BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 11.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A.No.154 of 2010

Thanga Nalini .. Appellant/Appellant/Plaintiff

Vs.

1.Petchiammal (died)
2.Selvaraj .. Respondents1 & 2/ Respondents / Defendants
3.Minor S.Balu Sanjeeth
(R3 rep. through his father and natural guardian the 2nd respondent)
4.S.Kalaimani
5.A.Anbalagan
6.S.Subburaj .. Respondents

[R3&R4 are brought on record as LRs of the deceased R1 vide order dated 27.02.2012 made in M.P(MD).NO.3 of 2011]

[R5 &R6 are impleaded vide order dated 02.11.2016 made in M.P.(MD).No.1 of 2013]

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree, dated 16.04.2009, made in A.S.No.42 of 2008, on the file of the Subordinate Judge, Kovilpatti, confirming the judgment and decree, dated 21.08.2008, made in O.S.No.261 of 2005, on the file of the District Munsif, Kovilpatti.

For Appellant: Mr.S.Alagarsamy
for Mr.D.Nallathambi

For Respondents: Mr.I.Suthakaran
for R2 &R3
Mr.Rajeshkanna
for R5 &R6
for R4-No appearance
R1-died

JUDGMENT

This Second appeal is filed aggrieved over the concurrent findings of the Courts below.

2. The brief facts leading to the filing of the suit is as follows:

Originally, the first defendant is the owner of the suit property. She was indebted to the plaintiff's brother-in-law, namely, K.Murugan. As she is not able to discharge the amount, in order to sell the property, she has executed Power-of-Attorney in favour of the said Murugan, who is the brother-in-law of the plaintiff and one Kathiresan on 19.06.2017 and 12.06.2017, respectively. At the time of Power-of -Attorney, the first defendant has informed the power agent that the property can be sold and the sale proceedings could be adjusted towards the debt. Accordingly, the suit property was sold by the said Murugan to the plaintiff on 13.10.1999 for valuable consideration. After purchase, the plaintiff requested the defendants to vacate the properties. However, they requested her to allow them to occupy the property as a tenant and offer the rent to the tune of Rs.400/-p.m. Subsequently, the rent was enhanced to Rs.800/-. Payment made by the defendants was accounted in a notebook by the plaintiff. However, the defendants neither paid the rent and nor vacate the premises. Hence the suit.

3. It is the case of the defendants that the plaintiff and his family was doing money lending business for high rate of interest. The defendants borrowed a sum of Rs.90,000/- from the brother-in-law of the plaintiff, one Murugan and Kathiresan, for the kidney transplantation to the daughter of the first defendant, who is the wife of the second defendant. As requested by the said Murugan, the first defendant executed a registered power deed, dated 19.06.1997 in favour of the plaintiff's brother-in-law(Murugan). Though the defendants spent huge amount for kidney transplantation, their daughter died on 04.01.2005. They were not able to repay the loan as per the deed. Therefore, by an agreement, dated 02.08.1999, the defendants and the plaintiff's brother-in-law Murugan and Kathiresan entered into an agreement. It is agreed that the defendants have to pay a total sum of Rs.1,40,605/-, including the principal amount of Rs.90,000/- with interest within 50 days. However, the said Murugan executed sale deed in favour of the plaintiff on 13.10.1999 behind the back of the defendants. The power document is sham and nominal. It was only executed as a security. It is also denied that there is no landlord and tenant relationship between the parties.

4. Based on the above pleadings, the trial Court has framed three issues and finally held that the sale deed is sham and nominal and there is no landlord and tenant relationship between the parties and dismissed the suit.

5. The first Appellate Court has also concurred the findings of the trial Court as against the second appeal is filed.

6. The second appeal is admitted on the following substantial question of law.

> Whether the Courts below are correct in holding that the sale deed executed by the respondent is only a security bond and not a sale deed, under which the appellant cannot claim title to the property?

7. The learned counsel for the appellant S.Alagarsamy vehemently contended that the Courts below have not appreciated the evidence and the power deed has been admitted by the parties and the defendants also admitted that if they fail to pay the loan amount, sale can be executed. Such being the matter, the plaintiff has purchased the property from the power agent and the defendants themselves admitted in the written statement about the said transaction. Now, they cannot avoid sale deed. The burden, which is on the side of the defendants, has not been discharged to prove the alleged lack of consideration of the sale deed. Hence, he submitted further that the plaintiff has also sent legal notice prior to the filing of the suit, which has not been replied.

8. The learned counsel for the respondents submitted that the trial Court and the first Appellate Court found that the entire transaction is the result of loan transaction. There is no consideration whatsoever passed on the sale deed. Taking advantage of the loan transaction, the sale deed came to be executed in favour of the plaintiff, who is none other than the sister-in-law of the the power agent. Both the Courts below relied on the factual aspects and found that the sale deed is sham and nominal and hence, prays for dismissal of the appeal.

9. I have heard both side counsel and perused the entire materials.

10. The plaint itself clearly indicates that the defendants were in adversity and financial constrains and both of them borrowed the said money from Murugan, who is none other than the brother-in-law of the plaintiff and one Kathiresan. Towards such loan transaction, a power-of-attorney said to have been executed in favour of the said Murugan and Kathiresan. It is the case of the plaintiff that she has purchased the property from the said Murugan. Thereafter she permitted the defendants to reside as a tenant and received the rent. Absolutely, there is no dispute with regard to the burden of establishing the alleged transaction on the person, who seeks to avoid transactions. To discharge such burden, not only oral evidence but also other circumstances, which are relevant to show that particular document is sham and nominal are sufficient. Even in admission on the part of the plaintiff itself can be the best evidence to find out whether the burden on the side of the

defendants is discharged or not. As held above even the plaint, it is clearly pleaded to the effect that the defendants are in financial crisis. It is also clearly pleaded by the defendants that they borrowed a loan for a sum of Rs.90,000/- from the said Murugan and Kathiresan, only for the purpose of kidney transplantation of the daughter of the first defendant. This fact is clearly established on record. It is their categorical stand that the power deed has been executed as a security and never intended to sale of the property. They also stated that on the failure to return the amount, the said Murugan can sell the property towards the loan. Before the time agreed between the parties to settle the loan, the sale has been registered in favour of the plaintiff. It is no doubt PW.1 is the purchaser from the power agent Murugan, who is none other than her own brother-in-law. If really the power agent has acted only as an agent and power deed is not related to the security. Then it has to be established on record that the power agent has infact acted only on the basis of the power deed, which is independent to the loan transaction. On such case, there must be evidence on the side of the plaintiff to show that there were proper accounts that have been settled by the agent. The plaintiff claimed to have purchased the property for consideration has not chosen to examine her own brother-in-law in this regard to show that the power deed is independent transaction and not a security document for the loan. Be that as it may, as to whether the plaintiff has paid any consideration for purchase of the property, the evidence of the plaintiff in the cross-examination itself clearly shows that the document is nothing but sham and nominal. She does not know the survey number of the property and the boundaries of the property and she did not even know the value of the property. The conduct of the plaintiff and showing ignorance to the nature of the property itself clearly indicates that she never intend to purchase the property for any consideration. The normal conduct of the humanbeing would make reasonable enquiry, when she or he intends to purchase a property. Therefore her conduct itself clearly indicates that the document is nothing but sham and nominal. She feigns ignorance to the fact that the defendants are residing in the suit property for more than 50 years though the plaintiff claims to be a neighbour.

11. The conduct of the plaintiff in suppressing the material facts before the Court at the time of filing the suit is also relevant to test her credibility. In fact Ex.B1 indicated that the immediately effect sale is registered in her favour and property has been again transferred to third party, whereas the above fact has been totally suppressed in the plaint. It is also to be noted that when the person claims to have acquired a title for consideration, when the other side has shown that the document is never intended for sale of property and only intended for security. The burden lies on plaintiff to prove consideration, whereas the admission of the plaintiff itself proves the fact that defendants are in adversity and the second defendant's wife underwent kidney transplantation. Therefore, the burden lies on the party to prove that the entire

transaction is the result of good faith and honest. The defendants infact probablised the case that the power-of-attorney is only a security towards the loan. The sale deed is not supported by any consideration. Admittedly, the power agent is none other than the brother-in-law of the plaintiff. Such being the position, when the defendants are in such financial constraint and total adversity, such position cannot be taken as advantage by the persons, who were in dominant position at the relevant point of time by lending the money to transfer the property to third parties on their whims and fancies. At the most, lender has to enforce the right for recovery of money only, not to defeat the rights of the parties and transfer the properties. When the trial Court and the first Appellate Court factually found out that the documents are sham and nominal, this Court also, after analysing the evidence of PW.1, has come to the conclusion that the sale deed Ex.A2 is only sham and nominal.

12. Accordingly, substantial question of law is answered as against the appellant and the second appeal stands dismissed. No Costs. This Court has also place on record the appreciation for the young counsel, who is just enrolled 45 days and advanced arguments on behalf of the appellant.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

To

1.The Subordinate Judge, Kovilpatti.

2.The District Munsif, Kovilpatti.

3.The Section Officer, (2 Copies)
Vernacular Records,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.I.SUTHAKARAN, Advocate (SR-104542[F] 11/12/2019)
+1 CC to M/s.D.NALLATHAMBI, Advocate (SR-104638[F] 12/12/2019)

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