



AS No.643 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 10.08.2023	Delivered on 29.08.2023
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CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MRS.JUSTICE **R.KALAIMATHI**

A.S.No.643 of 2016
and CMP Nos.18565 and 6801 of 2022

G.Nagaraj ... Appellant

Vs

1. R.J. Anandmul

2. Mahendra A Challani ... Respondents

R2 Impleaded viz.
(Mahendra @ Challani
vide Court order dated 24.03.2022
made in CMP No.3131 of 2022 in
AS No.643 of 2016 (MKKSJ & VSGJ)

This appeal is filed under Section 96 of the Code of Civil Procedure and Order 41 Rule of C.P.C., to set aside the judgement and decree dated 22.07.2016 in O.S.No.12852 of 2010 passed by the VI Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.P.Subba Reddy

For Respondent : Mr.R.Subramanian
for M/s. D.Nagesh Babu



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J U D G E M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The defendant who suffered a decree for specific performance in OS No.12852 of 2010 is the appellant. The said suit was laid by the plaintiff seeking specific performance of an agreement of sale dated 31.01.2005.

2. According to the plaintiff, the defendant agreed to convey an extent of 23,393 sq.ft of land in the outskirts of Chennai for a consideration of Rs.25,00,000/-. On the date of the agreement an advance of Rs.15,00,000/- was paid and 21 months time was fixed for the payment of balance. The plaintiff would claim that he has paid a sum of Rs.10,00,000/- on 17.03.2005. It is also claimed that the plaintiff was put in possession of the property as a caretaker. Since the defendant did not come forward to execute the Sale Deed, despite repeated demands made by the plaintiff, the plaintiff caused a legal notice to be issued on 10.11.2006. The said notice was returned un-served.

3. Claiming that the defendant is attempting to alienate the



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property, the plaintiff filed a suit for permanent injunction restraining the defendant from alienating the property on 04.07.2007. Care was taken by the plaintiff to take leave under Order II Rule 2 of the Code of Civil Procedure. The said suit came to be decreed *exparte* on 26.03.2008. Thereafter, the plaintiff laid the instant suit seeking specific performance on 21.08.2008. The plaintiff would aver that he was always ready and willing to perform his part of the contract.

4. The defendant resisted the suit contending that the suit agreement was not intended to be an agreement of sale, according to him it was executed as a security for the borrowing. It was also pointed out that the guideline value of the property as on the date of the agreement was about rupees One Crore. The defendant would point out the fact that substantial part of the sale consideration was paid on the date of the agreement, the remaining amount was also paid within a period of one and half months (1½) from the date of the agreement and the plaintiff demanded specific performance only after about a year and 8 months and the suit itself came to be filed nearly 2 years after the legal notice to justify his claim. According to the defendant, the above facts would point to the conclusion that the agreement was not intended to be acted upon as



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an agreement of sale. It was also contended that the suit is barred under

Order II Rule 2 of the Code of Civil Procedure as well as limitation.

5. At trial the plaintiff was examined as P.W.1 and one Mr.V.Govindaraj, was examined as P.W.2 and Exhibits A1 to A9 were marked. The defendant was examined as D.W.1 and one Mr.S.Paulraj an officer from the office of the Sub Registrar was examined as C.W.1. An extract of the Guideline Register was marked as Ex.C1

6. On the above pleadings the learned Trial Judge framed the following issues:

- a) *Whether the suit is barred by limitation.*
- b) *Whether the suit is barred under Order II Rule 2 of CPC.*
- c) *Whether the Court Fee paid is correct.*
- d) *Whether the transaction between the plaintiff and defendant is not a sale agreement*
- e) *Whether the plaintiff is entitled for specific performance as prayed for.*
- f) *To what reliefs.*



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7. On the issue relating to the Bar under Order II Rule 2 of the

Code of Civil Procedure the trial court held that, since the defendant had taken leave to file the suit in IA No.10497 of 2007 even when he instituted the injunction suit in OS No.4095 of 2007, the present suit cannot be said to be barred under Order II Rule 2 of the Code of Civil Procedure. The learned Trial Judge after referring to Article 54 of the Limitation Act held that the suit cannot be said to be barred by limitation, since it has been instituted within three years from the day fixed for performance under the agreement between the parties. On the plea that the agreement was not intended to be acted upon and it is only executed as a security for repayment of the loan, the learned Trial Judge invoked Section 92 of the Evidence Act and held that oral evidence contrary to the contents of the written instrument cannot be looked into.

8. The learned Trial Judge found that the plaintiff having paid the entire sale consideration was ready and willing to perform his part of the contract. On the above findings, the learned Trial Judge decreed the suit. Aggrieved the defendant is on Appeal.



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9. We have heard Mr.P.Subba Reddy, learned counsel appearing for the appellant and Mr.R.Subramanian, learned counsel appearing for the respondent.

10. The prayer in C.M.P.No.6801 of 2022, reads as follows:

“to receive additional documents as mentioned in the petition.”

All the documents sought to be produced have emanated after the filing of the appeals in question and Document Nos.6 and 7 are sale deed executed by the Court pursuant to the decree in the suit subject matter of the appeal and a subsequent settlement executed by the respondent herein in favour of his son. These documents are of no use in deciding the appeal. Hence, we do not see any necessity to receive those documents that are sought to be filed as additional evidence.

11. Mr.P.Subba Reddy, learned counsel appearing for the appellant would vehemently contend that the Trial Court was not right in invoking Section 92 of the Evidence Act, to repel the defence to the effect that the agreement was not intended to be acted upon as an agreement of sale was executed as a security for a loan transaction. Drawing our attention to



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Section 92 of the Evidence Act, which reads as follows:

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“92. Exclusion of evidence of oral agreement.—

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1). — Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2). —The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3). —The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract,



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grant or disposition of property, may be proved.

Proviso (4). —The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5). — Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). — Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

the learned counsel appearing for the appellant would contend that what is prohibited under Section 92 of the Evidence Act, is an attempted proof by parol evidence of a set of facts which would contradict, vary, add to, or subtract from the terms of the written agreement. He would also draw our attention to the judgment of the Division Bench of this Court in ***Kamireddi Sattiaraju and others v. Kandamuri Boolaeswari***, reported



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in **2007 (1) LW 309**, wherein a Division Bench of this Court had an occasion to consider a similar question. The learned counsel would also invite our attention to the more recent judgment of the Hon'ble Supreme Court in *Ayillyath Yadunath Nambiar v. P. Sreedharan*, made in Civil Appeal Nos.4943 and 4944 of 2022, wherein the Hon'ble Supreme Court has upheld the judgment of the Kerala High Court which upheld a similar plea raised.

12. The learned counsel appearing for the appellant would also further contend that the Trial Court erred in not framing an issue relating to readiness and willingness of the plaintiff. Even though the entire amount was paid by 17.03.2005, the plaintiff issued a notice seeking specific performance only on 10.11.2006 that is after the expiry of the 21 months period contemplated under the agreement. He would also point out that the suit was filed almost 2 years thereafter on 21.08.2008, this conduct of the plaintiff, according to the learned counsel would debar him from obtaining the relief for specific performance.

13. Contending contra, Mr.R.Subramanian, learned counsel appearing for the respondent would vehemently contend that the



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defendant cannot raise a plea that the agreement was not intended to be acted upon as an agreement of sale, but it was executed as a security for a loan transaction. The learned counsel would point out that the plaintiff had paid the entire sale consideration within one and half months from the date of the agreement and has demanded performance within the time stipulated under the contract. The learned counsel would further contend that suit having been laid within the time allowed under Article 54 of the Limitation Act, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract.

14. We have considered the rival submissions.

15. On the submissions of the learned counsel for the parties, the following points arise for determination in the Appeal:

(i) Whether the defence that the agreement was executed as a security for a loan transaction is probable.

(ii) Whether the plaintiff could be said to have been continuously ready and willing to perform his part of the contract.



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WEB COPY **Point No.1:**

16. Though it has not been expressly stated the rejection of the defence by the Trial Court is presumably in view of Section 92 of the Evidence Act. We can immediately referred to the judgment of the Division Bench of this Court in ***Kamireddi Sattiaraju and others v. Kandamuri Boolaeswari***, (*supra*) where the Division Bench of this Court had considered the scope of Section 92 of the Evidence Act and held that what is prohibited under Section 92 is only contradicting, varying, adding to or subtracting from the terms of the contract and not a claim that what was intended by the parties was a totally different contract. After analyzing almost all the previous judgments on the issue, the Division Bench had observed as follows:

14. Having heard the contentions of the learned Counsel for the respective parties, we take up issue Nos. (i) and (ii) together for consideration in the first instance:

Issue Nos. (i) and (ii):

(i) Whether Ex. A-1 agreement was not intended to be acted upon as claimed by the appellants.

(ii) Whether there was a different agreement between the parties as claimed by the appellants.



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At the outset, it will have to be stated that existence of Ex. A-1 agreement was never in dispute. As far as application of Section 92 of the Indian Evidence Act is concerned, by virtue of Section 91, and having regard to the existence of Ex. A-1 agreement, the terms contained in Ex. A-1 are to be considered without any reference to any other oral evidence insofar as it related to the terms contained therein. In that respect, Section 91 and 92 of the Indian Evidence Act are inter-dependent. In the light of the evidence available on record, both oral and documentary, as well as the application of Section 92 of the Indian Evidence Act, there is no scope to permit the appellants to contradict, vary or subtract the terms contained in Ex. A-1 agreement. Therefore, even taking Ex. A-1 agreement on its face value, what has to be considered is whether the contention put forward on behalf of the appellants that it was never intended to be acted upon, requires consideration. On this aspect, we find that the decisions relied on by learned Counsel for the appellants Mr. R. Subramanian as (supra) and (supra) fully support his contention.

15. In the judgment reported in 2003 (6) SCC 595, in paragraph 22, the Supreme Court has stated the legal position as regards the substantive part of Section 92 of the Indian Evidence Act in the following words:



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22. *This Court in Gagabai v. Chhabubai and Ishwar Dass Jain v. Sohan Lal with reference to Section 92(1) held that it is permissible to 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. Oral evidence is admissible to show that 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.*

16. *In the decision, the Supreme Court has held as under in paragraph 9:*

An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Mudaliyar v. Vedathanni is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different.

17. *From the above ratio laid down by the Supreme Court, when we analyse the stand of the*



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parties, according to the appellants, irrespective of the fact that Ex. A-1 came into being, it was contended that the deed was never intended to be acted upon and that it was a sham document. When the said stand is probed into further, as held by the Supreme Court, the bar under Section 92 of the Indian Evidence Act vis-a-vis Ex. A-1 would operate if only the appellants attempt to rely upon Ex. A-1 agreement and simultaneously sought to vary and contradict its terms. Such is not the case of the appellants. The appellants are not attempting to contend that the terms contained therein are to be varied or that the evidence let in on their side was to contradict the terms contained therein. According to the appellants, the entire evidence let in both oral and documentary, was only to demonstrate that inspite of existence of Ex. A-1, it will have to be held that the parties had a different contract altogether and Ex. A-1 was never intended to be acted upon. At the risk of repetition, we state that applying the ratio laid down by the Supreme Court, such a stand of the appellants was certainly not prohibited under Section 92 of the Indian Evidence Act.

17. We, therefore, will have to examine the defence in the light of the law declared as above. As rightly pointed out by the learned counsel appearing for the appellant, the following features which appear from the



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conduct of the parties would definitely have a bearing on our conclusion.

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(i) The consideration for sale has been fixed at Rs.25,00,000/-. Ex.C1 shows that the guideline value of the property was around a Crore of rupees at the relevant time;

(ii) An advance of Rs.15,00,000/- is shown to have been paid on the date of the agreement;

(iii) Unusually long period of 21 months is fixed for performance of the contract;

(iv) The plaintiff pays the balance of sale consideration on 17.03.2005 i.e. within a month and half of the date of the agreement; and

(v) The plaintiff issues a legal notice on 10.11.2006 i.e. almost a year and 8 months after the payment of the entire sale consideration and after the expiry of the 21 month period fixed under the contract;

(vi) A suit for injunction is filed in January 2007 and eventually a suit for specific performance is laid on 21.08.2008 nearly 2 years after the issuance of the suit notice;

(vii) P.W.2 one of the attestors to the document has



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stated that the plaintiff is a financier and he has been doing money lending for 15 to 20 years. He has also admitted that he used to obtain loan from the plaintiff for others.

18. The above factors, in our opinion, would definitely point to the conclusion that the defence to the effect that the agreement was not intended to be acted upon is more probable. The conduct of the plaintiff in not demanding a sale deed for more than a year and half, after the payment of the entire sale consideration raises serious doubts in our mind regarding the claim of the plaintiff that the agreement is in fact a sale agreement. Once it is found that the defendant is not precluded by Section 92 of the Evidence Act from raising such a plea, the Court can look into the surrounding circumstances and the preponderance of probabilities to see whether the agreement was actually intended to be acted upon.

19. No doubt insufficiency of consideration cannot be the sole ground to refuse specific performance, but the same can be a looked into to ascertain the nature of the actual agreement between the parties.

Ex.C1 demonstrates that even the guideline value of the property on the



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date of the agreement was around a Crore which is nearly four times the value shown in the agreement. Specific Performance being an equitable relief cannot be granted for the mere asking. Yet another circumstance which impels us to conclude that the agreement was not intended to be acted upon is the conduct of the plaintiff in filing a suit for bare injunction when the relief for specific performance was available to him.

20. As we had already pointed out the time fixed under the agreement Ex.A9 expired on 30.10.2006, a legal notice had been issued by the plaintiff on 10.11.2006, therefore, it was well open to the plaintiff to have sought for specific performance of the agreement even on 04.07.2007 when he launched the suit for injunction. Of course, the plaintiff has taken leave under Order II Rule 2 of the Code of Civil Procedure, that by itself will not be sufficient to justify the conduct of the plaintiff in delaying the suit for specific performance for nearly two years thereafter. We are therefore of the considered opinion that the defence viz. the contention that the agreement was not intended to be acted upon is more probable and the plaintiff has not dispelled the lingering doubts that arise on the circumstances surrounding the execution of the agreement. We are, therefore, unable to sustain the finding of the Trial



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Court that the defendant is precluded from contending that the agreement was not intended to be acted upon. Hence Point No.1 is answered in favour of the appellant.

Point No.II:

21. This issue, a most crucial one in a suit for specific performance has been dealt with in a very haphazard manner by the Trial Court. We must point out that the Trial Court had not framed an issue regarding the readiness and willingness of the plaintiff. Mere non framing of an issue may not be fatal, however, we find that the Trial Court has totally misdirected itself in not considering the conduct of the plaintiff. The following are the admitted facts:

- (a) The agreement was entered into on 31.01.2005;
- (b) A sum of Rs.15,00,000/- was paid on the date of the agreement;
- (c) The balance amount was paid on 17.03.2005;
- (d) A Legal notice seeking execution of Sale Deed was issued on 10.11.2006, there was no reply;
- (e) A suit for injunction came to be filed nearly 8 months thereafter on 04.07.2007; and



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(f) A suit for specific performance came to be filed on

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22. A perusal of the above dates would show that though the plaintiff had paid the entire sale consideration within the 21 months period fixed under the contract, there was no demand for performance by the plaintiff within the said time. There was complete silence for nearly a year and 8 months between 17.03.2005 and 10.11.2006. The Hon'ble Supreme Court in *Saradamani Kandappan v. S.Rajalakshmi & Ors.*, reported in **2011 (4) CTC 640**, has pointed out that the plaintiff in a suit for specific performance should be shown to have been ready and willing to perform his part of the contract throughout the period of the contract, viz. from the date of the agreement till date of the filing of the suit.

23. In the case on hand, though the plaintiff has paid the entire sale consideration by 17.03.2005 he had not chosen to demand performance for almost a year and 8 months thereafter. The first demand came only on 10.11.2006 in the form of a legal notice. Mere payment of consideration alone cannot be taken as proof of readiness and willingness, there are so many other aspects which will have to be



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considered by the Court in granting or refusing the relief of specific performance. Merely because the suit is filed in time, it cannot be presumed the plaintiff was always ready and willing to perform his part of the contract. The conduct of the plaintiff shows that he was reluctant to seek performance of the contract. The Trial Court had lost sight of the delay on the part of the plaintiff at each and every stage. It had proceeded on the footing that the payment of sale consideration would alone be proof of readiness and willingness on the part of the plaintiff. Hence we are unable to sustain the finding of the Trial Court regarding readiness and willingness.

24. The suit has been filed even in 2008 prior to the amendment of the Specific Relief Act, and discretion that was available to the Court prior to the amendment of the Specific Relief Act is still available, in view of the judgment of the Hon'ble Supreme Court in ***Smt. Katta Sujatha Reddy & Anr. V. Siddamsetty Infra Projects Pvt. Ltd. & Ors***, reported in **2023 (1) SCC 355**. Useful reference can also be made to the judgment of the Hon'ble Supreme Court in ***K.S.Vidyanadam and Others v. Vairavan***, reported in **1997 (3) SCC 1**, wherein the concept of the readiness and willingness was considered by the Hon'ble Supreme Court.



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25. In the light of the principles laid down by the Hon'ble Supreme Court in the judgments, referred to supra, we are unable to persuade ourselves to conclude that the plaintiff was always ready and willing to perform his part of the contract and he would be entitled to discretionary relief of specific performance. We, therefore, conclude that the Trial Court was not right in its conclusion that the plaintiff was always ready and willing to perform his part of the contract. Hence the Point No.II is also answered in favour of the appellant.

26. In view of the above findings, the Appeal will have to succeed. The Appeal is **allowed**, the judgment and decree of the Trial Court will stand set aside, the suit in OS No.12852 of 2010 will stand dismissed. The parties will bear their respective costs throughout. Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.) (R.KALAIMATHI, J.)
29. 08.2023

jv



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P.S.:-

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The learned VI-Additional Judge, City Civil Court, Chennai is directed to forward this judgment to the Sub-Registrar, Sembium and Madhavaram with a direction to enter the fact that the decree pursuant to which the sale deed dated 05.08.2021 was executed has been set aside and therefore, the sale deed will stand cancelled and consequently, the subsequent settlement deed executed by the respondent in favour of his son on 27.12.2021 before the Sub-Registrar, Madhavaram also will stand set aside.

(R.S.M., J.) (R.K.M., J.)
29.08.2023

Index : Yes
Internet : Yes
Speaking order
Neutral Citation: Yes

To

The VI Additional Judge,
City Civil Court,
Chennai.



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