

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.01.2017

PRONOUNCED ON : 06.02.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.336 of 2011

&

M.P.No.1 of 2011

A.Rajangam

... Appellant/Appellant/Defendant
Vs.

V.Dhavamani

...Respondent/Respondent/Plaintiff

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 26.11.2010 made in A.S.No.26 of 2010 on the file of the Principal District Judge, Cuddalore, confirming the Judgment and Decree dated 07.08.2007 made in O.S.No.41 of 2006 on the file of the Principal Subordinate Judge, Cuddalore.

For Appellant : Mr.R.Gururaj

For Respondent : Mrs.Hema Sampath
Senior Counsel for
M/s.R.Meenal

JUDGMENT

Challenge in this second appeal is made by the defendant against the judgment and decree dated 26.11.2010 made in A.S.No.26 of 2010 on the file of the Principal District Judge, Cuddalore, confirming the Judgment and Decree dated 07.08.2007 made in O.S.No.41 of 2006 on the file of the Principal Subordinate Judge, Cuddalore.

2.The second appeal has been admitted and the following substantial question of law is formulated for consideration in this second appeal:

(i)Whether the judgment and decree of the Courts below in decreeing the suit in favour of the plaintiff are based upon the perverse findings and misdirected against the evidence on record?

3.The suit had been laid by the plaintiff for specific performance.

4. In brief, according to the plaintiff, the defendant offered to sell the suit properties to him for a sum of Rs.1,10,000/- and after negotiation, the plaintiff and the defendant entered into an Agreement of Sale dated 03.01.2005 in respect of the sale of the suit properties and accordingly the plaintiff paid a sum of Rs.1,00,000/- on the date of the sale agreement as advance and the parties have agreed that the plaintiff should pay the balance amount of Rs.10,000/- within 18 months from the date of the agreement and the sale agreement had been registered and though the plaintiff was always ready and willing to pay the balance sale consideration and get the sale deed executed from the defendant, inasmuch as the defendant did not come forward to perform his part of the contract and on the other hand attempted to encumber the suit property, according to the plaintiff, he has been necessitated to lay the suit for specific performance against the defendant.

5. Per contra, the case of the defendant is that he did not intend to sell the suit properties to the plaintiff and on the other hand according to the defendant as he was in need of urgent funds he sought for a loan from the plaintiff's husband and accordingly the sale agreement was taken as a security for the loan transaction and under the said deed, the defendant had received a sum of Rs.1,00,000/- and therefore, according to the defendant, the suit laid by the plaintiff on the basis of the security document given towards the loan transaction for specific performance is not maintainable. Further, according to the defendant, the suit property is worth of Rs.5,00,000/- and the defendant did not intend to sell the suit properties to the plaintiff. There was no consensus ad idem and the plaintiff has no cause of action to lay the suit and hence the suit is liable to be dismissed.

6. Inasmuch as the defendant has resisted the plaintiff's suit for specific performance on the footing that the sale agreement has been executed by him as a security for the loan transaction, it is obvious that the onus of proof is cast upon the defendant to establish the same. However, no acceptable material whatsoever has been placed by the defendant to establish that the sale agreement marked as Ex.A1 had been executed by him only towards the loan transaction and there was no consensus ad idem between the parties to execute the sale agreement in respect of the suit properties.

7. In fact, as found by the courts below, the defendant examined as DW1 in his evidence has clearly admitted that on 03.01.2005, he had received a sum of Rs.1,00,000/- from the plaintiff and had executed the sale agreement marked as Ex.A1 and before the execution of the sale agreement Ex.A1, the contents of the same were read over to him and thereafter, he had signed the document in every page and after execution of the

document he had received a sum of Rs.1,00,000/- and Ex.A1 had been attested by the witnesses and the same had been scribed by Gunasekaran and Ex.A1 had been registered on the same day. It is therefore clear from the above admission of the defendant that knowing about the contents of Ex.A1 and having agreed to sell the suit properties to the plaintiff for the consideration mentioned therein, it could be seen that the defendant had received a sum of Rs.1,00,000/- from the plaintiff as advance on the date of the sale agreement and therefore the plea now taken by the defendant sans proof that Ex.A1 had been executed only in respect of the loan transaction and not intended as the sale agreement in respect of the suit properties, as such cannot be countenanced in any manner.

8.The point that is, putforth by the learned counsel for the defendant is that inasmuch as the time limit of 18 months had been stipulated in the sale agreement for paying the balance sale consideration of Rs.10,000/-, according to him, the same would only indicate that it is only a security given towards the loan transaction and the above said period had been fixed only to enable the defendant to pay the borrowed sum.

9.However, as rightly found by the courts below inasmuch as there were fruit bearing trees in the suit properties, in order to enable the defendant to harvest the same, the time limit of 18 months had been stipulated between the parties for completing the sale transaction. This fact has also been admitted by the defendant during the cross examination. As pointed out by the courts below, in such view of the matter, the argument now putforth by the defendant's counsel that merely from the long period mentioned in the sale agreement for completing the sale transaction would by itself be sufficient to hold that it is a security given towards the loan transaction, as such cannot be accepted and believed. As regards the execution of the Agreement of sale, Ex.A1 and the receipt of Rs.1,00,000/- as advance by the defendant from the plaintiff under the same, the plaintiff has examined the attesor as PW2 and the scribe of the document as PW3. Both PW2 and PW3 have given cogent, acceptable and reliable evidence in support of the plaintiff's case. Nothing has been pointed out during the course of cross examination of PW1 to 3 to disbelieve their version.

10.It is further contended by the learned counsel for the defendant that the suit properties were worth about Rs.5,00,000/- on the date of the sale agreement Ex.A1 and in such circumstances, the court should hold that the parties would not have intended to enter into an agreement of sale of the same for a paltry sum of Rs.1,10,000/- in respect of the same. However, as regards the case of the defendant that the suit properties were worth about Rs.5,00,000/- on the date of the sale agreement, as rightly found by the courts below, there is

nil evidence on the part of the defendant. No doubt, the defendant had examined DW3 on the said aspect. However, merely on the basis of the oral evidence of DW3 sans any acceptable material to buttress the same, we cannot safely conclude that the suit properties were worth about Rs.5,00,000/- on the date of the sale agreement, Ex.A1. It is not the case of the defendant that the plaintiff was not ready and willing to perform her part of the contract or that the plaintiff was not having the adequate means to complete the sale transaction. On the other hand, as seen from the evidence of the plaintiff examined as PW1, it could be seen that the plaintiff has always been ready and willing to perform her part of the contract.

11.Insofar as this case is concerned, it is found that after the closure of the evidence of the respective parties, when the suit was posted for arguments, it is found that the defendant had taken out an application in I.A.No.36 of 2007 for permitting him to file an additional written statement. The said I.A. after contest came to be dismissed. It is also found that the defendant preferred CRP PD No.1964 of 2007 impugning the same. However, the High Court has dismissed the above said CRP filed by the defendant on 24.07.2007. It is also found that the High Court on noticing the dubious means and fraud adopted by the defendant in the prosecution of the suit, ordered criminal action against the defendant in the above said CRP. It is found that the defendant preferred SLP in the Supreme Court against the direction of the High Court to initiate the criminal action against him and the above said direction of the High Court had come to be set aside by the Apex Court. However, the fact remains that the attempt of the defendant to file the additional written statement has become final by the dismissal of the CRP by the High Court. In such view of the matter, the defendant having lost his attempt to set up a new case by way of filing the additional written statement and the same did not fructify, he cannot be allowed to rake up the issue again on some other pretext.

12.However, it is found that the defendant having lost in the trial court preferred the first appeal and in the first appellate court, it appears that the defendant had preferred I.A.No.312 of 2010 for the reception of the additional evidence in the appeal. Inter alia the documents sought to be marked as the additional evidence include the copies of the sale deeds in the name of his brother alleged to be in respect of the suit properties. However, the first appellate court has refused to accede to the request of the defendant seeking permission to adduce the additional evidence by holding that the defendant had attempted to bypass the order of the High Court passed in CRP PD No.1964 of 2007 by filing the above said petition for the reception of the additional evidence and in such view of the matter, refused to entertain the said petition.

13.The order the first appellate court refusing to accede to the request of the defendant for the reception of the additional evidence seems to be perfect and in order. As rightly found by the first appellate court what could not be achieved by the defendant by filing the additional written statement could not be allowed to be secured by him by way of projecting the same defence by way of the additional documents before the first appellate court. Therefore, no exception could be taken to the order of the first appellate court in dismissing I.A.No.312 of 2010.

14.In the light of the above position, when there is no pleadings available in the lis that the suit properties belonged to the defendant's brother and when it is found that the defendant claiming to be the owner of the suit properties had entered into an agreement of sale with the plaintiff marked as Ex.A1 and when the defendant has failed to establish that Ex.A1 have been intended to be a security only for the loan transaction and when the other defence set out by the defendant to nullify the sale agreement having been found to be unacceptable, it could be seen that the defendant cannot be allowed to contend in the second appeal that the suit properties belonged to his brother and therefore, the plaintiff should not be granted the relief of specific performance. As rightly putforth by the learned counsel for the plaintiff, in the absence of pleadings the defendant cannot be allowed to raise arguments on a new set of facts.

15.Further, if according to the defendant, he is not the owner of the suit properties and his brother alone is the owner of the suit properties, it has not been explained by the defendant as to how come he had volunteered to execute Ex.A1, Sale Agreement in favour of the plaintiff. Further, if really, the defendant's brother is the owner of the suit properties, nothing prevented the defendant from taking steps to implead his brother as a party to the suit proceedings. Further, if really, the defendant is not the owner of the suit properties and only his brother is the owner of the suit properties, as rightly putforth by the plaintiff's counsel, it does not stand to reason as to why the defendant is fighting tooth and nail the plaintiff's case.

16.As rightly argued by the learned counsel for the plaintiff, if the defendant's brother is the owner of the suit properties and the plaintiff cannot take the sale deed from the defendant in respect of the same under the decree passed by the courts below, it is the look out of the plaintiff to get the possession of the suit properties through the court process in the manner known to law. In such view of the matter, the very fact that the defendant is hotly contesting the suit laid by

the plaintiff raises a suspicion as to whether at all the plea now put forth by the defendant that it is only his brother, who is the owner of the suit properties and not the defendant is really true and genuine and hence cannot be countenanced. Therefore, the argument put forth by the defendant's counsel during the course of second appeal on the footing that the suit properties belongs to his brother and not to him, as such cannot be accepted in any manner in the absence of pleadings, proof and material.

17.It could therefore be seen that the courts below have rightly appreciated the evidence on record and based upon the proper reasonings and conclusions found that the plaintiff is entitled to obtain the relief of specific performance.

18.In support of the various contentions, the defendant's counsel relied upon the following authorities:

AIR 1982 SC 20(Smt. Gangabai Vs. Smt. Chhabubai), AIR 1951 SC 177(Firm Srinivas Ram Kumar Vs. Mahabir Prasad and others), AIR 1993 SC 1318(B.R.Mulani Vs. Dr. A.B. Aswathanarayana and Others), AIR 1995 SC 1769(S.Rangaraju Naidu Vs. S. Thiruvarakkarasu), 1995(2) MLJ 118(SC)(N.P.Tirugnanam (died) by LRs Vs. Dr. R.Jagan Mohan Rao and others), CS 301/2007(Duraisingam Vs. S.R.Jagannathan and another), AIR 1983 SC 462(Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and another), 2000(1) SCC 712(B.K.Narayana Pillai Vs. Parameswaran Pillai and another), AIR 1960 SC 941(Satyadhyam Ghosal and others Vs. Smt. Deorjin Debi and another), AIR 1979 SC 1436 (Smt. Sukhrani(dead) by LRs Vs. Hari Shanker and Others), 1996 (6) SCC 96(P.G. Eshwarappa Vs. M. Rudrappa and others), 1996(6) SCC 424(Allahabad Development Authority Vs. Nasiruzzaman and Others), AIR 1966 SC 605(Ambika Prasad Thakur and others etc., Vs. Ram Ekbal Rai(dead) by his LRs and others), 1997 (3) LW 888 (Palaniswamy Konar Vs. Gopala Konar and 8 others), AIR 1973 SC 814(Banwari Lal and others Vs. Sukhdarshan Dayal), 1975 (2) MLJ 59(DB)(Rajendrakumar Bhandari Vs. Poosammal and others), 1982 (2) MLJ 314(DB) (P. Thangavelu Vs. R.Dhanalakshmi Ammal and others), 1995(2) LW 808(Seethalakshmi and 5 others Vs. T.Sridhar and another), AIR 1971 SC 1201(The Ahmedabad Municipal Corporation of the City of Ahmedabad Vs. Haji Abdul Gafur Haji Hussienbhai), AIR 1977 SC 1226(Piarey Lal Vs. Hori Lak), AIR 1963 SC 1917(Gurbaksh Singh Vs. Nikka Singh and another), AIR 1968 SC 466(Smt. Sonawati and others Vs. Sri Ram and another), AIR 1969 SC 204(Ram Kristo Mandal and another Vs. Dhankisto Mandal), AIR 1976 SC 2229(Damadilal and others Vs. Parashram and others), 1990(4) SCC 464(U.P. State Road Transport Corporation Vs. Muniruddin), AIR 1990 SC 723(Hari Lal and another Vs. Gajjan and others), AIR 1992 SC 1604(Jagdish Singh Vs. Natthu Singh), 2001(7) SCC 189(Hafazat Hussain Vs. Abdul Majeed @ Sheikh Ballan and others), 2002(9) SCC 532(Bhagwan Bala

Mahanavar Vs. Sandipan Lazman Shinde and others), AIR 1965 SC 1364(Sm. Surasaibalani Debi Vs. Phanindra Mohan Majumdar), 85 LW 841(DB) (Panchapakesan(died) and others Vs. Peria Thambi Naicker(died) and others), AIR 1975 SC 1409(Pasupuleti Venkateswarlu Vs. The Motor & General Traders), 98 LW 25(SC) (M/s. Variety Emporium Vs. V.R.M. Mohd. Ibrahim Naina), AIR 1962 SC 370(Immani Appa Rao and others Vs. Gollapalli Ramalingamurthi and others), 2013(1) LW 471(SC)(Satya Jain(d) Thr. LRs. and others Vs. Anis Ahmed Rushdie(d) Tr. LRs. and others), AIR 1963 SC 1633(Madamanchi Ramappa and another Vs. Muthaluru Bojjappa), 2016(8) MLJ 231(A.Sankariah Vs. V. Ravichandran and others).

19.The learned counsel for the plaintiff contended that the authorities relied upon by the defendant's counsel are not in any manner applicable and related to the facts and circumstances of the case at hand. The plaintiff's counsel in support of her contention relied upon the decision reported in 1997 2 LW 761(Ranipet Municipality rep. by its Commissioner & Special Officer, Ranipet Vs. M. Shamsheerkhan). The principles of law out lined in the above said decisions both cited by the defendant and the plaintiff's counsel are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

20.Resultantly, the substantial question of law formulated in this second appeal is answered in favour of the plaintiff and against the defendant.

21.In conclusion, the second appeal fails and accordingly is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar

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To

1.The Principal District Judge,
Cuddalore

2. The Principal Subordinate Judge,
Cuddalore

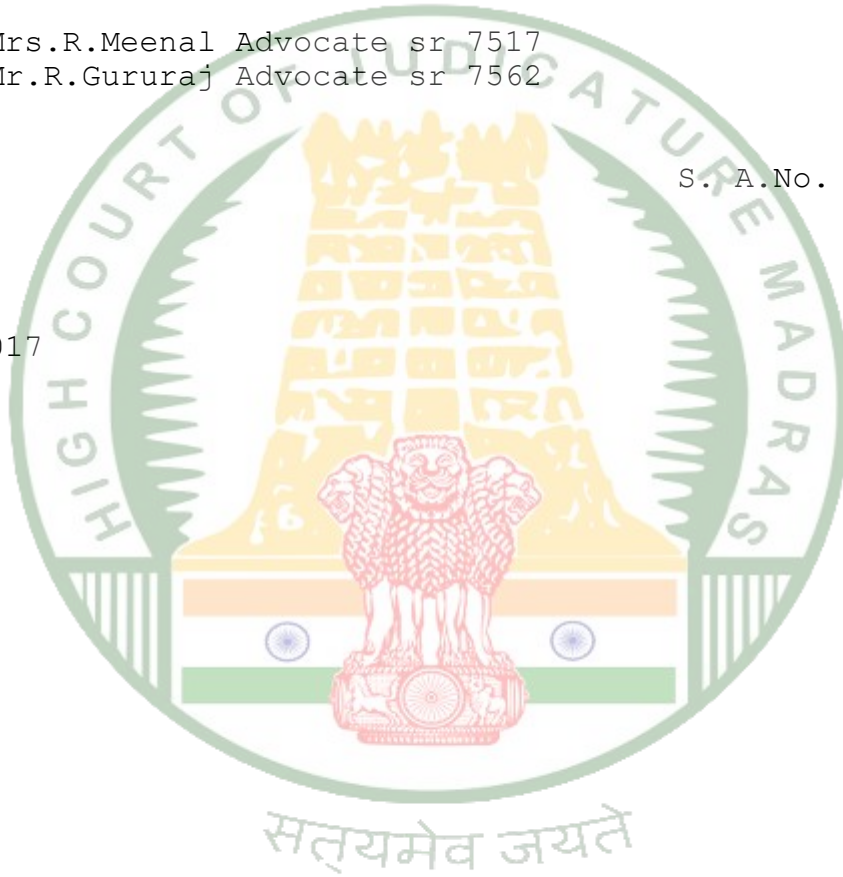
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VR Section
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