



S.A.Nos.948 and 949 of 2013

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.02.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.Nos.948 and 949 of 2013

M.P.Muthusamy

.. Appellant in
both SAs

Vs.

S.Lakshmanan

.. Respondent in
S.A.No.948 of 2013

V.Senthilkumar

.. Respondent in
S.A.No.949 of 2013

Prayer in S.A.No.948 of 2013 : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the decree and judgment passed in A.S.No.78 of 2011, dated 25.09.2012 on the file of the IV Additional District Judge, Erode District at Bhavani reversing the decree and judgment passed in O.S.No.30 of 2007, dated 17.12.2011 on the file of the Subordinate Judge, Bhavani, Erode District and consequentially confirm the decree and judgment passed in O.S.No.30 of 2007, dated 17.12.2011.



S.A.Nos.948 and 949 of 2013

Prayer in S.A.No.949 of 2013 : This Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the decree and judgment passed in A.S.No.79 of 2011, dated 25.09.2012 on the file of the IV Additional District Judge, Erode District at Bhavani reversing the decree and judgment passed in O.S.No.31 of 2007, dated 17.12.2011 on the file of the Subordinate Judge, Bhavani, Erode District and consequentially confirm the decree and judgment passed in O.S.No.31 of 2007, dated 17.12.2011.

For Appellant : Mr.M.L.Ramesh
(in both SAs)

For Respondent : Mr.B.M.Kiran Kishan
(in both SAs) for Mr.V.V.Sathya

COMMON JUDGMENT

These appeals arise out of two suits for specific performance in O.S.Nos.30 and 31 of 2007 on the file of the learned Subordinate Judge at Bhavani, Erode District. The suits are for specific performance of an agreement of sale. The plaintiff in both the suits is one M.P.Muthusamy. The defendants S.Lakshmanan and V.Senthilkumar are brothers.

2. It is the case of M.P.Muthusamy in O.S.No.30 of 2007 that he had entered into an agreement with S.Lakshmanan on 29.07.2006 for sale of the



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suit schedule mentioned property. As per the agreement, the sale was for a sum of Rs.2,00,000/-. On 29.07.2006 itself, the plaintiff had paid a sum of Rs.50,000/- to S.Lakshmanan.

3. Insofar as O.S.No.31 of 2007 is concerned, his case is on 29.07.2006, he had entered into a sale agreement giving an advance of Rs.1,50,000/- leaving the balance of Rs.2,75,000/- to be paid.

4. According to the plaintiff in both the suits, he had gone to the Sub Registrar's Office on 27.04.2007 to apply for encumbrance certificate to get the sale deed. He had kept the original agreement, dated 29.07.2006 along with three other agreements in a cover in his car. On his return, he found the original agreement along with the other agreements went missing. Therefore, he lodged a police complaint and also followed it up with a paper publication. The police had given a receipt that the documents are non-traceable. He would state that he issued an Advocate notice on 30.04.2007 to the respective defendants calling upon them to come and execute the sale deed. They had received the notice and issued replies on 03.05.2007 and 05.05.2007 to the effect that they had never entered into an agreement with



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the plaintiff and the question of specific performance does not arise because the plaintiff is stranger to them.

5. The plaintiff had pleaded that he is ready and willing to perform his part of the contract and to take the sale deed. He also pleaded that the defendants are also having originals as the documents were executed in duplicate, with one original being with the plaintiff and other originals being with the defendants. As the defendants were attempting to alienate the property, he came forward with a suit for specific performance of the agreements, dated 29.07.2006.

6. The defendants entered appearance and took a more or less similar stands. According to them, they had never entered into an agreement with the plaintiff and the document is a result of fabrication of the plaintiff. They further pleaded that they had never intended to execute any sale agreement with the plaintiff and the story of the plaintiff having gone to the Sub Registrar's Office is "Cock and Bull story". Crucially, they had pleaded in the written statement that a photostat copy of the alleged agreements cannot be accepted as the proof of evidence of the agreement as it is easily capable



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of being fabricated. The parties went to trial on the basis of these pleadings.

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7. On basis of these pleadings, the learned Trial Judge framed the following issues :

In O.S.No.30 of 2007 :

“ 1. Whether the alleged agreement dated 29.07.2006 is true and valid in law ?

2. Whether the plaintiff is entitled for the relief of specific performance as prayed for ?

3. Whether the plaintiff was ready and willing to perform his part of contract ?

4. To what other reliefs the plaintiff is entitled for ? ”

In O.S.No.31 of 2007 :

“ 1. Whether the alleged agreement dated 29.07.2006 is true and valid in law ?

2. Whether the plaintiff is entitled for the relief of specific performance as prayed for ?

3. Whether the plaintiff was ready and willing to perform his part of contract ?



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4. To what other reliefs the plaintiff is entitled for ? ”

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8. On behalf of the plaintiff, he himself entered the witness box as P.W.1 and examined on his side, four other witnesses. The person who prepared the agreement was examined as P.W.3. The Notary was examined as P.W.4 and two other witnesses as P.W.2 and P.W.5. On the side of the plaintiff, he marked Ex.A1 to Ex.A10 and the defendants marked Ex.B1 to Ex.B5.

9. The learned Trial Judge came to a conclusion that the Photostat copy of the agreement of sale is admissible in evidence and he was satisfied with the evidence of the Notary Public, who entered the witness box as P.W.5 and since the plaintiff have taken all efforts possible, he decreed the suit as prayed for.

10. Aggrieved by the same, the respective defendants preferred regular appeals in A.S.Nos.78 and 79 of 2011 before the IV Additional District Judge at Bhavani, Erode District. The learned 1st Appellate Judge came to a diametrically opposite conclusion that the documents are not



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admissible in evidence and on that basis, dismissed the suit. This was in and by way of his judgment, dated 25.09.2012.

11. Aggrieved by the same, these present Second Appeals have come before this Court. On 13.12.2013, these Second Appeals were admitted on the following substantial questions of law :

“ 1. Whether first Appellate Court is right in holding that attested photo copy duly attested by Notary Public on comparison of the original document cannot be admitted as secondary evidence ?

2. Whether first Appellate Court is right in holding that the decree for specific performance of the agreement for sale cannot be granted for not producing the original agreement for sale ? ”

12. I heard Mr.M.L.Ramesh for the appellant and Mr.B.M.Kiran Kishan for Mr.V.V.Sathya appearing for the respondents.

13. Mr.M.L.Ramesh would argue that the lower Appellate Court committed an error in holding that the secondary evidence of the agreement



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is inadmissible in evidence as it failed to take into consideration the loss of the original at the hands of the plaintiff. He drew my attention to the Exhibits filed in both the suits, in particular, the police complaint, the loss of document publication given by him as well as the non-traceable receipt that had been given by the police in order to substantiate that the documents are admissible. He would further invite my attention to the two notices to produce the originals given by the plaintiff to the defendants which had been filed as Exhibits before the Trial Court in order to state that whatever he could do had been done and being left with no other alternative, he had produced the photostat copies thereof.

14. On the aspect of readiness and willingness, he would argue that the plaintiff had been given 11 months of time from 29.07.2006 to pay the balance and he having been filed a suit within the said period, should be presumed to have been ready and willing to convert the sale agreement into a sale deed.

15. Mr.B.M.Kiran Kishan, on the contrary would invite my attention to the evidence of P.W.5 and would argue that, there is an inherent



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contradiction in the evidence of P.W.1 and P.W.5. He would state that P.W.1 had deposed in the witness box that he had taken eight documents namely, 4 originals and 4 photostat copies attested by the lawyer to the person through whom he had applied for encumbrance certificate, whereas P.W.5 would state that what had been produced before him were only four attested copies. He would further invite my attention to the complaint that was given to the police as well as the newspaper publication made in the respective suits in order to argue that no details were given by P.W.1 to the police with regard to these documents and therefore, there is a doubt whether the complaints relate to these documents. He would state that there is no proof of two originals having been created and therefore, the question of calling upon the defendants to produce the originals does not arise at all.

16. He would invite the attention of the Court to the evidence of the scribe to state that though specifically the scribe had been asked to produce the computer in which a folder had been created in the name of P.W.1, the same had not been brought forth. The line of the argument seems to be that as the original had not been produced and neither the electronic copy of the original had been produced, the photostat copy is inadmissible. He would



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state that P.W.1 had stated that he had taken attestation on 15.10.2006 so as not to take the originals outside his office and the fact that P.W.1 had stated that the originals had been taken to the office of P.W.5 would show that a false case has been pleaded by the plaintiff. Finally, he would point out that one stamp paper had been procured at Ottapidaram, whereas the other document had been obtained from Dharapuram, which are separated by hundreds of Kms and therefore, it raises a doubt as to how the P.W.1 could have procured the documents within 1 hour and finally he would submit, that even if the agreement is true and genuine, the readiness and willingness of the plaintiff had not been proved.

17. I have carefully considered the arguments on either side and have gone through the records.

18. The entire effort of the defendants which found acceptance with the lower Appellate Court is that, what had been produced is the photostat copy and the original not having been produced, the suits should fail. I am not in agreement with this contention. It is here that I have to refer to Sections 64 and 65 of the Indian Evidence Act. Section 64 demands upon



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the litigant before the Court to produce primary evidence and in this case, it is an agreement of sale. Section 65 creates an exemption to Section 64 permitting a person to produce the secondary evidence when it satisfies the requirements of Section 65(a) to (g). In this particular case, if I were to accept the contention of the learned counsel for the respondents that no suit for specific performance can be presented on the basis of a photostat copy, I feel I will be laying down the wrong position of law. For example if an agreement of sale had been genuinely entered into between the parties is lost, then, the only option that the party has is to produce the secondary evidence thereof. It is the duty of the plaintiff to prove as to what happened to the primary evidence before he presents a suit on the basis of the secondary evidence.

19. In this case, the plaintiff has shown by way of a police complaint that he had lost the originals on 27.04.2007 and this was quickly followed up with the publication on 29.04.2007 as well as the non-traceable certificate that had been issued by the said department. Even in the suit notice which was issued the next day after the publication, he had specifically pleaded that the documents had been lost. It is here that the



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judgment of the Supreme Court in ***Smt.J.Yashoda vs. Smt.K.Shobha Rani***

case reported in ***(2007) 5 SCC 730*** becomes relevant.

20. The Supreme Court was specifically called upon to answer an issue as to what is the position with respect to the production of secondary evidence. The Supreme Court held that :

(1) The secondary evidence can be produced when the primary evidence is admissible.

(2) Where the litigant is able to prove to the Court that the case falls under anyone of the categories of Section 65(a) to (g). Then, the litigant can rely upon the secondary evidence.

21. Applying the judgment to the facts of the present case, I feel that Section 65(c) of the Evidence Act is applicable to the facts of the present case, this is because the plaintiff has shown that he is not in possession of the document as it was lost. Had the plaintiff stopped with a mere pleading that the document had been lost, perhaps, I could have considered the arguments of the respondents on this point. However, as the record would show in both the cases, the plaintiff lost the documents on 27.04.2007 and



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immediately followed it up with the police complaint and obtained a non-traceable receipt and also made a paper publication that the documents were lost.

22. Apart from that, immediately on presentation of the plaint, he had called upon the defendants of the respective suits to produce the original. Therefore, he had done all that he could have done in order to explain the loss of the primary evidence namely, the two agreements. Therefore, applying the judgment of the Supreme Court to the facts of the present case, I reject the argument of Mr.B.M.Kiran Kishan that since the agreements of sale are inadmissible, the suits have to fail.

23. Mr.B.M.Kiran Kishan would place strong reliance upon the judgment of this Court in ***Vaikundam Agro Tech Limited, Trivandrum rep. by General Manager vs. State of Tamil Nadu rep. by District Collector, Kanyakumari District*** case reported in ***(2008) 1 MLJ 200*** and would refer to paragraph No.17 of the said judgment. According to him, the learned Single Judge of this Court had laid down that unless and until, the certified copies are produced, secondary evidence is inadmissible. I feel that



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the learned counsel wants to take the judgment beyond the realms of which the law had been laid down in that case.

24. In that particular case, the subject matter of issue was the production of the photostat copies of registered sale deeds. Instead of producing certified copies thereof, the party in that case had produced the photostat copies of the sale deeds. Therefore, the learned Single Judge had held that when the party who had produced the photostat copies of the sale deed could have obtained certified copies thereof from the registering authorities, his production of Photostat copies are not admissible. This is very clear because the learned Judge had stated where certified copies issued by competent authorities are available, they should be produced and they are admissible in evidence and under those circumstances, production of photostat copies of sale deeds notarized by an Advocate are inadmissible.

25. The very narration of the facts above clearly shows that the said judgment does not apply to the facts of the case. The subject matter in that case was the notarized photostat copies of the sale deeds, when the party could have produced registration copies from the file of the competent



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authority. Therefore, the Court rejected the photostat copies to hold that such copies are inadmissible when the party can produce better evidence before the Court. The better evidence being certified copies of the sale deeds. In this particular case, the party could not have produced certified copies of the agreement of sale because admittedly it was unregistered. Law cannot and does not call upon a party to do the impossible. I cannot call upon a party to produce certified copies of a document when the original document itself is unregistered. Therefore, I have to conclude that the judgment reported in *(2008) 1 MLJ 200* does not apply to the facts of the present case.

26. This takes me to the meat of the issue namely, whether the plaintiff has proved readiness and willingness on his part in order to get the benefit of a decree for specific performance at the hands of this Court. I have gone through the judgment of the Trial Court which decreed the suit. The Trial Court came to a conclusion that the agreement is true and genuine and therefore, the plaintiff is ready and willing to convert the execution of the sale agreement into a sale deed. The Lower Appellate Court having held the document is inadmissible and allowed the appeal did not have the occasion



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to go into the issue of readiness and willingness. Therefore, I called upon Mr.M.L.Ramesh to submit, as to what evidence he has let in before the Court in order to prove his financial capacity and willingness to convert the sale agreement into a sale deed.

27. Mr.M.L.Ramesh would argue that as per the agreement, dated 29.07.2006, eleven months period had been granted in the respective agreements to conclude the contract. The eleven months stood extinguished on 28.06.2007. However, he had quickly taken steps from 27.04.2007 onwards till the presentation of the plaint on 16.05.2007 in order to state that he had always been ready and willing to get the sale deed executed in his favour.

28. It is settled position of law that readiness and willingness are two distinct concepts but both have to be not only pleaded but have to be proved in order to get over the bar under Section 16(c) of the Specific Relief Act. One deals with the intention of the party and other, his financial capacity. None of the documents that had been filed before the Court, point out to the financial capacity of the plaintiff. If I were to the accept the arguments of



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Mr.M.L.Ramesh, within the period given for the agreement, the party need not prove readiness and willingness, I will be rewriting Section 16(c) of the Specific Relief Act. The Section 16(c) as the unamended provision stood at the time of presentation of the plaintiff called upon the plaintiff to "aver and prove".

29. A party, who is seeking for assistance of the Court to get a sale deed in his favour should necessarily prove both the aspects. Section 16(c) does not say that the averment and proof should be only from the last date on which the agreement expires. On the contrary, the settled position of law is that the plaintiff in a suit for specific performance must be ready and willing from the date of the agreement till the presentation of the plaint and this continues till the execution of the sale deed by the Court. This is the reason why, even after the decree had been passed in favour of a party in a suit for specific performance, he should prove that he had been ready and willing for, if not, he will invite the wrath of Section 28 of the Specific Relief Act.

30. Apart from that, if Mr.M.L.Ramesh's argument is to be accepted,



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then from the date of the agreement namely, 29.07.2006 till the last date fixed by the agreement 28.06.2007, the Court cannot call upon a party to prove readiness and willingness, this is not as pointed out the purport of Section 16(c). Where the Section does not say so, I am not willing to lay down a law that the Court cannot call upon a party to prove his readiness and willingness from the date of the agreement till the time given under the agreement expires.

31. In this case, there are absolutely no evidence to show that the plaintiff had the funds in order to convert the sale agreement into a sale deed. Apart from that, deadly silence had been maintained by the plaintiff between 29.07.2006 till he applied for encumbrance certificate on 27.04.2007. Even if I were to take the case of the plaintiff on its face value, as to what he did for a period of nine months had not been explained at all. Therefore, I am not in a position to conclude that the plaintiff had been ready and willing to convert the sale agreement into a sale deed.

32. Facing this predicament, Mr.M.L.Ramesh would rely upon the judgments of the Supreme Court in ***Indira Kaur (Smt) and Others vs. Sheo***



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Lal Kapoor case reported in *1988 SCC 2 488* and *Madhukar Nivrutti*

Jagtap & Ors. vs. Smt.Pramilabai Chandulal Parandekar & Ors. in *Civil*

Appeal No. 5382 of 2007, dated 13.08.2019 and *P.Daivasigamani vs.*

S.Sambandan case reported in *CDJ 2022 SC 1126* and *Sukhbir Singh and*

Others vs. Brij Pal Singh and Others case reported in *(1997) 2 SCC 200*

and a judgment of Andhra Pradesh High Court in *Shaik Mahaboob Saheb*

vs. Kampasati Nageswara Rao case reported in *2008 AIR AP 55*, in order

to argue that the very fact that he had appeared before the Sub Registrar's

Office on 27.04.2007 is sufficient to show that he had been ready and

willing.

33. Let us take the first of those judgments reported in *1988 SCC 2 488*. In the case before the Supreme Court, the party had been called upon much before the dead line fixed under the agreement to appear before the Sub Registrar for execution of sale deed. Similar was the situation in the case reported in *(1997) 2 SCC 200*. In both the cases, the plaintiff had tendered proof that the plaintiff had appeared before the Sub Registrar for execution of sale deed and it was the defendants, who had absented themselves. The fact that the plaintiffs in those cases had appeared before



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the Sub Registrar for the conversion of the sale agreement into a sale deed was taken as proof of their readiness and willingness. Such fact is absent in the present case.

34. The evidence, only shows, on 27.04.2007, the plaintiff had only asked his agent to apply for encumbrance certificate but did not call upon them to appear for registration of the sale deed. Fundamentally, an application for issuance of encumbrance certificate is different from calling upon a party to appear for execution of the sale deed. By the time, a person, who reaches the stage of execution of the sale deed, he would have already satisfied himself with the title and as to whether there are any encumbrances of the property and it is only thereafter, he would have prepared a draft sale deed for the purpose of registration. The steps taken prior to the registration being absent in the present case, I am unable to apply the verdicts of the aforesaid cases to the facts of the present case.

35. Turning to the judgment of the Andhra Pradesh High Court in ***Shaik Mahaboob Saheb vs. Kampasati Nageswara Rao*** case reported in



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2008 AIR AP 55, it is seen that prior to the presentation of the plaint, the plaintiff had been able to prove that the parties had entered into a Mediation and had also got extension of time during that period in the process. The Court held against the plaintiff on the ground that he had not complied with the essential terms of the agreement. Those judgments in my view, does not help Mr.M.L.Ramesh to plead that eleven months time was granted under the agreement and the Court has to presume readiness and willingness during that period. As stated above, if I were to agree to that proposition then it would amount to rewriting Section 16(c).

36. Insofar as the judgment of the Supreme Court in ***Madhukar Nivrutti Jagtap & Ors. vs. Smt.Pramilabai Chandulal Parandekar & Ors.*** case in ***Civil Appeal No.5382 of 2007*** is concerned, the Court had laid down a position in Paragraph No.13.2, that it is not the requirement of the plaintiff should continuously approach the defendant with payment or make insistent requests for performance. It further held for the relief of specific performance, a plaintiff must be found standing with the contract and the plaintiff's conduct should not be carry any blame worthiness so as to be considered inequitable. This lays down the difference between the law that



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was prevailing in England and the law as applicable prior to the amendment to the Specific Relief Act. In England, the question of looking into the blame worthy conduct never arose at all. Mere delay was sufficient to non-suit a plaintiff but the law in India developed to an extent that in addition to the delay, if there was blame worthy conduct, the Court could non-suit the plaintiff.

37. As discussed above, I do not find any steps taken by the plaintiff from 29.07.2006 till 27.04.2007. Therefore, I have to necessarily conclude that the plaintiff has miserably failed to prove his readiness and willingness in the contract. I should hasten to add that the plaintiff need not jingle the coins or deposit the funds before the Court but it is expected of the plaintiff to show that he was not in want of funds which resulted in the delay in conversion of the sale agreement into a sale deed. I have found that the plaintiff maintained deadly silence from July 2006 till April 2007 and there is absolutely no explanation in the evidence of P.W.1 as to why he kept silent during this period.

38. Therefore, I conclude,

(1) The photostat copy of the agreement is admissible in



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evidence if the party is able to substantiate the loss or unavailability of the primary evidence as required under Section 65.

(2). In the facts of the case, the plaintiff has not proved his readiness and willingness and therefore, he is not entitled to the equitable relief of specific performance.

39. I also took guidance under Section 20 and I have to take note of the fact that, merely because the agreement is lawful, the suit for specific performance need not be decreed unless and until a person is able to get over the bar under Section 16(c).

40. In fine, these Second Appeals are dismissed. The judgment and decree of the Court of the learned IV Additional District Judge, Erode at Bhavani in A.S.Nos.78 and 79 of 2011, dated 25.09.2012 in reversing the judgment and decree of the Court of the learned Subordinate Judge at Bhavani in O.S.Nos.30 and 31 of 2007, dated 17.12.2011 stands confirmed.

41. Considering the interesting questions of law that had been argued



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in these appeals, I am not inclined to impose any costs.

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Index:Yes/No
Speaking Order :Yes/No
Neutral Citation:Yes/No
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To

- 1.The IV Additional District Judge,
Erode District at Bhavani
- 2.The Subordinate Judge, Bhavani,
Erode District

V. LAKSHMINARAYANAN, J.



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