



S.A.No.549 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 02.01.2024

Delivered on: 31.01.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.B.BALAJI

S.A.No.549 of 2017
and
C.M.P.No.13406 of 2017

N.Basuvaraj

...Appellant

Vs.

Gullamma

...Respondent

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the Judgment and Decree of the learned Subordinate Judge of Hosur, dated 10.01.2017 in A.S. No.11 of 2015 reversing the Judgment and Decree of the learned District Munsif of Denkanikottai, dated 11.02.2015 in O.S. No.65 of 2007.

For Appellant : Mr.R.Jayaprakash

For Respondent : Mr.V.Ragavachari,
Senior Counsel for



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Ms.K.Abirame

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JUDGMENT

The unsuccessful defendant in a suit for specific performance is the appellant before this Court.

2. For the sake of convenience, the parties are described as per their litigative status before the Trial Court,

3. The plaintiff filed a suit in O.S.No.65 of 2007 before the District Munsif Court, Denkanikottai, seeking specific performance of an agreement of sale dated 17.05.2005 for purchasing the suit property. It is the case of the plaintiff that the defendant approached the plaintiff for selling the suit scheduled property measuring 6 cents, comprised of two items of three cents each for a total consideration of Rs.55,000/-. The plaintiff has further pleaded that an advance of Rs.50,000/- was paid on the date of sale agreement itself and for payment of remaining sale consideration of Rs.5,000/-, one year time was mutually agreed upon between the parties. Alleging that despite several



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requests made by the plaintiff to receive the balance sale consideration and execute the registered sale deed in favour of the plaintiff and also a lawyer's notice dated 16.05.2006, which was evaded by the defendant, the defendant did not come forward to honour the terms of the sale agreement. Pleading readiness and willingness, the suit for specific performance came to be instituted.

4. The defendant filed his written statement stating that there was no intended sale agreement between the parties and it was only a money transaction viz., namely borrowing of Rs.50,000/- by the defendant from the plaintiff and in respect of the said transaction, as surety, the sale agreement was entered into. The defendant further stated that even on 03.06.2003, he had similarly borrowed a sum of Rs.30,000/- from one R.Srinivasan, and after the repayment of the principal and interest amount the nominal sale agreement dated 03.06.2003 was handed over to the defendant. It is the further case of the defendant that out of the three attesting witnesses to the said agreement dated 03.06.2003, two of them are witnesses to the suit sale



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agreement and even the scribe who prepared the agreement dated 03.06.2003 as well as the suit sale agreement was one and the same person viz., R.Purushothaman. The defendant has further stated that he paid Rs.1,000/- towards interest up to February 2006 and the plaintiff did not acknowledge receipt of any of the amounts paid by the defendant. Only when the plaintiff demanded a raise in the interest rate and the defendant refused to agree to the same, the plaintiff has chosen to demand performance of the agreement of sale and approached the court with the suit for specific performance. It is further contended by the defendant the suit property is situated on the Hosur Denkanikotta Main Road and each of the plots measuring 3 cents was having a market value of Rs.1,80,000/- and only because the sale agreement was a nominal document, the sale consideration was fixed at Rs.55,000/-. The defendant had further stated that there is no necessity for the defendant to sell the suit property as he had shifted from Parandur village to one Pancheswaram village and he had already started constructing a residential house and also laid foundation, spending Rs.1,50,000/- on the suit property. The defendant has further stated that since his father-in-law had assisted him



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monetarily, the defendant had already settled the suit property in the name of his wife. The defendant also expresses his willingness to repay the principal amount of Rs.50,000/-.

5. Before the Trial Court, the plaintiff examined herself as P.W.1 and the Document Writer, Purushothaman as P.W.2. On the side of the defendant, he examined himself as D.W.1 and two witnesses to the suit sale agreement as D.W.2 and D.W.3. On the side of the plaintiff, the suit sale agreement was marked as Ex.A1 and the copy of the lawyer's notice issued by the plaintiff before filing the suit was marked as Ex.A2. The unserved returned cover with postal receipt was marked as Ex.A3. The originals of the sale deeds under which the suit items were purchased by the defendant was marked as Ex.A4 and A5. On the side of the defendant, the agreement dated 03.06.2003 entered into between the defendant and Srinivasan was marked as Ex.B1.

6. The Trial Court, after assessing the oral and documentary evidence, dismissed the suit holding that the plaintiff was not entitled to the relief of



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specific performance.

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7. Aggrieved by the dismissal of the suit, the plaintiff preferred A.S.No.11 of 2015 before the Sub Court, Hosur. On reappraisal of the oral and documentary evidence, the First Appellate Court disagreed with the findings of the Trial Court and allowed the Appeal and thereby granted a decree for specific performance as prayed for by the plaintiff.

8. The defendant has therefore preferred the above Second Appeal. At the time of admission of the Second Appeal, the following substantial questions of law have been framed:

“ a. When the evidence on record and the recitals in the suit agreement clearly establish that the agreement executed by the defendant is not intended for selling the suit property to the plaintiff but only in respect of the loan borrowed by him whether the findings of the lower appellate Court that the suit agreement is an agreement of sale are not perverse and contrary to evidence?.

b. When the plaintiff did not taken any steps



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to implement the suit agreement dated 17.05.2005 for a period of one year upto 16.5.2006 and filing the suit on 04.04.2007 would establish that the plaintiff is not ready and willing to perform her part of contract whether the lower appellate Court is correct in granting the relief of specific performance to the plaintiff which is contrary to the materials on record?.

c. When admittedly there are foundation in the suit properties and whereas the description of the property in the suit agreement and the suit were shown as vacant sites and thus the plaintiff has come to Court with unclean hands whether the lower appellate Court is correct in granting the discretionary relief of specific performance in favour of the plaintiff?."

9. I have heard Mr.R.Jayaprakash, learned counsel for the appellant/defendant and Mr.V.Raghavachari, learned Senior counsel appearing for Ms.V.Srimathi, learned counsel for the respondent/plaintiff.

10. I have paid my anxious, careful consideration to the rival



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submissions advanced by the learned counsel for the appellant and the learned Senior counsel for the respondent and also independently gone through the judgements of the Courts below and the oral and documentary evidence adduced by the parties before the Trial Court.

11. The learned counsel for the appellant, Mr.R.Jayaprakash would contend that the very nature of terms and conditions stipulated under the agreement, coupled with the fact that the sale consideration was fixed at Rs.55,000/- which was a pittance considering the prevailing market prices in the locality, would state that it would only cumulatively would point to the fact that the agreement of sale was only executed as a security for the borrowing of Rs.50,000/-. The learned counsel for the appellant would also take me through the evidence of P.W.2-the Document Writer whose evidence, according to the learned counsel for the appellant was clearly exposing the plaintiff's case itself and on the contrary supporting the defence set up by the appellant. The learned counsel for the appellant would also state that even assuming the sale agreement was true and genuine, still the plaintiff



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would not be entitled to the equitable and discretionary relief of specific performance and would refer to Sec.16(c) and Sec.20 of the Specific Relief Act, 1963. The learned counsel for the appellant also placed reliance on the following decisions:

1. *Saradamani Kandappan Vs. S.Rajalakshmi and Ors*, reported in *(2011) 12 SCC 18*;
2. *Parakunnan Veetill Joseph's on Mathew Vs. Nedumbara Kuruvila's son & anr* reported in *1987 (supp) SCC 340*;
3. *A.C.Arulappan Vs. Ahalya Naik (SMT)* reported in *(2001) 6 SCC 600*;
4. *P.Sampoornam and Ors Vs. L.T.Somasundaram and Ors*, reported in *2007 SCC Online Nad 1003*;
5. *Bal Krishna and anr Vs. Bhagwan Das (Dead) by Lrs and Ors*, reported in *(2008) 12 SCC 145*;
6. *Mohammadia Co-operative building Society Ltd Vs. Lakshmi Srinivasa Co-operative Building Society Ltd* reported in *(2008) 7 SCC 310*;
7. *K.Muthusamy and another Vs. K.V.K.Subramaniam* reported in



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2011 2 L.W. 289;

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8. *Nanjappan Vs. Ramasamy and anr*, reported in (2015) 14 SCC 341;

9. *Surinder Kaur (dead) through Lrs Vs. Bahadur Singh (dead) through Lrs*, reported in (2019) 8 SCC 575;

10. *Ravi Setia Vs. Madan Lal*, reported in (2019) 9 SCC 381;

11. *Muthulakshmi and Ors Vs. Balaguru Pandiyan* reported in 2019 SCC Online Mad 38072;

12. *D.Lakshmi and Ors Vs. R.Naresh Kumar*, reported in 2020 SCC Online Mad 6374;

13. *S.Rajeshwari Vs. A.Ramasamy and anr* reported in 2020 SCC Online Mad 4884;

14. *U.N.Krishnamurthy (since deceased) through Lrs Vs. A.M.Krishnamurthy* reported in 2022 SCC Online SC 840

12. Per contra, the learned Senior counsel for the respondent would submit that when the defendant had admitted to the execution of Ex.A1 sale



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agreement, he could not contradict the terms of the same and there was express bar U/s.92 of the Indian Evidence Act in that regard. Learned Senior counsel would also rely on the evidence of D.W.2 and D.W.3 who have been examined on the side of the defendant and admittedly being close acquaintance of the defendant, have actually given evidence favouring the plaintiff. According to the learned Senior counsel, the plaintiff is a widow and even according to the defendant, the document was prepared only at the instance of the defendant, and therefore the plaintiff who had no other property, evinced interest to purchase the suit property and when the defendant admitted its execution, specifically, the defendant cannot take a contradictory plea that the agreement was a nominal sale agreement entered into only as a security for a borrowing Rs.50,000/-.

13. Learned Senior counsel for the respondent would also state that Ex.B1 which was the earlier sale agreement entered into by the defendant with one R.Srinivasan was not binding on the plaintiff as the plaintiff was not a party to the said document and in any event, the document was wholly



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irrelevant for the purpose of the present suit, besides also not being proved by examining the said R.Srinivasan, the signatory to the said agreement of sale. Further, the learned senior counsel for the respondent would submit that the appellant cannot canvass the plea of readiness and willingness having taken a definite stand that the agreement of sale was only a nominal transaction and not an intended or true sale agreement.

14. Learned Senior counsel for the respondents would place reliance on *Parvathy and anr Vs. Ranjith and anr*, reported in *2023 SCC Online Mad*, in which I was a part of the Division Bench delivered the judgment. The ratio laid down in the above case, with regard to readiness and willingness and exercise of discretion are well settled and there is no quarrel with the same. I find that the facts of the said cases were entirely on a different footing and the agreements in the cases were also registered sale agreements.

15. I am fortified by the decision of the Hon'ble Supreme Court in



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Placido Franciso Pinto (D) by Lr's Vs. Jose Francisco Pinto reported in **2021 8 MLJ 565**, wherein the Hon'ble Supreme Court held that first proviso to Sec.92 of the Indian Evidence Act permits any fact, which if proved, would invalidate any document. In so far as the reliance placed by the learned Senior counsel for the respondent on the decision of **Parvathy and another's** case and other judgments pertaining to readiness and willingness and exercise of discretion.

16. The Hon'ble Supreme Court in **Gangabai Vs.Chhabubai** reported in **1982 1 SCC pg 4** has elaborately dealt with Sec.92 Sub-Sec(1) of the Indian Evidence Act and held that the bar imposed by Sub-Sec(1) of Sec.92 applies only when a party seeks to rely upon the document embodying the terms of the transaction and in that event the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purposes of contradicting or modifying its terms. However, the Apex Court has held that the said principle



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is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and the document is a sham document. Applying the ratio laid down by the Hon'ble Supreme Court to the facts of the present case, the appellant has asserted that the sale agreement entered into was a totally different transaction altogether and the terms of the sale agreement were never intended to be acted upon and were of no consequence and for such purposes, oral evidence is admissible to show that the document was never intended to operate as an agreement of sale but was an entirely different agreement altogether, though not recorded in the document. The said ratio will squarely apply to the facts of the present case since the case of the defendant is that even though an agreement of sale was entered into, the parties never intended to act upon the same as a sale agreement but it was only executed as a security for repayment of the amount borrowed.

17. Conscious of the fact that I am exercising jurisdiction U/s. 100 of C.P.C, the substantial questions of law having already being framed by this



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Court on 19.12.2017, I proceed to discuss the material facts and legal contentions and relate them to settled legal position as discussed hereinabove, in order to answer the substantial questions of law. There is no difficulty with regard to the execution of the sale agreement as the defendant has categorically admitted to the fact that the said agreement was entered into between the plaintiff and the defendant. However, the point that remains to be seen is as to whether the said sale agreement was really intended to be acted upon as a sale agreement or as to whether the sale agreement was executed only as security for the alleged borrowing of Rs.50,000/- as contended by the defendant. The evidence of the plaintiff as P.W.1 is scanned and from her evidence, the following relevant admissions are shortlisted:

- a) the plaintiff states that she is not aware of the extent of the property;
- b) she had sold a property for Rs.1,00,000/- and had ready money with her and out of which she paid Rs.50,000/- as advance in order to purchase the suit property;
- c) the plaintiff owns lands in Pancheswaram village;
- d) the plaintiff is unaware of the length and breadth of the suit



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property;

e) the plaintiff claims that the suit property is of an extent of 3 cents alone;

f) the plaintiff has been getting an income of Rs.3,000/- every month;

g) the plaintiff has constructed a house and has been residing there for the past 3 years;

h) the plaintiff initially claimed ignorance of the factum of foundation having been raised in the suit property but when a question was put to her as to whether an Advocate Commissioner can be appointed, the plaintiff changed her stand and stated that the foundation has been already laid in the suit property, even before the date of the suit agreement;

18. D.W.2-Document Writer has stated that Ex.B1 was also prepared by him. He has also identified the witnesses to the said sale agreement dated 03.06.2003(Ex.B1);

D.W.2 has further categorically stated that in the locality, the practice of a person borrowing money and offering the property as security by



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entering into an agreement of sale was common. Further, he also stated that Exs.A1 and B1, though styled as sale agreements, they were not intended to be acted upon as sale agreements, but probably executed only as security for the money transactions. He has also further admitted to the fact that he has prepared similar documents for third parties. Importantly, he has not denied the suggestion that the agreement between the plaintiff and the defendant was only intended as security for the borrowing made by the defendant.

19. D.W.2 was re-examined by the counsel for the plaintiff and he has stated that Ex.A1 was a proper sale agreement and Ex.B1 was executed only as a security. He has further stated that for the plaintiff, he had prepared five to six documents and that neither the plaintiff nor the defendant informed him about anything with regard to the agreement being entered into only as a security for the amount borrowed by the defendant.

20. D.W.1- the defendant has stated that the signatures found in the Sale agreement Ex.A1 are his signatures and that the amount received by the



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plaintiff was only a borrowing and not advance for the sale of the property.

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With regard to the notice in Ex.A2, the defendant had stated that the notice was addressed to the correct address of the defendant. He also admits to the fact that it was brought to him by one person and that at the time of the borrowing, the defendant handed over the original sale deeds under which he purchased the two suit items to the plaintiff. He has also spoken about similar transaction entered into him by earlier with Srinivasan on 03.06.2003. D.W.2 one of the witnesses to Ex.A1 sale agreement has stated that (in cross examination on 08/09/2014) about 15 years back, the defendant had borrowed a sum of Rs.30,000/- from Srinivasan and as a security for the said borrowing an agreement of sale was entered into. He has also stated that he did not read the contents of the Ex.A1 sale agreement. D.W.3, the other attester to Ex.A1 has stated that he has attested Ex.A1 sale agreement and further denied the suggestion that the amount of Rs.50,000/-represented only advance and not a borrowing.

21. On an overall assessment of the above oral evidence, coupled with



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the unnatural terms of sale agreement Ex.A1, I am constrained to disagree with the findings of the First Appellate Court for the following reasons:

(i) even according to the plaintiff she had sold a property in Pancheswaram for Rs.1,00,000/- and only out of the said sale consideration, she paid advance under the agreement of sale for purchase of the suit property. Admittedly the sale consideration mentioned in the sale agreement was Rs.55,000/- for the entire suit property. When the plaintiff had the wherewithal to pay the entire sale consideration even on the date of the agreement, if really the parties intended the agreement to be a sale agreement, there was no rhyme or reason for fixing a one year time period for payment of a mere Rs.5,000/-, especially when the plaintiff had admitted to the fact that she had sufficient money with her, besides also earning Rs.3,000/- per month. If the case of the plaintiff as projected by the learned Senior counsel for the respondent is to be believed that she was a widow and that she believed the defendant and that she wanted to purchase a property for herself and reside there, the conduct of the plaintiff does not in anyway conform to such a line of argument. The plaintiff would have straight away paid the sum of



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Rs.55,000/- and purchased the property without waiting for one year to pay Rs. 5,000/- alone and get the property transferred to her.

ii) The second aspect is with regard to the handing over of the original documents of sale in favour of the defendant. Admittedly the plaintiff has exhibited two original sale deeds under which the suit items had been purchased by the defendant vide Exs.A4 and A5. This conduct is also quite unnatural, when it comes to a normal sale transaction. The owner of the property does not normally part with the custody of the original title deeds even at the time of entering into an agreement of sale and there is also no mention about the said handing over of the original sale deeds in the sale agreement viz., Ex.A1. This peculiar conduct of the parties viz., the defendant handing over his original sale needs (2 in number) to the plaintiff would only lead to an inference that the documents were only handed over as a security for the borrowing made by the defendant from the plaintiff. It is not as if the plaintiff has no means, because admittedly she has stated in her evidence that she has a house as well as lands in Pancheswaram village and that in cross examination she has also confirmed the fact that about 3 years



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back she has constructed a house and she has been residing there. Therefore the contention of the learned Senior counsel for the respondent that the plaintiff was a widow and had a no male support, having lost her husband cannot be countenanced.

22. Though, there is force in the submission of the learned Senior counsel for respondent that if really the defendant had only borrowed a sum of Rs.50,000/- from the plaintiff, the defendant ought to have established payment of interest as claimed by him and also the fact that despite knowledge of the pre-suit notice being admitted to by the defendant, the total silence and inaction on the part of the defendant would only establish the case put forth by the plaintiff. In a suit for specific performance, the relief sought is not only an equitable relief but also a discretionary relief. The plaintiff has to firstly establish the factum of an enforceable agreement of sale between the plaintiff and the defendant and additionally is also bound to satisfy the court that the plaintiff was always ready and willing to perform his or her part of the said agreement of sale at all relevant points of time and only



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if these twin factors are satisfied, the plaintiff would become entitled to the relief of specific performance.

23. Admittedly as seen from the evidence of P.W.1 as well as P.W.2 the specific portions which have been culled out herein above, the plaintiff does not even know the actual extent of the property or its boundaries. She also admitted to the fact that the property prices have gone up in the locality. Further, the Document Writer examined on the side of the plaintiff as P.W.2 has categorically stated that the suit sale agreement was intended only to be a security for the borrowing not intended to be a normal or regular sale agreement. Even though in re-examination he has chosen to state otherwise, his evidence especially in cross examination fortifies the case of the defendant that it was normal practice in the locality for parties to borrow money and offer their properties as security by entering into agreements of sale and further he has also admitted to the factum of Ex.B1 being prepared by him and witnesses known to him having attested that said document.

24. At this juncture, it would be relevant to address the argument put



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forth by the learned Senior counsel for the respondent that Ex.B1 cannot be looked into as it was irrelevant and also inadmissible in so far as the plaintiff was concerned. The admissions of P.W.2 as well as evidence of D.W.2 and D.W.3 who also attested Ex.B1 are sufficient to establish the evidentially value of Ex.B1. It was not necessary for the defendant to examine Srinivasan from whom the defendant had borrowed money. The evidence of P.W.2 coupled with evidence of D.W.2 and D.W.3 sufficiently established the fact that the defendant has offered his property for sale to one Srinivasan and it was only a nominal sale agreement, not intended to be acted upon. Even though learned Senior counsel for the respondent would point out the evidence of D.W.2 that the sale agreement of Srinivasan was around 1999, and could not refer to Ex.B1-sale agreement, I am unable to accept the said submission for the simple reason that the parties especially D.W.2 has given evidence in 2014 he may have casually mentioned the year as about 15 years back and one cannot expect an attesting witness to give dates with mathematical accuracy or precision. Evidence of P.W.2 read in consonance with evidence of D.W.2 and D.W.3 would only establish that Ex.B1 sale



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agreement was an agreement of sale entered into by the defendant for sale of the very same suit property and only as security for repayment of money borrowed. Even with regard to knowledge of the notice issued by the plaintiff and not replying to the same, the mere fact that the defendant has not chosen to receive the said notice personally had or taken any steps even after coming to know of the contents of the said notice, the same cannot be fatal to case of the defendant. As already pointed out, in a suit for specific performance, the plaintiff has to establish, by pleading and proving readiness and willingness and in cases of this nature, where the agreement itself is stated to be a nominal agreement, not intended to be acted upon as a sale agreement but only entered into for purpose of security, the burden is certainly on the plaintiff to upfront establish that the parties had actually intended to enter into a regular sale transaction and that the plaintiff was always ready and willing to perform his or her part of the obligations under the said agreement of sale and draw a presumption in his favour, before the burden shifts to the defendant to rebut the presumption. From an overall assessment of the pleadings as well as oral and documentary evidence, the plaintiff has not



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been able to establish the fact that Ex.A1 was a regular sale agreement, intended to be acted upon as a sale agreement. Further, even assuming the plaintiff and the defendant had entered into Ex.A1 sale agreement with an intention to actually convey the property, the conduct of the plaintiff clearly does not entitle her to the equitable and discretionary relief of specific performance. No doubt, a period of one year was fixed for performance of the terms of the sale agreement. However, the said period came to an end on 16.05.2006 on which date alone, the plaintiff choose to issue Ex.A2 notice. However, the suit was not filed immediately thereafter and the plaintiff chosen to file the suit for specific performance only on 02.04.2007, almost 11 months later, for which there is absolutely no explanation on the side of the plaintiff. Further, the fact that the plaintiff has initially denied the factum of foundation having been laid in the suit property and claimed that the suit property was vacant land turned around immediately on being confronted by the counsel for the defendant in cross examination that an Advocate Commissioner could be appointed to inspect the suit property and report about the physical features. The conduct of the plaintiff therefore is not



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blemishes.

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25. For all the above reasons, the plaintiff is not entitled to relief of specific performance. Exercising jurisdiction U/s.100 of C.P.C, in a case of this nature where the suit has been dismissed disentitling the plaintiff for the relief of specific performance and the First Appellate Court has reversed the findings, and this Court finds that the findings of the First Appellate Court are clearly based on misreading of the evidence adduced by the parties and also omission to advert to vital admissions of the parties Viz., P.W.1 and P.W.2, I am inclined to interfere with the findings of the First Appellate Court. Accordingly, the substantial questions of law are answered against the plaintiff and in favour of the defendant.

In fine, the Second Appeal is Allowed. However, the defendant has admitted the fact that he has borrowed a sum of Rs.50,000/- from the plaintiff and is therefore, directed to repay the same together with interest at 24% which is the agreed rate of interest even as per the defendant, from



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17.05.2005 till date within a period of two months from the date of receipt of a copy of this judgment. However, there shall be no order as to costs.

Consequently, connected miscellaneous petition is closed.

31.01.2024.

Internet:Yes

Index:Yes/No

Neutral Citation:Yes/No

Speaking/Non-speaking order

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To

1. The Subordinate Judge of Hosur.
2. The District Munsif of Denkanikottai.



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P.B.BALAJI, J.,
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Pre-delivery Judgment in
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