

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.01.2019

Delivered on: 03.06.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.42 of 2018

S.Govindaraj ...Appellant/1st Respondent
/Plaintiff

1.Smt.Saroja Ramakrishnan 1st Respondent/ Appellant
/3rd Defendant

2.G.M.Polyester Laminations ...2nd Respondent/2nd Respondent
/2nd Defendant

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure against the Judgement and Decree dated 09.04.2015 passed by the Learned I Additional District Judge at Coimbatore in A.S.No.2 of 2005 reversing the Decree and Judgement dated 27.04.2004, passed by the learned III Additional Subordinate Judge at Coimbatore in O.S.No.242 of 1992.

For Appellant : Ms.S.T.P.Kuilmozhi

For Respondent 1 : Mr.N.Manokaran

J U D G E M E N T

The plaintiff in the suit O.S.No.242 of 1992 on the file of the III Additional Subordinate Judge, Coimbatore, is the appellant before this Court. The parties are referred to in the same array as in the suit.

2.Relief claimed in the suit:

"a)Directing the 3rd defendant to execute a sale in favour the plaintiff pursuant to the agreement of Sale Deed dated 12.06.1991, with respect to A Schedule of property;

b)Directing the defendants to deliver possession of the property described in the B-Schedule;

c)In the alternative, directing the 3rd defendant to refund the sum of Rs.One Lakh being the advance amount paid to the 1st defendant, under the agreement of Sale, with interest at 18% per annum from the date of suit till realization."

3.Plaintiff's Case:

3.1.It is the case of the plaintiff that the 1st defendant is the owner of the A-Schedule. The plaintiff was in possession of the Northern half of the A-Schedule as a tenant at monthly rental of Rs.1,300/-. At the time of being inducted as a tenant an advance of Rs.10,000/- was paid by the plaintiff to the 1st defendant. The Eastern portion was being used as a passage by the plaintiff. The Western Portion was in possession of the 2nd defendant and has been described as the B-Schedule.

3.2.On 12.06.1991, the plaintiff and the 1st defendant had entered into an agreement of sale for the purchase of A-Schedule property. A total sale consideration was fixed at Rs.1,50,000/- and an advance of Rs.1,00,000/- was paid on the date of the agreement and the time for completion of the sale was fixed at six months. The B-Schedule property was also part of the agreement.

3.3.It is the case of the plaintiff that despite his request to the 1st defendant to execute the sale deed much prior to the agreement of sale coming to an end, the 1st defendant did not comply with the request and kept putting off the sale under one pretext or the other. Ultimately, on 14.10.1991, the plaintiff had wrote to the 1st defendant putting him on notice that he was ready to proceed with the sale and asking the 1st defendant to come forward to execute the sale. However the 1st defendant remained evasive and this constrained the plaintiff to issue a legal notice dated 26.11.1991, calling upon the 1st defendant to execute the deed of sale.

3.4.A belated reply was sent by the 1st defendant in which he had taken out the stand that the agreement of sale was only executed as a security for the loan borrowed by the 1st defendant from the plaintiff and another Balachandran on two occasions and that the plaintiff acknowledged this arrangement and had executed a Varthamana Letter on the same date.

3.5.The plaintiff had immediately sent a re-joinder to the counsel for the 1st defendant to give a copy of the Varthamana letter, however, the same was not given. The plaintiff denied the execution of any such letter and reiterated that he is ready and willing to proceed with the sale. Pending the suit and after the evidence on 11.04.2002, the 1st defendant died and the 3rd defendant who is the mother, sole representative was brought on record.

4.Written Statement:

4.1.The 1st defendant had filed a written statement inter alia admitting the fact that the plaintiff was a tenant under him but however contending that despite the rent being enhanced the plaintiff had failed to make the payment at the enhanced rate thereby accumulating arrears. The defendant would further

contend that he had borrowed a sum of Rs.10,000/- and Rs.35,000/- from the plaintiff for which he had executed promissory notes dated 25.07.1990 and 07.06.1990 respectively.

4.2.In addition to that the 1st defendant's father had borrowed a sum of Rs.55,000/- from one Balachandran and the plaintiff insisted upon the 1st defendant to execute an additional security in addition to the pronotes and therefore agreement of sale dated 12.06.1991, was executed.

4.3.It was the case of the 1st defendant that a Varthamana letter was executed by the plaintiff in favour of the defendant, wherein he had clearly stated that the agreement of sale was only a security for the loan and once the amounts were paid the agreement of sale would be returned. It is the case of the 1st defendant that a sum of Rs.1,00,000/- which is claimed to be the advance paid by the plaintiff is nothing but a loan that was due from the 1st defendant's father and the said Balachandran.

4.4.He would further contend that the suit was bad for the non-joinder of necessary parties namely the omission to implead the said Balachandran. He would further contend that the letter dated 14.10.1991, was created only for the purpose of the case and to the legal notice issued by the plaintiff, the 1st defendant had issued a suitable reply dated 26.11.1991. The 1st defendant would concede that the plaintiff is entitled to a sum of Rs.45,000/- together with an interest and a sum of Rs.55,000/- is due to Balachandran.

4.5.The 1st defendant would further contend that by executing the Varthamana letter, the plaintiff had negated the agreement assuming without admitting that the agreement of sale was intended to be an agreement. He would further go on to state that the suit had been filed on the instigation of Balachandran since disputes had arisen between the plaintiff and the 1st defendant on account of the enhanced rents not being paid by the plaintiff. The defendant would contend that since the suit lacked a cause of action it deserved to be dismissed.

5.Trial Court:

5.1.The learned III Additional Subordinate Judge, Coimbatore had framed the following issues:

- “1. 12.06.91 ல் வாதியும் பிரதிவாதியும் வழக்கிடை “ஏ” அட்டவணைச் சொத்தைப் பொறுத்து கிரைய ஒப்பந்தம் செய்துள்ளார்களா?
2. 12.06.91 ஒப்பந்தம் கிரைய ஒப்பந்தமா? செல்லத்தக்கதா?
3. வாதிக்கு ஏற்றதை அற்றக் கோரும் பரிகாரம் வழங்கத்தக்கதா?
4. வாதிக்கு வழக்கிடை “பி” அட்டவணைச் சொத்தைப் பொறுத்து பரிகாரம் கிடைக்கக்கூடியதா?
5. வாதிக்கு என்ன பரிகாரம் கிடைக்கும்?”

5.2.The plaintiff had examined himself as P.W.1 and had marked Ex.A.1 to Ex.A.22. On the side of the defendant, the 1st defendant had examined himself as D.W.1. and one Radhakrishnan and Govindham Pillai as D.W.2 and D.W.3 and had marked Ex.B1 and B2. The learned III Additional Subordinate Judge, after enquiry, decreed the suit as prayed for in respect of prayer for specific performance and dismissed the prayer for the relief of recovery of possession in so far as it related to the B-Schedule.

6.Appellate Court (Before Remand):

Challenging the said Judgement and Decree the defendants had gone on appeal in A.S.No.2 of 2005, before the District Judge, Coimbatore. The learned District Judge by his Judgement and Decree dated 18.09.2006, partly allowed the appeal by modifying the decree to the alternate relief of recovery of a sum of Rs.1,00,000/- together with interest at 12% per annum. The learned Judge had held that Ex.A.2 agreement of sale was a sham and nominal document and had come into existence only as a security for the borrowal made by the 1st defendant's father. The learned Judge has also held that the Varthamana letter marked as Ex.B.2 was a valid document.

7.Second Appeal:

Aggrieved by this Judgement and Decree the plaintiff had filed S.A.No.1005 of 2007 on the file of this Court. By the Judgement and Decree dated 12.03.2013, this Court remitted the matter back to the 1st Appellate Court, since this Court was of the view that the signature in Ex.B.2 which was disputed by the plaintiff has not been tested by proving its genuineness and for this limited purpose the Second Appeal was remitted back with the following observations:

"30.Not to put too fine a point on it, on balance, the Judgement and decree of the first appellate Court has to be set aside and the matter has to be remitted back to the first appellate court. Accordingly, the Judgement and decree of the first appellate court are set aside and the matter is remitted back to the first appellate Court with the following mandates:

The first appellate Court, namely, the District and Sessions Judge, Coimbatore, shall send the disputed signature to the handwriting expert for getting his opinion. The plaintiff is enjoined and hereby mandated to furnish before the first appellate Court the contemporaneous of authentic ante litem motam writings as well as his signatures for taking them as exemplars for comparing the same with the writings as well as signature in Ex.B2 - the vardhamana letter. If for any reason, the ante litem

motam writings of the plaintiff could not be furnished at least contemporaneous or the ante litem motam signature of the plaintiff should be furnished to the Court for comparison. Whereupon, at the cost of both the plaintiff and the defendants, an Advocate Commissioner shall be appointed:

(a) To carry the relevant documents in connection with this case personally in a sealed cover;

(b) and produce the same before the Forensic Expert;

(c) leave it in his custody under his acknowledgement for as many days as the Forensic Expert may require;

(d) collect the record from the Forensic Expert on the day as may be fixed by him;

(e) bring it back and lodge it with the Court.

The Forensic Expert is directed to complete the examination of the records in any event, within a week after the depositing of the same by the Advocate Commissioner with him.

31. After getting such opinion from the Forensic Expert, both sides should be given opportunity to file objections, if any. The expert also shall be examined as Court witness, and opportunity also shall be given to both sides to cross-examine the expert, if they so desire. The first appellate Court shall take all endeavours to see that the matter is disposed on merits untrammelled and uninfluenced by any of the observations made by this Court in deciding this Second Appeal, within a period of three months from the date of receipt of a copy of this order."

8. First Appellate Court (After Remand) :

8.1. After the matter was remitted back to the I Additional District Judge, Coimbatore, the disputed signature in Ex.B.2 was sent for comparison with the admitted signature in Ex.A.2 as well as other admitted signatures belonging to the plaintiff. The Forensic Sciences Department submitted a report dated 10.03.2014, stating that the signature found in Ex.B.2 does not match with the admitted signatures contained in the agreement of sale and the other documents.

8.2. The Forensic expert was also examined as C.W.1. Thereafter, the learned Appellate Judge, rejected the report of the expert on the ground that the comparison of the signatures had been done with documents that were not contemporaneous documents and further the signatures that were found in Ex.A.2, in the opinion of the expert, was also different therefore the learned Judge took the view that the report could not be relied upon totally.

8.3. Thereafter, the learned Judge had gone to state that the value of the property was much more than what was stated in the document, Ex.A.2. These circumstances would lead the Court to exercise its discretion granted under Section 20 of the Specific Relief Act, to hold that the agreement was not intended to be an agreement of sale but only intended to be a security and therefore once again held that the plaintiff was only entitled to the alternative relief.

9. Second Appeal:

9.1. Challenging the said Judgement and Decree the plaintiff is before this Court. On receipt of notice in the above Second Appeal the 1st respondent/3rd defendant had entered appearance through counsel and the counsels on either side made their submissions. The following questions of law have been framed on the basis of the submissions that have been made by the counsel which are extracted herein below:

"1. Whether the agreement of sale (Ex.A.2), is a sham and nominal document in view of Ex.B.2 document of the same date?

2. Whether Ex.B.2 is a valid document or a rank forgery as stated by the plaintiff?

3. Whether the Lower Appellate Court was correct in law in coming to the conclusion that the agreement of sale was not intended to be an agreement and relying upon the market price of land being higher than the value quoted in the agreement of sale?"

10. Submissions:

10.1. Ms. Kuilmozhi, learned counsel appearing on behalf of the plaintiff would contend that the report of the Forensic Sciences Department coupled with the evidence of C.W.1, would clearly prove that the Varthamana letter is nothing but a forgery. She would further contend that the learned Judge has erred in rejecting the report on the ground that the contemporaneous documents had not been filed and further even in the admitted signatures there is a variation.

10.2. The learned counsel would argue that the learned District Judge has not read the entire evidence of the expert wherein he has categorically stated that the difference is only the natural variations which does not in any manner impeach the fact that the signatures is that of the plaintiff in Ex.A.2. The learned counsel would further argue that the signature in Ex.A.2, which is the admitted signature of the plaintiff is found to be in stark variation to the signature in Ex.B.2. The learned Judge has committed a grave error in brushing aside the report of the expert.

10.3. She would further contend that there is no steep difference in the price quoted in the agreement of sale vis-a-vis the market value. She would further contend that the defendant who has come forward with the specific case that the agreement of sale was intended to be a security has not substantiated the same by producing the promissory notes which according to the defendant formed the basis for the execution of Ex.A.2, agreement of sale. Further, none of the witnesses to Ex.A.2 had been examined on the side of the defendant to show that the agreement of sale was never intended to be an agreement.

10.4. She would further argue that, to the letter dated 14.10.1991, calling upon the 1st defendant to execute the sale deed there has been no response, it is only after the legal notice was issued that a reply had been sent in which the Varthamana letter was quoted for the first time.

10.5. It is also her case that as a re-joinder to the said reply the plaintiff had sent a reply on 17.12.1991, (Ex.A.9) calling upon the 1st defendant to send a copy of the letter dated 12.06.1991, to which there has been no response which would clearly indicate that the Varthamana letter, Ex.B.2 has been created subsequently. She would further contend that once the plaintiff has proved his readiness and willingness the learned Judge ought to have confirmed the Judgement and Decree of the Trial Court in O.S.NO.242 of 1992.

10.6. Per contra, Mr.N.Manokaran, learned counsel appearing on behalf of the 1st respondent/3rd defendant would contend that the document, Ex.A.2 had been executed only as a security which is clearly evident from the fact that the agreement of sale does not denote the market value. He would further argue that the quantum of the balance sale consideration namely Rs.50,000/- is also a pointer to the fact that the agreement was intended only to be a security.

10.7. He would also attack the pleadings put forward by the plaintiff, which according to him does not constitute the requisite pleading for a suit for specific performance. In support of this contention he would rely on the Judgement in Padmakumari Vs. Dasayyan reported in (2015) 8 SCC 695. He would draw the attention of the Court to Paragraph No.21 of the said Judgement.

10.8. He would further rely upon the Judgement of the Honourable Supreme Court in Saradamani Kandappan Vs. S.Rajalakshmi and others reported in 2011 (4) CTC 640 in support of the argument that the plaintiff has overlooked the fact that

time was essence of the contract since the period of six months have been stipulated under Ex.A.2, agreement of sale and the first notice had come to hand only just prior to the term granted therein. He would draw the attention of this Court to the Paragraph Nos.17, 24 and 26 of the said Judgement.

10.9.He would also rely upon the Judgement in Alamgir Vs. State (NCT, Delhi) reported in (2003) 1 SCC 21, in support of his argument that the report of the expert cannot be relied upon completely without there being a corroborative evidence to support the analysis.

11.Discussion:

11.1.Heard the counsels on either side, examined the records and the citations placed for consideration. The suit in question is one for specific performance or in the alternative for the refund of the advance amount. The plaintiff has come forward with a case that Ex.A.2 sale deed had been executed on 12.06.1991 and the sale consideration had been fixed at Rs.1,50,000/- out of which a sum of Rs.1,00,000/- had been paid as an advance and what remained was only a balance of Rs.50,000/-.

11.2.The plaintiff was already in possession of the A-Schedule property as a tenant and that the B-Schedule property which is occupied by the 2nd defendant was also the subject matter of the agreement. The plaintiff had stated that despite he being ready and willing to proceed with the sale, the 1st defendant has not come forward to execute the sale deed, constraining him to issue first letter dated 14.10.1991 and thereafter a legal notice dated 26.11.1991 and it is only in response to the legal notice dated 26.11.1991, Ex.A.6, that the defendant had come forward with the reply for the first time putting forward Ex.B.2, Varthamana letter.

11.3.The defendant has refuted the allegations that he had executed an agreement of sale and it is a specific case that the said agreement has been executed only as a security for the loan borrowed by his father from the plaintiff and from one Balachandran. The 1st defendant had also pleaded that the plaintiff has admitted the fact that the document was only intended to be a security by executing Ex.B.2, Varthamana letter and therefore it is the contention of the defendant that the agreement of sale was never intended to be acted upon. He would also challenge the agreement of sale stating that prices quoted in the agreement of sale was not commensurate to the market value and consequently it was only intended to be a security.

11.4.The lower Appellate Court has chosen to discredit the handwriting expert's report by stating that, during his evidence

the expert who was examined as C.W.1 has stated that there is a variation in the signatures which have been marked as A.1 to A.3 and which is found in Ex.A.2, which is the agreement of sale. It is clear that the learned Subordinate Judge has not read the evidence completely. The expert has clearly opined that the variations which are found in the signatures are only the natural variations which happen when a person puts several signatures. The expert has clearly deposed that the signature A.1 to A.3 found in Ex.A.2 is affixed by the same person.

11.5.The expert has made a study that the signatures which is found in Ex.B.2 does not match with the signatures of which A.1 to A.3, are the signature found in the agreement of sale Ex.A.2, which is also of the same date as the disputed varthamana letter and therefore a contemporaneous document.

11.6.In the light of such overwhelming evidence on the side of the plaintiff lacked by the report and evidence of the expert it is not known as to how the learned Judge has deem it fit to overlook the report. It is also to be borne in mind that the signatures of the plaintiff in Ex.A.2 is admitted by the defendant and it is not the case of the defendant that the signatures numbering three in the Ex.A.2 has not being affixed by the plaintiff, on the contrary it is their admitted case that Ex.A.2 had been executed by the parties and the only difference being that the defendant would contend that it is executed by way of security, whereas the plaintiff would state that it was executed only for the purpose of proceeding with the sale.

11.7.Another thing that has to be taken note of is that, it is only in reply notice, Ex.A.8 that the 1st defendant has come forward with the case that the plaintiff has executed Varthamana letter and despite the plaintiff requesting the defendant to give him a copy of the said varthamana letter there was no response from the 1st defendant, which definitely gives raise to the suspicion in the minds of the Court. The signature in Ex.B.2 does not match the signature in Ex.A.2, which would clearly prove that Ex.B.2, has been created for the purpose of the suit.

11.8.Once the contention of the defendant that the varthamana letter is not proved then his contention that the agreement of sale was intended as a security fails. The Court has to then look into the other corroborative evidence that has been let in by the defendant to support his case that the agreement of sale was never intended to be a sale but was only intended to be a security.

11.9.It is seen that the defendant has not chosen to examine the witnesses to Ex.A.2, who are the best persons to state the

circumstances in which Ex.A.2 had come into existence. That apart, the 1st defendant who had pleaded that the plaintiff is in rental arrears from 1991 has not taken any steps to institute proceedings for evicting the plaintiff from the premises, since admittedly the plaintiff is a tenant that coupled with the fact that the defendant has not chosen to repay the loan amount even after the legal notice, Ex.A.6 will only go to show that the document Ex.A.2, was intended to be an agreement of sale and not a security. That apart as per Ex.A.2, the sale was to be completed on or before 11.12.1991. Even before the expiry of that period the letter dated 14.10.1991 has been issued by the plaintiff.

11.10.As regards the findings of the Court below that the fact that the agreement of sale does not denote the market value and therefore it is only a security is not taken into account since the plaintiff is already in possession of the property as a tenant and the fact that the parties have signed the dotted lines fully comprehending the terms would only show that the parties had entered into an agreement. Further the fabrication of Ex.B.2, would only go to strengthen this finding.

11.11.The 1st defendant having created Ex.B.2 to get over the agreement of sale Ex.A.2 would only show that the 1st defendant was trying to wriggle out of the agreement, if the same was intended as a security there was no necessity for the 1st defendant to have created the document. Therefore the 1st defendant has come forward with a false case, the 1st defendant has not chosen to examine the witness to Ex.A.2 and also initiate proceedings against the plaintiff for the arrears of rent as claimed by him and also the failure on the part of the defendant to repay the amount borrowed clearly indicates that Ex.A.2 was only intended to be an agreement of sale therefore the Judgement and Decree of the lower Appellate Court stating that the Ex.A.2 was not intended to be an agreement of sale is erroneous and is liable to set aside.

The Second Appeal is allowed and the Judgement and Decree in O.S.No.242 of 1992 is confirmed. There shall be no order as to costs.

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Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The I Additional District Judge,
Coimbatore.

2.The III Additional Subordinate Judge
Coimbatore.

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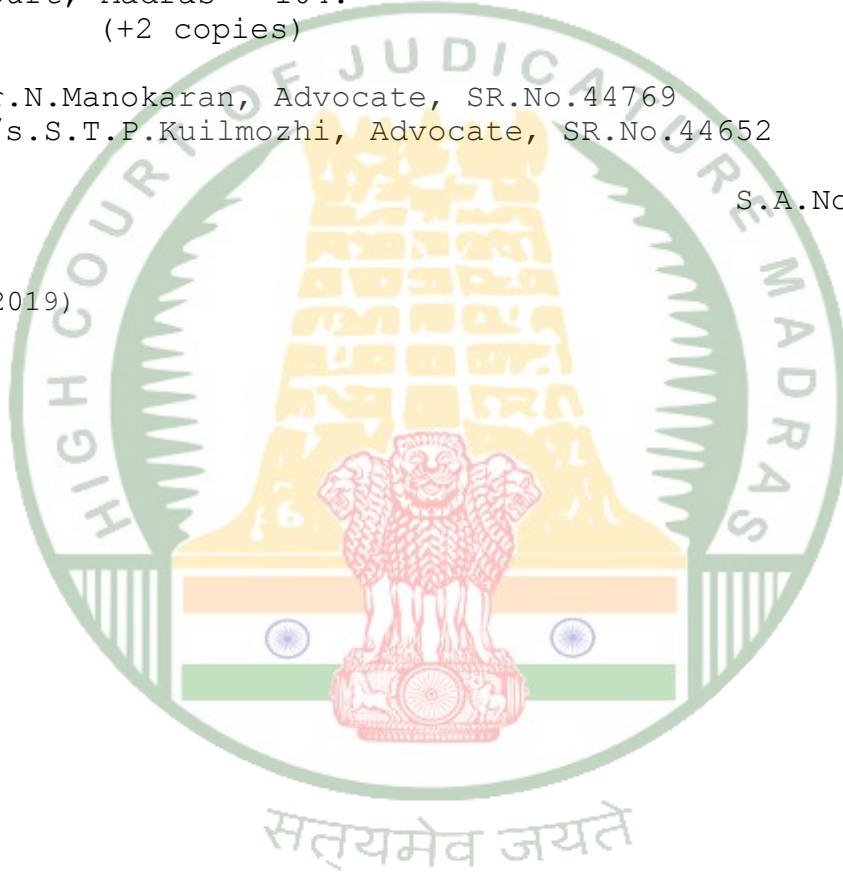
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Kak(30/10/2019)



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