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SA.No.1349 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2023

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.1349 of 2007 and
M.P.No. 2 of 2007 and 1 of 2009

S. Kannan

... Appellant

- Vs -

1. Suseela

2. Baby

3. Rajkumar

4. Zareena

(Cause title accepted vide Order of Court dated
24.09.2007 in M.P.No.1 of 2007 by KMJ)

5. Sellathmary

6. The Executive Officer,
Wellington Cantonment Board,
Wellington Barracks P.O
The Nilgiris.

... Respondents

Prayer: Second Appeal is filed under Section 100 of the Civil
Procedure Code against the Judgment and decree dated 26.04.2007 made in
A.S.No.68 of 2006 on the file of the Sub Court of the Nilgiris at



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Udhagamandalam reversing the Judgment and Decree dated 30.06.2006 made in O.S.No.52 of 2004 on the file of the District Munsif Court, Coonnor.

For Appellant	: Ms. J. Usha
For Respondents 1 to 4	: Mr. Bijesh Thomas
Respondent 5	: Died
Respondent 6	: Given up

JUDGMENT

The second defendant is the appellant before this Court. The Respondents 1 to 4 are the legal heirs of the plaintiff. The fifth respondent is the first defendant before the Trial Court and the sixth respondent is the third defendant before the Trial Court.

2. This second appeal has been filed at the instance of the second defendant, who is the subsequent purchaser of the suit property.

3. For the sake of convenience, parties will be referred according to their litigative status before the Court below.



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4. The brief averments, which give rise to the instant second appeal.
are as follows:-

(i) The plaintiff entered into a sale agreement with the first defendant on 29.06.1998. Wherein the first defendant had agreed to execute the sale deed in favour of the plaintiff for a total extent of 330 square feet of a building comprising of superstructure bearing door Nos.120 and 121 of Wellington Market. The total sale consideration agreed was fixed at Rs.95,000/- and the plaintiff paid a sum of Rs.5,000/- as advance and the remaining amount was agreed to be paid within a reasonable time. It was further agreed that after the first defendant produces the Nil encumbrance certificate, house tax property clearance certificate, and no objection certificate from the third defendant, the sale deed would be executed.

(ii) While so, the first defendant issued a letter on 22.12.1998 thereby revoking the sale agreement dated 26.09.1988 along with bankers cheque for the advance amount paid stating that the plaintiff had not come forward to pay the balance consideration within 90 days from the date of said sale agreement. According to the plaintiff there was no recital in the said sale agreement fixing the time for performance as 90 days. While so, the first defendant had sold the suit property to the second defendant on 06.01.1999



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much after the suit sale agreement. Hence, this plaintiff submits that the second defendant is not a *bona fide* purchaser. Thus, this plaintiff came forward with the suit for specific performance.

5. The first defendant was set ex-parte. However, the second defendant resisted the said suit by contending that he entered into a sale agreement with the first defendant on 22.01.1998 in respect of Door Nos.120 and 121. Thereafter, in pursuance of the said sale agreement dated 22.01.1998, on 06.01.1999, the first defendant had executed the sale deed in favour of the second defendant. It was the submission of the second defendant that the sale agreement dated 22.01.1998 was anterior in point of time. Therefore, their right would prevail over the right of the plaintiff. Apart from that, the sale agreement between the plaintiff and the first defendant was as a result of collusion between them. He would further state that the very institution of the suit without the relief of declaration to avoid the sale deed, which stands in the name of the second defendant is not proper. It is the further submission of the second defendant that he is a *bona fide* purchaser for a valuable consideration. Hence, he prayed to dismiss the suit.



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6. The plaintiff examined two witnesses as P.W.1 and P.W.2 and marked 11 documents as Ex.A1 to Ex.A11. On behalf of the defendants two witnessess were examined as D.W.1 and D.W.2 and 12 documents were marked as Ex.B1 to B12. The Trial Court, after having considered the oral and documentary evidence, disbelieved the sale agreement dated 22.01.1998 set up by the second defendant. However, the Trial Court dismissed the suit on the ground that the plaintiff did not seek for the relief of declaration declaring that the sale deed dated 06.01.1999 executed by the first defendant in favour of the second defendant as null and void.

7. Aggrieved by the Judgment of the Trial Court, the plaintiff preferred an appeal before the First Appellate Court. Though, the First Appellate Court found that the property purchased by the second defendant was different from that of the suit property, ultimately the decreed the suit for specific performance.

8. On 10.12.2007, the Second Appeal was admitted on the following substantial questions of law:-



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(i) Whether the Judgment of the Lower Appellate Court is vitiated in that it has granted the discretionary relief of specific performance even though, the rights of this appellant had already become vested in the suit property?

(ii) Whether the plaintiff is entitled to the relief of specific performance of an agreement of sale, particularly when he is deemed to have notice of the appellant's possession of the suit property?

9. The learned counsel for the Appellant/second defendant would contend that the second defendant was a *bona fide* purchaser for valuable consideration, and that the sale agreement dated 22.01.1998 was anterior in point of time to the suit sale agreement marked as Ex.A4. He would also vehemently contend that the plaintiff did not come to the witness box to prove his readiness and willingness to perform his part of the agreement. Therefore, the learned counsel prayed to draw an adverse inference against the plaintiff. It is also the submission of the learned counsel for the Appellant/second defendant that the description of property found in the plaintiff's sale agreement was wrong. In support of her contention, she relied upon two Judgments, in the case of ***Man Kaur (Dead) by lrs vs Hartar***



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Singh Sangha [(2010) 10 SCC 512], and in the case of U.N.Krishnamurthy(since deceased) through lrs vs A.M.Krishnamurthy [AIR (2022) SC 3361].

10. *Per contra*, the learned counsel for the legal heirs of the plaintiff/R1 to R4 would contend that, though the second defendant set up a sale agreement namely Ex.B1, the same did not reflect in Ex.B2/ Sale deed. Therefore, he contended that the finding of fact recorded by both the Courts below that Ex.B1 was a fabricated one is well merited and does not require any interference. It is also his submission that the plaintiff proved his ready and willingness to perform his part of the agreement by depositing the entire sale consideration before the Trial Court and by approaching the Court within a reasonable time. He further contended that even according to the suit sale agreement, there was no stipulation as to the period for performance. Therefore, the filing of the suit by the plaintiff within a reasonable time could very well be considered as an act to prove his readiness and willingness.



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11.This Court has given its anxious consideration to either side submissions.

12.In order to decide the substantial questions of law, it is incumbent upon this Court to find out as to whether the findings of fact recorded by the First Appellate Court in respect of Ex.B1/Sale agreement is plausible or not. According to the second defendant, Ex.B1/Sale agreement dated 22.01.1998 was between the first defendant and the second defendant, which was anterior in point of time to Ex.A4/sale agreement entered into between the plaintiff and the first defendant on 29.06.1998. If the Ex.B1/sale agreement is proved, then the second defendant's right to purchase the suit property will prevail over the right of the plaintiff flowing from Ex.A4/Sale agreement.

13. In this direction, while considering the validity of Ex.B1/Sale Agreement, the Trial Court has found that if Ex.B1/sale agreement was prior to Ex.B2/sale deed, naturally the receipt of Rs.5,000/- through the Ex.B1/sale agreement, would have found a place in the Ex.B2/Sale Deed. But, there was no reference about Ex.B1/Sale Agreement in the 2nd defendant's Sale



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Deed/Ex.B2. Therefore, it was found by the Trial Court that Ex.B1/sale agreement came into existence subsequent to Ex.B2/Sale deed. The same finding was confirmed by the First Appellate Court that Ex.B1/sale agreement was a fabricated one. In view of the above discussion, this Court also does not find any material to deviate from the said finding.

14. At this juncture, this Court deems it appropriate to discuss the findings recorded by the First Appellate Court in respect of the identity of the property between Ex.A4/Sale agreement, and Ex.B1/Sale agreement. There are no pleadings on either side in respect of the identity of property between Ex.A4 and Ex.B1. Therefore, there was no necessity for the First Appellate Court to go into the said aspect and the finding in respect of identity of the property is beyond the scope of the pleadings. In this regard it is useful to refer the Judgment in the case of ***Shivaji Balaram Haibatti Vs Avinash Maruthi Pawar [(2018) 11 SCC 562]***. The relevant portion of the Judgment is extracted below:

" It is a settled principle of law that the parties to the suit cannot travel beyond the pleadings so also the Court cannot record any findings on the



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issues which are not part of the pleadings. In other words, the Court has to record the findings only on the issues which are part of the pleadings on which parties are contesting the case. Any finding recorded on an issue dehors the pleadings is without jurisdiction. Such is the case here."

15. As per the above Judgment, the Court cannot record any finding beyond the scope of the pleadings. Here, admittedly, both the plaintiff as well as the defendants admitted that the property mentioned in the Ex.A4/Sale agreement and Ex.B2/Sale deed were one and the same. Therefore, this Court is of the view that the finding recorded by the First Appellate Court that the properties in Ex.A4/Sale agreement and Ex.B2/Sale deed are two different properties is unwarranted.

16. At this juncture, the learned counsel for the appellant/second defendant would contend that the plaintiff had not proved his readiness and willingness and that the same could be further vindicated by not examining the plaintiff himself as a witnesses. In this connection, the learned counsel for the appellant relied upon the Judgment of the Hon'ble Supreme Court held in the case of **Man Kaur (Dead) by lrs (cited supra)**, wherein, the



relevant portion is extracted as hereunder:
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"18. we may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge.

(a) An attorney-holder who has signed the plaint and instituted the suit. but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time



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had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his “state of mind” or “conduct”, normally the persons concerned along has to give evidence and



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not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his “ bona fide” need and a purchaser seeking specific performance who has to show his “ readiness and willingness” fall under this category. There is however a recognized exception to this

requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be close family member), ti may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”. Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.”

17. Though the learned counsel for the appellant/D2 would contend that the plaintiff himself was not examined to prove his readiness and willingness, and only opted to examine his son would be sufficient ground to hold that the plaintiff had not proved his readiness and willingness. It is



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settled principle of law, that the word “readiness” speaks about the financial capacity of the plaintiff, and the word “willingness” denotes the conduct of the plaintiff. In this case, P.W.1 who is the son of the plaintiff, categorically deposed before the Trial Court that he knew the facts personally. Therefore, as per the ***Man Kaur*** Judgment (cited supra), the evidence of P.W.1 comes within the exception mentioned in the above Judgment.

18. The learned counsel for the Appellant/second defendant has also relied upon another Judgment *in the case of U.N.Krishnamurthy (cited supra)* wherein, the relevant portion of the Judgment is extracted as hereunder:

"33. In a suit for specific performance of a contract, the Court is required to pose unto itself the following questions, namely:-

(i) Whether there is a valid agreement of sale binding on both the vendor and the vendee and

(ii) Whether the plaintiff has all along been and still is ready and willing to perform his part of the contract as envisaged under Section 16(c) of the Specific Relief Act, 1963."

19. Here in this case, as per the findings recorded by both the Courts



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below, the agreement entered between the first and second defendant is found to be fabricated. Though, the second defendant, being the subsequent purchaser, he is entitled to take all defence as the original owner of the property. But, while looking at the defence raised by the second defendant, though across the bar, an argument was advanced in respect of the readiness and willingness, no defence or pleading was set up by the second defendant in their written statement on this aspect. It is pertinent to mention here that in the plaint, the plaintiff categorically stated that he was ready and willing to perform his part of the agreement. Such pleading remains unchallenged. Therefore, this Court is of the firm view that the plaintiff was ready and willing to perform his part of the agreement as rightly recorded by both the Courts below, and this Court has no reason to interfere with such a well merited finding.

20. At this juncture the learned counsel appearing for R1 to R4/ plaintiff's legal heirs would invite the attention of this Court to the Judgment in the case of *P. Ramasubbamma Vs. V. Vijayalakshmi and others* [(2022) 7 SCC 384], which followed the earlier Judgment of the three Judge Bench of the Hon'ble Supreme Court in the case of *Lala Durga Prasad and*



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another Vs Lala Deep Chand and others [reported in *AIR 1954 SC 75*]

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21. The relevant portion of **P. Ramasubbamma** case (cited supra) is extracted as hereunder:

*16. In the light of the aforesaid factual aspects and the findings recorded by the learned trial Court, the decision of this Court in **Durga Prasad** is required to be referred to. In para 42, it is observed and held as under: (AIR p.81)*

*“42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff’. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta high Court in *Kafiladdin Vs Samiraddin* and appears to be the English practice. See *fry on specific performance*. 6th Edn., p.90, Para 207; also *Potter Vs Sanders*. we direct accordingly.*

The aforesaid decision has been subsequently



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referred to and followed by this Court in the subsequent decision in Rathnavathi.

22. By relying the above Judgment it is contended by the learned counsel for R1 to R4/ legal heirs of the plaintiff that both the defendants 1 and 2 have to jointly execute the sale deed in favour of the plaintiff, as the second defendant is holding the suit property for the benefit of the previous agreement holder as stated in Section 91 of the Trust Act.

23. This Court is of the firm view, that the second defendant has not proved his case of *bona fide* purchaser for valuable consideration. Besides that, he has not disputed the readiness and willingness of the plaintiff to perform his part of the agreement. Further, both the Courts below found that the agreement Ex.B1 in the name of the second defendant is fabricated. All the above findings are well merited and based on evidence. Therefore, this Court does not find any ground to interfere with such well merited findings. Thus, both the substantial questions of law are answered against the appellant.

24. In the result, this second appeal is dismissed by confirming the



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Judgment of the First Appellate Court and by decreeing the suit as prayed for. No order as to costs. Consequently the connected miscellaneous petition are closed.

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Index: yes / no

To

- 1.The Sub Court of the Nilgiris
2. The District Munsif court, Connor.

C.KUMARAPPAN, J.



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