



S.A.(MD) No.724 of 2010

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.06.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.724 of 2010

and

M.P.(MD) No.1 of 2010

Backiavathy

... Appellant/Respondent/
Plaintiff

-VS-

N.Balasundaram

... Respondent/Appellant/
Defendant

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 09.03.2010 made in A.S.No.59 of 2007 on the file of the Principal Subordinate Court, Kumbakonam, reversing the judgment and decree dated 26.02.2007 made in O.S.No.434 of 2005 on the file of I Additional District Munsif Court, Kumbakonam.

For Appellant : Mr.H.Lakshmi Shankar
for Mr.T.V.Sivakumar

For Respondent : Mrs.Sivashankari
for Mr.Siddharthan



S.A.(MD) No.724 of 2010

JUDGMENT

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The plaintiff, in O.S.No.434 of 2005, which was laid for specific performance of a sale agreement dated 09.12.2003, having been successful before the trial Court, but suffered reversal before the first appellate Court, has approached this Court in this second appeal.

2. The case of the plaintiff is straight forward. On 09.12.2003, the plaintiff and the defendant entered into Ext.A1-sale agreement for the sale of suit property for a total consideration of Rs.70,000/-. The plaintiff had paid in advance a sum of Rs.56,000/- under the agreement and some four days thereafter, on 13.12.2003, he paid Rs.1,000/-. In particular, it is pleaded that Ext.A1-sale agreement was executed before a Notary. Subsequently, on 03.08.2005, the plaintiff issued a suit notice and there was no reply, following which, the plaintiff laid the suit.

3. The contentions taken by the defendant in the written statement are that the suit property is a joint family property, and that he did not have any right to execute the sale agreement. Indeed, this defendant has laid a suit for



S.A.(MD) No.724 of 2010

partition in O.S.No.260 of 2001 before the Sub Court, Kumbakonam, for partition against his co-sharers and this was later transferred to FTC Court, Thanjavur, where it was taken on record as O.S.No.18 of 2004. The plaintiff's husband was a licensee for collecting the agricultural yield from the suit property. He moved the Revenue Court for registering him as a cultivating tenant and that came to be dismissed. Thereafter, the plaintiff has laid this suit.

4.1. The dispute went to trial, where the husband of the plaintiff was examined as P.W.1. Besides, he also examined both the attesting witnesses as P.W.2 and P.W.3. During chief examination, he produced Ext.A1 and Ext.A2.

4.2. For the defendant, he examined himself as D.W.1. During his cross examination, the plaintiff confronted D.W.1 with a copy of a certain partition deed, dated 31.03.1994 involving the defendant and his family members. This document was admitted by the defendant and it came to be marked as Ext.A3. On his side, the defendant produced Ext.B1, which is the proceedings of the Tahsildar, Kumbakonam, dated 29.06.2001.



S.A.(MD) No.724 of 2010

WEB COPY

5. On appreciating the evidence before it, the trial Court decreed the suit.

The critical issue before the trial Court was whether the defendant had at all executed Ext.A1 sale agreement. To resolve it, the trial Court compared the admitted signature of the defendant in Ext.A3-partition deed with his signature in Ext.A1-sale agreement, and came to the conclusion that Ext.A1-sale agreement indeed was executed by the defendant. The matter was taken before the first appellate court in A.S.No.59 of 2007. The first appellate Court came to a different conclusion, as it found several unexplained contradictions as regards the place where Ext.A1 was executed. It specifically noted that while in the plaint, the plaintiff had made a pointed plea that Ext.A1 was executed before the Notary, during trial, each of the three witnesses examined on the side of the plaintiff came out with different places where the document was executed, and hence it suspected the plaintiff's case. Dealing with the second line of defence of the defendant that Ext.A1 came to be fabricated since P.W.1 lost his case to have his name registered as a cultivating tenant, *vis-a-vis* the suit property, the first appellate Court has held that differences had arisen between the parties even



S.A.(MD) No.724 of 2010

prior to Ext.A3, and the circumstances hardly provided any comfort for the parties to enter into a sale agreement such as the present one. Aggrieved by the same, the plaintiff is before this Court. The appeal is not yet admitted.

6. Heard Mr.H.Lakshmi Shankar, learned counsel for the appellant and Mrs.Sivashankari, learned counsel for the respondent.

7. The learned counsel for the appellant vehemently contended that here is a defendant, who opted to lie before the Court and he made a statement that he did not execute Ext.A1, but at the same length admitted the execution of Ext.A3-partition deed some nine years prior to the date of execution of Ext.A1. In Ext.A3, he has signed in English so has he in Ext.A1-sale agreement. But once the suit was laid for specific performance, the defendant makes a calculated effort and started signing in Tamil as could be seen from his written statement and also in his deposition. Even if he has not deliberately done it, yet it only brings to surface that he had the habit of signing both in English as well as in Tamil and the trial Court was correct in comparing the admitted signature of the defendant in Ext.A3 with his



S.A.(MD) No.724 of 2010

WEB COPY

disputed signature in Ext.A1. The first appellate Court however did not venture to explain why it still need to suspect the execution of Ext.A1.

8. Mrs.Sivashankari, the learned counsel for the respondent, on the other hand has submitted that in a suit for specific performance, the plaintiff must come with utmost clean hands. In proving the case, she did not enter the witness box, but her husband has stepped into the box. Even though it is permissible under Sec.120 of the Indian Evidence Act, 1872, the fact remains there is serious inconsistency as to the the place of execution of Ext.A-1. There were multiple versions in the testimony of all the witnesses examined by the plaintiff. This is further compounded by the fact that there was some dispute before the Revenue Court as could be seen from Ext.B1, which indicates that the plaintiff's husband (P.W.1 herein) has moved the Revenue Court to register himself as a cultivating tenant of the suit property against the defendant. This precisely provides the backdrop in which the Court may have to test the genuineness of Ext.A1, and this precisely the first appellate Court has done.



S.A.(MD) No.724 of 2010

WEB COPY

9. There is merit on both sides which would indicate that neither side has come clean speaking the whole truth before the Court. It is a case of *in pari delicto*, the advantage should necessarily flow in favour of the defendant. The trial Court's finding is all about entering a finding regarding the signature of the defendant in Ext.A1. That cannot be isolated from other attending circumstances. After all, in a suit for specific performance, the decree is not automatic and being an equitable remedy, the plaintiff must be able to explain every shade of suspicion that may be directed against her case for her to qualify for a decree. If Ext.A1 is admitted, then it has to be positioned along side the circumstances regarding its execution as are available on record. Admittedly, as to the place of execution of the agreement, all the three witnesses whom the plaintiff had examined, comes out with different versions. This is also adequately backed by Ext.B1, the notice from the Tahsildar indicating an outstanding dispute between P.W.1 and the defendant prior to Ext.A1. While the defendant posed some answer under what circumstances he had signed Ext.A1, the plaintiff has lot to explain about these internal inconsistencies which casts doubt on her case.



S.A.(MD) No.724 of 2010

WEB COPY

After all, a shade of doubt is adequate to non-suit the plaintiff in a suit for specific performance, since equity expects the plaintiff to come clear of every shade of suspicion and every possible blames. Here, the defendant scores.

10. In fine, this Court does find that the findings of the first appellate Court are perverse enough to shock conscience of the Court as to warrant an interference under Section 100 of Code of Civil Procedure. The second appeal is dismissed, accordingly. No costs. Consequently connected miscellaneous petition is also dismissed.

28.06.2022

Internet: Yes
Index: Yes/No

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WEB COPY



S.A.(MD) No.724 of 2010

To

- 1.The I-Additional District Munsif Court,
Kumbakonam.
- 2.The Principal Subordinate Court,
Kumbakonam.



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S.A.(MD) No.724 of 2010

N.SESHASAYEE, J.

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S.A.(MD) No.724 of 2010

28.06.2022