



AS.No.854 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.12.2023

CORAM

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MR.JUSTICE **N.SENTHILKUMAR**

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1. Munithayamma

2. Narasimmappa

3. Dakshayani

4. Minor Nagarathina

5. Minor Baby

Minors 4 & 5 are represented

by their father and natural guardian

the 2nd appellant

6. Muruges

7. Ramesh

8. Sujatha

9. Minor Premkumar

10. Minor Bindhu

Minors 9 & 10 are represented by their
father and natural guardian, the 7th appellant.

11. Nanjamma

12. Annemma

13. Sudha

... Appellants

VS.

N.V.Mariayappa

... Respondent



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Appeal suit has been filed under Section 96 read with Order XLI Rule 1 of the Civil Procedure Code, to set aside the judgment and decree dated 26.07.2011 passed in OS No.71 of 2007 on the file of Principal District Judge, Krishnagiri.

For Appellants : Mr. H.Arif Ali

For Respondent : Mr.G.Rajagopalan, Senior Counsel
Asst. by Mr.V.Vargees Amal Raja

J U D G M E N T

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

The defendants in OS No.71 of 2007 are on Appeal challenging the decree for specific performance granted therein.

2. The plaintiff sued for specific performance of the agreement of sale dated 01.12.2005, the total consideration was fixed at Rs.41,18,000/- and an advance of Rs.5,00,000/- was paid on the date of the agreement. A period of 11 months was fixed for performance under the agreement. Another sum of Rs.2,00,000/- was paid on 28.08.2006 by



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way of a cheque bearing No.883944.

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3. Claiming that the defendants have received a sum of Rs.7,00,000/- as advance and the plaintiff is ready and willing to pay the balance of sale consideration, the plaintiff issued a notice on 23.12.2006 demanding specific performance. A reply was sent by the defendants on 21.02.2007 containing false allegations. While admitting the agreement, the defendants claimed that the plaintiff paid only a sum of Rs.5,00,000/- as a loan, out of which the defendants have repaid a sum of Rs.1,50,000/-, the balance of Rs.3,50,000/- left be paid. They denied the second payment. They would also claim that two suits for partition with regard to the property were pending before the Civil Courts. In view of the said reply, the plaintiff was obliged to approach the Court seeking a decree for specific performance.

4. The defendants resisted the suit contending that the suit agreement was not intended to be acted upon as an agreement of sale. It was executed as a security for a loan transaction where the second defendant borrowed a sum of Rs.5,00,000/- from the plaintiff for



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agricultural purposes. It also contended that the defendants are not the absolute owners of the entire property and the heirs of one Kalappa had a right over the same. They also pointed out that two suits one by the defendants seeking partition and the other by the heirs of Kalappa seeking partition were pending. The readiness and willingness of the plaintiff was also questioned.

5. At Trial, the plaintiff was examined as P.W.1 and one Varalakshmi was examined as P.W.2. The second defendant was examined as D.W.1 and one Ramesh was examined as D.W.2. Exhibits A1 to A22 were marked. Ex.A1 is the suit agreement and Exhibits A2 to A20 are the notice and returned postal cover/acknowledgement. Ex.A22 is the unregistered agreement entered into between the defendants and D.W.2. Exhibits B1 to B4 were marked on the side of the defendants.

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

1. Whether the suit agreement of sale is true and



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genuine;

2. Whether the claim that the plaintiff obtained signature is blank stamp papers as security for loan transaction is true;

3. Whether suit is bad for non-joinder of necessary parties i.e. Kalappa his children and Ramesh;

4. Whether plaintiff was always ready and willing to perform his part of contract;

5. Whether the plaintiff is entitled to get the relief of specific performance and injunction as prayed for; and

6. To what relief the plaintiff is entitled?

7. Upon considering the evidence on record, the learned Trial Judge found that the claim that the agreement was executed as a security for a loan transaction was not true. The learned Trial Judge found that the sale agreement is true and genuine. The Trial Court also found that the denial by the defendants of receipt of the second instalment of



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Rs.2,00,000/- as advance is false. The learned Trial Judge also found that the plaintiff was always ready and willing to perform his part of the contract and it is the defendants, who had evaded execution of the sale deed despite repeated demands by the plaintiff.

8. On the question of title, the learned Trial Judge found that the agreement recited that the suit property was allotted to the defendants at an oral partition and it was at the instance of the plaintiff that the defendants had agreed to have a regular partition deed registered. Even otherwise, if the defendants convey the entirety of the property, the same may not affect the heirs of Kalappa and it was for the heirs of Kalappa to work out their rights as against the purchaser.

9. On the said findings, the learned Trial Judge rejected the contention of the defendants that they are only part owners of the property and therefore, the agreement cannot be enforced specifically. On the above findings, the learned Trial Judge decreed the suit. Hence this Appeal.



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10. We have heard Mr.H.Arif Ali, learned counsel appearing for the appellants and Mr.G.Rajagopalan, learned Senior Counsel instructed by Mr.V.Vargees Amal Raja, appearing for the respondent.

11. Mr.H.Arif Ali, learned counsel appearing for the appellants would vehemently contend that the Trial Court grievously erred in concluding that the agreement is enforceable, despite the fact that the defendants are only part owners of the property. He would draw our attention to the judgment of the Hon'ble Supreme Court in ***Pemmada Prabhakar and Others v. Youngmen's Vysya Association and others***, reported in (2015) 5 SCC 355, to contend that if entire immovable property is sought to be sold by some of the sharers alone, the agreement cannot be enforced specifically. The learned counsel would also further contend that the second payment of Rs.2,00,000/- has not been established. Therefore, according to the learned counsel, the plaintiff was not ready and willing to perform his part of the contract, hence is not entitled to a decree for specific performance.



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12. Contending contra Mr.G.Rajagopalan, learned Senior Counsel

appearing for the respondent would submit that as far as the readiness and willingness of the plaintiff is concerned the plaintiff's evidence as P.W.1 has not in any way been shaken in cross-examination and therefore, the same deserves acceptance. He would also point out that the agreement specifically states that there was an oral partition between the parties and the defendants are the actual owners of the entirety of the property and therefore, the defendants are precluded from letting in any evidence contrary to the statement in the written document in terms of Section 92 of the Evidence Act.

13. Claiming that what is sought to be done by the defendants is to let in evidence to vary the terms of the document, the learned counsel would submit that the same is prohibited under Section 92 of the Evidence Act. The learned Senior counsel would further point out that after the decree a sale deed has also been executed by the Court in favour of the plaintiff.

14. We have considered the rival submissions.



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15. The following questions arise for determination:

1. Whether the suit agreement was executed as security for a loan transaction;

2. Whether the Trial Court was right in its conclusion that the plaintiff was always ready and willing to perform his part of the contract; and

3. Whether the claim that the suit is not maintainable as the defendants are only co-owners of the property.

Point No.1:

16. As regards the claim of the defendants that the agreement dated 01.12.2005 was not intended to be acted upon as an agreement of sale and it was executed for as a security, there is no evidence to support the said contention except the oral evidence of D.W.1. Such contention is also belied by the fact that the defendants themselves have entered into earlier agreement of sale with D.W.2 with reference to the very same



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property and have got it cancelled subsequently and the present agreement has been entered into and the advance received under this agreement has been paid over to D.W.2, in repayment of the advance received from him.

17. Of course it is open to the defendants, in a suit for specific performance, to plead that the agreement was not intended to be acted upon and it was executed as security for loan transaction. But in order to sustain such plea, the defendants must let in unimpeachable evidence, which would lead the court to no other conclusion except the conclusion that the agreement was not intended to be acted upon. In the case on hand, we do not have any evidence in support of the said contention, except the oral evidence of D.W.1/ the second defendant. The conduct of the parties if looked into would by itself belie the contention of the defendants regarding the purpose for which the agreement was entered into.

18. As we have already pointed out that the defendants have entered into an earlier agreement with reference to same property for



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higher price and the said agreement was not honoured. It is also seen

that while the total consideration under the suit agreement was about

Rs.41,18,000/- what was paid as an advance is just about 1/8th of it viz.

Rs.5,00,000/- and a sum of Rs.2,00,000/- was paid much later on

28.08.2006. Normally when an agreement is executed as the security for

a loan transaction, the advance that is shown to be paid under the

agreement will be almost the sale price or a little less than the sale price.

It won't be just about 15% of the sale price and a longer period for

performance would be fixed, so as to enable repayment within that time.

Both these factors are absent in the case on hand.

19. The advance paid is relatively minimum when compared to the total sale consideration. The time fixed for performance is also not very long as it is only 11 months from the date of the agreement. We are therefore, unable to sustain the contention of the learned counsel for the appellants that the agreement was entered into only as a security for a loan transaction.

Point No:2

20. If that defence goes the evidence available on record clearly



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points out that the plaintiff was always ready and willing to perform his part of the contract. In fact the plaintiff has issued a notice demanding performance as early as on 23.12.2006 and has filed a suit on 10.10.2007 within the period of limitation allowed under law.

21. The evidence of P.W.1 on this aspect also has found acceptance with the learned Trial Judge and we have also gone through the evidence of P.W.1 and we do not see any reason to differ from the opinion formed by the learned Trial Judge. We therefore conclude that the finding of the learned Trial Judge regarding the readiness and willingness of the plaintiff need not be interfered with.

Point No.3:

22. On the question of ownership, the agreement recites that there has been a partition between the defendants and the heirs of Kalappa in the year 1997 and the plaintiff has demanded a registered instrument to which the defendants have agreed. However, the defendants have not come forward to have a partition deed executed and registered instead suits have been filed between the defendants and the legal heirs of



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Kalappa for partition. Even assuming that there has been no partition and the defendants go ahead selling the property claiming to be the owners of the same under a oral partition. It is for the heirs of Kalappa to dispute the title of the plaintiff and seek partition.

23. In a suit for specific performance, the Court need not go into the title. It is the plaintiff who would take the risk. The judgment relied upon by the learned counsel for the appellant in ***Pemmada Prabhakar and Others v. Youngmen's Vysya Association and others***, will not apply to the facts of this case since there an agreement was entered into by two co-sharers for sale of the entire property. The same is not the case here, the defendants have claimed to be the owners of the property and had entered into an agreement citing an oral partition.

24. As we have already pointed out, we need not investigate the title of the defendants in this suit. It is for the plaintiff to work out his rights against the heirs of Kalappa if they choose to make a claim, we are also informed that both the suits filed for partition have been dismissed for non-prosecution. We do not pronounce upon the effect of the same.



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25. In view of the above findings both the points are answered against the appellants and the appeal fails and it is accordingly dismissed. However, we direct the parties to bear their own costs.

(R.SUBRAMANIAN, J .) (N.SENTHILKUMAR, J.)
13.12.2023

Index : No
Internet : Yes
Neutral Citation : No
Speaking order
jv

To

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1. The Principal District Judge,
Krishnagiri.

2. The Section Officer,
V.R.Section,
Madras High Court.

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