



S.A(MD)No.144 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 03.11.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A(MD)No.144 of 2017
and
C.M.P(MD)No.2268 of 2017

Natarajan
S/o.Ramaiyah
Rep.by his Power Agent
Jeyasankar,
S/o.Natarajan

...Appellant / Respondent / Plaintiff

VS

1.Mary
2.Juliet Anthonyraj
Defendants

...Respondents / Appellants /

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decreetal order dated 28.09.2016 passed by the Principal District Court, Thanjavur made in A.S.No.57 of 2012, by modifying the Decree and judgment dated 24.02.2012 passed in O.S.No.1 of 2010 on the file of the Additional Sub-Judge, Thanjavur.

For Appellant : Mr.G.Karnan

For Respondents : Mr..A.Ebenezer



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ORDER

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The suit in O.S.No.1 of 2010 has been filed by the plaintiff / appellant for specific performance directing the defendants / respondents to receive the balance sale consideration and to execute the sale deed or alternatively to pay the advance amount of Rs.1,00,000/-.

2. The case of the plaintiff is that, the defendants are the owners of the property. In order to develop the land and divided the land into housing plots, they have taken steps, but the defendants were not having liquid cash, hence, the plaintiff agreed to purchase the land from the defendants. In view of the above, on 27.03.2008 the plaintiff and the defendants entered into a sale agreement with regard to the suit property. The said sale agreement was marked as Ex.A1 and the sale price was fixed at Rs.2,44,150/-. The plaintiff has paid a sum of Rs.60,000/- as advance and subsequently, on 15.07.2008 the plaintiff had paid a sum of Rs.50,000/- as part of balance amount for sale consideration and has also made an endorsement in the sale agreement. Subsequently, the plaintiff was ready and willing to pay the balance amount, but the defendants have refused to receive the balance sale consideration and to execute the sale deed. Therefore, the plaintiff has sent a legal notice on 20.11.2009 calling upon the defendants to execute the sale deed after receiving



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the balance sale consideration. After receiving the notice the defendants sent a reply with denying the execution of the sale agreement as false allegation.

Therefore, the plaintiff has preferred the present suit.

3. The contention of the defendants is that in order to develop the land, the defendants had borrowed a sum of Rs.20,000/- from the plaintiff and after sometime, they were ready and willing to pay back the amount along with interest in cash, but the plaintiff had refused to receive the same and demanded to execute the sale deed regarding the plots. Hence, the dispute arose between the plaintiff and the defendants.

4. The trial Court has allowed and decreed the suit. Aggrieved over the said judgment and decree, the defendants have preferred an appeal in A.S.No. 57 of 2012 before the Principal District Court, Thanjavur. The Appellate Court has reversed the said judgment and decree. Aggrieved over the same, the plaintiff is before this Court raising the following substantial question of law:

1. Whether the Lower Appellate Court finding is correct when the execution of document itself is admitted by the Defendant?
2. Whether the Lower Appellate Court finding that the plaintiff has not proved his case is correct, when the plaintiff has examined the PW 2 and PW3 who are all attesting witnesses?
3. Whether the Lower Appellate Court finding that the burden of proof will not shift to defendants is correct even after the



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examination of PW 2 and PW3?

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5. The Appellate Court has relied on Ex.A1 and has held that the plaintiff has not stated the details of execution of Ex.A1. Also the P.W.1 who is the plaintiff's son had not stated the details of execution of Ex.A1 in chief examination. However, in the cross-examination, the plaintiff's son, has stated that the agreement was entered into in the year 2007 itself but the actual execution happened on 21.03.2008 in the defendant's house. Taking such aspect of deposition in the cross examination, the Appellate Court has come to the conclusion that the plaintiff has not stated these facts in the plaint. But when the defendant has admitted the execution of the Ex.A1, it is not necessary to go into such aspects. If the defendant had denied the execution of the document itself, then the Court has to go into the facts like under what circumstances the Ex.A1 was executed, whether it was executed in the defendant place or some other place, whether the same was executed in 2007 or 2008 ought to be taken into consideration. When it is not the case of the parties then by relying on the facts that the place of execution and other details were not stated in the plaint and declining the prayer is erroneous and the Appellate Court judgment ought to be interfered. Hence the first substantial question of law is held in favour of



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the appellant / plaintiff.

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6. The next issue raised by the Appellate Court is that the initial amount of Rs.60,000/- was paid and subsequently a part of balance amount of Rs. 55,000/- was paid and the 2nd payment is entered in the next page of the sale agreement, but disbelieved the said payment. The reasons stated by the Appellate Court is that there are two serial numbers for two witnesses but only one witness had affixed the signature, since the second witness had not affixed the signature the same is not believable. Such reasoning of the Appellate Court is not acceptable, if one witness had affixed the signature then the transaction between the parties is believable and the same cannot be denied. Therefore, the finding of the Appellate Court since the second witness has not signed, such payment is not substantiated is erroneous and the same cannot be accepted.

7. The next issue raised is that the defendant had denied the execution of sale agreement. But the plaintiff submitted that the defendant had accepted the affixture of signature in 20 rupees stamp paper alone, but had claimed the same is blank sheet. When the sale agreement is in three sheets, then the defendant ought to have denied affixture of signature in all the three sheets. The defendant had denied the signature affixed in the second and third sheets alone and hence



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the same cannot be entertained. On perusal of the sale agreement, it is seen the same is executed in three sheets, the first sheet is Rs.20/- stamp paper. In the written statement, the defendant has accepted the affixture of signature in 20 rupees stamp paper alone, but the defendant has denied the second and third sheets. In fact, in the third sheet, in the middle of the page the defendant Mary had affixed the signature. When the plaintiff has produced three sheets and the defendant has refused only one sheet, then such denial is not believable and hence the denial is not acceptable.

8. Infact the case of the plaintiff is supported by deposition of the witnesses P.W.2 namely Manimaran and D.W.2. Anthonysamy. The plaintiff had brought in the P.W.2 who has attested the sale agreement and the P.W.2 had spoken of execution. In order to disprove the sale agreement, the defendant had produced the another attestor Anthonysamy. The said Anthonysamy while deposing in chief-examination has admitted the signature but has denied the signature in the cross-examination. The said Anthonysamy was brought in as witness by the defendant, who in the chief examination had accepted and admitted the affixture of signature in the sale agreement. If the Anthonysamy is produced by the plaintiff, then his deposition that he had affixed the signature in the sale agreement cannot be accepted. But in the present case the said



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Anthonyamy while deposing in chief examination as defendant witness has accepted the signature, then it can be stated that the Anthonyamy witness is supporting the case of the plaintiff. In other words, the said Anthonyamy was produced by the defendants while he spoke in favour of the plaintiff and not in favour of the defendants.

9. At this juncture, the Learned Counsel appearing for the defendant submitted that the said Anthonyamy had denied the same is cross examination and has stated that he does not know contents of the sale agreement. This Court is of the considered opinion that it is not necessary that the said Anthonyamy should state the contents of the sale agreement and the same is supported by the judgment rendered in ***S.A.No.561 of 2008*** reported in ***2009 (1) CTC 541*** in the case of ***Selvi and others Vs. Gomathy Ammal*** wherein it is held as under:

“16.At this juncture, it would be apropos to look into Section 3 of the Transfer of Property Act, 1882 and the same reads as follows; "..... "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;"

17.The said provision can be vivisected as follows;

a)There must be two or more attesting witnesses to an instrument.



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b)Each attesting witnesses should have seen the signature of the executant or his mark to the instrument.

c)Attesting witness can receive personal acknowledgement of the signature of the executant or his mark, or of the signature of such other person.

d)It shall not be necessary that more than one of such attesting witness shall have been present at the time of the executant put his signature or mark.

e)No particular form of attestation shall be necessary.

18.It is an avowed principle of law that proof of execution of document required by law to be attested should be proved as per the provision of Section 68 of the Evidence Act and the same reads as follows;

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied."

19.From the close reading of the said provision, it is made clear that if a document is required by law to be attested, for the purpose of proving the same, one attesting witness should be examined.

20.In AIR 1954 Supreme Court 316 (Kishore Vs. Ganesh) the Honourable Apex Court has held that where an attesting witness stated that the executant put her thumb impression in his presence, it is sufficient proof of valid attestation. It must be shown that the attestator signed the document in the presence of the executant.

21.In AIR 1969 Supreme Court Cases 1147 (Abdul Jabbar Vs. Venkata Sastri) the Honourable Apex Court has held that the Act of attestation must be done animo attestandi i.e., with the intention to attest.

22.Therefore, from the close reading of the provision of Section 3 of the Transfer of Property Act, 1882 and Section 68 of the Evidence Act as well as the decisions referred to above, it is made clear that where an attesting witness stated in his evidence that he has seen the signature of executant, itself is a sufficient proof and valid attestation. To put it in a nutshell, the role of attesting witness to a document required by law to be attested is that he should see signature of executant and executant must see his signature and he need not prove the contents of document."



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As stated supra when the said Anthonysamy is speaking for the defendant who had admitted the affixture of signature in chief examination (but denied in cross examination) and has also admitted that he had seen the signature of the plaintiff and the defendants, hence the admission in chief examination when he had deposed for defendant ought to be taken into account. The said Anthonysamy has also stated that he is related to the defendant. Therefore, this Court is of the considered opinion that the DW 2 witness admitting the execution of the sale agreement is acceptable and hence the second substantial question of law is answered in favour of the plaintiff.

10. The claim of the plaintiff is that the Ex.A1 is sale agreement, but the claim of the defendant is that the transaction between them is loan transaction. When the defendant has taken a plea as loan transaction, then the defendant alone ought to prove the same that it is loan transaction. The burden of proof is on the defendant to prove his case. When the plaintiff has proved his case by the D.W.2 witness as stated supra, the defendant has not produced any evidence to substantiate the transaction as loan transaction, hence the plea of the defendant that it is loan transaction is not acceptable. Therefore, the third substantial question of law also held in favour of the plaintiff.



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11. For the reasons stated supra, all the three substantial question of law are answered in favour of the plaintiff / appellant. The appellate Court has erred in reversing the judgment and decree of the trial Court. Hence, the judgment and decree passed by the Principal District Judge, Thanjavur in A.S.No.57 of 2012 is set aside and the judgment and decree passed by the learned Additional Sub Judge, Thanjavur in O.S.No.1 of 2010 is confirmed.

12. Accordingly, the second appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
Internet : Yes
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To

- 1.The Principal District Court,
Thanjavur.
- 2.The Additional Sub-Judge,



Thanjavur.

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