



S.A(MD)No.129 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.07.2024

Pronounced on : 04.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

**S.A(MD)No.129 of 2017
and
C.M.P(MD)No.2105 of 2017**

Albert Wilson

... Appellant/Appellant
2nd Defendant

Vs.

1.Nelson

... 1st Respondent/1st Respondent/
Plaintiff

2.Alis Jothimani

... 2nd Respondent/2nd Respondent/
1st Defendant

3.K.Josevah Daniel

4.K.Immanuvel Jeyakumar

...3rd & 4th Respondents

(Respondents 3 and 4 were impleaded as per the order of this Court, dated 05.12.2023 made in C.M.P(MD)No. 16400 of 2023 in S.A(MD)No.129 of 2017)



S.A(MD)No.129 of 2017

WEB C PRAYER :-

This Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed by the I Additional District and Sessions Judge (PCR), Thanjavur in A.S.No.42 of 2014, dated 21.10.2016, confirming the judgment and decree passed by the Principal Subordinate Judge, Thanjavur in O.S.No.126 of 2010, dated 25.03.2013.

For Appellant	: Mr.N.Tamilmani
For R1	: Mr.P.Vadivel
For R2	: Mr.A.Arunprasad
For R3	: Mr.S.Mahendrapathy
R4	: Given up

JUDGMENT

This Second Appeal is filed against the judgment and decree, dated 21.10.2016 passed in A.S.No.42 of 2014 on the file of the I Additional District and Sessions Court (PCR), Thanjavur, confirming the judgment and decree, dated 25.03.2013 passed in O.S.No.126 of 2010 on the file of the Principal Sub Court, Thanjavur.

2. The appellant is the 2nd defendant and the 1st respondent is the plaintiff in O.S.No.126 of 2010 on the file of the Principal Sub Court,



S.A(MD)No.129 of 2017

Thanjavur. The 2nd respondent was the 1st defendant. Respondents 3 and 4 were impleaded as per the order of this Court, dated 05.12.2023 made in C.M.P(MD)No.16400 of 2023 in S.A(MD)No.129 of 2017.

3. The 1st respondent/plaintiff filed the suit for specific performance in respect of the suit property.

4. For the sake of convenience, the parties are referred as arrayed in O.S.No.126 of 2010 on the file of the Principal Sub Court, Thanjavur.

5. Case of the plaintiff:

The suit property belonged to the 1st defendant. She leased out the property to the plaintiff's family by way of Othi in the year 1996. Subsequently, on 17.03.1999, the 1st defendant executed an Othi deed in respect of suit property in favour of the plaintiff's mother on receipt of Rs.30,000/-. The plaintiff's family has been in possession and enjoyment of the property from 1996 by paying kists. Thereafter, the 1st defendant offered to sell the suit property to the plaintiff, who also agreed to purchase the same, and on 11.02.2009 a sale agreement was executed by the parties fixing



S.A(MD)No.129 of 2017

WEB COPY

the sale consideration at Rs.1,10,000/-. On the same date, the 1st defendant received Rs.70,000/- from the plaintiff out of sale consideration.

It was agreed that the defendant adjusted the Othi amount of Rs.30,000/- and the balance of Rs.10,000/- was to be paid within 6 months. At the time of sale agreement, the 1st defendant handed over the original title deeds of the suit property to the plaintiff. On 30.07.2009, the 1st defendant received the balance of Rs.10,000/-, thereby, the 1st defendant received the entire sale consideration. The plaintiff requested the 1st defendant to register the sale deed. In spite of several times, the 1st defendant did not perform her part of contract, while the plaintiff was always ready and always willing to perform his part. During 2nd and 3rd week of May 2010, the 1st defendant demanded more money for executing the sale deed. So, the plaintiff issued a legal notice, dated 23.05.2010. The 1st defendant, who received the legal notice, did not send any reply and requested two weeks further time. The plaintiff purchased stamp papers for registration and waited for registration. In the meanwhile, on 09.06.2010 the 2nd defendant openly gave out that he purchased the suit property from the 1st defendant and he would take forcible possession from the plaintiff. The plaintiff came to know that there was a sale deed executed by the 1st defendant in favour of the 2nd defendant on



S.A(MD)No.129 of 2017

21.05.2010. The 2nd defendant is not a *bona-fide* purchaser. Hence, the plaintiff filed the suit for specific performance.

6. Case of the 1st Defendant:-

The 1st defendant and the mother of the plaintiff were working as teachers in the same school. The 1st defendant has given the suit property to her on Othi since 1996 and on 17.03.1999, she executed the Othi deed on receipt of Othi amount Rs.30,000/-. On 11.02.2009, the 1st defendant offered to sell the suit property to the plaintiff and both agreed for the same. The sale agreement was executed by them on 11.02.2009 for sale consideration of Rs.1,10,000/-, out of the said amount the 1st defendant received Rs.70,000/- and the Othi amount Rs.30,000/- was adjusted and Rs.10,000/- was only to be paid. On 30.07.2009, the said Rs.10,000/- was received. The 1st defendant was always ready and willing to execute the sale deed. Due to old age, she depended on her sons. The younger son and her husband represented that the sale deed was prepared in favour of the plaintiff and obtained her signature, she was not allowed to read the contents. This defendant has not agreed to sell the property in favour of the second defendant at any time.



S.A(MD)No.129 of 2017

WEB COPY

7. Case of the 2nd defendant:-

The 2nd defendant denied the entire averments made in the plaint. The 2nd defendant is the owner of the eastern side of the suit property, so he wanted to purchase the suit property. He approached the plaintiff and enquired about Othi stated his willingness for purchase of suit property. The plaintiff also gave consent to hand over the original deeds related to the suit property. Then only, the 2nd defendant purchased the suit property from the 1st defendant by virtue of registered sale deed, dated 23.05.2010. The 2nd defendant is a *bona-fide* purchaser and the sale deed, dated 23.05.2010 is not sham and nominal. A joint patta was granted in favour of the 2nd defendant on 23.09.2011. The 2nd defendant is the absolute owner of the suit property and he is in possession and enjoyment of the suit property.

8. During trial, on the plaintiff's side, the plaintiff was examined as P.W.1 and one of the attestors to sale agreement was examined as P.W.2 and marked 9 exhibits as Ex.A.1 to Ex.A.9. On the defendants' side, the 1st defendant was examined as D.W.1, however, her evidence was eschewed on application since she failed to appear for cross examination, one



S.A(MD)No.129 of 2017

Jeyaseelan and Kuilandaisamy were examined as DW2 and DW3 and Ex.B.1 to Ex.B.8 were marked.

9. The trial Court/Principal Sub Court, Thanjavur framed the following issues:-

"(1) Whether the plaintiff was ready and willing to perform his part of contract?

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

(3) Whether the plaintiff is entitled to the relief of injunction as prayed for?

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

10. After hearing both sides, the learned Principal Sub Judge, Thanjavur concluded that the plaintiff has proved his case and decreed the suit as prayed by passing judgment and decree, dated 25.03.2013.

11. Aggrieved by the judgment and decree in O.S.No.126 of 2010, the 2nd defendant preferred the Civil Appeal in A.S.No.42 of 2014 on the file of the I Additional District and Sessions Court (PCR), Thanjavur. Thereafter, the 1st defendant filed the appeal in A.S.No.10 of 2015 on the ground that the



S.A(MD)No.129 of 2017

trial Court has not properly appreciated the petition by the 1st defendant to set off her pleadings.

12. The first Appellate Court after hearing both sides and after perusing the material records discussed the following points:

A.S.No.42 of 2014

(1) Whether the plaintiff has proved Ex.A.1 sale agreement is true and valid?

(2) Whether the plaintiff has proved his readiness and willingness to perform his part of obligation under Ex.A.1 sale agreement?

(3) Whether the 2nd defendant is a bona fide purchaser of the suit property purchased the same for value without notice of Ex.A.1 sale agreement?

(4) Whether the plaintiff is entitled to the relief of specific performance of Ex.A.1 sale agreement.

(5) Whether the plaintiff is entitled only to alternative relief as prayed for?

A.S.No.10 of 2015

Whether the 1st defendant can be allowed to set off her earlier pleadings?



S.A(MD)No.129 of 2017

WEB COPY

13. The first Appellate Court, after hearing both and after perusing the case records, answered the points in favour of the plaintiff and dismissed the appeals in A.S.No.42 of 2014 and A.S.No.10 of 2015 by passing judgment, dated 21.10.2016 and confirmed the judgment and decree passed in O.S.No. 126 of 2010, dated 25.03.2013.

14. Challenging the judgment and decree of the First Appellate Court passed in A.S.No.42 of 2014, the second defendant has preferred this Second Appeal and the same has been admitted on 03.03.2017 by framing the following substantial questions of law:-

1. Whether the executor of alleged sale agreement in favour of the plaintiff (Ex.A.1) and the sale deed in favour of the second defendant (Ex.B.1) was not come forward to depose evidence, whether the Courts below are correct in considering the written statement of the first defendant is admissible in evidence?

2. Whether the second defendant taking plea that the plaintiff and the 1st defendant are colluded together and filed the suit, whether the Courts below are correct in considering the written statement of the first defendant in favour of the plaintiff?



WEB COPY



S.A(MD)No.129 of 2017

3. When an application under Order VII Rule 8

CPC is filed by the 2nd defendant to set aside the pleadings of the first defendant is pending, passing of judgment and decree by the trial court by considering the pleadings of the 1st defendant is correct in the eye of law?

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

Both sides have filed their written arguments.

16. The learned counsel for the appellant/2nd defendant has submitted that the 2nd defendant is not directly aware of the Othi, dated 11.02.2009 between the plaintiff and the 1st defendant. It came to understand that at the time of Othi, the plaintiff compelled the 1st defendant to hand over the original title deeds of the property and upon such compulsion, the 1st defendant handed over the title deeds and taking advantage of the same, the plaintiff created sale agreement, dated 11.02.2009. The 1st defendant approached the 2nd defendant and offered to sell the suit property, as the 2nd defendant is the owner of eastern side of the suit property, he agreed to purchase. At that time, the 1st defendant disclosed the Othi of the plaintiff.



S.A(MD)No.129 of 2017

WEB COPY

The plaintiff also agreed to hand over the original documents after the Othi amount was received. So, believing the words, the 2nd defendant purchased the property by virtue of a registered sale deed, dated 21.05.2010. The 1st defendant has also handed over Ex.B.2 - Patta Pass Book and Ex.B.3 and Ex.B.4 - earlier Othi deeds and hence, the 2nd defendant is a *bona-fide* purchaser. Thereafter, the 1st defendant demanded more money from the 2nd defendant. When the 2nd defendant refused, the 1st defendant and the plaintiff colluded together to cheat the 2nd defendant and created Ex.A.1 unregistered sale agreement using anti dated stamp paper. Ex.A.1 - Stamp Papers bear the date of seal as 19.06.2008, whereas it was mentioned as they were sold on 10.02.2009 in the name of plaintiff. The 1st defendant had not handed over the title deeds to the 2nd defendant. So, the 1st defendant and plaintiff colluded together and created the alleged sale agreement and hence, the 2nd defendant lodged a police complaint. Admittedly, the plaintiff alleged to have paid entire sale consideration on 30.07.2009. The plaintiff issued Ex.A.3 - Legal Notice on 23.05.2010 only after the purchase of suit property by the 2nd defendant on 21.05.2010. The plaintiff admitted that the defendants 1 and 2 are residing in the same street much less as neighbours. So, the plaintiff knew about the purchase of suit property by the



S.A(MD)No.129 of 2017

2nd defendant. Further, after payment of entire sale consideration on 30.07.2009, the plaintiff has not taken any sincere steps to get sale deed registered in his name as per sale agreement till the issuance of legal notice, i.e., for more than 10 months. It is a settled proposition that the compliance of readiness and willingness has to be in spirit and substance and not in letter or form and if the allegations in the plaint as well as evidence and the other circumstances lead to the conclusion that the plaintiff was not ready and willing to perform his part of the contract then he is not entitled to a decree for specific performance. In this case, the plaintiff has not proved his readiness and willingness after payment of entire sale consideration. So, the plaintiff and the 1st defendant colluded in creating the alleged unregistered Ex.A.1 - Sale Agreement. The 1st defendant was a teacher and her statement that she signed the sale deed, dated 21.05.2010 without reading its contents is absolutely not acceptable. After purchase of property, a joint patta was also issued in favour of the 2nd defendant. Though in the written statement filed by the 1st defendant admitting the sale agreement and case of the plaintiff, the 2nd defendant has not been given opportunity to cross examine the 1st defendant regarding her pleadings. Without examining the party, pleading cannot be taken into consideration. The plaintiff has not proved that



S.A(MD)No.129 of 2017

he was always ready and willing to perform his part of contract. There is no reason pleaded when he paid the entire sale consideration, why he waited for a long time in getting the sale deed registered. Further, the defendant filed a petition to set off the earlier pleadings, but the trial Court without considering the same passed the decree. The Courts below erred in coming to a conclusion only based on written statement of 1st defendant, which is a miscarriage of justice. The plaintiff is only entitled to get back his money from the 1st defendant. In support of his contention, the learned counsel for the 2nd defendant relied on the decision reported in **2011 (3) CTC 205 (S.Narayanappa /v/ Sampangi Ramayya)**.

17. Per contra, the learned counsel for the plaintiff contended that the Courts below gave concurrent findings and in Second Appeal the evidence could not be re-appreciated. The suit property belonged to the 1st defendant, who offered for sale of her property to the plaintiff and a sale agreement was reduced into writing on 11.02.2009 fixing sale consideration of Rs.1,10,000/-. The 1st defendant filed her written statement, wherein she specifically admitted the execution of sale agreement and also the receipt of sale consideration after adjusting the Othi amount. Admittedly, the plaintiff



S.A(MD)No.129 of 2017

has been in possession from 1996 onwards and the original title deeds of the suit property are in the custody of the plaintiff. The 1st defendant contended that her son and husband made her to sign a deed on 21.05.2010 stating the sale deed was executed in favour of the plaintiff based on sale agreement. Believing her husband and son, she signed the deed. The contention of the 2nd defendant that the 1st defendant approached him to sell the property to discharge the debt including the Othi amount to the plaintiff and the 2nd defendant enquired the plaintiff about the Othi deed are all false. If really the 2nd defendant enquired with the plaintiff, he would have disclosed about the Othi and sale agreement. Thereafter, the plaintiff made several requests to the 1st defendant, who also pleaded in her written statement that as she was not well, her husband and son obtained her signature in the sale deed as if it was executed in the name of the plaintiff. So, the plaintiff has established his part of contract and also both the Courts below correctly held the same is proved as per provision of Section 16(c) of the Specific Relief Act. Further, the 2nd defendant stated that he was a *bona-fide* purchaser without notice. But as per his pleadings he is fully aware of the possession of the plaintiff over the suit property and also the title deeds were with the plaintiff. Contrary to that, in the sale deed obtained by him on 21.05.2010



S.A(MD)No.129 of 2017

endorsement were made as if the possession was handed over to him on that date. In Ex.B.7 - Police Complaint, the 2nd defendant alleged that the 1st defendant suppressed the sale agreement and sold the suit property. So the 2nd defendant's sale is not protected under Section 19 of the Specific Relief Act. It is trite principle of law that the subsequent purchaser alone prove his *bona-fide* under Section 19(b) of the Specific Relief Act. But, in this case, the 2nd defendant failed to prove his *bona fide*. No prudent man would purchase a property and got sale deed in his favour, when admittedly there is encumbrance by way of Othi and also original title deeds are with the Othidar. Further, there is no recital in the sale deed of the 2nd defendant about the Othi and custody of original title deeds with the plaintiff. Further, the 2nd defendant did not get into witness box to depose evidence, only his power of attorney deposed on his behalf. The Courts below are correct in holding that the plaintiff is entitled for decree of specific performance. Therefore, he prayed to dismiss the Second Appeal. In support of his contention, the appellant/plaintiff's counsel relied on the following citations:

- (1) 2015 (2) Law Weekly 419 (K.Prakash /v/ B.R.Sampathkumar)**
(2) 2015 (5) CTC 147 (M.Bama /v/ Dr.R.Nirupama)



S.A(MD)No.129 of 2017

WEB COPY

(3) (2011) 15 Supreme Court Cases 247
(Jogendra Ram /v/ Phullan Mian)

(4) (2000) 6 Supreme Court Cases 402
(R.K.Mohammed Ubaidullah & Ors./v/ Hajee
C.Abdul Wahab (D) By LR.s. & Ors.)

18. It is an admitted fact that the suit property belonged to the 1st defendant. The 1st defendant and the plaintiff's mother were working as teachers in the same school. It is the case of the plaintiff that the plaintiff's family is in possession of the suit property from 1996 and subsequently, the 1st defendant executed the Othi deed on 17.03.1999 in favour of the plaintiff. It is the case of the plaintiff that the 1st defendant offered for sale of the suit property and both the plaintiff and the 1st defendant executed Ex.A.1 - Sale Agreement on 11.02.2009 fixing sale consideration of Rs.1,10,000/- and received Rs.70,000/- and adjusted the Othi amount of Rs.30,000/- and balance of Rs.10,000/- was to be paid. It is also stated that the 1st defendant handed over Ex.A.2 deed of the suit property to the plaintiff. When there was delay in execution of sale deed, after sending legal notice the plaintiff filed the suit with above pleadings. The 1st defendant did not send any reply notice. She appeared in the suit and filed written statement admitting the pleadings made in the plaint. Based on such admission, the Courts below



S.A(MD)No.129 of 2017

concluded the issues in favour of the plaintiff. Challenging the concurrent finding the present Second Appeal is preferred by the 2nd defendant.

19. Normally when the Courts below gave concurrent findings, in the Second Appeal the evidence could not be reappreciated. In **Ravi Setia v. Madan Lal** case reported in (2019) SCC 381, the Hon'ble Supreme Court held that, in cases of perverse findings/complete misappropriation/erroneous consideration of the evidence, or failure to consider relevant evidence, a Court in the second appeal could reappreciate the evidence. Further, in **Nazir Mohamed v. J.Kamala** case reported in (2020) 19 SCC 57, the Hon'ble Supreme Court held as follows:

“37.4 The general rule is, that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well recognized exceptions are where: (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there



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S.A(MD)No.129 of 2017

is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.”

20. In this case, admittedly the 1st defendant filed a written statement admitting the pleadings of the plaintiff. Next, she filed a proof affidavit as chief examination, subsequently, a memo was filed on the 1st defendant's side, to eschew the proof affidavit as she was unable to get into witness box for cross-examination. This was not disputed by both sides. So, from the records, it is clear that the 1st defendant has not got into witness box and was subjected for cross examination by the parties to the suit. It is a settled proposition, that a pleading of a litigant cannot be taken as evidence unless he/she enter into witness box and is subject to cross examination. In the case of **Ameer Trading Corporation Ltd., v. Shapoorji Data Processing Ltd.**, reported in **AIR 2004 SC 355**, the Hon’ble Supreme Court held as follows:

“In all appealable cases, though the examination in chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be ordered to form part of the evidence unless the deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is



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S.A(MD)No.129 of 2017

under his signature and the statement being made on oath is to be recorded by following the procedure prescribed under Rule .5. ”

So there cannot any doubt that in all appealable cases, the examination in chief of a witness in the form of the affidavit cannot form part of the evidence unless the deponent himself enters into the witness box and confirms the contents of the affidavit are as per his instruction and he/she has signed the same.

21. In this case, the 1st defendant was not in a position to get into witness box to confirm that the evidence in the affidavit was prepared as per her instruction and she put her signature on it. So, though the 1st defendant filed a written statement favouring the case of the plaintiff, her proof affidavit filed, which was not confirmed and the same was eschewed on the basis of a memo filed by the 1st defendant side as she was not in a position to get into witness box for cross examination. While being the facts, the Courts below considered the written statement of the 1st defendant and concluded the same in favour of the plaintiff is not a valid one in the eye of law. Because, the 2nd defendant claims that he is a *bona-fide* purchaser of the suit property by virtue of Ex.B.1 registered sale deed executed by the



S.A(MD)No.129 of 2017

1st defendant, whereas the Ex.A.1 - Sale Agreement is unregistered one.

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On perusal of records, the plaintiff has paid the balance sale consideration of Rs.10,000/- on 30.07.2009, but he has not taken sincere steps to get sale deed registered in his favour. The plaintiff issued legal notice only after execution of the sale deed Ex.B.1 and also he purchased stamp paper for the execution of sale deed only after Ex.B.1. The plaintiff as P.W.1 deposed in his cross examination as follows:

“நான் கிரய ஒப்பந்தம் முதல் பிரதிவாதியிடம் மட்டும்தான் செய்தேன் என்றால் சரிதான். 30.07.2009ல் பாக்கி தொகையை கொடுத்துவிட்டேன். ஒப்பந்தப்படி மீதத் தொகை கொடுக்கவேண்டியது ரூ.10,000/- என்றால் சரிதான்..... 30.07.2009க்கு பிறகு 1ம் பிரதிவாதிக்கு 23.5.2010 அன்றுதான் வழக்கறிஞர் அறிவிப்பு அனுப்பினேன் என்றால் சரிதான். அந்த அறிவிப்பு முதல் பிரதிவாதிக்கு மட்டும் அனுப்பினேன் என்றால் சரிதான். மேற்சொன்ன 10 மாத கால இடைவெளியில் முத்திரை தாள்கள் வாங்கி கிரயம் செய்வதற்கு நான் எந்த நடவடிக்கையும் எடுக்கவில்லை என்றால் சரிதான்....அறிவிப்பும் முத்திரைதாள்களும் முதல் பிரதிவாதி 2ம் பிரதிவாதிக்கு கிரயம் செய்து கொடுத்த பிறகுதான் என்றால் சரிதான். 2ம் பிரதிவாதிக்கு கிரயம் செய்து கொடுத்த பிறகு 1ம் பிரதிவாதி என்னுடைய கிரய ஒப்பந்தம் போலியானது என்று காவல்நிலையத்தில் புகார் கொடுத்து வழக்கு பதிவு செய்யப்பட்டுள்ளது என்றால் சரிதான்.”



S.A(MD)No.129 of 2017

In **2011(3) CTC 205**, relied on by the appellant/2nd defendant, this Court held that the compliance of readiness and willingness has to be in spirit and substance and not in letter or form and if the allegations in the plaint as well as the evidence and the other circumstances lead to the conclusion that the plaintiff was not ready and willing to perform his part of contract, then he is not entitled to the relief. For which this Court is relying on the decision of the **Hon'ble Supreme Court** reported in **Motilal Jain v. Ramdasi Devi 2000 (3)MLJ 202 (SC)** and **Mst.Sugani v. Rameshwar Das, 2006 (3) CTC 108 (SC)**.

22. Further, it is the definite case of the appellant/2nd defendant that the 1st defendant and the plaintiff colluded and created the unregistered Ex.A.1 - sale agreement to defeat his title for the reason known to them. To answer these allegations, it is the duty of the plaintiff to prove that Ex.A.1 was validly executed. The plaintiff has examined one of the attesor as P.W.2. Except P.W2, he has not examined the writer and another attesting witness on his side. P.W.2 in turn deposed in his cross examination as follows:

“வா.த.சா.ஆ.1 பத்திரம் யார் எங்கே
வாங்கினார்கள் என்ற விபரம் எனக்கு தெரியாது. பத்திரம்
எங்கு வைத்து எழுதப்பட்டது என்று எனக்கு தெரியாது.



S.A(MD)No.129 of 2017

WEB COPY

அதை யார் எழுதினார்கள் என்றும்
தெரியாது....வா.த.சா.அ.1ன் பின்புறத்தில் உள்ள
கையெழுத்து என்னுடையது அல்ல. அதில் என்னிடம்
கையெழுத்து வாங்கவில்லை.. நான் சாட்சி கையொப்பம்
செய்ததை தவிர வேறு ஒன்றும் எனக்கு தெரியாது.”

From the evidence of P.W.2, it is very clear that he has not known the contents of Ex.A.1 except his signing and also he has not seen the signing of other witnesses i.e., scribe and another attesting witness. So, the plaintiff failed to prove Ex.A.1. as a valid sale agreement. As stated supra, though the 1st defendant filed the written statement in favour of the plaintiff, she did not get into witness box to prove the averments and was also subject to cross examination by the 2nd defendant. The power agent of 2nd defendant deposed that before purchase he applied encumbrance and as there was no encumbrance disclosed, he purchased the suit property. As Ex.A.1 is unregistered one, it would not reflect in encumbrance. It is also admitted by the plaintiff. The argument of the respondent/plaintiff that the 2nd defendant has not got into witness box to substantiate his case is not acceptable. It is established that the 2nd defendant is in abroad and on his behalf his power of attorney was examined as DW2. This was not objected at the time of evidence and it is not denied by the plaintiff. Therefore, from the above



S.A(MD)No.129 of 2017

facts and evidences, the case of the 2nd defendant that he is a *bona-fide* purchaser is true one. The Courts below have not correctly appreciated the above facts and evidences and simply concluded based on a written statement of 1st defendant, which is not correct in the eye of law. Therefore, the 1st question of law is answered in favour of the appellant/2nd defendant.

23. The next contention raised by the appellant/2nd defendant is that the plaintiff and the 1st defendant colluded together and filed the suit. As stated supra, the plaintiff paid the entire sale consideration by 30.07.2009 and has not performed his part of contract strictly compelling the 1st defendant to execute the sale deed. Only after the purchase of suit property by 2nd defendant on 21.05.2010, the plaintiff issued Ex.A.3 - Legal Notice on 23.05.2010 and in order to show his performance he purchased stamp papers on 09.06.2010 and applied and obtained encumbrance from 01.01.1995 to 10.06.2010. The acts of plaintiff are all subsequent to the execution of Ex.B.1 - Sale Deed. As already stated supra, the 2nd defendant is a *bona-fide* purchaser, as per his evidence he enquired about the suit property and also obtained encumbrance certificate, wherein no encumbrance was reflected. Admittedly, Ex.A.1 - Sale Agreement is unregistered.



S.A(MD)No.129 of 2017

Further, it is pertinent to note here that the 1st defendant was a teacher by profession and so a literate person. No prudent man would sign the sale deed transferring right in land without reading or without knowing the contents of the same. The subsequent acts of the plaintiff are all after Ex.B.1 - Sale Deed. Hence, the stand of the 2nd defendant that the plaintiff and the 1st defendant colluded themselves to defeat the right over property under Ex.B.1 – Sale Deed is acceptable one. In the absence of any contra evidence on the plaintiff's side and in the absence of the 1st defendant getting into witness box, the stand taken by the 2nd defendant could be taken as presumably proved.

24. On perusal of records, the 2nd defendant came to knowledge of the Othi and the custody of the title deeds with the plaintiff. This was not denied by the 2nd defendant. According to the Courts below, it was observed that the 2nd defendant made enquiry with the plaintiff about the Othi transaction. But, on perusal of Ex.B.7, which is police complaint, given after the filing of the written statement, the 2nd defendant did not state about the enquiry with the plaintiff, which is not correctly appreciated by the Court below. Because the plaintiff himself admitted in his evidence as follows:



S.A(MD)No.129 of 2017

□2ம் பிரதிவாதிக்கு கிரயம் செய்து கொடுத்த

பிறகு 1ம் பிரதிவாதி என்னுடைய கிரய ஒப்பந்தம்
போலியானது என்று காவல்நிலையத்தில் புகார்
கொடுத்து வழக்கு பதிவு செய்யப்பட்டுள்ளது
என்றால் சரிதான்.□

So, the Courts below have not correctly appreciated the evidences adduced in this case. Further, the Courts below observed that on perusal of Ex.B.1 recitals, there is no content about the Othi and disbursement of Othi amount to the plaintiff or any undertaking in this regard. But, it is the definite case of the appellant/2nd defendant that the 1st defendant assured to get back the title deed from the plaintiff and to hand over the same after sale deed, as the Othi was unregistered and so it was not mentioned. This fact is not considered by the Courts below. On perusal of Ex.B.7 - Police Complaint given by the 2nd defendant, it is also stated that the 1st defendant assured him that after discharging the Othi amount from the plaintiff, she would hand over the possession of the suit property. This was not specifically denied by the plaintiff. Therefore, the finding of the Courts below that the 2nd defendant is not a *bona fide* purchaser is without any proper appreciation of evidence adduced. Hence, the second question of law is also answered in favour of the appellant/2nd defendant.



S.A(MD)No.129 of 2017

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25. The next contention raised by the appellant/2nd defendant is that the Courts below considered the written statement of the 1st defendant when an application under Order VIII Rule 8 of the Civil Procedure Code was pending disposal. On perusal of judgment of the 1st Appellate Court, it has discussed about the said petition in its judgment. On perusal of the same, the 1st Appellate Court observed that the petition under Order VIII Rule 8 of the Civil Procedure Code was numbered as I.A.No.125 of 2013 and the same was rejected on 19.03.2013 and also the petition to reopen the case filed by the defendant was also dismissed. Admittedly, there is no revision or appeal filed against those dismissal orders. The provision of Order VIII Rule 8 of the Civil Procedure Code is as follows:

"Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off or counter-claim may be raised by the defendant or plaintiff, as the case may be, in his written statement."

As per the above provision, only a new ground of defence which arisen after the institution of suit or written statement can be raised. The petition to set off the earlier pleadings under VIII Rule 8 of the Civil



S.A(MD)No.129 of 2017

WEB COPY

Procedure Code would not be available as rightly held by the I Appellate Court. A party who made an admission in his/her pleadings could not be allowed to retract from the same even by blaming his/her counsel. Admittedly, the 1st defendant was an educated person, who was working as a school teacher, could not sign without knowledge of pleadings in a suit. Hence, the contention of the appellant/2nd defendant when the petition under Order VIII Rule 8 of the Civil Procedure Code was pending the Courts below gave a conclusion on the basis of the written statement of the 1st defendant is untenable. Therefore, the 3rd question of law is answered against the appellant/2nd defendant.

26. From the above facts and circumstances, the Courts below found concurrent finding only based on the written statement filed by the 1st defendant without properly and correctly appreciating the evidences in accordance with a settled proposition of law. On available evidences, it is only proved that the plaintiff is only entitled to get back the alleged Othi amount from the 1st defendant and the alleged Ex.A.1 - Sale Agreement is not proved by the plaintiff. The said findings needs to be interfered by this Court by way of Second Appeal. The citations relied on by the



S.A(MD)No.129 of 2017

respondent/plaintiff are not applicable to the facts and circumstances of this case. The 2nd defendant is a *bona-fide* purchaser of the suit property by virtue of Ex.B.1 registered sale deed. So, he is at liberty to seek remedy for recovery of possession from the plaintiff as known to law. The questions of law 1 and 2 are answered in favour of the appellant. Thus, this Second Appeal succeeds.

27. In the result, the Second Appeal is allowed. The judgment and decree, dated 21.10.2016 passed in A.S.No.42 of 2014 on the file of the I Additional District and Sessions Court (PCR), Thanjavur, confirming the judgment and decree, dated 25.03.2013 passed in O.S.No.126 of 2010 on the file of Principal Sub Court, Thanjavur are set aside. The suit in O.S.No.126 of 2010 is dismissed. The appellant/2nd defendant is at liberty to seek remedy for recovery of possession from the plaintiff as known to law. No costs. Consequently, the connected Miscellaneous Petition is closed.

04.10.2024

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD



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S.A(MD)No.129 of 2017

To

- 1.The I Additional District and Sessions Judge (PCR),
Thanjavur.
- 2.The Principal Subordinate Judge,
Thanjavur
- 3.The Record Keeper,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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S.A(MD)No.129 of 2017

P.VADAMALAI, J.

VSD

**Pre-Delivery Judgment made in
S.A(MD)No.129 of 2017**

04.10.2024