



S.A(MD)No.127 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 28.08.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

S.A(MD)No.127 of 2017

and

C.M.P(MD)Nos.5542 and 2104 of 2017

Mallika

... Appellant/Respondent/
Defendant

Vs.

1. P.Manoharan (Died)

...Respondent/Appellant/
Plaintiff

2.Amudha

3.Manju

4.Minor Sivaranjini

... Respondents 2 to 4

(Respondents 2 to 4 are brought on record as LR's of the deceased sole respondent vide Court order dated 08.06.2023 made in C.M.P(MD)No.5840 of 2023 in S.A(MD)No.127 of 2017)

(Minor 4th Respondent represented through her mother 2nd respondent as natural Guardian)

PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, to call for the records relating to the judgment and decree dated 22.09.2016 made in A.S.No.38 of 2014 on the file of the Subordinate Judge, Devakottai, reversing the judgment and decree dated 03.07.2014 in O.S.No.



S.A(MD)No.127 of 2017

39 of 2010 on the file of the District Munsif Court, Devakottai and set aside the same and consequently allowed the Second Appeal.

For Appellant : Mr.J.Anandkumar
For R2 – R4 : Mr.M.Rajeswari

JUDGMENT

This Second Appeal is preferred against the judgment and decree dated 22.09.2016 passed in A.S.No.38 of 2014 on the file of the Sub Court, Devakottai, reversing the judgment and decree dated 03.07.2014 passed in O.S.No.39 of 2010 on the file of the District Munsif Court, Devakottai.

2. The appellant is the defendant and the respondent is the plaintiff in O.S.No.39 of 2010 on the file of the District Munsif Court, Devakottai. The respondent/plaintiff has filed the suit for declaration that the suit property was purchased from the funds of plaintiff and directing the defendant to execute the sale deed in favour of the plaintiff.

3. For the sake of convenience, the parties are referred as plaintiff and defendant as arrayed in O.S.No.39 of 2010 on the file of the District Munsif Court, Devakottai.



S.A(MD)No.127 of 2017

WEB COPY

4. Case of the plaintiff in brief:

The plaintiff and the defendant are husband and wife, they married on 12.04.1987 and they lived together from 1987 to 2008. Out of wedlock, one female child was born. The plaintiff was working in Dubai and used to send money to the defendant. The defendant has no income and she always depended on the plaintiff. The suit property was purchased in the name of the defendant out of funds sent by the plaintiff with the condition that the defendant should transfer the suit property to the plaintiff whenever it is required. During the joint living, the plaintiff has given more than 25 lakhs and 60 sovereigns of gold jewels to the defendant. But the defendant acted on her own ways. Hence, a panchayat was held on 12.01.2005. In the presence of panchayatdars, the defendant executed a document admitting that the suit property was purchased in her name under promise that she would transfer the property in favour of the plaintiff on his demand. On 21.03.2010 the plaintiff returned to India from Dubai and asked to execute the sale deed. But the defendant uttered that she would sell the property to some other third party. Therefore, the plaintiff laid the suit.



S.A(MD)No.127 of 2017

5. Case of the Defendant in brief:

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The defendant purchased the suit property out of her own earnings. The plaintiff did not send any money to her. The defendant denied that the plaintiff sent Rs.25 lakhs and gave 60 sovereigns of gold to her. The defendant is illiterate. There was no panchayat held on 12.01.2005 and the defendant had not executed any deed (aatharavu pathiram). The deed would have been forged fraudulently by the plaintiff.

6. The Trial Court framed the following issues:

"(1) Whether the suit property was purchased out of income of the plaintiff?

(2) Whether the plaintiff is entitled to the relief of declaration as prayed for?

(3) Whether the plaintiff is entitled to seek the relief of mandatory injunction to execute sale deed in his favour?

(4) To what other relief the plaintiff is entitled to?"

7. During trial, on the plaintiff's side, four witnesses were examined as P.W.1 to P.W.4 and marked 8 exhibits as Ex.A.1 to Ex.A.8. On the defendant's side, the defendant was examined as D.W.1 and Ex.B.1 alone was marked.



S.A(MD)No.127 of 2017

WEB COPY

8. After hearing both, the learned District Munsif, Devakottai, concluded that the plaintiff failed to prove that he sent money to the defendant and out of which the defendant purchased the suit property and dismissed the suit by passing judgment and decree dated 03.07.2014.

9. Aggrieved by the judgment and decree in O.S.No.39 of 2010, the plaintiff preferred the Civil Appeal in A.S.No.38 of 2014 before the Subordinate Court, Devakottai. The first Appellate Court after hearing both and after perusing records held that the suit property was purchased by the defendant out of money sent by the plaintiff and passed judgment dated 22.09.2016 allowing the appeal in A.S.No.38 of 2014 by reversing the dismissal of the suit in O.S.No.39 of 2010.

10. Challenging the judgment and decree of the First Appellate Court, the defendant preferred this Second Appeal and the same has been admitted for file on 02.03.2017 on the following substantial question of law:-

"(1) Whether the first Appellate Court is right in reversing the judgment without framing an issue regarding benami transaction?"



S.A(MD)No.127 of 2017

WEB COPY

(2) Whether the first Appellate Court is right in granting mandatory injunction to execute sale deed when admittedly plaintiff failed to file a suit for specific performance based on Ex.A.3?

(3) Whether the first Appellate Court is right in granting decree by shifting burden to the appellant herein when admittedly the respondent/plaintiff did not discharge their initial burden?

(4) Whether the first Appellate Court is right in decreeing the suit in total when the relief of declaration and consequential mandatory injunction are mutually destructive in the circumstances of the case?"

11. Heard both sides and perused the records in this Second Appeal.

12. The learned counsel for the appellant/defendant has submitted that the plaintiff and the defendant are husband and wife. Their marriage was held in the year 1987 and the husband left in 1988. The suit property was purchased by the wife on 25.08.1996 under Ex.D.1 (Ex.A.2). Since a dispute arose between the plaintiff and defendant in the year 2005 they were living separately and it is alleged that the defendant executed a deed of undertaking to reconvey the suit property to the plaintiff. The plaintiff issued Ex.A.4 -



S.A(MD)No.127 of 2017

Legal Notice, dated 05.04.2010 wherein the plaintiff did not disclose about the deed of undertaking dated 12.01.2005 and the defendant did not state in her reply Ex.A.5 also. The plaintiff issued legal notice only mentioning as benami transaction and also return of money. The trial Court has clearly discussed in its judgment in paragraph No.11 by holding that the plaintiff failed to prove about the money sent by him to the defendant, though he stated through bank transaction, muchless failed to prove that the money advanced for Ex.D.1 sale deed. The trial Court has also held that the plaintiff did not prove the benami transaction. The plaintiff ought to have sought relief of cancellation of sale deed, in the absence of such prayer the suit is not maintainable. The trial Court has correctly appreciated the evidence of plaintiff side in paragraph No.11 and concluded that the Ex.A.3 deed of undertaking was not proved by the plaintiff. As per Section 102 of the Indian Evidence Act, the initial burden of proof lies only on the plaintiff, but he did not prove his initial burden. Further, even as per Ex.A.3 it is only an agreement, on that basis the plaintiff could not file suit for declaration and mandatory injunction. As per Section 31 of the Specific Relief Act, the plaintiff has to seek proper prayer. The first Appellate Court has not considered the question of benami transaction. As per Sections 3 and 4 of



S.A(MD)No.127 of 2017

the Benami Transaction Act, the person who claims benami has to prove the same since the plaintiff stated that he purchased the property in the name of the defendant only as name lender. The defendant's stand is that her father had 30 acres of land and she was in possession of 4 milch cows and she was having sufficient source to pay the sale consideration. The trial Court has correctly appreciated the evidence of both sides and dismissed the suit. But, the first Appellate Court misconstrued the facts and evidences of both sides and decreed the suit, which is not sustainable. Therefore, the Second Appeal may be allowed.

13. In support of his argument, the learned counsel for the appellant/defendant has relied on the following citations:

"(i) (2014) 7 MLJ 855 (S.Balakrishnan and Ors. /v/ S.Ayyammal (Deceased) and Ors.)

(ii) 2016 - 2 Law Weekly 630 (Om Prakash Sharma @ O.P.Joshi /v/ Rajendra Prasad Shewda and Others)

(iii) 1974 AIR 171 (Jaydayal Poddar (Deceased) Through his LRs and Anr. /v/ MST.Bibi Harza and Ors.)

(iv) (2015) 4 MLJ 140 (Angamuthammal /v/ Govindaraj)"



S.A(MD)No.127 of 2017

WEB COPY

14. Per contra, the learned counsel for the respondents vehemently argued that the defendant admits that the plaintiff was working in Dubai and that four bank accounts were opened after marriage. The plaintiff's side witnesses categorically deposed that the plaintiff sent money from Dubai, where he was working and the suit property was purchased out of money sent by the plaintiff. The plaintiff's case is that since the defendant intended to live on her own way misunderstanding arose between the parties and they were living separately and hence, a panchayat was held in the year 2005 and in that panchayat the defendant agreed to transfer the suit property to the name of plaintiff and also return the money sent by him. Ex.A.3 was reduced into writing based on panchayat held. The defendant herself admitted that she signed in Ex.A.3. The plaintiff has proved these facts by examining the witnesses who signed in Ex.A.3. Admittedly, P.W.3 is the daughter of the plaintiff and defendant, who clearly adduced evidence in support of plaintiff. P.W.3 could not be termed as an interested witness. When the defendant pleads that Ex.A.3 is forged by her signature, she has to prove the same. Whereas the plaintiff has clearly proved the execution of Ex.A.3 and the signature put by the defendant, now the onus is on the defendant to disprove



S.A(MD)No.127 of 2017

the same. But, except the defendant, no other witness was examined on the defendant's side. Ex.A.3 is not a sale agreement and so, the defendant's version is not correct. In Ex.A.3, the defendant agreed to reconvey the property to the plaintiff. The defendant has not acted as per Ex.A.3 and so, the plaintiff filed the suit. This fact was categorically proved by the plaintiff side witnesses P.W.2 to P.W.4. The version of the plaintiff is not benami transaction. Hence, the plaintiff clearly sought for a declaration that the suit property is self acquired property of plaintiff and consequential mandatory injunction of reconvey, by paying appropriate Court fee. In support of his argument, the learned counsel for the respondents has relied on the following citation:

"(i) (2010) 1 Supreme Court Cases 83 (Grasim Industries Ltd. and Anr. /v/ Agarwal Steel)

(ii) (2019) 8 Supreme Court Cases 701 (Raja Ram /v/ Jai Prakash Singh and Ors.)"

15. Heard the arguments of both and perused the material records of the case. It is admitted by both the plaintiff and defendant that both are husband and wife and the plaintiff was working in Dubai at the time of purchase of suit property. The appellant/defendant side mainly contended



S.A(MD)No.127 of 2017

WEB COPY

that the plaintiff's case is under benami transaction and he failed to prove the same and also the first Appellate Court failed to decide the issue of benami transaction. Transaction between the husband and wife is not a benami transaction. It is in general practice in our society, that the husband pays sale consideration and gets sale deed executed in the name of wife. If a husband gives sale consideration for purchase of an immovable property in the name of his wife, such fact does not necessarily imply benami transaction. This fact was upheld in various decisions of the Hon'ble Supreme Court and High Courts. Hence, the argument advanced by the appellant/defendant regarding benami transaction is not tenable and not acceptable.

16. On perusal of judgments of the Courts below, the trial Court held that the plaintiff failed to prove the funds sent by the plaintiff to defendant to purchase the suit property and the material witnesses contradictorily deposed in respect of Ex.A.3 and since Ex.A.3 is an agreement, the plaintiff has to seek relief under the Specific Relief Act. On perusal of judgment of the first Appellate Court, it has correctly held that Ex.A.3 is not an agreement and it is an undertaking, unilaterally executed by the defendant in the presence of witnesses to execute the sale deed as and when required by the plaintiff. On



S.A(MD)No.127 of 2017

perusal of evidences of both sides, P.W.2 to P.W.4 are the close relatives to both parties. P.W.4 is the brother of the defendant. They have categorically deposed that the plaintiff sent money from abroad for the purchase of property. But, the defendant failed to prove that she advanced sale consideration out of her own income from milch cows and lands of her father. Except defendant's evidence, there is no evidence adduced in support of her stand. It is the case of the plaintiff that money was sent from abroad through bank. Admittedly, the defendant opened four bank accounts after marriage, but she has not come forward to produce those bank statements, if so, it is presumed that the money was sent by the plaintiff through bank is proved. Moreover, the plaintiff's side witnesses firmly deposed about the sending of money by the plaintiff. The defendant in her cross examination deposed as follows:-

“எனது கணவர் சுமார் திருமணம் முடிந்து 2, 3 மாதங்கள் இருந்து அவர் வெளி நாட்டில்தான் இருந்து வருகிறார். இடையில் வந்து போவார்.....திருமணம் முடிந்த பிறகுதான் வங்கி கணக்கு ஆரம்பித்தேன் மேற்படி கணக்கு தற்போது வரை என் பெயரில் உள்ளது என்றால் சரிதான். வங்கி கணக்கு புத்தகத்தை நீதிமன்றத்தில் தாக்கல் செய்ய தயாராக இல்லை ...”.



S.A(MD)No.127 of 2017

WEB COPY

17. On perusal of evidence of both sides, the defendant has not denied her signature in Ex.A.3 and she has not stated that she could not read and write Tamil. As per panchayat held in the year 2005, Ex.A.3 is said to have been executed before a notary public. P.W.2 and P.W.4 signed in that deed. On perusal of Ex.A.3, the recitals are as follows:

“தாங்களும் துபாயிலிருந்து தங்களது சம்பாத்தியத் தொகையிலிருந்து டிராப்ட் மூலமாக தொகைகள் அனுப்பியும் மற்றும் தாங்கள் ஊருக்கு வரும்போது என்னிடம் நேரடியாக கொடுத்த தொகைகள் மற்றும் நகைகளை வைத்து நான் நமது குடும்பத்தையும் நமது மகளையும் நல்லமுறையில் பாதுகாத்து பராமரித்து வருகிறேன். தங்களுடன் உடன்பிறந்தவர்களான பஞ்சநாதன் என்ற தம்பியும் இந்திரா என்ற அக்காவும் உள்ளார்கள் என்றும் ஆகவே தங்கள் பெயரில் சொத்துக்கள் வாங்கினால் மேற்படியார்களால் பின்நாட்களில் ஏதேனும் பிரச்சனைகள் ஏற்படக்கூடும் என்பதற்காக தாங்கள் துபாயிலிருந்து தொகைகளை அனுப்பி எனது பெயரில் சொத்துக்களை வாங்கிக்கொள்ளும்படி குறிப்பிட்டுக் கூறியதன் அடிப்படையில் தாங்கள் அனுப்பிய தொகையைக் கொண்டு நான் தேவக் கோட்டை.....(தாவா சொத்து) பதிவு செய்யப்பட்டுள்ளது. மேற்படி கிரையபத்திரமும் மற்றும் கிரையபத்திரத்தில் கண்ட சொத்துக்கள் சம்மந்தப்பட்ட ஆவணங்களும் என்னிடம் உள்ளது. ஆகவே தாங்கள் துபாயிலிருந்து ஊருக்கு வந்தவுடன் தாங்கள் கேட்கும் சமயத்தில் தங்கள் பணத்தால் வாங்கப்பட்ட சொத்தை தங்கள் பெயருக்கு பாத்தியப்படுத்திக்கொடுத்து



S.A(MD)No.127 of 2017

WEB COPY

அதற்கான ஆவணங்களை எழுதி பதிவு செய்து கொடுக்க
சம்மதிக்கிறேன்.....”

It is clear from the above recitals that the suit property was purchased utilizing the money sent by the plaintiff in the name of defendant, who admitted to reconvey the same when he requires. So, it cannot be taken as sale agreement, because both parties not signed, only defendant signed in all pages, which is admitted by her and also categorically proved by P.W.2 to P.W.4, hence, it is an undertaking executed by the defendant. Therefore, the first Appellate Court correctly appreciated the evidences adduced by both side and correctly reversed the finding of the trial Court, which need not be interfered by way of Second Appeal. The citation relied on by the appellant/defendant are not applicable to the facts of the case, whereas the citation relied on by the respondents side are applicable to the facts of the case.

18. From the above facts and circumstances conjoined with evidences oral and documentary, adduced in this case, the first Appellate Court correctly passed the judgment and the said findings need not be interfered by this Court by way of Second Appeal. Hence, the questions of law framed in



S.A(MD)No.127 of 2017

this Second Appeal are answered against the appellant/defendant. Thus, this Second Appeal fails.

19. In the result, the Second Appeal is dismissed. The judgment and decree dated 22.09.2016 passed in A.S.No.38 of 2014 on the file of the Sub Court, Devakottai, reversing the judgment and decree dated 03.07.2014 passed in O.S.No.39 of 2010 on the file of the District Munsif Court, Devakottai is confirmed. No costs. Consequently, connected Miscellaneous Petitions are closed.

28.08.2024

NCC : Yes / No

Internet : Yes / No

Index : Yes / No

VSD

To

1.The Subordinate Judge,
Devakottai.

2.The District Munsif Court,
Devakottai.

3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.A(MD)No.127 of 2017

P.VADAMALAI, J.

VSD

Pre-Delivery Judgment made in
S.A(MD)No.127 of 2017

28.08.2024