



A.S.No.813 of 2009

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.11.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE C.KUMARAPPAN

A.S.No.813 of 2009

and

C.M.P.No.9853 of 2024

1.S.Ramani

2.Lakshmi

...Appellants

Vs.

P.N.Balaji

...Respondent

Prayer: Appeal filed under Section 96 read with Order 41 Rule 11 of the Code of Civil Procedure, 1908, praying to set aside the judgment and decree of the Principal District Judge, Krishnagiri, dated 03.04.2009 in O.S.No.57 of 2006.

For Appellants : Mr.R.Bharath Kumar

For Respondent : Mr.G.Vigneswaran



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J U D G M E N T

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

For the sake of convenience, the parties are referred to as per their rank in the suit.

2. The instant appeal has been filed by the defendants in O.S.No.57 of 2006, a suit for specific performance.

3. According to the plaintiff, the defendants have entered into an agreement of sale on 05.10.2005 agreeing to convey an extent of 17.31 acres, which was described as Item Nos.1 to 8 in the agreement, for a total consideration of Rs.31,61,000/-. On the date of agreement, a sum of Rs.10,00,000/- was paid as advance. A period of one month was fixed for performance. The time fixed for performance ended on 04.11.2005. In the interregnum, the plaintiff paid a further advance of Rs.2,00,000/- and after 04.11.2005, the plaintiff paid a further advance of Rs.5,00,000/- on 06.11.2005 and another sum of Rs.1,00,000/- on 28.11.2005. Thus, the total sum of Rs.18,00,000/- was paid as advance.



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4. On 10.12.2005 the plaintiff issued a notice demanding performance of the contract, claiming that he has been ready and willing to perform his part of the contract. A notice was sent by the defendants on 01.04.2006 without reference to the notice issued by the plaintiff on 10.12.2005 admitting the agreement and claiming that they have come to know that the power of attorney holder M.M.Suresh Kumar, who had executed the sale deed in respect of 7.39 acres out of 17.31 acres of land subject matter of the agreement had forged the signature of the owner Ms.Vijayalakshmi in the power of attorney on 04.12.1997 and therefore their title have become defective and hence they cannot convey the entire property. On the said ground the defendants wanted the plaintiff to cancel the agreement and take back the advance.

5. The plaintiff sent a reply to the said notice on 13.04.2006 seeking execution of the sale deed in respect of the remaining lands excluding the 7.39 acres of land which is in controversy. To this a re-joinder was issued by the learned counsel for the defendants, wherein, this request was not



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acceded to. Another notice was sent by the learned counsel for the defendants upon instruction of the defendants on 30.08.2006 requiring the plaintiff to take back the advance.

6. Thereafter, the plaintiff came up with the suit seeking specific performance in respect of the total extent of 9.90 acres out of the extent of 17.31 acres, excluding the land which, according to the defendants, was in dispute. The plaintiff in the plaint itself had pleaded that in view of the stand taken by the defendants that the property which is described as Item Nos.1 to 4 in the schedule to the sale agreement purchased from Vijayalakshmi through her power of attorney M.M.Suresh Kumar is in dispute and therefore the said land is excluded and he is ready and willing to pay the balance of sale consideration proportionate to the extent to which he is seeking conveyance.

7. This suit was resisted by the defendants contending that time is the essence of the contract. The plaintiff was not ready and willing to perform his part of the contract. Fortunately for the plaintiff, the defendants



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admitted the agreement and receipt of Rs.18,00,000/- as advance as claimed by the plaintiff. The dispute was only with reference to 7.39 acres of land which was purchased by the defendants from one Ms.Vijayalakshmi. It was also claimed that the defendants were not ready to sell the land in piecemeal and therefore the suit itself has to be dismissed. It will be pertinent to point out that the 2nd defendant did not file a written statement separately and she adopted the written statement filed by the 1st defendant admitting the execution of agreement.

8. On the above pleadings, the learned trial Judge framed the following issues :-

- 1. Whether the plaintiff is always ready and willing to perform his part of the contract?*
- 2. Whether time is essence of contract?*
- 3. Whether the plaintiff is entitled for relief of specific performance and injunction as prayed for?*
- 4. To what relief the plaintiff is entitled?*

9. At trial, the plaintiff was examined as PW1 and another witness



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Mr.P.M.Nanjundasami was examined as PW2. The 1st defendant was examined as DW1. Exs.A1 to A5 were marked on the side of the plaintiff and Exs.B1 to B6 were marked on the side of the defendants.

10. On a consideration of the evidence on record, the learned trial Judge concluded that the plaintiff is entitled to seek part performance of the agreement in a case where the defendants themselves would contend that there is a cloud upon title to the remaining property. The learned trial Judge also found that the plaintiff has been ready and willing to perform his part of the contract. On the said finding, the learned trial Judge granted a decree as prayed for. Aggrieved the defendants are on appeal.

11. We have heard Mr.R.Bharath Kumar, learned counsel appearing for the appellant and Mr.G.Vigneswaran, learned counsel appearing for the respondents.

12.1. Mr.R.Bharath Kumar, learned counsel appearing for the appellant would vehemently contend that the plaintiff has to seek for specific



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performance of the agreement as a whole and he cannot seek performance of a modified agreement of his choice. He would also point out that the properties subject matter of the agreement are vastly different from the plaint schedule properties. He would therefore contend that the Court ought not to have decreed the suit for specific performance, where the properties are completely different and the execution of such decree would become difficult.

12.2. He would also further point out that the plaintiff was not ready and willing to perform his part of the contract. He would also point out that the time fixed under the agreement expired on 04.11.2005 and the suit was filed only during December 2006 i.e., after almost 13 months from the date of expiry of the time fixed under the agreement. The learned counsel would also further plead that the 2nd defendant/ 2nd appellant had not authorized the 1st defendant (her husband) to enter into an agreement and therefore the Court ought not to have granted specific performance.

13.1. Contending contra Mr.G.Vigneswaran, learned counsel



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appearing for the respondent would submit that Section 12 of the Specific Relief Act enables the plaintiff to seek performance of part of the agreement and that it is clear from the own showing of the defendants that they would not be able to perform part of the agreement. It is open to the plaintiff to seek performance of that part of the agreement which could be performed.

13.2. On the question of delay the learned counsel would submit that there was exchange of notices between the parties between 10.12.2005 to 30.08.2006. Therefore, it cannot be said that the plaintiff was not ready and willing to perform his part of the contract. He would also draw our attention to the fact that on 30.08.2006, the defendants have sent a notice to the plaintiff requiring him to cancel the agreement and take back the advance. He would also point out that the suit has been filed within the time allowed under law of limitation and therefore the plaintiff cannot be non-suited on the question of delay.

13.3. On the plea by the 2nd defendant that the 1st defendant was not authorized to deal with the property, the learned counsel would point out



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that the 1st defendant had signed the agreement as power agent of the 2nd defendant. All the notices prior to the suit have been issued jointly by the 1st and 2nd defendants. The 2nd defendant did not have a separate case before the trial Court, inasmuch as she adopted the written statement of the 1st defendant. She also did not led evidence separately. The learned counsel would further point out that there was no plea to the effect that the 1st defendant had no authority to represent the 2nd defendant either in the suit or in the appeal when it was filed. Only in the year 2024, this plea was sought to be introduced by way of an application to produce additional evidence under Order 41 Rule 27 of the Code of Civil Procedure.

14. On the above contentions of the learned counsel for the parties, the following points arise for determination:

- 1) Whether the plaintiff is entitled to seek part performance of the contract?*
- 2) Whether the plaintiff was ready and willing to perform his part of the contract?*
- 3) Whether the 2nd defendant be permitted to raise a plea that the 1st defendant had no authority to represent*



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her in the suit?

*4) Whether the petition in C.M.P.No.9583 of 2024
filed under Order 41 Rule 27 of the Code of Civil
Procedure could be allowed?*

Point No.1:-

15. On the question of part performance of the contract, the pleadings in the suit and the facts that are brought before the Court assumes significance. Agreement was entered into for a total extent of 17.31 acres. It consisted of nearly eight items of suit properties. The plaintiff issued a notice demanding performance of the agreement on 10.12.2005. The fact that time was not considered to be the essence of the contract is made out from the conduct of the parties, particularly the defendants in accepting the payments even after the time fixed under the contract. As already set out two payments were made after 04.11.2005 i.e., a sum of Rs.5,00,000/- on 06.11.2005 and a sum of Rs.1,00,000/- on 28.11.2005.

16. Immediately thereafter within a period of 15 days, the plaintiff issued a notice demanding performance on 10.12.2005. The defendants did

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not choose to reply. But, they came up with another notice on 01.04.2006 claiming that their title to a portion of property is under cloud, of course, by a revelation that the sale deed in their favour was executed by a person M.M.Suresh Kumar based upon a forged power of attorney said to have been executed by one Ms.Vijayalakshmi. It is also stated in the notice dated 01.04.2006 that the defendants have lodged a police complaint against M.M.Suresh Kumar for having committed forgery. What eventually happened to the complaint is not known. No evidence has been placed before the Court regarding the fate of the complaint and the fate of the title of the defendants to the land of an extent of 7.39 acres. In such circumstances, the plaintiff sought for performance of the agreement to the extent of the property to which the defendants had clear title. The plaintiff also offered to pay balance amount proportionately.

17. Section 12 of the Specific Relief Act enables part performance of the contract. Sub-Section 2 of Section 12 enables the Court to grant specific performance of the part of the contract, where a party to the contract is unable to perform whole of his part of the contract, when the part left



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unperformed forms a small part of it, and admits compensation in money,

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18. In the case on hand, the extent of land agreed to be conveyed was 17.31 acres. Of which to an extent of 7.39 acres, the title of the 1st defendant is under cloud. Therefore, the remaining part viz., 9.09 acres is capable of being sold. The plaintiff had set out all these facts in the plaint and has sought for performance of the contract to the extent to which it could be performed. He has also set out the property to which the title is undisputed in the suit schedule. We are therefore convinced that the plaintiff is entitled to seek part performance of the contract in the circumstances wherein the defendants themselves claim that their title to an extent of land covered by the agreement is under cloud. We are therefore unable to fault the trial Court for having decreed the suit for specific performance.

19. However, we find that there are certain errors in the description of property in the plaint. The plaintiff in the body of the plaint says that the title of the defendants to item No.1 to 4 in the suit agreement is defective. But while describing the properties he has included a portion of item No.1 measuring about 83 cents as item Nos.9 and 10 in the suit schedule. When



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he has averred specifically in the plaint that the title of the defendants to item Nos.1 to 4 measuring about 7.39 acres is under cloud and he is not making a claim in respect of those items in the suit, he ought to have excluded item Nos.1 to 4 measuring 7.39 acres. But he has included an area of about 83 cents out of that 7.39 acres in the suit schedule. This inclusion in our opinion is improper. This inclusion by itself does not take away the power of the Court to grant specific performance of the contract to the extent it could be performed. Therefore, out of the total extent of the suit properties measuring 9.90 acres, if item Nos.9 and 10 are excluded remaining extent would be 9.07 acres. Hence, we find that the plaintiff would be entitled to seek a decree in respect of item Nos.1 to 8 of the suit schedule properties.

20. It is pointed out by Mr.R.Bharath Kumar, learned counsel appearing for the appellants that there is a mistake in the decree of the trial Court where, in item No.2 the survey number is given as 784/1, it should be 774/1. We find that it is only a typographical error and it can be corrected at the appellate stage by this Court.



Point No.2:-

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21. It is the claim of the appellants that the respondent was not ready and willing to perform his part of the contract. The agreement is dated 05.10.2005. The last date for performance is 04.11.2005. On the date of the agreement a sum of Rs.10,00,000/- is paid as advance. On 16.10.2005 a sum of Rs.2,00,000/- has been paid as advance. On 06.11.2005 and 28.11.2005 sum of Rs.5,00,000/- and Rs.1,00,000/- were paid as further advance respectively. The last two payments are after the date fixed for performance under the contract. This by itself would demonstrate that the parties did not intend the time to be the essence of the contract. Of course, there is a delay of about a year and a month in filing the suit by the plaintiff, that delay stands explained because of the conduct of the defendants themselves.

22. On 10.12.2005, the plaintiff sought for performance of the contract. The defendants did not sent a reply. Subsequently on 01.04.2006 they themselves sent a notice saying that their title in respect of item Nos.1 to 4 is defective and therefore the agreement should be cancelled. The



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plaintiff sent a reply to the said notice on 13.04.2006 agreeing to purchase the remaining portion of the land. To this, a reply was sent by the defendants on 21.04.2006. Thereafter, in August 2006 ie., on 30.08.2006 the defendants again reiterated their claim that the contract should be cancelled. This forced the plaintiff to lodge the plaint in December 2006.

23. Therefore, for the entire period during which the delay is attributed to the plaintiff, there was correspondence between the parties and there were exchange of notices between the parties, wherein, the dispute regarding the land to which the defendants' title was under cloud was put in issue. Therefore, we do not think we can blame the plaintiff for not being ready and willing to perform his part of the contract. The conduct of the parties taken as a whole would very clearly demonstrate that it was the defendants who were attempting to wriggle out of the contract by raising various issues during the period. Hence, we do not think we can conclude that the plaintiff was not ready and willing to perform his part of the contract. Hence this point is answered against the appellants.



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Point No.3:-

24. The third and novel contention that is raised before us in this appeal is that the 1st plaintiff was not authorized by the 2nd plaintiff to enter into the contract. This plea does not find place in any of the pleadings before the trial Court or before us. For the first time it is sought to be introduced in 2024 by filing an application under Order 41 Rule 27 seeking permission to produce the sale deed under which the 2nd defendant had purchased the portion of the suit properties. We do not think we can allow such a plea to be raised in the absence of any support of pleadings before the trial Court or before this Court.

Point No.4:-

25. This application has been filed by the appellants seeking receipt of additional documents viz., the sale deed dated 27.03.2003 registered as Doc.No.288/2003. The said sale deed is the document under which the 2nd defendant had purchased an extent of about 8.63 acres, which forms part of the suit property in O.S.No.57 of 2006, the decree which is under challenge



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in A.S.No.813 of 2009, from one Syed Yusuf s/o. Syed Ahmed on 27.03.2003. The patta issued to the 2nd appellant has also been produced.

26. The object of production of these documents is to demonstrate that the 2nd appellant is the exclusive owner of the said 8.63 acres out of the suit properties and it was her husband who had signed the sale agreement dated 05.10.2005, which is sought to be specifically enforced, as her power agent. It is now claimed that she had not executed any power of attorney in favour of her husband. Therefore, the agreement itself is not valid.

27. We do not find this as a genuine attempt. The suit for specific performance was filed in the year 2006 as against the husband and the wife. The husband filed the written statement in June 2007. The wife who was the 2nd defendant adopted the said written statement. She did not make a whisper about the absence of authority for the husband to execute the sale agreement in the written statement or during the entire proceedings in the trial Court. She did not appear as witness before the trial Court. She did not deny the capacity of the husband to enter into the agreement on her behalf.



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The suit was decreed on 03.04.2009 and this appeal was presented in this Court on 2nd July 2009. Nearly 15 years after filing the appeal, the 2nd appellant has come up with the instant application seeking to produce the sale deed, in order to claim that the husband had no authority to execute the sale agreement. We do not think we could allow such a plea at this distant point of time, almost 18 years after the filing of the suit.

28.1. The learned counsel for the appellant would rely upon the judgment of the Hon'ble Supreme Court in *Rachakonda Narayana Vs. Ponthala Parvathamma and another* reported in *2001 (3) CTC 689* to contend that being the 2nd appellant the defendant could be allowed to plead that her husband did not have the authority to enter into an agreement on her behalf 15 years after the filing of the appeal without having taken any plea either in the written statement or in the appeal grounds filed before this Court.

28.2. The said judgment arose out of a case where there was an agreement for sale of two plots. After the agreement the third party issued a



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notice to the purchaser stating that the defendant No.1 had no right to sell one of the plots viz., plot B measuring 1 acre 30 cents. Thereafter, a suit was filed for specific performance. The plaintiff therein prayed for performance of contract in respect of one plot only measuring about 2 acres after proportionate deduction of consideration. The trial Court dismissed the suit.

28.3. Aggrieved the plaintiff filed an appeal. Before the first appellate Court it was stated that the defendant No.1 has no title in respect of plot B and the same belongs to his wife and she has refused to assign the said land in his favour. In such circumstance, the amendment of the plaint was made to the effect that the plaintiff is ready and willing to purchase 2 acres of land in plot 'A' paying the entire sale consideration. Further relinquishing his claim in respect of land in plot 'B' and he would not claim any compensation. The said amendment was allowed and thereafter the first appellate Court granted the decree in respect of 2 acres.



28.4. A Second Appeal was preferred before the High Court and the High Court concluded that the plaintiff did not come with the suit claiming the benefit of sub-Section (3) of Section 12 of the Specific Relief Act, he claimed performance of part of the whole agreement, therefore, he was not ready and willing to perform the whole contract. Hence, he is not entitled to for decree for specific performance of the agreement to sell.

28.5. When the matter went to the Hon'ble Supreme Court, the Hon'ble Supreme Court concluded that since the defendant No.1 had stated that he had no title to plot 'B' only in the appellate stage, the plaintiff would be entitled to the relief. Thus, the judgment in appeal was set aside and decree for specific performance granted by the lower appellate Court was confirmed.

29. We do not find that this judgment in any manner helps the appellant. In the case on hand, the 1st appellant is specifically described as power of attorney holder of the 2nd appellant in the agreement. The 2nd appellant was 2nd defendant in the suit. She was aware of the fact that the 1st



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appellant had entered into an agreement as her power of attorney holder.

She did not choose to dispute the fact that her husband had claimed as power of attorney holder and entered into an agreement before the trial Court or before this Court for nearly 15 years. Therefore, we do not think she could be allowed to raise such a plea at this distant point of time. If not anything else acquiescence will estop her from setting up a plea that her husband was not empowered to enter into an agreement on her behalf. We therefore dismiss the application.

30. In the light of the above conclusion, we find that the plaintiff would be entitled to specific performance in respect of item Nos.1 to 8 of the suit properties measuring about 9 acres and 7 cents. The proportionate value of the property which is now directed to be conveyed is Rs.16,56,283/- . The plaintiff has paid a sum of Rs.18,00,000/- as advance. We therefore direct the defendants to execute a sale deed in respect of the extent of 9 acres 7 cents covered by item Nos.1 to 8 of the suit properties. In respect of item Nos.9 and 10 the suit will stand dismissed. The defendants will refund the sum of Rs.1,43,717/- with 6% interest from the date of suit till date of



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payment to the plaintiff, as the value of the land conveyed is within the advance amount that has been paid by the plaintiffs.

31. Accordingly, this appeal is **partly allowed**. There will be a decree for specific performance in respect of items 1 to 8 of the suit properties. The suit in respect of items 9 & 10 the suit will stand dismissed. Parties shall bear their own costs in this appeal. The plaintiff would be entitled to take back the money deposited by him to the credit of the suit in the trial Court with accrued interest. Consequently, the connected miscellaneous petition is closed.

(R.S.M., J.) (C.K., J.)
14.11.2024

dsa
Index : Yes
Neutral Citation : Yes
Speaking order

Note:-

While drafting the decree the description of the property found in the plaint shall be stated in the decree without any corrections.



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Issue order copy by 22.11.2024

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To

The Principal District Judge,
Krishnagiri.



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R.SUBRAMANIAN, J.
and
C.KUMARAPPAN, J.

dsa

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