



S.A.(MD) Nos.944 & 945 of 2010

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 10.08.2022

DELIVERED ON : 23.09.2022

CORAM: JUSTICE N.SESHASAYEE

S.A.(MD) Nos.944 & 945 of 2010

and

M.P.(MD)Nos.2 & 2 of 2010

Perumalakkal (died)

1.Gundumani

2.Karthikeyan

...Appellants/Respondents/Defendants
in both appeals

(Cause title accepted Vide order dated 09.12.2010)

Vs

1.Thangaraj (died)

2.Perumal Naicker (died)

..Respondents/Appellants/Plaintiffs
in both appeals

3.T.Perumal

4.T.Shankar

5.T.Ravichandran

6.M.Shanthi

7.Muthuvel

8.Thavaperumal

9.Suganthi

..Respondents/Appellants/Plaintiffs
in both appeals

(Respondents 5 to 7 are suo motu impleaded as legal heirs of the deceased second defendant Vide Court order dated 28.03.2022)



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Common Prayer:- Appeals filed under Section 100 of Civil Procedure Code against the judgment and decree made in A.S.Nos.36 and 37 of 2009 dated 30.06.2010 on the file of the II Additional Subordinate Court, Madurai reversing the judgment and decree made in O.S.Nos.420 and 462 of 2005 dated 20.11.2008 on the file of the District Munsif Court, Thirumangalam.

In both appeals:

For Appellants : Mr.A.Arumugam
for G.Mari Muthu

For Respondents 3 to 9 : Mr.J.Barathan

COMMON JUDGMENT

These two appeals arise out of two separate suits. The details are as below:

- The first suit is O.S.No.420 of 2005 on the file of the District Munsif Court, Thirumangalam. This was laid against three defendants for declaration of title over 5 items of suit properties and for ancillary relief of injunction. The defendants in turn, instituted O.S.No.462 of 2005 against the plaintiffs in O.S.No.420 of 2005 *inter alia* for specific performance. Both the suits were tried jointly and evidence was recorded in O.S.No.420 of 2005.



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- After appreciating the evidence before it, the trial Court dismissed O.S.No.420 of 2005 and decreed the suit for specific performance in O.S.No.462 of 2005. Challenging the aforesaid decrees, two separate appeals were preferred by the plaintiffs in A.S.No.36 of 2009 and A.S.No.37 of 2009. Before the first appellate Court, there is a reversal in fortune for the defendants when both the appeals came to be allowed. Aggrieved by the same, the defendants are before this Court with these second appeals.
- For narrative convenience, parties would be referred to by their rank in O.S.No.420 of 2005.

2.1. The facts are substantially admitted and the dispute falls within a narrow space. They are now bullet pointed:

- The suit properties, five in number, were originally held by a certain Kandasamy Naicker as the *karta* of the joint family comprising Kandasamy Naicker and his brother named Chinnandi Naicker. This is not in dispute. Ext.A.1 is the patta relating to the suit property issued in the name of Kandasamy Naicker in 1973. Both Kandasamy



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Naicker and Chinnandi Naicker had passed away, and the first and the second plaintiffs are their sons respectively.

- In continuance of the patta issued under Ext.A.1, the first plaintiff too was granted Ext.A.14-patta. The plaintiffs assert that they are in actual physical possession and enjoyment of the suit property, and to substantiate the same they have produced Ext.A.2 to Ext.A.13, Ext.A.15 and Ext.A.16, all of which are the land tax/*kist* receipts. Of them, Ext.A.15 and Ext.A.16 alone are post the institution of the suit. They further assert that their ownership has been recognised Vide Ext.A.18 and Ext.A.19, which are documents pertaining to payment of compensation to the plaintiffs for use of their land for laying petroleum pipelines under the provisions of Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962.
- Be that as it may, the defendants issued Ext.A.20-suit notice dated 11.07.2005 asserting right over the suit properties. Promptly the plaintiffs issued their reply Vide Ext.A.21 dated 26.07.2005 and without any loss of time, they laid the suit in O.S.No.420 of 2005.



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3. The suit was resisted by the defendants, who also adopted the same line of pleading in their suit for specific performance in O.S.No.462 of 2005.

They allege:

- On 01.07.1985, Vide Ext.B7 both the plaintiffs entered into a sale agreement with one Alagarsamy. The first defendant is the widow of Alagarsamy and defendants 2 and 3 are their children.
- On the strength of Ext.B.7, the defendants assert that they are put in possession of the suit properties. It may have to be stated here that this fact is asserted in their written statement to O.S.No.420 of 2005, but they are silent about it in their suit for specific performance in O.S.No.462 of 2005. They contend that as they faced obstruction to their possession, they have filed the suit for specifically enforcing Ext.B.7. In between, they have also produced Ext.B.1 to Ext.B6, land tax receipts to show that they are in possession and all these receipts are also prior to the suit.

4. The plaintiffs in their written statement to the suit for specific performance in O.S.462 of 2005 have taken the following pleas:



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- It is indeed true that the plaintiffs had entered into a sale agreement with Alagarsamy but that was much earlier to the date which Ext.B.7 bears. And Ext.B.7 is a fabricated document.
- The contents of Ext.B.7 would reveal that it is not a sale agreement, but an unregistered sale deed.
- The suit for specific performance is barred by limitation.

5. On this set of pleadings, the dispute went to trial. Before the trial Court, the first plaintiff's son was examined as P.W.1 and the second plaintiff examined himself as P.W.2. Besides, they have examined an independent witness as P.W.3. Documents, which the plaintiffs have produced, have already been introduced. For the defendants, the third defendant was examined as D.W.1 and their documents have also been referred to above. The defendants also examined D.W.2, an independent witness. They however, did not chose to examine any of the attesting witnesses to Ext.B.7.

6. On appreciating the evidence before it, the trial Court dismissed the suit for declaration of title and decreed the defendants' suit for specific



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performance. It's line of reasoning is:

- Ext.B.7 is genuine. For arriving at this conclusion, the trial Court itself compared the purported signatures of plaintiffs 1 and 2 with their admitted signatures in the pleadings. In this context, it also had observed that even though none of the attesting witnesses have been examined, it was submitted during arguments that all the attesting witnesses have died, which in fact the plaintiffs did not dispute during arguments.
- The first plaintiff had not entered the witness box, and drew adverse inference was drawn against him. Though the second plaintiff was examined after the examination of P.W.1 (the son of the first plaintiff), the same was in breach of Order 18 Rule 3-A CPC and accordingly eschewed the evidence of P.W.2.
- Ext.B.7 is an unregistered sale agreement, and it is genuine.
- On the point of limitation, the time ran out only from the time of refusal under Article 54 of the Limitation Act, 1963, to be specific from the date of reply notice of the plaintiffs in Ext. A 21 dated 26-07-2005 .



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7. Aggrieved by the aforesaid decrees, the plaintiffs preferred twin appeals before the first appellate Court. As was mentioned earlier, the first appeals came to be allowed. The first appellate Court has found that Ext.B.7 is an unregistered sale deed, and that inasmuch as it was not registered within four months period as stipulated under Sec. 28 of the Registration Act, 1908, it conferred no right to the defendants. So far as the application of Order 18 Rule 3-A of the Code of Civil Procedure is concerned, the first appellate Court held that it is only directory and not mandatory.

8. Now, it is the turn of the defendants to prefer these appeals and they were admitted on 15.12.2010, for considering the following substantial questions of law:

Sl.No	S.A.(MD) No.944 of 2010	S.A.(MD) No.945 of 2010
1	<i>Whether the Lower Appellate Court has given a perverse finding that Ex.B7 is not an agreement for sale, reversing the well considered decision of the Trial Court?</i>	<i>Whether the Lower Appellate Court has given a perverse finding that Ex.B7 is not an agreement for sale, reversing the well considered decision of the Trial Court?</i>



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2	<i>Whether the Lower Appellate Court has committed an error in not considering the genuineness or otherwise of Ex.B7, based on which the relief of specific performance was claimed, on the sole ground that the said document was titled as sale deed even though it contemplated a further act on the part of the parties to give effect to the transaction fully?</i>	<i>Whether the Lower Appellate Court has committed an error in law in not considering the genuineness or otherwise of Ex.B7, based on which the relief of specific performance was claimed, on the sole ground that the said document was titled as sale deed even though it contemplated a further act on the part of the parties to give effect to the transaction fully?</i>
3	<i>Whether the Lower Appellate Court has committed an error in not considering the admission made by the respondents in Ex.A21-Reply Notice, wherein, it was admitted that the same was an agreement, but, it was contended that the prayer for the relief of specific performance was time barred?</i>	<i>Whether the Lower Appellate Court has committed an error in not considering the admission made by the respondents in Ex.A21-Reply Notice, wherein, it was admitted that the same was an agreement, but, it was contended that the prayer for the relief of specific performance was time barred?</i>



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4	<i>Whether the Lower Appellate Court has committed an error in recording a finding that the evidence of P.W.2 which was recorded despite the objection raised by the appellants could be looked into and the same would not be affected by the provision found in Order 18 Rule 3-A of the Civil Procedure Code?"</i>	<i>Whether the finding of the Lower Appellate Court that the respondents are in possession of the suit property is perverse?</i>
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9. Opening the arguments for the appellants, their learned Counsel submitted:

- That Ex.B7 cannot be considered as an unregistered sale deed as has been found by the first appellate court. Ext.B7 though in the first part may possess all the elements of sale, when it is proceeded to the third page, it says that sale deed could be executed at such appropriate time, when it was convenient for the plaintiffs to execute. This implies that execution of sale deed indeed was deferred to a future date and this clause would go to characterise Ex.B7 as a sale agreement.



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- The First Appellate Court was also in error in overlooking the effect of Order XVIII Rule 3A, Code of Civil Procedure. Admittedly, the first plaintiff was not examined and only his son was examined as P.W.1. Thereafter, the second plaintiff was examined as P.W.2. In fitness of things, the plaintiff should have obtained the leave of the trial Court for examining an independent witness as P.W.1 before examining P.W.2. Order XVIII Rule 3A is intended to protect the purity of trial and also intended to avoid any attempt to fill in any lacunae in the evidence of the independent witness. P.W.1 says that the second plaintiff is incapable of tendering evidence, whereas P.W.2 himself has appeared to tender evidence.
- Turning to the reliance placed on Exs.A18 & A19, under which compensation was paid for the use of suit property for laying the petroleum pipe line to the plaintiffs is concerned, technically the title has not been transferred to the defendant, since the sale deed is yet to be executed, and therefore it was only appropriate that



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the compensation was paid to the one who is the registered owner of the property as on the date of payment of compensation.

10. Per contra, Mr.J.Bharathan, the learned Counsel for the plaintiffs/respondents submitted:

- that the defendants have helped themselves with considerable double speak as to the character of Ex.B7. After the plaintiffs have laid their suit, the defendants first filed their suit for specific performance and thereafter had filed their written statement to the plaintiffs' suit for declaration of their title. In their plaint in the suit for specific performance, the defendants as plaintiffs characterized Ex.B7 as a sale agreement, whereas in their written statement to the plaintiffs' suit they characterized the same document as a sale deed. In a joint trial situation, this conflicting and contradicting characterisation of the same document would nullify the effect of both.
- The trial Court has found that at best only the first plaintiff could



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have signed Ext.B-7 and not both the plaintiffs. In terms of the said document, the second plaintiff has only affixed his left hand thumb impression. While under Section 73 of the Indian Evidence Act, the Courts are empowered to compare the signature, the same cannot be extended to compare the thumb impressions.

- Ex.B7 was executed on four sheets of stamp papers, which has a combined value of Rs.2.50/-. Two such sheets are for the value of Rs.1/- each and the remaining two sheets are for 25 paise each. The first two stamp papers were purchased on 28.06.1985 under Serial Nos.6469 and 6468. The stamp vendor is one S.Krishnamoorthy, from Thirumangalam, which is about 25 km from Madurai, and it was purchased in the name of one Mani of Madurai. The third stamp paper bears the value 25 paise and it was sold by the same stamp vendor to certain Harihara Iyer, Advocate, Thirumangalam on 20.04.1985 under serial No.2799. The last of the stamp papers again has a value of 25 paise and it



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was sold again to the same Mani from Madurai but on 10.05.1985 under Serial No.8465. In this regard when D.W.1 was cross examined, she would say that on 01.07.1985, she along with her father Alagarsamy, both the plaintiffs and two of the attestors namely, Perumalsamy Devar and Subbiah Naiker have arrived at the Sub Registry at around 10.00 a.m.. She would further testify that her father had gone to purchase stamp papers and returned with the same about half an hour later. She would say that her father had Rs.13,000/- on that day with him. What is intriguing here is that if Alagarsamy had gone to purchase stamp papers at the morning on 01.07.1985, why stamp papers were purchased not in his name or in the name of the plaintiffs, but in the name of third parties, and why the stamp papers bear different dates. This was not adequately explained.

- According to the defendants and in terms of Ex.B7, the property was outstanding on an oral othi with certain Singaraj (D.W.2) and that the plaintiffs owed Rs.2,000/- to him. This Rs.2,000/-,



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according to the defendants, was paid to Singaraj not on 01.07.1985, the date on which Ex.B7 was executed but on the following date. This implies Alagarsamy had entire Rs.13,000/- with him at the time when Ex.B7 was executed. Secondly, the parties were also at the Sub Registry. The sale consideration was a meager i.e., Rs.12,500/-. According to Ex.B7, only Rs. 10,500/- was paid to the plaintiffs and the balance amount of Rs. 2,500/- was still with Alagarsamy. Given the balance sale consideration required to be paid, Alagarsamy had adequately enough money for him to complete the sale and to go for the execution of the sale deed, rather than going for what they now claim as sale agreement. Indeed they could have easily paid the differential stamp duty payable even before the Sub Registry along with the registration charges. The conduct of Alagarsamy appears extremely strange. In a suit for specific performance, the Court may not ignore the conduct that defines the attitude of the defendants.



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- The aforesaid Singaraj, the mortgagee, was examined as D.W.2. According to D.W.1 this Singaraj was physically present at the time of the execution of Ext.B7. According to D.W.1 the othi amount due to Singaraj was not paid to him at that time, but only on the next date, whereas Singaraj would testify that Ex.B7 was executed without his knowledge and that the money was settled to him some four day after Ex.B7.
- The defendants further claim possession of the suit property based on Ex.B7. In order to prove possession, the defendants have produced Exs.B1 and B6, essentially dealt with fasli year in relation to which tax was paid. Not one of these tax receipts show the survey number of the property in order to ascertain if tax was paid for the suit property, but gives a list of patta number. Not one patta was produced before the Court to enable it to ascertain if the defendants had paid land tax for the property.

11. In response, the learned Counsel for the appellants relied on the



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authority in *Thiruvengadam Pillai Vs Navaneethammal & another* [(2008) 4 SCC 530] and submitted that the mere fact that old stamp papers were used by itself is not adequate to suspect the document nor they need to have continuous serial numbers. He further submitted that the first appellate Court has not entered finding on the character of Ex.B7. Hence findings of the trial Court deserves to be granted greater weight.

12. While both sides spent some time in trying to define the character of Ext.B-7 – whether it is an unregistered sale deed or a mere sale agreement, but this Court is not fascinated to deal with it. For, if it is an unregistered sale deed, then it forecloses all options for the defendants, and if it is a sale agreement then the relief sought is not automatic since it has to pass through severe forensic scrutiny. And, if this Court finds that the defendants are not entitled to the discretionary relief of specific performance even if Ext.B-7 is presumed to be a sale agreement, then that would drive the last nail on the hopes of the defendants. Hence, this Court intends to proceed on the presumption that Ext.B-7 represents a sale agreement.



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13. The criteria for grant of a decree for specific performance which predominantly includes the conduct of the party seeking it, has been too well settled for a newer exposition. If tested on these principles, it is seen that the plaintiff scores very heavily over the defendants, both in projecting the unreliability of Ext.B-7 as a genuine document, and also the conduct which the defendants have put on display. Mr. Bharathan has pinpointed each of them and they are enumerated in paragraph 10 above.

14. Before dealing with the substantial issue, at least two aspects may now be addressed:

- There were considerable discussion if P.W.2's evidence should be eschewed in view of Order XVIII Rule 3A CPC, and whether Rule 3A is mandatory or directory. This Court considers that this is absolutely unnecessary and the Courts below appears to have walked unwittingly into deciding on it. The issue is all about the quality of Ext.B-7 and the defendants' entitlement to obtain a decree for specific performance. And, the burden to establish it is



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on the defendants who seek specific performance and not on the plaintiffs. Therefore, it is immaterial who entered the witness box for the plaintiffs and in which order.

- The next aspect is about the stamp papers used for the preparation of Ext.B-7. In *Thiruvengadam Pillai's case* the Hon'ble Supreme Court has not declared that using old stamp papers for preparation of a document can never be a criterion for disbelieving its genuineness. On the other hand it did indicate that may weigh with the court.

15. Turning to the defendants' entitlement to seek specific performance, the principal issue is if Ext.B-7 inspires confidence that could be acted upon; and the ancillary issue is if the defendants deserve a decree. And, this Court does not consider that they deserve it as their entire case is fitted loosely around a suspicious fabric:

- First, to Ext.B-7, D.W.1 has made a candid statement that on the morning of the day on which Ext.B-7 was executed, Alagarsamy had



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gone to procure stamp papers. In all, there are four stamp papers of two different denominations sold by the same stamp vendor to different persons on different dates, but not one of them in the name of Alagarsamy or any of the plaintiffs, nor were they seen sold on 01-07-1985, the date on which Ext.B-1 was executed. Has Alagarsamy gone about searching for old stamp papers? And according to D.W.1, he had Rs.13,000/- with him that day. Is it not intriguing that some one should purchase old stamp papers for an inconsequential total value of Rs.2.50 sold to different persons on different dates?

- Secondly, when Alagarsamy had all the money with him to obtain the sale of the property but why he did not go for it? The reasonable man of law alerts this Court as his conduct does not fit in with the conduct of an ordinary person with ordinary prudence.
- Turning to proof of the signatures of the plaintiffs in the document, under Sec.73 of the Evidence Act, the Court can, at the best, compare the signatures and not thumb impressions. It may be that the first plaintiff has not entered witness box, but P.W.1, his son was



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examined, and he should be one who would be more familiar with his father's signature. But the purported signature of the first plaintiff in Ext.B-7 was not confronted to P.W.1. The first attempt should have been to elicit it from P.W.1, before the Court attempts to compare the signatures. Here, the defendants ought to have taken out a Commission for obtaining expert opinion. It is not done. These aspects send a strong message of caution to this Court in acting on Ext.B-7 as a genuine document.

- The Fourth aspect is the associated conduct of the defendants. The very fact they have come out with an unreliable Ext.B-7 for building their cause of action for a relief of specific performance will have to be counted against them. And, the manner in which they stitch together their efforts to prove the same has proved disastrous. The oral testimony is riddled with material inconsistencies and they have been stated in paragraph 10 above.

16. A suit for specific performance is akin to tight-rope walking. One false step is adequate to non-suit the plaintiff. But the defendants here, as



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plaintiffs in their suit in O.S. No.462/05 were unmindful of their steps and fail themselves.

17. In conclusion, this Court does not find any merit in both the appeals and they are dismissed with costs. Consequently, connected miscellaneous petitions are closed.

23.09.2022

Internet: Yes
Index: Yes/No
Abr/ta

To,
1. The II Additional Subordinate Judge, Madurai.
2. The District Munsif, Thirumangalam.



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N.SESHASAYEE, J.

Abr

Pre-delivery judgment made in
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