IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 01.04.2015

Delivered on : 18.06.2015

CORAM

THE HONOURABLE MR. JUSTICE P.R.SHIVAKUMAR

A.S.No.516 of 2011
&
M.P.No.1 of 2011

1. Mr.P.Palani
2. Mrs.Kowsalya
3. Mr.P.Saravanan ...Appellants

-Vs-

Mr.G.Subramaniam ...Respondent

Appeal filed under Section 96 of the Civil Procedure Code and Order 41 Rules 1 and 2 of CPC against the judgement and decree of the learned Additional District Judge, Fast Track Court No.1, Chengalpattu dated 08.12.2010 in O.S.No.123 of 2007.

For Appellant : Mr.K.Shahul Hameed

For Respondent : Mr.V.Manohar

JUDGMENT

The defendants in the original suit O.S.No.123 of 2007 on the file of the Additional District Judge, Fast Track Court No.1, Chengalpattu are the appellants in the appeal. The plaintiff therein is the respondent before this Court. The respondent G.Subramaniam filed the above said suit for the relief of specific performance and for permanent injunction based on an agreement for sale dated 05.01.2006. After contest, the suit was decreed by the trial Court by a judgment and decree dated 08.12.2010. Challenging the said decree, the present appeal has been filed by the appellants herein, who were the defendants in the original suit.

2. The plaint averments based on which the respondent herein sought the reliefs are, in brief, as follows:

i) An Extent of 9.95 acres comprised in S.Nos.1080/1, 1081, 1082/3E/2 and 1097 at Ponvilaindha Kalathur Village, Chengalpattu Taluk, Kancheepuram District originally belonged to three persons viz., 1) K.P.Narasimman, 2) K.S.Srinivasa Raghavachariar and 3) K.S.Veeraraghavan. The third appellant/third defendant Saravanan purchased the said property through this father and natural guardian, namely the first appellant/first defendant, as he was then a minor, under a registered sale deed dated 05.02.1992 registered on the file of the District Registrar, Chengalpattu as Document No.71/1992. On 16.07.2004, all the three appellants/defendants jointly sold an extent of 3.14 acres comprised in S.No.1081, 1082/3E/2 and 1097, out of the total extent of 9.95 acres, under a registered sale deed bearing Document No.771/2004 to V.Rajagopal. The remaining extent of 6.81 acres comprised in S.No.1080/1 was agreed to be sold by the appellants / defendants to the respondent/plaintiff under a registered agreement for sale dated 04.01.2006 registered as Document No.15/2006 on the file of Joint Registrar 1, Chengalpattu. The total sale consideration was fixed at Rs.14,98,200/- at the rate of Rs.2,200/- per cent and a sum of Rs.1,00,000/- was paid as advance. The agreed time for completion of the sale was 90 days.

ii) The appellants/defendants informed that there was no encumbrance on the property agreed to be sold. Subsequent to the execution of the said sale agreement, the respondent/plaintiff came to know that there were two mortgages created for Rs.1,50,000/- each in respect of the property agreed to be sold. The appellants/defendants represented that the principal and interest worked out to Rs.5,00,000/- and above. Hence, on 05.01.2006 itself, the respondent/plaintiff paid a sum of Rs.5,50,000/- to the appellants/defendants towards part payment of the sale consideration in order to enable them to clear the mortgage debts. For acknowledging the receipt of the said amount alone, a further agreement was entered into with similar terms and conditions on 05.01.2006. The appellants/defendants, contrary to their undertaking, redeemed only one mortgage created in favour of Sumerchand for a sum of Rs.1,50,000/- and failed to redeem the other mortgage created in favour of V.Rajagopal in respect of the suit land, namely acres 6.81 comprised in S.No.1081/1. The respondent/plaintiff made a further payment of Rs.80,000/- making the total tally of the amount paid by him to Rs.7,30,000/- and the balance sale consideration payable under the agreement was only Rs.7,68,200/-.

iii) Despite several requests to redeem the mortgage created in favour of V.Rajagopal and execute a sale deed in terms of the agreement for sale, the appellants/defendants neither redeemed the mortgage nor came forward to execute the sale deed. On the other hand, they were postponing the execution of the sale deed stating that they would redeem the mortgage and then execute the sale deed. In the said circumstances, the respondent / plaintiff was constrained to issue a notice on 12.02.2007 calling upon the appellants/defendants to fix a date to receive the sale consideration deducting the pending mortgage debt (Principal, accrued interest and expenses) and execute the sale deed within seven days from the date of receipt of the said notice. Notices sent by Certificate of Posting should have been served. Hence, the appellants/defendants made the registered post containing the notice to be returned. The appellants/defendants were making efforts to sell the suit property to a third party. Hence, the respondent /plaintiff was constrained to file the suit for the relief of specific performance and permanent injunction restraining the appellants/defendants from alienating the schedule mentioned property. Though a total sum of Rs.7,30,000/- had been paid by the respondent/plaintiff, since no receipts were obtained for a sum of Rs.80,000/-, deducting the said amount, he would concede that the total amount paid towards sale consideration was Rs.6,50,000/- only and he was ready and willing to pay the balance amount of Rs.8,48,200/- for getting the reliefs sought for. Hence, the suit.

3. The suit was resisted by the appellants/defendants based on the written statement filed by the first appellant/first defendant which was adopted by the other appellants/other defendants. The averments made in the written statement, besides the denial of the plaint averments, are as follows:

The appellants/defendants did not agree to sell the suit property measuring 6.81 acres comprised in S.No.1080/1 to the plaintiff for a sum of Rs.14,98,200/- as claimed by the respondent/plaintiff and the allegation that a sum of Rs.1,00,000/- was paid as advance was also false. The first appellant/first defendant did have some money dealings with the respondent/plaintiff for about 15 years prior to the filing of the suit and the respondent/plaintiff had gained the confidence of the first appellant/first defendant by helping him in times of need. In the middle of 2005, the first appellant/first defendant needed funds for the performance of his daughter's marriage and approached the respondent / plaintiff for help. The respondent/plaintiff paid a sum of Rs.25,000/- on the date of betrothal and another sum of Rs.35,000/- within a week thereafter. The marriage was fixed to be held on 22.01.2006 and for the purchase of jewels and other expenses, the respondent/plaintiff paid a sum of Rs.3,00,000/- just a week prior to the date of marriage and paid yet another sum of Rs.1,00,000/- on the eve of the marriage, i.e., on 21.01.2006. Thus, a sum of Rs.4,60,000/- alone had been paid by the respondent/plaintiff to the first appellant/first defendant. In the course of the said transaction, the respondent/plaintiff compelled the appellants/defendants to sign the documents which had already been prepared by him as an agreement. Believing the words of the respondent/plaintiff that the document was obtained only as a safety measure to secure due repayment and that the document would be returned duly cancelled on repayment of the amount, the appellants/defendants signed document. Acre 0.98 comprised in S.No.1081 with 5 HB Motor pumpset , acre 0.54 comprised in S.No.1082/3E2 and Acre 1.62 comprised in S.No.1097/3 together with half share in the well, totally measuring Acres 3.14 had been sold to one Rajagopal on 16.07.2004. At the time of sale to Rajagopal, a part of the sale consideration was reserved for discharging the mortgage debt due to Sumerchand and accordingly Rajagopal discharged the same. The remaining extent of Acres 6.81 was mortgaged to Rajagopal on 16.11.2004. Except the payments mentioned above made at the time of marriage of the daughter of the first respondent/first defendant, no other amount was paid by the respondent/plaintiff. The appellants /defendants did not receive any notice either under Certificate of Posting or under Registered post. The suit is frivolous, besides being abuse of process of law. The respondent/plaintiff, at the best, would have filed a suit for a simple money decree for recovery of the amounts paid by him and not a suit for specific performance. Hence, the suit must be dismissed with exemplary costs under Section 35-A of the Code of Civil Procedure.

4. Based on the above said averments, the trial Court framed the following issues:

Issues:

1) Whether the plaintiff is entitled to specific performance as prayed for?
2) Whether the suit agreement is vitiated of (sic) by fraud, coercion and undue influence as pleaded by the defendant is true?
3) Whether the cause of action pleaded by the plaintiff is true?
4) To what relief?

Additional Issue:

1) Whether the plaintiff is entitled to permanent injunction as prayed for?

5. Two witnesses were examined as Pws 1 and 2 and 9 documents were marked as Exs.A1 to A9 on the side of the respondent herein/plaintiff, whereas two witnesses were examined as Dws 1 and 2 and 10 documents were marked as Exs.B1 to B10 on the side of the appellants herein/defendants. The trial Court, on an appreciation of evidence and after hearing the arguments advanced on both sides, believed the case of the respondent/plaintiff in entirety, discountenanced the contention of the appellant/defendant, answered the issues in favour of the respondent/plaintiff and decreed the suit as prayed for granting both the reliefs viz., specific performance and permanent injunction.

6. Attacking the findings of the Court and contending that the learned trial Judge failed to properly appreciate the evidence adduced on both sides and arrived at an erroneous conclusion that the respondent herein/plaintiff was entitled to the reliefs sought for by him in the suit, the present appeal came to be filed on various grounds set out in the memorandum of grounds of appeal.

7. The points that arise for consideration in the appeal are as under:

1) Whether Ex.A1-Agreement for sale was obtained by fraud as contended by the appellants/defendants?
2) Whether Ex.A1-Agreement for sale was intended to be a security for repayment of the loan and not intended to be acted upon as an agreement for sale?
3) Whether the further payment of Rs.5,50,000/- on 05.01.2006 has been proved?
4) Whether the respondent/plaintiff was ready and willing to perform his part of the obligations under Ex.A1-Agreement for sale?
5) Whether the respondent/plaintiff is entitled to the relief of specific performance and the relief of injunction as sought for?

8. The arguments advanced by Mr.K.Shahul Hameed, learned counsel for the appellants/defendants and by Mr.V.Manohar, learned counsel for the respondent / plaintiff were heard and the materials available on record in the form of typed-set of papers were also perused.

Point No.1:-

9. The respondent/plaintiff filed the suit for specific performance and permanent injunction based on the suit agreement for sale dated 04.01.2006, which was supplemented by another agreement dated 05.01.2006. The agreement dated 04.01.2006 has been marked as Ex.A1 and alleged supplementary agreement dated 05.01.2006 has been marked as Ex.A2. Ex.A1 is a registered agreement bearing Document No.15 of 2006 whereas Ex.A2 is not a registered document. The case of the respondent/plaintiff is that the appellants/defendants agreed to sell the suit land measuring acres 6.81 to the respondent/plaintiff for a sum of Rs.14,98,200/- and executed Ex.A1 suit agreement for sale on 04.01.2006 and received a sum of Rs.1,00,000/- as advance. It is the further case of the respondent/plaintiff that on the very next day, namely on 05.01.2006 itself, the respondent/plaintiff paid a sum of Rs.5,50,000/- and for the said purpose, Ex.A2 came to be executed. In addition, the plaintiff alleges payment of another sum of Rs.80,000/- leaving a sum of Rs.7,68,200/- towards the balance sale consideration payable under the agreement for sale.

10. On the other hand, the appellants/defendants, who do not deny having executed Ex.A1 registered agreement for sale dated 04.01.2006, contend that the same was obtained from them fraudulently representing to be a security for the repayment of the loan advanced by the respondent/plaintiff. According to the appellants/defendants, the first appellant/first defendant had money dealings with the respondent/plaintiff for more than 15 years and in the course of the said money dealings, the respondent/plaintiff gained the confidence of the first appellant/first defendant as he helped him in time of need. It is the further contention of the appellants/defendants that when the first appellant/first defendant needed funds for the marriage of his daughter, the respondent/plaintiff assured to help him and paid another sum of Rs.25,000/- on the date of betrothal and a further sum of Rs.35,000/- within a week thereafter; that the respondent/plaintiff paid a sum of Rs.3,00,000/- for marriage expenses and for purchase of jewels just a week prior to the marriage which was scheduled to be held on 22.01.2006 and that he paid another sum of Rs.1,00,000/- on 21.01.2006, the eve of marriage. Based on the above said particulars furnished by them, the appellants/defendants contended that only under the said circumstances, they were made to sign the document which had already been prepared by the respondent/plaintiff.

11. It is true that the appellants/defendants have also made a plea that the suit agreement for sale marked as Ex.A1 and the further agreement marked as Ex.A2 were obtained by misrepresentation and playing a fraud upon them. The person, who pleads fraud or misrepresentation, has to prove the same by adducing evidence. In other words, the burden of proof would stand cast upon the person alleging the same as a vitiating factor. So far as Ex.A1 is concerned, the same being a registered document duly registered before the registering authority, stronger evidence is needed to prove fraud being played on the appellants/defendants in getting the Ex.A1 agreement for sale. It is neither the plea of the appellants/defendants, nor the evidence of the witnesses examined by them that their signatures in Ex.A1 agreement and in the endorsement for its registration were obtained making the appellants/defendant believe that the said document was not an agreement for sale. On the other hand, in Paragraph 6 of the written statement of the first appellant/first defendant which has been adopted by the other appellants/other defendants, there is a categorical admission that they signed the said document knowing fully well that the same was an agreement for sale. However, they took a stand that they executed the document believing the words of the respondent/plaintiff that the same was being obtained as a security for the repayment of the amounts paid to the appellants/defendants and that as soon as the amounts were repaid, the document would be returned duly cancelled. From the said pleading it is quite obvious that the appellants/defendants

executed Ex.A1 agreement for sale knowing fully well that they were executing an agreement for sale. The evidence of DW1 is also on the same line. Hence, it is quite obvious that no fraud was committed in getting the suit agreement for sale marked as Ex.A1 and that the appellants/defendants have not discharged their burden of proving the said document to have been obtained by playing a fraud upon them.

Point Nos.2 and 3:-

12. Though there is lack of evidence to prove the fraud in obtaining Ex.A1 agreement for sale from the appellants/defendants, since it was contended by the appellants/defendants that the same was obtained only as a security for repayment of the loan, the burden of proving the same also shall be cast upon them. In this regard, it is the contention of the appellants/defendants that the first appellant/first defendant and the respondent/plaintiff did have long standing money dealings and on that basis alone, the suit agreement for sale marked as Ex.A1 came to be executed as security for the loan promised to be advanced by the respondent/plaintiff. The evidence of DW1, the first defendant, in this regard seems to be reliable and it gets corroboration from the evidence of DW2. The respondent /plaintiff, who figured as PW1, denied having any money dealings with the first appellant/first defendant. It is also his evidence that he did not provide any fund for the betrothal and marriage expenses of the daughter of the first appellant/first defendant. DW2 has not only supported the defence case of the appellants/defendants that the respondent /plaintiff helped by providing funds for the marriage of the daughter of the first appellant/first defendant, but also corroborated the oral testimony of DW1 in this regard. DW2, Karumbadi W/o.Bakthavatchalam is a relative of the respondent/plaintiff. According to her testimony, the wife of the respondent/plaintiff is the daughter of the junior paternal uncle of the husband of the DW1.

13. The said evidence of DW2 remains unchallenged and uncontraverted. However, an attempt was made by cross-examining her suggesting that she had problem with the respondent/plaintiff in connection with the marriage of her daughter. DW2 was fair enough to admit that she had arranged for the marriage of her daughter with one person, but she married another with whom she had developed a love affair. In this regard, to a suggestion made to her to the effect that she had problem with the respondent/plaintiff, she stoutly denied the same. A consideration of the totality of the said part of the evidence of DW2 will make it clear that DW2 is a relative of the respondent/plaintiff and the motive alleged against her for falsely deposing in favour of the appellants/defendants does not stands substantiated. She was categorical in her assertion that the respondent / plaintiff and

the first appellant/first defendant had money dealings and the first respondent/first defendant had been prompt in repaying the amount borrowed from the respondent/plaintiff; that in the middle of 2005, the first appellant/first defendant Palani met the respondent/plantiff at his residence at Velachery and requested for lending him money for the marriage expenses of his daughter; that the respondent/plaintiff agreed to provide funds and that at that point time she and her husband were present in the residence of the respondent/plaintiff. It is the further evidence of DW2 that the Betrothal of the daughter of Palani took place in a choultry in Thirukazhukundram in the middle of September 2005; that at that point of time, the respondent/plaintiff asked her to attend the betrothal informing her that he was going to pay a sum of Rs.25,000/- for the betrothal expenses to Palani; that, however, she was not able to attend the betrothal; that within a week thereafter, the respondent/plaintiff paid a sum of Rs.35,000/- to Palani in the presence of DW2 and her husband and that a further sum of Rs.1,00,000/- was paid on the eve of the marriage of the daughter of the first respondent/first defendant and on that occasion also, she was present at the residence of the respondent/plaintiff. So far as the payment of Rs.3,00,000/-, one week prior to the date of marriage of the daughter of the respondent/plaintiff, it is the evidence of DW2 that she did not know the same directly and the same was informed by Palani to her. That part of the evieence of DW2 can be omitted from the purview of consideration as hearsay evidence. But the other parts of her evidence are quite spontaneous, natural and trustworthy. The said evidence, in all respects, coincides with and corroborates the evidence of DW1. In addition, the betrothal invitation and marriage invitation produced as Exs.B2 and B3 provide corroboration to the evidence of Dws 1 and 2 regarding the provision of funds made by the respondent/plaintiff to the first appellant/first defendant for meeting the expenses of the betrothal and marriage of his daughter.

14. The case of the respondent/plaintiff is that, besides a payment of Rs.1,00,000/- as advance on the date of execution of Ex.A1 agreement for sale, a sum of Rs.5,50,000/- was paid on the very next day, namely 05.01.2006 itself for the purpose of discharging the mortgage, which had been created in favour of Rajagopal and that in view of the said payment, a second agreement was executed on 05.01.2006. The said second agreement dated 05.01.2006 has been marked as Ex.A2. As stated supra, it is not a registered one. Having got a registered agreement for sale on the previous date itself, the respondent/plaintiff could have got no necessity to get a second agreement on 05.01.2006. Either an endorsement in the agreement dated 04.01.2006 or a receipt for the payment of Rs.5,50,000/- towards additional advance would have been sufficient. The very fact that a separate agreement came to be obtained on 05.01.2006 will make it clear that there was something

wrong in the circumstances under which Ex.A2 got executed. It is pertinent to note that the stamp papers for the preparation of Ex.A1 and Ex.A2 agreements came to be purchased from one and the same vendor by name M.Ganapathy, at No.42, Velachery Main Road, Chennai - 42. Both the stamp papers were purchased on 03.01.2006 itself. In fact both the stamp papers bear successive serial numbers. The stamp paper used for the preparation of Ex.A2 on 05.01.2006 bears a previous serial number (135) and the stamp paper used for preparation of Ex.A1 dated 04.01.2006 bears the subsequent serial number (136).

15. It is not the case of the respondent/plaintiff that the appellants/defendants agreed to arrange for the sale of 3.14 acres of land from Rajagopal. It is quite surprising to see that such a clause came to be incorporated in Ex.A2 before the description of property. The property sought to be sold under Ex.A1 and Ex.A2 agreement is described to be acres 6.81 out of acres 9.95 comprised in S.Nos.1080/1, 1081, 1082/3E/2 and 1097. In which part and in which Survey number (s) the extent of acres 6.81 agreed to be sold comes has not been mentioned. It is also pertinent to note that neither in Ex.A1 nor in Ex.A2, the sale made in respect of 3.14 acres comprised in S.No.1081, 1082/3E/2 and 1097 in favour of Rajagopal has been referred to. Without any reference to the same, a clause came to be incorporated in Ex.A2. The said clause is extracted herein:

> "மேற்படி ராஜகோபால் வசம் இருந்து 3 ஏக்கர் 14 செண்ட் நிலத்தினை செண்ட் ஒன்றுக்கு ரூ.2,200/- விலைபேசி வாங்கித் தர சம்மதிக்கிறேன்."

16. In this regard, PW1 during cross-examination stated that there was no discussion regarding the purchase of 3.14 acres from Rajagopal. The relevant portion of his evidence is "ராஜகோபால் கிரயம் பெற்ற 3 ஏக்கர் 14 செண்டை நான் கிரயம் வாங்குவதாகவோ அல்லது பிரதிவாதி கிரயம் கொடுப்பதாகவோ எதுவும் பேச்சில்லை," However the last portion of Ex.A2 before the description of property contains a reference to 3.14 acres sold to Rajagopal and proceeds further to state that he would arrange for the purchase of the said property from the said Rajagopal. However, PW1 himself denied having made any such description. In addition no such reference has been made in Ex.A1 to Rajagopal or the sale effected in his favour. A consideration of the said aspects coupled with the evidence adduced on the side of the appellants/defendants (discussed above) will make the contention of the appellants/defendants that the said documents were obtained as security for repayment of the loan advanced and to be advanced to meet the expenses of Betrothal and marriage of the daughter of Palani, the first appellant/first defendant, probable.

17. The evidence of PW1 is that the advance paid under Ex.A1 was paid at 01.00 p.m in the presence of the Registrar. On the other hand, there is nothing in Ex.A1 agreement that the said amount was paid in the presence of the registering authority and there is also no endorsement to that effect. So far as the alleged payment of Rs.5,50,000/- under Ex.A2 is concerned, it is the evidence of PW1 that he borrowed the said amount from one Munusamy of Royapettah, Chennai. It is his further version that he borrowed it on 03.01.2006 by issuing a cheque, and he got back the cheque after repaying the said amount in cash. The said particulars regarding how he raised the funds for the payment of Rs.5,50,000/- under Ex.A2 have not been adverted to either in the plaint or in the proof affidavit produced as his evidence in chief examination. Only during cross-examination, he came forward with such particulars. The said cheque has not been produced. The above said Munusamy, who is said to have lent the said amount to the respondent/plaintiff, has not been examined. It is quite obvious that only on 04.01.2006, Ex.A1 came to be executed and registered. It is also the evidence of PW1 and PW2 that only at the time of registration of Ex.A1, Rajagopal came and caused trouble by questioning the propriety of the act on the part of the respondent/plaintiff in coming forward to purchase the property. It is also the case of the respondent/plaintiff that only after registering Ex.A1 sale agreement, he made enquries with the appellants/defendants and came to know that there were two mortgages, each one for a sum of Rs.1,50,000/-, remaining undischarged. If at all the existence of the mortgages came to his notice only on 05.01.2006, it is quite improbable that he would have borrowed a huge amount of Rs.5,50,000/- from another person on 03.01.2006 itself.

18. Further, it is the contention of the respondent/plaintiff that there were two mortgages, each one for a sum of Rs.1,50,000/-, in force as on the date of agreement for sale. The purchase made by Rajagopal has not been adverted to either in Ex.A1 or in the plaint averments. However, in the earlier part of the evidence in cross-examination, he did not deny the suggestion that Rajagopal purchased 3.14 acres on 16.07.2004. He has also pleaded absence of knowledge that a mortgage deed was executed in favour of Rajagopal on 16.07.2004 itself. However, he admitted that on 16.07.2004, a mortgage was created in favour of Rajagopal regarding the unsold portion measuring acres 6.89. However, in the later part of his evidence in cross-examination, he ventured to state that only after the execution of the suit sale agreement, 3.14 acres of land was sold to Rajagopal. The same will show the confusion and contradiction in the evidence of PW1.

19. A certified copy of the sale deed executed by the appellants/defendants to Rajagopal on 16.07.2004 has been produced as Ex.B4. From Ex.B4 it is obvious that 98 cents comprised in

S.No.1081 along with a well and 5 HB Motor pumpset, 54 cents comprised in S.No. 1082/3E/2 and 1 acre 62 cents comprised in S.No.1097/1, all measuring a total extent of 3.14 acres came to be sold by the appellants/defendants to V.Rajagopal. Thereafter property remaining with the appellants/defendants was only 6.18 acres comprised in S.No.1080/1 alone. The agreement under Exs.A1 and A2 refer to the total extent of 9.95 acres comprised in all the four survey numbers and show 6.81 acres out of it as the subject matter of the agreement without referring to the particular survey number in which it is comprised. PW1, is also not in a position to say in which survey number the property agreed to be sold under Ex.A1 is comprised. Boundaries have also not been provided either in Ex.A1 or in Ex.A2 or in the plaint schedule. It is an admitted fact that the entire extent of 9.95 acres comprised in all the four survey numbers (S.Nos.1080/1, 1081, 1082/3E/2 and 1097) had been mortgaged to one Sumerchand by Palani by a deed of mortgage dated 03.07.2002. The said mortgage deed has been produced as Ex.B5. From Ex.B5, it is obvious that the said deed was executed securing a sum of Rs.1,50,000/- on 03.07.2002 in respect of the entire extent of 9.95 acres. The interest stipulated therein was 24% p.a. In the sale deed executed in favour of Rajagopal, a certified copy of which has been marked as Ex.B4, the sale consideration has been recited as follows:

1) The amount withheld by the purchaser for clearing the mortgage debt due to Sumerchand	:	Rs.1,50,000.00
2) The amount paid in the presence of Sub-Registrar	:	Rs. 20,000.00
Total		Rs.1,70,000.00

The same will make it clear that the purchaser under Ex.B4, namely Rajagopal had to discharge the mortgage debt due to Sumerchand. It is the clear case of the appellants/defendants that the amount due to Sumerchand was paid and the mortgage debt was cleared by Rajagopal. However, the discharge receipt came to be registered only on 14.08.2006. Simply because the discharge receipt came to be registered on 14.08.2006, it cannot be assumed that the debt was not discharged earlier. Ex.B6 does not contain the date on which the debt was repaid. It simply contains a recital that the amount due towards the principal and interest had been paid and hence the discharge receipt was being executed. Four months after the date of Ex.B4 sale, Ex.B7 mortgage deed came to be executed in favour of Rajagopal in respect of the unsold portion, namely 6.81 acres comprised in S.No.1080/1, in favour of Rajagopal securing a sum of Rs.1,50,000/-. The interest stipulated therein is 18% per annum.

The said mortgage was also discharged as evidenced by Ex.B8 cash receipt (registered) dated 30.07.2008. Ex.B9 has been produced as the hand chit (account pulli) mentioning the amount due to the respondent/plaintiff from the first appellant/first defendant. Of course, there is no authenticity in Ex.B9 either with the signature of the respondent/plaintiff or with any other authenticating mark. Hence, the same cannot be taken into account.

20. However, the appellants/defendants have produced a xerox copy of receipt issued by the respondent/plaintiff on 23.10.1996. Both the first appellant and the respondent have signed the said document. The first appellant signed it as the person who made payment and the respondent/plaintiff signed it as the person who received payment. The signature found therein has not been disputed by the respondent/plaintiff and there is no explanation whatsoever regarding the same. From the said documentary evidence, coupled with the natural and spontaneous oral evidence adduced by Dws 1 and 2, it is quite obvious that there had been money dealings between the respondent/plaintiff and the first appellant/first defendant for quite a long time, at least from 1996 as evidenced by Ex.B1. It falsifies the contention of the respondent/plaintiff that he did not have any money dealing with the appellants/defendants and he did not lend any amount to the first appellant/first defendant at any point of time. In addition, PW2, who has been examined as attestor of both Exs.A1 and A2, claims that he had gone to the Registrar's Office on the date of execution of Ex.A1 to get encumbrance certificate in respect of some other properties. Though he would state that he signed the document as a witness, he could not state who was the other attestor. It is not his case that he saw the respondent/plaintiff making payment of Rs.1,00,000/- as advance. In fact he has not spoken about the quantum of advance paid under Ex.A1. It is also not his case that the appellants/defendants admitted the receipt of the advance. He happened to be a chance witness for the execution of Ex.A1. On what business he went to Chengalpattu on the next day to be a witness for Ex.A2 has not been divulged. Though he would state that on the next day, namely 05.01.2006 he saw the respondent/plaintiff making payment to the vendors under the agreement, he would also state that he did not know how much amount was paid. It is also his evidence that he was not aware of the discussion between them even though he saw them discussing. The vital admission made by PW2 is that he did not know whether the two agreements came to be executed on one and the same day. The further improbability found in his evidence is that he asserted that he did affix his signature in Ex.A1 at one place alone, whereas he has signed as an attestor and also as an identifying witness before the Registrar. Even PW1 in his evidence in cross-examination does not dispute that Exs.A1 and A2 were executed on one and the same day. The relevant portion of his deposition reads as follows:

"எ1, ஏ2 இரண்டுமே ஒரே நாளில் தயார் செய்தது என்றால் அது தெரியாது"

If the cumulative effect of all these aspects is taken into account, the probable conclusion that can be arrived at is that the appellants/defendants have succeeded in establishing that Ex.A1 agreement came to be obtained as a security for prompt re-payment of the amount advanced and to be advanced by the respondent/plaintiff and Exs.A1 and A2 came to be obtained on one and the same day. The respondent/plaintiff has miserably failed to prove that Exs.A1 and A2 agreements were not intended to be security for repayment of loan and on the other hand it was a genuine transaction of agreement for sale.

Point Nos.4 and 5:-

21. Even if it is assumed that the appellants/defendatns cannot deny the nature of the transaction after having consciously executed Ex.A1 agreement for sale, unless the respondent/plaintiff complies with the mandatory requirements of Section 16-C of the Specific Relief Act, 1963 he shall not be entitled to the relief of specific performance. In this regard, the mere reproduction of the same words used in Section 16-C of the Specific Relief Act shall not be enough. On the other hand, necessary pleading setting out the facts showing his readiness and willingness should have been made and the same should have been proved by reliable evidence. Though 90 days time was fixed in the agreement for completion of the sale transaction, it has not been contended by either of the parties that the same was considered to be an essential condition for sale. The pleading made in the plaint is to the effect that the respondent/plaintiff was ready and willing to pay the balance amount of sale consideration of Rs.8,48,200/, but the appellants and defendants were not ready and willing. In this regard, it is pertinent to note that the respondent/plaintiff contended that the mortgage created in favour of Sumerchand was discharged by the appellants/defendants from the amount received from the respondent/plaintiff under Ex.A2. Under Ex.B4 sale deed itself, Rajagopal had deducted Rs.1,50,000/- from the sale consideration as amount payable to Sumerchand for the discharge of the debt under the mortgage created in favour of Sumerchand. In addition, the appellants/defendants also executed a mortgage deed under Ex.B7 on the date of Ex.B4 sale deed in respect of the unsold portion, which is the subject matter of the present suit, for a sum of Rs.1,50,000/- in favour of Rajagopal. Ex.B6 evidences the discharge of the mortgage created in favour of Sumerchand. Evidence has also been adduced both oral and documentary, especially Ex.B8 registered receipt, showing the discharge of the mortgage created in favour of Rajagopal. Even if it is assumed for argument sake that a sum of Rs.5,50,000/- was paid by the respondent/plaintiff on 05.01.2006, the further contention of the respondent/plaintiff that he made a further payment of Rs.80,000/- leaving a balance of Rs.7,68,200/- alone towards balance

consideration will make it clear that he was not prepared to pay the entire Rs.8,48,200/- as balance sale consideration. Only at the time of filing of the suit, he has chosen to give up his claim that he paid a sum of Rs.80,000/- on various dates.

22. The plaint averments made in Paragraph 12 is to the effect that the said amount of Rs.80,000/- was not paid on a single day, but it was paid on various dates. The date or dates of payment also have not been furnished in the plaint. In the proof affidavit also the date/dates of payment of the said amount have not been furnished. During cross-examination, PW1 stated that the entire amount of Rs.80,000/- was received by the first appellant/first defendant on one and the same day in the month of December 2006. However, at another place, he has stated that the said sum of Rs.80,000/- was paid in two installments of Rs.30,000/- and Rs.50,000/- respectively and that the said payments were made after four months from the date of registration of suit sale agreement. Ex.A1 sale agreement was registered on 04.01.2006. Then the alleged payment of Rs.80,000/- should have been in May 2006. According to his own testimony, it was paid in the month of December 2006. It will show how improbable and unreliable the evidence of PW1 is.

23. Of course the notices sent to the appellants/defendants have returned unserved. But the respondent/plaintiff would contend that he had sent the notice earlier by certificate of posting and only after receiving the same, the appellants knew that the Registered Tapal contained the notices and hence they returned the same without receiving them. The very fact that the respondent/plaintiff chose to take a stand that he sent the notice by certificate of posting and also by registered post will make the bonafide of the respondent/plaintiff suspicious. The mere fact that the appellants/defendants received the notices in the caveats filed by the respondent/plaintiff, when served through Court, will not give raise to any inference that the appellants/defendants deliberately avoided or refused to receive the pre-suit notice. Even if it is assumed that the appellants / defendants deliberately avoided receiving the notice and thereby showed their absence of readiness and willingness, it shall be immaterial since the plaintiff in a suit for specific performance cannot get the relief showing the absence of readiness or willing on the part of the defendant, without proving his own readiness and willingness to complete the transaction.

24. Pre-suit notice dated 12.07.2007 has been marked as Ex.A4. The respondent/plaintiff reiterated his stand that he paid Rs.1,00,000/- on the date of agreement, Rs.5,50,000/- on 05.01.2006 and Rs.80,000/- subsequently, making a total amount of Rs.7,30,000/- as the amount paid towards advance and part payment of sale consideration. It is also obvious from the said notice

that he expressed his willingness to pay the balance consideration of Rs.7,68,200/-,after deducting from it the mortgage money and its accrued interest and expenses. The same will show that the respondent/plaintiff was not prepared to make payment of the entire balance amount of sale consideration. In the plaint, he has given a go by to his stand that he paid Rs.80,000/, by not taking the said amount into account towards the amounts paid to the appellants/defendants and contended that he would restrict his claim of payment of advance to Rs.6,50,000/- and that the balance sale consideration was Rs.8,48,200/-, which he was prepared to pay. The same will make it clear that he was not ready and willing to pay the entire balance amount of sale consideration under the agreement for sale before the filing of the suit. Therefore, the respondent/plaintiff has miserably failed to prove his readiness and willingness right from the date of agreement to perform his part of the obligations under the agreement in tune with the requirements of Section 16-C of the Specific Relief Act, 1963. Hence, even if it is assumed that the suit sale agreement is a genuine agreement and it was intended to be an agreement for sale and not as a security for repayment of the loan, the respondent/plaintiff shall not be entitled to the discretionary relief of specific performance, since he failed to prove his readiness and willingness to perform his part of the obligations under the agreement for sale right form the date of agreement till the date of filing of the suit. The same will disentitle the respondent/plaintiff from getting the relief of specific performance.

25. The learned trial Judge, without properly appreciating the pleadings and evidence simply rendered a perverse finding in this regard which resulted in the passing of a decree granting the relief of specific performance as well as permanent injunction as sought for by the respondent/plaintiff.

26. Upon re-appreciation of evidence, for the reasons stated supra, this Court holds that findings of the Courts below cannot be sustained. The judgment and decree of the trial Court cannot withstand the scrutiny of this Court and the decree of the trial Court deserve to be interfered with and set aside. Since the respondent/plaintiff has not made any alternative prayer for the re-fund of the advance amount and since this Court has rendered a finding that the agreement itself had been obtained as a security for the loan advanced and to be advanced, the question of directing re-fund of the amount paid under the agreement shall not arise. However, considering the facts and circumstances of the case, there shall be no order as to costs.

27. In the result, the appeal is allowed and the decree of the trial Court dated 08.12.2010 made in O.S.No.123 of 2007 is set aside. O.S.No.123 of 2007 shall stand dismissed. No costs.

Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

gpa

To

1.The Additional District Judge
Fast Track Court No.1,
Chengalpattu.

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

2 CCs to Mr.V.Manohar, Advocate SR.No. 30022

A.S.No.516 of 2011 &
M.P.No.1 of 2011

SVI (CO)
PSI (09.07.2015)