**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**RESERVED ON : 14.11.2017**

**PRONOUNCED ON : 16.11.2017**

**CORAM**

**THE HONOURABLE MR. JUSTICE T.RAVINDRAN**

**S. A.No.850 of 2001**

1. Lakshmi
2. Papathi .. Appellants

Vs

1. Duraisamy
2. Vedathal
3. Govindasamy
4. Govindammal .. Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 29.10.1999 made in A.S.No.37 of 1998 on the file of the Principal Subordinate Court, Salem, confirming the Judgment and Decree dated 02.09.1998 made in O.S.No.1232 of 1996 on the file of the II Additional District Munsif Court, Salem.

For Appellants : Ms.P.Saritha
for M/s.Zeenath Begaum

For Respondents : No appearance
( set exparte)

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**JUDGMENT**

Challenge in this second appeal is made to the Judgment and Decree dated 29.10.1999 made in A.S.No.37 of 1998 on the file of the Principal Subordinate Court, Salem, confirming the Judgment and Decree dated 02.09.1998 made in O.S.No.1232 of 1996 on the file of the II Additional District Munsif Court, Salem.

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

3. Suit for Specific Performance or in the alternative for the return of the advance amount and for possession.

4. The case of the plaintiffs, in brief, is that the plaintiffs and the defendants entered into a registered sale agreement on 03.02.1984 for the sale of the plaint schedule property for a sum of Rs.30,000/- and advance of Rs.19,000/- was paid towards the sale consideration on the date of the registered sale agreement above referred to and the said sum of Rs.19,000/- was made up as follows, i.e. the first defendant had executed a registered mortgage for a sum of Rs.10,000/- in favour of the plaintiffs on 01.07.1982 and the same had

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been adjusted on the date of the sale agreement besides Rs.7,100/- paid in cash on the same date, in all amounting to a sum of Rs.19,000/- and the plaintiffs and the defendants agreed to conclude the sale within 5 years and it has been agreed between the parties that in the event of the defendants paying a sum of Rs.19,000/- within 3 years from the date of agreement, the plaintiffs should not insist on taking the sale and however, the defendants failed to pay the sum of Rs.19,000/- within 3 years as agreed to and hence, the defendants are bound to receive the balance sale consideration of Rs.11,000/- and execute the registered sale deed in respect of the suit property in favour of the plaintiffs and the defendants, however, failed to honour the terms of the consideration, though the plaintiffs had been always ready to perform their part of the contract and in this connection, a telegraphic notice was sent through their advocate on 18.01.1989 for completing the sale transaction and to the same, a reply has been sent falsely, as if there is no need to execute the sale deed pursuant to the sale agreement and it is false to state that the sale agreement had been entered into only in respect of the loan transaction and hence, the suit for appropriate reliefs.

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5. The case of the defendants, in brief, is that the suit is not maintainable either in law or on facts. It is incorrect to state that the plaintiffs and the defendants entered into a sale agreement on 03.02.1984 and the same had been entered into only in respect of the loan transaction, for which, the sale agreement was insisted and obtained from the defendants and the terms of the agreement of sale itself would be the testimony to the same. The defendants originally borrowed a sum of Rs.10,000/- from the plaintiffs under a mortgage deed dated 01.07.1982 and the plaintiffs insisted the payment of the above said amount and as the defendants were not in a position to pay the same, the plaintiffs insisted that the defendants should give their property as security by way of the registered agreement and including the interest and previous balance of Rs.5,000/- amounting to Rs.19,000/- for which, the sale agreement had come to be executed on 03.02.1984 and as per the terms of the agreement, it was specifically agreed to between the parties that the amount has to be paid within 3 years and therefore, there was no consenses between the parties for selling the suit property at the time of the execution of the agreement and hence, the sale agreement is not enforceable in law. Further, on 03.02.1984, the parties have executed an independent agreement, where by, the defendants agreed to pay

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Rs.380/- per month as interest regularly and in the event of paying entire amount, the plaintiffs had agreed to cancel the sale agreement dated 03.02.1984 and subsequently, the defendants have paid the amounts due to the plaintiffs and the plaintiffs have also given discharge receipt to the same and the amounts paid to the plaintiffs, after 24.03.1994, had not been duly given credit to by the plaintiffs, however, the defendants have paid the entire amount and it is only the plaintiffs, who had failed to honour the terms of the sale agreement dated 03.02.1984. To the notice sent, a suitable reply containing true facts had been sent. The defendants are illiterate people and taking advantage of their ignorance, the plaintiffs have laid the suit without any cause of action and for the amount due to the plaintiffs, if any, from the defendants, at the most, the plaintiffs would be entitled only to file the suit for recovery of the amount and not for specific performance of the agreement dated 03.02.1984. Further, the claim of the recovery of the amount has also become time barred and hence, the suit is liable to be dismissed.

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6. In support of the plaintiffs' case, PW1 has been examined and Exs.A1 to 8 were marked. On the side of the defendants, DW1 was examined and Exs.B1 to 6 were marked.

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7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to dismiss the suit laid by the plaintiffs. Aggrieved over the same, the present second appeal has come to be preferred.

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

> ***" (i) Whether the Courts below have misinterpreted the sale agreement Ex.A3 and the loan transaction Ex.B1 which were executed on the same, date, to hold, that the loan transaction supersede the sale agreement?***
>
> ***(ii) When an opinion has been given to a vendor to meet the advance paid in an agreement of sale as a loan, and that in default of the repayment of the advance, the sale agreement has to take place, and such default having been committed, whether the judgments of the***

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***Courts below are vitiated by holding that only the advance amount is repayable and that the sale agreement cannot be enforced?***

9. It is found that there is no dispute between the parties that the sale agreement dated 03.02.1984 has come to be entered into between the parties in respect of the suit property and according to the defendants, the said agreement had been taken only in respect of the loan transactions, which had been pending between the parties prior to the sale agreement. With reference to the same, it is found that as per the admitted case of the parties, the defendants have borrowed a sum of Rs.10,000/- from the plaintiffs by way of a mortgage deed dated 01.07.1982 and the same could be evidenced from the mortgage deed marked as Ex.A1. It is the case of the defendants that as the plaintiffs demanded the payment due to them under the mortgage deed and as the defendants were not in a position to discharge the debt, according to them, the plaintiffs insisted for the execution of the sale agreement in respect of the suit property and accordingly, the sale agreement had come to be executed for a sum of Rs.30,000/- with recitals containing that a sum of Rs.19,000/- has been paid on the date of the sale agreement i.e. on 03.02.1984 by way of calculating the principle amount and interest due under the

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mortgage deed as on date and also by adding a sum of Rs.7,100/- in cash paid on the same date and accordingly, a sum of Rs.19,000/- is reflected to have been paid as advance under the sale agreement dated 03.02.1984, which has been marked as Ex.A3. It is found further that the parties have entered into another agreement on the same date on 03.02.1984 marked as Ex.B1, whereunder, it has been agreed that the defendants should pay the sum of Rs.19,000/- received as advance under the sale agreement Ex.A3 with interest at the rate of Rs.380/- per month and in the event of the defendants discharging the amount, the plaintiffs would not enforce the sale agreement Ex.A3. The execution of the agreement dated 03.02.1984 marked as Ex.B1 has been not disputed by the plaintiffs and it is found that they have admitted their signatures in the said document and also it is found by the Courts below rightly that the signature of the husband of the plaintiff is found in the said document. If really, the parties had intended to convey the suit property by way of the sale agreement Ex.A3, there is no need for the parties to enter a separate agreement on the same date with the defendants promising to repay the sum of Rs.19,000/- said to have been given as advance under the sale agreement Ex.A3 with interest to the plaintiffs at the rate of Rs.380/- per month within 3 years. Similarly, there would have been

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understanding between the parties under Ex.B1 that in case, the defendants pay the entire amount with interest as promised, the plaintiffs would not enforce the sale agreement Ex.A3. It is therefore found that the Courts below have rightly clubbed the recitals found in Exs.A3 & B1 together and accordingly held that as the defendants were unable to discharge the loan amount received under Ex.A1, found that they had agreed to execute Ex.A3 sale agreement as insisted by the plaintiffs and accordingly, as the plaintiffs had also no intention to purchase the property under Ex.A3, it is found that the parties have entered into a separate agreement on the same date under Ex.B1, whereunder, it has been agreed to that in the event of the defendants paying the entire amount with interest within 3 years, the plaintiffs would not enforce the sale agreement Ex.A3. Therefore, as rightly determined by the Courts below, there is completely absence of the consensus ad idem between the parties for the sale of the suit property under Ex.A3 and it has been clearly by the Courts below that the sale agreement Ex.A3 has come into existence only in respect of the loan transactions as put forth by the defendant. Accordingly, it is found that the Courts below have rightly held that the plaintiffs are not entitled to enforce the sale agreement Ex.A3. In this connection, it is found that the Courts below have rightly placed reliance upon the

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decision reported in ***1996 1 Law Weekly page 785,*** whereunder, it has been held that where an agreement of sale has been executed towards the amount due, the person, who has obtained the agreement in his favour is not entitled to the specific performance of the agreement and it has been further held that the Courts are not bound to grant relief of specific performance in such cases where the agreement has come to be made containing recitals as regards the sale of the property but made only to recover the earlier dues. Accordingly, it is found that when the parties themselves have under Ex.B1 agreed for the payment of advance, the amount said to have been paid under Ex.A3 within 3 years and further, the plaintiffs having admitted not to enforce the sale agreement, further when it is found that in Ex.A3, specific recitals have also been incorporated, wherein, the plaintiffs had agreed to enforce the sale agreement only after a period of 3 years from the date of the sale agreement, this also would go to show that as 3 years time period has been granted to the defendants to discharge the debt fully with interest as promised, the above said time limit has been agreed to between the parties and in such view of the matter, no exception could be taken to the approach of the Courts below in clubbing both Ex.A3 & B1 for determining the issues involved in between the parties in this lis.

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10. It is found that according to the defendants, they have paid the entire amount due to the plaintiffs. Per contra, it is the contention of the plaintiffs that the amount has not been discharged in full by the defendants. However, as far as this case is concerned, when it is found that the amount paid as advance is not passed on as advance amount towards a part of the sale consideration and on the other hand, when it is found that the same reflects only the earlier debt borrowed by the defendants from the plaintiffs, accordingly, it has been rightly held by the Courts below that the plaintiffs cannot enforce the sale agreement Ex.A3 for the recovery of the amount due from the defendants claiming the sum as advance amount. At the most the plaintiffs would be entitled to recover the said amount only as a debt paid to the defendants and accordingly, it has been held by the Courts below that the plaintiffs are not entitled to enforce the sale agreement Ex.A3 for the recovery of the debt due from the defendants. Accordingly, it has been correctly held by the Courts below that there is no need for any determination as to the issue whether the defendants have paid the entire amount due to the plaintiffs or not in this lis. Since the cause of action for the recovery of the debt is not connected with the cause of action of the present suit, which is the suit for specific performance, as rightly held that if at all any amount is due

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from the defendants, the plaintiffs have to lay a separate suit for the recovery of the sum, provided they have the time limit for the same. However, as rightly held by the Courts below, the plaintiffs have not laid the suit within the specific time limit provided under law for the recovery of the amount and therefore, the plaintiffs cannot be allowed to claim the recovery of the debt from the defendants based on the sale agreement Ex.A3, when it is clearly found that the recovery has become time barred.

11. It is further found by the Courts below rightly that as the parties have not intended to sell the suit property under the sale agreement Ex.A3, in the earlier litigation between the parties in O.S.No.496 of 1988, which could be evidenced from Exs.B5 & 6, the plaintiffs have admitted that she has not laid the present suit for enforcing the sale agreement Ex.A3. That apart, as rightly determined by the first appellate Court, if really, the plaintiffs had intended to purchase the suit property from the defendants under Ex.A3, PW1 examined on behalf of the plaintiffs would have given details about the property, which the plaintiffs intended to purchase and on the other hand, it is found that PW1 has no knowledge about the extent of the property and the boundaries to the same and also does not know, how

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the defendants derived title to the property concerned for conveying the same under Ex.A3, all these only would only go to show that, as rightly determined as Ex.A3 has come to be entered into between the parties only in respect of the loan transaction, it is found that PW1 is unable to give any particulars about the property covered under the sale agreement.

12. In the light of the above discussions, it is found that the Courts below have rightly held that Ex.B1 supersedes Ex.A3 and that Ex.A3 has been entered into between the parties only in respect of the loan transaction and accordingly, rightly held that the sale agreement Ex.A3 cannot be enforced and in such view of the matter, the substantial questions of law formulated in this second appeal are answered against the plaintiffs and in favour of the defendants.

13. The reasonings and conclusions of the Courts below for rejecting the plaintiffs' case do not call for any interference and accordingly, they are confirmed.

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

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Internet :Yes/No
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To

1. The Principal Subordinate Court, Salem.

2. The II Additional District Munsif Court, Salem.

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**T.RAVINDRAN,J.**
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**Pre-delievery judgment made in**

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