IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.03.2024

CORAM

THE HONOURABLE Mr. JUSTICE **G.ARUL MURUGAN**

**S.A.No.444 of 2012**
**and MP.No.1 of 2012**

1.Nachimuthu (Died)
2.Pappathi
3.Amsaveni
4.Mathesh ... Appellants
(Appellants 2 to 4 brought on record as LRs of the deceased sole Appellant viz.,Nachimuthu vide Court order dated 15.11.2021 made in CMP.No.11930 to 11932 of 2018 in SA.No.444/2012 (TKRJ))

vs.

Marimuthu ...Respondents

**Prayer:-** Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.03.2011 passed in A.S.No.49 of 2008 on the file of Additional District Court, (FTC No.I), Salem reversing the judgment and decree dated 29.01.2008 passed in

OS.No.25 of 2006 on the file of Sub Court, Mettur.

For Appellants : Mr.A.Sundara Vadhanan

For Respondent : Mr.V.Sekar for
Mr.D.Shivakumaran

**J U D G M E N T**

The plaintiff in the suit for specific performance is the appellant herein. The Second Appeal is filed challenging the judgment and decree dated 28.03.2011 passed in AS.No.49 of 2008 on the file of Additional District Court, Fast Track Court No.I, Salem, reversing the judgment and decree dated 29.01.2008 passed in O.S.No.25 of 2006 on the file of Sub Court, Mettur.

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

**The brief facts, which give rise to the second appeal, are as follows:**

3. According to the plaintiff, the defendant offered to sell the suit property and he agreed to purchase the same for a sum of Rs.2,70,000/-, pursuant to the agreement dated 16.11.2005. The plaintiff entered into a sale agreement for purchasing the suit property for a total sale consideration of Rs.2,70,000/- and on that date itself, the plaintiff has paid an advance of Rs.2,50,000/-. It was further agreed that the defendant shall execute the sale deed in favour of the plaintiff after receiving the balance

consideration of Rs.20,000/- within seven months from the date of agreement.

4. According to the plaintiff, he approached the defendant on many occasions and requested the defendant to execute the sale deed by tendering the balance sale consideration of Rs.20,000/-. Since the defendant did not show any interest, finally on 15.05.2006 the plaintiff met the defendant in person and requested to perform his part of the contract. Since it did not materialize, the plaintiff sent legal notice on 16.11.2005 calling upon the defendant to come to the Sub Registrar Office on 26.11.2005 to execute the sale deed, but the defendant have evaded the service of notice. According to the plaintiff, he was always ready and willing to perform his part of contract, since the defendant evaded, he has come with the suit for specific performance of the sale agreement dated 16.11.2005.

5. The defendant resisted the suit by filing the written statement disputing the sale agreement in Ex.A.1. According to the defendant, he borrowed a loan from M/s.Mettur, M/s.Mettur Chollan Finance & Investments, Mettur, M/s.Erode Cheran Corporation and Mettur Pandiyan Finance and Investments, Mettur and Seran Finance and Investments, Mettur. On 04.09.2000, the defendant borrowed a sum of Rs.1,50,000/- to purchase a tata vehicle from the above said financiers, for which, the financiers obtained unfilled signed cheques from the defendant along with signed unfilled 20 Rupees stamp papers, two unfilled signed conquer sheets and four unfilled signed pro notes, all for security purposes. According to the defendant, the plaintiff's son Madesh and plaintiff's wife Pappathi are partners in Mettur Seran Finance and in Erode Seran Corporation Finance. The defendant had also borrowed a sum of Rs.4,50,000/- for purchasing a rig vehicle from Erode Seran Corporation

Finance, during the month of June 2004.

6. According to the defendant, he had closed the loan account. However, while availing the loan, the financiers obtained the signatures from the defendant on two unfilled 20 rupees stamp papers, four unwritten green concur sheets and four unfilled stamped pronotes. Even after the completion of the loan amount, these documents were not returned. Further, according to the defendant, one Appu @ Perumal obtained loan from the finance and the defendant was compelled to give unfilled documents as a security. Even after settling all these accounts, the finances retained those documents and set up the plaintiff and created the sale agreement by utilising unfilled stamp papers and concur sheets. Therefore, according to the defendant, the sale agreement in Ex.A.1 is not true and genuine and it was never intended and executed by the parties for the sale of the suit property. The defendant also averred that he issued the

lawyers notice on 19.07.2006 demanding the return of the documents and prayed for dismissal of the suit.

**Evidence and Documents:**

7. During trial, on the side of the plaintiff, the plaintiff examined himself as PW.1 and the attestor was examined as PW.2 and marked Exs.A1 to A.4. On the side of the defendants, the defendant himself was examined as DW.1 and also examined four other witnesses DW.2 to DW.5 and marked Exs.B.1 to B.36. The defendant signature is marked as Ex.C.1 and Ex.X1 to X3 were marked through witnesses.

**Findings of the Court below:**

8. After appraising the evidences and documents, the Trial court decreed the suit for specific performance. The Trial Court came to the conclusion that the sale agreement in Ex.A.1 is true and genuine and disbelieved the version of the defendant that he was not available in Tamil Nadu during the time of execution of sale agreement in Ex.A1 and since the signature in Ex.A.1 is not denied and major part of the sale consideration was paid, the plaintiff had proved the sale agreement.

9. Aggrieved by the judgment and decree of the trial court, the defendant filed appeal in AS.No.49 of 2008 on the file of Additional District Judge, Fast Track Court No.1, Salem. The Lower Appellate Court after reappraising the evidence allowed the appeal and set aside the decree of the Trial Court. The Lower Appellate Court found that the plaintiff has not established the passing of consideration and proved that agreement in

Ex.A.1 is true. Aggrieved by the reversal judgement and decree of the Lower Appellate Court, the plaintiff is before this Court on appeal.

10. This Court by order dated 25.04.2022, framed the following substantial questions of law:

*"a) Whether the lower Appellate Court has assigned cogent reasons while differing with the findings of the Trial Court as mandated under Order 41 Rule 31 of CPC?*

*b) Whether the findings of the lower Appellate Court can be termed as perverse due to improper appreciation of oral and documentary evidence?"*

**<u>Submission made by the learned counsel for the appellant</u>**:

11. The learned counsel appearing for the appellant argued that the parties have entered into the sale agreement in Ex.A.1 and on the same day an advance of Rs.2,50,000/- was paid out of the total sale consideration of Rs.2.70,000/- and a period of seven months was fixed for the payment of balance sale consideration. The learned counsel further

contended that the defendant has admitted the signature in Ex.A.1 and also the plaintiff has examined the attestor PW.2 and proved the due execution of the sale agreement. The defendant for the purpose of evading the sale transaction introduced a new story of loan availed by him and issuance of unfilled stamp papers. He also has come forward with the defence that he was not available in the state and was at Ranchi during the period of execution of the sale agreement.

12. The learned counsel further contended that though the defendant has filed the ticket in Ex.B.3 to show that he traveled from Salem to Ranchi on 09.11.2005, through the cross examination of DW.3, it has been clearly brought out that it cannot be confirmed that the defendant himself traveled on the ticket. Further the unserved ticket in Ex.B.5 has been filed for the travel on 21.11.2005, which cannot indicate that the defendant had traveled on the ticket. Further, when DW.2 has

deposed that after two days journey, the defendant reached Ranchi on 11.11.2005, the document filed by the plaintiff in Ex.B.4 shows that the excess fare was charged only on 13.11.2005. Therefore, from this document filed by the defendant, he was not able to establish that he was not available in the state and he was available in the Ranchi and therefore, his defence that during the period of execution of the sale agreement in Ex.A.1, he was not available has not been proved.

13. The learned counsel further argued that only since cultivation had been done in the suit property for the purpose of harvest, a time period of seven months was given for completion on sale even after making the payment of the major part of the sale consideration.

14. The learned counsel further contended that since the plaintiff was a contractor, he had a stock of stamp papers and the same had been

used for execution of the sale agreement in Ex.A.1. Therefore, the Trial Court by taking note of all these factors, accepted the sale agreement to be true and genuine and decreed the suit. However, the Lower Appellate Court had erroneously allowed the appeal by relying on the irrelevant factors.. The Lower Appellate Court relied on the evidence of PW.2 who had picked up stray sentences and come to the conclusion that the sale agreement is not genuine. The learned counsel contended that the lower appellate court has erroneously arrived at a finding which is perverse and sought for allowing the appeal.

15.. In support of his arguments, the learned counsel for the appellant relied on the following decisions of the Hon'ble Supreme Court,

(1) **Tomaso Bruno and another vs. State of Uttar Pradesh** reported in **(2015) 7 SCC 178** and

(2) **Suresh Budharmal Kalani Alias Pappu Kalani vs. State of**

**Maharashtra** reported in **(1998) 7 SCC 377.**

16. Per contra, the learned counsel appearing for the respondent argued that the agreement in Ex.A.1 is not true and valid. The defendant had availed loan from the finance company and had given the unfilled signed stamp papers which have been used by the plaintiff in the present suit. The learned counsel further contended that the defendant was not available in Tamil Nadu from 09.11.2005 to 21.11.2005 and he had travelled to Ranchi and the same has been established by filing the documents in Ex.B.3 to B.5 and also Ex.X1. The defendant had also examined the Chief Commercial Inspector of Southern Railway as DW.3, who by filing Ex.X1 had confirmed that the defendant had travelled in the confirmed ticket to Ranchi on 09.11.2005. As such there was no possibility for the defendant to execute the sale agreement in Ex.A.1 on 16.11.2005.

17. Further, the learned counsel for the respondent argued that the sale agreement had been executed on 16.11.2005 on stamp papers purchased on 22.03.2004. The fact that the stamp papers purchased on 22.03.2004 had been used after nearly 1 ½ years to prepare the sale agreement in Ex.A.1 fortifies the fact that it is not the true document. Further, the plaintiff has claimed that he purchased the stamp papers 5 or 6 months before for his business. But whereas, from the evidence of DW.4 it has been established that the stamp papers were actually sold to one Ramasami of Erode. Further, the DW.5, stamp vendor has clearly given evidence that he has sold the stamp papers to one Ramasamy on 22.03.2004 and he had not written the name of Nachimuthu, Kolathur, the name of the plaintiff in Ex.A.1 agreement. As such, the claim of the plaintiff that he purchased the stamp papers by signing in the relevant register is not correct.

18. The learned counsel further contended that when admittedly Ex.A.1 sale agreement is unregistered, PW.2 ithe attestor in the agreement, deposed that the sale agreement was prepared in his presence and got registered around 3.00 p.m. From the evidence of PW.2, the very execution of the agreement becomes doubtful as passing of consideration is not proved. The learned counsel for the appellant further contended that there is no explanation or details given in the agreement as to why the seven months time was granted for the payment of Rs.20,000/- when the major sale consideration of Rs.2,50,000/- was paid on the same day.

19. The learned counsel further contended that the Lower Appellate Court, by taking note of all these factors had rightly appreciated the documents filed by the defendant and appreciating the oral evidence let in by the parties, has arrived at the finding of fact that the sale agreement in

Ex.A.1 is not true and genuine and has rightly set aside the decree of the Trial Court.

20. The learned counsel further contended that when the finding of the Lower Appellate Court is based on the available materials no interference is required in the second appeal.

21. In support of his arguments, the learned counsel for the respondent relied on the following decisions,

1. **Rathinameenakshi vs. Somaraj** reported in **2021 (3) CTC 72(Mad).**

**2. M.Jayaprakash Narayanan vs. Santhammal** reported in **2018 (1) CTC 701 (Mad)**.

3. **S.Palanivel and Another vs. P.Natesan** reported in **2018 (1) CTC 50 (Mad)**

4. **S.S.M. Soundappan and 5 others vs. K.G.Balakrishnan and 14 others** reported in **1997 (II) CTC 385**.

22. Heard the learned counsel on either side and perused the materials available on record.

**Analysis:**

23. The plaintiff has come up with the suit for specific performance

based on the sale agreement dated 16.11.2005 in Ex.A.1. As per the sale agreement, the total sale consideration of Rs.2,70,000/- has been fixed and an advance of Rs.2,50,000/- has been paid on the same day and a time period of seven months is fixed to pay the balance sale consideration of Rs.20,000/- and complete the sale. It is the case of the plaintiff that he was always ready and willing to pay the balance sale consideration and complete the sale, but however the defendant evaded the completion of the sale. Therefore, a legal notice dated 17.05.2006 in Ex.A.2 was issued and since the defendant has not received the notice, the plaintiff filed the suit on 12.06.2006 for specific performance.

24. The defendant has disputed Ex.A.1 sale agreement and has stated that he availed loan from the finance and executed unfilled signed stamp papers as security towards the loan transaction. The defendant also claimed that he was not available in Tamil Nadu and had travelled to

Ranchi and was there from 09.11.2005 to 21.11.2005. Hence, there was no possibility for him to have executed the sale agreement on 16.11.2005.

25. The defendant's further case is that he had availed loan from the finance and he had given the unfilled stamp papers as security for the loan. The defendant has filed documents in Ex.B.1 and Ex.B.2, which are the registered partnership deeds to establish that the plaintiff 's son Mathesh and plaintiff's wife Pappathi are the partners in Mettur Seran Finance and Erode Seran Corporation. In fact, PW.1 in his evidence had admitted that his son and wife are partners in Mettur Seran Finance and investments. Further, PW.1 in his cross examination had also admitted that the defendant might have borrowed the loan for a Tata car for a sum of Rs.1,50,000/-, for which, the defendant could have given the blank cheques, 20 Rupees stamp papers, 4 green sheets and pro notes to the finance. When it is the specific case of the defendant that he had availed

loan from the finance in which the plaintiff's wife and son are partners and they also filed documents in Ex.B.1 and B.2 to establish the same and prove his case that the unfilled stamp papers given by him had been misused by the plaintiff for preparing the Ex.A.1 sale agreement and filed the suit, the admission of the plaintiff himself proved that his son and wife are partners and that the defendant would have borrowed the loan and could have handed over the unfilled stamp papers to the finance supports the very case of the defendant and makes the sale agreement in Ex.A.1 doubtful.

26. Further when admittedly the sale agreement is executed on 16.11.2005, the perusal of the agreement shows that it has been executed on the stamp paper purchased on 22.03.2004. When in the normal course, the stamp papers are purchased in the name of the plaintiff during the time of execution of the deed, the fact that the stamp papers were

purchased on 22.03.2004 by the plaintiff and were kept for more than a period of 1 ½ years and the sale agreement in Ex.A.1 was executed on 16.11.2005 creates a doubt on the genuineness of the agreement and also probabilizes the claim of the defendant that signed unfilled stamp papers were given by him to the finance. Further, when the plaintiff claimed that he was in a contract business as a contractor and he used to buy stamp papers 5 to 6 months in advance and have a stock of the stamp papers and particularly the stamp papers in Ex.A.1 was purchased by entering his name in the register, the plaintiff had not filed any document to show that he is a contractor or in a contract business which required him to purchase and keep a stock of the stamp papers. Further, the defendant had examined D.W.4 and D.W.5 and also marked Ex.X.1 which reveals that the stamp paper bearing No.7212 in which Ex.A.1 sale agreement is prepared was actually sold to one Ramasamy of Erode on 22.03.2004. DW.5 the stamp vendor who had sold the stamp paper had also deposed that he had sold the stamp paper to Ramasamy of Erode on 22.03.2004 and had also denied that he had entered the name of the plaintiff Nachimuthu in Ex.A.1 sale agreement.

27. From the evidences of DW.4 and DW.5, it is evident that the claim of the plaintiff that he had purchased the stamp papers by affixing the signature in the relevant register and he used the same for execution of the sale agreement in Ex.A.1 is false. The stamp papers were sold to one Ramasamy of Erode on 22.03.2004 and the sale agreement was executed only on 16.11.2005 on the same stamp paper by entering the name of the plaintiff and the stamp paper purchased 1 ½ years prior to the sale agreement has been used later, creates serious suspicion and doubt in the genuineness of the sale agreement in Ex.A.1.

28. The defendant had claimed that he was in Ranchi from

09.11.2005 to 21.11.2005 and he had filed the confirmed travel ticket in Ex.B.3 showing he travelled from Salem to Ranchi. He also examined D.W.3, who had marked the document in Ex.X.1 to establish that he had travelled in the confirmed ticket on 09.11.2005 to Ranchi. The argument of the learned counsel for the appellant that during the cross examination DW.3, stated that it cannot be confirmed whether the defendant traveled in the train, does not make a big impact. The defendant by filing Ex.B.5, a return ticket, even though unreserved, and also by examining DW.2, was able to show that he has actually undertaken the business travel to Ranchi during this period. He was not available at Mettur and therefore there was no possibility of the defendant executing the sale agreement in Ex.A.1.

29. The plaintiff had examined the attestor of the sale agreement, who is PW.2. The evidence of PW.2 becomes very crucial as the defendant denies the execution of the sale agreement in Ex.A.1. PW.1

deposed that he is a relative of the plaintiff and that on the day of execution, the plaintiff purchased and brought the stamp paper. The plaintiff along with Marimuthu and Pannerselvam went to Mettur. He was not aware on the day on which the agreement was executed, but however the sale agreement was registered at 3.00 p.m. He further deposed that the plaintiff informed over phone at 2.30 p.m. From the Kolathur check post, they all joined together and went to the office of Sivaraj, where the sale agreement was typed. All of them signed with the same pen given by Sivaraj and the sale agreement was registered at 3.00 p.m.

30. The perusal of the sale agreement in Ex.A.1 shows that it is not signed with the same pen and it is also computer print out and not a typed agreement as stated by him. Further, when PW.2 deposed that the agreement was registered at 3.00 p.m, the fact that Ex.A.1 sale agreement is un-registered which makes his evidence very doubtful and the passing

of consideration through Ex.A.1 has not been established. As such, the evidence of PW.2, who is the attestor of the document is doubtful and not reliable about the execution of the agreement in Ex.A.1.

31. When the evidence of PW.1 and PW.2 are analyzed, it could be seen that serious doubt arises about the case of the plaintiff in respect of execution of the agreement. In the suit for specific performance when the plaintiff has come forward for the discretionary relief, the plaintiff is bound to prove the sale agreement and that the consideration has been passed. The plaintiff must be able to establish that the parties agreed and intended to sell the suit properties and there was *consensus -ad-idem* reached between them, based on which, the sale agreement was executed. When the evidences of PW.1 and PW.2 and the evidences of DW.1 to DW.5 are considered together, the plaintiff was not able to prove that the

agreement in Ex.A.1 was intended by the parties and executed for the sale of suit property.

32. Yet another factor is that when a sum of Rs.2,50,000/- has been paid on the date of the sale agreement itself, there is no explanation available in the agreement, as to why a period of seven months was fixed to complete the sale for the balance payment of Rs.20,000 alone. Even though, the learned counsel argued that since there was cultivation, the time period was given to harvest, which is stated by PW.1 in his evidence, but no reasons are available in the sale agreement in Ex.A.1 for fixing a long period of seven months when almost the major part of the sale consideration was paid on the date of sale agreement.

33. In the decision of this Hon'ble Court, in **M.Jayaprakash Narayanan vs. Santhammal and others (cited supra),** it has been held

that merely because the attestor supported the case of the plaintiff in the chief examination but from the cross examination his evidence becomes totally unreliable and when the two elements namely free consent and lawful consideration are absent in the document, such document cannot be considered as executed for lawful consideration in the eye of law. Relevant period of the judgment is usefully extracted hereunder:

> *"12. Though PW2 has supported the plaintiff in chief-examinaion, his cross-examination has clearly shows that his evidence his totally reliable. In fact,he has stated in his evidence that he has only attested the document alone, whereas he also stood as witness in Ex.A.17. PW2 is involved in Real Estate business. His evidence clearly indicate that he is only an agent of PW.1. Therefore, merely because PW1 & PW2 have stated above the execution of document, taking into consideration the totality of the circumstances as discussed above, we are constrained to hold that the evidence of PW1 and PW2 does not satisfy the conscious of this Court to believe their evidence to presume*

*the execution of E.A1-agreement, particularly the alleged consideration of Rs.40,00,000 on the date of agreement is not been established at all. Therefore, mere signature of the parties were established on the basis of some interested witnesses of the parties, who wants to enforce the so called contract, in respect o the huge property, the execution cannot be inferred merely on the basis of such witnesses, there must be evidence to show that Ex.A.1 is made out of free consent of parties and there is a lawful consideration in the above agreement. Only when the plaintiff established that there was a consensus ad idem between the parties and a valuable consideration, then the above contract can be termed as a valid contract capable of enforcing before the court of law. When the two elements namely, the free consent and lawful consideration are absent in the document. Such document cannot be considered for lawful consideration in the eye of law. Therefore, we are constrained to hold that Ex.A.1 is not established as a true document."*

34. Further in the judgment relied on by the respondent reported in **S.Palanivel and Another vs. P.Natesan and other (cited supra),** it is held that the plaintiffs are not entitled to take an unfair advantage merely because it is lawful to grant specific relief, when the plaintiffs have failed to establish that there was a valid sale agreement. The relevant portion of the judgment is extracted hereunder:

> *"52. In the instant case, as stated supra, the plaintiffs have established that there is valid sale agreement. Further, the plaintiffs have also failed to establish the passing of the sale consideration of 20 lakhs by producing the income-tax returns and bank accounts statements. Therefore, we are of the opinion that the plaintiffs are not entitled to get the relief of specific performance. In this regard, a reference could be placed in another decision of the Hon'ble Supreme Court in A.C. Arulappan vs. Ahalya Naik, AIR 2001 SC 2783, wherein it has been held that merely because it is lawful to grant specific relief, the court need not grant such an order,*

*thereby allowing the plaintiff to take an unfair advantage over the defendants. In the case on hand also, the plaintiffs are not entitled to any such unfair advantage."*

35. From the above decisions, it is clear that the plaintiff has to prove the passing of consideration and the sale agreement to be genuine for the discretionary relief of the specific performance. In the instant case, even the perusal of Ex.A.1 sale agreement shows that there is a gap between the contents mentioned in the document and the signature of the defendant. Even, PW.1 in his evidence, admitted that the gap between the signature and the contents is 1 ½ inches.

36. The over all analysis of evidence of PW.1 and PW.2 shows that the evidence of PW.2 is not reliable when his entire evidence in respect of A1 sale agreement is contrary to the factual aspects. Further, PW.1 himself admitted his wife and son to be the partners and the possibility of the defendant handing over the unfilled stamp papers, thereby completely

supporting the case of the defendants. The evidences of DW.4 and DW,5 in respect of the purchaser of the stamp paper and admittedly, the stamp paper purchased on 22.03.2004 has been used for execution of the sale agreement in Ex.A.1 after the period of 1 ½ years, i.e, on 16.11.2005. Further when Rs.2,50,000/- has been paid as advance, 7 months has been fixed for completing the sale for balance payment of Rs.20,000/-. It does not satisfy the conscience of this Court to accept the sale agreement in Ex.A.1 as true and genuine. Therefore, the plaintiff has failed to prove the sale agreement in Ex.A.1. The decisions relied on by the respondent is not relevant to the facts of the present case.

37. The Lower Appellate Court has couched and framed the following points for consideration. It could be seen that the points have been couched in one and the same paragraph. Even though they could have been separated and framed as to whether the finding of the Trial Court that the suit at sale agreement is true, whether the plaintiff was

always ready and willing to perform his part of the contract, where the plaintiff is entitled to relief for specific performance of contract, whether the appeal can be allowed, all the above have been couched together. However, the Lower Appellate Court has analyzed in detail all the documents and the oral evidences and has considered all the factual issues in detail and arrived at a finding by giving cogent reasons, has therefore complied with the procedure mandated under Order 41 Rule 31 of CPC.

38. The first substantial question of law is answered in the affirmative and in view of the above findings, the second question of law is answered against the appellant and in favour of the respondent.

39. The Lower Appellate Court has arrived at a findings of fact which is based on the material available on record and there is no perversity or illegality for this Court to interfere in the Second Appeal.

40. In view of the same, the Second Appeal stands dismissed. The Judgment and Decree of the Lower Appellate Court is confirmed. However, there is no order as to costs. Consequently, connected Miscellaneous Petition is closed.

**01.03.2024**

Index : Yes/No
Speaking order/Non-speaking order
drl

To

1. The Additional District Court,
   Fast Track Court, No.I, Salem.

2. The Sub Court, Mettur.

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

**G.ARUL MURUGAN,J**

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**S.A.No.444 of 2012**
**and MP.No.1 of 2012**

**01.03.2024**