

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.02.2020

Date of Verdict : 10.03.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.1181 of 2006

Rathnavelu ...Appellant/Respondent/Plaintiff

Vs.

S.Lakshmi Ammal ...Respondent/Appellant/Respondent

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 23.11.2005 made in A.S.No.15 of 2005 on the file of the Principal District Judge, Cuddalore, reversing the judgment and decree dated 29.03.2004 made in O.S.No.135 of 2000 on the file of the Principal Subordinate Court, Cuddalore.

For Appellant : M/s.Chitra Sampath,  
Senior Counsel  
For Mr.R.Sunil kumar

For Respondent : Mr.R.Gururaj

JUDGMENT

This second appeal is directed as against the judgment and decree dated 23.11.2005 made in A.S.No.15 of 2005 on the file of the Principal District Court, Cuddalore, reversing the judgment and decree dated 29.03.2004 made in O.S.No.135 of 2000 on the file of the Principal Subordinate Court, Cuddalore.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial Court.

3. The case of the plaintiff in brief is as follows :-

3.1. The suit is filed for declaration, recovery of possession and also for means profit. The suit property is a vacant site with an incomplete house, which was purchased by the plaintiff by a registered sale deed dated 03.06.1991 for the sale consideration of Rs.31,500/- from the defendant. Since the construction was incomplete, the property was mentioned as vacant site and the sale consideration mentioned as Rs.31,500/-. But actual sale

consideration paid by the plaintiff was Rs.1,65,000/-. A sum of Rs.1,00,000/- out of the sale consideration was paid by the plaintiff by way of banker cheque in favour of the husband of the defendant. Remaining amount of the sale consideration was paid in cash to the defendant by power of attorney of the plaintiff on the date of sale.

3.2. Thereafter, the plaintiff constructed pacca house in the year 1994 and assessed to the house tax. The said house was rented out to the husband of the defendant for the monthly rent at the rate of Rs.650/- and he was paying the rent till his death viz., 15.07.1999. Thereafter, the defendant attorned the tenancy in favour of the plaintiff and the defendant has to pay monthly rent. However the defendant failed to pay any rent and denied the tenancy and claimed ownership of the suit property. Hence, the plaintiff filed the present suit for declaration, recovery of possession and also for means profit.

4. Resisting the same, the defendant filed written statement along with counter claim and stated that the plaintiff is nor the owner of the suit property and he never hold ownership on either the land or over the super structure. There was no land lord or tenant relationship between the plaintiff and the defendant. The present suit has been filed only to grab the suit property. The defendant never sold the vacant site or super structure in favour of the plaintiff. The defendant borrowed a sum of Rs.20,000/- to meet out medical expenses for his son, who was suffering from brain tumour, from the plaintiff. While borrowing the said loan for security purpose, the sale deed referred by the plaintiff emerged. In fact, on the date of alleged sale there was a pucca building, since the entire construction was completed even in the year 1988. Thereafter the grahapravesam was also performed by the defendant. The defendant is an illiterate lady and she only knows to sign. Further she stated that she never part his possession relating to the suit property and she has been in possession and enjoyment of the suit property without any interference. She also ready and willing to pay the principle amount and redeemed the mortgage by depositing the sum of Rs.31,500/- and she prayed for dismissal of the suit and declare that the simple mortgage dated 03.06.1991 shall stand discharged on payment of Rs.20,000/- to the plaintiff.

5. On the side of the plaintiff, he examined P.W.1 and were marked Ex.A.1 to Ex.A.10. On the side of the defendant, she examined D.W.1 to D.W.7 and were marked Ex.D.1 to Ex.D.42. On perusal of the material produced on record and on considering both the oral and documentary evidences adduced by the respective parties and also the submissions made, the trial Court decreed the suit in

favour of the plaintiff and dismissed the counter claim of the defendant. Aggrieved by the same, the defendant preferred two appeal suits in A.S.Nos.10 & 15 of 2005 as against the judgment and decree passed in O.S.No.135/2000 and against the counter claim. The first appellate Court partly allowed the appeals and set aside the judgment and decree passed by the trial Court and directed the defendant to pay a sum of Rs.1,31,500/- to the plaintiff with 12% interest per annum. Aggrieved by the same, the plaintiff preferred this present second appeal.

6. At the time of admission of this second appeal on 14.06.2007, the following substantial questions of law were formulated for consideration:-

"a) Whether the learned District Judge did not err in dismissing the plaintiff's suit, when it dismissed the defendant's counter claim filed by her on the basis that the transaction of sale in her favour could not be treated as mortgage?

b) Whether the mere fact that the description of property in the sale deed was defective in its failure to refer to an incomplete construction could operate to extinguish the nature of transaction as a sale?

c) Whether the Court below did not err in failing to note that there had been transfer of title in favour of the plaintiff on payment of full consideration and the defendant cannot treat herself to be the owner of the property entitled to suffer a mere charge for the amount received by her?"

7. Ms.Chitra Sampath, learned Senior Counsel appearing for the appellant/plaintiff submitted that according to the plaintiff, he purchased the suit property with insignificant super structure and thereafter he built the house and allowed the defendant's husband to stay their family as tenant. After demise of the husband of the defendant, she attained the tenancy in favour of the plaintiff. While being so, she started disputing the title of the plaintiff. She further contended that both the Courts have concurrently held that the defendant had voluntarily executed the registered sale deed on 03.06.1991, and hence the plaintiff is entitled for declaration of title and recovery of possession. More over the counter claim of the defendant that the transaction on 03.06.1991 under Ex.A.2 was a mortgage has been rejected by both the Courts below. Therefore, the character of Ex.A.2 as a registered sale deed cannot be altered.

7.1. The learned Senior Counsel further contended that both the Courts below have held that the defendant's husband has received a sum of Rs.1 lakh under Ex.A.8 towards the value of the incomplete structure and the suit property had been assessed to property tax since 1994 in the name of plaintiff. Further the defendant had not produced a single document to prove the existence of the completed house in the suit property. However, the first appellate Court though has jurisdiction to reverse or affirm the findings of the trial Court, without any conscious application of mind and record the findings supported by any reasons, reversed the findings of the trial Court, when the trial Court assigned valid reasons and decreed the suit in favour of the plaintiff.

7.2. To support of her contention, the learned Senior Counsel appearing for the appellant/plaintiff would rely upon the following judgments :-

(i) (2019) 8 SCC 637 - State of Rajasthan and others Vs. Shiv

Dayal and anr.

(ii) Civil Appeal.9681 of 2014 dated 13.10.2014 - Vinod Kumar Vs.

Gangadhar

8. Per contra the learned counsel appearing for the respondent/ defendant contended that they had borrowed a loan of Rs.20,000/- as such the husband of the defendant constrained to execute the sale deed which was marked as Ex.A.2, which is actually a simple mortgage transaction and not a sale deed. She also expressed her readiness to deposit a sum of Rs.20,000/- or the sum may be Rs.31,500/- as sale consideration mentioned in the sale deed, which was marked as Ex.A.2. The sale deed was executed by the defendant in favour of the plaintiff on 03.06.1991. The description of the schedule property revealed that the suit property is a vacant site ad measuring 1500 sq.ft., comprised in survey No.56/7 and old survey No.109/3 situated at Pathirikuppam Village, Cuddalore. Though the schedule of the property did not describe about the super structure put up by the defendant there on, the plaintiff pleaded that the total sale consideration was fixed at Rs.1,60,000/- which included the value of the site and value of the incomplete house. The house and the site were valued separately. The recital of the sale deed clearly shows that only vacant site was there and no site with super structure. Therefore, Ex.A.2 is a simple mortgage, since the document Ex.A.2 is a shame and nominal one. But the plaintiff categorically stated that both had intention that the site with super structure should be the subject matter of the sale and that being so, the entire sale goes away for want of necessary recital to that extent.

8.1. The learned counsel appearing for the respondent would rely upon the following reported judgments to support of his arguments:-

- i) AIR 1953 SC 235 - Messrs.Trojan & Company Vs. R.M. N.N.Nagappa Chettiar
- ii) AIR 1993 SC 956 - Mst. Sethani Vs. Bhana
- iii) AIR 1965 SC 1506 - Brahma Nand Puri Vs. Nelei Puri (died)  
rep by Mathra Puri and anr
- iv) (1974) 1 SCC 424 - M/s. Raval and co. Vs. K.G.Ramachandran  
and others.
- v) (1988) 2 LW 292 - Kalianna Gounder (died) & ors Vs. Kalianna  
Gunder and ors.
- vi) 1946 PC 98 - Jagdish Narain and ors Vs. Nawab Said Ahmad  
Khan and ors.
- vii) (2005) 2 SCC 217 - Janki Vashdeo Bhojwani & anr Vs.  
Indusind Bank Ltd & ors.
- viii) AIR 1937 PC 152 - Lord cotton spinning and weaving mills  
ltd., Vs. Secretary of State.
- ix) (2003) 2 LW 152 - Varadarasu @ Devarasu Vs. Malone Veerasamy @ Thanapal & ors.
- x) AIR 1982 SC 20 - Smt.Gangabai Vs. Smt.Chhabubai
- xi) AIR 1960 SC 301 - Bhaskar Waman Joshi Vs. Shrinarayan  
Rambilas Agarwal
- xii) AIR 1988 SC 1074 - India Karu & ors Vs. Sheo Lal Kapoor
- xiii) AIR 1951 SC 177 - Srinivas Ram Kumar Vs. Mahabir Prasad  
& ors.
- xiv) AIR 1993 SC 1318 - B.R.Mulani Vs. Dr.A.B.Aswathanarayana  
& ors.
- xv) AIR 1962 SC 370 - Immani Appa Rao & ors Vs. Golapalli Ramalingamurthi & ors.

9. Heard Ms.Chitra Sampath, learned counsel appearing for the appellant/plaintiff and Mr.R.Gururaj, learned counsel appearing for the respondent/defendant.

10. Admittedly, the suit property is not a vacant site and it also includes building. Therefore, the sale deed is a fraudulent document. That apart the sale consideration mentioned in the sale deed i.e., a sum of Rs.31,500/- was not a real sale consideration. In the plaint, it is categorically stated that a sum of Rs.33,500/- was paid by way of cash by one Venugopal, the Power of attorney of the plaintiff towards sale consideration. The balance sale consideration of

Rs.1,00,000/- was paid by way of cheque in the name of the defendant's husband for the super structure. Whereas the sale consideration mentioned in the sale deed is only Rs.31,500/-. Therefore, the sale itself a fraudulent one in the eye of law and also against the provisions under Section 92 of the Indian Evidence Act. It is relevant to extract the provisions under Section 92 of the Indian Evidence Act, as follows :-

"92. Exclusion of evidence of oral agreement.-When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).--Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1\* [want or failure] of consideration, or mistake in fact or law.

Proviso (2).--The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).--The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).--The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of

documents.

Proviso (5).--Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).--Any fact may be proved which shows in what manner the language of a document is related to existing facts."

11. Further, the defendant cannot take the stand that it is only a simple mortgage deed. The plaintiff also failed to justify in adducing evidence contra to the terms of Ex.A.2 that the sale deed is not for vacant site and also for super structure. Further the plaintiff has to establish the sale consideration is not a sum of Rs.31,500/- as mentioned in the sale deed, but he paid a sum of Rs.1,65,000/- for the vacant site as well as the super structure. At the same time, the defendant also failed to prove that the transaction was simple mortgage. The plaintiff deposed that he paid house tax for the year 1992-1993 up to 1999-2000, which were marked as Ex.A.4 and Ex.A.5 and he further avert that he constructed house in the year 1994. Therefore, Exs.A. 4&5 proves that even before the year 1994, there was a house ie., after the sale deed Ex.A.2.

12. According to the defendant, she made construction in the year 1988 itself, and they performed grahapravesam for their house. She also produced Exs.B.7 to 13, the photographs which were taken at the time of grahapravesam ceremony. The plaintiff did not produce any of the documents to show that after purchase of the suit property, they constructed house. Further in Exs.B.14 & 15 i.e., the voters identity cards clearly mentioned the address of the suit property and other document Ex.B.16 & 17, electricity connection bills related to the house stand in the name of the defendant. Though those documents would not prove the ownership of the house, it would be supportive evidence that the defendant obtained electricity service connection in her name and she was paying the electricity bills in her name. The electricity receipt would not be issued in the name of the tenant and it would be issued in the name of person on whose name the electricity service connection was obtained. Therefore, those documents are clearly proved that the defendant is the owner of the house. Ex.B.39 & Ex.B.40 also stand in the name of the defendant and proved her ownership of the suit house. Therefore the plaintiff miserably failed to prove that he became the owner of the suit property. Further there is no peace of document marked

by the plaintiff that there was a landlord-tenant relationship between the plaintiff and the defendant. The plaintiff stated that the husband of the defendant was permitted to occupy the suit property as tenant. But the plaintiff failed to mark any piece of document to prove the same.

13. Insofar as the loan of Rs.20,000/- borrowed by the defendant, she was ready and willing to return the said amount or the sale consideration mentioned in the sale deed. As per the sale deed, the defendant received a sum of Rs.31,500/- and also a sum of Rs.1 lakh was received by her husband by a banker's cheque and same was encashed on 04.06.1991. Therefore, the plaintiff paid a sum of Rs.1,31,500/- to the defendant and her husband together, as such the defendant along with her husband borrowed a sum of Rs.1,31,500/- and she bound to repay the said amount. The first appellate Court, though there is no such prayer sought by the plaintiff, directed the defendant to repay a sum of Rs.1,31,500/- with 12% interest per annum and partly allowed the appeal and set aside the judgment and decree passed by the trial Court.

14. The learned Senior Counsel appearing for the appellant/plaintiff would rely upon judgment reported in (2019) 8 SCC 637 in the case of State of Rajasthan and others Vs. Shiv Dayal and anr., which reads as follows :-

"14. True it is as has been laid down by this Court in several decisions that "concurrent finding of fact" is usually binding on the High Court while hearing the second appeal under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"). However, this rule of law is subject to certain well known exceptions mentioned infra.

.....  
17. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code. "

15. She would further rely upon the judgment of the Hon'ble Supreme Court of India in Civil Appeal.9681 of 2014 dated 13.10.2014 in the case of Vinod Kumar Vs. Gangadhar, as follows :-

"5) In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held (at

pages 188-189) as under:

".....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it....."

It is true that when the first appellate Court reversed findings of the trial Court, it must reflect its conscious application of mind and record findings supported by the reasons and also along with contentions put forth.

16. In the case on hand, the trial Court without considering the fact that the sale deed i.e., Ex.A.2 contains only the vacant site and not mentioned about the super structure in the suit property and decreed the suit. Whereas the plaintiff specifically deposed that even at the time of purchasing the suit property there was an incomplete house for which, he separately paid a sum of Rs.1 lakh to the husband of the defendant. He also marked the tax receipt for the house situated in the suit property even from the year 1992. The suit property is a vacant site purchased by the plaintiff and as such he could not have constructed the house immediately and therefore, the first appellate Court had categorically reversed the findings of the trial Court. Further the first appellate Court had gone into depth of the issue and passed well considered judgment. Therefore, it cannot be said that the first appellate Court reversed the findings of the trial Court without conscious application of mind and without stating any reasons. Therefore, the above judgments are not helpful to the case of the plaintiff.

17. In view of the above discussion, this Court does not find any valid reason to interfere with the reasonings and findings rendered by the first appellate Court for upholding the case of the plaintiff. As such, this Court is

of the considered opinion that no substantial question of law involved in this appeal. Be that as it may, all the substantial questions of law formulated by this Court are answered in favour of the defendant and as against the plaintiff.

18. In fine, the second appeal stands dismissed by confirming the judgment and decree passed by the first appellate Court. There is no order as to costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

rts

To

1. The Principal District Judge,  
Cuddalore.
2. The Principal Subordinate Judge,  
Cuddalore.
3. The Section Officer,  
V.R.Section,  
Madras High Court,  
Chennai.

+1cc to Mr.D.Baskar, Advocate, S.R.No.21125

+1cc to Mr.R.Sunil Kumar, Advocate, S.R.No.21954

सत्यमेव जयते

S.A.No.1181 of 2006

GMR (CO)

CB (20/08/2020)

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