



A.S.(MD)No.147 of 2014

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

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**DATED : 09.03.2023**

**CORAM:**

**THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR**

**A.S.(MD)No.147 of 2014**

R.Poongodi

... Appellant / plaintiff

Vs.

N.Kanagammal (Died)

2.N.Kamala

(Memo dated 07.12.0221 in USR No.27697  
is recorded as R1 died and the 2<sup>nd</sup> respondent,  
who is already on record, is recorded as LR of  
the deceased R1, vide Court order dated  
12.09.2022 made in A.S.(MD)No.147/2014)

... Respondents / Defendants

**PRAYER:** This Appeal Suit is filed under Section 96 of C.P.C. against the judgment and decree passed by the Additional District Judge cum Fast Track Court No.2, Madurai, in O.S.No.56/2008, dated 04.08.2010.

For Appellant

: Mr.S.Natesh Raja

For Respondents

: Mr.D.Malaichamy for R2



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## **JUDGMENT**

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Aggrieved over the decree and judgment of the Additional District Judge cum Fast Track Court No.2, Madurai, in O.S.No.56/2008, dated 04.08.2010, dismissing the suit filed for specific performance and granting only alternative relief of refund of money, the present appeal has been filed by the unsuccessful plaintiff.

2. For the sake of convenience, the parties are referred to herein, as per their rank before the Trial Court.

3. The brief facts, leading to the filing of this Civil Miscellaneous Appeal, are as follows:-

The defendants 1 and 2 are the mother and daughter. The first item of the property belonged to the defendant No.1. Second item of the property belonged to the second defendant. Both the defendants decided to sell the properties. As a result, on 26.09.2007, both of them orally agreed to sell the suit properties to the plaintiff for a total sale consideration of Rs.15,25,000/- and received a sum of Rs.50,001/- as token advance, followed by an written sale agreement dated 11.10.2007 and received a sum of Rs.2 lakhs towards sale consideration. It is



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agreed between the parties that sale shall be completed within a period of three months. Second defendant agreed to discharge the loan amount of Rs.2,52,000/- borrowed from the Tamil Nadu Electricity Board. However, the second defendant has not discharged the loan amount. The plaintiff has approached the defendants on several occasions and requested them to execute a sale deed in favour of her after receiving balance sale consideration, within a time. The second defendant has not performed their part of obligations. As the defendants neither discharged the loan nor executed the sale deed, the plaintiff has also gave a complaint before the Sellur Police Station dated 05.03.2008. The second defendant, however, in order to escape from the criminal complaint, issued a cheque for a sum of Rs. 1,25,000/- in favour of the plaintiff on 15.03.2008. The plaintiff received the cheque under the compulsion of the defendants and presented the same through her advocate on 18.03.2008. However, the payment was stopped by the drawer. Thereafter, the second defendant also informed that they are ready to pay the balance sale consideration as per the agreement. However, the defendants have not come forward to receive the balance sale consideration and execute the sale deed. Therefore, the plaintiff has sent a legal notice dated 01.04.2008, which was replied by the defendant on 04.04.2008. Hence, the suit.



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4. Admitting the sale agreement, it is the contention of the defendants in the written statement that the plaintiff has given a police complaint on 05.03.2008. Thereafter, the second defendant issued a cheque for a sum of Rs.1,25,000/- to the plaintiff on 15.03.2008. It is the contention of the defendants that the plaintiff could not mobilize the fund to pay the balance sale consideration and to get the execution of sale within the time fixed in the sale agreement, since time is the essence of contract. The plaintiff also addressed two complaints to the Inspector of Police levelling allegations against the defendants. The above complaints itself clearly show that the plaintiff was not in a position to perform her part of the contract. The plaintiff demanded refund of advance amount from the defendants and accordingly, they issued a cheque for the part amount on condition that balance should be paid within three months from 15.03.2008. Since the plaintiff has not issued any receipt, the second defendant instructed the bank on 14.03.2008 to stop the payment. It is the further contention of the defendants that the plaintiff never requested the second defendant and she never tendered the balance amount of sale consideration and the plaintiff was never ready and willing to perform her part of the contract.



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5. On the basis of the above pleadings, the trial Court framed the following issues:

*“1. Whether the plaintiff proves that she is entitled for the relief of specific performance of contract as prayed for?*

*2. Whether the defendants proves that the plaintiff failed to perform her part of contract within the stipulated period?*

*3. To what relief, the plaintiff is entitled to?”*

6. On the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 16 documents were marked as Ex.A1 to A16. On the side of the defendants, three witnesses were examined as D.W.1 to D.W.3 and 12 documents were marked as Ex.B1 to Ex.B12 were marked.

7. Based on the evidence and materials, the trial Court found that there was no enforceable contract between the parties on the basis of Ex.A3 and it is only a mere receipt and not an agreement. The trial Court has also found that the plaintiff was not ready and willing to perform the contract and also there is suppression of material facts and ultimately dismissed the suit as far as the specific performance and decreed the suit for alternative relief to refund the amount received by the defendants with interest at the rate of 6% p.a., from the date of execution of



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Ex.A3, failing which the amount should carry the interest at the rate of 9% p.a., from the date of execution of Ex.A3. Aggrieved over the above judgment, the unsuccessful plaintiff has filed the present appeal.

8. The main contention of the learned counsel appearing for the plaintiff before this Court that the trial Court has erred in holding that Ex.A3 is only mere receipt and it is incapable of enforcement. In fact, Ex.A3 is a written contract between the parties, wherein the terms have been agreed between the parties, which has not been noticed by the trial court. It is the contention of the learned counsel appearing for the plaintiff that the agreement itself clearly indicates that second defendant has to discharge the mortgage loan borrowed by her from the Tamil Nadu Electricity Board and three months time has been granted in the agreement only to discharge the mortgage loan. The advance amount has also paid only to discharge the mortgage. However, having received the amount, the second defendant neither paid that amount nor discharged the mortgage. Therefore, the plaintiff has given police complaint-Ex.A5. It is the further contention of the learned counsel appearing for the plaintiff that due to the compulsion in the Police Station, the plaintiff has agreed to receive the amount. Second defendant issued a cheque for a sum of Rs.1,25,000/- and when the cheque was presented, the same



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was dishonored on the ground that 'payment stopped by drawer' and the second defendant agreed to execute the sale deed. Even after that they have not executed the sale deed.

9. It is the further contention of the learned counsel appearing for the plaintiff that the plaintiff has clearly spoken in her evidence that after getting the original document only, she would arrange the loan from the LIC to pay the entire sale consideration. According to the learned counsel for the plaintiff that P.W.1 and P.W.2 has clearly spoken about this aspect. Hence, submitted that the plaintiff is always ready and willing to perform the part of her contract and the trial Court has not considered the oral and documentary evidence on the side of the plaintiff properly. It is the further contention of the learned counsel appearing for the plaintiff that merely because P.W.2-husband of the plaintiff has filed a suit in respect of the suit property not to evict them in due process of law, such circumstances cannot be pitted against the plaintiff for suppression of material facts. The learned trial Court has erred in concluding that there is suppression of material facts. Hence, submitted that as the time is not an essence of contract, the petitioner is entitled to specific performance. In support of his submission, he has also placed reliance on the judgments of the Hon'ble Apex Court in



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**A. Kanthamani v. Nasreen Ahmed**, reported in (2017) 4 SCC 654 and **Sukhbir Singh Vs. Brij Pal Singh** reported in (1996) 2 CTC 295.

10. The learned counsel appearing for the defendants / respondents would submit that though the agreement was executed, the plaintiff was never ready and willing to perform the part of her contract. There is no evidence to show that the plaintiff has a capacity to raise the fund to pay the remaining balance sale consideration. Having agreed to pay the remaining balance sale consideration, within three months from the date of agreement, the plaintiff never shown ready and willingness on her part to pay the remaining sale consideration. The theory of obtaining loan from the LIC has been introduced for the first time in the evidence without any pleadings. Therefore, that trial Court has rightly appreciated the evidence and come to the conclusion that the plaintiff was never ready and willing to perform the part of her contract. It is his further contention that P.W.2, who is the husband of the plaintiff, has already filed a suit against the defendants in respect of the same property. Plaintiff is also aware of the above fact, but the same has been suppressed in the entire pleadings. Therefore, she has not come to this Court with clean hands. Hence, at the judgment of the trial Court does not require any interference and this Appeal Suit is liable to be dismissed.



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**11.** In the light of the above submissions, now the points arise for consideration in the appeal are as follows:

1. Is there any enforceable contract between the parties?
2. If so, whether the plaintiff is always ready and willing to perform the contract?
3. To what relief, the parties are entitled to?

**12.** It is relevant to note that Ex.A3 is an agreement dated 11.10.2007 entered between the defendants and the plaintiff. In fact, the defendants have not denied the execution of the contract. The defendants also not disputed in their pleadings that prior to Ex.A3, there was a oral agreement for sale. The total sale consideration agreed between the parties was Rs.15,25,000/-. It is also not disputed between the parties that the oral agreement was reached on 26.09.2007 and on that day, a sum of Rs.50,001/- had paid as token advance. Thereafter, the parties entered into a written contract-Ex.A3. On a perusal of Ex.A3, it is seen that not only the parties confirmed the oral agreement dated 26.09.2007, but also entered a written contract and received further sum of Rs.2 lakhs and agreed to complete the sale within a period of three months. It is also agreed that three months time was granted to the second defendant in order to discharge the



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mortgage loan from the Tamil Nadu Electricity Board and the agreement was also attested not only by the witnesses but also by the husband of the second defendant.

When there is no dispute with regard to the execution of this document by the defendants, the finding of the trial Court that it is only a mere receipt and it is not an agreement, cannot be countenanced. Though there is no specific schedule was not given in the agreement, the parties understood that the sale is only in respect of the suit schedule properties. Therefore, it cannot be said that Ex.A3 is only a receipt and it is incapable of enforcement. Such conclusion of the trial Court is not according to law. Even the oral agreement is capable of enforcement when the same has been established before the Court of law. Such being a position, the finding of the trial Court that Ex.A3 dated 11.10.2007 is only a mere receipt and not an agreement is not correct. Accordingly, the first point is answered.

**13.** It is the case of the plaintiff that though the defendant No.2 agreed to clear the mortgage within three months, she has not discharged the same. Though it was agreed between the parties that three months time was granted only in order to discharge the mortgage, it is no where agreed in the agreement that only after handing over the original documents, the plaintiff would mobilize the funds through LIC loan. In the agreement, it was specifically stipulated that the



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remaining sale consideration other than the advance amount should be paid within three months. Three months time has been extended only for the purpose of discharging the mortgage. The fact remains that the mortgage was not discharged. Be that as it may. Merely because the mortgage was not discharged by the second defendant, that will not inure the benefit to the plaintiff. Plaintiff should show the readiness and willingness from the very inception of the agreement till the end. It is the specific case of the plaintiff in her pleadings that she was tendering the sale consideration on several times to the defendants, however, they avoided the same. In para 6 of the plaint, it is the the specific pleadings of the plaintiff that after the period of three months, she has tendered the balance sale consideration and the defendants avoided the same. Similarly, it is her case that, she insisted the second defendant to discharge the mortgage loan. It is to be noted that whereas in evidence, the plaintiff has clearly admitted that she did not have any ready cash to tender the balance sale consideration and she had to mobilize the fund only after getting the original documents, through LIC loan and explanation has been given in her evidence that since original documents have not been handed over, she could not process the loan application.



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**14.** It is relevant to note that this oral evidence about raising the loan to pay the balance sale consideration first time spoken only in the evidence. There is no pleadings what so ever in the entire plaint. Whereas in the plaint, it is the specific case of the plaintiff that she had tendered the balance sale consideration on several times before sending the legal notice. However, the defendants avoided the same. Therefore, any oral evidence introduced, without pleadings cannot be given much importance. Be that as it may. The plaintiff has admitted that she could not even process the LIC loan and she has also admitted in her evidence that she has no independent bank account. It is to be noted that the plaintiff has filed an application before the trial Court in I.A.No.217 of 2008 to deposit the balance sale consideration, however, she has not deposited the same before the Court despite the time granted by the trial Court. This fact clearly shows that the plaintiff had no capacity to raise the fund at the relevant point of time and she had no means to mobilize the fund to pay the balance sale consideration. Therefore, now in the evidence she has come up with the explanation that since original documents have not been handed over to her after discharging the mortgage, she could not raise the loan to pay the remaining balance sale consideration. Such explanation, without any pleadings, cannot be given much importance. It is also relevant to note that the mortgage loan is only about Rs.2,50,000/-. If the plaintiff



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had really intention to purchase the property and she was ready to pay the balance sale consideration as pleaded in the plaint, she could have very well cleared the mortgage loan and got the property registered in her name.

**15.** Therefore, in the absence of readiness and willingness on her part from the very inception, now she cannot contend that since the original document has not been handed over to her, she could not mobilize the fund. The readiness is the capacity of the plaintiff to pay the amount and the willingness is a mental attitude to purchase the property. Both the words 'readiness and willingness' are distinct and both should go together to get an equitable relief of specific performance. The plaintiff has not even shown readiness and willingness and no other bank accounts produced to show that she had sufficient means to pay the balance sale consideration. No doubt, the plaintiff need not show the ready cash in hand but that will not absolve the plaintiff from proving the capacity to raise funds. The entire analysis of the facts, the plaintiff has failed to prove the readiness and willingness on her part. If really, the plaintiff had an intention to purchase the property, since the mortgage amount is only a small amount, the plaintiff could have got the property registered in her name and could have cleared the mortgage amount. It is always subject to the prior right created in the mortgage, which was also not done so.



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**16.** In such view of the matter, this Court is of the view that the plaintiff is miserably failed to establish the readiness and willingness. Accordingly, the second point is answered. In the judgments relied upon by the learned counsel for the plaintiffs, the Hon'ble Supreme Court considering the facts and circumstances of that case, has granted specific performance, and therefore, the above judgments are not applicable to the facts of the present case.

**17.** In the result, this Appeal Suit is dismissed and the judgment of the Additional District Judge cum Fast Track Court No.2, Madurai, in O.S.No.56 of 2008, dated 04.08.2010 is confirmed and accordingly, the defendants are directed to refund the amount i.e., a sum of Rs.2,50,001/- received by them to the plaintiff with interest at the rate of 6% p.a., as ordered by the trial Court and failing which, the amount shall be carried the interest as ordered by the trail Court. No costs.

**09.03.2023**

NCC : Yes

Index : Yes/No

Internet : Yes

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To

1. Additional District Judge cum Fast Track Court No.2,  
Madurai,
2. The Section Officer,  
Vernacular Records,  
Madurai Bench of Madras High Court,  
Madurai.



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**N.SATHISH KUMAR, J.**

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