question. The time stipulated in the said agreement was two years from the date of the sale agreement. The suit was filed only one day prior to the last date of the stipulated time mentioned in the agreement. As per the clause mentioned in the agreement, the respondent has to deposit the balance sale consideration into the Court on the date of filing of the suit, whereas he has not deposited the same into the Court. The appellant never disputed the execution of the agreement in question, however, at the same time, she categorically stated in her written statement itself that the agreement has been executed for the purpose of getting loan from the respondent. In such circumstances, the burden of proof lies on the respondent.

10.He would further submit that the appellant never received any advance amount and executed a sale agreement, she borrowed a sum of Rs.3,50,000/- (Rupees Three Lakhs and Fifty Thousand Only) as loan for medical expenses to her husband, additional construction in the suit property, higher education to her son and the marriage of her daughter. The respondent was working in Abroad and out of the income, he is doing usury business in his native at Dindigul. Therefore, she approached the respondent for loan. At that time, the



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respondent insisted her to execute the sale agreement and without knowing the consequences, the illiterate lady had executed the sale agreement. Actually, the sale agreement was not executed for the purpose of selling the property and taking advantage of the need of the appellant, utilizing the document, which was obtained by the respondent from the appellant under the compulsion and coercion, the respondent has filed the suit. Even otherwise the respondent has to establish that he was ready and willing to perform his part of the contract and he did not prove such basic ingredients. However, the trial Court failed to appreciate the evidence and facts and circumstances of the present case, based on the citation submitted by the learned counsel for the respondent, the trial Court rendered judgment without appreciating the evidence and facts of the present case on hand. Therefore, the appeal is to be allowed and the judgment and decree passed by the trial Court is liable to be set aside.

11.The learned counsel for the respondent would submit that once the appellant admitted the signature and execution of the document, it is for the appellant to rebut the presumption. In this case, the appellant admitted that she executed the sale agreement for repayment of the loan, not for selling the



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property. If the contention of the appellant is against the recitals of the written document, it is for the appellant to establish the same. It is settled proposition of law that once the execution is admitted, the presumption lies in favour of the respondent and it is for the appellant to rebut such presumption. Further, it is barred under Section 91 of the Indian Evidence Act letting oral evidence against the recital in the written document.

12.Further, he would submit that the admission is the best piece of evidence. Since the appellant admitted the execution of the document, she has to establish that the document has not been executed for the purpose as mentioned in the agreement. Therefore, once the execution of the agreement and signature in the agreement are admitted, onus of the proof has been shifted to the appellant. It is for the appellant to establish the defence that the document was not intended to be executed for the purpose as stated in the agreement. Admittedly, the respondent is working in Abroad and his financial capacity is also not denied by the appellant. Therefore, the readiness of the respondent was not questioned by the appellant. Since the respondent was in Abroad and the stipulated time was two years that too for the purpose of making alternative arrangements to shift the



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place, when the respondent came from Abroad and approached the appellant to receive the balance sale consideration and execute the sale deed, the appellant insisted to pay further sum of Rs.2,00,000/- (Rupees Two Lakhs Only). Total sale consideration was fixed as only Rs.7,00,000/- (Rupees Seven Lakhs Only) out of which already at the time of agreement Rs.5,00,000/- was given and the balance sale consideration is only Rs.2,00,000/-. The appellant has to receive a sum of Rs.2,00,000/- as per the sale agreement and execute the sale deed. Since the respondent refused to pay more than the amount fixed in the agreement, the appellant refused to execute the sale deed by receiving balance sale consideration. Therefore, the respondent was always ready and willing to perform his part of the contract. Only the appellant was not ready and willing to complete her part of the contract. The pre-suit notice is not a condition precedent, which is not mandatory and also pre-deposit of the sale consideration before the Court is also not mandatory. Therefore, the trial Court rightly appreciated the oral and documentary evidence and rightly decreed the suit. Accordingly, there is no merit in the appeal, hence, the appeal is liable to be dismissed.

13.Heard both sides and perused the materials available on record carefully.

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14.A perusal of the pleadings, oral and documentary evidence shows that it is the case of the respondent that the appellant entered into a sale agreement on 25.08.2005 for total sale consideration of Rs.7,00,000/-. Out of which, a sum of Rs.5,00,000/- was paid as an advance on the same date itself. Since the appellant is residing in the suit property, in order to find out an alternative place, time for execution of the sale deed is fixed as two years. When the respondent came to India in the last week of August, 2007, he approached the appellant to execute the sale deed by receiving the balance sale consideration, for which the appellant insisted the respondent to pay further sum of Rs.2,00,000/-. Since the respondent denied, she refused to execute the sale deed and when the respondent filed the suit, the appellant filed false allegations in her written statement.

15.The case of the appellant is that the appellant has never intended to sell the property and there is no necessity for her to sell the suit property, which is main source for income for her survival. Therefore, if she sells the property, it is difficult for her to maintain her family. On 25.10.2005, when the appellant



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approached the respondent for getting loan, the respondent gave a sum of Rs.3,50,000/-, for which the respondent insisted the appellant to execute the sale agreement as security for repayment of the loan. Even without knowing the contents in the sale agreement, the appellant signed it by receiving only a sum of Rs.3,50,000/- and she also agreed to repay the said amount within two years. Therefore, the time of two years has been mentioned and interest of Rs.3/- per Rs. 100/- per month has been fixed. Though the respondent has initially never intended to purchase the suit property, since the suit property is situated in prime locality, which is valuable property and gives more income, the respondent has changed his mind subsequently. The respondent is the man of money power, who is working in Abroad and the appellant's husband is suffering with ill-health. Therefore, taking advantage of the weakness of the appellant and the possession of the agreement signed by the appellant, even without sending any pre-suit notice and without depositing the amount before the trial Court, the respondent has filed the suit for specific performance.

16.A perusal of the records shows that the appellant herself admitted the signature and also the execution of the agreement. The appellant has stated that



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the sale agreement was not executed for selling the property only under compulsion and coercion for need of money, it was executed only as a security for repayment of loan and she has not received a sum of Rs.5,00,000/- either as advance or as a loan. She received only a sum of Rs.3,50,000/- as loan that too interest of Rs.3/- for Rs.100/- per month was fixed and agreed to repay the loan amount within a period of two years. The respondent examined himself as P.W.1 and he has produced the sale agreement, which was marked as Ex.A.1, executed by the appellant.

17.It is settled proposition of law that once the execution and signature are admitted, the document is treated as genuine. In this case, the agreement is also registered. Though the burden of proof is on the appellant, who has denied the purpose of the document, has to discharge such burden in the manner known to law. Whereas, the appellant has not examined any other witnesses to substantiate that she has not executed the sale agreement for selling the property and it was executed only for security purpose for repayment of loan, as insisted or compelled by the respondent. Even assuming that the agreement is genuine, since the suit is filed for specific performance, it is for the plaintiff to prove his case



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that he was ready and willing to perform his part of the contract from the date of inception of the agreement till disposing of the suit. Since the agreement is a registered document and the appellant has not substantiated her defence, still the respondent has to plead and prove about his readiness and willingness.

18. Though the respondent in his evidence has stated the reason for fixing two years time that too for arrangement of an alternative place in order to shift their business, the said reason has not been mentioned in the sale agreement. Though the appellant has also stated that in order to give treatment to her husband for medical expenses and educational expenses of their children and also additional construction, the said facts have also not been mentioned in the sale agreement. Therefore, though both parties are barred under Section 91 of Indian Evidence Act to take the evidence against the recital mentioned in the document, under Section 16 of Specific Relief Act, the respondent has to plead and prove about the readiness and willingness. Though the time period for executing the sale agreement is fixed for two years, the recital shows that the sale deed has to be executed within a period of two years from the date of the agreement. That being the case, the respondent has to perform his part of the contract within a period of



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two years and he must plead and prove that within the said period of two years, he was always ready and willing to perform his part of the contract.

19.As already stated, the respondent was working in Abroad and occasionally, used to come to native. When the specific date has not been given for completing the contract and only it is mentioned as within two years, it is for the respondent to plead and prove that he was always ready and willing to complete his part of the contract. Though he has pleaded that he was ready and willing, he has not proved the same. Since the respondent was working in Abroad, paying the balance sale consideration of Rs.2,00,000/- may not be a problem for the respondent. However, he has to prove that he was willing to perform his part of the contract. When the time stipulated was two years within the outer time limit, the respondent should have approached the appellant to perform his part of the contract. Since the respondent was residing in Abroad, occasionally come to Dindigul, it is for the respondent to prove that he communicated the appellant, as he is coming to India or the native on particular date and he is ready to perform his part of the contract and asked the appellant to make available to execute the sale deed by receiving the balance sale



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consideration. Admittedly, there is no written communication between the appellant and the respondent from the date of agreement till the date of filing of the suit.

20. When the respondent was in Abroad, the appellant may not know availability of the respondent to perform his part of the contract. Therefore, the respondent should have intimated the appellant for his arrival to India. Even though the respondent has stated that in the last week of August, 2007, he came to India and also asked the appellant to execute the sale deed, there is no other evidence, except his visa, which shows that he came on 21.08.2007 and left on 29.08.2007. Even at least before starting to come from Abroad, he should have intimated the appellant about his arrival on 21.08.2007 and asked the appellant to make available herself to execute the sale deed. Even though the pre-suit notice is not mandatory for filing suit, the respondent has to prove that he was ready and willing to perform his part of the contract. The respondent has not proved that though he has approached the appellant on particular date, only the appellant has not come forward to perform her part of the contract.



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21.It is pertinent to point out that the recital in the agreement clearly shows that when the respondent is ready and willing, in case the appellant fails to perform her part of the contract, the respondent has to deposit the balance sale consideration before the Civil Court and get the sale deed through the Civil Court. If at all the respondent approached the appellant, if the appellant refused to execute the sale deed, as contended in the agreement he should have deposited the balance sale consideration before the Civil Court at the time of filing the suit, whereas even on the date of filing of the suit, during the pendency of the suit and also till the disposal of the suit, the respondent has never deposited the balance sale consideration before the Civil Court. Even till date, the respondent has not deposited any money.

22.It is settled proposition of law that mere readiness itself is not sufficient. Both readiness and willingness have to be pleaded and proved. Though in this case, the balance sale consideration of Rs.2,00,000/- is only meagre amount and the appellant has also not questioned the capacity of the respondent, the respondent has to prove that he was willing to get the sale deed to



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be executed by paying balance sale consideration. As already stated, there was no communication between the respondent and the appellant within the two years time stipulated in the agreement. The respondent has not proved that prior to filing of the suit, he either approached the appellant by way of written communication or with the help of any third party and the appellant still refused to execute the sale deed by receiving the balance sale consideration. Therefore, it is the bounden duty of the respondent as a plaintiff in the suit for specific performance, to plead and prove that he was always ready and willing to perform his part of the contract. Therefore, it creates a serious doubt in the mind of this Court that if really the agreement Ex.A.1 was executed for purchasing the property, certainly the respondent could have approached the appellant. However, the respondent has not taken any steps to perform his part of the contract.

23.Further, since it is an agreement executed for the purpose of getting loan, the respondent might have waited for repayment of loan and interest and after two years, the mind of the respondent could have changed, since the property is located in the prime area and the value of the property has also been raised. Since the appellant was not in a position to repay the loan, taking



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advantage of the situation, the respondent has made use of Ex.A.1 as agreement for selling the property and he has filed the suit even without issuing notice and depositing the money before the trial Court.

24.Moreover, as far as the discretionary relief of specific performance is concerned, the Court has to look into the conduct of the parties also. The parties must approach the Court with clean hands without suppressing the material facts. In the present case on hand, looking into the conduct of the respondent, he has not proved that he was always ready and willing to perform his part of the contract from the inception of the so-called sale agreement till filing of the suit and even after filing of the suit till the disposal of the suit. The conduct of the respondent is very peculiar. Normally, if a person is in Abroad and the agreement is genuine and he has intended to purchase the property, within the period of two years when he came to India, definitely, he could have intimated the appellant about his willingness because the balance sale consideration of Rs.2,00,000/- is very meagre amount. If suddenly, a person is coming from Abroad for the purpose of getting sale deed, in order to avoid further delay he could have certainly intimated the appellant regarding the date of arrival and the date of execution of the



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document and registration etc. Admittedly, in this case, there is no communication at all between the respondent and the appellant. Hence, the case of the respondent is not believable. Therefore, this Court finds that the respondent is not entitled to get discretionary relief of specific performance.

25.Since this Court is an Appellate Court as fact finding Court, it has to re-appreciate the entire evidence and come to an independent conclusion. Though the trial Court based on Ex.A.1 agreement, has granted decree, stating that the respondent was ready and willing to perform his part of the contract and though the appellant has denied that she has not executed the agreement for selling the property and it was executed only for security purpose, she has not proved the same. The trial Court failed to consider the fact that since the suit is for specific performance, the conduct of the parties also have to be taken into consideration. This Court, while re-appreciating the entire evidence, independently, come to the conclusion that the respondent has not proved that he was willing to perform his part of the contract, still filing of the suit.



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26.In the result, this Appeal Suit stands allowed and the Judgment and decree of the trial Court are set aside. However, considering the facts and circumstances of the case, the respective parties are directed to bear their own costs in both suit as well as in the appeal. Consequently, connected miscellaneous petition is closed.

28.07.2022

Index : Yes / No

Internet : Yes / No

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To

1.The Additional District Judge,
Fast Track Court, Dindigul.

2.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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P.VELMURUGAN, J.

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Judgment made in
A.S.(MD)No.205 of 2011

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