



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	04.02.2020
Delivered on	12.02.2020

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CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD)No.1253 of 2006

Kandasamy : Appellant/Appellant/Defendant

Vs.

1.M.Chellammal
2.Pandi Thurai
3.Kamala Devi
4.Ratnadevi

: Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, praying to set aside the judgment and decree made in A.S.No.32 of 2006, dated 30.08.2006, on the file of the learned Principal District Judge, Tirunelveli, confirming the judgment and decree in O.S.No.174 of 1998, dated 29.11.2005 on the file of the learned Additional Sub Judge, Tenkasi.

For Appellant : Mr.S.Meenakshi Sundaram,
Senior Counsel,
For Mr.S.Kumar

For Respondents : Mr.K.Sree Kumaran Nair

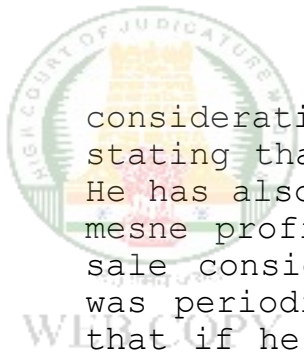
J U D G M E N T

Aggrieved over the concurrent finding of the Courts below granting the relief of specific performance in favour of the plaintiffs, the present Second Appeal is filed.

2. For the sake of convenience, the parties are referred to herein, as per their ranking before the Trial Court.

3. The brief facts of the plaintiffs' case are as follows:

The suit property originally belonged to one Muthiahsamy Thalaivar, husband of the first plaintiff and father of the plaintiffs 2 to 4. The defendant, being the friend of the husband of the first plaintiff, agreed to purchase the suit property for a sum of Rs.1,10,000/-. On the date of sale deed, viz., Ex.B.1, dated 27.01.1993, since the defendant was not having funds to pay the sale



consideration, he executed an agreement-Ex.A.1 on the same day, stating that he will pay the said sum, within a period of one year. He has also agreed to pay a sum of Rs.5,000/- for every crop towards mesne profits. As the defendant was not in a position to pay the sale consideration within the stipulated time, period for payment was periodically extended. The defendant entered into an agreement that if he failed to pay the amount, he will execute the sale deed in respect of the suit property in favour of Muthiahsamy Thalaivar. On 21.08.1994, he has paid a sum of Rs.15,000/- towards the mesne profits. However, he has not paid the sale consideration, as agreed. Muthiahsamy Thalaivar died on 16.09.1997 and immediately, the plaintiffs have sent a legal notice on 25.10.1997, which was not replied by the defendant. The plaintiffs are always ready and willing to complete the sale. Hence, the suit to enforce the contract executed by the said Muthiahsamy Thalaivar.

4. The defendant filed a written statement stating that there was no contract executed by him on the same date of the sale. It is contended that the defendant and the said Muthiahsamy Thalaivar were close friends. The allegation that the sale was sham and nominal is also denied. The alleged agreement to pay mesne profits towards the sale consideration is also denied. It is his contention that there was a dispute between Muthiahsamy Thalaivar and his wife. Muthiahsamy Thalaivar, in order to avoid the legal proceedings initiated by the wife in respect of the sale of the property, requested the defendant to put his signature in the contract after one year of the sale deed. According to the defendant, the agreement was not executed on 27.01.1993. As the dispute between the husband and wife is not over by the time, at the request of Muthiahsamy Thalaivar, the defendant put four signatures in blank papers. With the said blank papers, the suit documents have been fabricated few months before the death of Muthiahsamy Thalaivar. Muthiahsamy Thalaivar has informed the defendant that the dispute between the husband and wife is over and he has destroyed all the agreements. Thereafter, after receipt of notice from the plaintiffs, the defendant has informed the same to one Periyagurusamy, who informed the defendant that he would warn the plaintiffs not to take any action. The allegation that the plaintiffs are ready and willing to complete the sale is also denied. Hence he prayed for dismissal of the suit.

5. The Trial Court has framed necessary issues. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Exs.A.1 to A.10 were marked. On the side of the defendant, D.W.1 and D.W.2 were examined and Exs.B.1 and B.2 were marked.

6. On the basis of the evidence and materials, the Trial Court has decreed the suit in favour of the plaintiffs. The first Appellate Court has also confirmed the same. As against the concurrent finding, the present Second Appeal came to be filed.



7. At the time of admission of the Second Appeal, the following substantial question of law was framed:

"Whether the Courts below are right in decreeing the suit by relying upon Exs.A.1 to A.5 inasmuch as they are inadmissible in evidence and hit by Section 92 of the Evidence Act?"

8. In addition to that, after hearing the learned counsel appearing on both sides, the following additional substantial questions of law are also framed by this Court for consideration:

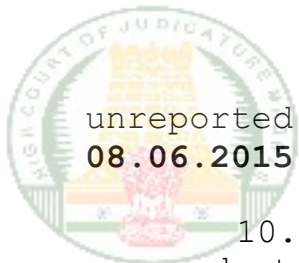
"(i) Whether the Courts below have correctly appreciated the evidence of D.W.2 who is the scribe and attesting witness in Exhibit A1?

(ii) Whether the Courts below are right in granting the equitable relief of specific performance of contract in the light of suspicious circumstances elucidated from Exhibit A1 to A5?

(ii) Whether the Courts below are correct in granting the decree of specific performance of contract when there is no evidence regarding the readiness and willingness to conclude the contract and it is indispensable under Section 16 of the Specific Relief Act?"

9. The learned Senior Counsel appearing for the appellant submitted that the Trial Court and the first Appellate Court have granted the relief of specific performance on the basis of Ex.A.4. It is the case of the plaintiffs that Ex.A.4 is the agreement for re-conveying the property, whereas, the same does not show that it is a contract for re-conveying the property. Therefore, it cannot be construed as a contract. It is his further contention that if really, the parties are intended to re-convey the property, there was no reason as to why the agreement for re-conveyance was not registered on the same day, i.e., on the date of the sale deed Ex.B.1. Ex.B.1 was registered for a sale consideration of Rs.39,240/-. Whereas, under Ex.A.1, sale consideration was shown as Rs.1,10,000/-. This fact creates serious doubt. It is his further contention that in Exs.A.1, A.3, A.4 and B.1, one of the attesting witnesses is none other than the brother of Muthiahsamy Thalaivar. He was examined as D.W.2. His evidence clearly shows that those documents were not executed simultaneously. Ex.A.4 said to be the contract for reconveyance. No explanation by the plaintiffs as to the interpolation in the document. Hence, it is contended that once the document is shrouded with serious doubt, relief of specific performance cannot be granted. Further, readiness and willingness on the part of the plaintiffs has also not been established. Therefore, it is contended that both the Courts below have not properly appreciated the evidence of D.W.2 and simply granted a decree of specific performance in favour of the plaintiffs. In support of the

<https://hcscservices.com/hcscservices/> The learned Senior Counsel has relied upon the



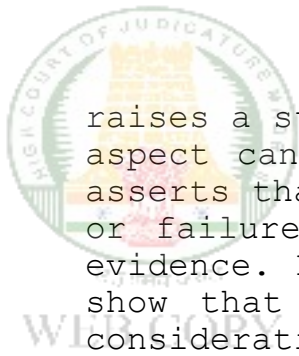
unreported judgment of this Court in **S.A.No.295 of 2009**, dated **08.06.2015 [Chinnasellan vs. Santha]**.

10. Whereas, the learned counsel appearing for the respondents submitted that the evidence of D.W.2 was rightly rejected by both the Courts below, as he has strong motive to give false evidence against the plaintiffs. Therefore, the above finding of fact cannot be re-appreciated by this Court in a Second Appeal. It is further contended that no reply was issued by the defendant for Ex.A.6- suit notice. This fact clearly shows that the sale deed was sham and nominal and not supported by any consideration. Only to pay the sale consideration, Exs.A.1 to A.5 were executed by the defendant. Hence, it is contended that when the execution of the documents is admitted by the defendant, the Trial Court and the first Appellate Court have factually found that the plaintiffs are entitled to the relief of specific performance.

11. Adding further, the learned counsel submitted that the bar imposed under Sections 91 and 92 of the Evidence Act cannot be applied to the given case and the proviso, in fact, empowers the party to show that there was a different transaction altogether and what is required in the document was intended to be of no consequence whatsoever. Hence, it is submitted that the judgment and decree of both the Courts below are well balanced and the same do not require any interference. Hence, he prayed for dismissal of the appeal.

12. I have perused the entire materials.

13. The suit has been filed for specific performance based on the agreements entered between the parties, namely Exs.A.1 to A.5. It is the case of the plaintiffs that Muthiahsamy Thalaivar intended to sell the suit property in favour of the defendant for a consideration of Rs.1,10,000/-. Since the defendant did not have any money to pay the consideration, one year time was sought by him to pay the amount. Pursuant to that, on 27.01.1993, a sale deed was executed on the guideline value of Rs.39,240/-. On the same day, the defendant has executed another agreement agreeing to pay Rs.1,10,000/- within one year, besides, he has also agreed to pay Rs.5,000/- for ever crop towards mesne profits. Whereas, it is the case of the defendant that the sale deed has been supported by consideration and in Exs.A.1 to A.5, his signatures were obtained by Muthiahsamy Thalaivar only in order to prevent any possible action by his wife, due to dispute between them, in a maintenance proceedings. Accordingly, he has signed ante-dated papers. Therefore, his contention is that Exs.A.1 to A.5 are fabricated at a later point of time and not executed on the date of sale itself. No doubt, Ex.B.1 is the sale deed in favour of the defendant for a sum of Rs.39,240/- for total extent of 2 Acres 18 Cents. The sale deed was registered on 27.01.1993. Normally, the registered sale deed

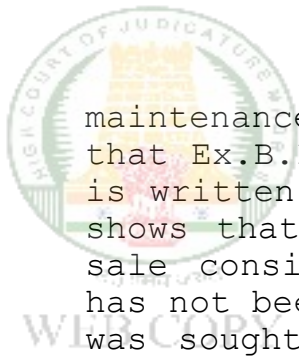


raises a strong presumption as to the passing of consideration. This aspect cannot be ignored altogether. At the same time, if a party asserts that the sale is not supported by any consideration and want or failure of consideration, the same can be proved by any other evidence. If a party takes such plea, initial burden lies on him to show that the document is not supported by consideration and no consideration whatsoever paid. Therefore, it cannot be said that no oral evidence is permissible at all to prove the above fact. The main contention of the plaintiffs is that since the defendant was the close friend of Muthiahamsy Thalaivar, at his request, a sale deed was executed for sale consideration of Rs.1,10,000/-. However, the sale consideration has not been paid. To pay the sale consideration, a separate agreement was entered between them on the same day. Whereas, it is the contention of the defendant that the sale consideration has been paid under Ex.B.1, and at the request of Muthiahamsy Thalaivar, he has signed ante-dated papers, which were fabricated at a later point of time.

14. The rival contentions of the parties, when assessed, Ex.B.1 is the document of sale dated 27.01.1993. The sale consideration set out in the document is Rs.39,240/-. The plaintiffs in their pleadings and evidence stated that sale was registered only on the guideline value of the property. Whereas, the sale consideration agreed between the parties is Rs.1,10,000/-, which has not been paid. Ex.A.1 is filed in this regard. Ex.A.1 was written by D.W.2 on 27.01.1993.

15. It is to be noted that D.W.2 is the brother of the said Muthiahamsy Thalaivar, the husband of the first plaintiff. Whereas, D.W.2 was examined on the side of the defendant. He is also one of the attesting witnesses in Ex.B.1 and Exs.A.1, A.3 and A.4. In his evidence, he has taken a contrary stand. In fact, he has supported the defendant's case. The Trial Court and the first Appellate Court rejected his evidence on the ground that his evidence is unreliable. This Court is also perused his evidence. The finding of the Trial Court and the first Appellate Court rejecting his evidence is well balanced, for the simple reason that he has strong motive to give false evidence against the plaintiffs, who are the legal heirs of his own brother. His evidence clearly indicated that there were criminal cases filed against him, besides, civil case is also filed against him. Therefore, he had strong motive against the plaintiffs to give contra evidence. Therefore, this Court is of the view that the finding of both the Courts below rejecting the evidence of D.W.2 does not require any interference at all.

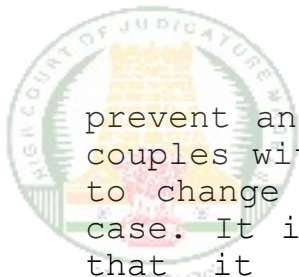
16. Whereas, P.W.2 is also one of the attesting witnesses in Exs.A.3 and A.4. He has clearly spoken about the entire transaction. The very contention of the defendant in the written statement that those documents were signed by him at the request of Muthiahamsy Thalaivar, is not supported by any evidence. It is not possible to prevent any possible action by his wife in a



maintenance proceedings clearly probabilised the plaintiffs' case that Ex.B.1 is not supported by any consideration. Ex.A.1, in fact, is written by D.W.2 on the same day on 27.01.1993. The same clearly shows that though the sale deed was registered on 27.01.1993, the sale consideration agreed between the parties i.e., Rs.1,10,000/- has not been paid on the same day. To pay such amount, one year time was sought by the defendant, besides, he has also agreed to pay Rs.10,000/- as mesne profits. Under Ex.A.2 time has been extended again one year to pay the amount. Thereafter, on 21.08.1994, the rent of Rs.15,000 was paid by the defendant, vide Ex.A.3, which was attested by P.W.2 and D.W.2. Thereafter, on 27.04.1997, under Ex.A.4, it was specifically agreed by the defendant that as per Ex.A.1, he has not paid any amount and in the event of his failure to pay the amount before 27.07.1997, he will hand over the possession of the property registered in his name and execute the sale deed and accordingly, agreement was written by the parties, which is also attested by P.W.2 and D.W.2. It is to be noted that if really, Ex.B.1 was outright sale, there was no necessity whatsoever for the defendant to pay the amount and extend the time to pay the sale consideration of Rs.1,10,000/-.

17. It is also to be noted that if really, Ex.B.1 was outright sale, the normal conduct of the person having purchased the property is to take at least some efforts to mutate the revenue records in his name, that has not been done so in this case. The evidence of the defendant as D.W.1 also clearly indicates that patta has not been changed and other revenue records have not been changed in his name. Further, original sale deed is also with the plaintiffs, which was marked as Ex.A.8. If really the defendant intended to purchase the property, his conduct would be to at least to receive the copy of the document. Further, there is no evidence to show that he has made any reasonable enquiry with regard to the property. P.W.2 has clearly spoken about the manner in which Exs.A.1 to A.4 executed by the defendant. Further, one of the attesting witnesses is also said to be the brother of Muthiahsamy Thalaivar, who has written Ex.A.1 and after the death of his brother, due to ill-will developed in the family, he supported the case of the defendant. Therefore, his evidence cannot be given much importance. Whereas, P.W.2 against whom there was no motive whatsoever established has clearly spoken about the independent transaction between the parties. The manner in which amount has been paid towards the rent under Ex.A.3 clearly shows that Ex.B.1 is not supported by any consideration and it is only a sham and nominal document.

18. Further, as already discussed, to show that the sale deed was acted upon and mutation has been taken place, there is no evidence available on record. In fact, the defence of the defendant clearly probabilised the plaintiffs' case. His defence itself clearly indicates that there were maintenance proceedings between the defendant and his wife. At that stage, he has signed the documents to



prevent any possible action from the wife of the vendor. This fact coupled with the conduct of the defendant, not even made any attempt to change the revenue records, which probabilsed the plaintiffs' case. It is further to be noted that though the nomenclature shows that it is only reconveyance of the document, execution of agreements has been clearly established on record. In fact, the plaintiffs are ill advised to file a suit for specific performance. They could have very well sought for declaration to cancel the deed itself. However, based on Ex.A.4-agreement, wherein the defendant has agreed to execute the sale deed in the event of failure to pay the consideration before 27.07,1997, the suit has been filed. Since there is an agreement to reconvey the property, enforcing such contract on the basis of such document, cannot be faulted. Under Ex.A.6, a legal notice was issued by the plaintiffs narrating all the facts, which was not replied by the defendant. Notice was sent on 25.10.1997, within one month from the date of death of Muthiahsamy Thalaivar. It is the contention of the defendant in the written statement that after receipt of notice, he has informed the same to D.W.2 and D.W.2 has warned the plaintiffs not to take any action. Whereas, D.W.2 has never whispered anything about such notice. Therefore, his explanation is also highly doubtful. At any event, the suit has been filed within three years from the date of last payment made by the defendant on 25.07.1997 under Ex.A.5. Admittedly, signature in all the documents has been admitted by the defendant and the suit has been filed within three years from the last payment and well within the period of limitation and the plaintiffs have also sent a reply notice for registration of the document expressing their readiness and willingness. In the plaint also, they have pleaded readiness and willingness. Therefore, the contention of the learned Senior Counsel that the readiness and willingness has not been established cannot have any bearing in this case. Furthermore, as it is only a reconveyance agreement, the rigour of Section 16(c) of the Specific Relief Act cannot be applied to the case at hand.

19. It is to be noted that when the defendant himself has agreed to execute the sale deed, in the event of failure to make payment towards sale consideration, such contract is also capable for enforcement. Furthermore, both the oral and documentary evidence clinchingly established that Ex.B.1 is sham and nominal. Exs.A.1 to A.4 proved by the evidence and Ex.A.4 is written by the parties themselves, as could be seen from the tenor of language, which clearly shows that both parties, who had no skills in document writing, have written the documents. Therefore, merely because some correction in the date at the top of the agreement, the same cannot be considered as interpolation.

20. Now, coming to the judgment cited by the learned Senior Counsel appearing for the appellant in **S.A.No.295 of 2009**, dated **08.06.2015 [Chinnasellan vs. Santha]**, this Court is of the



considered opinion that the same cannot be applied to the facts of this case, for the simple reason that in the above case, execution of separate agreement for reconveyance has been pleaded and the plaintiff has not proved the same, but, whereas, in the present case, the same has been clearly established on record.

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21. Thus, in view of the foregoing reasons and also considering the peculiar facts of the case, this Court is of the view that the finding of the Trial Court and the first Appellate Court granting the decree for specific performance cannot be found fault with. Accordingly, all the substantial questions of law are answered against the appellant.

22. In the result, the Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

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To

1.The Principal District Judge,
Tirunelveli.

2.The Additional Sub Judge,
Tenkasi.

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Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.S.KUMAR, Advocate (SR-5754[F] dated 12/02/2020)

+1 CC to M/s.K.SREE KUMARAN NAIR, Advocate (SR-5796[F] dated 12/02/2020)

Judgment made in
S.A. (MD)No.1253 of 2006
Delivered on: **12.02.2020**

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