

IN THE HIGH COURT OF JUDICATURE AT MADRAS

31.08.2018

CORAM

THE HONOURABLE Mrs.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. 3661 of 2010

and

M.P.No.1 of 2010

Haji Syed Mohideen

.. Appellant

Vs

Rukmani Ammal

.... Respondents

Prayer : Civil Miscellaneous Appeal filed under Order 43 rule 1 (a) Read with Section 104 of CPC, to set aside the order of remand dated 12.08.2010 passed in AS 6/2010 on the file of the Principal District Court, Cuddalore confirming the judgment and the decree dated 29.11.2008 passed in OS.No.103/2005.

For Appellant : Ms.R.Meenal

For Respondents : Mr.P.Mani

JUDGMENT

The Civil Miscellaneous Appeal has been filed, for set aside the order of remand dated 12.08.2010 passed in AS.No. 6 of 2010 on the file of the Principal District Court, Cuddalore , who was confirming the judgment and decree dated 29.11.2008 passed in OS.No.103 of 2005 by the second Additional sub Court, Cuddalore.

2.The case of the appellant who is the plaintiff in O.S.No.103 of 2005 is that the defendant and her husband had approached the plaintiff and offered to sell the suit property and the plaintiff also agreed to purchase the same and fixed the sale consideration as Rs.1,35,000/-. The terms of the agreement was that Rs.1,00,000/- should be paid in advance and the balance Rs.35,000/- should be paid in two years. On payment of the balance of Rs.35,000/- , the sale deed should be executed by the defendant. The same was reduced to writing on 08.10.2001, as aggrieved by the parties and signed by the parties and

Rs.1,00,000/- was also paid by the plaintiff to the defendants. After the payment of the said amounts plaintiff had approached the respondents for executing the sale deed in favour of them, the same was delayed by the defendant in one way and the other said agreement period was also again extended for a period of one year from 08.10.2004, again 16.10.2004 a separate document was also signed by both the parties and the same was also attested by the defendant husband. Since, the defendant was postponing the execution of the sale deed, the plaintiff/appellant had no other option than to send a legal notice dated 29.09.2005, calling upon him to receive the balance amount of Rs.35,000/- and execute the sale deed.

3.The defendant/respondent has not heeded to the request and the the plaintiff was put into hardship. Since, the defendant has not accepting the claim of the plaintiff and the money has already been paid and pending execution of sale with the defendants. Hence, with no other option, the plaintiff has filed a suit for specific performance to direct the defendant to execute the sale deed for the said properties mentioned in the schedule below after receiving the balance amount of Rs.35,000/- within a period of such time being fixed by the Court. The respondent/defendant has also filed a written statement wherein, they would contend that the entire transactions has been denied and they would submit that the agreement was executed in favour of the plaintiff only on the following circumstances.

4.The plaintiff would further submit that the defendants husband had borrowed a sum of Rs.60,000/- from one Gopal and Murugan in the year 1999, and allowed them to cultivate 2.25 acres of lands at Manakuppam Village. There was an oral agreement between the Gopal and Murugan. In the year 2001, the said murugan met with an accident and for his treatment, the Murugan and Gopal could not cultivate the properties after 2001 and they demanded the amount money less Rs.12,000/- namely Rs.48,000/- from the defendants. The Murugan had already borrowed Rs.25,000/- from the plaintiff herein, for his medical treatment and the Murugan had requested the defendant husband to execute a document in favour of the plaintiff as a security for the amount which was borrowed from the plaintiff, at the time, the defendant husband had no money. As requested by the Gopal and Murugan the defendant executed a document on 08.10.2001 in favour of the plaintiff without getting any consideration. The parties never had intention to sell the property and only to help the said Gopal and Murugan, they executed the same. The very fact that the period has mentioned as two years and two extensions were executed would prove that the document was only for a security payable by Murugan, and the defendant would also submit that she is not the owner of the property. The property belongs to one of her Uncle Velayudha Padayachi and he has executed a settlement deed dated 06.10.1975 in favour of the defendant and in the said settlement, she has right to enjoy the

property till her lifetime and thereafter to be taken her by her legal heirs absolutely. The defendant has got one son who is a major and she can only use the property and has to be devolved to defendant's son and no possession was given to the plaintiff herein. She would also further submit that her son is in actual possession and enjoyment of the said property from 2001 and the defendant is paying the land taxes for the said land and the receipts were also produced and she would also further submit that the plaintiff is being an influential person can maneuvered to get the name included in the pattas and she would also submit that the rate prevailed for the suit property in 2001 was Rs.2,00,000/- per acre. The existence of borewell with E.B service connection is worth of Rs.2,00,000/- and no person would sell the property i.e.2.25 acre for Rs.1,35,000/- when the property fetching a value of more than Rs.6.5 Lakhs. The suit was taken up for hearing, after the trial the decree and judgment was passed by the Second Additional Sub Court against the plaintiff and dismissed the suit against which the respondent/defendant/the plaintiff has filed an appeal before the Principal District Judge, Cuddalore District. The respondent/defendant after hearing the appeal the Principal Judge has come to a conclusion that the factual circumstances indicates that there was no intention to sell the property by the defendant and which was executed only as a security due to the repayment of the loan cannot be ruled out and in absence of the intention to sell the suit property, when she entered into a sale agreement, the practice of money lenders in getting a sale agreement executed at the time of advancing loan cannot be ruled out. Hence, the finding of the trial court that Ex.A.1 was not intended to be executed as a sale agreement with the intent to sell the suit property, though arrived at on a different reason has to be sustained and he had also further observed that the remedy only available to the plaintiff was to ask for the repayment of the advance paid by him. In this regard, he has also refer to the Section 22 of the Specific Reliefs Act, relevant portion which was extracted in the said Judgment.

5. Accordingly, the documents would show that there is a clear admission as borrowal from the plaintiff and execution of a document though as a security, the ends of justice require in equity the defendant should repay and repayment the said amount to the plaintiff since there is no alternative relief for refund of advance in terms of Section 22 of the Specific Relief Act cannot be a ground for rejecting his case in toto so as to allow the defendant to enrich unjustly. Hence the appellate Court has thought it is a fit case to remand to the Lower Court with the direction to the plaintiff to seek appropriate amendment for the amount of repayment of the amount. If such a course adopted by the plaintiff, the trial Court has to order repayment of the advance amount to the plaintiff. Hence, the appeal was allowed in part and the case was remitted back to the Trial Court with

the direction regarding the issue stated above.

6. Accordingly, the case was remitted back to the Trial Court with the direction to the plaintiff to seek amendment to the plaint to include alternate relief and in such an event the Trial Court based on the available evidence, suitably award a decree for refund of the advance amount of Rs.1,00,000/- received by the defendant from the plaintiff. Against the judgment this memorandum of the appeal has been filed by the plaintiff on the various grounds. He would also submit that the Lower Court have not considered the Ex.A.1, being the agreement and there was no examination of the evidence regarding the intention and the Lower Court grievously erred in holding that the agreement was executed only as security for the loan transaction between the respondent and one Murugan and that the Lower Appellate Court ought not to have remanded the case back to the Lower Court when all the materials for passing a decree is available and the decree of specific performance was the prayer in the plaint and there was no prayer for returning the advance amount paid by him. When there were no such prayer, the Lower Appellate Court ought not have taken the said issue on hand. The Courts cannot read the intention of the respondents in executing Ex.A.1, when she did not depose the same before the court. The Apex Court, has held that when the appellate court finds there is new issue raised and if the court finds that the decree can be a proper decree and the judgment can be passed only based on certain fresh evidence, the Lower Appellate Court can itself decide that issue by letting evidence on the points to be considered and the Lower Appellate Court need not remand the matter back to the Lower Court for fresh adjudication. The Lower Appellate Court's finding is that as per Section 22 of the Specific Reliefs Act, the prayer for refund of amount advanced can be asked for even by making appropriate amendment at a later stage and the time is not specific and when the plaintiff has not claimed any such relief, the Court which at any stage of the proceedings, can consider the request of inclusion such relief and hence, the Lower Court itself can decide the issue while framing new issues. When the Lower Appellate Court itself has come to a conclusion that the appellant/plaintiff is not entitled to any relief as prayed for, it ought to have allowed the appellant to amend the plaint and it could have framed new issues and it can decide the same. The impugned order was passed in the year 2010 and by filing the Civil Miscellaneous Appeal, eight years have been lapsed and no positive decision has been taken. Hence, in view of the long delay pending, the matter is remanded back to the Lower Appellate Court/ Sub Court for deciding the issue by the Sub Court itself within a period of three months from the date of receipt of a copy of this order, after giving the opportunity to both the parties and by framing fresh issues by the said Court.

7. Therefore, the Civil Miscellaneous Appeal is allowed. Consequently connected Miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

mp/ssb

To

1. Principal District Court, Cuddalore
2. The Additional Sub Court, Cuddalore.

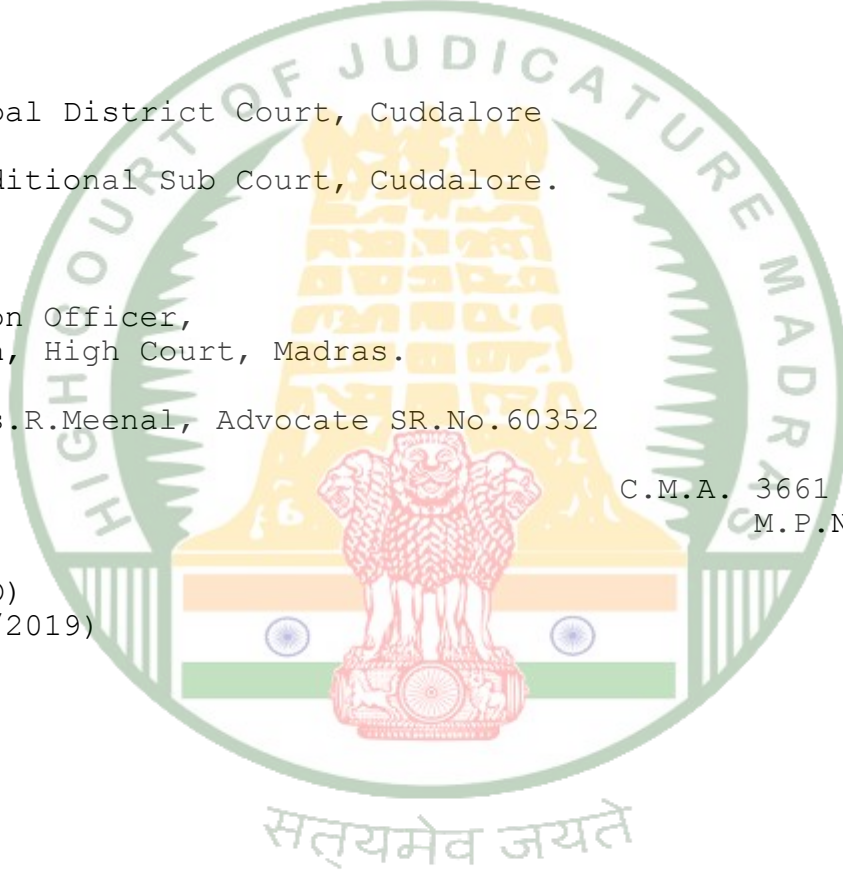
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VR Section, High Court, Madras.

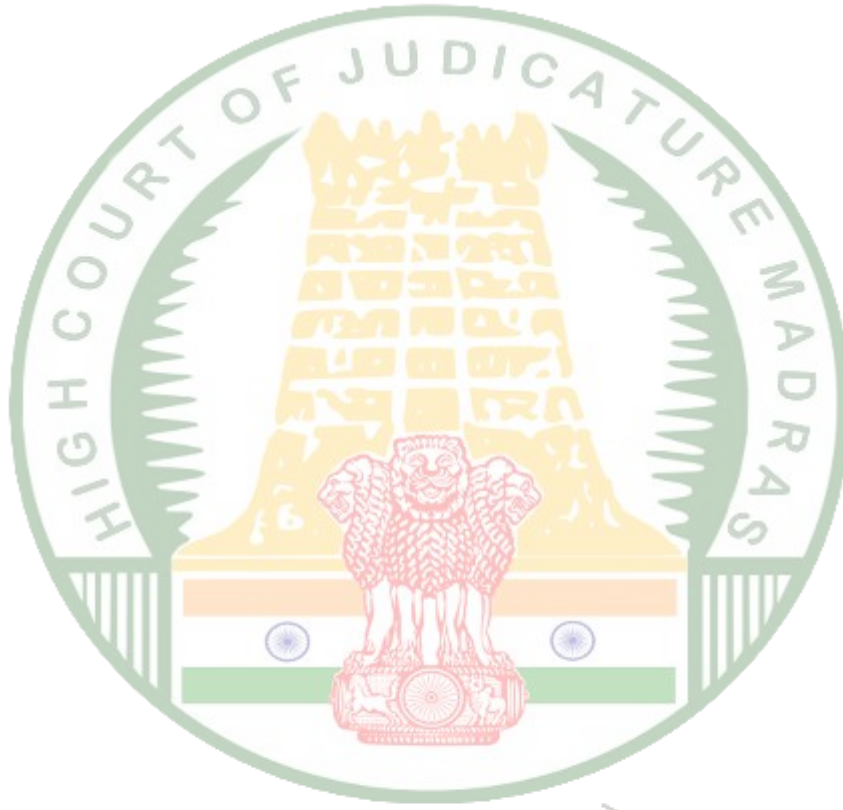
+1cc to Ms.R.Meenal, Advocate SR.No.60352

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