



A.S.(MD)No.3 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 18.04.2023

DELIVERED ON : 28.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.(MD)No.3 of 2016

R.Ramesh

... Appellant / Plaintiff

Vs.

1.Packiam

2.Selvam

3.Jothi

4.Sahul Hameed (Died)

5.Syed Diwan Ali

(5th respondent is impleaded / brought
on record as LR of the deceased 4th
respondent vide Court order dated 08.04.2022
made in C.M.P.(MD)No.2859/2022)

... Respondents / defendants

PRAYER: This Appeal Suit is filed under Order 41 Rule r/w Section 96 of C.P.C.
against the judgment and decree dated 23.06.2015 passed in O.S.No.57 of 2006,
on the file of I Additional District Court, Tirunelveli.



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For Appellant : Mr.S.Meenakshi Sundaram,
Senior Counsel for
Mr.T.Arivukumar

For Respondents : Mr.R.Balakrishnan for R1 to R3

M/s.N.Krishnaveni,
Senior Counsel for
Mr.M.P.Senthil for R5

JUDGMENT

Aggrieved over the dismissal of the suit filed for specific performance, the present appeal came to be filed by the unsuccessful plaintiff.

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

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

3.1. The defendants 1 to 3 are the owners of the property. The first defendant agreed to sell her undivided half share in favour of the plaintiff for a total sale consideration of Rs.9,60,000/- and executed a unregistered sale agreement on 31.05.2006, and the 1st defendant has received a sum of Rs.10,000/-



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as advance and it was agreed between the parties that the time for stipulation for the contract is three months. Thereafter on 05.08.2006, the plaintiff has paid a sum of Rs.1 laksh as further advance to the first defendant. Similarly, the defendants 2 and 3 also executed an agreement on 31.05.2006 in respect of their undivided share of the suit property, for a total sale consideration of Rs.9,60,000/- and received Rs.1 lakh as advance and they have also agreed to complete the sale within a period of three months. The plaintiff was always ready and willing to perform his part of the contract. However, the defendants 1 to 3 are evading to perform their part of contract. Hence, the plaintiff, issued a legal notice on 21.08.2006 and also publication on 23.08.2006. Even after, the defendants 1 to 3 have evaded to execute the sale deed. It is the case of the plaintiff that the defendants 1 to 3 also deposited the original deed in respect of the suit properties. On 08.09.2006, the defendants issued a reply notice with false averment stating that they already entered into an agreement with the 4th defendant on 15.05.2006 for a total sale consideration of Rs.19,20,000/- and received a sum of Rs.10,000/- as advance. If the 4th defendant is failed to perform his part of the contract, then only plaintiff is entitled to get the property. Accordingly, the property has been sold to the 4th defendant on 25.08.2006. Hence, the suit.



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4. The defendants 1 to 3 have filed a statement admitting that they have already executed an agreement in favour of the 4th defendant on 15.05.2006 for sale of suit property for a total sale consideration of Rs.19,20,000/- and the time for completion of contract is four months. It is also admitted that the suit agreement was also executed only on the condition that when the fourth defendant is not able to perform his part of contract, the sale will be made in favour of the plaintiff. However, the plaintiff has not paid the amount. In the meanwhile, the 4th defendant paid the entire amounts and also cleared the mortgage loan. Therefore, the sale deed has been executed in favour of the 4th defendant. According to the defendants 1 to 3, plaintiff was also aware of the agreement entered between the 4th defendant on 15.05.2006. 4th defendant is the *bona fide* purchaser and he has also made improvement by spending Rs.2,50,000/-. Plaintiff was also aware of the earlier contract. Hence, the plaintiff was never ready and willing to pay the amount. In the additional written statement, it is the contention of the defendants 1 to 3 that the suit agreement has been materially acted and the plaintiff has not come to the Court with clean hands.

5. The 4th defendant has filed a written statement, denying the agreement made in favour of the plaintiff and he admitted that he has entered an agreement on 15.05.2006 in respect of the suit property for a total sale consideration of Rs.



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19,20,000/- and paid a sum of Rs.10,000/- as an advance and he has also cleared the mortgage loan of Rs.7,30,000/- of the defendants. The plaintiff was also aware of those documents. After purchasing the property, the fourth defendant has developed the property and incurred expenses upto Rs.2.5 lakhs. The plaintiff was also aware of the same. Hence, it is the contention of the 4th defendant that he is the *bona fide* purchaser and the plaintiff is not entitled to the relief of specific performance.

6. Based on the above pleadings, the trial Court has framed the following issues:

- “1. Whether the alleged sale agreement dated 31.05.2006 is true?*
- 2. Whether alleged further payment of Rs.1,00,000/- on 05.08.2006 is true?*
- 3. Whether alleged sale agreement expired on 31.08.2006 and the right of plaintiff ceased with that?*
- 4. Whether documents of title were handed over by the defendants to the plaintiff?*
- 5. whether the plaintiff agreed to get back the advances money making D1 to D3 entitled to sell the property to one Sahul Hameed?*
- 7. Whether the sale agreement in favour of D4 dated 15.05.2006 is true and valid?*
- 7. Whether D4 is a bona fide purchaser?*
- 8. Whether the plaintiff is entitled for a decree as prayed for?*
- 9. To what other relief, the plaintiff is entitled for?”*



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8. On the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 20 documents were marked as Ex.A1 to Ex.A20. On the side of the defendants, six witness were examined as D.W.1 to D.W.6 and 25 documents were marked as Ex.B1 to Ex.B25 marked.

9. The trial Court after appreciation of evidence has negated the contention of the defendants that there was a prior agreement, however, non-suited the plaintiff on the ground that there was a material alteration of the contract and the plaintiff has not come to the Court with clean hands and dismissed the suit and decreed the suit for alternative relief. Challenging the same, the appeal has been filed.

10. It is the contention of the learned counsel appearing for the plaintiff / appellant that the execution of the agreement is not disputed. The suit agreement dated 31.05.2006, has been executed by the defendants 1 to 3 under Ex.A1 and Ex.A2. The defence of the plaintiff that the prior agreement dated 15.05.2006 executed under Ex.B4, found to be created for the purpose of the case. Hence, it is the contention of the learned counsel appearing for the plaintiff / appellant that though the trial Court has found that the defendants have created such document, has failed to consider the case of the plaintiff and dismissed the relief of specific



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performance only on the ground that there is a material alteration under Ex.A1 and Ex.A2.

11. Further, it is the contention of the learned counsel appearing for the plaintiff / appellant that the evidence of D.W.1 clearly show that the survey number were corrected at the time of entering into agreement itself. Admittedly, other than the suit properties, the plaintiff has no other properties. Therefore, incorporating the different survey number in the original agreement, at the time of entering into a contract, is highly improbable. It is only a small mistake which has been set right on the date of agreement itself. Therefore, such mere alteration in the survey number will not amount to material alteration. The plaintiff was all along shown his readiness and willingness and he has immediately sent a legal notice on 21.08.2006. Besides he has also issued a publication on 23.08.2006 under Ex.A6. Further, within the period as agreed in the agreement, he has also made a further payment of Rs.1 lakh to the first defendant. All these facts clearly show that the plaintiff was always ready and willing to perform his part of the contract. Whereas the defendants, having set up the prior agreement has sold the property to the 4th defendant only in order to defeat the rights of the plaintiff. Hence, it is the contention of the learned counsel appearing for the plaintiff /



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appellant that the 4th defendant is not a *bona fide* purchaser for value without notice. Therefore, the plaintiff is entitled to specific performance which has not been properly considered by the trial Court.

12. It is the further contention of the learned counsel appearing for the plaintiff / appellant that with regard to the plea of material alteration, there is no averment in the written statement and the said plea has been taken only in the additional written statement, which has been filed much delay and that itself clearly shows that the defence has been set up only to defeat the rights of the plaintiff. The trial Court has clearly found that Ex.B4, the unregistered agreement dated 15.05.2006 was created only for the purpose of the case and when the trial Court having found that, ought to have granted specific performance. It is the contention of the learned counsel appearing for the plaintiff / appellant that the original documents have also been handed over to the plaintiff at the time of agreement. These facts clearly show that the plaintiff was always ready and willing to perform his part of the contract and the fourth defendant is not a *bona fide* purchaser. Therefore, the plaintiff is certainly entitled to specific performance.



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13. The learned counsel appearing for the defendants / respondents that the trial Court after analyzing the entire evidence has found that the plaintiff has approached the Court with unclean hands. Further, with regard to the corrections of survey number made in EX.A1 and Ex.A2, there was no signature of the parties. When the legal notice dated 22.08.2006 was issued by the plaintiff, the original survey number alone has been mentioned. Similarly, when the paper publication was effected on 23.08.2006, in which also the original survey number has been mentioned. After issuing the above notice, the survey number has been corrected before filing the suit. These aspects have been clearly admitted by the plaintiff himself. Therefore, when the document itself materially altered and suit has been filed, the plaintiff is certainly not entitled to specific performance. The trial Court has clearly found that the plaintiff has not approached the Court with clean hands. Further, it is the contention of the learned counsel appearing for the defendants / respondents that though three months time has been stipulated, except making a small advance amount, no other steps whatsoever has been taken by the plaintiff to pay the remaining sale consideration. The defendants, in fact, were in need of funds in order to clear the various mortgages. In order to clear the loan, the sale agreement has been executed in favour of the 4th defendant. When the plaintiff has not shown any readiness and willingness to pay the amount, he is not entitled to



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specific performance. On the other hand, the 4th defendant has cleared the mortgage loan of the defendants 1 to 3 and paid the remaining sale consideration. Therefore, it is the contention of the learned counsel appearing for the defendants / respondents that when the plaintiff has failed prove the readiness and willingness and approached the Court with the unclean hands, he is not entitled to the relief of specific performance.

14. In the light of the above submissions, now the point arise for consideration in this appeal are as follows:

1. Whether the plaintiff was always ready and willing to perform his part of contract?
2. Whether the plaintiff has not approached the Court with clean hands?
3. Whether the plaintiff is entitled to specific performance as prayed for?

15. On a perusal of the documents, particularly Ex.A1 and Ex.A2, it is seen that the above said documents have been executed by the defendants 1 to 3 in respect of their undivided shares and the execution of the contract has not been disputed. It is the only contention of the defendants that the plaintiff was also aware of the preexisting contract with 4th defendant dated 15.05.2006. Further, the



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sale agreement dated 31.05.2006 has been executed in favour of the plaintiff only on the condition that if the 4th defendant failed to perform his part of contract, they will execute the sale deed in favour of the plaintiff. In the meanwhile, the defendant has cleared all the loans and paid sale consideration and therefore, they executed the sale in favour of the 4th defendant.

16. On a perusal of the documents viz., Ex.A1 and Ex.A2, it is seen that the time agreed to complete the sale is three months and further it is also stipulated that in the event the entire sale consideration has not been paid, within the period of time agreed, the advance amount shall be forfeited. The terms agreed between the parties to forfeit the advance amount if the defendant has not paid the amount within three months, makes it clear that the parties were in fact intended to make the time as an essence of contract. Be that as it may. Having entered into a contract on 31.05.2006, to pay the remaining sale consideration within a period of three months, except making another sum of Rs.1 lakh of payment to the first defendant, the plaintiff has not taken any steps to pay the remaining sale consideration and get the sale deed executed. Whereas, first time the legal notice has been issued on 21.08.2006 under Ex.A4 and immediately, the publication has been effected on 23.08.2006 under Ex.A6. Except paying Rs.1 lakh on



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05.08.2006 to the first defendant, he has not taken any active steps to pay the remaining sale consideration.

17. The legal notice-Ex.A4 and the paper publication-Ex.A6 make it clear that notice has been issued in respect of the S.No.364/2C Acre 2058 and 363/8 Acre 3.74. The publication has also been issued in respect of the above survey number. Office copies of the legal notice-Ex.B2 filed also contained the same survey number. These facts clearly show that survey number in the contract has been altered at the later point of time. If really, the contract was entered with incorrect details of the survey number and alteration has been made on the date of agreement itself as contended by the plaintiff, the legal notice and the publication issued by the plaintiff should have been contained the altered survey number. Whereas, EX.A4 and Ex.A6 legal notice and publication contained only the original survey number mentioned in the contract. These facts clearly show that alteration has been made subsequently just before filing the suit. Therefore, any alteration is made in the agreement unilaterally without the consent of the other party, such alteration certainly amounts to material in nature and the plaintiff has made such alteration unilaterally and filed the suit. Therefore, only inference can be drawn against him is that he has not come to the Court with clean hands.



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18. The evidence of P.W.1 in this regard when carefully perused, it is found that he has admitted that the correction has been made after issuing Ex.A4 and Ex.A6. Thereafter, other notice has also been sent and he has also specifically admitted that survey number has been corrected just prior to the filing of the suit after seeing the original document. Only on the basis of the original document, the correction has been made in the agreement. Therefore, when the plaintiff has approached the Court by altering the suit survey numbers and filing the suit, certainly he is not entitled to equitable relief of specific performance. It is further to be noted that if really there was mistake crept in survey number at the time of agreement, the plaintiff ought to have issued the legal notice or by calling upon the defendants indicating the same. Whereas only for the purpose of filing the case, correction has been made as if it was made at the time of agreement itself. The above conduct of the plaintiff will disentitle him to seek equitable relief.

19. The evidence on record further indicates that the fourth defendant has purchased the property though in a prior agreement was set up by the defendants, which was disbelieved by the trial Court. The fact remains that the property has been transferred to the 4th defendant and he has also discharged the various mortgage loans borrowed by the defendants 1 to 3 and Ex.B6 to Ex.B20



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has been filed to prove that various mortgage loans have been cleared and the property has been redeemed. This fact clearly shows that the property has been registered in favour of the 4th defendant only for the purpose of clearing the loans borrowed by the defendants 1 to 3. Admittedly, the plaintiff has agreed to purchase the property within a period of three months. However, except making a small advance amount of Rs.10,000/- to the first defendant on the date of agreement and another sum of Rs.1 lakh on 05.08.2006 and also a sum of Rs.1 lakh, as advance amount to the defendants 2 and 3 on the date of agreement, he has not made any attempt to tender the balance sale consideration. Therefore, when the defendants have agreed to sell the property only to get rid of the debts, depending on the sale consideration and the same has not been paid within a time, only on the basis of legal notice sent on 21.08.2006 followed by publication on 23.08.2006, it cannot be said that the plaintiff was always ready and willing to perform his part of contract.

20. Further, to show that he had a capacity to mobilize the remaining amount of sale consideration at the relevant point of time and had relevant amount in his hand, there was no evidence available on record. Therefore, in the absence of establishing the readiness and willingness by the plaintiff, he is certainly not



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entitled to the specific performance. Further, the admission in the cross examination of P.W.1, also clearly shows that after entering into a sale agreement viz., Ex.A1 and Ex.A2, the plaintiff has not met the defendants and only for the first time i.e., on 05.08.2006, as the first defendant asked for Rs.1 lakh, he sent the said amount by way of Demand Draft. He has also further admitted in the cross examination that he has not verified the encumbrance in the suit property and not even applied for the encumbrance certificate. He has also admitted that he called the defendants over phone on 20.08.20006 and he has not called them on any other dates and to prove the same, Ex.A7, telephone Bills have been marked. It is also makes it very clear that the plaintiff was not ready and willing to perform his part of contract.

21. Further, the plaintiff was specifically admitted in his evidence that survey number was altered in Ex.A1 only at the time of filing the suit. Though the plaintiff having entered an agreement to conclude the contract within a period of three months, he slept over without taking any active steps to perform his part of contract, except sending the legal notice and issuing publication. Further the evidence of P.W.1 indicates that he has not made any effort even to clear the mortgages by paying the remaining sale consideration. All these facts clearly



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show that the plaintiff has not established his readiness and willingness. That apart he has come to the Court by making alteration unilaterally. This also is not entitled to seek relief of specific performance. Though the trial Court has disbelieved Ex.B4, the sale agreement dated 15.05.2006, which was entered between 4th defendant and the defendants 1 to 3, the fact remains that the plaintiff has not established the readiness and willingness to perform the part of his contract. Besides he has also altered the survey number and not approached the Court with clean hands. Such view of the matter, the equitable relief of specific performance cannot be granted in favour of the plaintiff. Accordingly, all these points are answered.

22. In the result, this Appeal Suit is dismissed and the judgment and decree passed by the learned I Additional District Court, Tirunelveli, in O.S.No.57 of 2006, dated 23.06.2015, is confirmed. No costs.

28.04.2023

NCC : Yes /No
Index : Yes/No
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To

- 1.The I Additional District Judge, Tirunelveli.
- 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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Judgment in
A.S.(MD)No.3 of 2016

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