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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.03.2022

CORAM

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

S.A.NO.1289 OF 2011

AND

M.P.NOS.1 OF 2011 & 1 OF 2012

T.R.Thangavel

... Appellant/Defendant

Vs.

Thangammal

... Respondent/Plaintiff

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 20.07.2011 passed in A.S. No.45 of 2010, on the file of the Principal District Judge, Namakkal, reversing the decree and judgment dated 29.11.2008 passed in O.S. No.32 of 2008, on the file of the Subordinate Court, Tiruchengode (transferred O.S. No.809 of 2002 of Subordinate Court, Namakkal).

For Appellant : Mr.N.Manokaran

For Respondent : Mr.D.Rajagopal

JUDGMENT

The appellant is the defendant in O.S. No.32 of 2008 on the file of the Subordinate Court, Tiruchengode (transferred O.S. No.809 of 2002 of Subordinate Court, Namakkal). The respondent/plaintiff filed the suit for the following reliefs.

- "1) To pass a decree for specific performance of contract directing the defendant to receive the balance sale consideration of Rs.25,000/- and execute a sale deed and register the same within the time to be specified by the Court and if the defendant failed to do so, order to deposit the sale price into Court, execute and register the sale deed by this Court on behalf of the defendant (or) in the alternative
- 2) directing the defendant to repay the advance



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amount of Rs.75,000/- plus Rs.25,000/- towards damages for non execution of the sale deed with interest @ 24% per annum from the date of suit till realisation,

3) award costs of suit and

4) for a permanent injunction restraining the defendant, his men, agents and attorneys from in any way alienating the properties,

5) grant such other relief or reliefs the Hon'ble Court may deem fit and proper in the circumstances of the case".

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

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

The defendant executed an agreement of sale dated 22.08.1994 (Ex.A1) in favour of the plaintiff agreeing for the sale of the suit properties. The time mentioned in the agreement for the completion of transaction was three years and the sale consideration was fixed as Rs.1,00,000/-, out of which a sum of Rs.75,000/- was paid by the plaintiff towards advance to the defendant on the date of Ex.A1. The plaintiff was always ready and willing to perform her part of the contract from the date of sale agreement. The plaintiff also sent a notice undated nil (Ex.A3) to the defendant indicating her willingness to get the sale deed executed in her favour by paying the balance sale consideration of Rs.25,000/-. On receipt of the said notice, the defendant approached the plaintiff and expressed his inability to execute the sale deed in favour of the plaintiff and requested for a further period of 3 years and made an endorsement dated 20.08.1997 (Ex.A2) in this regard on Ex.A1. Thereafter, despite repeated demands by the plaintiff, the defendant did not come forward to honour the sale agreement and therefore, a lawyer's notice dated 29.04.1999 (Ex.A4) was issued to the defendant calling upon the defendant to perform his part of the contract. The defendant sent a reply dated 12.06.1999 (Ex.A5), which according to the plaintiff contained false allegations. Hence the suit was filed by the plaintiff.

4. The suit was resisted by the defendant on the following grounds.

- 1) It is false to state that the defendant agreed to sell the suit properties in favour of the plaintiff for a sale consideration of Rs.1,00,000/- and that a sum of Rs.75,000/- was paid by the plaintiff towards advance.
- 2) The suit properties do not belong to the defendant alone and they are the ancestral properties belonging to the



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family of the defendant. The defendant's wife and his minor children filed a suit for partition in O.S. No.109/1999 before the District Munsif, Tiruchengode and a preliminary decree for partition was also passed in respect of the suit properties on 13.10.1999.

- 3) An application for passing of final decree for partition is pending.
- 4) The defendant borrowed a sum of Rs.75,000/- from the plaintiff and executed a sale agreement (Ex.A1) as a security for the said loan transaction.
- 5) Since the period mentioned in Ex.A1 expired on 22.08.1997, the defendant made an endorsement on 20.08.1997 (Ex.A2) extending the period by 3 years.
- 6) Though the defendant prayed time to repay the loan amount of Rs.75,000/-, the plaintiff, in order to grab the suit properties, had filed the present suit and hence the suit is liable to be dismissed.

5. On the basis of the above pleadings, the trial court framed appropriate issues and after full contest dismissed the suit filed by the plaintiff vide its decree and judgment dated 29.11.2008 on the following grounds:

- 1) The sale agreement dated 22.08.1994 (Ex.A1) was executed only as a security for the loan transaction between the plaintiff and the defendant.
- 2) The suit properties are the ancestral properties of the family of the defendant as is seen from the suit in O.S. No.109 of 1999.
- 3) The plaintiff has not also proved the execution of Ex.A1 that it was intended for selling the suit properties in her favour.

The trial court, therefore, directed the defendant to pay the advance amount of Rs.75,000/- to the plaintiff together with interest @ 9% per annum from the date of suit till the date of decree and thereafter @ 6% till the date of realisation.

6. Aggrieved over the same, the plaintiff preferred an appeal in A.S. No.45 of 2010 before the Principal District Court, Namakkal. The learned Principal District Judge, allowed the appeal and set aside the decree and judgment of the trial court vide his decree and judgment dated 20.07.2011 on the ground that since the sale agreement Ex.A1 is a registered document, the parties cannot be allowed to let in evidence to vary/alter the contract as it is hit under Sections 91 and 92 of the Indian Evidence Act. The first appellate court, therefore, decreed the suit filed by the plaintiff.

7. Now the present second appeal is filed on the following substantial questions of law:

- 1) Whether the first appellate court committed a wrong in



rejecting the evidence of D.W.1 and D.W.2 particularly when the defendant is legally entitled to let in oral evidence to controvert the written document since the suit document was executed altogether for a different purpose?

- 2) Whether an adverse interference ought to be drawn against the plaintiff on account of non examination of her husband, witnesses and scribe to Ex.A1 to justify the nature of the transaction?
- 3) Whether the suit is barred by limitation in view of the specific recital and default clause in the suit document?

8. Heard Mr. N. Manokaran, learned counsel for the appellant and Mr.D. Rajagopal, learned counsel for the respondent.

9. Mr. N. Manokaran, learned counsel for the appellant contended that though the plaintiff did not prove that she was all along ready and willing to perform her part of the contract as mandated under Section 16(c) of the Specific Relief Act, the first Appellate Court was wrong in decreeing the suit in favour of the plaintiff merely on the ground that the agreement of sale is registered. It is also his contention that if really the parties had agreed to enter into a sale agreement for the purpose of conveyance of the suit properties and the balance sum remaining to be paid is only Rs.25,000/-, there is no need on the part of the parties to fix an outer time limit of 3 years for completing the sale transaction. He relied on the decision in P. Selvaraj Vs. R.Gopal reported in 2019 (3) CTC 679 in this regard. According to him, the reason for extending further 3 year period has not been properly explained by the plaintiff and there was no discussion on this aspect by the first Appellate Court. It is his contention that the defendant cannot be precluded from taking a plea that the sale agreement Ex.A1 was not intended to be acted upon as an agreement of sale, but it was executed for some other purpose namely as a security for a loan transaction and such a plea would fall within the exception under Section 92 of the Indian Evidence Act and the defendant is not attempting to vary the terms of the contract. He would therefore contend that the first Appellate Court was totally wrong in decreeing the suit in favour of the plaintiff on the sole ground that Ex.A1 sale agreement is a registered instrument and that the defendant cannot be permitted to adduce evidence to vary the terms of the contract as per Section 92 of the Indian Evidence Act. He also cited several decisions to show that the plaintiff did not prove her readiness and willingness for purchasing the suit properties and that Ex.A1 was never intended for selling the suit properties.

10. Per contra learned counsel for the respondent/plaintiff

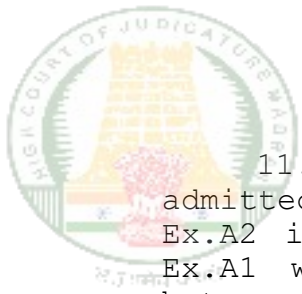


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contended that

- 1) the defendant in his written statement had admitted the execution of the sale agreement Ex.A1 and also the endorsement (Ex.A2) made for the extension of time for further period of three years.
- 2) Having admitted the execution of Ex.A1 and Ex.A2, it is not open to the defendant to contend that the sale agreement Ex.A1 was executed only as a security for the loan transaction between him and the plaintiff.
- 3) It is also his contention that since the defendant expressed his inability to execute the sale deed, he made an endorsement Ex.A2 on Ex.A1 and the recitals in Ex.A2 would clearly prove the same and that therefore, the defendant cannot say that the plaintiff was not ready and willing to perform her part of the contract.
- 4) According to him, the decree passed in O.S. No.109 of 1999 on the file of the District Munsif, Tiruchengode, is only an exparte decree and based on that alone, it cannot be held that the suit properties are not the exclusive properties of the appellant/defendant.
- 5) The trial Court ignored the admissions made by the defendant in his written statement and held that the execution of Ex.A1 sale agreement has not been proved by the plaintiff.
- 6) The lower appellate Court had elaborately considered the pleadings as well as oral / documentary evidence and had concluded that the properties covered under Ex.A1 were not intended for the purpose of loan transaction and therefore, the same cannot be set aside by this Court.
- 7) As regards the limitation raised in the present appeal, it is relevant to mention that there was no specific issue as to whether the suit was barred by limitation either in the trial Court or in the first appellate Court.
- 8) The Hon'ble Supreme Court in numerous judgments had held that the readiness and willingness can be inferred from the pleadings and that since the plaintiff has paid 75% of the sale transaction, it can be easily inferred that she was always ready and willing to perform her part of the contract.

Therefore, he prayed for the dismissal of the present second appeal.



11. At the outset, it may be observed that the defendant admitted in his written statement the execution of Ex.A1 and Ex.A2 in favour of the plaintiff. His only contention is that Ex.A1 was made only as a security for the loan transaction between him and the plaintiff. The trial Court after analysing the oral / documentary evidence held that Ex.A1 was not executed for the purpose of selling the suit properties in favour of the plaintiff and that the plaintiff has not also proved that Ex.A1 is true and valid. The trial Court did not render any finding whether the plaintiff was always ready and willing to perform her part of the contract though a specific issue was framed in this regard.

12. The first appellate Court also did not render any finding with regard to the readiness and willingness on the part of the plaintiff and decreed the suit merely based on the fact that Ex.A1 is a registered document and the defendant cannot be permitted to vary the contract as it is hit by Section 92 of the Indian Evidence Act. The first appellate Court also did not frame points for determination as mandated under Order XLI Rule 31 of the Code of Civil Procedure. It is settled principles of law that right to file the first appeal against the decree under Section 96 of the Code of Civil Procedure is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of the trial Court and it is open to the appellant to attack all the findings of fact / law in the first appeal. It is the duty of the first appellate Court to appreciate the entire evidence and may come to a different conclusion from that of the trial Court. While reversing the finding of fact, the first appellate Court must come into close quarters with the reasonings assigned by the trial Court and then assign its own reasons for arriving at a different finding. In Kurian Chacko Vs Varkey Ouseph reported in AIR 1969 Kerala 316, Justice V.R.Krishna Iyer (as he then was the judge of the Kerala High Court), while deciding the first appeal under Section 96 of the Code of Civil Procedure, reminded the first appellate Court of its duty as to how the first appeal under Section 96 of the Indian Evidence Act, should be decided. The learned judge held as under :

"The plaintiff unsuccessful in two courts, has come up here aggrieved by the dismissal of the suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit recorded findings against the plaintiff both on title and possession. In an appeal, the learned Subordinate Judge disposed of the whole matter glibly and



briefly, in a few sentence".

13. In the following decisions of Hon'ble Supreme Court it has been clearly held that the judgment of the first appellate Court must reflect its conscious application of mind on all the issues arising along with the contentions put forth and prayed by the parties for decision of the appellate Court while reversing a finding of fact and it is the duty of the first appellate Court to deal with all the issues.

- 1) Shasidhar & Others vs. Smt. Ashwini Uma Mathad reported in 2015 (AIR) SCW 777.
- 2) Santosh Hazari vs. Purushottam Tiwari (deceased by LRS) reported in (2001) 3 SCC 179.
- 3) B.V. Nagesh and another vs. H.V. Srinivasa Murthy reported in (2010) 13 SCC 530
- 4) Vinod Kumar vs. Gangadhar reported in (2014) 12 SCALE 171

14. In the instant case, the first appellate Court has not at all adverted to the reasonings accorded by the trial Court while reversing the judgment. It is also settled principles of law that the defendant cannot be precluded from taking a plea that the agreement was not intended to be acted upon as an agreement of sale but it was executed for some other purpose, namely, as a security for a loan transaction and such a plea would fall within the exception under Section 92 of the Indian Evidence Act. This settled principle of law has been ignored by the first appellate Court and had merely held that the defendant cannot be permitted to vary the terms of contract as it is hit under Section 92 of the Indian Evidence Act. As already observed, both the Courts below did not render any finding with regard to the readiness and willingness on the part of the plaintiff in performing her part of the contract and the first appellate Court also did not frame separate points for determination as envisaged under Order XLI Rule 31 of the Code of Civil Procedure.

15. In view of the afore stated exposition of law, the decree and judgment passed by the first appellate Court cannot be sustained and therefore it has got to be set aside. The case is remitted back to the first appellate Court for deciding afresh. The parties through their counsels are directed to appear before the Principal District Judge, Namakkal, on 25.04.2022. Since the suit was filed in the year 2002, the first appellate Court is required to decide the same as expeditiously as possible and in any event not later than six months from the date of 25.04.2022.

16. With the above observations, this second appeal is



disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

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Sd/-
Assistant Registrar (CS-IV)

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Sub Assistant Registrar

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To

1. The Principal District Judge, Namakkal.
2. The Subordinate Judge, Tiruchengode.
3. The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate, SR.No.22043 [08/04/2022]

+1cc to Mr.D.Rajagopal, Advocate, SR.No.22125 [18/04/2022]

S.A.No.1289 of 2011
and
M.P.Nos.1 of 2011 & 1 of 2012

EV (CO)
RLP (31/03/2022)