



A.S.Nos.172 & 173 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.02.2024

PRONOUNCED ON : 26.04.2024

CORAM

THE HONOURABLE **MR.JUSTICE K.KUMARESH BABU**

A.S.Nos.172 & 173 of 2016

K.Thulasimani ... Appellant/1st defendant
in both Appeals
Vs

1.Prakash Chand Jain ... 1st Respondent/Plaintiff
in A.S.No.172 of 2016

1.Indu Bala Jaion ... 1st Respondent/Plaintiff
in A.S.No.173 of 2016

2.Indusind Bank Ltd.,
by its Branch Manager,
1115, Mettur Road,
Erode. ... 2nd Respondent/2nd defendant
in both Appeals

COMMON PRAYER: These First Appeal have been filed Under Order 41 Rule 1 read with Section 96 of the Civil Procedure Code, against the common judgment and decree dated 14.06.2013 made in O.S.Nos.37 & 38 of 2010, on the file of the learned First Additional District Court, Erode.



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For Appellants : Ms.Elizabeth Ravi in both Appeals.

For Respondents : Mr.P.J.George for R1 in both Appeals

Ms.Pavithra Sundarajan
for Mr.K.Moorthy for R2
in both Appeals

COMMON JUDGMENT

These instant appeals have been filed by the respective first defendant as being aggrieved against the common judgment of the Court below granting a decree of specific performance to execute the sale deeds in respect of the suit properties on the strength of the agreement of sale entered by them in favour of the plaintiff on deposit of the balance sale consideration. For easy reference, the parties are referred as per their rank in the Original Suit.

2.Heard M/s.Elizabeth Ravi learned counsel appearing for the appellant/first defendant in both cases, Mr.P.J.George learned counsel appearing for the first respondent/plaintiff in both cases and M/s.Pavithra Sundarajan learned counsel for Mr.K.Moorthy learned counsel appearing for second respondent bank in both cases.



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3.The facts which lead to the present appeals in a nut shell is that the first defendant is the owner of both the suit properties. Both the plaintiffs and the first defendant entered into the sale agreements on 25.08.2009 and 02.09.2009 respectively to execute the sale deed in respect of the suit properties within a period of 3 months from the date of execution of sale agreements. As per the sale agreements, the sale consideration was fixed as Rs.13,75,000/- and Rs.8,25,000/-. The plaintiffs in both the suits had paid Rs.2,50,000/- and Rs.1,50,000/- respectively towards the advance by way of cheque. The endorsement made in the sale agreement also evidence the payment of further advance for the performance of the obligation in the sale agreement. The first defendant had mortgaged the suit property with the second defendant and redeemed those properties. The first defendant denied the execution of the sale agreements in favour of the plaintiffs and the advance amount received from the plaintiffs in the written statement. The second defendant admitted the loan and denied the fact that the second defendant was not aware of the transaction between the plaintiffs and the first defendant in the written statement and the



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second defendant contended that the second defendant is not a necessary party to both the suits.

4. Considering the pleadings and the evidences available before the trial court, the following issues were framed by the Trial Court for consideration in **O.S.No.37 of 2010:-**

- 1) Whether the plaintiff is entitled to the relief of specific performance of contract or refund of advance amount as alleged?*
- 2) Whether the plaintiff is entitled a charge over the property for proper payment of the decree amount as alleged?*
- 3) Whether the plaintiff is ready and willing to perform his part of the contract as alleged?*
- 4) Whether the first defendant by negotiating to sell the property to plaintiff as alleged?*
- 5) Whether the second defendant is unnecessary party and the suit is bad for mis-joinder of parties as alleged?*
- 6) To what relief if any the plaintiff is entitled to?*

O.S.No.38 of 2010:-

- (1) Whether the Suit is bad for mis-joinder of parties?*



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(2) Whether the sale agreement was created for loan transaction?

(3) Whether the endorsement dated 07.12.2009 is true, genuine and supported by consideration?

(4) whether the plaintiff is entitled to get the relief of specific performance?

(5) If not, whether the plaintiff is entitled to get refund of advance amount?

(6) To what relief plaintiff is entitled to?

5. The learned counsel appearing for the appellant/first defendant would submit that the respective plaintiffs had approached the Court with unclean hands and have suppressed the materials facts and hence, they would not be entitled for the relief claimed for in the Suit. She would submit that the first defendant is the absolute owner of the suit schedule property. The property had been mortgaged with the second defendant bank and since coercive steps have been taken by the bank, the first defendant had approached the plaintiffs for a hand-loan to redeem the property from the bank. However, the plaintiffs had insisted upon the execution of sale agreements as a security. She would further submit that when such was the stand of the first defendant, it was incumbent upon the plaintiffs to prove that the sale



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agreements had been entered with an intention to sell the property.

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6.She would further submit that the plaintiffs in the respective suits have not examined any witness to substantiate that the sale agreements had been entered with an intention to sell the property. She would further submit that when there was no intention on the part of the first defendant to sell the property, the plaintiffs cannot on the strength of the sale agreement could insist upon the specific performance of the same. She would submit that the Court below had failed to frame issues as regards to the enforceability of the agreement of sale. Contrary to the onus of burden of proof to be established by the plaintiffs, the Court below had shifted the onus on the first defendant.

7.She would vehemently contend that time is the essence of the contract. Even according to the said agreement of sale, the time for execution of the sale deed was three months. But however, the plaintiffs have not expressed their readiness and willingness to perform their part of contract and therefore, the decree is bad in law. She would further contend that the plaintiffs had even failed to deposit the



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remaining sale consideration at the time of filing the suits, but had only produced the bank accounts to contend that the amount was always available with them. In that context, she would reply upon the judgment of the Division Bench of the Apex Court in the case of **Manjunath Anandappa urf Shivappa Hanasi Vs Tammanasa and others**, reported in **2003 (2) CTC 109** and the judgments rendered by this Court in the case of **Vasanth and others Vs M.Senguttuvan**, reported in **1998(1) CTC 186** and in the case of **Chinnammal and another Vs Perumal** in S.A.No.980 of 2013. Relying upon the said judgments, she would submit that agreement holder should prove his readiness and willingness continuously from date of agreement upto the date of hearing. Therefore, equitable remedy should not be granted, if agreement holder is not ready to take up the sale deed even if it is for a single day.

8.She also contended that according to both the sale agreements, advance amounts were paid by way of cash, in contra to the averments in the plaint and the evidence of P.W.1 where it is admitted that the alleged advance amount paid by way of cheques. She would also contend that the suit for specific performance is the discretionary relief



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and it cannot be granted merely because it is lawful to do so. Hence she would contend that the Appeal Suits would have to be allowed and the judgment and decree of the Court below would have to be set aside.

9.Countering her arguments, Mr.P.J.George, the learned counsel for the first respondents/plaintiffs submitted that the first defendant is the absolute owner of both the suit properties. The total extent of the suit property is 3200 sq.ft., out of which an extent of 2000 sq.ft. is the subject matter of O.S.No.37 of 2010 and remaining 1200 sq.ft. is the subject matter of O.S.No.38 of 2010. The learned counsel for the first respondent contented that the first defendant borrowed loan from the second defendant as equitable mortgage and deposited the title deed. He also argued that the second defendant initiated recovery action as against the first defendant for the loan amount due. In the meanwhile, the first defendant approached the plaintiff to sell the suit property for a valuable sale consideration and executed the sale agreements.

10.The learned counsel for the first respondent vehemently submitted that the first defendant approached the plaintiff and demanded further advance and also sought for further extension of time



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for 6 months, on the pretext the 1st defendant requires time to clear the encumbrances. Accordingly, the plaintiff paid the further advance and endorsements were made in that respect. He also contended that the plaintiff had deposited the balance sale consideration along with the sale expenditures in his account with the second defendant bank and submitted the proof for the same. In spite of repeated reminders to the first defendant without any rhyme or reason the first defendant postponed the sale and refused to execute the sale deed pointing the hike in the price of the suit property. He further submitted that the plaintiffs issued notice to the first defendant on 07.01.2010 to execute the sale deeds and waited only because the first defendant had requested time for execution of sale deed. Therefore, there is no fault on part of the plaintiffs. In that context, he would rely upon the judgment of the learned Single Judge of this Court in the case of *A.N.Arunachalam Vs T.Sivaprakasam and another* in *A.S.No.270 of 2007*. Relying upon the said judgment, he would contend that when the time is the essence of a contract, the period of three years begins to run from the date fixed for the performance.

11.He also submitted that the plaintiffs were always ready and



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willing to execute the sale agreements and to establish the same, he had produced the proof of the available balance for the sale consideration in his account in the second defendant's bank. He also contended that the trial court has correctly pointed out that the first defendant denied the execution of sale agreements itself in the written statement, whereas in contra, the first defendant in the cross examination denied the signatures in the endorsement and stated that the sale agreements were executed only for security purpose and there is no intention to sell the suit properties. He also argued that the court below has rightly decided that though the first defendant denied the endorsements in written statements, she admitted that she had received a further advance amount. Hence, the Trial Court had correctly arrived at a conclusion that the 1st defendant executed the sale agreements in favour of the plaintiffs as well as the endorsements made in the sale agreements are true and genuine.

12. I have heard the rival submissions made on either side and perused the materials placed on record.

13. On considering the arguments made by the learned counsel



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appearing on either side and also the judgment of the Court below, the

following issues arise for consideration:-

- i) whether the claim of the plaintiffs are barred by limitation?*
- ii) whether the endorsements have been made by the respective parties?*
- iii) whether the sale agreement was entered only as a security for the hand loan?*
- iv) whether the plaintiff is ready and willing to perform their part of contract?*
- v) whether the Court below was right in decreeing the Suits?*

Issue No.(i)

14.The main contention of the learned counsel appearing for the first defendant is that the Suit is barred by limitation. The sale agreements in the respective Suits have been entered upon on 25.08.2009, and 02.09.2009. The time for completion of sale under



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both the said agreements was three months. The said sale agreements have been marked as Ex.A1 and Ex.A6. Under the said agreements, endorsements have been made on 07.12.2009, and the same have been marked as Ex.A12 and Ex.A13. A reading of the said endorsement, signed by both the plaintiffs and the first defendant would indicate that time has been extended for further six months to perform the obligations under Ex.A1 and Ex.A6 and the said endorsements also evidence payment of further amount by the plaintiffs to the first defendant. The suits were presented by the respective plaintiffs in the year 2010.

15.Article 54 of the Schedule II of the Limitation Act, 1963 deals with the “limitation for specific performance” which reads as follows:-

54	For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.
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16.The period of limitation for instituting a suit for specific performance is three years which shall be counted from the day fixed for performance and if no such date is fixed, when the plaintiff has notice that performance is refused. In the present case, the agreements for sale is under Ex.A1 and Ex.A6, dated 25.08.2009 and 02.01.2009,



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respectively. Under both the agreements, three months period had been fixed as an outer limit for the parties to perform their part of contract.

By a further endorsement in both the sale agreements, which have been marked as Ex.A12 and Ex.A13 dated 07.12.2009, which would show that the time limit was extended to a further period of six months. Even though the said endorsement is beyond the period of three months, under the said agreements for sale and in view that the parties have consciously entered upon the further endorsements on 07.12.2009, fixing six months time period for completion of the sale, the period fixed under the said sale agreement got extended upto 06.05.2010. Therefore, the outer limit date fixed for performance of the said agreement under the original sale agreements dated 24.11.2009 and 01.12.2009 respectively is 06.05.2010. If the agreement had not been performed, then the period of limitation starts from the said date.

17. Admittedly, the Suits have been filed in the year 2010 i.e., well within the three years from the period fixed for performance, even excluding the period of the endorsement that had been made on 07.12.2009 for extension of the time. Therefore, this Court is of the view that the Suits have been filed well within the period of limitation.



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Issue No.(ii)

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18.The next issue is that the endorsements have been manipulated by the plaintiffs by stating that the said endorsements were not made by the first defendant. The said arguments at any stretch of imagination cannot be accepted for the simple reason that the first defendant had infact taken out an application for referring the documents for evaluation by an expert and the same had been dismissed, against which the first defendant had not taken any further steps. Therefore, no evidence has been placed before this Court to come to a different conclusion that the endorsements had not been made by the parties to the documents.

Issue No.(iii)

19.It is the case of the first defendant that the sale agreements have been made only as a security for the hand-loan that had been advanced by the plaintiffs to redeem the property which was under mortgage. The Trial Court, in its judgment had extracted a portion of the cross examination of the defendant. From which it is seen that the Ex.A1 & Ex.A6 were executed in the presence of a Notary Public at his office. The same has been categorically admitted to by the first



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defendant. The first defendant has also admitted that a part

consideration under the sale agreements, i.e., Ex.A1 & Ex.A6 had been

received through a cheque, of which amount had also been credited to

his account. Even though the first defendant had contested the

endorsements made and also the extension of time for performance of

agreement, the part consideration that had been received upto the date

was also mentioned. Though steps were taken by the first defendant to

refer the said endorsements for forensic examination and the same was

rejected by the Court, no further action had been taken first defendant.

In that aspect, I am of the view that the first defendant who claimed

that the endorsements had not been made by him, had failed to provide

any evidence to substantiate his claim, as there is a clear onus upon him

to substantiate such a claim. In such view of the matter, I am of the

view that the sale agreements were not entered as a security for hand-

loan, but had been made only to redeem the property from the second

defendant bank.

Issue No.(iv):-

20.The endorsements in agreement under Ex.A1 & Ex.A6 have

been made on 07.12.2009. The plaintiffs in the respective case, had



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also effected to Advocate's notice on 07.01.2010, which was returned with an endorsement "refused". Infact the Court below had given a specific findings that the address of the first defendant was the same as that of the address in the sale agreement and the defendant had purposefully evaded the notice issued by the plaintiffs to defeat the right of the plaintiffs. Immediately thereafter, the plaintiffs had also approached the Court and have pleaded that he was always ready and willing to perform the part of their contract. The sale consideration under Ex.A1 is for a sum of Rs.13,75,000/- out of which Rs.3,25,000/- had been received by the first defendant and the sale consideration under Ex.A6 is for a sum of Rs.8,25,000/- and as per the endorsement, the first defendant had received a sum of Rs.1,75,000/-.

21.Had the first defendant received the legal notice and had replied to the same suitably and if the plaintiffs have not called upon the first defendant thereafter to execute a sale deed on the fixed date, then they could be heard to say that the plaintiffs were not ready and willing to perform their part of contract. Therefore, I am of the view that the plaintiffs were ready and willing to perform their part of contract and it is the first defendant for the reasons best known to her tried to evade the obligations to be performed by her under Exs.A1 and



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Ex.A6.

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Issue No.(v):-

22.For the findings and reasonings recorded above, I am of the view that the Court below was correct in decreeing the Suit for specific performance as prayed for.

In fine, the Appeal Suits fail and the same are dismissed.

However, there shall be no order as to costs.

26.04.2024

Index: Yes/No

Speaking Order/Non Speaking Order

Neutral Citation:Yes/No

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K.KUMARESH BABU,J.

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To

The First Additional District Court, Erode

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