



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.11.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.516 of 2010

1. Murugan Pillai
2. Muthu Pillai ... Appellants / Appellants 2 & 3 /
Defendants 2 & 3

Vs.

1. Ponnammal ... Respondent / Respondent /
Plaintiff

2. Veerayyan Chettiar (Died) ... Respondent / 1st Appellant /
1st Defendant

3. Saraswarthi Achi
4. Palaniappan
5. Govindarajan
6. Tamilselvi
7. Indiragandhi
8. Padmavathi
9. Mallika ... Respondents

(R-3 to R-9 are brought on record as LR's of the
deceased R-2 as per order dated 03.12.2018
in M.P. (MD)No.3 of 2015)

Prayer: Second appeal filed under Section 100 of C.P.C.,
against the decree and judgment passed in A.S.No.25 of 2008 on the
file of the Sub Court, Pattukkottai, dated 30.11.2009 confirming the
decree and judgment passed in O.S.No.29 of 2004 on the file of the
District Munsif cum Judicial Magistrate Court, Orathanadu, dated
25.09.2008.

For Appellants : Mr.S.Parthasarathy,
for Mr.D.Venkatesh.

For R-1 : Mr.P.Ganapathi Subramanian

For R-2 : Mr.M.P.Senthil

* * *



J U D G M E N T

Defendants 2 and 3 in O.S.No.29 of 2004 on the file of the District Munsif cum Judicial Magistrate, Orathanadu, are the appellants in this second appeal.

2. The suit was filed by the first respondent herein, namely, Ponnammal for the relief of specific performance. The case of the plaintiff was that the suit property belonged to Veerayyan Chettiar and that he entered into a sale agreement dated 28.08.1987 with her. The sale consideration was fixed at Rs.12,750/-. The time for concluding the contract was six months. However, it was claimed by Ponnammal that she had taken possession of the suit property in the year 1987 itself, since the consideration was almost paid and only some of the part was left unpaid. For certain reasons, the sale deed could not be registered and Veerayyan Chettiar / the first defendant entered into a fresh sale agreement dated 02.05.2003. Since Veerayyan Chettiar was still delaying the execution of the sale deed, Ponnammal caused to issue notice (Ex.A.3). In response thereto, Veerayyan issued reply dated 22.04.2004. It transpired that he had already sold the suit property in favour of the appellants on 27.02.2004 itself. Therefore, the present suit came to be laid and the appellants were also impleaded as defendants. The defendants filed written statement controverting the plaint averments. The execution of the sale agreement dated 02.05.2003 was questioned. Based on the divergent pleadings, the trial Court framed the necessary issues. The plaintiff examined herself as P.W.1 and two of the attestors of the sale agreement dated 02.05.2003 were examined as P.W.2 and P.W.3. Ex.A.1 to Ex.A.11 were marked. Defendants examined themselves as D.W.1 to D.W.3 and examined three other witnesses. Ex.B.1 to Ex.B.11 were marked on their side. An Advocate Commissioner was appointed and his report was marked as Ex.C.1 and Ex.C.2.

3. After a consideration of the evidence on record, by judgment and decree dated 25.09.2008, the trial Court decreed the suit as prayed for. Aggrieved by the same, the defendants filed A.S.No.29 of 2004 before the Sub Court, Pattukottai. The first appellate Court by judgment and decree dated 30.11.2009 dismissed the appeal. Challenging the same, the purchasers alone filed this second appeal. The original vendor was shown as the second respondent. During the pendency of the second appeal, the vendor passed away and his legal heirs were brought on record.

4. This second appeal was admitted on 27.10.2021 on the following substantial questions of law:-

" (i) Whether the finding of the Courts below



that Ex.A.2 has been proved by invoking Section 57 of the Indian Evidence Act is perverse?

(ii) Whether granting the relief of specific performance is contrary to the settled principles of law?"

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5. Heard the learned counsel appearing for the appellants as well as the learned counsel appearing for the contesting respondent as well as the learned counsel for the legal heirs of the original D.W.1.

6. The primary contention of the learned counsel appearing for the appellants is that the original sale agreement which was marked as Ex.A.1 is of the year 1987. The sale consideration itself was only for a sum of Rs.12,750/-. Even according to the plaintiff, a sum of Rs.11,750/- was paid. There was simply no reason for not executing the sale consideration then and there. According to the appellants, the first defendant Veerayyan Chettiar and the plaintiff had a financial dealing and Ex.A.1 was executed for security purpose. In fact, a reading of the contents of Ex.A.1 would show that the same could have been placed for registration before the Registrar. It was only after 16 years, once again the plaintiff wanted one more sale agreement from the first defendant. It was only on 14.12.2004 Ponnammal applied for Adangal. The overall conduct of the plaintiff is such that that she is not entitled to the relief of the specific performance.

7. The learned counsel would point out that Ex.A.2 had been notarised. But the Notary was not examined. The Courts below chose to invoke Section 85 of the Indian Evidence Act and come to the conclusion that the authenticity of Ex.A.2 had been established. When once the defendants contested the genuineness of Ex.A.2, the burden lay on the plaintiff to prove that it was executed only by Verrayan. The plaintiff did not take any step to obtain expert opinion. He prayed that the substantial questions of law may be answered in favour of the appellants.

8. Per contra, the learned counsel appearing for the plaintiff submitted that the impugned judgments do not call for any interference.

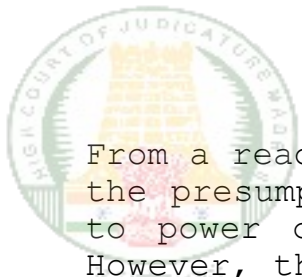
9. I carefully considered the rival contentions and went through the entire evidence on record.

10. Section 85 of the Indian Evidence Act is as follows:-

"85. Presumption as to powers-of-attorney.

The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was

so executed and authenticated. "



From a reading of the provision, one can come to the conclusion that the presumption contemplated under Section 85 of the Act will apply to power of attorney. It cannot be applied to a sale agreement. However, the Courts below invoked Section 85 of the Indian Evidence Act and came to the conclusion that Ex.A.2 should be presumed to have been proved in view of its notarisation. In fact, Courts below refer to Section 57 which talks of facts of which the Court can take judicial notice.

11. Section 57 of the Indian Evidence Act is as follows:-

" 57. Facts of which Court must take judicial notice. --

The Court shall take judicial notice of the following facts: --

- (1) All laws in force in the territory of India;
- (2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;
- (3) Articles of War for the Indian Army Navy or Air Force;
- (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the States;
- (5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;
- (6) All seals of which English Courts take judicial notice: the seals of all the Courts in India and of all Courts out of India established by the authority of the Central Government or the Crown Representative; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;
- (7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;
- (8) The existence, title and national flag of every State or Sovereign recognized by the Government of India;
- (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;
- (10) The territories under the dominion of the Government of India;
- (11) The commencement, continuance and termination of hostilities between the Government of India and any other State or body of persons;
- (12) The names of the members and officers of the Court, and of their deputies and subordinate offices and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons



authorized by law to appear or act before it;

(13) The rule of the road on land or at sea.

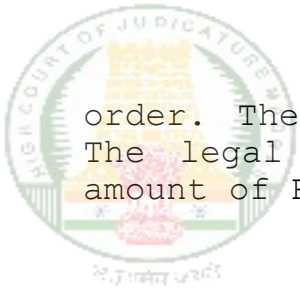
In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so."

From a reading of Section 57 as well as Section 85 of the Evidence Act, I am not able to find any such mandate as claimed by the Courts below. Therefore, I answer the first substantial question of law in favour of the appellants.

12. The next question is whether failure on the part of the plaintiff to refer Ex.A.2 for forensic opinion is fatal to her case. The plaintiff examined herself and also one of the attestors of Ex.A.2. By doing so, the plaintiff had discharged the initial onus cast on her. Even according to the defendants, Ex.A.2 was not executed by the first defendant. But nothing stopped them from filing an I.A. for referring the document for forensic opinion, since the onus had clearly shifted to them. They have not done so. Therefore, there is no merit in the contention of the appellants' counsel that the plaintiff had not discharged the burden cast on her. More than anything else, the conduct of the original defendant will have to be taken note of. As rightly pointed out by the plaintiff, not only the conduct of the plaintiff, but also the conduct of the defendant has to be taken note of by the Courts below. The plaintiff had marked Ex.A.10 and Ex.A.11. Ex.A.10 is also dated 28.08.1987, the same date as that of Ex.A.10 is the sale agreement executed in favour of Chellammal. Pursuant to the said agreement, sale deed was executed in her favour by Veerayyan as late on 05.02.2007 and it was marked as Ex.A.11. Veerayyan proceeded to deny his signature in Ex.A.10. From this one can come to the conclusion that Veerayyan has not been *bona fide* in his conduct. Therefore, though I fault the reasons set out by the Courts below, I independently come to the conclusion that the plaintiff proved Ex.A.2. The suit was filed in time. The appellants have traced the suit property under Ex.B.9. Therefore, the Courts below have declined to grant relief to the appellants. The concurrent findings of the Courts below do not warrant any interference.

13. This second appeal is dismissed. At this stage, the plaintiff had fairly stated that the plaintiff would deposit a sum of Rs.4,00,000/- to the credit of O.S.No.29 of 2004 on the file of the District Munsif cum Judicial Magistrate, Orathanadu, within a period of four weeks from the date of receipt of a copy of this



order. The appellants will be entitled to withdraw Rs.3,00,000/-. The legal heirs of Veerayyan will be entitled to the remaining amount of Rs.1,00,000/-. No costs.

Sd/-

Assistant Registrar (CS-I)

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Sub Assistant Registrar(CS)

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Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The Sub Judge,
Pattukkottai.
- 2.The District Munsif cum Judicial Magistrate,
Orathanadu.
3. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC to M/s.D. VENKATESH, Advocate (SR-33842[F] dated 09/11/2021)

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