



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.10.2024

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THE HON'BLE MR.JUSTICE P.VELMURUGAN

and

THE HON'BLE MR.JUSTICE JUSTICE K.K.RAMAKRISHNAN

A.S.(MD) No.116 of 2022 and
Cross Objection (MD)No.31 of 2024 and
CMP(MD)No.4086 of 2022

A.S.(MD) No.116 of 2022

1.Ashokan
2.Jeeva Harikrishnan

... Appellants/Defendants

Vs.

K.K.D.Pandian

... Respondent/Plaintiff

Prayer: Appeal Suit filed under Section 96 of Civil Procedure Code, to set aside the Judgment and Decree dated 19.08.2021 passed in O.S.No.26 of 2016 on the file of the Additional District Court (Fast Track), Theni.

For Appellants : Mr.J.Barathan

For Respondent : Mr.G.Prabhu Rajadurai



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Cross Objection (MD)No.31 of 2024

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K.K.D.Pandian

... Cross Objector / Respondent

Vs.

1.S.Asokan

2.Jeeva Harikrishnan

... Respondents/Appellants

Prayer: Cross Objection filed under Order 42 Rule (22) C.P.C to set aside the Judgment and Decree dated 19.08.2021 passed in O.S.No.26 of 2016 on the file of the Additional District Court (Fast Track), Theni and allow the cross appeal by decreeing the suit for specific performance with costs.

For Cross Objector : Mr.C.Sundaravadivel

For Respondents : Mr.J.Barathan

COMMON JUDGMENT

P.VELMURUGAN, J.

The respondent is the plaintiff in O.S.No.26 of 2016. The appellants are the defendants in the said suit. The respondent filed the suit in O.S.No.26 of 2016 on the file of the learned Principal District



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Judge, Theni, for specific performance and the same was made over to the learned Additional District Judge, (Fast Track), Theni, for disposal. After trial, the learned Additional District Judge, though dismissed the main relief of specific performance, however, granted the alternative relief of refund of the advance amount. Challenging the said Judgment and Decree, the defendants in the suit have filed the present appeal and challenging the relief of dismissal of the specific performance, the respondent has filed the cross objection. Since both the appeal and the cross objection arise out of the same judgment and decree, both are heard together and disposed of by this common Judgment.

2. The brief facts of the case of the respondent/plaintiff are that the suit property with a larger extent of 2 acre 4 cents, out of 4 acre 8 cents in S.No.1434/2001, originally belonged to one Sivasamy Chettiyar and their children, Samidurai and the father of the appellants, by name, Subramanian, and they got the “C” schedule property, which contains 5 times, to an extent of 2 acre and 4 cents through a registered partition deed, dated 25.01.1959. Therefore, the original owner Subramanian and his children viz., the appellants and Sivakumar are the co-parceners of the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Hindu joint family property. For the development and the interest of the

joint family, the said Subramanian and their male members alienated a

portion of the property to an extent of 1 acre 2 cents from the 2 acres and

4 cents, except the suit property, The same was sub-divided as S.No.

1434/1C. As a Kartha of the family, the patta stood in the name of

Subramanian for the land to an extent of 1 acre 2 cents in S.No.1434/1C.

While so, the said Subramanian executed a settlement deed in respect of

1/3rd share in favour of his daughter, the second appellant on 29.09.2010

under a registered Will. Thereafter, the said Subramanian died leaving

behind his legal heirs, the appellants and one Sivakumar. Therefore, as

per the Hindu Succession Act, the appellants and the said Sivakumar are

the legal heirs of the deceased Subramanian. After the death of the said

Subramanian, the said Will came into existence. Therefore, all the

appellants and Sivakumar were enjoying the property jointly and

therefore, the said Sivakumar is entitled to 1/3rd share in the above said

suit property of 1 acre 2 cents. As per the Will, from the 1 acre 2 cents,

the appellants are entitled to 34 cents each and the said Sivakumar is

entitled to 34 cents. The appellants entered into a sale agreement with one

Damodharan under a sale agreement, dated 09.11.2010, as if, the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

appellants are entitled to the entire property of 1 acre 2 cents and the

appellants received a sum of Rs.10,00,000/- from the said Damodharan as

advance. Therefore, the said Sivakumar filed the suit against the

appellants in O.S.No.39 of 2010 and thereafter, they entered into a

compromise. Subsequently, based on the above said agreement, the said

Damodharan entered into a sale agreement with the respondent with the

knowledge of the appellants on 11.11.2010. The said Damodharan

received a sum of Rs.86,50,000/- from the respondent for the advance of

sale consideration. Thereafter, the son of the first appellant one Karthik

filed a suit against Subramanian, the first appellant and Sivakumar on the

file of the I Additional District Judge, Fast Track Court, Periyakulam for

partition. Pending the suit, the said Subramanian died and the said suit is

pending. The second appellant executed a power of attorney in favour of

the first appellant on 04.03.2011 in respect of her share and therefore, the

first appellant for himself and as the power of attorney of her

sister/second appellant, executed a sale agreement on 02.09.2013 in

respect of their 2/3rd share to the extent of 68 cents, out of 1 acre 2 cents.

In the said agreement, there is a recital about the agreement between the

respondent and the said Damodharan and the respondent paid the amount



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

to the said Damodharan and therefore, after deducting the said amount paid by the respondent to the Damodharan, the respondent agreed to pay the balance sale consideration to the appellants and the appellants have also agreed for the same and they have executed the sale agreement for the extent of 68 cents, out of 1 acre 2 cents. Since the suit filed by Karthik was pending before the Fast Track Court, Periyakulam, they have entered into a compromise with the said Karthik and they executed the sale deed. Thereafter, the appellants have prolonged the same and they have not executed the sale deed. The respondent was always ready and willing to perform his part of the contract and the appellants are one way or other stating their dispute with the legal heirs of the said Subramanian, evaded to execute the sale deed and therefore, the respondent filed the suit for specific performance and for the alternative relief of the advance payment made by him to the said Damodharan with the interest of 12% per annum.

3.The brief facts of the written statement filed by the appellants/defendants are that the alleged sale deed, dated 29.09.2010, said to have been executed by the appellants in favour of Damodharan is



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

false and not supported with consideration and also alleged agreements dated 09.11.2010 and 11.11.2010 and 02.03.2013 are false and they have created the documents for the purpose of this case. The agreement, dated 09.11.2010, is not legally valid and all the interested parties in the suit have not been impleaded as party. Therefore, the suit is hit by non-jointer of necessary parties. The appellants have not received any so called consideration said to have been paid by Damodharan and the agreements dated 09.10.2010 and 11.11.2010 are concocted documents. The suit is barred by limitation. The respondent very well knows about the pending suit in O.S.No.39 of 2010 on the file of the Fast Track Court, Periyakulam and despite knowing the pendency of the suit, the alleged agreements said to have been executed and the said agreements are not valid in law and the respondent also suppressed the date of the death of Subramanian. The suit is not maintainable. The appellants never received any amount from the said Damodharan much less than the Rs.86,50,000/- and also except those amount and that they executed the sale consideration for the balance consideration, is utterly false. The said agreement is not a registered one and therefore, it is not valid. In the agreement, dated 02.09.2013, the signature of the first appellant was obtained by fraud and



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

the witnesses shown in the said agreement are fraudulent persons and the

respondent has not stated how the Advocate-cum-Notary Public Mr.Raja

Mohammad was involved in this case. Though the respondent obtained

agreement for the land to an extent of 1 acre 2 cents, the suit has been

filed only for 42 ½ cents. Therefore, the suit is not valid in law. The

respondent has not deposited the so called advance of Rs.86,50,000/- and

the respondent has falsely stated that he has filed the lodgment schedule

before the Court for depositing the said amount. The respondent has not

pleaded regarding the readiness and willingness to perform the contract

on his side. The four boundaries of the suit property has not been

properly identified and the pending suit also has not been properly

disclosed in the plaint. Since the agreement is in respect of the undivided

property of 42 ½ cents, the brother of the first appellant one Sivakumar

and Damodharan are the necessary party in the suit, however, they have

not been impleaded as a party to the suit. Therefore, the suit is hit by

non-jointer of necessary parties. The respondent, with the connivance of

Damodharan, has fraudulently created the documents for the purpose of

filing the suit and filed the suit. The respondent has no cause of action to

file the suit. The suit is liable to be dismissed for suppression of material

8/41



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

facts. The respondent is not entitled to get any decree as sought for in the plaint much less than the relief of specific performance or refund of the advance amount.

4. Based on the pleadings and the documents produced by both the parties, the Trial Court framed the following issues:

“(i) Whether the defendants have executed the sale agreements dated 09.11.2010, 11.11.2010 and 02.03.2013 in favour of the plaintiff in respect of the suit property?

(ii) Whether the plaintiff is entitled to get the relief of specific performance of the contract as prayed for?

(iii) Whether the plaintiff is entitled to recover the advance amount of Rs.86,50,000/- with interest as alternative relief?

(iv) To what other relief and the cost of the suit, the plaintiff is entitled?”

5. During trial, on the side of the respondent, three witnesses were examined as P.W.1 to P.W.3 and eight documents were marked as Exs.A1



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

to A8. On the side of the appellants, one witness was examined as D.W.1 and one document was marked as Ex.B1.

6. After trial, the Trial Court, on hearing the arguments on either side, considering the pleadings and oral and documentary evidence, dismissed the suit in respect of the relief of specific performance, however, decreed the suit for alternative relief of refund of the advance amount of Rs.86,50,000/- with the interest at the rate of 12% per annum with costs. Challenging the said judgment and decree, the appellants have filed the present appeal and the respondent has filed the cross objection aggrieved over the dismissal of the relief of specific performance.

7(i) The learned counsel for the appellants would submit that the alleged sale agreements dated 09.11.2010 and 11.11.2010 are in respect of land to an extent of 1 acre 2 cents in S.No.1434/1C of Veerapandi Village, whereas, the sale agreement, dated 02.09.2013, is in respect of an undivided 2/3rd share measuring an extent of 68 cents, out of 1 acre 2 cents in the above said survey. The specific case of the respondent is that



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

the appellants had entered into an agreement, dated 09.11.2010, with one Damodharan and that the appellants had received a sum of Rs.10,00,000/- agreeing to sell the property at the rate of Rs.3,40,000/- per cent at a total sale consideration of Rs.3,46,80,000/-, however, the above said Damodharan was not impleaded as a party to the suit. The alleged sale agreement, dated 09.11.2010, had been attested by the three witnesses, but none of them had been examined as witness on the side of the respondent to prove the execution of the said agreement. The respondent had filed the original sale agreement, dated 09.11.2010, along with the plaint, but he had not pleaded anywhere in the plaint, how he got custody of the said original document alleged to have been entered into between the appellants and the said Damodharan. However, the said Damodharan has not filed any suit against the appellants either for specific performance of the alleged sale agreement, dated 09.11.2010, or for refund of the alleged advance amount. The alleged sale agreement, dated 11.11.2010, had been entered into within two days of the alleged sale agreement, dated 09.11.2010, but the appellants are not even parties to the same. The alleged sale agreement, dated 11.11.2010, states that the subject property is under the control of the said Damodharan; that he had



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

agreed to sell the same to the respondent for a sum of Rs.4,15,000/- per cent at a total sale consideration of Rs.4,23,30,000/-; that the said Damodharan had received the advance amount of Rs.86,50,000/- from the respondent; and that the time for performance of the contract is on or before 31.12.2010.

(ii) The learned counsel would further submit that the specific case of the respondent is that the said Damodharan had received a sum of Rs. 86,50,000/- as advance amount from him under the sale agreement, dated 11.11.2010. The respondent had specifically pleaded in his plaint that the appellants had agreed to sell a portion of the subject property at the very same rate of Rs.4,15,000/- per cent even under the alleged sale agreement, dated 02.09.2013 nearly after three years of the alleged sale agreement, dated 11.11.2010. The alleged sale agreement, dated 02.09.2013, is not even a tri-party agreement between appellants, the respondent and the said Damodharan. The alleged sale agreement, dated 11.11.2010, and any of its recitals, terms and conditions will not bind the appellants. The sale agreements dated 09.11.2010, 11.11.2010 and 02.09.2013 had been fraudulently created and concocted by the

12/41



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

respondent. The respondent had produced the alleged sale agreement, dated 11.11.2010 along with the plaint and the list of documents states that the original of it had been produced before the lower Court and the respondent has marked the same as an exhibit treating it as original, but during the cross examination, the respondent (P.W.1) had clearly admitted that the said sale agreement produced and marked before the Court below is a colour Xerox copy. The appellants had specifically pleaded in the written statement that they had not received the amount of Rs.86,50,000/- either from the respondent or from the said Damodharan. The said Damodharan had not even attested the alleged sale agreement, dated 02.09.2013. The sale agreement, dated 02.09.2013, did not state that the appellants had received a sum of Rs.86,50,000/- from the said Damodharan. The alleged sale agreement, dated 02.09.2013, contains an interlineation with ink pen by removing the printed portion with a whitener; further, such an intention had not been attested either by the respondent or by the appellants. The respondent, during his cross examination, had admitted that the Advocate-cum-Notary Public Mr.Raja Mohammed, who had allegedly attested the alleged sale agreements dated 11.11.2010 and 02.09.2013, is his close relative.



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(iii). The learned counsel would further submit that the respondent had deposed in his cross examination that he had shown the sum of Rs. 86,50,000/- allegedly paid by him to the said Damodharan, in his Income Tax Returns and that he is prepared to produce his accounts before the Court, but he had not produced them before the Court on the subsequent dates. The Trial Court has to draw adverse inference against the respondent for not producing the Income Tax accounts to show the payment of Rs.86,50,000/- paid to Damodharan. The respondent had admitted during his cross examination that the alleged sale agreements, dated 11.11.2010 and 02.09.2013, do not contain any recital to show that the appellants had received a sum of Rs.86,50,000/-. The respondent had admitted during his cross examination that the said Damodharan was not present at the time of the execution of the alleged sale agreement, dated 02.09.2013. He would further submit that the font size in pages 1 and 2 of the alleged sale agreement, dated 02.09.2013, are different. The respondent had admitted during his cross examination that he did not send any pre-suit notice to Damodharan. The respondent had not even pleaded in his plaint that he had sent any pre-suit notice before institution



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

of the plaint. But on the other hand, the respondent has deposed, as if he sent pre-suit notice to the appellants and as if they returned without being served on them; but, no such returned cover had been either produced along with the plaint or at the time of trial.

(iv) The learned counsel would further submit that though the respondent had stated that a lodgement schedule along with the plaint for a sum of Rs.3,36,80,000/- has been deposited before the Court, but he has not obtained any challan from the Court and has not deposited the said amount into Court in order to prove his readiness and willingness. Since he has not deposited any amount, it clearly shows that the three alleged sale agreements had been fraudulently created and concocted only for the purpose of getting the decree for recovery of the amount and for the purpose of specific performance. Even the respondent had admitted during his cross examination that there was no agreement between him and the said Damodharan as to payment of any interest and that he does not know about any such agreement for payment of interest between him and the said Damodharan. Even P.W.2, who was said to have been examined as witness for the alleged agreement, did not speak about the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

execution of the earlier one and about his attestation to the same. He would further submit that the proof affidavit filed for chief examination itself shows that there is no sufficient material to prove the execution of the alleged sale agreement, dated 02.09.2013. He would further submit that the respondent has not proved the said document under Section 68 of the Indian Evidence Act. The alleged agreement was not proved in the manner known to law. The Advocate-cum-Notary Public, who was examined as P.W.3, has admitted that he has to be bound to maintain a Notary Register and give a serial number, whereas, he had not obtained any signature from the parties in his Notary Register and he has not given any serial number for the disputed documents. P.W.2 also admitted the difference in font size of the letters in the alleged agreement, dated 02.09.2013.

(v) The learned counsel would further submit that inspite of filing a written statement denying the execution of the alleged sale agreements dated 09.11.2010 and 02.09.2013 and also questioning all the three witnesses regarding fraudulent creation and concoction of the disputed documents, the respondent did not take any steps to sent them to the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

forensic lab to obtain opinion from the handwriting expert under Section

45 of the Indian Evidence Act, 1972. The first appellant had specifically

stated in his deposition that he has no objection for sending the disputed

documents for comparison to the handwriting expert. The evidence of

P.W.2 and P.W.3 are not sufficient to prove the execution of the alleged

sale agreements dated 11.11.2010 and 02.09.2013. Especially, Ex.A2

original sale agreement was not produced and colour Xerox alone was

marked as Ex.A2. Even the submission made by the appellants was not

considered by the Trial Court, while deciding the case. The respondent is

not entitled to any interest as claimed by him in the suit. The suit is liable

to be dismissed with extraordinary costs under Section 35 of C.P.C. The

learned counsel would further submit that the respondent was not ready

and willing to perform his part of the contract and since the alleged

agreements themselves are forged and concocted, the respondent is not

entitled to even the relief of recovery of the advance amount. Therefore,

the Judgment and Decree passed by the Trial Court for alternative relief

of refund of the advance amount is liable to be dismissed. Hence, the

appeal may be allowed.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

8(i) The learned counsel for the cross objector/respondent/plaintiff

would submit that the appellants have executed a sale agreement in favour of the respondent. Since they already entered into an agreement with one Damodharan and received a sum of Rs.86,50,000/- from the said Damodharan, in Ex.A4, they have stated that less the amount, which was already paid by Damodharan. Since the respondent paid the said amount to the said Damodharan, he has to pay the balance sale consideration to the appellants. After the agreement, the respondent was ready and willing to perform his part of the contract and he has also established the agreement said to have been executed by the appellants in favour of the respondent. Though the Trial Court admitted the evidence of P.W.2 and P.W.3, granted the alternative relief of refund of the advance amount. The Trial Court failed to see that the respondent was ready and willing to perform his part of the contract and he has also paid advance amount, which was paid by Damodharan to the appellants. The appellants have not produced any documents to prove their readiness and willingness, however, the respondent was ready and willing to perform his part of the contract by paying the balance sale consideration, as per the agreement, dated 02.09.2013. Though the respondent filed the lodgment schedule to



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

the Trial Court, the Trial Court has not passed any order to deposit the said amount and therefore, he could not deposit the amount before the Court. The non-deposit of the amount before the Trial Court will not be a proof of non-performance of the contract and the respondent was not ready and willing to perform his part of the contract. In spite of the respondent was ready and willing to perform his part of the contract, the appellants even after receiving the pre-suit notice, have not come forward to execute the sale deed, after obtaining the balance sale consideration, less the amount already paid to the Damodharan, i.e., Rs.86,50,000/-. The respondent has pleaded in his pleadings that he was ready and willing to perform his part of the contract and also ready to pay the balance sale consideration, less the amount already paid to Damodharan.

(ii) The learned counsel would further submit that the time was not essence of the contract. Even in Ex.A4, agreement dated 02.09.2013, there is no recital regarding that time is essence of the contract. Even otherwise, it is well settled proposition of law that for sale agreement of immovable property, unless the specific recital in the agreement for the particular purpose, ordinary time is not essence of the contract. The Trial



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Court failed to consider the fact, merely because, the respondent has not deposited the balance sale consideration into the Court and also he has not paid the amount within the stipulated time. Therefore, the cross objector/plaintiff had not proved that he was ready and willing to perform his part of the contract. The finding of the Trial Court is erroneous and the respondent was always ready and willing to perform his part of the contract and he has sufficient sources to meet out the sale consideration. The respondent has also produced the agreement dated 02.09.2013 (Ex.A4) and the same was proved by examining P.W2 and P.W3, Notary Public, who attested to the agreement. The Trial Court failed to exercise the discretionary power of the Court by granting the relief of specific performance under Section 20(3) of the Specific Relief Act. Therefore, the respondent proved his case including his readiness and willingness and the execution of the documents. Though the Trial Court accepted the execution of the documents and payment of the sale consideration of Rs. 86,50,000/-, failed to consider the fact that the respondent was ready and willing to perform his part of the contract. Therefore, under these circumstances, the appeal filed by the appellants is liable to be dismissed and the judgment and decree passed by the Trial Court regarding the

20/41



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

dismissal of the specific performance is liable to be set aside and the cross objection is liable to be allowed.

9. Since the first Appellate Court is the fact finding Court, this Court has to re-appreciate the entire evidence and give independent finding, for which, this Court has taken the following points for determination:

“(1) Whether the respondent/cross objector has proved the execution of Ex.A4 - sale agreement?

(2) Whether the respondent/cross objector was ready and willing to perform his part of the contract and the same was proved by the respondent/cross objector?

(3) Whether the respondent/cross objector is entitled to the claim as sought for in the cross objection?

(4) Whether the Judgment and Decree passed by the Trial Court regarding the alternative decree, is liable to be set aside?”

Point No.1:

10. The specific case of the respondent in the appeal/cross objector is that the suit property belongs to the appellants. The appellants are the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

brother and sister. The second appellant executed a power of attorney in favour of the first appellant. Based on the power of attorney, the first appellant executed Ex.A4-sale agreement for himself and as a power of attorney of the second appellant, in favour of the respondent on 02.09.2013. The consideration stated to have been paid that the appellants executed a sale agreement in favour of one Damodharan by getting Rs.86,50,000/-. The appellants have not executed the sale agreement in time due to the pendency of the suit filed by the son of the first appellant. In that agreement, the appellants agreed to execute the sale deed either in favour of Damodharan or on his direction to anybody. Subsequently, the said Damodharan entered into an agreement with the respondent while getting the said advance amount already paid by Damodharan to the appellants. Therefore, the appellants also agreed to execute the sale deed for their share. After settling the pending suit filed by the son of the first appellant, the appellants have delayed to perform their part of the contract. After giving sufficient time and also the demand, the respondent has filed the suit for specific performance and for the alternative relief of refund of the advance sale consideration paid to the appellants by discharging the amount paid to the said Damodharan.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Since the appellants have already received the said amount from the said

Damodharan, the appellants are liable to execute the sale deed on receipt of the balance sale consideration as mentioned in Ex.A4. In order to prove the case of the respondent/cross objector, the respondent himself was examined as P.W.1 and also to prove Ex.A4 agreement, he examined two witness as P.W.2 and P.W.3. Though the respondent proved the agreement (Ex.A4) and also his readiness and willingness, the Trial Court failed to consider the same and dismissed the relief of specific performance sought for by the respondent, however, decreed the suit for alternative relief of payment of the advance amount as mentioned in Ex.A4 agreement. Challenging the said Judgment and Decree, the appellants have filed the present appeal and for dismissal of the relief of specific performance, the respondent has filed the cross objection.

11. The specific case of the appellants is that they have not executed the sale agreement (Ex.A4) and Ex.A4 and connected agreements are concocted by the respondent and no consideration was paid and even the suit properties are not properly identified. The earlier agreement was for entire extent of 1 acre 2 cents, whereas, Ex.A4 is only



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

for 68 cents. Further, the other owners of the properties were not impleaded as the parties. Both the suits are also pending between the original owners of the suit property. The appellants denied the execution of the agreement and signatures of the appellants were also forged and the suit is barred by limitation and the appellants have not proved their readiness and willingness and the agreement Ex.A4 was also not proved in the manner known to law. Though the Trial Court has rightly appreciated the defence taken by the appellants and also appreciated the evidence that the respondent has not proved the readiness and willingness, has rightly dismissed the main relief, however, granted the alternative relief. In the absence of proof of Ex.A4, granting the alternative relief, is not proper. Therefore, as they aggrieved, they have filed the present appeal.

12. Though the respondent has filed the suit for specific performance based on the agreement Ex.A4 said to have been executed by the first appellant for himself and on behalf of the second appellant in favour of the respondent, the appellants have denied the same and also gone into the extent of saying that the agreements are forged and



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

concocted and therefore, once the execution itself is denied, it is the duty of the respondent/cross objector, as the plaintiff, to prove the case that the agreement Ex.A1 was executed by the appellants herein. In order to prove the said agreement, the respondent has examined himself as P.W.1. He has spoken about the execution of Ex.A1 agreement. He has also examined one of the witnesses to the said agreement as P.W.2 and he has spoken about the execution of the agreement by the appellants in favour of the respondent. The agreement was notarized and therefore, the Notary Public was examined as P.W.3. However, the learned counsel for the appellants vehemently contended that the said agreement has to be proved under Section 68 of the Indian Evidence Act by examining the attestor and the agreement, dated 02.09.2013, (Ex.A4) was not proved, as contemplated under Section 68 of the Indian Evidence Act. He would further contend that the evidence of P.W.1 is not sufficient to prove the execution of the alleged sale agreement, dated 02.09.2013 (Ex.A4) under Section 68 of the Indian Evidence Act. The respondent himself was examined and produced the said agreement, dated 02.09.2013, and the same was marked as Ex.A4 and one of the witnesses to the agreement was also examined on the side of the respondent and the Notary Public was



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

also examined as P.W3. However, the learned counsel for the appellants contended that the agreement was not proved under Section 68 of the Indian Evidence Act. Therefore, for better understanding, it is necessary to extract hereunder Section 68 of the Indian Evidence Act:

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

13. A bare reading of Section 68 of the Act shows that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its execution. Therefore, it is necessary to say that what are the documents are required to be attested.

14. Mortgage deed is required by law to be attested for the reason, as per Section 59 of the Transfer of Property Act, the mortgage deed with



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

the secured amount is more than one hundred Rupees, the mortgage should be effected through a registered instrument and it has been signed by the mortgagor and attested by at least two witnesses. Section 59 of the Transfer of Property Act is extracted hereunder:

“59. Mortgage when to be by assurance.—

Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.”

15. Yet another document, gift/settlement deed is required by law to be attested for the reason that under Section 123 of the Transfer of Property Act, the settlement deed must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. Section 123 of the Transfer of Property Act is extracted hereunder:



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

“123. Transfer how effected.—For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

16. Therefore, except these two documents, no other documents are required by law to be attested as per the provisions of the Transfer of Property Act. Apart from these two documents, yet another document is a Will as required by law to be attested for the reason that as per Section 63 of the Indian Succession Act, even though the Will is not a compulsory registered document, however, the Will has to be attested by two witnesses. Section 63 of the Indian Succession Act is extracted hereunder:

“63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:—



(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary”

17. Therefore, under Section 68 of the Indian Evidence Act, these are three documents required by law to be attested and therefore, the same shall not be used as evidence, until one attesting witness at least has been called for, for the purpose of proving its execution.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

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18. The subject matter of the suit is filed only based on the sale agreement (Ex.A4). Therefore, it does not fall under Section 68 of the Indian Evidence Act. Therefore, the agreement is not the document required by law to be attested and therefore, it need not be proved under Section 68 of the Indian Evidence Act.

19. Section 72 of the Indian Evidence Act is clear that proof of document not required by law to be attested, other than the above said document not required by law to be attested, may be proved as if it was unattested. In this case, since the agreement not falls under documents required by law to be attested, the agreement need not be proved under Section 68 of the Indian Evidence Act, then, it can be proved as if it was unattested. Section 72 of the Indian Evidence Act reads as follows:

“72. Proof of document not required by law to be attested.—An attested document not required by law to be attested may be proved as if it was unattested.”



WEB COPY 20. Further, the agreement is defined under the Contract Act.

Section 2(e) of the Contract Act reads as follows:

“2(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;”

21. On a reading of the said Section, it is seen that the agreement either may be oral or written. Once the agreement is in written, then it has to be proved in the manner known to law. As already stated, it is not a document required to be attested and it can be proved as if it was unattested document and as stated, in order to prove Ex.A4, even one of the witnesses to Ex.A4 was examined as P.W.2. In this case, the document is an unattested document and therefore, it was proved as if it is unattested document and as already stated, the respondent was examined as P.W.1 and he has spoken about the execution and the one of the witnesses to the document was also examined as P.W.2 and the Notary Public was also examined for proving the execution of the documents.



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22. The further contention of the learned counsel for the appellants is that since the execution was denied, the respondent ought to have proved the document by sending the disputed document with admitted document to the Forensic Lab and getting opinion by invoking Section 45 of the Indian Evidence Act. The first appellant was examined as D.W.1 and when he was put to suggestion as to whether he is going to take any steps for sending the document, he has answered that 'not necessary'. It is the duty of the respondent to prove the document, whereas, the respondent has produced and marked the said agreement itself as Ex.A4 as primary evidence and in order to prove the execution of the document, P.W.1 to P.W.3 were examined. Therefore, the foundation fact of execution of the agreement was proved by the respondent. Therefore, onus has been shifted to the appellants. But the appellants could not discharge their onus, however, the respondent has produced the document before the Court and also examined the witnesses to prove the same that the appellants have not taken any contra evidence. Therefore, under these circumstances, since the first Appellate Court is the fact finding Court, this Court has to re-appreciate the entire evidence.



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23. Though the appellants have denied the execution of Ex.A4-agreement, when the respondent has taken effective steps to prove the same in the manner known to law, the appellants have not taken any steps to disprove the same in the manner known to law. Though it is well settled proposition of law that the plaintiff has to prove his case on his own strength and he cannot take advantage of the loopholes left by the defendant, however, in this case, the plaintiff has taken effective steps to prove the disputed alleged sale agreement Ex.A4. Further, the burden of proof of the plaintiff in the civil case is not that of the prosecution in the criminal case that the prosecution has to prove the case beyond the reasonable doubt. Whereas, in the civil case, the plaintiff at the best has to establish the case with preponderance of probabilities. Whereas, in this case, the respondent has established the agreement that was executed by the first appellant for himself and on behalf of the second appellant as the power of attorney in favour of the respondent. This point is determined accordingly.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Point Nos.2 and 3:

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24. Though Ex.A4-agreement was said to have executed by the appellants in favour of the respondent, mere execution of the agreement itself is not enough to get the relief of specific performance. Further, the respondent has to prove the readiness and willingness. The respondent has stated that time is essence of the contract, whereas, there is no such stipulation in the agreement. However, even though the time is not essence of the contract regarding the sale of immovable property still the plaintiff has to prove that from the date of execution of the agreement till the filing of the suit, he was ready and willing to perform his part of the contract. Though the respondent has stated that the appellants originally executed the agreement in favour of one Damodharan, however, there is no material to show that the said Damodharan was ready and willing and sent legal notice. Further, there is a recital in the agreement that the appellants have to execute the sale deed either in favour of Damodharan or his direction and based on that the respondent said to have got agreement. It is not the case that the said Damodharan has made over the said agreement, however, according to the respondent, he paid the amount to Damodharan, which was paid by the Damodharan to the appellants.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

However, still the respondent/cross objector has to prove that he was ready and willing to perform his part of the contract from the date of agreement till the date of filing of the suit. Though the respondent has stated that he was a man of means, the same was challenged by the appellants. Even if he is financially well sound man of means, it may be satisfied regarding the readiness. As far as willingness is concerned, the respondent has to prove that he was always willing to execute his part of the contract.

25. A reading of the entire materials and both oral and documentary evidence, this Court does not find that the respondent proved the willingness from the date of agreement till the filing of the suit. At the time of filing the suit, he got lodgment statement for depositing the amount, however, he has not proved that he deposited the balance sale consideration less the advance amount of Rs.86,50,000/- and they deposited the said amount before the Court. The deposit of the balance sale consideration is not a condition precedent of filing the suit or proving the willingness. Ex.A4 was executed on 02.09.2013, however, the suit was filed only on 13.04.2016 i.e., four months prior to the expiry of Ex.A4. Whereas, even the oral agreement is dated 09.11.2010 and the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

subsequent agreement is dated 11.11.2010 (Ex.A2). Therefore, after execution of Ex.A1 and Ex.A2, November 2010 only, Ex.A4 came to be executed only on 02.09.2013 i.e., within two months prior of the expiry of the limitation period. However, even assuming that the suit is within a period of limitation, taking into consideration Ex.A4 dated 02.09.2013, the suit came to be filed on 13.04.2016, but the respondent/cross objector has not proved that he approached the appellants to execute the documents and even the respondent has not sent a pre-suit notice and called for the appellants to execute the sale deed by receiving the balance sale consideration. Therefore, under these circumstances, there is no material to show that the respondent has proved that the willingness to perform his part of the contract. While granting the relief of specific performance, the Court has to see conduct of the parties from entire materials not from isolated facts. Therefore, under these circumstances, this Court finds that the respondent is not entitled to the relief of specific performance as sought for in the suit. Since the respondent has not established the readiness and willingness, he is not entitled to get the decree as sought for in the suit. Therefore, the respondent/cross objector is not entitled to get the relief as sought for in the cross objection.



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

Therefore, the cross objection is liable to be dismissed. The points are determined accordingly.

Point No.4:

26. As already discussed, though the respondent has proved the execution of the agreement (Ex.A4), he has not proved the readiness and willingness, hence, the relief of specific performance was rejected by the Trial Court. A careful perusal of the oral and documentary evidence, this Court also finds that the respondent has not proved the readiness and willingness, however, the agreement Ex.A4 was proved. Once the relief of specific performance is disallowed, this Court has to decide as to whether the respondent/cross objector is entitled to get the refund of advance amount paid. In this case, even as per the agreement Ex.A4, the respondent has not directly paid the advance amount of Rs.86,50,000/- to the appellants. However, he has stated that the appellants said to have entered into the agreement on 09.11.2010 with one Damodharan and they were paid a sum of Rs.10,00,000/- as advance amount and thereafter, the respondent entered into the agreement with one Damodharan, in which, he has paid Rs.86,50,000/- as advance. Subsequently, under Ex.A4, the



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

respondent entered into the agreement with the appellants. The recital of Ex.A4-agreement shows that the said Damodharan said to have received a sum of Rs.86,50,000/- from the respondent and executed Ex.A2 agreement. Based on that, the appellants and the respondent have executed Ex.A4-agreement and less the said amount paid to the said Damodharan, the respondent has agreed to pay the balance sale consideration to the appellants. The appellants have taken a specific stand that the said Damodharan neither impleaded as party nor examined as witness. However, it is seen that already the respondent filed the application to implead the said Damodharan as a party in the suit, but the same was dismissed by the Trial Court stating that the suit for specific performance cannot be converted into a comprehensive suit. Except the parties to the agreement Ex.A4, no one is neither necessary nor proper party and hence, the same was dismissed and the same was not challenged by either of the parties. Therefore, the finding of the Trial Court in this regard is ended finality. Further, it is only a suit for specific performance based on the agreement Ex.A4. Therefore, the Court has to see while granting discretionary remedy, whether the agreement is genuine and the plaintiff has proved the execution of the agreement and the readiness and



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

willingness. In case the plaintiff is able to prove the readiness and willingness, the Court can grant the relief of specific performance. In case the Court is not satisfied that the readiness and willingness were not proved by the parties, who approached the Court, the Court can order a refund of the advance amount, if any, paid under the agreement. Therefore, in this case also, as already stated, Ex.A4-agreement was proved by the respondent/cross objector in the manner known to law. Though the appellants denied the execution and also the signature, they have not discharged their onus in the manner known to law. Therefore, under these circumstances, the respondent/cross objector is entitled to get the refund of the advance amount mentioned in the agreement. Therefore, this point is determined accordingly.

27. In the result, both the appeal and the cross objection are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

[P.V., J.] [K.K.R.K., J.]
23.10.2024

NCC : Yes/No
Index : Yes/No
Internet: Yes
skn



A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

To:

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1. The II Additional District Judge, Tiruchirappalli.
2. The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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A.S.(MD) No.116 of 2022 & Cro.Obj(MD)No.31 of 2024

P.VELMURUGAN, J.
and
K.K.RAMAKRISHNAN, J.

skn

A.S.(MD) No.116 of 2022 and
Cross Objection (MD)No.31 of 2024 and
CMP(MD)No.4086 of 2022

23.10.2024