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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

JUDGMENT RESERVED ON : 26.10.2017

JUDGMENT PRONOUNED ON : 20.12.2017

CORAM

THE HONOURABLE **MR. JUSTICE S. BASKARAN**

S.A. (MD) .No.347 of 2017

AND

CMP (MD) .No.7338 of 2017

A.Veeranan (died)

1.V.Puhalendhi

2.V.Madhan

... Appellants 1 & 2/Appellants 1 to 3/
Defendants 1 to 3

Vs.

1.S.Rajkumar

2.Gomathi

3.Pradeepa

... Respondent/Respondent/Plaintiff

... Respondents 2 & 3/

Additional Lrs of deceased Veeranan

(cause title accepted, vide court order dated 02.01.2017 made in
Cmp(md).No.12438/16 in S.A. (MD) .No.SR.48817/16)

Prayer: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree dated 22.12.2015, made in A.S.No.7 of 2014 on the file of Additional District and Sessions Court, Theni, at Periyakulam, confirming the judgment and decree dated 20.12.2012, made in O.S.No.99 of 2010, on the file of the Sub-Court, Uthamapalayam.

For Appellants

: Mr.A.Arumugam

For Respondents

: Mr.R.R.Kannan for R-1

Mr.K.Prabhakaran for RR-2 & 3

JUDGMENT

Challenging the judgment and decree dated 22.12.2015, made in A.S.No.7 of 2014 on the file of Additional District and Sessions Court, Theni, at Periyakulam, confirming the judgment and decree dated 20.12.2012, made in O.S.No.99 of 2010, on the file of the Sub-Court, Uthamapalayam, the present second appeal has been filed. The defendants, who lost before the courts below are the appellants before this court.



2. At the stage of admission itself, this second appeal is taken up for final disposal. Both sides counsel are present.

3. For the sake of convenience, both parties are hereinafter referred to as they were arrayed in the trial court.

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4. The first respondent/plaintiff filed a suit in O.S.No.99 of 2010 on the file of the Sub-Court, Uthamapalayam against the appellants/defendants herein, praying for the relief of specific performance on the basis of Ex.A.1/sale agreement executed by the defendants in favour of the plaintiff herein. The suit property belongs to the first defendant, as per partition deed, registered in Kambam Sub Registrar Office-1-1676/1977 and the defendants entered into a sale agreement (Ex.A.1) on 28.08.2009 agreeing to sell the suit property for a total consideration of Rs.2,60,000/- and received a sum of Rs.2,50,000/-. The defendants agreed to receive the balance amount of Rs.10,000/- on or before 27.08.2010 and execute sale deed. The said Ex.A.1/sale agreement was registered in Kambam Sub Registrar Office as document No.3703/2009. Subsequently, the plaintiff met the defendants on 02.08.2010 and requested them to receive the balance sale consideration of Rs.10,000/- and to execute the sale deed. However, the defendants failed to comply with the request of the plaintiff and avoided execution of sale deed.

5. The defendants avoided completion of sale by stating that the suit property was allotted to the father of the defendants by way of partition deed and the original partition deed was given to a third party as security for the loan awarded and after giving back the same, defendant promised to come and executed the sale deed. Since major portion of the sale consideration was paid, defendants handed over possession of the property to the plaintiff on 08.09.2009. Eversince the plaintiff is in possession and enjoyment of the suit property. Thereafter, on 09.08.2010, the plaintiff caused Ex.A.2/legal notice calling upon the defendants to complete the sale. The defendants, in response to Ex.A.2/legal notice sent Ex.A.3/reply notice dated 31.08.2010 with false contention. Thereafter, a telegram (copy of the same is marked as Ex.A.4) was sent to the defendants asking them to come to registration office at Kambam on 27.08.2010. In spite of receiving Ex.A.4/telegram, the defendants have not come to Registration Office at Kambam on 27.08.2010, even though the plaintiff waited in the office till evening. Patta passbook relating to the property is Ex.A.5. Thus, the defendants, after executing Ex.A.1/sale agreement and receiving the major portion of the sale consideration is delaying the sale consideration. Hence, the plaintiff has come forward with the suit, seeking the relief of specific performance against the suit.

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6. On the other hand, opposing the suit claim, the

respondents/defendants filed a written statement, denying the averments in the plaint and contended that Ex.A.1/sale agreement was executed only as a security for loan transaction and they never intended to sell the suit property as claimed by the plaintiff. The defendants, who admitted execution of Ex.A.1/sale agreement, contends that there were transactions between the defendants and father of the plaintiff one Singadurai for over a period of time and Ex.A.1/sale agreement executed only as a security towards the loan awarded by the defendants. The defendants received Rs.3,50,000/- from the plaintiff's father/Singathurai in 2005 and executed an Othi deed for Rs.1,00,000/- and a promissory note for Rs.2,50,000/- in the Sub Registrar Office, Kambam, on 19.08.2005. Subsequently, after calculating the interest upto 10.08.2009, it was decided to give the interest amount of Rs.15,000/- to the plaintiff's father in three installments and for the balance sale consideration of Rs.1,00,000/-, a mortgage deed was executed on 10.08.2009 itself. Further on 25.04.2008, a consent agreement was entered into between the father of the plaintiff and defendants. Thereafter, on 10.08.2009, the father of the plaintiff's sent a legal notice to the defendants stating that after paying the amount due to the plaintiff namely Rs.7,00,000/-, in three installments, the defendants will get back the documents. Thereafter, the defendants' property in Sy.No.1144/5D was given away by the defendants to one K.Singadurai on othi basis for a sum of Rs.5,00,000/- and in that regard, an othi deed was executed, after receiving a sum of Rs.1,00,000/-. In the event of the defendants repaying the amount, the documents was agreed to be returned. It was also agreed to execute a mortgage deed for Rs.1,00,000/- in favour of the mother of the plaintiff and also to execute a mortgage deed in favour of Singathurai. In that regard, the plaintiff and his parents Singathurai and Bavani executed a consent deed to the defendants on 01.09.2009. From the above said document, executed by the plaintiff and his parents, it is contended that Ex.A.1/ the suit sale agreement was executed only as a security for loan transaction and it was never intended to be acted upon as a sale agreement. Thus, the defendants seek dismissal of the suit.

7.The trial court, on the basis of the above pleadings, has framed the following issues:

1. கிரைய ஒப்பந்தம் கடனுக்கான எழுதிக் கொடுக்கப்பட்டதாக பிரதிவாதிகள் சொல்வது சரியா?
- 2.வாதி விரும்ப நிலையிலும் தயார் நிலையிலும் இருந்தாரா?
- 3.வாதி கோரிய ஏற்றதை ஆற்றுக பரிகாரம் கிடைக்கத்தக்கதா?
- 4.வாதி கோரிய நிரந்தர உறுத்துக்கட்டளை பரிகாரம் கிடைக்கத்தக்கதா?
- 5.வேறு என்ன பரிகாரம்?"

8. During the course of trial, the plaintiff examined himself as P.W.1 and marked Exs.A.1 to A.5. The respondents/defendants examined two witnesses as D.Ws.1 and D.W.2



and marked Ex.B.1 to B.6.

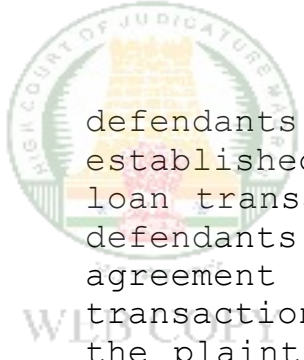
9.The trial court, on consideration of oral and documentary evidence placed before it, found that Ex.A.1/sale agreement is a registered document and that there was no loan transaction between the plaintiff's father and defendants as alleged in the written statement and the fact of Ex.A.1 being executed towards loan transaction is not proved. The trial court also found that the defendants have not examined any witness to prove the fact that Ex.B.1 and Ex.B.4/consent agreement was executed by plaintiff's parents in the circumstances stated by the defendants. Hence, the trial court rejected the contention of the defendants that Ex.A.1/sale agreement was executed on the basis of Exs.B.1 & B.4, consent agreement executed by plaintiff's parents in connection with loan transaction. It is also held by the trial court that the plaintiff was always ready and willing to pay the balance sale consideration. Further, he sent a legal notice and telegram to the defendants, in which, he has expressed his readiness and willingness to perform his part of agreement. The evidence let in by the plaintiff has categorically established the fact that Ex.A.1 sale agreement was executed. On that basis, the trial court decreed the suit as prayed for by the plaintiff.

10. Aggrieved over the same, the defendants filed an appeal in A.S.No.7 of 2014 on the file of the Additional District Court at Periyakulam.

11.The lower appellate court, on going through the grounds of appeal, framed the following issues:

- "1. வா.சா.ஆ.1 கிரைய ஒப்பந்தம் கடனுக்கு ஆதரவாக எழுதிக்கொடுக்கப் பட்டுள்ளதா?
- 2.வாதிக்கு பிரதில் கோரியுள்ளபடி ஏற்றதை ஆற்றுக பரிகாரம் மற்றும் நிரந்தர உறுத்துக்கட்டளை பரிகாரம் கிடைக்கக்கூடியதா?
- 3.இம்மேல் முறையீடு அனுமதிக்கத்தக்கதா?"

12.The lower appellate court held that as execution of Ex.A.1 is admitted by the defendants, the burden is on them to prove the claim that Ex.A.1/sale agreement was executed only as security towards loan transaction. The lower appellate court also held that the claim of the defendants that Ex.B.1 and B.4/consent agreement was executed by the plaintiff is not substantiated by any acceptable oral evidence . The first appellate court held that Ex.A.1/sale agreement was executed only subsequent to Ex.B.1, consent agreement. Likewise, the first appellate court held that Ex.B.2-notice was sent by the plaintiff's father Singathurai, but nothing is mentioned in it about the consent deed. It is further held that Ex.B.2 is a transaction between the plaintiff's father Singadhurai and defendants regarding Sy.No.144/5. It is further held that even though there was financial transactions between the plaintiff's father and



defendants in respect of some other property, it is not established that Ex.A.1/sale deed was executed in connection with loan transaction. Thus, the first appellate court found that the defendants have failed to establish the fact that Ex.A.1/sale agreement was executed only as a security towards loan transaction. It was also held by the first appellate court that the plaintiff was always ready and willing to perform his part of contract and he has issued a legal notice (Ex.A.2 and Ex.B.5) asking the defendants to come forward to execute the sale agreement and that itself is enough to prove the readiness and willingness of the plaintiff. It is further observed that the plaintiff has also produced the challan dated 12.08.2009 showing that he has deposited balance sale consideration of Rs.10,000/-. Thus, on reappraisal of the entire evidence, the first appellate court held that the plaintiff has established his claim and there is no error apparent on the conclusion arrived at by the trial court. On that basis, dismissed the first appeal by judgment dated 22.12.2015.

13.The defendants, who had lost before the courts below, aggrieved by the concurrent findings rendered by the trial court as well as the first appellate court, has filed the present second appeal. In the memorandum of grounds of second appeal, the appellant has raised the following substantial questions of law for consideration:

"1.Whether the alleged sale agreement Ex.A.1 is really a sale agreement or is only a security of debt as contained by the defendant in view of the fact that the alleged sale agreement states that more than 95% of the sale consideration was paid as advance and a long period of one year was given for paying the paltry sum of Rs.10,000/- at the time of execution of the alleged sale agreement when the suit property is an agricultural property and not a house site?

2.In the absence of pleading and proof as regards the alleged readiness and willingness, whether the plaintiff is entitled to the relief of specific performance?

3.Whether the courts below ought to have drawn adverse inference under Section 114(g) of the Indian Evidence Act, 1872 against the plaintiff for his failure to examine his father as a witness to prove that the alleged sale agreement is true and valid and it is not executed as a security for a debt?

4.Whether the findings of the courts below that the plaintiff is entitled to the decree for specific performance is as a result of admission of inadmissible, irrelevant and immaterial evidence and rejection of material, admissible and relevant evidence and whether the finding is perverse and legally unacceptable finding is liable to be set aside under Section 100 of C.P.C, 1908?

5.Whether the judgment and decree of the first



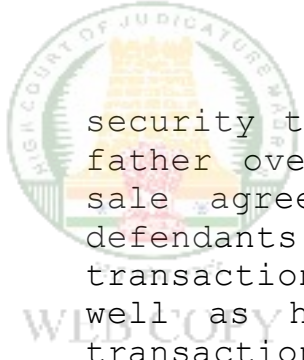
appellate court is liable to be set aside for its failure to apply the letter, spirit and scope of Order 41 Rule 27 of C.P.C, 1908 in the proper perspective?"

14.The learned counsel for the appellants contended that out of sale consideration of Rs.2,60,000/-, on the alleged date of sale agreement itself, Rs.2,50,000/- was paid and for the payment of remaining paltry sum of Rs.10,000/-, the agreement provided for one year time and that itself will clearly indicate that Ex.A.1 document was executed only as security for loan transaction. It is further pointed out that the defendants are entitled to contend that the nature of transaction, as alleged in the sale agreement is not true and they are entitled to plead contrary stand. The defendants also contended that the plaintiff has not proved his readiness and willingness. It is further pointed out that the plaintiff has not obtained any encumbrance certificate and that will go to show that the said transaction is only a loan transaction. The learned counsel appearing for the appellants also contended that they are entitled to produce additional document to prove the fact of Ex.A.1 sale agreement was not intended to be acted upon but only executed as security for loan transaction by letting in additional evidence and their plea for letting in additional evidence was wrongly rejected by the first appellate court. Thus, the learned counsel for the defendants/appellants pleaded that the conclusion arrived at by the first appellate court and the reason given for the same is not proper and the same is liable to be set aside.

15.Per contra, the learned counsel for the respondents contended that the defendants are not entitled to let in any additional evidence to contradict the averments in the document/Ex.A.1 and any attempt to produce additional evidence, at the appeal stage cannot be permitted, as it was intended to fill up the lacunae in the plaintiff's case. The respondents further contended that D.W.1 in his evidence has not stated anything about the sale agreement being executed towards loan transaction and no material is available on record to prove the fact of loan transaction between the plaintiff's father and defendants. Thus, the learned counsel for the respondents contended that the finding arrived at by the courts below are based upon proper appreciation of the materials available on record and the same needs no interference. Hence, he seeks dismissal of the second appeal.

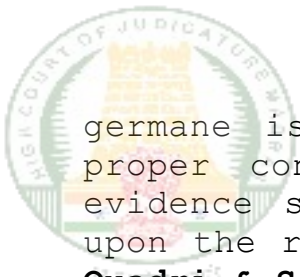
16.This court has paid its best attention to the impugned judgments passed by the courts below and perused the records carefully.

17.It is an admitted fact that Ex.A.1/sale agreement was executed in favour of the defendants in favour of the plaintiff herein. However, the defendants contend that Ex.A.1/sale agreement was not executed with an intention to sell the property, but only as a



security towards the loan transaction with the plaintiff and his father over a period of time and in that regard only, the suit sale agreement was executed. In the written statement, the defendants have categorically mentioned about the various loan transactions between themselves on one side and the plaintiff as well as his father Singadurai on the other side. The loan transaction between the plaintiff's father Singadurai and the defendants is admitted by the plaintiff himself. It is also clear from the evidence of the plaintiff that his father is in possession of some other property of the defendants, pursuant to the earlier one transaction. However, the plaintiff denied the claim of the defendants that Ex.A.1 was executed only as security for loan transaction. The plaintiffs deposed as P.W.1 has categorically denied execution of Ex.A.1/sale agreement in connection with Rs.2,50,000/- payable to his father Singadurai by the defendants herein. In his evidence, P.W.1 also denied any knowledge about the execution of any document by the defendants in favour of his father in connection with loan transaction. The learned counsel for the defendants contend that P.W.1 has only stated that he is in no way connected with the documents executed by the defendants in favour of his father, but, he has not denied categorically the loan transaction between them. The courts below have held that in spite of alleging in the written statement about the loan transactions, the defendants have not produced any documents relating to the said loan transaction before the court and as such, the claim of the defendants cannot be accepted. Admittedly, the defendants have failed to produce any document in support of their contention of earlier loan transactions before the trial court. However, the defendants filed I.A.No.471 of 2014 in A.S.No.7 of 2014 before the first appellate court under Order 41 Rule 27 C.P.C to receive the documents executed in favour of the plaintiff's father as additional evidence to substantiate their claim. The said I.A.No.471 of 2014 was dismissed by the first appellate court on the ground that even though the documents sought to be produced as additional evidence are certified copies of registered documents, as they were all available even during the proceedings in the trial court and the defendants have not stated any acceptable reason for not producing them at the earliest stage, dismissed the application to receive additional documents. The defendants/appellants herein in the grounds of appeal and also in oral arguments, contended that the first appellate court failed to appreciate the provisions of Order 41 Rule 27 C.P.C in proper manner and has dismissed I.A.No.471 of 2014 mechanically without any application of mind. Hence, the defendants seek to entertain the said I.A.No.471/2017 in the interest of justice.

18. The learned counsel for the appellants/defendants contend that even assuming that there was delay on the part of the defendants in producing the documents, if the court feels that the additional documents sought to be produced will throw light on



germane issue and will help the court in arriving at just and proper conclusion, then the application to receive additional evidence should be allowed. In support of the same, he relied upon the ruling reported in **JT 2002(6) Sc 16, (Syed Shah Mohammed Quadri & S.N.Variava)**, wherein, it is held as follows:

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"7. Now it is clear that Rule 27 deals with production of additional evidence in the appellate court. The general principle incorporated in Sub-rule (1) is that the parties to an appeal are not entitled to produce additional evidence (oral or documentary) in the appellate court to cure a lacuna or fill up a gap in a case. The exceptions to that principle are enumerated thereunder in Clauses (a), (a) and (b). We are concerned here with Clause (b) which is an enabling provision. It says that if the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, it may allow such document to be produced or witness to be examined. The requirement or need is that of the appellate court bearing in mind that the interest of justice is paramount. If it feels that pronouncing a judgment in the absence of such evidence would result in a defective decision and to pronounce an effective judgment admission of such evidence is necessary, Clause (b) enables it to adopt that course. Invocation of Clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on record it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case."

19. Likewise, the learned counsel for the appellants/defendants contended that the ultimate goal of the court is to render justice and for that, it is necessary to admit the additional evidence, when the same relates to crux of the matter to be decided. In support of the same, he relied upon the ruling of this court reported in **(2010) 1 MLJ 1019 (K.V.Ramasamy and another Vs. K.V.Rahgavan and Others)**, wherein, it is held follows:

"27. From the decisions referred to supra, it is made clear to the Court that the word "shall" mentioned in the Order 41 Rule 27(2) of the Code of Civil Procedure is nothing but directory and not mandatory, and even if sufficient reasons have not been assigned for admission of additional evidence, such admission would not be vitiated. Further it is made clear to the Court



that the Courts shall not dwell upon technicalities mentioned in law. The ultimate goal of the Court is to render justice and under the said circumstances, the Court can admit important and also necessary piece of evidence even in appellate stage. Therefore, the argument advanced by the learned senior counsel appearing for the appellant in Appeal Suit No.176 of 2001 is really having subsisting force. Under the said circumstances, the petitions filed in M.P.Nos.1 of 2008 & 1 of 2009 are allowed and the documents filed thereon are marked as Exs.A26 to A32."

20.The learned counsel for the defendants also relied upon the ruling of this court reported in **2002-1-L.W.-330, R.M.Natarajan Chettiar Vs. Sahul Hameed and Annammal** to contend that the courts of law exist not to punish the litigants for the lapses but only to render justice. In the said judgment, it is held as follows:

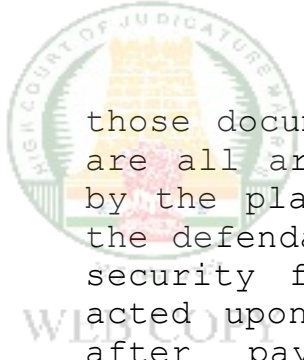
"It is hardly necessary to emphasise that the courts of law exist not to punish the litigants for their lapses, but to render justice.

Learned Subordinate Judge, in my view, has overlooked all the crucial aspects of the matter, particularly that there would no gain or advantage to the plaintiff by delaying the trial in a money suit instituted by him. No doubt, there is a lapse on the plaintiff, but that is not a ground to punish him by preventing him to let in best possible and relevant evidence. In my view, learned Subordinate Judge should have allowed the application on payment of heavy costs."

Thus, the defendants plead to permit them to let in additional evidence by allowing I.A.No.471/2017 which has been dismissed by the first appellate court.

21.On the other hand, the learned counsel for the 1st respondent/plaintiff relying upon the ruling reported in **2017 (4) CTC 876 (D.Vijayalakshmi Vs E.Vedagiri)**, contended that the defendants could very well have filed similar applications before the trial court, but they failed to do so and hence, it is not open to them to seek permission to receive additional documents in the first appellate court that too belatedly with the intention to fill up the lacuna in their case.

22.However, considering the reason stated by the defendants and the fact that in the written statement, it is stated about the various loan transactions and the documents executed in favour of the plaintiff's parents and only



those documents are now sought to be produced and further as they are all are copies of registered documents, the objection raised by the plaintiff cannot be accepted. Further, the contention of the defendant is that Ex.A.1/sale agreement was executed only as a security for loan transaction and it was never intended to be acted upon as a sale agreement and that is why the plaintiff, after paying Rs.2,50,000/- out of Rs.2,60,000/- of sale consideration, has taken one year time to pay the balance amount. This according to the defendants will clearly show that the agreement was executed only as security for the loan transaction. The fact of executing Ex.A.1/sale agreement is not denied by the defendants. However, the contention of the defendants is that they have already on several occasions received money from the plaintiff and his parents as loan and as security for the same, the said Ex.A.1 agreement was executed. Thus, according to the defendants, Ex.A.1/agreement of sale was not intended for selling the suit property, but executed only as a security for loan transaction. Therefore, it is contended that the issue which arise for consideration is whether the defendants executed Ex.A.1 agreement of sale with an intention to sell the suit property to the plaintiff or they executed the said agreement of sale as a security for the loan obtained by them. It is stated by the defendants that to decide that issue, the additional evidence sought to be produced by them is absolutely necessary.

23.It is admitted by both sides that out of sale consideration of Rs.2,60,000/- on the date of agreement itself, Rs.2,50,000/- was paid and only a sum of Rs.10,000/- remain to be paid. The time fixed for completion of sale as per Ex.A.1 is one year. Pointing it out, the learned counsel for the defendants contended that if it was a genuine sale agreement (after paying major portion of the amount), the plaintiff would not have taken one year period for paying remaining sum of Rs.10,000/- and only because the transaction is a loan transaction, one year time was given for completion of sale agreement. It is also pointed out that possession was not given on the date of agreement and nothing is mentioned in Ex.A.1/sale agreement about the same. On the other hand, the plaintiff claims that possession was given subsequently, since major portion of the amount was advanced by them to the defendants. Disputing the same, the defendants contend that the property is in possession and enjoyment of the plaintiff's father since 2003, in connection with loan transaction, as per documents executed earlier. Refuting the same, the plaintiff stated in his evidence that the property in possession of his father is not the suit property, but, it is some other property of the defendants. As stated earlier, the existence of loan transaction between the plaintiff's father and defendants is admitted by the plaintiff. In such circumstances, the defendants plead to receive the additional documents, which are executed in favour of plaintiff's parents as security in the loan transaction.



24. The learned counsel for the plaintiff contended that there cannot be any oral evidence or pleadings in contrary to the averments in Ex.A.1/sale agreement, which is a written document. However, disputing the same, the learned counsel for the defendants contended that they are not trying to vary the terms of contract, but only trying to demonstrate that the parties had a different understanding of the agreement and they never intended to act upon Ex.A.1. In such circumstances, it is pointed out by the defendants that as per Section 92 of the Indian Evidence Act, the defendants are entitled to let in additional evidence to prove the fact that Ex.A.1 was not sale agreement, but only executed as security for the loan transaction. In support of that, he relied upon the ruling of this Court, in **2008 (2) CTC 382 (P.Sampoornam and Others Vs L.T.Somasundaram and Others)**, wherein, this court has held as follows:

16. In the decision reported in **2004 (4) SCC 794 = 2004-4-L.W.53**, the Supreme Court has held as under in paragraph 9:

"... An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Mudaliyar vs. Vedathanni (AIR 1936 PC 70: 64 1A 126=(1936) 43 L.W.271) is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different..."

17. From the above ratio laid down by the Supreme Court, when we analyse the stand of the parties, according to the appellants, irrespective of the fact that Ex.A.1 came into being, it was contended that the deed was never intended to be acted upon and that it was a sham document. When the said stand is probed into further, as held by the Supreme Court, the bar under Section 92 of the Indian Evidence Act vis-a-vis Ex.A.1 would operate if only the appellants attempt to rely upon Ex.A.1 agreement and simultaneously sought to vary and contradict its terms. Such is not the case of the appellants. The appellants are not attempting to contend that the terms contained therein are to be varied of that the evidence let in on their side was to contradict the terms contained therein. According to the appellants, the entire evidence let in both oral and documentary, was only to demonstrate that in spite of existence of Ex.A.1, it will have to be held that the parties had a different contract altogether and Ex.A.1 was never intended to be acted upon. At the risk of repetition, we state that applying the ratio laid down by the Supreme Court, such a stand of the

appellants was certainly not prohibited under Section 92 of the Indian Evidence Act."

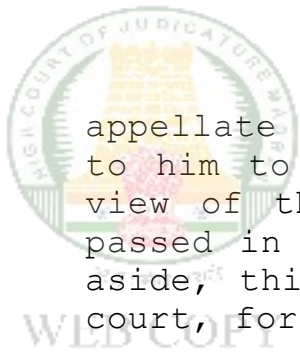
Similarly, he relied upon the judgment of this Court in **Lakshamma Vs. Rathinamma reported in 2011 (5) CTC 543**, wherein, it is held as follows:

"Therefore, having regard to the Supreme Court judgments relied upon in the judgment reported in 2007-1-LW 309, in the case of **Kamireddi Sattiaraju & another vs. Kandamuri Boolaeswari**, the appellant is entitled to plead that Ex.A1 was not intended to be acted upon as an agreement of sale and it was executed only as a security and Sections 91 and 92 are not bar for letting in any such evidence."

25. It is clear from the above said ruling relied upon by the defendants that in the cases, where the party concerned is trying to let in additional evidence to prove that the document challenged by him was not intended to be acted upon and there was no attempt to contradict the terms contained therein, the same is to be permitted.

26. In the case on hand, as stated above, the issue whether Ex.A.1/sale agreement was intended to be acted upon or it was only executed as security for the loan transaction is the point to be considered. The documents sought to be produced by the defendants, as per I.A.No.471 of 2014 would throw light on the said issue and is therefore necessary for pronouncing judgment in the case. Apparently, the documents will enable the court to arrive at a just and correct conclusion as to whether loan transaction existed between plaintiff's parents and defendants and whether Ex.A.1/sale agreement was executed in that regard. In such circumstances, the plea of the defendants that the application under Order 41 Rule 27 of C.P.C is to be entertained has to be accepted, as the finding of the first appellate court to the contrary is unsustainable and the same is liable to be set aside.

27. Accordingly, the order dated 22.12.2015 passed in I.A.No.471 of 2014, passed by the first appellate court is set aside and the said I.A is allowed. Further, the first appellate court held that the burden is on the plaintiff to prove the fact that Ex.A.1/sale agreement was entered into only as a security for loan transaction and the defendants contend that it is not correct. It is contended by the learned counsel for the defendants that the courts below have shifted the burden on the defendants wrongly and as their contention is not to contradict the contents of Ex.A.1/sale agreement, but only the purpose for which it is executed. The approach of the courts below is not proper and the burden should be placed on the plaintiff to prove the fact of Ex.A.1/sale agreement was executed only for the purpose of securing the suit property. In such circumstances, the contention of the defendants that the judgment of the first



appellate court is to be set aside and opportunity should be given to him to produce additional evidence is just and proper and in view of the above said discussions and the fact that the order passed in I.A.No.471 of 2014 by the first appellate court is set aside, this matter is to be remanded back to the first appellate court, for fresh disposal. The point is answered accordingly.

28. In the result, the second appeal is allowed and the judgment and decree passed by the first appellate court is set aside and the case is remanded back to the first appellate court for fresh disposal in accordance with law, after giving opportunity to the parties to produce documents, as per order passed by this court, in allowing I.A.No.471/2017. The first appellate court will dispose of the appeal on the basis of available materials and further evidence let in pursuant to the order passed in I.A.No.471 of 2014 by this court as early as possible, preferably within a period of three months from the date of receipt of copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(AE)

/True Copy/

Sub Assistant Registrar

To

1. The Subordinate Judge, Uthamapalayam.
2. Do- Thro' The Chief Judicial Magistrate, Theni.
3. The Additional District and Sessions Court, Theni,
at Periyakulam.

Copy to:

1. The Record Keeper, VR Section,
Madurai Bench of Madras High Court,
Madurai. (2copies)
2. The Section Officer, Judicial Section,
Madurai Bench of Madras High Court, Madurai.

+ 1 cc TO Mr.A.Arumugam , Advocate in SR No. 94626
+ 1 cc TO Mr.R.R.Kannan , Advocate in SR No. 93930

VS

AE/SV MMS/SAR1/30.01.2018/13P/9C