IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.12.2017

CORAM:

THE HONOURABLE MR. JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.1135 OF 2010
& M.P.NO.1 OF 2010

T.M. Manichamy .. Appellant/Appellant/Defendant

Vs

C.Subramaniam ..Respondent/Respondent/Plaintiff

Prayer: Second Appeal filed under Section 100 CPC against the judgment and decree dated 27.01.2010 in A.S.No.121 of 2009 on the file of the Principal District Judge, Erode, confirming the judgment and decree dated 08.08.2009 made in O.S.No.582 of 1999 on the file of the I Additional Subordinate Judge, Erode.

For Appellant : M/s. G.Sankaran
For Respondent: Mr. N. Manokaran

JUDGMENT

This Second Appeal has been filed against the judgment and decree dated 27.01.2010 in A.S.No.121 of 2009 on the file of the Principal District Judge, Erode, confirming the judgment and decree dated 08.089.2009 made in O.S.No.582 of 1999 on the file of the I Additional Subordinate Judge, Erode.

2. The facts as stated by the parties is that the plaintiff/respondent entered into a registered sale agreement registered as document No.502 of 1998 on the file of Sub Registrar, Uthukuli, for purchase of the suit property, valuing the same at Rs.1,65,000/- and the appellant/defendant accepted the sale consideration and received a sum of Rs.1,40,000/- on the date of agreement itself.

3. Though it was specifically agreed that time was not essence of the contract, it was agreed that the appellant/defendant should execute the sale deed within a year. The respondent/plaintiff conveyed his readiness and willingness on several occasions by tendering the balance sale consideration of Rs.25,000/- and requested execution of sale deed, which the appellant/defendant evaded.

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4. Since there was an attempt to sell the land to third parties, the respondent/plaintiff issued a pre-suit notice on 5.6.1999. The appellant/defendant denied the intention of sale transaction and would state that it was a loan transaction and the said agreement was executed only as security for the same. Hence the respondent/plaintiff laid a suit for specific performance with an alternative prayer for refund of advance amount.

5. The appellant/defendant denied the contents of the plaint and would state that he borrowed a sum of Rs.1,00,000/- on executing a blank promissory note agreeing to repay the debt along with interest @ 12% per annum. Since the plaintiff insisted to execute a sale agreement as security to the said loan translation, he did the same. The plaintiff suddenly insisted on repayment of entire sum, which he could not fulfill, came out with a suit for specific performance. There was no necessity or intention for him to sell the property. He had not agreed to sell it for Rs.1,65,000/- nor received any advance and the statement that the plaintiff was ready and willing to perform the alleged contract itself is false. The time limit of one year for payment of balance sale consideration of Rs.25,000/- by itself belie the story of the plaintiff and sought for dismissal of the suit and that he was ready to discharge the debt.

6. The trial court, after framing the suitable issues and after conducting an elaborate trial, decreed the suit in favour of the plaintiff. The said judgment and decree were confirmed by the lower appellate court.

7. Aggrieved over the concurrent findings of the courts below, the defendant preferred the above second Appeal on the following substantial questions of law;

> (a) Whether the Lower Courts below are justified in coming to conclusion that the respondent is entitled for specific performance on the basis Ex.A.1, when it is admitted the case of the appellant that the Ex.A.1 executed only for security purpose regarding money transaction.
>
> (b) Whether the defendant examine any witness to prove the sale agreement executed in his favour not for the security regarding money transaction, when it is admitted case of appellant the sale agreement was executed for security purpose regarding money transaction.
>
> (c) Whether the Lower Court below erred in coming to conclusion that the appellant is ready

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to pay the amount borrowed from the defendant.

8. Heard both sides and perused the materials available on record.

9. In the present case, the factum of execution of a registered sale agreement has been admitted by both the parties. The defendant projected a case that he had no intention to sell the property, but it was a security given for the repayment of debt through a loan transaction. Thereby the execution of sale agreement was admitted but not the intention. A perusal of the sale agreement reveals that it was duly attested by the daughters of the defendant and the receipt of a sum of Rs.1,40,000/- is also acknowledged. Thus the initial burden of proving the sale transaction was discharged by the plaintiff. When the defendant propounds a defense of loan transaction and that there was no intention of property, the burden of proving the same lies on him. Though there were ample opportunities available to him to examine the attesting witnesses, who are none other than his own daughters, he had not chosen to examine them. There is no evidence on the side of the defendant as to the steps taken by him prior and after the pre suit notice dated 5.6.1999. The defendant has failed to prove that there was a loan transaction as pleaded by him and that he had no intention to sell the property and the sale agreement registered was only a security to the loan transaction. On the other hand, he would contend that the plaintiff has failed to prove the agreement for sale of property. The indubitable fact remains that execution of the sale agreement has been admitted by him. To disprove the intention of sale, the attesting witnesses should have been examined, but he expected the plaintiff to prove an admitted fact. The plaintiff has not only pleaded that he was ready and willing, but also deposited the balance sale consideration of Rs.25,000/- into the Court to prove his bonafide.

10.In similar circumstances, the judgment of a Division Bench of this Court in the case of M.Ramalingam, deceased by L.Rs. Vs. V.Subramanyam, deceased by L.Rs. reported in 2003 (1) MLJ 694, has categorically held that if the defendant has taken a plea that it was only a loan transaction and the sale agreement was never intended to be acted upon, the burden lies on him to prove the same and it was observed as under:-

> "10. What the defendant contended before the lower Court and equally here also is that it was only a loan transaction, that the sale agreement was only manipulated and brought about to hold a threat upon the defendant to secure the due repayment of Rs.40,000/- lent by the plaintiff; and

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that it was never intended to be acted upon. When the defendant came with a plea stating that the intention of the parties was only to treat the same as a loan transaction, and it was never intended to be acted upon, which is inconsistent with the terms of the document, a duty is cast upon the defendant to strictly prove that it was a different transaction all together, and what was recorded in the document was intended to be of no consequence whatsoever. No doubt, the defendant who came with such a plea, can well adduce evidence to show that Ex.A1 agreement though executed by him, was never intended to be operated as an agreement for sale, but only a loan transaction, which was not recorded in the document. After careful consideration of the available materials, the Court may hasten to say that the appellant have miserably failed to prove that it was a loan transaction, and the agreement was never intended to be acted upon. The defendant has not examined any independent witness or the attestors to the document, nor has he placed acceptable materials to hold so. Except the interested testimony of the defendant, nothing more is available on record. The specific averments in the written statement run as follows.

This part of the written statement would clearly be indicative of the fact that before executing Ex.A1 sale agreement, the defendant had the full knowledge that it was an agreement for sale in respect of the plaint Schedule mentioned property, and it was also registered. Hence, the contention of the appellants side that the defendant signed the document without knowing the contents of the same cannot be countenanced."

11. Further, another Division Bench judgment of this Court in the case of Nanjammal, etc & another Vs. Palaniammal reported in 1993 (2) L.W. 205, has held that when the defendant has taken a plea that the agreement was executed by way of security and admits execution of such an agreement, it is not open to the defendant to raise a plea that the terms of the agreement should be ignored as the real purpose was to secure the loan transaction. Such a defence and raising such a plea is barred by Section 92 of the Indian Evidence Act. The relevant portion of this judgment is extracted hereunder:-

"5. It was one of the contention urged in the Court below that the plaintiff had not even obtained encumbrance certificate before the execution of

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> Exhibit A1 and she had not taken the title deed from the defendant. The Court before has pointed out the recital in Exhibit A1 under which the defendant had undertaken to obtain an encumbrance certificate and give it to the plaintiff. The fact that the plaintiff had not taken the title deed in advance does not in any way discredit the truth of the agreement in Exhibit A1. In fact, the evidence of the defendant is that what was written was really an agreement though it was only for the purpose of securing the loan. She (defendant) has admitted that the plaintiff wanted her to execute an agreement for sale by way of security for the loan and she did execute such an agreement. When that is the fact, it is not open to the defendant to raise a plea that the terms of the agreement should be ignored as the real purpose was to secure the loan transaction. It is conceded by learned counsel for the appellants that the defendant is barred from raising such a plea by S.92 of the Indian Evidence Act."

12. Therefore, it can be seen that the appellant before this Court has admitted the execution of the sale deed, at this distance of time cannot be permitted to raise a plea that it is only a loan transaction, that too, in the absence of any evidence either oral or documentary to prove it is only a loan transaction. A judgment of this Court in the case of T.G.Pongiannan Vs. 1.K.M.Natarajan 2.N.Eswari reported in [2009 (6) CTC 301] has observed as under:-

> "13. The conduct of the Defendants should be taken note of. Even though the registered Agreement to Sell-Ex.A1 emerged as early as 30.08.1999, the Defendants have not chosen to, as per their own version, repay the loan or send any notice calling upon the Plaintiff to return Ex.A1.
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> 14. The Defendants have not proved by any shard or shred, scintilla or pint-sized, iota or molecule extent of evidence that any interest was paid by them to Plaintiff towards the alleged loan. As such, this Court can only treat their plea as a false one. Had really D.W.1 (D1), as claimed in his Chief Examination Affidavit, paid 18% interest for the sum of Rs.75,000/- or so, then there would have been at least some passbook or note book or any chit, evidencing the same."

13. The appellant/defendant has not substantiated by any evidence that he had paid interest or repaid any amount,

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which he had borrowed from the respondent/plaintiff by documentary or oral evidence. Even the denial made in the written statement is also superficial and it is not in accordance with Order VIII Rule 3 of Civil Procedure Code.

14. In the judgment of the Hon'ble Supreme Court in the case of Jaspal Kaur Cheema and Another Vs. Industrial Trade Links and Others etc. reported in (2017) 5 MLJ 884 (SC) it has been held that evasive denial would amount to an admission of the allegation made in the plaint in terms of Order VIII Rule 5 of the Code. In other words, the written statement must specifically deal with each of the allegations of fact made in the plaint, as found by the Hon'ble Supreme Court in another judgment in the case of Gian Chand and Brothers and Another Vs. Rattan Lal Alias Rattan Singh reported in (2013) 2 SCC 606. The relevant portion of the judgment is extracted hereunder:-

> "24.Rule 4 stipulates that a defendant must not evasively answer the point of substance. It is alleged that if he receives a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Rule 5 deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.
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> 25.We have referred to the aforesaid Rules of pleading only to highlight that in the written statement, there was absolutely evasive denial. We are not proceeding to state whether there was admission or not, but where there is total evasive denial and an attempt has been made to make out a case in adducing the evidence that he was not aware whether the signatures were taken or not, it is not permissible. In this context, we may profitably refer to a two-Judge Bench decision in Sushil Kumar V. Rakesh Kumar wherein, while dealing with the pleadings of election case, this Court has held thus: (SCC p.693, para 73)
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> > "73. In our opinion, the approach of the High Court was nor correct. It failed to apply the legal principles as

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> contained in Order 8 Rule 3 and 5 of the Code of Civil Procedure. The High Court had also not analysed the evidence adduced on behalf of the appellant in this behalf in detail but merely rejected the same summarily stating that vague statements had been made by some witnesses. Once it is held that the statements made in Para 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid."

We may state with profit that in the said case, reliance was placed on Badat and Co. V. East India Trading Co.

26.Scrutinised thus, the irresistible conclusion would be that the defendants could not have been permitted to lead any evidence when nothing was stated in the pleadings. The courts below had correctly rested the burden of proof on the defendant but the High court, in an erroneous impression, had overturned the said finding.

15. In view of the above judgments and the discussions of facts above, the questions of Law raised by the appellant is answered under;

(a) Whether the Lower Courts below are justified in coming to conclusion that the respondent is entitled for specific performance on the basis Ex.A.1, when it is admitted the case of the appellant that the Ex.A.1 executed only for security purpose regarding money transaction.

Even though the appellant claims that Ex.A.1 was executed for security purpose regarding money transaction, he has not come out with clear evidence particularly oral evidence from the attesting witnesses who were none other than the daughters. It cannot be held that the agreement for sale was executed for the purpose of security alone.

(b) Whether the defendant examined any witness to prove the sale agreement executed in his favour not for the security regarding money transaction, when it is admitted case of

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appellant the sale agreement was executed for security purpose regarding money transaction.

When the appellant/defendant admits the execution of the sale agreement, the burden is on him to prove the same and the plaintiff had given positive evidence that the intention was only to purchase the property and a sum of Rs.1,40,000/- was paid as advance towards the transaction, it is not incumbent on him to prove the admitted facts. On the other hand, it is for the appellant/defendant to prove that the sale agreement was executed for security purpose. In the absence of any proof much less the appellant/defendant fails to prove the available witnesses, the question raised herein is answered in favour of the plaintiff/respondent

(c) Whether the Lower Court below erred in coming to conclusion that the appellant is ready to pay the amount borrowed from the defendant.

The major amount of the sale consideration has been paid, i.e., out of Rs.1,65,000/-, the respondent/ plaintiff has paid Rs.1,40,000/- through the sale agreement. The remaining balance sale consideration was deposited by him as directed by the Court. The bonafide stands proved by the respondent/plaintiff. In such circumstances, the trial Court would come to only conclusion that the appellant was ready and willing to perform his part of contract. On the other hand, the claim of the appellant/defendant that he was willing to repay the debt, if directed by the Court is not supported by any material evidence. The appellant has failed to show the resources or deposit the money before the Court. In that event, the third question of law also answered against the appellant/defendant.

16. In view of substantial questions of law answered against the appellant/defendant, the Second Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (Insp Cell)

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Sub Assistant Registrar

msr

To

1.The Principal District Judge
Erode.

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2.The I Additional Subordinate Judge
Erode.

+1cc to Mr.G.Sankaran, Advocate, S.R.No. 86493
+1cc to Mr.N.Manokaran, Advocate, S.R.No.86151

SECOND APPEAL NO.1135 OF 2010

MR(CO)
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