



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON :29.08.2019
PRONOUNCED ON: 15.11.2019

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THE HONOURABLE MRS. JUSTICE R. THARANI

S.A.(MD)No.672 of 2009

Lakshmi

.. Appellant/Respondent/Plaintiff

Vs.

Sundari

.. Respondent/Petitioner/Defendant

Prayer :Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree passed in A.S.No.43 of 2007 dated 08.04.2008 on the file of the Principal District Court, Pudukkottai, Pudukkottai District reversing the Judgment and Decree passed in O.S.No.16 of 1999 dated 27.04.2007 on the file of the Subordinate Judge, Pudukkottai.

For Appellant : Mr.K.Baalasundharam

For Respondent : Mr.N.Balakrishnan

JUDGMENT

Heard the learned counsel on both the side.

2.This appeal is filed against the judgment and decree passed in A.S.No.43 of 2007 dated 08.04.2008 on the file of the Principal District Court, Pudukkottai, Pudukkottai District reversing the Judgment and Decree passed in O.S.No.16 of 1999 dated 27.04.2007 on the file of the learned Sub Judge, Pudukkottai.

3.The appellant herein is the plaintiff and the respondent herein is the defendant in the suit. The appellant herein filed a suit in O.S.No.16 of 1999 before the learned Sub Judge, Pudukkottai for a prayer of specific performance and an alternative prayer of repayment of advance amount with compensation of Rs.1,50,000/- (Rupees One Lakhs and Fifty Thousand only) and the suit was decreed by the trial Court. Against which, the respondent herein has filed



an appeal in A.S.No.43 of 2007 before the Principal District Judge, Pudukkottai. The appeal was allowed by the first appellate Court. Against the judgment and decree, the appellant herein has filed this second appeal.

4.The case of the plaintiff is as follows:-

The suit property belongs to the defendant. On 26.12.1994, the defendant has entered into an agreement with the plaintiff for the sale of the property. The sale amount was fixed as Rs.1,10,000/- (Rupees One Lakh and Ten Thousand only). An advance of Rs.1,00,000/- (Rupees One lakh only) was paid on that date itself and the time for execution is fixed as three years. When the plaintiff approached the defendant during the year 1997, the defendant told the plaintiff that he will be returning back to India during the year 1998 and he will execute the sale deed at that time. Again when the plaintiff approached the defendant during the first week of September in 1998, the defendant claimed extra amount and refused to execute the sale deed. The plaintiff sent a legal notice on 17.09.1998. The defendant sent a reply notice with false allegations. Hence, the plaintiff filed the suit.

5.The brief substance of the written statement filed by the defendant is as follows:

There is no agreement as stated by the plaintiff. It is wrong to state that the defendant without intimating the petitioner went abroad during the year 1995. The husband of the plaintiff was working in the oil mill of the defendant. There is no chance for the defendant to go without the knowledge of the plaintiff. The defendant entrusted the mill under the administration of the plaintiff's husband. He was not maintaining the accounts properly. After the return of the defendant, the husband of the plaintiff demanded the balance salary and the defendant refused the same, as there is no balance salary to be paid. Only with that motive, the plaintiff has filed this suit.

6.The brief substance of the additional written statement filed by the defendant on 29.05.2005, reads as follows:

The defendant was residing with her family in Kiramangam Village. The defendant with the help of the plaintiff's husband take visa and went to Qathar and after earning in Qathar, she came back to India after two years.

The defendant purchased the suit property and she run an oil mill and the plaintiff's husband was working in that mill. The plaintiff's husband and his friend Natarajan arranged for a loan of Rs.10,000/- (Rupees Ten Thousand only) for the defendant and they obtained the signature of the defendant in plain stamp papers and using the stamp paper, this sale agreement was created.

7.The brief substance of the second additional written

statement filed by the defendant reads as follows:



Only with a motive to defrauds the suit property, the sale agreement was created. There was no necessity for the defendant to sell the property. The plaintiff was not having sufficient means to purchase the property. The suit property was worth more than Rs.2,00,000/- (Rupees two Lakhs only) at the time of alleged sale agreement. There was no necessity to fix the time limit as three years.

8.The reply statement given by the plaintiff is as follows:

It is wrong to state that there was some dispute regarding the salary of the plaintiff's husband. It is wrong to state that this agreement was forged and it is wrong to state that there was no necessity for the defendant to sell the property and that the plaintiff was not having sufficient funds to purchase the property. It is the duty of the defendant to disprove the terms and conditions of the agreement. Only with a motive to swindle the advance amount, the defendant has come forward with the false written statement.

9.On the above said pleadings, the following issues were framed:

- "(i)வாதிக்கு அவர் கேட்டுள்ள ஏற்றதை ஆற்றுதல் பரிகாரம் கிடைக்கக்கூடியதா ?
(ii)அப்படியானால் வாதிக்கு கிடைக்கக்கூடிய பரிகாரம் என்ன ?"

10.Two witnesses were examined as P.W.1 and P.W.2 and three documents were marked as Exs.A1 to A3 on the side of the plaintiff. On the side of the defendant, three witnesses were examined as D.W.1 to D.W.3 and two documents were marked as Exs.B1 and B2. After considering the evidence and arguments, the trial Court decreed the suit. Against which, the respondent herein preferred an appeal in A.S.No.43 of 2007. On the aforesaid pleadings, the following issues were framed:

- "(i)இம்மேல்முறையீடு அனுமதிக்கப்பட்டு, கீழமை நீதிமன்றத்தின் தீர்ப்பும் தீர்ப்பாணையும் ரத்து செய்து, வாதி தாக்கல் செய்த வழக்கு தள்ளுபடி செய்யப்பட வேண்டும் என்பது சரியா ?
(ii)மேல்முறையீட்டாளர் வாதி எவ்வித கிரய ஒப்பந்தமும் ஏற்படுத்திக் கொடுக்கவில்லை என்பது சரியா ?
(iii)இம்மேல்முறையீட்டில் மேல்முறையீட்டாளருக்கு கிடைக்கும் இதர பரிகாரங்கள் என்ன?"

11.The first appellate Court allowed the appeal filed by the respondent. Aggrieved by the judgment and decree, the appellant herein has preferred this second appeal.

12.In the grounds of second appeal, it is stated that the first appellate Court ought to have dismissed the appeal and that the plaintiff has proved Ex.A1 as per Section 16 of the Indian Evidence Act. The execution of the agreement and passing of consideration were proved by the evidence of P.W.1 and P.W.2. The first appellate Court failed to note that the signature in Ex.A1 was admitted by the defendant and Exs.B1 and 2 have nothing to do with the subject matter of the suit. The first appellate Court wrongly



allowed the appeal on the ground that non examination of the plaintiff's husband is fatal. The first appellate Court failed to consider that Ex.B1 is not in the name of the plaintiff and examination of the plaintiff's husband is not necessary. D.W.1 herself has admitted that the husband of the plaintiff was working aboard and that is sufficient to prove that they had enough source of income to purchase the suit property. The alleged receipt in Ex.B1 is no way connected to the suit. The three written statements are in three different contention and the first appellate Court failed to consider the same.

13.This Court by order dated 03.09.2009, has admitted the second appeal and has framed the following substantial questions of law, which are as follows:

"(a)When a party pleads non est factum the burden of proof lies on whom with in the meaning of Section 101 of Indian Evidence Act ?

(b)Whether examination of an attesting witness and a beneficiary under a sale agreement is a proof of a document within the meaning of Section 67 of Indian Evidence Act ?

(c)Whether a person of full age and understanding having subscribed her signature is entitled to say that she signed a blank paper within the meaning of Section 18 of Indian Contract Act, 1872 ? "

Issue No.(a) :

14.On the side of the appellant, it is stated that when the defendant pleads non est factum the burden of proof lies on the defendant and the defendant failed to disprove the agreement under Section 101 of the Indian Evidence Act.

15.On the side of the appellant, it is stated that the signature in Ex.A1 was admitted by the defendant and that Ex.A1 was duly proved by the plaintiff by examining the attesting witness P.W.2 and that the readiness and willingness of the plaintiff was proved by the evidence of the plaintiff and that an increase in the market value of the property cannot be a ground for refusal to execute the sale deed and document of agreement of the sale does not require examination of attesting witness and that the suit is filed well within the time limit.

16.On the side of the respondent, it is stated that the agreement is a forged one and there is no necessity for the defendant to disprove the case of the plaintiff abd that the burden is upon the plaintiff to prove the case. It is stated that the relief under the specific performance is a discretionary relief. Even if a small doubt arises about the agreement of sale between the parties, the relief could be refused. In support of his contention, the judgment passed by this Court in the case of **Munusamy v. Nava Pillai** reported in **2008 2 L.W. 252**, which reads as



follows:

"Specific performance could be granted only if it is a clear case of agreement of sale between the parties, which is pleaded and established by some acceptable evidence - Discussion made raises a doubt, whether the defendant would have executed an agreement of sale in favour of the plaintiff out of free will or out of force or coercion - while so, granting a relief under Specific Relief Act, under a cloud is totally erroneous."

17.On the side of the respondent, it is stated that it is the duty of the plaintiff to prove the case but the plaintiff has failed to examine her husband and on non production of best evidence, the Court can draw adverse inference. The learned counsel appearing for the respondent relied on the judgment passed by this Court in the case of **Sonnappa Iyer v. K.R.Ramuthaiammal and other** reported in **1994 (1) M.L.J. 44**, which reads as follows:

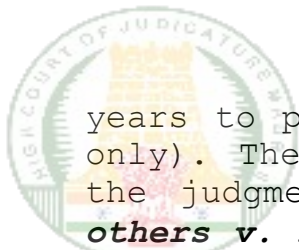
"Specific Relief Act (XLVII of 1963), Section 10 - Specific performance of contract-plaintiff's duty to prove claim for - Non - production of best evidence - Court, if can draw adverse inference.

When the burden is on the plaintiff to prove clearly in order to get the equitable relief of specific performance, he ought to have produced the best evidence with him and his failure to do so would enjoin the Court to draw an adverse inference against him. "

18.On the side of the respondent, it is stated that the burden of proof is upon the plaintiff. When the vendor disputed the agreement and alleged that the agreement is a forged one, the burden is upon the plaintiff to prove the agreement. In support of his contention, the judgment passed by this Court in the case of **Nallammal v. Dhanshkodi** reported in **2000 (IV) CTC 512**, which reads as follows:

"Suit for specific performance filed by the purchaser- Vendor disputed very agreement and alleged that agreement was forged - Ouns of proving the agreement was actually entered into is on one who relies on such agreement and purchaser had to prove it - lower appellate Court on comparison of signature of defendant (vendor) in agreement and vakalath found signature to have been forged."

19.On the side of the respondent, it is stated that the time limit fixed in the agreement is only an upper limit and that the plaintiff failed to prove the reasonable in fixing the time limit. It is stated that considering an escalation of rate, a party who



years to pay the meagre amount of Rs.10,000/- (Rupees Ten Thousand only). The learned counsel appearing for the respondent relied on the judgment passed by this Court in the case of **S.Mallika and others v. R.Saravanan and other** reported in **2016 (4) CTC 643**, which reads as follows:

"Time limit shown in contract is upper limit for execution and not real time for execution - considering escalation of real estate market every year, a party intending to effect sale would not wait for a long period of three years to pay a sum of Rs.5,000/- - established from conduct of parties that entire transaction was a loan transaction."

20.On the side of the appellant, it is stated that whether the time is essence of contract is to be determined on the terms of the contract and on the surrounding circumstances. It is further stated that the defendant has admitted the signature in the sale agreement in her additional written statement dated 29.05.2005 and there is no necessity for the appellant to prove the document. The burden is upon the defendant to disprove the document.

21.On the side of the appellant, it is stated that the determination of the time is to be considered on the basis of the express terms of the contract. The learned counsel for the appellant rely on the judgment passed by the Hon'ble supreme Court in the case of **Rathnavathi and another v. Kavita Ganashamdas** reported in **(2015) 5 SUPREME COURT CASES 223**, which reads as follows:

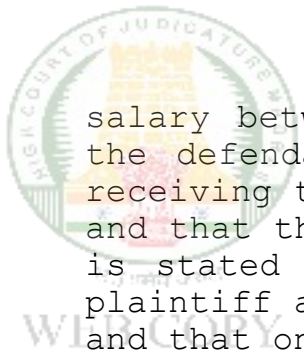
Contract for sale of immovable property- whether time essence of contract - determination of intention of parties can be gathered from express terms of contract, conduct of parties, nature of property and surrounding circumstances."

22.A perusal of the records reveals that in the additional written statement filed on 29.05.2005, it is admitted that the defendant signed in plain stamp papers. Hence, the duty is cast upon the defendant to disprove Ex.A1. The question of laws raised by the appellant is acceptable.

Issue No.(b):

23. On the side of the appellant, it is stated that examination of the attested witness is not necessary to prove the sale agreement and that only in the case of Will, the attesting witness should be examined. It is further stated that when signature in the sale agreement is admitted by the respondent, there is no necessity for the appellant to examine her husband.

24.On the side of the respondent, it is stated that husband of the plaintiff was working in the oil mill of the defendant and both of them went to Qathar and there is some dispute regarding the



salary between them and there is some money transaction, and that the defendant borrowed some amount from P.W.2 and at the time of receiving the loan, she handed over some signed plain stamped papers and that those papers were used for creating the agreement Ex.A2. It is stated that there was some dispute between the husband of the plaintiff and the defendant, which is revealed through Exs.B1 and B2 and that only with some motive, the sale agreement is created.

25.On the side of the respondent, it is stated that the Court must take adverse inference regarding the husband of the plaintiff avoid getting into the box and that the sale agreement is not proved under Section 67 of the Indian Evidence Act.

26.On the side of the respondent, it is stated that when a suspicion is raised, discretionary relief under specific performance should not be exercised and the plaintiff would be dis-entitled to the relief of specific performance, if his conduct is tainted with falsehood. In support of his contention, the judgment passed by this Court in the case of **M.Ramalingam v. K.Vijayakumar** reported in **2013 (3) TLNJ 199 (Civil)**, which reads as follows:

"suit filed for specific performance it is an equitable discretionary relief - a person, who approaches the Court for the equitable relief should come to Court with clean hands - when a suspicion is raised, discretion will not be exercised when it is inequitable to grant the relief of specific performance on account of conduct of the plaintiff - plaintiff would be dis-entitled to the relief of specific performance, if his conduct is tainted with falsity."

27.On the side of the appellant, it is stated that the appellant proved his readiness and willingness to perform his part of the contract. The defendant has admitted that the plaintiff was working and was earning in Qathar, which will prove that the plaintiff is having sufficient funds to pay the balance amount. It is stated that since the defendant was working abroad, three years time limit was fixed for execution of the sale agreement.

28.The learned counsel for the appellant rely on the judgment passed by the Hon'ble Supreme Court in the case of **Narinderjit Singh v. North star Estate Promoters Limited** reported in **(2012) 5 Supreme Court Cases 712**, which reads as follows:

"Readiness and willingness of plaintiff to perform his part of agreement of sale of land - to be decided with reference to conduct of parties, attendant circumstances and evidence on record."

29.It is seen that the plaintiff's husband was an attesting witness in Ex.A1. The husband of the plaintiff was not examined as a



witness. It is not mandatory to examine an attesor of a sale agreement. In the additional written statement, the signature of the defendant was admitted. Hence, there is no necessity to examine the attesting witness to prove Ex.A1. In the above circumstances, the question of law raised by the appellant is acceptable.

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Issue No.(c):

30.On the side of the appellant, it is stated that a person of full age and understanding having subscribed her signature is not entitled to say that she has signed a plain paper within the meaning of Section 18 of Indian Contract Act.

31.It is seen from the records that in the additional written statement, the signature is admitted and the only allegation is that she signed only in plain stamp paper. Under Section 18 of the Indian Contract Act, a person signing a document, is thereby accepting the contents of the document. Hence, the question of law raised by the appellant is acceptable.

32.All the questions of law raised by the appellant are answered in her favour. Accordingly, the Second Appeal is allowed and the judgment and decree passed in A.S.No.43 of 2007 dated 08.04.2008 on the file of the Principal District Court, Pudukkottai is set aside and the judgment and decree passed in O.S.No.16 of 1999 dated 27.04.2007 on the file of the learned Sub Judge, Pudukkottai is confirmed. If not already deposited, the appellant is directed to deposit the balance sale consideration before the trial Court within a period of four weeks from the date of receipt of copy of this order. On such deposit, the respondent is directed to execute the sale deed within a period of eight weeks therefrom. No Costs.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Mrn

To

1.The Principal District Judge,
Pudukkottai, Pudukkottai District

2.The Subordinate Judge,
Pudukkottai



3.The V.R.Section, (2 Copies)
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.N.BALAKRISHNAN, Advocate (SR-98686[F] dated 15/11/2019

+1 CC to M/s.K.BAALASUNDHARAM, Advocate (SR-98674[F] dated
15/11/2019)

S.A. (MD) No. 672 of 2009

. **15.11.2019**

JMN(22.01.2020) 9P : 7C