

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

Second Appeal No.148 of 2016 &
C.M.P.No.3016 of 2016

Dhanalakshmi

... Appellant/Plaintiff

v.

1. Rajamanickam

2. Sathiya

3. Minor Kanalarasan

4. Minor Santhiya

... Respondents/Defendants

(Minor Respondents 3 and 4
are rep by their next friend,
guardian father R1)

Second Appeal filed under Section 100 of C.P.C. against the judgment and decree dated 01.08.2015 passed in A.S.No.56 of 2012 on the file of the Principal District Court, Salem, reversing the Judgment and decree dated 31.01.2012 made in O.S.No.88 of 2009 on the file of the Sub Court, Attur.

For Appellant : Mr.P.Mani

For Respondents : Mr.T.Murugamanickam

J U D G M E N T

The above Second Appeal arises against the judgment and decree dated 01.08.2015 passed in A.S.No.56 of 2012 on the file of the Principal District Court, Salem, reversing the Judgment and decree dated 31.01.2012 made in O.S.No.88 of 2009 on the file of the Sub Court, Attur.

2. The suit in O.S.No.88 of 2009 has been filed by the appellant before the Subordinate Court, Attur, for the relief of specific performance based upon Ex.A.1 or in the alternative for refund of advance amount paid with interest.

3. It is the case of the plaintiff that Ex.A.1 has been executed between the plaintiff and the defendant on 16.07.2007 for a total consideration of Rs.1,15,000/-. Of the aforesaid amount, a sum of Rs.1,12,500/- has been paid at the time of

execution of Ex.A.1. Thus, the remaining amount was only Rs.2,500/-. Thereafter, under Ex.A2 dated 10.05.2008, time was extended by another 15 months. Since the defendant has not come forth to execute the sale deed, a legal notice was issued under Ex.A3 and on its receipt, the above suit has been laid.

4. The defendant, though not disputed the signature under Ex.A.1, took up a plea that Ex.A.2 is not genuine and the transaction is only that of a loan. There was an earlier loan obtained from the father of the plaintiff, for which documents have been executed and thereafter, cancelled under Ex.B.1 to B.4., since the amount mentioned therein could not be repaid. The trial Court, decreed the suit and the lower Appellate Court reversed it. While reversing, the lower Appellate Court, was pleased to take into consideration Exs.B.1 to B.4, which have been agreements and cancellation between the plaintiff's father and the defendant. Incidentally, it was held that the suit property is an ancestral property and therefore, Ex.A1 cannot be the basis for decreeing the suit. Merely because the legal notice was not replied, the same cannot be the sole factor to grant the relief which is discretionary in nature. Challenging the same, the present appeal has been filed.

5. This Court, on 03.03.2016, while admitting the Second Appeal, has raised the following substantial questions of law.

"a) Whether the lower Appellate Court erred in law in holding that Ex.A.1, Sale Agreement was executed pursuant to loan transaction, contrary to the terms of Ex.A1, Sale Agreement, when the defendants failed to prove the alleged loan transaction in order to invalidate Ex.A1, Sale Agreement as per proviso (1) of Section 92 of the Indian Evidence Act?

b) Whether the lower Appellate Court erred in law in holding that Ex.A1, Sale Agreement is not enforceable under Section 17 of the Specific Relief Act on the wrong premises that Ex.A1, Sale Agreement was executed by the first defendant alone, who has only 1/4th share in the suit property without considering the fact that Ex.A1, Sale Agreement was executed by all the defendants, who are jointly entitled to the suit property?

6. The learned counsel for the appellant submits that inasmuch as the signature under Ex.A.1 is not in dispute, the suit ought to have been decreed. It is further submitted that

an alternative plea sought for was also declined by the lower appellate Court on a wrong premise by placing reliance upon Exs.B1 to B.4.

7. The learned counsel appearing for the respondent submits that as Exs.B1 to B4 are not in dispute, the lower Appellate Court has rightly declined to accept the discretion. Consequently, the plaintiff is not entitled for refund.

8. After hearing the learned counsels, the following additional substantial question of law is raised and put forth to the learned counsel appearing for the parties, who have also made their submissions in this regard:

"Is not the lower Appellate Court erred in law in not decreeing the suit for alternative prayer, in view of admission made with reference to the signature contained in Ex.A.1 and the stand taken that it is only a loan transaction, while not disputing the amount mentioned therein?".

9. The prayer for specific performance involves discretionary relief which is judicial. The lower Appellate Court has rightly found that in view of Exs.B1 to B4, which are not in dispute, such a discretion is not entitled to be exercised, especially when the suit property is a joint family property. Thus, this Court does not find any error in the Judgment and decree rendered by the lower Appellate Court, insofar as refusal to exercise discretion for specific performance is concerned. However, in the case on hand, there is no dispute on execution of Ex.A.1. Having admitted the signature and having taken a plea that it is only a loan transaction, it is not open to the respondent to contend to the contrary. It is also not his case that the amount mentioned therein was not correct and he has discharged the loan. Rather, it is the specific case that the transaction is one involved in money. Further, it is not the case of the respondents that the said amount has been discharged. Therefore, the lower Appellate Court has committed an error in law in not decreeing the alternative relief sought for, especially, in view of admission of signature in Ex.A.1, coupled with the plea taken that it is only a loan transaction.

10. In such view of the matter, the Judgment and decree dated 01.08.2015 passed in A.S.No.56 of 2012 on the file of the Principal District Court, Salem is hereby set aside and the additional substantial question of law is answered in favour of the appellant.

11. In the result, the Second Appeal is allowed in part and there is a decree for refund of amount as prayed for. No costs. Connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. The Principal District Judge Salem.

2. The Sub Judge Attur.

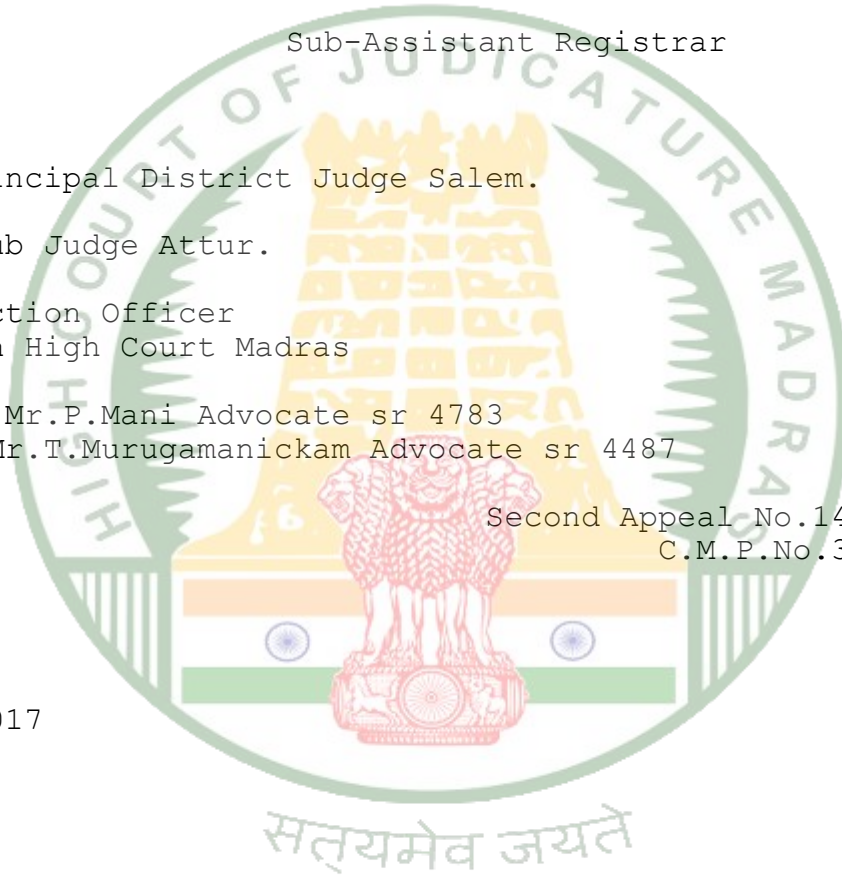
3. The Section Officer
VR Section High Court Madras

+1 cc to Mr.P.Mani Advocate sr 4783

+1 cc to Mr.T.Murugamanickam Advocate sr 4487

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