IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.10.2017

PRONOUNCED ON : 12.10.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.211 of 2001

M.R.Subramaniam ... Appellant

Vs.

G.S.Abimunissa ... Respondent

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and decree dated 24.11.1999 made in A.S.No.32 of 1999 on the file of the Sub Court, Gobichettipalayam confirming the judgment and decree dated 11.11.1998 made in O.S.No.435/1996 on the file of the District Munsif Court, Gobichettipalayam.

For Appellant : Mr.T.Murugamanickam
Senior Counsel
for M/s.D.Sivakumar

For Respondent : No appearance

JUDGMENT

The defendant has impugned, in this second appeal, the judgment and decree dated 24.11.1999 passed in A.S.No.32 of 1999 on the file of the Sub Court, Gobichettipalayam, confirming the judgment and decree dated 11.11.1998 passed in O.S.No.435 of 1996 on the file of the District Munsif Court, Gobichettipalayam.

2. The parties are referred to as per their rankings in the trial Court.

3.Suit for specific performance.

4.The case of the plaintiff, in brief, is that the defendant agreed to convey the suit property in favour of the plaintiff for a sum of Rs.17,500/- and accordingly, received a sum of Rs.10,250/- as advance and executed a sale agreement in favoaur of the plaintiff in respect of the suit property on 25.11.1992 covering the above said terms of the sale and the parties have agreed that the balance amount of Rs.7,250/- should be paid within three months from the date of agreement and the plaintiff should obtain the sale deed from the defendant and according to the plaintiff, she was always ready and willing to pay the balance sale consideration and get the legal conveyance from the defendant in respect of the suit property and accordingly, on 01.02.1993, when the plaintiff approached the defendant for getting the sale deed, the defendant expressed certain family circumstances and expressed his inability to convey the sale deed and promised to convey the sale deed within one year and on the same date, the defendant, for the purpose of meeting out his family expenses and other expenses, borrowed a sum of Rs.12,000/- from the plaintiff and in evidence thereof, mortgaged the suit property in favour of the plaintiff and thereafter, the defendant failed to execute the sale deed in respect of the suit property in favour of the plaintiff. It is the case of the plaintiff that she sent a legal notice calling upon the defendant to convey the suit property and despite the receipt of the notice, the defendant did not respond to the same and hence, the suit for specific performance. It is the further case of the plaintiff that on the date of filing of the suit, she has deposited the balance sale consideration of Rs.7,250/- in the court and hence, the necessary reliefs.

5.The case of the defendant, in brief, is that the defendant was a friend of the plaintiff's husband and accordingly, used to borrow the amount from the plaintiff's husband and in the course of the above said transactions, it is the case of the defendant that a sum of Rs.10,250/- was due to be paid as on 12.11.1992 and accordingly, the plaintiff had obtained the sale agreement as a security for the above said outstanding amount and the sale agreement had not been executed with the intention of conveying the suit property in favour of the plaintiff and it has been executed only as a security for the loan transactions above stated and there was no agreement between the parties that the defendant should execute the sale deed on the receipt of the balance sale consideration within three months from the date of the sale agreement and on 01.02.1993, the plaintiff had obtained further security by way of a mortgage deed from the defendant in respect of the suit property. However, on the date of mortgage, no amount was advanced by the plaintiff to the defendant and inasmuch as there has been no agreement entered into between the parties for the conveyance of the suit property as projected by the plaintiff, it is stated that the suit is liable to be dismissed.

6.It is found that in respect of the mortgage transaction put forth by the plaintiff, she has laid a suit against the defendant and another person in O.S.No.255 of 1996 and it is further found that both O.S.No.255 of 1996 and the suit for specific performance in O.S.No.435 of 1996 were jointly tried and accordingly, common evidence was adduced in both the suits and it is thus found that in support of the case of the plaintiff, PWs1 to 3 were examined and Exs.A1 to 5 were marked. On the side of the defendant, DW1 was examined and Ex.B1 has been marked.

7.On a consideration of the oral and documentary evidence adduced in the matter and on the basis of the submissions made by the respective parties, it is found that the trial Court below was pleased to dismiss the mortgage suit laid by the plaintiff in O.S.No.255

of 1996. However, the lower Court was pleased to decree the suit for specific performance laid by the plaintiff in O.S.No.435 of 1996. Challenging the decree passed in the suit for specific performance in O.S.No.435 of 1996, it is found that the defendant has preferred the first appeal and the First Appellate Court, on the basis of the materials placed by the respective parties and the contentions put forth by the counsel for the parties, accordingly dismissed the appeal preferred by the defendant, thereby, confirming the judgment and decree of the trial Court. Impugning the same, the present second appeal has been preferred.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

> ***i) When an agreement of sale is intended to be only a security for a loan transaction, whether a decree for specific performance can be granted in contravention of the settled law.***
>
> ***ii) Whether the deposit of the balance sale consideration at the time of the presentation of the suit can be a ground to grant a decree for specific performance, when this amount has not been tendered for over 3 years from the date of the alleged agreement of sale?***

9.The suit has been laid for specific performance. Briefly stated, according to the plaintiff, the defendant agreed to convey the suit property in favour of the plaintiff for a sum of Rs.17,500/- and accordingly, received a sum of Rs.10,250/- from the plaintiff as advance and accordingly, executed a sale agreement in favour of the plaintiff in respect of the suit property on 25.11.1992, where under, the defendant agreed to receive the balance sale consideration of Rs.7,250/- from the plaintiff within three months from the date of the sale agreement and convey the suit property in favour of the plaintiff. The sale agreement entered into between the parties has been marked as Ex.A1. Now, according to the plaintiff, though she has been always ready and willing to pay the balance sale consideration and get the sale deed executed from the defendant, it is her case that the defendant has never been ready and willing to perform his part of the contract and hence, according to the plaintiff, she had issued a legal notice calling upon the defendant to convey the suit property in her favour as per the terms of the sale agreement marked as Ex.A1 and it is the further case of the plaintiff that despite the receipt of the same, the defendant did not care to send any reply repudiating the contents of the legal notice, hence, the suit has been filed for specific performance.

10.The defence put forth by the defendant is that though he has admitted the execution of the sale agreement as such, it is his case that the sale agreement has been executed only as a security in respect of the loan transactions between the plaintiff and the defendant and it is the case of the defendant that in respect of the borrowals made by the defendant from the plaintiff's husband, a sum of Rs.10,250/- was outstanding and only with reference to the above said loan amount, at the instance of the plaintiff's husband, the sale agreement had been brought up as a security for the loan amount and there was no agreement as such between the parties to convey the suit property in favour of the plaintiff as put forth by the plaintiff.

11.Therefore, in the light of the above defence projected by the defendant, as rightly determined by the Courts below, it is found that the duty is heavily cast upon the defendant to establish that the sale agreement projected in this case has been executed only in respect of the alleged loan transactions as a security document. At the outset, there is no material to hold that prior to the sale agreement Ex.A1, there has been loan transactions between the plaintiff and the defendant and accordingly, a sum of Rs.10,250/- was outstanding as on 12.11.1992 as put forth by the defendant. With reference to the above case/defence put forth by the defendant, we have only the interested testimony of the defendant and no other material. On the other hand, a perusal of Ex.A1, the sale agreement would go to show that as rightly determined by the Courts below, only with a view to convey the suit property in favour of the plaintiff for a sum of Rs.17,500/-, it is found that the defendant had executed the sale agreement, after receiving a sum of Rs.10,250/- as advance and accordingly, it is seen that both parties have agreed to complete the sale transaction within three months thereafter, on the plaintiff paying the balance sale consideration of Rs.7,250/- to the defendant. Now, it is the case of the plaintiff that she has always been ready and willing to pay the balance sale consideration and accordingly, when she approached the defendant on 01.02.1993 for completing the sale transaction, it is her case that the defendant expressed certain difficulties in completing the sale transaction and further, it was pleaded by the plaintiff that the defendant, on account of his family necessity, borrowed a sum of Rs.12,000/- from her and mortgaged the suit property in favour of the plaintiff and even thereafter, as the defendant did not come forward to execute the sale deed, it is the case of the plaintiff that she had been forced to lay the suit, after calling upon the defendant through a lawyer's notice to complete the sale transaction as per the terms of the sale agreement marked as Ex.A1. It is the further case of the plaintiff that to the legal notice issued on her behalf, the defendant has not sent any reply repudiating the contents thereof.

12. It is found that in order to establish that the parties had agreed to enter into a sale transaction in respect of the suit property, the plaintiff has chosen to examine the attestor to the sale agreement Ramasamy as PW2 and PW2 also in his evidence has clearly deposed that the defendant agreed to convey the suit property in favour of the plaintiff for a sum of Rs.17,500/- and accordingly, received a sum of Rs.10,250/- as advance from the plaintiff and agreed to execute the sale deed in favour of the plaintiff, after receiving the balance sale consideration within three months thereafter and that, he had attested the sale agreement. Despite the cross-examination of PW2, as rightly found by the Courts below, nothing has been culled out from him to disbelieve his version in supporting the plaintiff's case or deposing against the defendant's case. Nothing has been validly suggested to him for testifying in favour of the plaintiff's case as such and it is found that PW2 has also denied the suggestion that Ex.A1 sale agreement has been executed only as a security for the purpose of loan

transaction between the parties concerned. It is thus found that the

defendant has miserably failed to establish that Ex.A1 sale agreement has come into existence only as a security for the alleged loan transactions between the parties.

13. As seen above, there is no material forthcoming on the part of the defendant that prior to Ex.A1 sale agreement, there had been borrowals between the plaintiff and the defendant and in respect of such transactions, a sum of Rs.10,250/- was outstanding as on 12.11.1992. With reference to the same, there is no documentary proof placed on the side of the defendant. Further, it is found that no other independent witness has also been examined on the side of the defendant to establish that there has been loan transactions between the parties concerned prior to Ex.A1. The document marked as Ex.B1 is dated 26.08.1995 and it, even according to the plaintiff's case, only pertains to the mortgage transaction entered into between the parties marked as Ex.A2. Therefore, when the onus is heavy upon the defendant to establish that Ex.A1 has come into existence only as security document in respect of loan transactions, on the failure of the defendant to establish the same with acceptable material, it is found that the Courts below have rightly disbelieved the defence version and

accordingly, accepted the plaintiff's case based upon the materials produced.

14. As regards the readiness and willingness on the part of the plaintiff to complete the sale transaction, it is found that the plaintiff has chosen to adduce the evidence with reference to the same, coupld with the evidence of the attestor examined as PW2. From the evidence adduced on the part of the plaintiff, it is found that as rightly determined by the Courts below, the plaintiff has always been ready and willing to pay the balance sale consideration within the time stipulated between the parties and accordingly, it is found that the plaintiff had even approached the defendant on 01.02.1993 for completing the sale transaction as such. However, on account of the certain difficulties put forth by the defendant in completing the sale transaction, it is found that further, as the defendant had requested the plaintiff to advance further sum for meeting out his family expenses, the mortgage deed had come into existence in respect of the suit property between the parties and accordingly, it is the case of the plaintiff that she had advanced a sum of Rs.12,000/- to the defendant and obtained the mortgage deed. Challenging the above case of the plaintiff, it is the contention of the defendant's counsel that Ex.A2 transaction would only prove that there has been borrowals

between the parties concerned and accordingly, the mortgage deed had also been taken as a security by the plaintiff for the earlier debts incurred by the defendant. However, there is no recital as such found in Ex.A2 that the same had come into existence in respect of the earlier debts borrowed by the defendant from the plaintiff or her husband. However, it is also argued by the defendant’s counsel that if really Ex.A1 had come into existence, the plaintiff, instead of advancing a sum of Rs.12,000/- to the defendant under Ex.A2 or even assuming for the sake of argument that the plaintiff had chosen to advance a sum of Rs.12,000/- to the defendant, it is contended, that as a prudent person, the plaintiff would have deducted the balance amount of the sale consideration from the loan advanced under Ex.A2 and obtained the sale deed from the defendant immediately and the failure on the part of the plaintiff in getting the sale deed and his act of obtaining the only mortgage deed from the defendant would go to show that, it is contended that there was no intention between the parties to convey the suit property. However, as rightly determined by the Courts below, as seen from the evidence put forth by the plaintiff, the plaintiff has always been ready and willing to pay the balance sale consideration, it is found that only on account of the failure of the defendant, the sale deed could not be executed. Further, merely because, the plaintiff had advanced the loan to the defendant under Ex.A2 mortgage deed that by alone could not be construed as if the sale agreement is not a true document. As seen above, it is the specific case of the plaintiff that only at request of the defendant, a sum of Rs.12,000/- was advanced for meeting out his family expenses and accordingly, the mortgage had been obtained from the defendant in respect of the suit property. In such view of the matter, the execution of the mortgage deed by itself would not render the sale agreement as a false document and similarly, the failure of the plaintiff in succeeding in her mortgage suit also would not by itself render the sale agreement as a false document.

15. As adverted above, the plaintiff has adduced acceptable evidence to show that she has always been ready and willing to pay the balance sale consideration and get the sale deed from the inception of the sale agreement. It is found that prior to the institution of the suit, the plaintiff has also issued a legal notice calling upon the defendant to receive the balance sale consideration and execute the sale deed in respect of the suit property. The receipt of the notice has not been disputed by the defendant. Despite the same, the defendant has not chosen to send any reply repudiating the contents of the legal notice. It is found that even in the legal notice, the plaintiff has clearly

averred that she has been always ready and willing to perform her part of the contract by paying the balance sale consideration and only on account of the delay tactics adopted by the defendant, the sale deed could not be executed. That apart, it is further found that to show her readiness and willingness, the plaintiff has also deposited the balance sale consideration in the Court on the date of the filing of the suit and this aspect also would go to establish that the plaintiff has always been ready and willing to perform her part of the contract and only on account of the delay tactics adopted by the defendant, the sale transaction could not be brought into existence.

16. In such view of the matter, it is found that the Courts below have clearly held that the defendant has failed to establish that the agreement of sale was entered into between the parties only as a security for the loan transactions as put forth by him and accordingly, held that the sale agreement had come into existence only following the agreement between the parties to convey the suit property in favour of the plaintiff for the consideration recited therein. It is further found that the Courts below have rightly held that the plaintiff has been always ready and willing to perform her part of the contract and only on account of the delay tactics adopted by the defendant, the sale

deed could not be executed and it is further found that the Courts below have also correctly held that the readiness and willingness on the part of the plaintiff has been further established by the deposit of the balance sale consideration by the plaintiff at the time of the presentation of the suit. The above findings of the Courts below are found to be based upon sound and cogent reasons and also based upon the proper appreciation of the materials placed in the right perspective both on facts as well as on legal aspects. In such view of the matter, there is no infirmity or error in the above findings of the Courts below for upholding the plaintiff's case. In such view of the matter, the substantial questions of law formulated for consideration in this second appeal are answered in favour of the plaintiff and against the defendant.

17. In the light of the above discussions, the decisions relied upon the plaintiff's counsel reported in ***2012 (1) CTC 53 (Lakshmi and two others Vs. Muthusamy), (2017) 6 MLJ 237 (Bhagirath Vs. Ram Ratan) and 2008 (2) CTC 382 (P.Sampoornam and others Vs. L.T.Somasundaram and others)*** are considered and the principles of law adumbrated in the above decisions are followed as applicable to the facts and circumstances of the case at hand.

18. In view of the above discussions, the second appeal fails and is accordingly, dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

12.10.2017

Index : Yes/No

Internet : Yes/No

sms

To

1. The Sub Court, Gobichettipalayam.
2. The District Munsif Court, Gobichettipalayam.

T.RAVINDRAN,J.

sms

Pre-delivery Judgment made

in

S. A.No. 211 of 2001

12.10.2017