



S.A.No.1320 of 2009

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.11.2023

CORAM :

THE HONOURABLE Mr. JUSTICE **C.KUMARAPPAN**

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Solaiya Pillai

.. Appellant

Vs.

1.Govindhasami,
2.Manikandan.

..Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree of the Principal District Court at Villupuram, dated 22.08.2008 in A.S.No.42 of 2006 reversing the judgment and decree of the Subordinate Judge's court at Kallakurichi, dated 12.06.2006 in O.S.No.274 of 2002.

For Appellant : Mr. P.Valliappan, Senior Counsel
for Mr.R.M.Palaniappan

For Respondents : Mr.D.Murugan
for Mr.V.Manohar

J U D G M E N T

The appellant herein is the plaintiff before the Trial Court. The respondents herein are the defendants before the Trial Court.



2.For the sake of convenience, the parties will be referred according to their litigative status before the Trial Court.

The brief facts which give rise to the instant Second Appeal is:

3.The suit property described hereunder belongs to the first defendant herein. The plaintiff and the first defendant entered into a Sale agreement dated 28.04.2002. At the time of execution of the sale agreement, the plaintiff paid a sum of Rs.1,20,000/- by way of an advance, and the remaining amount of Rs.25,000/- agreed to be paid to the first defendant within a period of 6 months. The plaintiff submits that he has been all along ready and willing to perform his part of the contract. However, the first defendant for one reason or the other, delaying the execution of the sale deed. Hence, he issued a legal notice on 04.09.2022. However, the defendants did not give any reply. Therefore, the plaintiff prayed for the relief of specific performance directing the defendants to execute the sale deed in respect of the suit property.

4.The suit was resisted by the first and second defendants by filing two separate written statements. According to the first defendant, he disputed the execution of the sale agreement and also denies the receipt of



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Rs.1,20,000/- by way of an advance. The first defendant submits that the plaintiff's son one Anbalagan was employed as appraiser in the Solampattu Village Agricultural Society. The said Anbalagan and the plaintiff used to lend money to the needy people with usurious interest. They were in the habit of getting sign in the empty bonds and stamp papers as security. While so, this first defendant was borrowing a sum of Rs.50,000/- from the said Anbalagan on 17.07.2000. As required by the said Anbalagan, the first defendant endorsed in an empty pronote. Since, the said loan amount could not be settled, the plaintiff had been compelled to sell his other property to Vaithiapillai by way of a registered Sale Deed on 05.02.2001. While selling the said property, the said Vaithiapillai agreed to pay a sum of Rs.50,000/- to Anbalagan to clear the amount received by the first defendant. Even after paying the sum of Rs.50,000/-, the first defendant was still liable to pay another sum of Rs.22,000/- to the said Anbalagan and agreed to settle the same. Therefore, on 23.02.2001, the said Vaithiapillai gave a sum of Rs.20,000/- as a part payment to Anbalagan and asked him to endorse on the pro-note. But without making endorsement, Anbalagan cunningly asked him to execute two empty ten rupees stamp papers. Therefore, it is the submission of the first defendant that on 23.02.2001, the first



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defendant as well as the said Vaithiapillai gave signed blank ten rupees stamp papers. The first defendant further submits that, however, the stamp paper which was given to Vaithiapillai, was returned to him after some negotiations, while settling the balance amount. But, cunningly, the plaintiff used the blank ten rupees stamp paper given by the first defendant to fabricate the sale agreement in respect of his ancestral properties. According to the first defendant, he could not enter into any agreement in respect of the ancestral property without getting the sign of the other family members. Though the defendant received a legal notice, the same was got back from the defendant on account of the promise made by the said Anbalagan not to initiate any action based upon the legal notice. Therefore, the first defendant submitted that the suit sale agreement is not genuine one, and the same is fabricated.

5.The second defendant who is the son of the first defendant, after he attained majority, has also filed a separate written statement. Wherein, he contended that the suit property is not only belongs to the first defendant but also belongs to the mother of the first defendant. Therefore, the second defendant would contend that the sale agreement cannot be enforced.



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Evidence, Documents and Finding of the Courts below:

6.Before the Trial Court, the plaintiff examined two witnesses as P.W.1 and P.W.2 and two documents were marked as Ex.A1 and Ex.A2. On behalf of the defendants, two witnesses were examined as D.W.1 and D.W.2 and 5 documents were marked as Ex.B1 to Ex.B5 and as a Court document, two documents were marked as Ex.X1 and X2.

7.After hearing either parties and upon considering the oral and documentary evidences, the Trial Court decreed the suit on the ground that the signature of the defendant was admitted by him. Therefore, the Trial Court concluded that there was due execution. Aggrieved by the decree for specific performance, the defendants preferred an appeal. In the appeal, the First Appellate Court has gone into various aspects and ultimately found that the suit property referred to in the plaint is not tallied with the property mentioned in the sale agreement and that there is a long delay from the date of purchase of the stamp paper and date of sale agreement. Apart from that, the First Appellate Court has found that Ex.X2/Empty stamp paper and Ex.A1/sale agreement stamp papers are purchased on the same date and ultimately believed the case of the



defendant and allowed the appeal by dismissing the suit. Aggrieved by the said order, the plaintiff is before this Court by filing this Second Appeal.

Substantial questions of law:

8.At the time of admission, this Court has framed the following substantial questions of law:

“1.When execution of Ex.A1-Sale agreement is admitted but the defence that it is only a loan transaction is raised and not substantiated, whether the Lower Appellate Court is correct in holding that the transaction is a loan & appellant had fabricated the suit sale agreement?

2.Whether the Lower Appellate Court is correct in law in misconstruing Exs.B1 to B5 in coming to the conclusion that the first respondent owns only a portion of the suit property and hence he cannot execute Ex.A1 – Sale agreement without any specific plan and evidence?

3.When the appellant is entitled to seek specific performance of even a part of the contract as per Section 12 of the Specific Relief Act, 1963, whether the Lower



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Appellate Court is correct in law dismissing the suit in its entirety?”

Submissions on either side:

9.The learned Senior Counsel appearing on behalf of the appellant would submit that, when the signature of the first defendant was admitted, on the absence of proof towards the loan transaction, the Trial Court ought to have concluded that the plaintiff was ready and willing to perform his part of the contract and ought to have decreed the suit. The learned Senior Counsel vehemently submits that the defendant did not prove the loan transaction and the reliance of various precedent by the First Appellate Court is not applicable to the facts of the case. Therefore, the learned Senior Counsel would pray to allow this second appeal.

10.Per contra, the learned counsel for the respondents would submit that their main case is fabrication of Ex.A1/sale agreement. It is also the submission of the learned counsel for the respondents that the Ex.A1/sale agreement and Ex.X2/blank stamp papers signed by P.W.2 were given to the plaintiff on 23.02.2001, which would evident from the date assigned in the said two stamp papers. It was also the contention of



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the learned counsel for the respondents that the description mentioned in the sale agreement is not tallied with the description of property mentioned in the plaint and therefore, would contend that the plaintiff is not entitled for specific performance. The learned counsel would further contend that the suit property is not only belongs to the first defendant, but also, belongs to his mother Pappa Ammal, whereas no signature was obtained from the said Pappa Ammal. It was the further contention of the learned counsel for the respondents that even according to the admissions made by the plaintiff, he did not receive any documents so as to scrutinize the title of the plaintiff in the suit property. The first defendant therefore, would contend that Ex.A1/sale agreement is fabricated one. Hence, he prayed to dismiss this Second Appeal.

11.I have given my anxious consideration on the either side submissions.

Analysis of the submissions:

12.Before we embark into the submissions made by the either side, this Court deems it appropriate to discuss the precedent relied by the learned Senior Counsel. The learned Senior Counsel relied upon the case



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of **J.C.Haridasan v. Anappath Parakttu Vasudeva Kurup** reported in

[2023 (1) CTC 605], through which the learned Senior Counsel would

submit that the Court cannot make out any new case, which has not at all

been pleaded. The relevant portion is extracted herein below:

*“28. [19] Clause (c) of Section 16 of the Act, which is relevant in the instant case, though amended w.e.f. 1st October 2018 clearly states that unless the Plaintiff established his readiness and willingness to perform his part of the Contract, he would not be entitled to a Decree of Specific Performance. Prior to the amendment, the expression “who fails to aver and prove” was on the Statue Book and its substitution by the words “who fails to prove” does not bring about any drastic change to the object and intent of the Clause. This is because failing to prove readiness and willingness to perform the essential terms of the Contract would first require averments to that effect to be made in the Plaint by the Plaintiff. The absence of such averments regarding readiness and willingness to perform the essential terms of the Contract by the Plaintiff would not permit him to let in any evidence on that aspect. It is a settled principle of law that no evidence can be permitted to be let in the absence of averments in the Plaint/Pleadings vide **Bachhaj Nahar v. Nilima Mandal and others**, 2008 (17) SCC 491. In the said case, a Bench of this Court speaking through Raveendran, J. laid down*



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as follows:

(i) *No amount of evidence can be looked into, upon a plea, which was never put forward in the pleadings. A question which did not arise from the pleadings and which was no the subject mater of an issue, cannot be decided by the Court; and*

(ii) *A Court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Nor can it grant a relief, which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.”*

13.The learned Senior Counsel has also relied upon the judgment of ***Bachhai Nahar v. Nilima Mandal and another*** case reported in ***[2008 (17) SCC 491]*** and ***Biraji alias Brijraji and another v. Surya Pratap and others*** reported in ***[2020 (10) SCC 729]*** and another judgment of the Single Judge of this Court in the case of ***S.Velsamy and others v. Esakkiammal and another*** reported in ***[2018 (5) CTC 668]*** to substantiate his contention that any amount of evidence will becomes no use, in the absence of pleading. He has also relied upon the judgment of the Single Judge of this Court rendered in the case of ***Rajeswari & others v. K.M.Kumarasamy & others*** reported in ***[2007 (4) MLJ 442]***,



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regarding various defence in the specific performance suit. Wherein this

Court, after analysing various decisions deduced the principles in para 14 as follows:

“14.After analysing the decision cited by the learned counsel for the respondent/plaintiff, the following points are unearthed out of it.

1) In a case of defence of money dealing by the vendor, it is for the vendor to prove the transaction as one of money dealing by some modes.

2) Failure to prove the discharge of money dealing, an adverse inference has to be drawn against the vendor.

3) Not sending any reply to the notice of the agreement holder an adverse inference has to be drawn against the vendor.

4) Even if there is any discrepancy in the date of purchase of the stamp paper, i.e. prior to date of the sale transaction, it will not affect the agreement of sale transaction.

5) The defence theory is hit by Section 92 of the Indian Evidence Act, unless there are circumstances which would prove that equity will suffer by enforcing the agreement for sale.”

14.Through this judgment, the learned senior counsel would contend that the defendant has not established the existence of loan



transaction and would further contend that the dispute in respect of identity of the property has not at all been pleaded. Therefore, contended that such defence cannot be considered at the time of the second appeal.

15.But, while perusing the judgment of *Rajeswari and others's* case (cited supra), this Court has held that, whenever any defence of money transaction and execution of agreement as security is pleaded, such defence has to be proved by some mode. While looking at the defence of the defendants, they would say that the sale agreement was fabricated and that the same has been prepared in a signed blank paper given by him to the plaintiff's son.

16.In order to establish such factum, he invited the attention of this Court in respect of the purchase of stamp papers in which, Ex.A1/sale agreement was executed. While perusing the said sale agreement, the stamp paper was purchased on 23.02.2001. But the sale agreement was entered after a period of almost one year on 28.04.2002. No doubt, entering into the sale agreement in the old stamp paper cannot be the sole reason to deny the relief for specific performance.



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17.However, in the instant case, according to the defendants, the

stamp paper in which Ex.A1/sale agreement executed was given to the plaintiff's son Anbalagan on 23.02.2001, and on that date D.W.2/Vaithiapillai has also given a signed blank stamp paper to settle his dues. In this regard, the defendants has examined the said Vaithiapillai and marked Ex.X2. The same (Ex.X2) is the signed blank paper containing the signature of Mr.Vaithiapillai (D.W.2). More pertinently, the said stamp paper was also purchased on the very same date on 23.02.2001, on which date of the stamp paper of Ex.A1/sale agreement was purchased. It is curious to note that both the stamp papers are numbered consecutively one after another. While cross-examining Mr.Vaithiapillai/D.W.2, the plaintiff did not challenge all these aspects and simply suggested that these documents were fabricated. Such conduct would only go against the plaintiff. Because the defendant has in so many words pleaded this fact. Therefore, when the defendant discharging his burden in proving his defence, the plaintiff has miserably failed to discharge their burden after onus shift up on him. In such background, the long delay between the purchase of the stamp paper for executing Ex.A1/sale agreement, and the execution of the sale agreement assumes much significance.



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18.The First Appellate Court has extensively relied upon various admissions made by the plaintiff. It was contended by the defendants that the suit property was an ancestral property, and that the sister of the first defendant have already relinquished her right by virtue of the Release deed, which was marked as Ex.B5. Thus, the property, ultimately belongs to the first defendant and his mother, Pappa Ammal. But, very curiously, the said Pappa Ammal did not sign the document.

19.Whenever a person intends to purchase any immovable property, the natural propensity of the buyer would be to verify the title of the property. But, in this case, even according to the plaintiff, he did not receive any parental deeds either certified copy or photocopy or original, so as to scrutinize the title of the first defendant. Had there been any agreement really executed between the parties, naturally the plaintiff would have received atleast a copy of the respective title deeds, so as to describe atleast the correct description of the property. Here, while seeing the description of the property in the sale agreement and in the plaint, the item 4 of the plaint does not find a place in the sale agreement. This was also found against the plaintiff by the First Appellate Court.



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20.To support the plaintiff's case, the plaintiff has examined the attestor/P.W.2 of the alleged Ex.A1/sale agreement. The attestor/P.W.2 has admitted that he signed after writing the contents of the sale agreement. Whereas, while cross-examining, he did not even speak about the agreement performance period and would say that a sum of Rs.1,20,000/- was paid on the date of the sale agreement and the remaining amount of Rs.25,000/- was agreed to be paid by the plaintiff whenever the sale deed would be executed. This was also found against the plaintiff by the First Appellate Court. From the evidence of P.W.2, it is clear that they aware that the suit property belongs to the first defendant as well as his family members. The relevant admission of P.W.2 as follows:

“1ம் பிரதிவாதியின் குடும்ப உறுப்பினர்களை அழைத்து வரவில்லையா என்று 1ம் பிரதிவாதியிடம் கேட்டேன் அவர் பதிவு செய்யும்போது அழைத்து வருகிறேன்,”

In this regard, the First Appellate Court has heavily relied upon the conduct of the plaintiff in not getting the previous documents so as to find out the title in respect of the first defendant.

21.Therefore, this Court is of the firm view that the finding



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recorded by the First Appellate Court is based on the materials and on the basis of settled legal principles. Thus, this Court could not find any ground to deviate from the above said findings. Hence, the substantial questions of law are answered in favour of the respondents.

22.In the result, this Second Appeal is dismissed. There shall be no order as to costs.

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Internet : Yes/No

Index: Yes/No

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To

- 1.The Principal District Judge, Villupuram,
- 2.The Subordinate Judge, Kallakurichi,
- 3.The Section Officer, V.R.Section, High Court, Madras.



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C.KUMARAPPAN,J.

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