

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.02.2017

Coram:

The Honourable Mr.Justice M.M.SUNDRESH

S.A.No.803 of 2015

& M.P.No.1 of 2015

Kanakavalli

.. Appellant/Plaintiff

Vs.

Pangachachi @ Pangajam

.. Respondent/Defendant

Second Appeal is filed under Section 100 C.P.C., as against the judgment and decree dated 28.02.2014 made in A.S.No.48 of 2012 on the file of Subordinate Court, Pollachi, reversing the judgment and decree dated 01.03.2011 made in O.S.No.577 of 2004 on the file of District Munsif, Pollachi.

For appellant : Mr.R.Nandhakumar

For respondent : Mr.D.Selvaraju

JUDGMENT

The plaintiff is the appellant. Suit has been filed for specific performance based upon Ex.A2-sale agreement dated 12.02.1999. Ex.A2 is an agreement entered into between the plaintiff/appellant being the agreement holder and the defendant being the owner for a total consideration of Rs.90,000/-. A sum of Rs.40,000/- has been paid under Ex.A2-sale agreement dated 12.02.1999 followed by another sum of Rs.8,000/- on 25.10.1999. The period mentioned for remaining payment is two years. Ex.A4 is the legal notice dated 09.10.2000 to the address in Pollachi. The said notice was returned as "no such addressee". Thereafter, Ex.A6-notice was issued to the suit property in which, the defendant was stated to be residing. Ex.A6 has been acknowledged by the defendant as per Ex.A7. Based upon which, the suit has been laid.

2. The trial Court decreed the suit as prayed for on the premise that the execution of Ex.A1-sale agreement and the endorsement are not denied. Incidentally, it has been held that the plaintiff is ready and willing to perform her part of the contract. An observation has been made by the trial Court to the effect that the statement made by the defendant that she is residing in the suit property as per Ex.A2 is not proved. The

lower appellate Court reversed the judgment and decree of the trial Court by raising doubt over the period of two years mentioned in Ex.A2. It found that the defence of the defendant is probable. Ex.A1 is only loan transaction. If the plaintiff is in possession of the remaining amount even after execution of Ex.A2, nothing prevented her from making the payment immediately thereafter. The contention of the plaintiff that the suit property has been leased out by the defendant and in order to hand over vacant possession of the suit property, she need time and that is the reason why the sale deed was not executed was found not correct in view of Ex.A6 having been received by the defendant therein as against the place of residence mentioned in Ex.A2. The lower appellate Court has also found that the plaintiff and her husband are doing business in finance. It is admitted by her that chit transaction was going on at their residence. Challenging the judgment and decree rendered by the lower appellate Court, the present second appeal has been filed.

3. At the time of admission of this appeal on 01.09.2015, the following substantial question of law has been framed for consideration.

1. Whether the first appellate Court was justified in ignoring Ex.A2, which is a registered sale agreement and whether such view of the first appellate Court is against Sections 91 and 92 of the Indian Evidence Act?
2. Whether the respondent/defendant has established her claim that Ex.A2 sale agreement is purported to be a security for the loan alleged to have been received by her from the husband of the appellant/plaintiff?
3. When it is the claim of the respondent/defendant that Ex.A2 registered sale agreement is made only as a security for loan transaction, are not the onus of proof lies on her to substantiate and prove the same and if so, whether the first appellate Court was just and proper in not appreciating the same?

4. The learned counsel appearing for the appellant/plaintiff submits that in terms of Sections 91 and 92 of the Indian Evidence Act, 1872, a presumption has to be drawn. The lower appellate Court has reversed the decree of the trial Court on mere surmise. Having received the amount it is not open to the defendant to contend to the contrary and that too Ex.A2-sale agreement along with Ex.A3-endorsement.

5. The learned counsel appearing for the

respondent/defendant submits the evidence of the parties as analysed by the lower appellate Court resulting in dismissal of the suit are perfectly in order. There is no perversity in the observation made by the lower appellate Court coupled with the fact that the plaintiff has not established her ready and willingness especially, when the defendant is residing in the suit property and the case of the plaintiff qua the existence of the tenants agreed to be vacated by the defendant is not supported by evidence. This statement never been pleaded in the legal notice as well as in the plaint. Hence, it is submitted that no interference is required.

6. Section 20 of the Specific Relief Act speaks about discretion which is certainly a judicial one. The lower appellate Court is a final Court of fact and law. The trial Court has found that the defendant was living in the suit property at Pollachi, whereas even a perusal of Ex.A7-acknowledgment card coupled with Ex.A5 would show that the defendant is living in the suit property. Therefore it negates and belies the case of the plaintiff that the defendant is living elsewhere and there was an agreement though orally that the tenants living in the suit property and after their vacation, sale deed can be executed. The period of two years mentioned in Ex.A2-sale agreement in respect of the suit property has been discussed in the teeth of the statement by the plaintiff in her evidence as P.W.1 that she is having remaining amount in her hand. The lower appellate Court further observed that if there is a need for sale, the defendant would have received the entire consideration and executed it. When once it is found that claim of the plaintiff with respect of the tenancy is found to be not correct, the presumption under Sections 91 and 92 of the Indian Evidence Act, 1872, becomes a rebuttable one. Incidentally, the lower appellate Court has rightly directed the defendant to pay the amount received by way of a loan along with interest.

7. It is also to be seen that at the time of execution of Ex.A1, which is the sale deed in favour of the defendant in the year 1991, the value of the suit property was Rs.87,000/- and Ex.A2, based upon which suit has been laid makes a valuation of Rs.90,000/-. It is common knowledge that the price of the suit property could have been escalated in the interregnum, apart from the fact that the amount mentioned in the sale deed, Ex.A1, more often, may not reflect the real market value.

8. In such view of the matter, this Court is of the view that there is no perversity in the judgment and decree rendered by the lower appellate Court in exercise of judicial discretion on an analysis of evidence both oral and documentary. Accordingly, the substantial questions of law are answered against the appellant and the second appeal stands dismissed.

No costs. Consequently, connected miscellaneous petition is also dismissed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1.The Subordinate Judge,
Pollachi.

2.The District Munsif Court,
Pollachi.

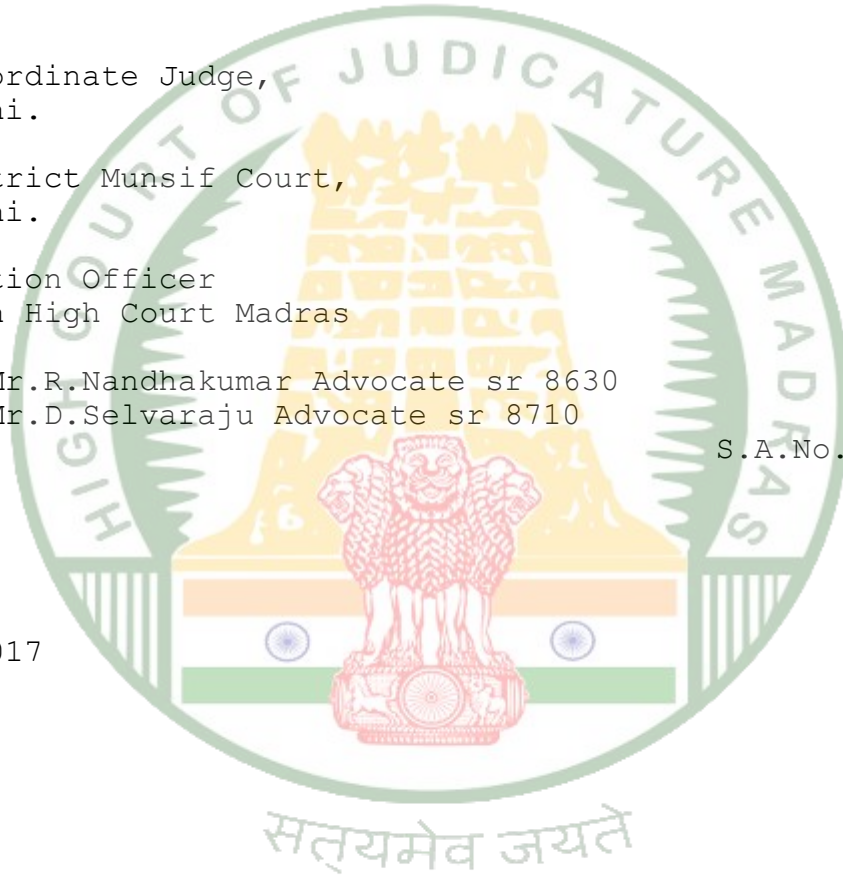
3.The Section Officer
VR Section High Court Madras

+1 cc to Mr.R.Nandhakumar Advocate sr 8630

+1 cc to Mr.D.Selvaraju Advocate sr 8710

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