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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 03.08.2018

Judgment Pronounced on : 26.09.2018

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

A.S.No.279 of 2008
and
M.P.No.1 of 2008

G.Soundararajan

.. Appellant/Defendent

Vs.

S.A.Thooyamani

... Respondent/Plaintiff

Appeal Suit (First Appeal) filed under Section 96 of the Civil Procedure Code against the judgment and decree dated 25.07.2007 in O.S.No.98 of 2005 on the file of the Additional District-cum-Sessions Court (Fast Track Court No.II) at Coimbatore.

For appellant : Mr.N.Sridhar, Senior Counsel for
M/s.R.Bharath Kumar
For respondent : Mr.M.Sriram

JUDGMENT

R.SUBBIAH, J

This Appeal Suit (First Appeal) is filed against the judgment and decree dated 25.07.2007 in O.S.No.98 of 2005 on the file of the Additional District-cum-Sessions Court (Fast Track Court No.II) at Coimbatore.

2. The appellant herein is the defendant in the said suit in O.S.No.98 of 2005. The suit was filed by the respondent/plaintiff for specific performance to direct the appellant/defendant to execute the sale deed in respect of the suit property by accepting the balance sale price of Rs.3.25



lakhs or in the alternative, the Court shall execute the sale deed.

3. For the sake of convenience, the parties herein are referred to as they are ranked in the suit as plaintiff and defendant.

4. The brief case of the plaintiff, inter-alia, is as follows:

(a) The plaintiff, as a distant relative of the defendant, knows the defendant for the past 20 years. In the first week of September 2001, the defendant met the plaintiff and represented that he is unable to pay his mortgage debt due to be paid to Coimbatore District Central Co-operative Bank Limited and his house property has also been brought to sale and so, he needs some amount to pay a portion of mortgage debt and stop the auction sale proceedings of house property, which was scheduled on 12.09.2001. The plaintiff sympathised with the defendant and agreed to pay a sum of Rs.1.50 lakhs to the defendant. On 10.09.2001, the plaintiff went to the Co-operative Bank along with the defendant and paid a sum of Rs.1.50 lakhs towards the said mortgage debt. The appellant/defendant agreed to pay the said amount to the plaintiff within three months.

(b) The defendant did not pay the amount within three months. When the plaintiff asked the defendant to repay the sum of Rs.1.50 lakhs paid by him, the defendant was evasive in his reply. However, on 15.03.2002, the defendant and his wife-Vasanthamani came to the plaintiff's house and requested the plaintiff to purchase the property, as they are unable to pay the mortgage debt due to be paid to the Central Co-operative Bank as well as other debts payable to other creditors. The defendant and his wife pleaded with the plaintiff that they have to pay nearly Rs.12 lakhs towards the debts. The plaintiff, in order to give a helping hand to the defendant, agreed to purchase the house property of the defendant for a sum of Rs.15 lakhs and it was agreed that the debts due to be paid by the defendant, can be paid on 18.03.2002 and the sale agreement can be executed stipulating the conditions agreed between the parties.

(c) On 18.03.2002, the plaintiff paid a sum of Rs.2,25,000/- towards the mortgage debt due to be paid by the defendant to the Central Co-operative Bank. The plaintiff was also asked to discharge the loans due to be paid by the defendant and his wife Vasanthamani to M/s.Kumara Krishna Finance and Siva Krishna Finance, Ganapathy, Coimbatore. Even though the loans due to be paid by the defendant to the above finance companies came around Rs.8.60 lakhs, as the amount was paid in lump-sum, the said finance companies agreed to receive Rs.8 lakhs towards full settlement. On 18.03.2002, the plaintiff paid to the defendant a sum of Rs.8 lakhs and the defendant, in turn paid a sum of Rs.4 lakhs to M/s.Siva Krishna Finance and another Rs.4 lakhs to M/s.Kumara Krishna Finance of Ganapathy. After settlement of



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accounts with the above said finance companies, the discharged promissory notes were handed over to the plaintiff in support of the sale agreement. Thus, the plaintiff paid a sum of Rs.10,25,000/- on 18.03.2002, apart from Rs.1.50 lakhs paid on 10.09.2001 in the presence of the witnesses Kalisamy and Viswanathan.

(d) Then, the sale agreement was prepared and in the sale agreement itself, the payment of Rs.11,75,000/- paid by the plaintiff towards a portion of sale consideration of Rs.15 lakhs, was incorporated and it was agreed that the defendant will have to execute the sale deed in respect of the suit property within a period of three months on receipt of the balance sale price of Rs.3.25 lakhs.

(e) It was also agreed that the plaintiff will have to get back the original title deeds in respect of the suit property, which have been deposited in the Co-operative Bank and kept it in support of the sale agreement. The sale agreement executed between the plaintiff and defendant, was attested by the witnesses Kalisamy and Viswanathan. The original title deeds deposited with the Bank, were returned and they were handed over to the plaintiff in support of the sale agreement executed by the defendant. Further, on 21.03.2002, the General Manager of the Co-operative Bank executed a discharge receipt in favour of the defendant for having fully settled the mortgage loan and the xerox copy of the above said discharge receipt was handed over to the plaintiff by the defendant. The plaintiff had always been ready and willing to pay the balance sale price of Rs.3.25 lakhs and get the sale deed registered in his name. On 18.06.2002, even though the plaintiff was ready to purchase the suit property by paying the balance sale price of Rs.3.25 lakhs, the defendant expressed his inability to vacate the house and hand over the possession to the plaintiff. So, on 13.06.2002, the defendant gave a letter to the plaintiff in his handwriting, stating that as he is unable to vacate the house as stipulated in the agreement, he needs extension of time till the end of Avani Tamil month, which falls on 15.09.2002. The plaintiff agreed to extend the time till the end of the month of Avani Tamil month.

(f) As the defendant did not comply with the agreement, the plaintiff sent a Lawyer's notice to the defendant calling upon him to execute the sale deed as agreed by him. The defendant having received the notice, did not send any reply. At the end of Avani 2002, the defendant, along with his wife and children, came to the house of the plaintiff and pleaded that as they were unable to get a convenient rental house to properly educate their children, they proposed to construct a house at their factory premises and that they need time till the end of Karthikai 2004, so that they can construct the house and shift their residence to the new building and hand over the possession of the suit property to the plaintiff. The plaintiff, who was



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always having a soft corner to the children, and on seeing the defendant's wife and their children, shedding tears and pleading for his mercy, agreed to grant time till 10.12.2004. As the time agreed by the defendant was about to expire, the plaintiff had sent one of his representatives and find out the real state of affairs. The plaintiff was shocked when he came to know that the defendant had not taken any steps to construct the house within his factory premises and he had cheated the plaintiff by false representation. (g) Hence, on 29.11.2004, the plaintiff sent a registered Lawyer's notice along with a copy of the Banker's Cheque for Rs.3.25 lakhs taken in the name of the defendant, calling upon him to come to the Sub-Registrar Office on 06.12.2004 and execute the sale deed by accepting the Banker's Cheque for Rs.3.25 lakhs, which is to be paid towards the balance sale consideration. The defendant, having received the notice, had sent a reply through his counsel, stating that he never entered into an agreement to sell his house property and he had never received any amount from the plaintiff. The defendant, after having saved his property from being sold in auction for a distress value, had turned the table and without any regard for truth, totally denied the execution of the sale agreement itself.

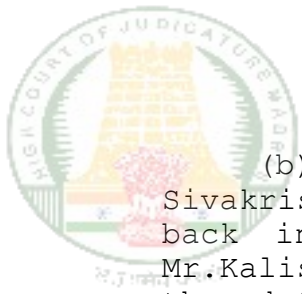
(h) The defendant having sent a reply denying the agreement, had sent word through his friends, stating that he is ready to execute the sale deed, if additional amount of Rs.5 lakhs is paid to him. Hence, the plaintiff has filed the suit for the following reliefs:

(i) for specific performance of the sale agreement dated 18.03.2002, directing the defendant to execute the sale deed in favour of the plaintiff in respect of the suit schedule property, free from encumbrance, by accepting the balance sale price of Rs.3.25 lakhs on or before a date to be fixed by the Court, and

(ii) on failure of the defendant in executing the sale deed as directed by the Court, the Court may execute the sale deed.

5. Resisting the case of the plaintiff, the defendant has filed written statement, stating as follows:

(a) The suit itself has been master-minded by the said Kalisamy, who is running three finance companies under the name and style of Sivakrishna Chit Funds Private Limited, Kumarakrishna Finance and Sivakrishna Finance. The said Kalisamy has introduced the plaintiff as a money lender. The plaintiff and the said Kalisamy have engaged themselves in a massive fraud to cheat the defendant. The alleged agreement of sale dated 18.03.2002 is nothing but the result of their fraudulent machinations. The entire agreement has been filled up in blank stamp papers and papers to which the defendant had subscribed his signature while availing of the chit amount from the said Sivakrishna Chit Private Limited and Mr.Kalisamy.



(b) The defendant had availed of chit facilities from Sivakrishna Chits Private Limited under two chit schemes way back in the year 1994. Since that time onwards, the said Mr.Kalisamy who is managing the Chit Company, is acquainted with the defendant. After subscribing the two chit accounts for sometime, the defendant bid for the chit amount and emerged as a successful bidder in both the chit accounts. As a result, he received the chit amount in advance and he became a debtor to the Chit Company. While receiving the bid amount, the said Mr.Kalisamy received the signature and thumb impression of the plaintiff in several stamp papers, printed pro-notes, pro-notes and blank papers.

(c) It is usual and customary for the Chit Companies to dominate the borrowers and stoop them to their will by taking advantage of the need of the borrower. Therefore, the defendant had no other alternative but to subscribe his signatures and thumb impressions as dictated by the plaintiff. The defendant's wife Mrs.Vasanthamani stood as guarantor in respect of the chit borrowals. The defendant has paid substantial amount(s) towards re-payment of the bid amounts. But towards the end of re-payment, the defendant's financial position deteriorated and he could not fulfill the commitments and there remained only small balance amount. The said Kalisamy was frequently calling upon the defendant to pay the amount.

(d) In or about 2002, the defendant was also facing problem and the defendant had already mortgaged the suit property to the Coimbatore City Co-operative Bank and a sum of Rs.2,18,203/- was payable to the said Bank and the defendant had no funds to settle the amount. At that juncture, the said Kalisamy represented to the defendant that he would help him to settle the dues and in turn, the defendant will have to obtain the original title deeds from the Co-operative Bank and hand it over to him. Faced with the critical situation, the defendant had no other alternative but to submit himself to the said Kalisamy totally, and as such, the said Kalisamy remitted the balance due to the Co-operative Bank and the defendant handed over the documents of title pertaining to the suit property to him. At that time, as instructed by the said Kalisamy, the defendant signed in several blank papers and stamp papers and handed over them to the said Kalisamy and apart from this, the said Kalisamy also obtained the thumb impressions of the defendant in several blank papers.

(e) The defendant was making earnest attempts to settle the dues both arising under the chit schemes and also on account of the said borrowal. The said Kalisamy represented that it is enough if the defendant pays 6% interest on Rs.2,18,203/- which was remitted by Kalisamy to settle the Co-operative Society dues. In spite of the best efforts of the defendant, he could not keep up the payment. The said Kalisamy devised fraudulent schemes in collusion and with active participation of the



plaintiff to weave out an incredible story as if an agreement of sale exists.

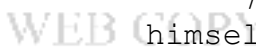
(f) The defendant had no contractual dealings or relationship with the plaintiff. The plaintiff had no transaction with the defendant at any time. The plaintiff has been planted by the said Kalisamy. The defendant has every reason to believe that the plaintiff and the said Kalisamy are close to each other and the plaintiff would do anything to oblige Kalisamy. Thus, a total stranger like the plaintiff, stooped to the lowest level by subscribing his name to fraudulent creation of documents.

(g) In the legal notice, dated 29.11.2004, the plaintiff has shown certain alleged payments towards part of the sale consideration. The first payment is an alleged sum of Rs.1,50,000/- purportedly on 10.09.2001 to the Co-operative Bank. The plaintiff obtained some particulars from Kalisamy to whom the defendant had divulged all his loan transactions with the Co-operative Bank including Rs.1,50,000/- paid by the defendant in September 2001 much before the defendant approached Kalisamy for assistance to discharge the balance Rs.2,18,203/-. The plaintiff never paid Rs.1,50,000/- on September 2001. The defendant made the said payment directly to the Co-operative Bank out of his own funds. There was no borrowal by the defendant from the plaintiff or anybody else to make the said payment.

(h) The alleged payment of Rs.8 lakhs in favour of Sivakrishna Finance and Kumarakrishna Finance is false and it is a fraudulent creation of Kalisamy. There was no such loan of Rs.4 lakhs each in favour of Kumarakrishna Finance and Sivakrishna Finance. Two promissory notes have been filled up in collusion with the said Kalisamy. The alleged payment of Rs.2,25,000/- by the plaintiff purportedly in favour of the Co-operative Bank on 18.03.2002, is also false and fraudulent. The defendant paid a sum of Rs.2,18,203/- with the help of the financial assistance of Kalisamy. It was at that juncture that several blank papers and stamp papers were signed by the defendant. Therefore, the said payment cannot be linked to the sale agreement. The letter dated 18.03.2002 is also filled up, which contains the defendant's signature and also the thumb impression. It has become common to the creditors to fill up the blank papers with a view to make it appear as if there has been agreement of sale. The alleged letter dated 13.06.2002 was not in the defendant's handwriting. The plaintiff is not entitled to the relief of specific performance. Hence, the defendant prayed for dismissal of the suit.

6. On the above pleadings, the trial Court has framed the following issues:

(i) Whether the plaintiff is entitled to the relief of specific performance?



(iii) To what relief the plaintiff is entitled to?

8. The trial Court, upon considering the oral and documentary evidence, decreed the suit as prayed for. Aggrieved by the same, the defendant has filed the present First Appeal.

10. Learned counsel for the appellant/defendant further submitted that it is the case of the plaintiff that though the defendant had promised to re-pay the amount, subsequently, he failed to re-pay and whenever the defendant was approached by the plaintiff, the defendant was evasive in his reply. It is also the further case of the plaintiff that when the defendant again approached and requested the plaintiff for purchase of property for discharge of the balance mortgage debt to settle his other creditors and to save some money for the education and



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maintenance of his children, the request of the defendant was readily accepted by the plaintiff who acted as a saviour and agreed to purchase the property for Rs.15 lakhs, but according to the defendant, the said case of the plaintiff cannot be believed. In this regard, learned counsel for the appellant submitted that it is an unbelievable story that despite the evasive attitude on the part of the defendant in the matter of re-payment of Rs.1,50,000/-, the plaintiff again was willing to help the defendant and agreed to discharge the alleged debts on 18.03.2002. Learned counsel for the appellant further submitted that it is the case of the plaintiff that on 18.03.2002, the plaintiff paid a sum of Rs.2,25,000/- for the mortgage debt due to be paid by the defendant to the Central Co-operative Bank. In this connection, learned counsel for the appellant/defendant again invited the attention of this Court to Ex.B-2 and submitted that no such payment of Rs.2,25,000/- was revealed on 18.03.2002; on the other hand, it shows that on 18.03.2002, only a sum of Rs.2,00,049/- was deposited towards principal and Rs.18,154/- towards interest. It is the further contention of the learned counsel for the appellant/defendant that it is the case of the plaintiff that P.W.2 Kalisamy, who is the partner of the finance companies, paid a sum of Rs.2,18,203/- on 18.03.2002 to discharge the loan amount to the Bank and the plaintiff has paid the said amount to P.W.2 Kalisamy and thereafter, the plaintiff had closed the account and obtained the original documents from the Bank and handed over it to P.W.2 Kalisamy, who misused the said document with the connivance of the plaintiff, by projecting the case as if the plaintiff had discharged the loan on the request of the defendant, since the defendant agreed to convey his suit property by entering into a sale agreement on 18.03.2002.

11. In the above context, it is the submission of the learned counsel for the appellant that it is also the case of the plaintiff that on the date of agreement, namely on 18.03.2002, apart from the alleged payment of Rs.2,25,000/- to the Central Co-operative Bank, the plaintiff also paid to the defendant a sum of Rs.8 lakhs and the defendant, in turn paid Rs.4 lakhs each to Sivakrishna Finance/Kumarakrishna Finance on 18.03.2002 to close his loan account and after settlement, the discharged promissory notes were handed over to the plaintiff in support of the sale agreement. Learned counsel for the appellant/defendant further submitted that as per the version of the plaintiff, Rs.8 lakhs was paid at the rate of Rs.4 lakhs each to the finance companies run by P.W.2 Kalisamy and if it is so, the finance company would have handed over the discharged promissory notes only to the defendant and not to the plaintiff. Though the plaintiff alleged in the plaint that in support of the alleged payment of Rs.8 lakhs, the abovesaid finance companies have handed over the discharged promissory notes to



the plaintiff in support of the sale agreement, but no such reference was made in the sale agreement Ex.A-2 about any promissory note or debt or handing over the discharged promissory notes to the plaintiff, either by the defendant or the finance companies in support of the sale agreement about non-mentioning of the promissory notes/debts and non-mentioning of the alleged promissory notes Exs.A-3 and A-4 to the plaintiff in the sale agreement Ex.A-2, which clearly shows that Exs.A-2 to A-4 are cooked up documents by the plaintiff with the connivance of P.W.2 Kalisamy.

12. Learned counsel for the appellant/defendant further submitted that it is the specific contention of the defendant in the written statement that the defendant has not borrowed any money either from Sivakrishna Finance or Kumarakrishna Finance under the alleged promissory notes dated 23.03.1999, which are marked as Exs.A-3 and A-4. A perusal of these exhibits clearly reveals that they were allegedly executed by the defendant and his wife for Rs.2,50,000/-, but neither in the pre-suit notice issued by the plaintiff under Ex.A-13, nor in the alleged sale agreement, there is any mention about these promissory notes. P.W.1 plaintiff has admitted these facts during cross-examination. Learned counsel for the appellant/defendant further contended that in Exs.A-2, A-3 and A-4, there is no reference about the alleged joint borrowal of the loan amount by the defendant along with his wife from P.W.2 Kalisamy. It is the specific case of the defendant in the written statement that he has not borrowed any money on 23.03.1999, i.e. the date of promissory notes; on the other hand, he borrowed loan only in the year 2002 from Kalisamy who is one of the partners of the abovesaid two finance companies for the purpose of discharging the mortgage loan payable to Coimbatore City Co-operative Bank and at that time, he signed various blank papers and stamp papers and put his thumb impression in the blank papers by way of security for the borrowal from Kalisamy in the year 2002. After settling the dues from the amount borrowed from Kalisamy in the year 2002, he handed over the original title deeds to Kalisamy as security and it has not been specifically denied by the defendant.

13. It is the further submission of the learned counsel for the appellant/defendant that P.Ws.1 and 2 have not produced the accounts of the abovesaid two finance companies to show that under Exs.A-3 and A-4 promissory notes, the finance companies lent money to the defendant and his wife. They have also failed to produce the accounts and with-held the same. In such circumstances, if such relevant evidence is with-held by the plaintiff, then under Section 114 of the Indian Evidence Act, there is a presumption to the effect that if produced, the said accounts would be unfavourable to the plaintiff. In this



regard, learned counsel for the appellant/defendant relied on a decision of the Supreme Court reported in AIR 1961 SC 1316 (Kundal Lal Rallaram Vs. Custodian, Evacuee Property, Bombay).

14. Learned counsel for appellant/defendant further contended that P.W.1 plaintiff and P.W.2 Kalisamy failed to prove the lending to the defendant under Exs.A-3 and A-4 and hence, question of such non-existing debt does not arise. It is specific case of the plaintiff that he paid Rs.8 lakhs on 18.03.2002 to P.W.2 kalisamy to discharge the alleged promissory notes under Exs.A-3 and A-4 and the alleged endorsements of discharge are marked as Exs.A-21 and A-22. P.W.2 Kalisamy has categorically admitted that there is no entry in the books of his finance companies about receipt of the said sum of Rs.8 lakhs on 18.03.2002. Thus, the plaintiff failed to prove the alleged lending to the defendant under Exs.A-3 and A-4 promissory notes and also the alleged discharge as per endorsements Exs.A-21 and A-22, which were made on the back of Exs.A-3 and A-4. But it is the specific case of defendant that he never borrowed any money from plaintiff and never entered into any sale agreement. It is further case of the defendant that Ex.A-2 sale agreement was created based on signature in the blank papers, which were handed over to P.W.2 Kalisamy in the year 2002 while availing loan. According to learned counsel for appellant/defendant, trial Court has given specific finding that there is discrepancy in sale agreement, but despite that finding, the trial Court decreed the suit, when the fact remains that plaintiff failed to prove the sale agreement. In such circumstances, Court is not bound to grant relief of specific performance merely because it is lawful to do so. In this regard, learned counsel for appellant/defendant relied on a judgment of the Supreme Court reported in AIR 1987 SC 2328 (Parakunnam Veetil Joseph's son Mathew Vs. Nedumbara Kuruvila's son and others). In support of his submissions, learned counsel for appellant/defendant also relied on a decision of a Division Bench of this Court reported in AIR 1977 Madras 83 (Manickathammal Vs. Nallasami Pillai). Thus, learned counsel for appellant/defendant prayed for setting aside the judgment and decree of the trial Court.

15. Countering the above submissions, learned counsel for the respondent/plaintiff submitted that it is incorrect on the part of the defendant to state that the plaintiff is a stranger and has nothing to do with the defendant. Learned counsel for the respondent/plaintiff invited the attention of this Court to the evidence of P.W.2 Kalisamy and submitted that he has categorically stated in his evidence that the defendant was the Joint Secretary and P.W.2 Kalisamy was the Secretary of the Lion's Club in the years 1997 to 1999. The plaintiff has also stated in his plaint that he knows the defendant for 20 years. However, the same was denied by the defendant in the written



statement. Apart from the evidence of P.W.2 Kalisamy, the evidence of P.W.3, who is the witness to the promissory note, also goes to show that the plaintiff, defendant and P.W.2 Kalisamy were the office bearers of the said Lion's Club and the plaintiff who was the President, had sent notices to the members of the Club. Therefore, it is absolutely false to state that the plaintiff is stranger to the defendant.

16. Learned counsel for the respondent/plaintiff further contended that Exs.A-3 and A-4 are the promissory notes, dated 23.03.1999 for a sum of Rs.2,50,000/- each, executed by the defendant and his wife in favour of Sivakrishna Finance and Kumarakrishna Finance. The defendant admits his signature in the said promissory notes, but denies the contents. The said promissory notes were discharged by the plaintiff after payment of Rs.8 lakhs to the financiers. The defendant had agreed to sell his property to the plaintiff, if he discharges all his debts, apart from discharge of the loan to the Bank and also the discharge of loan under the promissory notes and loan from Sivakrishna Finance and Kumarakrishna Finance. However, the defendant is denying the borrowal of loan amount under Exs.A-3 and A-4 promissory notes, by stating that he had signed in blank papers and the plaintiff and P.W.2 Kalisamy colluded with each other and created fraudulent documents and it was projected as if these promissory notes were discharged by the plaintiff only on the understanding that the property would be sold to him for sale consideration of Rs.15 lakhs. Thus, according to the defendant, the promissory notes are not supported by any loan transaction.

17. Learned counsel for the respondent/plaintiff further submitted that Exs.A-3 and A-4 promissory notes were executed by the defendant and his wife and the plaintiff discharged the promissory notes, but the plaintiff was not a party to the documents and hence, to prove the execution of promissory notes, P.W.3 was examined, who categorically stated in his evidence that he saw the defendant and his wife signing in the promissory notes. Even assuming that Exs.A-3 and A-4 were signed in blank papers, no question was put-forth by the defendant to P.W.3 whether the signature was obtained in blank papers. So, this clearly proves that consideration was passed through the promissory notes and the same are valid. Subsequently, the defendant had discharged the promissory notes and the endorsement was made by the financier on the back of Exs.A-3 and A-4. Therefore, it is evident that the plaintiff has paid Rs.8 lakhs on behalf of the defendant. Thus, when once the promissory notes are executed and the signature is admitted and they were also proved through pro-note witness P.W.3, the consideration was transferred from Sivakrishna Finance and Kumarakrishna Finance to the defendant and the defendant cannot dispute the



same. The defendant had executed the promissory notes and admitted his signatures in the documents, though the defendant denies the contents of the same, and therefore, it is the duty of the defendant to prove that he has not received any amount. In this regard, learned counsel for the respondent/plaintiff relied on a decision of a Division Bench of this Court reported in 2002 (4) LW 360 (Ramasami Moopar Vs. Ramaswami Moopanar), wherein it has been held that under Section 118 of the Negotiable Instruments Act, there is a valid presumption with respect to the consideration also.

18. With regard to the submission of the learned counsel for the appellant/defendant that Ex.A-2 sale agreement dated 18.03.2002 is a created document, the learned counsel for the respondent/plaintiff submitted that the defendant admits the signature in the document, but denies the contents of the same and as per the sale agreement, the consideration was fixed at Rs.15 lakhs and the plaintiff had paid totally Rs.11,75,000/-. The following is the list of payments made on various dates by the plaintiff to the defendant:

10.09.2001	Paid a sum of Rs.1,50,000/- to the defendant who in turn paid the same to the District Co-operative Society Bank.
18.03.2002	Paid a sum of Rs.4,00,000/- to Sivakrishna Finance - Ex.A-3
18.03.2002	Paid a sum of Rs.4,00,000/- to Kumarakrishna Finance - Ex.A-4
18.03.2002	Paid a sum of Rs.2,25,000/- to the defendant, who in turn paid the same to District Co-operative Society Bank
29.11.2004	Plaintiff's Banker's Cheque for a sum of Rs.3,25,000/- sent along with the Advocate notice.
Total payment made as above	Rs.15,00,000/-

19. Thus, the learned counsel appearing for the respondent/plaintiff further submitted that the plaintiff has proved that he is always ready and willing to pay the entire sale consideration. He further submitted that the defendant denied the above payments made by the plaintiff. In this regard, learned counsel for the plaintiff assails the case of the defendant and submitted that in re-examination, D.W.1 (defendant) stated that in the years 1994 and 2004, he has signed in blank stamp papers. But it is evident that the stamp papers in Ex.A-2 sale agreement, are dated 16.03.2002. Therefore, the statement of D.W.1 that his signature was



obtained by Kalisamy during the earlier transactions, proved to be false. The contents of Ex.A-2 sale agreement was made known to the defendant by the first notice Ex.A-10, which was received by defendant, but he has not chosen to repudiate the same. This clearly shows that Ex.A-1 sale agreement is a genuine document and thus, the plaintiff has proved his case correctly and the trial Court decreed the suit and no interference is necessary and hence, he prayed for dismissal of the appeal.

20. As we have dealt with the factual matrix of the case in detail as above, we are refraining ourselves from reiterating the same any further in this appeal. However, for the purpose of disposal of this appeal, certain facts which are absolutely germane and necessary alone are reiterated hereunder. We have given our anxious consideration to the submissions made on either side and perused the materials available on record.

21. In view of the above submission made on either side, the following question is framed for consideration in this appeal:

"Whether this is a fit case to exercise the discretion by the Court to grant equitable relief of specific performance ?"

22. First of all, we have to bear in mind that this is not a straight case where the sale agreement was entered into and executed between the parties for purchase of land. According to the plaintiff, the sale agreement was entered into between the parties pursuant to the loan transaction. It is the case of the plaintiff that during September 2001, the defendant approached the plaintiff and requested him to pay the money to prevent the sale of the suit property by District Co-operative Bank, which was mortgaged by the defendant at that time. The plaintiff agreed to pay Rs.1,50,000/- on 10.09.2001 and the plaintiff came to the Co-operative Bank along with the defendant and paid Rs.1,50,000/-. Though the defendant agreed to repay the same within three months, he did not pay the said amount. The defendant was evasive in his reply. However, on 15.03.2002, the defendant and his wife came to the plaintiff's house and requested the plaintiff to purchase the property, as they are unable to pay the mortgage debt due to be paid to the Co-operative Bank, as well as other debts payable to other creditors. Hence, on 18.03.2002, the plaintiff paid a sum of Rs.2,25,000/- towards the mortgage debt due to be paid by the defendant to the Bank. The plaintiff was also asked to discharge the loan due to be paid by the defendant and his wife to M/s.Kumarakrishna Finance and Sivakrishna Finance, in which P.W.2 Kalisamy is a partner. On 18.03.2002, the plaintiff paid a further sum of Rs.8 lakhs and the defendant in turn paid Rs.4 lakhs and another Rs.4 lakhs to Sivakrishna and Kumarakrishna Finance Companies respectively. After settling all the amounts, the said Finance Companies discharged the promissory notes and



handed over the same to the plaintiff in support of the sale agreement. Thereafter, the sale agreement was prepared and the same was attested by two witnesses, namely P.W.2 Kalisamy and one Viswanathan. The original title deeds deposited, were returned and handed over to the plaintiff in support of the sale agreement. The copy of the discharge receipt dated 21.03.2002 was handed over to the plaintiff by the defendant.

23. Further, on 13.06.2002, the defendant gave a letter to the plaintiff stating that he is unable to vacate the suit property which is the residential house of the defendant. He needed extension of time till the end of Avani Tamil month, which fell on 15.09.2002. Since the defendant failed to vacate the house, the plaintiff issued a legal notice at the end of Avani 2002. The defendant along with his wife and children, came to the house of the plaintiff and pleaded that they need some more time to construct a new house and requested time till the end of Karthikai Tamil month of 2004. The plaintiff agreed to grant time 10.12.2004 after receiving the letter dated 18.09.2002 from the defendant. Thereafter, on 29.11.2004, the plaintiff issued a legal notice along with a Banker's Cheque for Rs.3,25,000/- calling upon the defendant to come and execute the sale on 06.12.2004. The defendant issued a reply notice through his counsel, denying the sale agreement.

24. The case of the plaintiff was totally denied by the defendant stating that absolutely, there is no transaction between the plaintiff and the defendant and the entire suit itself was master-minded by P.W.2 Kalisamy, who was running business of finance companies under the name and style of Sivakrishna Chit Funds Private Limited, Kumarakrishna Finance and Sivakrishna Finance. According to the defendant, he has borrowed only a single loan from Kalisamy during 1999 to discharge his loan to the Co-operative Bank and at that time, P.W.2 Kalisamy obtained his signatures in several blank papers and later, P.W.2 Kalisamy connived with P.W.1 plaintiff and created all the documents and projected a case as if the plaintiff obliged for discharge of loan by creating documents and saying that he would sell his property.

25. In view of the above facts and submissions made on either side, now we have to see as to whether advancement of amount by the plaintiff to the defendant, had been established.

26. According to the plaintiff, the following amounts have been paid on various dates, which are evident from Ex.A-2:

- (i) Rs.1,50,000/- on 10.09.2001 to Central Co-operative Bank;
- (ii) Rs.4,00,000/- on 18.03.2002 to Sivakrishna Finance to discharge the loan of the defendant;
- (iii) Rs.4,00,000/- on 18.03.2002 to Kumarakrishna Finance to discharge the loan;



(iv) Rs.2,25,000/- on 18.03.2002 to Central Co-operative Bank.

Thus, the plaintiff totally has paid Rs.11,75,000/-. In order to disprove the payment, Ex.B-2 statement of bank loan account was marked on the side of the defendant. According to the plaintiff, on 10.09.2001, he personally went along with the defendant, to deposit Rs.1,50,000/-, but the Bank entry shows that on 12.09.2001, there was a credit of Rs.1,09,255/- towards the principal and Rs.15,745/- towards interest and it does not tally with the amount said to have been deposited by the plaintiff who went along with the defendant on that day. Similarly, though it has been stated that the plaintiff has paid Rs.2,25,000/- to the Central Co-operative Bank to discharge the loan of the defendant, from Ex.B-2, it is seen that on 18.03.2002, Rs.2,00,049/- was shown as deposited towards principal amount and Rs.18,154/- was paid towards interest. These amounts do not tally with the amount said to have been paid by the plaintiff. According to the learned counsel appearing for the defendant, to discharge the loan, the defendant paid a sum of Rs.2,18,203/- to the Bank on 18.03.2002, and since he borrowed the amount from P.W.2 Kalisamy, he handed over the title/documents, which he got back from the Bank, to P.W.2 Kalisamy, who connived with the plaintiff, at that time, obtained signature in blank papers and later used the same as sale agreement. It would be appropriate to extract the evidence of P.W.1 in that regard as follows:

Chief examination :

"நான் பிரதிவாதியின் கோரிக்கையை ஏற்று 10.09.2001 அவருடன் கோவை மாவட்ட கூட்டுறவு, வங்கிக்கு சென்று பிரதிவாதி சார்பாக வங்கியில் ரூ.1,50,000/-த்தை செலுத்தினேன்."

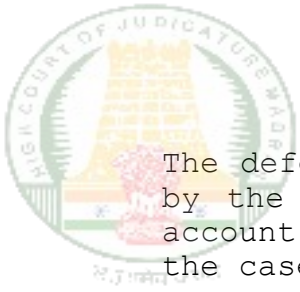
Cross-examination:

"நான் பிரதிவாதியிடம் பணம் கொடுத்ததற்கு எழுத்து மூலமான ஆவணமோ, வங்கியில் பணம் செலுத்தியதற்கான செலான் என்னிடம் உள்ளதா என்றால் இல்லை. செப்டம்பர் 10ம் தேதி ரூ.1,50,000/- வங்கியில் பிரதிவாதிக்காக கட்டப்பட்டது."

"செப்டம்பர் 10ம் தேதி பிரதிவாதிக்காக ரூ.1,50,000/- தொகையை நான் செலுத்தவில்லையென்றால் அது தவறு."

Chief examination:

பின்பு, நானும் பிரதிவாதியும் 18.02.2002 தேதியன்று கோயமுத்துர் மாவட்ட கூட்டுறவு, வங்கிக்கு சென்று நான் பிரதிவாதியிடம், வங்கி கடன் தீர்ப்பதற்காக வேண்டி அவரிடம் ரூ.2,25,000/- கொடுத்தேன். பிறகு அவர் வங்கிக்கு செலுத்த வேண்டிய தொகையை செலுத்தினார். கோயமுத்துர் சென்ட்ரல் கோஆப்ரெட்டிவ் வங்கிக்கு சென்று பிரதிவாதி தீர்க்க வேண்டிய கடனை தீர்த்தேன். ரூ.2,25,000/- தொகை செலுத்தினேன்."



The defendant has deposited the amount, but the amount mentioned by the plaintiff does not tally with Ex.B-2 statement of loan account. Therefore, we are of the opinion that the very basis of the case of the plaintiff itself appears to be doubtful.

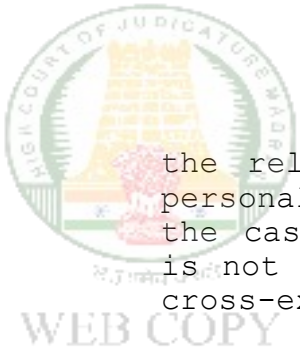
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27. It is also the case of the plaintiff that the defendant has borrowed a sum of Rs.2,25,000/- each under Exs.A-3 and A-4 promissory notes from P.W.2 Kalisamy, who is the partner of the finance companies. In order to discharge the loan, the plaintiff had paid a sum of Rs.8 lakhs to the defendant, who in turn paid Rs.4 lakhs each to the financiers, namely Sivakrishna Finance and Kumarakrishna finance.

28. On a perusal of the evidence of P.W.2 Kalisamy who is the partner of the said two finance companies, it is seen that he had admitted that even if he produces the day book and ledger, there will not be any entry in the books of accounts to show that they have received a sum of Rs.8 lakhs on 18.03.2002. The relevant portion of the evidence of P.W.2 Kalisamy, in his cross-examination, reads as follows:

"பதிவு, செய்யப்பட்ட நிதி நிறுவனமாக இருந்தால் குறிப்பேடு, நாளேடு (Day Book, Ledger) மெயின்டன் செய்ய வேண்டும் என்றால் ஆமாம். சிவகிருஷ்ணா மற்றும் குமரகிருஷ்ணா நிதி நிறுவனம் பதிவு, செய்யப்பட்ட நிறுவனங்கள், அதற்கு டே பக் லெட்சர் மெயின்டன் செய்து வந்தோமா என்றால் ஆமாம். 18.03.2002ம் தேதி ரூ.8,00,000/- எங்கள் நிதி நிறுவனத்திற்கு வந்ததாக என்ட்ரி இருக்காது."

29. Thus, P.W.2 Kalisamy has categorically admitted that there is no proof in Exs.A-3, A4, A-21 and A-22 that on 18.03.2002, the defendant came to the office of the finance companies as alleged by the plaintiff. There is no endorsement to that effect in Exs.A-3, A-4, A-21 and A-22. There is no attestation to show that the plaintiff allegedly paid Rs.8,00,000/- under Exs.A-21 and A-22 to P.W.2 Kalisamy. Thus, it is the stand of the defendant that non-production of the statement of accounts by the finance companies, clearly shows that the payment of Rs.8 lakhs by the plaintiff to P.W.2 to discharge the loan of the defendant, was not established. Therefore, the plaintiff failed to prove the alleged lending to the defendant under Exs.A-3 and A-4 and also the alleged discharge as per the endorsements/Exs.A-21 and A-22, which were made on the back of Exs.A-3 and A-4. P.W.2 Kalisamy failed to produce the accounts of the finance companies to show that Rs.8 lakhs was paid by the plaintiff to the defendant. Further, despite the denial by the defendant that the plaintiff has no means to pay, the plaintiff failed to produce any cash book and ledger to show his alleged financial capacity and also to show that he paid the advance on



the relevant dates. The non-production of personal ledger and personal cash book of the plaintiff, is fatal to the facts of the case and strengthens the case of the defendant that Ex.A-2 is not a real agreement. The following evidence of P.W.1 in his cross-examination further proves that he has no means to pay:

" ... எனக்கு வங்கி கணக்கு உள்ளது. நான் வருமான வரி செலுத்திவருபவர் தான். வருமான வரிக்கணக்கில் வருமானங்களை பற்றி தான் குறிப்பிட முடியும். செலவுகளை குறிப்பிடக் கூடாது. சொத்து வாங்கினால் அதை வருமான வரிக்கணக்கில் காண்பிக்க வேண்டாமா என்றால் அவசியமில்லை.

நானும் கடன் வாங்கியிருக்கிறேன். வங்கியிலும் கடன் வாங்கியிருக்கிறேன். நண்பர்களிடமும் வாங்கியிருக்கிறேன். கடன் வாங்கும் பணத்தை வருமான வரிக்கணக்கை வருமான வரிக்கணக்கில் காண்பிக்க வேண்டியதில்லை. வங்கியில் நிறைய கடன் இருந்தது என்றால் வாங்கியுள்ளேன். ..."

In those circumstances, when such relevant evidence is with-held by the plaintiff, then Section 114 of the Indian Evidence Act enables the Court to draw a presumption to the effect that if produced, the said accounts would be unfavourable to the plaintiff. This presumption, under certain circumstances, has to be rebutted if raised under Section 138 of the Negotiable Instruments Act and the burden of proof may be shifted by the presumption of law or fact, and the presumption of fact may be rebutted not only by direct or circumstantial evidence, but also by presumption of law or fact. This has been held by the Supreme Court in the decision reported in AIR 1961 SC 1316 (Kundan Lal Rallaram Vs. Custodian, Evacuee Property, Bombay), wherein the Apex Court held as follows:

"5. Under S.114 of the Evidence Act, "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that Section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said



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account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S.114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under S.118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law."

Various contradictions and wilful with-holding of the material evidence (account books of finance companies) clearly reveals that the defendant rebutted the presumption under Section 138 of the Negotiable Instruments Act, i.e. non-passing of the consideration under Exs.A-3 and A-4.

30. As stated supra, there was no entry with regard to the discharge of loan. There is no evidence to show that Rs.8 lakhs had been paid on 18.03.2002 to P.W.2 Kalisamy to discharge the alleged promissory notes Exs.A-3 and A-4 and the alleged endorsements of discharge are marked as Exs.A-21 and A-22. On the other hand, the admission of P.W.2 Kalisamy that there is no entry in the books of the finance companies about the receipt of the said sum of Rs.8 lakhs on 18.03.2002, which shows that the defendant rebutted the presumption under Section 138 of the Negotiable Instruments Act, by non-passing of the consideration under Exs.A-3 and A-4, since P.Ws.1 and 2 failed to prove the lending to the defendant.

31. Thus, the respondent/plaintiff failed to prove the alleged lending of the loan under Exs.A-3 and A-4 promissory notes and also the alleged discharge as per the endorsements Exs.A-21 and A-22 made on the back of Exs.A-3 and A-4. In such circumstances, this Court is not bound to grant the relief of specific performance, merely because it is lawful to do so, as laid down by the Supreme Court in the decision reported in AIR 1987 SC 2328 (Parakunnam Veetill Joseph's son Mathew Vs. Nedumbara Kuruvila's son and others), wherein it was observed by the Apex Court that Section 20 of the Specific Relief Act preserves judicial discretion to Courts as to decreeing specific performance; the Court should meticulously consider all facts and circumstances of the case; the Court is not bound to grant



specific performance merely because it is lawful to do so; the motive behind the litigation should also enter into the judicial verdict and the Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. In the case on hand, the respondent/plaintiff failed to prove the passing off of the consideration under Ex.A-2 sale agreement and thus, he is not entitled for the equitable relief of specific performance.

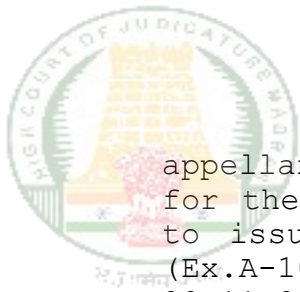
32. Learned counsel for the appellant/defendant also relied on a decision of a Division Bench of this Court reported in AIR 1977 Madras 83 = 1976 (89) LW 419 (Manickathammal Vs. Nallasami Pillai), wherein it was held that even assuming that the sale agreement is a genuine one, the onus is on the plaintiff to establish that he did make the deposit as pleaded by him; the recitals contained in the sale agreement about the advance payment, are not conclusive and the plaintiff having failed to establish that he made such deposits as claimed by him, cannot claim the equitable relief of specific performance. It is useful to refer the relevant paragraph of the said decision of the Division Bench, which reads as follows:

"7. Even assuming that the document Ex.A-1 is a genuine one, the onus is on the plaintiff to establish that he did make the deposit as pleaded by him. A fortiori, this would be so if the defendant, who is one of the executants, specifically pleaded that no consideration passed under the said document. . . .

.. ..

9. We have made the above observations only at the last stage for we are convinced that even assuming that Exhibit A-1, which has been admitted in evidence, contains the said recital to the effect that Veerappa Pillai received Rs.25,000/-, that by itself not being conclusive and the plaintiff having failed to establish that he made such deposits as claimed by him, he cannot claim the equitable relief of specific performance. The relief of specific performance either under the Common Law or under the Specific Relief Act is always a discretionary relief. To exercise such a judicial discretion the party claiming such an equity should be entitled to such an equity. We find that the plaintiff is not entitled to it. . . ."

33. It is lastly contended by the learned counsel for the



appellant/defendant that the contention of the learned counsel for the respondent/plaintiff that the appellant/defendant failed to issue a reply to the first legal notice, dated 24.07.2002 (Ex.A-10) and replied only to the second legal notice, dated 29.11.2004 (Ex.A-13). The reply notice dated 03.12.2004 issued by the appellant/defendant is marked as Ex.A-15, in which the appellant/defendant denied the sale agreement, handing over of the title deeds, passing of any consideration, etc. In spite of the denial in the reply, the respondent/plaintiff failed to issue any rejoinder to this reply notice. The suit was filed only on 03.03.2005. There is no answer from the respondent/plaintiff for non-issuance of the rejoinder. Once the appellant/defendant denied the second legal notice by issuing reply, the non-reply to the first legal notice is insignificant. It is settled law that mere fact of non-reply will not lead to the conclusion that the contents of the lawyer's notice are true, as laid down by this Court in the decision reported in 2008 (8) MLJ 862 (C.T.Devaraja, Proprietor of Jayalakshmi Industries and also of 'Vil Ambu' a Tamil weekly, T.Nagara, Madras, In re).

34. This is not a straight case for issuing direction to execute the sale agreement. The trial Court misdirected itself in decreeing the suit and it ought to have taken care to see as to whether the sale agreement Ex.A-1 is used as an instrument of oppression to have an unfair advantage to the respondent/plaintiff. Absolutely, the plaintiff has not established the entire gamut of his claim and his case is shrouded by mystery and suspicion, and therefore, this is not a fit case to exercise the equitable and discretionary relief of specific performance. The question framed is answered in the above terms. This appeal is accordingly allowed, setting aside the judgment and decree of the trial Court. No costs. The Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

CS

To

1. The Additional District and Sessions Judge,
Fast Track Court No.2, Coimbatore.

2.The Section Officer, V.R. Section,
High Court, Madras.

+lcc to Mr.R.Bharathkumar, Advocate, S.R.No.66904

A.S.No.279 of 2008

KJI(CO)

GSP(23/11/2018)