

A.S(MD)No40 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON	25.04.2024
PRONOUNCED ON	.01.2025

CORAM :

JUSTICE N.SESHASAYEE
and
JUSTICE P.VADAMALAI

A.S(MD)No.40 of 2014
and
C.M.P(MD)No.10958 of 2022
and M.P(MD)No.2 of 2014

1.Prabhakaran
2.Sirosini

...Appellants/Plaintiffs

Vs

Thomas

... Respondent/Defendant

(Cause title is accepted vide order dated 21.02.2014 in M.P(MD)No.1 of 2014 in ASSR-45776/2013 by ASJ and GCJ)

PRAYER: Appeal Suit is filed under Section 96 of the Code of Civil Procedure, against the judgement and decree dated 29.04.2013 in O.S.No.13 of 2012 on the file of the First Additional District Judge, Thoothukudi.



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For Appellants

: Mr.P.Subbaiah
for Mrs.P.Jesi Jeeva Priya

For R-1

: Mr. S.Deenadhayalan

JUDGMENT

(Judgment was delivered by N.SESHASAYEE J.)

The plaintiffs who have lost their suit for specific performance in O.S.No.13 of 2012 on the file of the I Additional District Court, Thoothukudi, has approached this Court with this appeal. For narrative convenience, the parties are referred to by their rank before the trial Court.

2. The plaintiffs have come forward with an uncomplicated straight forward case. Their pleadings are as below:

- a) The suit property is a residential property comprised in T.Sy.Nos. 1154/5 and 1155/8 in Block No.35 of Thoothukudi Corporation covering an extent of 2.056 cents with a residential house. This property belongs to the defendant.
- b) On 29.09.2011, the defendant and the plaintiffs entered into Ext.A1 a sale agreement, in terms of which, the defendant had



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agreed to sell the suit property to the plaintiffs for a total consideration of Rs.28.75 lakhs. Out of the said sum, the plaintiffs had paid a sum of Rs.11,00,000/- as advance. The agreement also provided 15 days time for payment of the balance consideration.

- c) While so, on 12.11.2011, the defendant had conveyed his inability to perform his part of contract vide Ex.A2 on certain untenable reasons. The plaintiffs responded to it with Ex.A3 notice, dated 22.11.2011, wherein they had required the defendant to perform his part of contract.

As the defendant did not offer to perform his part of contract, a suit came to be filed on the said facts. Narrating the above facts, the plaintiffs had pleaded that they are ready and willing to perform their part of contract.

3. Denying the allegations in the plaint, the defendant had filed his written statement wherein he alleges:

- (i) The total sale consideration for the suit was fixed at Rs. 25,00,000/- and not Rs.28.75 lakhs. Contrary to the allegation in the plaint that the plaintiffs had paid Rs.11,00,000/- as advance, they have paid only Rs.5,00,000/- as advance.



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(ii) The plaintiffs were defaulters in performing their part of contract within the time stipulated. As a result of which, the defendant had repaid the advance sum of Rs.5,00,000/- to the plaintiffs. In short, there is no relation between the sale agreement on which the plaintiffs have founded their cause of action, and the defendant. The plaintiffs tried to intimidate the defendant through their men and the defendant therefore, was constrained to institute O.S.No.40 of 2012 before the Principal District Munsif Court, Thoothukudi for a decree of prohibitory injunction to protect his peaceful possession of the property and the suit is pending.

4.1 On the above pleadings, the trial Court framed as many as five issues and all the issues relate to the plaintiffs' line of the case and no issue was framed *vis-a-vis* the defendant's line of defence.

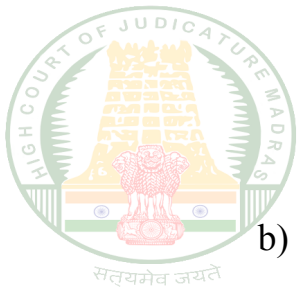
4.2 The dispute went to trial and during trial, for the plaintiffs, the second plaintiff examined herself as P.W.1 and also examined one Vasanthara as P.W.2 to establish that the advance sale consideration of Rs.11,00,000/- was paid in the presence of P.W.2. The plaintiffs had also produced Exs.A1 to A4 of which Exts. A1 to A3 have already been introduced in



evidence. Ex.A4 is a copy of the complaint which the first plaintiff had preferred before the police. For the defendant, he had examined himself as D.W.1 and had also examined one Sesuraj as D.W.2 for establishing that the plaintiffs had paid only Rs.5.0 lakhs as advance. He had also produced Ex.B1, a notary attested true copy of the agreement which the defendant has pleaded in his written statement (not a copy of Ext.A1 on which the suit is laid) and Ex.B2, advocate notice sent by the defendant's Advocate to the 1st plaintiff – xerox copy.

4.3 On appreciation of evidence before her, the learned District Judge chose to dismiss the suit, and her line of reasoning is:

- a) According to the defendant, the first page of Ex.A1 and Ex.B1 are the same whereas the plaintiffs had changed the second page of Ex.A1 in which the material terms of the contract were incorporated, and replaced it with another sheet by forging the signature of the defendant, whereas Ext.B1 was attested by a Notary Public, and the terms of the contract which the second page Ext.B1 discloses material variation of substantial kind as regards the total sale consideration payable and also the advance amount paid by the plaintiffs.



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- b) The testimony of the defendant discloses that the original sale agreement (something which the defendant claims, and necessarily it is not Ext.A1) a photo-copy was made and the said copy was handed over to the defendant. In Ex.A1, the signature of the defendant was found in Tamil whereas in second page of Ex.B1, the signature of the defendant is found in English.
- c) Even though the plaintiffs tried to prove the sale agreement through P.W.2, her evidence was not sufficient as she was not a witness to Ex.A1.
- d) P.W.1 in her testimony, has conceded that on the date of sale agreement, she did not possess sufficient money to complete the sale and hence, she had applied for a loan. But, the said loan was not sanctioned and that she did not possess the entire balance consideration to get ready for performing her part of contract within 15 days from the date of sale agreement. The plaintiffs are therefore, not ready to perform their part of contract.
- e) This apart, the suit was filed on 18.04.2012 and there is inordinate delay in filing the suit.
- f) So far as the return of the alleged advance amount of Rs.5,00,000/- by the defendant to the plaintiffs is concerned, the trial Court



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disbelieved the case of the plaintiffs that on the relevant date the first plaintiff was abroad since the plaintiffs had chosen not to produce his passport. This apart, the sale agreement itself has been cancelled.

g) This apart, the first plaintiff has not proved that Ex.A4 police complaint was actually given by him.

The aforesaid decree of the trial Court is now under challenge.

5. The points for consideration:

- a) As between Ex.A1 and Ex.B1 which is genuine?*
- b) What is the advance amount which the plaintiffs have paid to the defendant?*
- c) Has the defendants repaid Rs.5,00,000/- to the plaintiffs?*
- d) What is effect of termination of sale agreement by the defendant under Ext.A2?*

6. In this appeal, the plaintiffs have amended the plaint vide order in CMP(MD) 10957 of 2022 and introduced an alternate prayer for seeking the return of the advance money.

7. The learned counsel for the plaintiffs/appellants submitted that the trial court's approach is pivoted on its trust in defendant's version that Ext.B1



was the copy of the original agreement and that Ext.A1 was not the original, that the plaintiffs had changed the second page of the original document and had given it the colour of the original document and produced the same as Ext.A1, but the Court was in error in holding against the genuineness of Ext.A1 for the following reasons:

- a) That Ex.B1 is the xerox copy and while according to the defendant the first page of this document is the same as the first page of Ext.A1, yet the perusal of both the documents show that not one information in the first page of Ex.B1 tallies with the first page of Ex.A1.
- b) Inasmuch as the defendant had admitted the execution of the sale agreement and had taken a defence that the second page of sale agreement was replaced by the plaintiffs, the burden is on him to establish that it was the plaintiffs who had replaced the second page of the sale agreement and this burden had not been discharged by the defendant.
- c) Second page of Ex.B1 shows that the said document had been attested by a Notary Public. If the Notary had actually attested Ex.B1 to certify that it is a true copy of Ext.A1, then the defendant is under obligation to explain which is that original which the



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Notary had compared and attested. Indeed, the Notary Public was not even cited as a witness on behalf of the defendant.

- d) If ordinary course of human conduct is the basis, then the allegation of the case of the plaintiffs preponderates the probability of their case since according to Ext.A1 the plaintiffs had quoted a higher sale consideration of Rs.28.75 lakhs as against Rs.25.0 lakhs which the defendant quotes. If only Ex.A1 was a fabricated document, it does not stand to reason why the plaintiffs should quote a higher price than what the defendant claims as the agreed sale consideration.
- e) Turning to the delay in filing the suit, in a suit for sale of immovable property, time is not the essence of contract. At any rate, the suit was laid within few months from the date of Ex.A3.
- f) So far as the finding of the trial court that the plaintiffs were not ready and willing to perform their part of the contract goes, the property in question was encumbered at the time when the sale agreement was entered into, and as per the stipulations in Ext.A1 the defendant should sell the property free of encumbrance as it was under attachment by a court in Coimbatore. On the other hand, it was the defendant who was not ready and willing to



perform his part of the contract.

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Reliance was placed on the authorities in *Gautam Sarup Vs Leela jetley and others* [(2008) 7 SCC 85]; *Union of India Vs Ibrahim Uddin and another* [(2012) 8 SCC 148]; *Parvathy and another Vs Ranjith* [2023 (2) CTC 13]; *Sanjay Kumar Singh Vs State of Jharkhand* [(2022) 7 SCC 247]; *Santosh Vs Jagat Ram and another* [(2010) 3 SCC 251]; *State of Orissa and another Vs Bibhisan Kanhar* [(2017) 8 SCC 608]; *Ferrodous Estates (Pvt) Ltd. Vs P.Gopirathnam (Dead) & others* [2021-1-L.W.388]; *Y.P.Sudhanva Reddy and others Vs Chairman and Managing Director, Karnataka Milk Federation and others* [(2018) 6 SCC 574]; and *Thanikodi Vs R.J.Pandiarasan and others* [2022 (3) CTC 104].

8. Per contra, the learned counsel for the defendant/respondent argued:

- a) The time stipulated for performance of contractual terms under Ext.A1 dated 29.09.2011 was 15 days and this period expired on 14.10.2011. Indeed, under Ext.B2, notice dated 12.11.2011, the defendant had terminated Ext.A1 sale agreement. However, the suit was laid only on 18.04.2012. This shows that the plaintiffs were not ready and willing to perform their part of the contract in



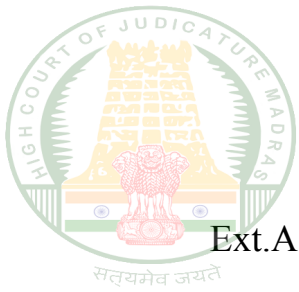
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terms of **Sec.16(c) of the Specific Relief Act**. Reliance was placed on the ratio in *M/s.Ramnath Publications Pvt. Ltd. & another Vs. A.R.Madana Gopal* [2008-3-L.W.817].

b) Indeed, the plaintiffs cannot seek refund of the advance amount paid, since when D.W.2 was examined, not even a suggestion was made seeking refund of the said amount. And when the trial Court has held that Ext.A1, on which the plaintiffs have found the cause of action was not genuine, it is impermissible for the plaintiffs to seek refund of the advance amount.

9. This Court weighed the rival contentions carefully. What is not in dispute is the existence of the sale agreement dated 29.09.2011 between the plaintiffs and the defendant for the sale of the suit property. The issue was whether Ext.A1 is a genuine document. Here the defendant has taken up a stand that the original sale agreement was prepared in duplicate and it was attested by the notary public and that the second page of this document was totally changed by the plaintiffs. However, this is not found to be true. As submitted by the learned senior counsel for the plaintiffs, even the first page of Ext.A1 is not the same as Ext.B1. Indeed, the stamp paper as found in the first page of Ext.B1 and that in



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Ext.A1 are entirely different. And to support his plea, the defendant has not examined the notary public either. And when this Court compared the signature of the defendant in both the pages of Ext.A1, they bear striking similarity which indicate that both the signatures in Ext.A1 belonged to the same person. Having admitted the execution of the sale agreement dated 29.09.2011, and having admitted only the second page of Ext.A1 has been changed by the plaintiffs, the burden is squarely on the defendant to establish that Ext.A1 was not the document that he had executed. And to Ext.A2 notice which the defendant had issued cancelling the sale agreement, the plaintiffs have issued Ext.A3 reply notice, in which the latter has asserted that the sale consideration was Rs. 28,75,000/- and that Rs.11,00,000/- was paid as advance. However, the defendant has not issued any rejoinder denying it, which in the ordinary course of human conduct it would have evoked some response from the defendant.

10. Taking cumulatively Ext.A1 along with the conduct of the defendant, this Court has little hesitation in holding that there is a preponderating probability that Ext.A1 is genuine,



11. And this Court now direct specific enforcement of Ext.A1 sale agreement. Here, P.W.1 in her testimony has conceded that the plaintiffs did not possess the balance sale consideration to complete the sale within 15 days. Very obviously the plaintiffs were not ready to perform their part of the contract. It may be that the defendant has indicated in Ext.A2 notice about the attachment of the suit property by a civil court in Coimbatore as one of the reason for cancelling the sale agreement, but that has little relevance when the obligation is cast only on the plaintiffs to prove their readiness and willingness to perform his part of the contractual obligation then it is immaterial whether the defendant was ready to sell the property or not, whatever be his reason for his decision. Necessarily, the plaintiffs will not be entitled to seek specific enforcement of the contract.

12.1 The next issue is whether the plaintiffs are entitled to seek refund of the advancement amount? This now requires a decision on the advance amount paid by the plaintiffs. According to the plaintiffs they had paid Rs.11.0 lakhs as advance to the defendant whereas the defendant claims it was only Rs.5.0 lakhs. And the second part is that according to the defendant even this Rs.5.0 lakhs has been repaid to the plaintiffs.



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12.2 This Court has already found that Ext.A1 is genuine, and this implies that its contents have to be trusted as true, and accordingly it has to be held that the plaintiffs have paid Rs.11.0 lakhs as advance to the defendant. And, if it is the case of the defendant that only Rs.5.0 lakhs was paid then burden is again on him to prove it, but he did not. Turning to the last aspect as to whether the defendant had repaid Rs.5.0 lakhs which alone he claims to have recieved, he only makes a self-serving statement to support his assertion, and it hardly takes the place of believable truth. At least going by the rule of preponderance of probability, his assertion appears most improbable.

13. Should the court now direct the repayment of the advance amount paid by the plaintiffs? Here it is the defendant who has cancelled the contract and hence it cannot be held that the plaintiffs was in breach. Therefore, it is only appropriate that the defendant is directed to repay the advance amount of Rs.11.0 lakhs to the plaintiffs. And so far as the interest goes this Court deems it appropriate to direct payment of interest at 6% p.a. on the advance amount, but only from the date on which C.M.P.(MD) No.10957 of 2022 was allowed.



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14. In the end, this Court allows this appeal and the judgement and decree of the learned I Additional District Judge, Thoothukudi, dated 29.04.2013 in O.S.No.13 of 2012, is set aside. This Court directs the defendant to pay the plaintiffs a sum of Rs.11.0 lakhs with interest at 6% p.a from 25.04.2024 on which C.M.P.(MD) No.10957 of 2022 was allowed. No costs. Consequently, connected miscellaneous petitions are closed.

(N.S.S., J.) (P.V.M., J.)
06.01.2025

NCC : Yes/No
Index : Yes/No
PM / ds

To :

1. The First Additional District Judge
Thoothukudi.
2. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.
and
P.VADAMALAI, J.

PM

Pre-delivery JUDGMENT MADE IN
A.S(MD)No.40 of 2014
and
C.M.P(MD)No.10958 of 2022
and M.P(MD)No.2 of 2014

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