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S.A.No.742 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.03.2024

CORAM

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

S.A.No.742 of 2013

and

M.P.No.1 of 2014

1.Vasanth Paul Pandian (Died)

2.Paulpandian Thirumalaisamy

3.Jeyachithra Rajanphilip

4.Hemalatha Ragunathan

5.S.Krithiga

6.Lavanya Paulpandian

.. Appellants

(Sole appellant died, A2 to A6 are brought on record as LR's of deceased sole appellant, vide order of Court dated 13.03.2024 made in CMP.Nos.5677, 5683 and 5693 of 2024 in S.A.No.742 of 2013 by VLNJ)

Vs.

1.Thangam alias Angamuthu alias Allimuthu



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2.Madhammal

3.Sakthivel

.. Respondents

Prayer : The Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree in A.S.No.36 of 2010 on the file of the Principal District Judge at Salem, dated 15.12.2010 in reversing the judgment and decree in O.S.No.82 of 2001 on the file of the Sub-Judge, Mettur, dated 19.08.2005.

For Appellants : Mr.N.Manoharan
for Mr.P.Arumugavel

For Respondents : Mr.R.Nalliyappan

JUDGMENT

The present Second Appeal arises against the judgment and decree of the Court of the Principal District Judge at Salem in allowing A.S.No.36 of 2010, dated 15.12.2010 and thereby, dismissing the suit in O.S.No.82 of 2001, dated 19.08.2005 on the file of the learned Subordinate Judge at Mettur.

2. For the sake of convenience, the parties will be referred to as their ranks in the suit.



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3. The 1st plaintiff presented a suit in O.S.No.82 of 2001 before the learned Subordinate Judge at Mettur for specific performance of an agreement of sale.

4. It is the plaintiff's case, that defendants 1 to 3 had entered into an agreement for sale of the suit schedule mentioned property with her on 03.07.2000. The sale consideration for the property was fixed at a sum of Rs.1,50,000/- (Rupees One Lakh and Fifty Thousand only) and the 1st plaintiff had paid an advance of Rs.1,00,000/- (Rupees One Lakh only) leaving the balance sum of Rs.50,000/- (Rupees Fifty Thousand only) to be paid within a time period of eleven months.

5. As defendants 1 to 3 did not come forward to execute the sale deed and were dodging the same, the plaintiff issued a suit notice on 21.05.2001. The suit notice was returned as refused. Therefore, he issued a telegram on 02.06.2001, calling upon the defendants to execute the document. As the defendants did not accede to her request, the 1st plaintiff presented a suit for specific performance on 04.06.2001.



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6. The stand of the defendants is that, the agreement that had been entered into was not for the purpose of a sale but had been entered into for the purpose of loan transaction. They stated that the 3rd defendant was to get married on 07.07.2000 and therefore, the family was in urgent need of funds. Consequently, they contacted one Babu for loan and Babu had pleaded his inability stating that he does not have money with him. Babu had introduced the 1st plaintiff to the defendants and as a security for the loan that had been paid by the 1st plaintiff to the defendants, the document had been executed.

7. They further pleaded that they had repaid a sum of Rs.20,000/- (Rupees Twenty Thousand only) out of the loan amount of Rs.1,00,000/- (Rupees One Lakh only) to one Babu and what remains to be paid is only a sum of Rs.80,000/- (Rupees Eighty Thousand only). When they wanted to pay the amount, the 1st plaintiff stated that she is not interested in taking the money from the defendants but wanted the property for which the defendants were not willing. Hence, the suit for specific performance should be dismissed.



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

- “ 1. தாவாகிரய ஒப்பந்தம் உண்மையா, செல்லத்தக்கதா ?
2. தாவாகிரய ஒப்பந்தத்திற்கு தக்க மறுபயன் ஆதரவு உள்ளதா ?
3. எதிர்வாதிகள் தாவா கிரய ஒப்பந்தம் வாய்மொழியாக கடன் நடவடிக்கைக்கு செக்யூரிட்டிக்காக ஏற்படுத்தப்பட்டதாக கூறியுள்ளது உண்மையா ?
4. வாதி தன் பங்கு ஒப்பந்தத்தை நிறைவேற்ற தயாராகவும் விருப்பமாகவும் இருந்து வந்துள்ளாரா ?
5. வாதிகோரியுள்ளபடி ஏற்றதை ஆற்றுக பரிகாரம் பெறத்தக்கவரா ?
6. வாதிக்கு கிடைக்க வேண்டிய இதர பரிகாரம் என்ன ? ”

9. On the side of the plaintiff, 1st plaintiff's husband was examined as P.W.1 and one Karthikeyan was examined as P.W.2 and Ex.A1 to Ex.A5 were marked. On the side of the defendants, the 1st defendant/Thangam @ Allimuthu was examined as D.W.1 and one Saravanan was examined as D.W.2 and Ex.B1 and Ex.B2 were marked.



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10. Considering the oral and documentary evidence, the learned Trial Judge was pleased to decree the suit as prayed for with costs.

11. Aggrieved by the same, a regular appeal was preferred before the learned Principal District Judge at Salem. The appeal was preferred with a delay of 532 days. The said application came to be dismissed against which a revision was preferred before this Court in C.R.P.(NPD)No.3785 of 2008. The Civil Revision Petition was allowed by this Court on 08.04.2010, condoning the delay in preferring the appeal. Thereafter, an appeal was taken on file as A.S.No.36 of 2010. The learned Appellate Judge after hearing both sides came to a conclusion that while the agreement was between Vasantha Paul Pandian/1st plaintiff and the defendants, it was only her husband Mr.Paul Pandian who had entered the witness box and therefore, the Court should take an adverse inference for the lack of the 1st plaintiff from entering the witness box.

12. The learned Appellate Judge further held that as the 1st plaintiff



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had not been examined, there is no evidence before the Court to prove the readiness and willingness on part of the 1st plaintiff and therefore, he denied the relief of specific performance and allowed the appeal.

13. The learned Appellate Judge while allowing the appeal and dismissing the suit for specific performance, granted a decree for return of an amount of Rs.1,00,000/- (Rupees One Lakh only) together with interest from 03.07.2000 till the date of repayment. In other words, the Court denied the relief of specific performance but granted a decree for recovery of advance amounts.

14. Aggrieved by the same, the present Second Appeal has been preferred by the plaintiffs before this Court.

15. This appeal was admitted by this Court on 26.08.2013 on the following substantial question of law :

“ Whether the lower appellate Court is right in holding that the parties entered into a loan transaction and not an agreement of sale having regard to the admission by the respondents in the written statement that the appellant insisted



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the respondents executed the sale deed as per the agreement ? ”

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16. Mr.R.Nalliyappan entered appearance on behalf of the respondents in the appeal.

17. I heard Mr.N.Manoharan representing Mr.P.Arumugavel for the appellants and Mr.R.Nalliyappan for the respondents.

18. Mr.N.Manoharan would submit that the 1st plaintiff has proved her readiness and willingness and therefore, the lower Appellate Judge erred in interfering with a decree. He would further state that by virtue of Ex.A1, she has proved the document as an agreement of sale, the fact that in quick succession under Ex.A2 and Ex.A3, she had called upon the defendants to appear before the Sub-Registrar's office for registration shows that she was not only possessed the funds as stated by her in the evidence but she was also ready and willing to convert the sale agreement into a sale deed.

19. He would point out that the lower Appellate Judge had rendered



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a judgment without referring to Section 120 of the Indian Evidence Act, whereunder, a wife can depose on behalf of the husband and a husband can depose on behalf of the wife in the civil proceedings and failure to take note of the same is fatal to the judgment. He would state that the plaintiffs had done all that they had to do and therefore, the lower Appellate Judge erred in interfering with the decree of the Trial Court which had the benefit of seeing the parties deposing before it.

20. Mr.N.Manoharan would rely upon the judgments of the Supreme Court in *Kirpal Kaur and Another v. Ritesh and Others* [(2022) 6 SCC 620] and *Madhukar Nivrutti Jagtap and Others v. Pramilabai Chandulal Parandekar (Dead) through Legal Representatives and Others* [(2020) 15 SCC 731] and *Bhavyanath represented by Power of Attorney holder v. K.V.Balan (Dead) through Legal Representatives* [(2020) 11 SCC 790]. On the basis of these judgments, he would argue that unless and until, the sale agreement itself states that it is towards the loan transaction, the Court cannot interpret the same otherwise.

21. Mr.R.Nalliyappan would contend that the transaction is only a



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loan transaction and this is clear from the evidence that had been let in by the defendants. He would draw my attention to the evidence of D.W.1 and D.W.2 to substantiate this point. He would state that the statement in the written statement that the agreement had been entered into cannot be treated as an admission because, in Paragraph Nos.3 and 4 of the written statement, it had been specifically stated by his clients that it was not an agreement of sale but an agreement which had been entered into for the purpose of a loan transaction. On these points, he would state that the substantial question of law that had been framed by this Court does not arise for consideration and prayed for dismissal of this appeal.

22. I have gone through the documents and had applied my mind to the submissions made by the counsels on either side.

23. Insofar as the first plea that the 1st plaintiff has not examined herself but has only examined her husband and that being fatal to the proceedings, I have to agree with Mr.N.Manoharan that under Section 120 of the Indian Evidence Act, a husband can depose on behalf of the wife and a wife can depose on behalf of the husband. Infact, the Section declares that



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the respective spouses in civil proceedings will be a competent witness.

Therefore, the view of the learned Appellate Judge is that as the 1st plaintiff has not entered the witness box, the Court must take an adverse inference as against the 1st plaintiff is a view, which is contrary to the statute.

24. Infact, the very judgment relied upon by Mr.R.Nalliyappan to support the view taken by the learned Appellate Judge in ***Rajiah Nadar v. Manonmani Ammal*** [1999 (1) CTC 245] in Paragraph 10 would specifically held that the non-examination of the plaintiff in a suit for specific performance is not fatal as long as it is explained.

25. In the case on hand, it is not a case of a third party having been examined on behalf of the 1st plaintiff. The person examined is none else than her husband and the relationship between Vasantha/1st plaintiff and Paul Pandian is not in dispute. Therefore, the learned Appellate Judge fell in error in holding that a husband cannot depose on behalf of the wife in a suit for specific performance and therefore, the finding to the effect deserves to be set aside.



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26. Now, turning to the facts of the case, it is on record by the evidence of P.W.1 that the date on which he entered into an agreement, he had a sum of Rs.3,00,000/- (Rupees Three Lakhs only) with him. The relevant portion of the evidence read hereunder :

“ ஒப்பந்தப் பத்திரம் எழுதப்பட்ட போது எங்கள்
கைவசம் எவ்வளவு பணம் இருந்தது என்றால் வீட்டில்
வங்கியில் எல்லாம் சேர்த்து ஏறத்தாழ 3 லட்சம்
இருந்திருக்கும். ”

27. This shows that the 1st plaintiff had sufficient funds for getting a sale deed on the very date. However, for the reasons unexplained by the 1st plaintiff, she had only taken a sale agreement instead of a sale deed.

28. The second aspect which I have to consider is the fact that both the 1st plaintiff and the defendants agreed that the transaction was gone through with the help of one Babu. This Babu is none else than the nephew of P.W.1. The case of the 1st plaintiff is that Babu had negotiated for sale of the property, whereas, the case of the defendants is that Babu had negotiated for arranging funds for the marriage in the family. The 1st plaintiff did not examine Babu to substantiate the case that had been



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pleaded by him.

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29. Further, the fact remains is that the property is situated within the jurisdiction of the Sub-Registrar of Omalur. The parties had gone to the Sub-Registrar's office and yet did not enter into a sale deed, though the 1st plaintiff was possessed of sufficient funds but had only entered into a sale agreement.

30. Mr.N.Manoharan would contend that since the marriage was a near proximity of an agreement, instead of entering into a sale deed, they decided to enter into a sale agreement. This point have two aspects. The date on which the agreement was entered into, the 1st plaintiff had the money and this is clear from her evidence as stated above. The parties had also on the vicinity of the Sub-Registrar's office and therefore, the statement that because of the wedding in the family, it would not have been possible for the defendants to enter into a sale deed does not hold water.



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31. I am constrained to come to a conclusion that it was only a money transaction because of yet another factor, namely, the original of the title deed, under which, the 2nd defendant purchased the property was produced by the 1st plaintiff as Ex.A2. Original title deed is not given at the time of entering into a sale agreement. It is only given when a loan transaction is entered into as a guarantee for the repayment of the amount and to ensure that the property is not mortgaged elsewhere for the purpose of duping the original money lender.

32. Further, though Ex.B1 had been marked under objection, the 1st plaintiff had not even cross examined the 1st defendant that the marriage certificate had been prepared for the purpose of the case or to the fact the marriage itself had not taken place at all. It is settled position of law that where on a crucial aspect of the case that there is no cross examination, it is deemed to have been admitted. See, *Browne v. Dunn* [(1893) 6 R. 67 (HL)], *State of Uttar Pradesh v. Nahar Singh (dead) and Ors.* [(1998) 3 SCC 561] and *Rajinder Pershad (Dead) By LRs v. Smt. Darshana Devi* [(2001) 7 SCC 69].



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33. In a suit for specific performance, the high hurdle that is placed on the 1st plaintiff should be discharged satisfactorily before the Court turns to the conduct of the defendants. This is because of two sections, namely, Section 16(c) and Section 20. Section 16(c) places a personal bar on the plaintiff to get a decree for specific performance and Section 20 states that even if it is legal if the Court comes to a conclusion that it is inequitable, the suit for specific performance cannot be decreed.

34. In the light of the above doubts that have been raised by the defendants, with respect to the circumstances surrounding to the execution of Ex.A1, I am left with no other option than to concur with the view that has been taken by the Appellate Court in A.S.No.36 of 2010, dated 15.12.2010.

35. However, I have to take note of the fact that on account of the delay in presentation of the appeal by the defendants as against the decree, the 1st plaintiff was constrained to initiate execution proceedings. In the through Court, she got a sale deed executed in her favour after spending a sum of Rs.18,071/- (Rupees Eighteen Thousand and Seventy One only).



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Since I am confirming the judgment and decree of the 1st Appellate Court, the defendants are duty bound not only to honour the decree of refund that has been granted by the lower Appellate Judge but they would also liable to pay a aforesaid sum of Rs.18,071/- (Rupees Eighteen Thousand and Seventy One only) which the plaintiffs had spent towards the execution of the sale deed.

36. The substantial question of law framed does not arise for consideration.

37. In fine, the judgment and decree of the Court of the lower Appellate Judge denying the relief of the specific performance and directing refund of the advance amount for a sum of Rs.1,00,000/- (Rupees One Lakh only) stands confirmed. In addition, the defendants shall refund to the plaintiffs a sum of Rs.18,071/- (Rupees Eighteen Thousand and Seventy One only) spent towards the execution of a sale deed by the Court in favour of the plaintiffs pursuant to the decree in O.S.No.82 of 2001, dated 19.08.2005. Till the aforesaid amounts are discharged, there shall be a charge over the suit schedule mentioned property.



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38. Accordingly, the Second Appeal is dismissed in the above terms.

There shall be no order as to costs. Consequently, connected Miscellaneous
Petition is closed.

26.03.2024

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Index:Yes/No

Speaking Order :Yes/No

Neutral Citation:Yes/No

To

1.The Principal District Judge,
Salem

2.The Sub-Judge,
Mettur



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V. LAKSHMINARAYANAN, J.

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