



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.08.2017

CORAM

WEB COPY

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

SECOND APPEAL (MD) No.7 of 2014

and

M.P(MD)No.1 of 2014

1.A.Stalin (died) ... 1st Appellant/Appellant/Defendant
2.Gnanam
3.Jesu raja
4.Elsi Rani
5.Jenis
6.Iruthaya Debix Raja
7.Selva Jenila ... Appellants 2 to 7
(Appellants 2-7 brought on record as LR's of the Deceased Sole Appellant vide Court Order dated 5/12/2016 in CMP(MD).Nos.8083, 8084/2016 in SA(MD)No.7/2014)

Vs.

D.Thansekarana ... Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree, dated 02.08.2011 made in A.S.No.15 of 2010 on the file of the Principal District Court, Thoothukudi, confirming the Judgment and Decree dated 21.12.2005 made in O.S.No.165 of 1997 on the file of the Sub Court, Thoothukudi.

For Appellants : Mr.S.Meenakshi Sundaram
Senior Counsel
for Mr.R.T.Arivu Kumar

For Respondent : Mr.S.Kadarkarai

JUDGMENT

The above Second Appeal arises against the Judgment and Decree, dated 02.08.2011 passed in A.S.No.15 of 2010, on the file of the Principal District Court, Thoothukudi, confirming the Judgment and Decree dated 21.12.2005, passed in O.S.No.165 of 1997, on the file of the Sub Court, Thoothukudi.



2.The defendant in a suit for specific performance is the appellant, who had lost before the Courts below.

3.The case of the plaintiff is that the property mentioned in the agreement originally belonged to the defendant by virtue of sale deed, dated 12.11.1984. As the defendant was desirous of selling the property, he entered into an agreement with the plaintiff on 27.05.1996 fixing the sale consideration as Rs.1,30,000/- and received a substantial portion of the consideration, namely Rs.1,20,000/- on the same date. The agreement was registered on condition that the sale had to be completed within three months after paying the balance of the sale consideration. Though the plaintiff was ready and willing to complete his part of the sale with the sale price, the defendant was avoiding the same. Hence, a legal notice was issued on 19.08.1996 and the same was received by the defendant on 21.08.1996. However, there was no response to the same. Therefore, the plaintiff again issued a notice on 15.07.1997, calling upon the defendant to perform his part of the contract by executing the sale deed. When there was no response to the same also, the plaintiff filed the above suit for specific performance.

4.The suit was resisted by the defendant contending that the sale agreement was not true. According to the defendant, it was only a loan transaction, as the defendant requested the plaintiff to settle the loan borrowed by him from one Pon Gunaraj. Then the plaintiff insisted that the defendant should enter into the sale agreement as a condition. It is in such situation, the agreement was entered into for a sum of Rs.1,30,000/-, whereas, the property was worth more than Rs.4,00,000/-. It is further stated that there was no necessity for the defendant to sell the property.

5.On the above pleadings, the Courts below had concurrently held in favour of the plaintiff by decreeing the suit. Aggrieved over the same, the above appeal has been preferred.

6.At the time of admission of the above second appeal, the following substantial questions of law have been framed for consideration:-

"1) Whether the Courts below are correct in coming to the conclusion that the respondent/plaintiff was ready and willing to conclude the contract when he had not taken any steps immediately after Ex.A3, dated 19.08.1996 and when the suit had been filed only on 11.08.1997 and for the same no justifiable reasons or explanation had been given?

<https://hcservices.ecourts.gov.in/hcservices/>

2) Whether the Courts below are correct in coming to the conclusion that the respondent/plaintiff entitled



to the equitable relief of specific performance when the plaintiff/respondent was not able to give the answer why he has taken 3 months time for payment of only a balance of Rs.10,000/- alone as balance sale consideration?"

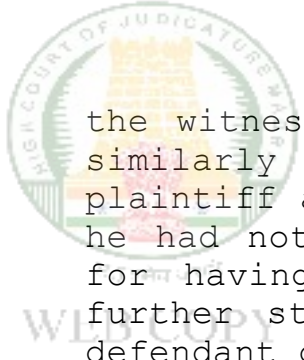
WEB COPY

7. Heard the learned counsel for the appellants and the learned counsel for the respondent.

8. It is a definite case of the defendant that no such sale agreement was executed, though the agreement dated 27.05.1996, marked as Ex.A.2 is a registered one. It is contended by the defendant that the agreement was entered into for settling a loan of Rs.1,00,000/- obtained by the defendant from a third party at the insistence of the plaintiff. Hence, Ex.A.2 should be considered only as a loan agreement and not as a sale agreement. The defendant also had further stated that the value of the property is much more than what has been agreed in Ex.A.2. So far as the genuineness of Ex.A.2 is concerned, it is relevant to advert to the evidence of D.W.1, who is the defendant. The defendant has specifically admitted that he had executed a sale agreement in favour of the plaintiff and deposited the original title deed marked as Ex.A.1 with the plaintiff. It is also categorically admitted that the signatures found in Ex.A.2 belonged to the defendant. The other terms of the agreement are also explicitly admitted by the defendant including the sale consideration, time for performance etc. Based on the said admission, the Courts below had concurrently held that Ex.A.2 is true and valid.

9. So far as the contention of the defendant that the suit agreement is only based on a loan transaction is concerned, there is no iota of evidence excepting the averments in the written statement.

10. The learned counsel appearing for the respondent pointed out that even after receipt of the suit notice under Ex.A.3, dated 19.08.1996 and thereafter the remainder under Ex.A.5, dated 15.07.1997, the appellant/defendant did not whisper anything about the loan transaction. Though the defendant had examined one Pon Gunaraj as D.W.3 in order to prove that it was a loan transaction excepting the interested testimony, there are no other document filed by the defendant to establish that there was a loan transaction between him and the said Pon Gunaraj. Even otherwise, D.W.2 and D.W.3 have put their signatures in Ex.A.2 as attestors. D.W.2 has categorically deposed that pursuant to the sale agreement, the defendant had entrusted the original title deed with the plaintiff. He had also specifically stated that "நான்



the witnesses to Ex.A.2 cannot depose otherwise. D.W.3 also has similarly stated that there was no transaction between the plaintiff and himself, and he has also specifically mentioned that he had not lent money to the defendant and there is no evidence for having paid the interest for the amount borrowed. He has further stated that he had not issued any notice to the first defendant demanding payment.

11. In view of the above evidences of D.W.2 and D.W.3, the case of the defendant is defeated. Further, there is not even a single document filed by the first defendant to support his contention that the suit transaction is only a loan transaction and not an agreement of sale. When Ex.A.2 is a registered document and the defendant had handed over the original title deed viz., Ex.A.1 to the plaintiff, it would only go to show that the parties intended only to sell the property. In the absence of any convincing evidence being produced by the defendant for the alleged loan transaction between the plaintiff and the defendant or between the defendant and D.W.3, the theory put forth by the defendant cannot be accepted. Above all, the defendant himself has admitted the execution of the sale agreement.

12. It is contended by the learned counsel for the appellants that the plaintiff having parted with the entire sale consideration, excepting a sum of Rs.10,000/-, should not have waited for more than a year. Therefore, it should be construed that the intention of the parties was not to sell the property, but only to support the loan transaction.

13. However, as stated earlier, inspite of receiving the legal notices under Ex.A3 and Ex.A.5, the defendant had not explained by way of a reply about the loan transaction. If the defendant was ready and willing to hand over the vacant possession of the suit property, the plaintiff would have paid the balance of sale consideration and brought the sale executed. As the defendant did not express his readiness and willingness, the plaintiff had issued legal notices expressing his willingness to pay the balance of sale consideration. Even after filing of the suit, the plaintiff had offered to deposit the balance of the sale consideration into the Court and it is not the case of the defendant that the plaintiff had no wherewithal to purchase the suit property.

14. The learned counsel for the appellants contended that the relief of specific performance being a discretionary relief, the Court has to also consider the intention of the parties. However, in the absence of any proof of such motives, the said argument cannot be considered. Reliance was placed by the learned counsel for the appellants on the following decisions:-



(I) In *Duraisamy and others Vs. N.Ethirajulu and others* reported in (2003) 1 M.L.J 369.

(ii) In *Ishwar Dass Jain (Dead) through Lrs. Vs. Sohan Lal (Dead) through Lrs* reported in 2000 (1) CTC 359.

The ratio laid down in the above decisions have no application to the facts of the present case.

15. Though it is contended by the learned counsel for the appellants that as held in *Indravanthi Vs. Kamala* reported in (2000) 3 M.L.J 106, long lapse of time from the date of notice is a ground to deny relief, in the case on hand, the suit is filed immediately after issuance of notice.

16. The learned counsel for the respondent relied on a decision in *Madina Begum and another Vs. Shiv Murti Prasad Pandey and others* reported in 2017 (4) CTC 99, wherein in paragraph No.19 it has been held as follows:-

"19. While answering this question on a reference made to the Three-Judge Bench, this Court considered the meaning of the word "date" and "fixed" appearing in Article 54. Upon such consideration, this Court held that the expression "date fixed for the performance" is a crystallized notion. When a date is fixed it means there is a definite date fixed for doing a particular act. Therefore, there is no question of finding out the intention from other circumstances. It was reiterated that the expression "date" is definitely suggestive of a specified date in the calendar. Paragraphs 11 & 12 of the report in this regard are of importance and they read as follows:

"11. The inevitable conclusion is that the expression "date fixed for the performance" is a crystallized notion. This is clear from the fact that the second part "time from which period begins to run" refers to a case where no such date is fixed. To put it differently, when date is fixed it means that there is a definite date fixed for doing a particular act. Even in the second part the stress is on "when the plaintiff has notice that performance is refused". Here again, there is a definite point of time, when the plaintiff notices the refusal. In that

the parts refer to definite dates. So, there is no question of finding out an intention from other circumstances.



12. Whether the date was fixed or not the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. The expression "date" used in Article 54 of the Schedule of the Act definitely is suggestive of a specified date in the calendar. We answer the reference accordingly. The matter shall now be placed before the Division Bench for deciding the issue on merits."

17. In the instant case, there was no response from the first defendant even though the plaintiff had issued notice expressing the readiness and willingness. In the light of the above discussions, the Second Appeal deserves to be dismissed and the questions of law raised by the appellants are answered against them.

18. In fine, this Second Appeal is dismissed confirming the Judgment and Decree of the Courts below.

19. After pronouncing the Judgment, the learned counsel appearing for the respondent submitted that this Court in M.P(MD) No.1 of 2014, dated 29.04.2014, has passed the following order:-

"Heard both sides.

2. The respondent herein filed a suit in O.S.No.165 of 1997 on the file of the Sub-Court, Tuticorin for specific performance of contract dated 27.05.1996. The total sale consideration of Rs.1,30,000/- was paid by the plaintiff. The defendant had contested the suit on the ground that the contract has been made only for the loan transaction and he never intend to sell the property. However, the Courts below have decreed the suit and granted the decree for specific performance. As there was a delay in filing the second appeal, the plaintiff/decreed holder executed the decree and obtained a sale on 28.02.2013 in his favour through Court. Now, only the delivery of possession is remaining. Admittedly, the defendant is in possession of the property and running a tailor shop in the suit property.

3. There was a stay granted by this Court earlier on 01.04.2014, the same has become infructuous in view of the sale being executed in favour of the decree holder.



4.The learned counsel for the respondent contended that if the suit property was rented out it will atleast get Rs.5,000/- per month as rent and having parted with the entire sale consideration is entitled to receive the rent or atleast interest for the amount paid by him as sale consideration. I see force in the contention made by the respondent decree holder. However, the learned counsel for the appellant denied that the property would fetch Rs.5,000/- as rent. However, the learned counsel for the appellant/petitioner agreed to deposit the amount equivalent to the interest that the bank may offer on the sale consideration every month. Admittedly, the sale consideration is Rs.1,30,000/- and approximate interest that a nationalised bank may offer is Rs.1,000/- per month. In the circumstances, the petitioner is directed to deposit a sum of Rs.1,000/- per month from 01.04.2014 to the credit of the suit in O.S.No.165 of 1997 on the file of the Sub Court, Thoothukudi. In case the petitioner defaults for two consecutive months, it is open to the decree holder/respondent to execute the decree and take delivery of possession.

5.In the result, there will be an order of stay only delivery of possession and there is no stay as to the costs."

20.In view of the above, it is open to the respondent to withdraw the said amount approaching the trial Court. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CSIII)

/True Copy/

Sub-Assistant Registrar

To

1.The Principal District Judge, Thoothukudi.

2.The Subordinate Judge, Thoothukudi.

+One cc to Mr.S.Kararkarai, Advocate, SR.No.71393

+One cc to M/s.R.T.Arivukumar, Advocate, SR.No.71463

ps

RL/5C/7P/KP/SAR1/25/9/2017

S.A(MD) No.7 of 2014

09.08.2017