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S.A.(MD).No.339 of 2017

THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **22.11.2023**

CORAM:

THE HONOURABLE **MRS.JUSTICE S.SRIMATHY**

S.A.(MD).No.339 of 2017

and

C.M.P.(MD)Nos.7261 and 7262 of 2017

M.Sakunthala Manuelraj

... Appellant

/Vs./

T.Anbalagan Alexandar

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the impugned Judgment and Decree passed by the Learned 1st Additional District Judge, Thoothukudi, dated 09.02.2017, in A.S.No.9 of 2015 reversing the impugned Judgment and Decree passed by the Learned Subordinate Judge, Thoothukudi, dated 07.12.2012, in O.S.No.23 of 2006.

For Appellant : Mr.N.Dilip Kumar

For Respondent : Mr.S.Kumar

JUDGMENT

The plaintiff has filed a suit for specific performance directing the defendant to execute the sale deed by receiving the balance consideration of Rs. 50,000/-.



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2. The brief facts of the case are that the sale agreement was executed on 03.06.2004 for the sale consideration of Rs.2,00,000/- and the same was registered. On the date of sale agreement, the plaintiff has already paid 75% of the sale consideration of Rs.1,50,000/-. The balance sale consideration payable by the plaintiff is Rs.50,000/- and the period fixed is one year. The plaintiff has stated that she has means to pay the same, since she has sufficient money in Canara Bank, Nazareth Branch and also in Cooperative Bank, Prakasapuram. Apart from the same, the plaintiff is having landed properties and she has cash in hand. The plaintiff was repeatedly requesting the defendant to receive the balance sale consideration Rs.50,000/- and to execute and register the sale deed in respect of the suit schedule property at the expenses of the plaintiff. The plaintiff further submitted that she and her daughter are at Bhilai and she used to come often to her native place but the defendant was evading to receive the balance of sale consideration Rs.50,000/- and to execute a sale deed. Further the defendant is trying to sell the schedule property for higher price. Hence, the plaintiff has issued suit notice dated 22.11.2005 and the defendant has received the same on 28.11.2005. Since the defendant has refused to execute the sale, the plaintiff has filed the suit on 13.02.2006.

3. The defendant has filed written statement denying the transaction



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as sale agreement and stated the defendant had not agreed to sell the suit property.

But the transaction between the plaintiff and the defendant is only loan transaction. The defendant has taken money from the plaintiff and the dispute arose while calculating interest. The sale agreement is created for the sake of the case and all the averments stated by the plaintiff ought to be proved by the plaintiff. Further the defendant submitted that the defendant is challenging the judgment of the Courts below only to the extent of adverse findings against him. The defendant is relying on the judgment of the Hon'ble Supreme Court in the case of *Shri Saurav Jain and another Vs. A.B.P. Design and another* reported in **2022 (1) CTC 235**. Hence, the defendant submitted that his plea is against the adverse finding of loan transaction alone and the same may be considered.

4. The Trial Court after considering the evidence had allowed the suit and directed the plaintiff to pay the balance amount of Rs.50,000/- and on such payment directed the defendant to execute the sale deed. Aggrieved over the same the defendant has preferred an appeal. In the meanwhile, the plaintiff has filed an execution petition and the sale has been executed by the Sub Judge, Thoothukudi on 16.09.2014. The Appellate Court has reversed the finding and has directed the plaintiff to repay the advance amount of Rs.1,50,000/- at 9% interest and from 09.03.2017 onwards with 12% interest. Aggrieved over the same, the plaintiff has



preferred the present second appeal.

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5. The second appeal was admitted on the following two substantial questions of law:

“(A) Whether the First Appellate Court had correctly applied the provisions under Section 16(c) and Section 20 of the Specific Relief Act to reject the case of the plaintiff?”

“(B) Whether the First Appellate Court is correct in reversing the Trial Court finding that the onus is upon the defendant to prove that the appellant is not ready and willing to perform the contract rather than demanding the plaintiff to prove readiness and willingness due to his denial of the sale agreement and contending it as a security document?”

6. The first substantial question of law is whether the case of the plaintiff has to be rejected under Section 16(c) and Section 20 of the Specific Relief Act? The relevant provisions of the sections are extracted hereunder:

“Section 16:

Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

[(a) who has obtained substituted performance of contract under section 20; or]2

(b) who has become incapable of performing, or violates any essential term



of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) 3[who fails to prove] that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (c),—

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff 4[must prove] performance of, or readiness and willingness to perform, the contract according to its true construction.

Section 20:

20. 3[Substituted performance of contract.—(1) Without prejudice to the generality of the provisions contained in the Indian Contract Act, 1872 (9 of 1872), and, except as otherwise agreed upon by the parties, where the contract is broken due to non-performance of promise by any party, the party who suffers by such breach shall have the option of substituted performance through a third party or by his own agency, and, recover the expenses and other costs actually incurred, spent or suffered by him, from the party committing such breach.

(2) No substituted performance of contract under sub-section (1) shall be undertaken unless the party who suffers such breach has given a notice in



writing, of not less than thirty days, to the party in breach calling upon him to perform the contract within such time as specified in the notice, and on his refusal or failure to do so, he may get the same performed by a third party or by his own agency:

Provided that the party who suffers such breach shall not be entitled to recover the expenses and costs under sub-section (1) unless he has got the contract performed through a third party or by his own agency.

(3) Where the party suffering breach of contract has got the contract performed through a third party or by his own agency after giving notice under sub-section (1), he shall not be entitled to claim relief of specific performance against the party in breach.

(4) Nothing in this section shall prevent the party who has suffered breach of contract from claiming compensation from the party in breach.”

7. Under Section 16(c) the person who is seeking specific performance ought to prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. In the present case, the plaintiff had averred in the plaint that the plaintiff was repeatedly requesting the defendant to receive the balance sale consideration Rs.50,000/- and to execute and register the sale deed in respect of the schedule property and further stated that she and her daughter are at Bhilai and she used to come often to her native place but the defendant was evading to receive the



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balance of sale consideration Rs.50,000/- and to execute a sale deed. Except for this averment there is no other evidence to show that the plaintiff is ready and willing to perform his part of the contract. Even in the above averment the plaintiff had not mentioned the dates, when she approached the defendant to perform the contract and on which date the defendant refused to execute. It is only bare statements.

8. Further the contract ought to be completed within a period of one year i.e. on or before 02.06.2005 and the plaintiff has not stated any reason for not completing her part of the contract within a period of one year. From the date of completion of one year till the date of issuance of suit notice, the plaintiff has not stated whether the plaintiff was ready and willing to complete the contract. Moreover, the plaintiff had not taken any steps to issue notice during the contract period of one year, which is an important aspect to determine the readiness and willingness. It is only subsequently, after the period of one year, the plaintiff has issued a suit notice on 22.11.2005 i.e. after five months of contract period. According to the plaintiff, the defendant has received it on 28.11.2005. But the defendant has stated that he has never received such notice from the plaintiff and further submitted that the plaintiff was not ready and willing to complete the contract. The learned Counsel appearing for the defendant (respondent herein)



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relied on the judgment rendered by this Court in the case of ***Durairaji and***

another Vs. Nadarajan reported in ***(2021) 3 CTC 520*** wherein the Learned Single

Judge has stated that merely stating in the plaint that he is ready and willing is not sufficient, the Act mandates to prove certain things and it is the duty of the Court to frame issue whether the party is ready and willing. In the above said case, the contract was entered between the parties and the party was willing to complete it within a period of two years and the Court held when the party was having means to pay Rs.37,000/-, it is not believable that the party could not pay the balance of Rs.10,500/-, hence the Learned Single Judge disbelieved the case of the party thereunder. In the present case also the balance payable is only Rs.50,000/- and the plaintiff is claiming that she is having means to pay the same, wherein the plaintiff stated that she is having Bank accounts wherein she is maintaining more than Rs.5,000/- in a month, the plaintiff is having landed properties and cash in hand, the plaintiff is earning through agriculture activities and the plaintiff's daughter is having a job at Bhilai. Hence submitted that the plaintiff has means to pay the balance amount. Further the plaintiff had stated in the deposition that every year through agriculture activities, she is earning Rs.50,000/- and had deposited the said amount in the Bank account. With such amount, she has already paid Rs.1,50,000/- and sought time to pay the balance amount within a period of one year and had produced the passbook marked as Ex.A5 and Fixed



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Deposit Ex.A6. This Court has perused the passbook wherein it is seen that from 2004 onwards the plaintiff is maintaining more than Rs.1,00,000/- and odd.

Subsequently, the plaintiff has sought one year time to pay the balance amount and to complete the transaction. On perusal of the Bank passbook, it is seen that the plaintiff was maintaining minimum Rs.5,000/- in the Bank accounts until 2011. Moreover, she has pleaded in the plaint that she is having some landed properties and also cash in hand. Further the plaintiff is having fixed deposits in another bank. From these it is evident the plaintiff is having means to pay. In such circumstances, this Court is of the considered opinion that the plaintiff has means to pay the balance amount. When the plaintiff has means to pay balance of Rs. 50,000/-, then seeking one-year period for paying the balance of Rs.50,000/- is unbelievable. Hence the said judgment is squarely applicable to the present case.

9. The Learned Counsel appearing for the appellant / plaintiff relied on the judgment rendered in the case of **George Kavalam Vs. P.Vijayalakshmi** in S.A.No.695 of 2006, vide judgment, dated 18.06.2015 and submitted that when the defendant has not taken a plea that there is absence of readiness and willingness and he has not adduced any evidence to that effect, then the case of the defendant cannot be believed. This Court cannot accept the said contention since the plaintiff ought to discharge his burden of proof first as per Section 16(c)



of the Specific Relief Act. Even in the said judgment of **George Kavalam** the Hon'ble Court had held that the plaintiff had discharged his duty and had relied on the exhibits, it only thereafter proceeded to state that the defendant ought to have taken a plea in the written statement that the plaintiff was not ready and willing. The relevant portion of the judgment is extracted hereunder:

“16. In a suit for specific performance it shall not be enough for the plaintiffs to prove the execution of the agreement and passing of consideration in the form of advance. As per section 16(c) of the Specific Relief Act, 1963 he has to plead and prove that he has either performed his part of the obligations under the agreement for sale or has been ready and willing to perform his part of the obligations under the agreement for sale. In compliance with the mandate provided in the said section, the plaintiff has made necessary plea to the effect that right from the date of execution of the agreement for sale he had been ready and willing to pay the balance amount of sale consideration and get the sale deed executed and registered in his name at his cost and that it was the respondent/defendant, who postponed the same under one pretext or other. In fact under Ex.A5, the appellant/plaintiff chose to issue a notice on 14.02.1998 calling upon the respondent/defendant to be present at 10.00 a.m. on 19.02.1998 in the Registrar's office to collect the balance sale consideration and execute the sale deed in terms of the agreement. The said notice was received by the appellant/plaintiff on 16.02.1998 as evidenced by Ex.A6. The respondent/defendant did not turn up and



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she had not even chosen to send a reply to the said notice. **In addition**, even in the written statement of the respondent/defendant, there is no specific denial of the readiness and willingness on the part of the appellant/plaintiff. In paragraph 5 of the written statement, it has been stated that she was not aware of several requests allegedly made by the plaintiff as averred in paragraph 3 of the plaint. Nowhere in the written statement the respondent/defendant had taken a specific plea that there was absence of readiness and willingness on the part of the appellant/plaintiff. There is also no such evidence adduce on the side of the respondent/defendant, whereas PW1 (plaintiff) in his evidence made it clear that he was having sufficient money for making payment of the sale consideration. He has also produced Ex.A12, the banker's certificate to show that he was having Rs.3,05,000/- in his account as on 12.12.2002. By the cumulative effect of oral and documentary evidence, the appellant/plaintiff proved his readiness and willingness to perform his part of the obligations under the agreement. He has also proved his capacity to make payment and the same has not been disproved by the respondent/defendant by reliable evidence. Hence the finding of the learned trial judge regarding the readiness and willingness on the part of the plaintiff also ought not to have been interfered with by the lower appellate judge and there is no justification for such interference. For all the reasons stated above, the third substantial question of law deserves to be answered in favour of the appellant and against the respondent herein.”



10. When the law states that the plaintiff seeking specific performance ought to plead in the plaint that he was ready and willing. Thereafter the plaintiff ought to submit proof that he was ready and willing. Then only the burden would shift to the defendant, wherein the defendant ought to have pleaded that the plaintiff was not ready and willing and also submit evidence to prove his version of case. In the present case the plaintiff had pleaded that she was ready and willing but has not submitted proof to substantiate her case. As stated supra within one year of contract period the plaintiff had not issued any notice stating that she was ready and willing to complete the contract. Subsequent issuance of notice (i.e. after five months of contract period) would not prove the case of the plaintiff that she was ready and willing. It should be within the contract period the plaintiff ought to have issued notice, then only there would be sufficient proof of ready and willingness. Therefore, by considering the aforesaid two judgments stated supra and the relevant records along with deposition, this Court is of the considered opinion that the readiness and willingness should be proved by the person who is claiming that he is ready and willing. In the present case, since there is five months delay in issuing notice calling upon the defendant to complete the contract, then the same would prove that the plaintiff was not ready and willing to complete the contract within the contract period of one-year. Hence there is no readiness and willingness on the part of the plaintiff.



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11. The Learned Counsel appearing for the plaintiff / appellant tried to convince this court by stating that the plaintiff was travelling frequently and hence could not complete it within a period of one-year. And also submitted that the parties are known to each other for more than eight years and the defendant has accepted that the plaintiff's son is a friend of the defendant and hence the delay in issuance of notice for five months cannot be taken for denying the prayer of specific performance. But the Learned Counsel appearing for the defendant submitted that there was no agreement to sale at all, since there was only loan transaction between the parties. In the written statement the defendant had submitted that there was dispute while arriving at interest to the loan transaction. But the defendant / respondent had suffered a finding in the Court below, wherein the Courts below had held that the defendant has accepted the sale agreement during cross examination and hence there is no loan transaction. For which the defendant is relying on the judgment of the Hon'ble Supreme Court in the case of ***Shri Saurav Jain and another Vs. A.B.P. Design and another*** reported in 2022 (1) CTC 235, wherein it is held any adverse remarks can be challenged. The principle in Order 41 Rule 22 is to do complete justice to party other than aggrieved party to challenge any adverse findings against them. But the Hon'ble Supreme Court had invoked Article 142 of the Constitution of India and had granted the relief. But such power is not available to the High Courts and hence



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this plea of the defendant cannot be entertained.

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12. Based on the above analysis both the substantial questions of law are held against the plaintiff. The plaintiff is not entitled to the relief of specific performance and hence the sale deed already executed by the Sub Court, Tuticorin on 16.09.2014 is cancelled. Since this Court has held that the plaintiff is not entitled to specific performance, at the same breath the defendant also is not entitled to the relief to set aside the adverse remarks regarding the loan transaction. Moreover, the defendant had not filed any appeal or cross appeal. Therefore, the Judgement and Decree of the First Appellate Court directing the plaintiff to return the amount of Rs.1,50,000/- with 9% interest and thereafter 12% interest is also set aside. This would be appropriate, since the defendant has stated in the written statement that there was dispute regarding calculating the interest alone. Hence, the second appeal is partly allowed in above terms. No costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes / No

NCC : Yes / No

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TO:

1. 1st Additional District Judge, Thoothukudi.
2. Subordinate Judge, Thoothukudi.
3. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Tmg

Judgment made in
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Dated:
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