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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.01.2025

CORAM

THE HONOURABLE Ms. JUSTICE R.N.MANJULA

S.A. No. 1314 of 2013
and M.P. No.1 of 2013

J.Rajamanickam ...Appellant

Vs.

1. A.Ramasamy Pillai (died)

2. The Special Officer
Gingee Co-operative Housing Society Ltd.
Periagaram No.S.A.Hsg-49, 41, Vasudevan Street
Periagaram, Gingee
Gingee Taluk, Villupuram District.

3. R.Murugesan
4. Mallika
5. Govindammal
6. Jeeva
7. Minor Karthikeyan ... Respondents

PRAYER: Second Appeal is filed under section 100 of the Code of Civil Procedure, 1908, to set aside the judgment and decree dated 28.04.2008 made in A.S. No. 39 of 2007 on the file of the Principal District Judge, Villupuram, confirming the judgment and decree dated 11.09.2006 made in O.S. No. 25 of 2005 on the file of the Subordinate Judge, Gingee.

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For Appellant	:	Mr.C.Vigneswaran
For Respondents	:	R1-died Dr.S.Suriya, AGP (R2) Mr.M.V.Venkateseshan (RR3 to 6) R7-Minor Rep. By R6

JUDGMENT

Affidavit of Service filed for completing the service of notice in respect of respondents 4 to 6 and the respondent 7 is represented by respondent 6.

2. The first defendant is the appellant. The plaintiff has filed the suit seeking a decree for specific performance and the same was decreed by the Trial Court. The first defendant has filed the first appeal challenging the judgment of the trial Court and the first appellate Court also dismissed the first appeal by confirming the judgment of the trial Court. Now the first defendant has preferred this second appeal.

3. The short facts as pleaded by the plaintiff in his plaint:-

The suit property belonged to the first defendant in view of the family partition deed executed on 21.04.1998. The first defendant and his brother along with their father Jambunatha Muthaliar had mortgaged the suit property

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in respect of item Nos. 1 and 2 in favour of the second defendant by availing a loan of Rs.60,000/-. On 10.03.1993, the entire suit property has been mortgaged in favour of the plaintiff and his brother's son, viz., Elumalai by availing loan of Rs.56,000/- by the first defendant, his father and his brother.

3.2. On 14.10.1999, a sale agreement has been entered into between the first defendant and the plaintiff for a total sale consideration of Rs.3,86,000/-. The sum of Rs. 56,000/-, which was the mortgage amount due to the plaintiff, was deducted from the sale consideration by the plaintiff. The first defendant has been paid with part sale consideration of Rs.1,60,000/- on the date of the sale agreement. It was assured that the first defendant would discharge the mortgage with the second defendant and then, the plaintiff would settle the balance sum of Rs.1,70,000/- to the first defendant within 150 days. Even prior to the sale agreement dated 14.10.1999, pursuant to the mortgage deed dated 10.03.1993, the plaintiff was put into the possession of the suit property to enjoy the same in lieu of the interest. Even after the receipt of Rs.1,60,000/-, the first defendant did not discharge the mortgage pending with the second defendant. On the date of sale agreement itself, it was understood that the first defendant would clear the mortgage pending with the second defendant. As the first defendant did not discharge the mortgage as agreed, the

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son of the plaintiff wrote a registered letter to the first defendant on 03.01.2000 and called upon him to perform his part of contract. The first defendant received a notice on 08.01.2000 and he did not send any reply notice. Once again another legal notice was sent to the first defendant on 20.01.2000. After receiving that, the first defendant had sent a reply on 11.03.2000 by admitting the execution of the sale agreement and sought time to clear the dues to the second defendant. Once again the plaintiff has sent a legal notice on 01.07.2000 and requested the first defendant to execute the sale deed in time after clearing the mortgage dues with the second defendant. However, the first defendant did not take any steps to clear the mortgage with the second deendant. A pre-litigation notice was sent by the plaintiff's son on 05.07.2000 to the defendants 1 and 2. The second defendant gave 10 days time to settle the loan, but the first defendant did not settle the loan within 10 days and thereafter, the plaintiff had filed the suit for specific performance.

4. The written-statement filed by the first defendant in brief:-

The suit property belonged to the first defendant. The mortgage in favour of the plaintiff and his brother's son Elumalai in respect of the suit property on 10.03.1993 for a loan of Rs.56,000/- was also admitted. Despite the loan amount was due to the plaintiff's brother's son Elumalai also, he was

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not a party to the sale agreement dated 14.10.1999. The said Elumalai has not been impleaded as party in this suit also. As the legal notice sent by the plaintiff was in English, the first defendant was not able to understand the same. The first defendant's father had availed a loan of Rs.60,000/- from the second defendant for the purpose of constructing a house in the suit property. The first defendant's father died after having paid a few installments towards the loan with the second defendant.

5. If the borrower who borrowed the loan from the second defendant society dies, the dues payable by the deceased will be taken care by the Group Insurance Scheme, but the second defendant did not discharge the loan amount availed by the first defendant's father from the Insurance Scheme. The first defendant has sent a letter to the second defendant stating that the he has to pay the dues to the tune of Rs.1,79,210/-. The second defendant has also filed a case against the first defendant before the Co-operative Registrar in a litigation No.469/96-97 and got an exparte decree against the first defendant on 11.04.2001 for a sum of Rs.1,79,210/-. The first defendant had initiated steps to set aside the exparte decree and the plaintiff and his brother's son were aware of the same. The plaintiff has filed the suit at the instigation of third parties whose aim was to grab the suit property from the first defendant. The

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plaintiff did not have the means to pay the balance sale consideration and he never insisted the first defendant to execute the sale deed. Hence, the defendants are not entitled to the relief as prayed.

6. The second defendant's written-statement in brief:-

On 13.05.1991, the first defendant, his father and his brother executed a mortgage deed with the second defendant in respect of the suit property and availed loan for a sum of Rs.60,000/-. The said mortgage amount has been disbursed on two occasions, i.e., Rs.42,000/- on 10.07.1991 and Rs.18,000/- on 30.12.1991. The first defendant's father has assured to repay the loan in 84 installments at the rate of Rs. 1,141.04 on or before 10th day of every month.

6.2. As the dues were not paid in time, the outstanding has risen up to a sum of Rs.2,55,207.80/- on 16.10.1993. On 26.11.1993, the first defendant's father died and the second defendant was aware of the said fact on 19.01.1999 only. During his life time he did not repay the loan regularly. On this aspect, the first defendant has sent a legal notice. It is stated by the second defendant to the plaintiff that if he paid the loan dues of the first defendant, the dues to the second defendant need not be deposited in the Court, and the loan obtained by the first defendant on 10.03.1993 will not bind the plaintiff. The second

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defendant is not a necessary party to the suit. The first defendant has preferred another writ petition in W.P. No. 7657 of 1996 in the Madras High Court and the same was dismissed.

7. Additional written statement filed by the first defendant in brief:-

The sale agreement is valid only for a period of 150 days from the date of its execution and thereafter, it would exist only as a loan transaction. The plaintiff is entitled to file a suit only in respect of the loan dues to him. The loan to be paid to the second defendant by the first defendant is also pending. But the plaintiff and his brother's son Elumalai have been enjoying the suit property in view of interest for the loan advanced by them to the first defendant. The outstanding payable by the first defendant to the plaintiff is Rs.1,60,000/-. As the plaintiff did not give pressure for repaying the above loan, the sale agreement has been made as security to the loan amount given by the plaintiff to the first defendant which is not enforceable. The amount of Rs.1,60,000/- given by the first defendant to the plaintiff on the date of the sale agreement is agreed to be repaid with interest at 12% per annum within 150 days. Hence, it cannot be taken that Rs.2,16,000/- has been paid as sale advance. There was no agreement between the plaintiff and the first defendant. The plaintiff was not ready and willing to perform his part of

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contract. As he did not come forward to pay the balance sale consideration within 150 days, he is not entitled to get the relief of specific performance. On 30.04.2004, the first defendant has paid a sum of Rs.91,000/- to the second defendant and discharged the loan. The first defendant was all along ready and willing to perform his part of contract. The first defendant has assured that he would execute the sale deed during the month of 'Thai' in the year 2000. As the plaintiff did not come forward as agreed, he sent a pre-litigation notice and thereafter, the plaintiff has filed the suit. In the reply notice sent by the first defendant on 11.03.2000, he requested extension of time and that itself would show the time has been extended for performing the contract.

8. On perusal of the above pleadings, the trial Court has framed the following issues:-

> *“(1) Whether the plaintiff is entitled to specific performance of the sale agreement dated 14.10.1999?*
>
> *(2) Whether the suit is bad for non-joinder of necessary party?*
>
> *(3) Whether the plaintiff was ready to willing to perform his part as per the terms of the sale agreement dated 14.10.1999?*
>
> *(4) To what other relief the plaintiff is entitled”*

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9. At the conclusion of the trial and on considering the evidence available on record, the trial Court has decreed the suit as prayed for. The first appeal preferred by the first defendant was also dismissed by confirming the judgment of the trial Court. Aggrieved over that, the first defendant has preferred this second appeal.

10. The learned counsel for the appellant submitted that the first respondent has proved the readiness and willingness to perform his part of contract. The suit has been filed at the verge of expiry of the limitation and that would show that the plaintiff was not all along ready and willing to perform his part of contract. As the plaintiff has not deposed evidence and subjected himself for examination the factum of readiness and willingness remains not proved.

11. The learned counsel for the respondents submitted that the plaintiff was all along ready and willing to perform his part of contract and he has been demanding the first defendant to come and receive the balance sale consideration and execute the sale deed, after discharging the loan pending with the second defendant. Despite the plaintiff had given several notices even before the expiry of 150 days, the appellant /first defendant did not discharge

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the loan and get himself prepared to execute the sale deed. The conduct of the plaintiff as substantiated by the documentary evidence would itself show that the plaintiff was ready and willing to perform his part of contract by paying the balance sale consideration, but it was due to the delay caused by the first defendant, the sale deed could not be executed. The first defendant did not allow the plaintiff to settle the loan with the first defendant and the loan with the second defendant has been discharged subsequent to the suit. As the plaintiff was physically weak, he was not in a position to come to the box. Since he has deputed his son to depose evidence, no adverse interference can be taken against him. The plaintiff was also having the financial competence to pay the balance sale consideration and that was not denied by the first defendant. In fact, the first defendant had availed loan from the plaintiff himself and that would also show his financial capability. The Courts below had rightly analysed the evidence in a right perspective and had chosen to decree the suit.

12. On the basis of the oral pleadings, I feel it is appropriate to deal with the appeal by framing the following substantial question of law:-

(1) Whether in law the lower Courts are right in granting the relief of specific performance even when the plaintiff did not

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come to box to speak about his readiness and willingness?

(2) Whether in law it is right for the Courts below to grant the relief of specific performance without properly appreciating the readiness and willingness on the part of the plaintiff?

13. For the sake of convenient discussion, the parties are referred to as per their rank and capacity in the suit.

14. The fact that the sale agreement-Ex.A2 dated 14.10.1999 has been executed between the first defendant and the plaintiff is not denied. Further fact that the first defendant has already mortgaged the property in favour of the plaintiff and his brother's son Elumalai by availing the loan of Rs.56,000/- is also not in dispute. The plaintiff has also mortgaged the said property with the second respondent Co-operative Bank for constructing a house in the suit property and the said loan was also not discharged and it is pending at the time when the sale agreement was executed. Insofar as the plaintiffs loan of Rs.56,000/- is concerned it is seen from the sale agreement itself that the said loan has been appropriated from and out of the total agreed sale consideration of Rs. 3,86,000/-. The sale agreement would read that the time for completing the sale consideration is 150 days. The sale agreement has stipulated further

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that the first defendant has discharged the loan pending with the second defendant before the registration of the sale deed and in the event of his failure to do the needful and to execute the sale deed, the plaintiff would file a suit for specific performance by depositing the balance sale consideration in the Court.

15. On the date of the sale agreement itself, the plaintiff received a partial sale consideration of Rs.1,60,000/- and that fact is not denied. Apart from the advance sale amount of Rs.1,60,000/- and the mortgage loan of Rs.56,000/- appropriated from the said sale consideration, the balance sale consideration yet to be paid by the plaintiff to the first defendant was Rs.1,70,000/-.

16. Each time when the plaintiff had approached the first defendant has stating that he would discharge the second defendant's loan. In fact, the defendant himself had sent a reply notice by Ex.A1 by seeking a further time to settle the loan.

17. Even though the second defendant had urged the plaintiff to discharge the loan pending with them by deducting the said amount from the balance sale consideration to be settled to the first defendant, the plaintiff did not discharge the pending loan with the second defendant in respect of the suit

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property.

18. Had the first defendant given consent to adjust the balance sale consideration against the loan amount to be payable to the pending outstanding of the loan payable to the second defendant, it would have been possible for the plaintiff to pay the said amount to the second defendant and then to pay the remaining sale consideration if any to the first defendant. The first defendant has stated that the plaintiff was not all along ready and willing to perform his part of contract. With the non-examination of PW1, readiness and willingness cannot be taken as proved. Insofar as the readiness is concerned, the plaintiff has been sending various letters and notices to the defendant to be ready to receive the balance sale consideration and execute the sale deed. The first defendant neither allowed the plaintiff to discharge the loan pending with the second defendant nor he himself had discharged the loan and proceeded further to complete the sale consideration. The repeated notices sent by the plaintiff to the first defendant, which are available as Exs.A3, A5 and A6 and A8 and A9 would only show that the plaintiff was all along urging the first defendant to complete the sale consideration.

19. The learned counsel for the appellant submitted that there was a huge

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delay between 01.04.2002 and 05.07.2002 and that would show that the plaintiff was not ready and willing to perform his part of contract. Had the first defendant discharged the loan with the second defendant within a specified time, it could be presumed that the first defendant was all along ready, but the plaintiff was not ready and willing. As the first defendant has been requesting repeated time to settle the loan with the second defendant and on his request, the time is being extended on each occasion, that would only show that the time agreed is the essence of the contract. However, it is for the plaintiff to offer explanation as to why he has been waiting between the two notices Exs. A8 and A9 and thereafter, filed a suit. Exs. A9 notice has been issued on 01.04.2002 and Ex.A9 notice has been sent on 05.07.2002. The only explanation offered by the plaintiff is that at the request of the defendant only he would repay the loan and release the suit property from the encumbrance with the second defendant society.

20. It is quite curious to note that the sale agreement has also got a clause stating that in the event of failure of the plaintiff, the first defendant should come forward to execute the sale deed and he is liable to repay the balance sale consideration of Rs.1,60,000/- along with the interest @ 12% per annum. So it is claimed by the appellant that the above transaction should be treated as

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security offered for the earlier loan availed by the first defendant and it cannot be strictly called as a 'sale agreement'.

21. The plaintiff knows that the sale agreement came to be in existence on 14.10.1999, and that there is one clause in the sale agreement which would state in the event of failure to execute the sale transaction within time, the first defendant to repay the advance loan amount received along with the interest. So it is claimed by the first defendant that the above clause would show that the transaction as only a security arrangement for the earlier loan availed by the first defendant and it cannot be construed as sale agreement.

22. To be noted that the plaintiff himself has given loan by taking the suit property itself as mortgage and hence, the loan offered by the plaintiff is a security. Thereafter, part sale consideration for purchase of the suit property has also been paid by the plaintiff to the first defendant. Therefore, even for the refund of the said part sale consideration, the very same property can serve as a security. Hence, there is no need to enter into an another sale agreement in order to consider as a separate security arrangement as pleaded by the first defendant. Even without the examination of the plaintiff, the evidence on records, mostly the documentary evidence and conduct of the first defendant

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would prove that the plaintiff had the financial capability to pay the balance sale consideration. His repeated reminders and the notices sent to the first defendant to come forward and execute the sale would show the willingness of the plaintiff. So the non-examination of the plaintiff is not adverse to the case of the plaintiff and hence, it is not fatal to the plaintiff's case.

23. Insofar as the gap between the Exs.A8 and A9 notices, one explanation offered by the plaintiff is that the first defendant has been repeatedly seeking time to settle the loan with the second defendant and the delay was only due to the first defendant in not discharging the loan pending with the second defendant society loan. The first defendant had settled the Co-operative society loan only on 30.04.2004, during which time the suit was pending. The delay cannot be attributed on the part of the plaintiff and it was the defendant who has sought time during each and every occasion and he had delayed the completion of the transaction. As the first defendant has availed loan from the plaintiff and from the second defendant, it cannot be imagined that the plaintiff had lent a further loan of Rs.1,60,000/-, as alleged by him. So a sum of Rs. 1,60,000/- which was paid on the date of the sale agreement was very much a part sale consideration and hence, Ex.A2 cannot be considered as a mere security arrangement for the loan given to the first defendant. The

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plaintiff has filed the suit within a short time immediately after issuing Ex.A9-notice sent to the first defendant. So the first defendant, who has caused delay in getting the sale transaction completed and requesting time to the plaintiff each occasions cannot be allowed to be benefited with his own wrongs. Hence, the plaintiff stands better on the equitable balance.

24. The Courts below had rightly appreciated the evidence in a holistic fashion and had chosen to find grounds in favour of the plaintiff in order to grant the relief of specific performance. As I do not find any legal or effectual infirmity in order to warrant any interference.

25. Accordingly, this second appeal is dismissed by confirming the judgment dated 28.04.2008 made in A.S. No. 39 of 2007 on the file of the Principal District Judge, Villupuram. No costs. Consequently, connected Miscellaneous Petition is closed.

29.01.2025

Index : Yes/No
Speaking order : Yes/No
NCC : Yes/No

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To

1. The Principal District Judge, Villupuram.

2. The Subordinate Judge, Gingee.

3. The Section Officer,
   V.R. Section,
   High Court, Madras.

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R.N.MANJULA, J.

Maya

S.A. No. 1314 of 2013

Dated : 29.01.2025