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S.A. No.138 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.02.2024

DELIVERED ON :08.03.2024

CORAM:

THE HON'BLE MR. JUSTICE P.B. BALAJI

S.A. No.138 of 2018
and CMP Nos.3270 and 3271 of 2018

M/s Thirumuruga Real Estate
Represented by its Managing Partner,
V.Thirunavukkarasu,
having Office at
No.73, Ranganathan Street,
T.Nagar, Chennai-600 104.

.... Appellant

Versus

1.Dhanraj
2.Inderchand Jain
3.Suresh Kumar

... Respondents

Second Appeal filed under Section 100 of the Civil Procedure code, against the decree and judgment passed in A.S. No.254 of 2016 dated 30.11.2017 on the file of I Additional City Civil Court, Chennai, reversing the judgment and decree dated 04.08.2015 in O.S.No.2945 of 1999 on the file of II Assistant City Civil Judge, Chennai.



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For Appellants

: Mr.M.K.Kabir
Senior Counsel
for Mr.P.Rajamanickam

For Respondents

: Mr.M.Sriram

JUDGMENT

The plaintiff, who sought for a relief of declaration of his title and for a permanent injunction to restrain the defendants and having succeeded before the trial Court, however, suffering a reversal finding before the first appellate Court, is the appellant herein. The parties are described as per their litigative status in the suit. The brief facts that are necessary for adjudicating the present Second Appeal are as hereunder:-

2. The plaintiff has stated that it is a partnership firm, engaged in real estate business for several decades. According to the plaintiff, in the course of business, the plaintiff purchased an extent of 1.44 acres in S.No.43 Part of Kulathur Village, Perambur Taluk, Chennai District for the purposes of developing the same. The sale consideration for the said property was Rs.3,75,000/-. However, since further sum of Rs.10,00,000/- was required for filling, levelling and laying of roads etc., the plaintiff approached the first



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defendant for financial assistance to the tune of Rs.2,25,000/-. According to the plaintiff, the 1st defendant agreed to lend the amount only on the condition that the sale deeds should be executed in favour of the defendant as security for due repayment of the loan amount that was being borrowed by the plaintiff. According to the demand of the first defendant, the plaintiff executed three sale deeds, one in the name of the first defendant, for 48 cents and remaining two sale deeds in the name of the defendants 2 and 3, for an extent of 48 cents each, totalling in all 1.44 acres. According to the plaintiff, the sale deeds reflected a lower sale consideration, at the request of the 1st defendant.

3. The plaintiff's further case is that after the sale deeds were executed for security purposes, the plaintiff took possession of the suit property and spent a sum of Rs.10,00,000/- for obtaining lay out and forming the layout. According to the plaintiff, he was not able to sell the plots immediately and only about 5 or 6 plots have been sold in the year 1989, after obtaining layout approval in L.A.No.55/88. The plaintiff also contends that the sale deeds in respect of the 6 plots sold in the year 1989 were all executed by the defendants, to the nominees of the plaintiff and according to the plaintiff, the



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said sale deeds included a covenant that the plaintiff was the developer. With such sale of plots, the defendants recovered part of the principal and interest, lent by them. According to the plaintiff, the defendants are not entitled to anything more than Rs.2,25,000/-, together with interest at 24% per annum from October 1987 and that as on the date of the plaint, the plaintiff was liable to pay only a sum of Rs.6 to 7 lakhs to all the defendants. However, the defendants, taking advantage of the rise in land value in the locality, became greedy and taking advantage of the sale deeds in their favour, they laid a false claim over the suit property. Under such circumstances, the suit came to be instituted.

4. The defendants filed written statement, denying the claims of the plaintiff. It is the specific case of the defendants that the sale deeds in their favour were true and valid documents, binding on the plaintiff and the version put forth by the plaintiff, as if the plaintiff is in need of Rs.2.25 lakhs and that he borrowed the said money and that the defendants insisted on the sale deeds to be executed for the suit property as security as totally false and baseless. According to the defendants, the plaintiff has filed the suit with speculative intention alone and he is entitled to neither the relief of



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declaration nor the relief of permanent injunction as the defendants alone are in possession of the suit property.

5. The trial Court decreed the suit and granted the relief of declaration and permanent injunction as prayed for by the plaintiff.

6. Aggrieved by the judgment and decree of the trial Court, the defendants have preferred an appeal in A.S.No.254 of 2016. The first appellate Court re-appreciated the evidence, oral and documentary and allowed the appeal filed by the defendants, thereby, dismissing the suit.

7. Aggrieved by the reversal findings rendered by the first appellate Court, the plaintiff has come up with the present Second Appeal.

8. I find from the records that the above Second Appeal has not yet been admitted and in fact, the parties were referred to Tamil Nadu Mediation and Conciliation Centre, attached to High Court, Madras. Thereafter, the parties were not able to arrive at an amicable settlement and the appeal has been listed from time to time before this Court. However, the learned Senior



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Counsel M.K.Kabir, appearing for the plaintiff/appellant and Mr.M.Sriram, learned counsel appearing for the respondents have argued the Second Appeal for final hearing. In the light of the submissions made by the learned Senior Counsel Mr.M.K.Kabir and Mr.M.Sriram, the learned counsel for the respondents, I proceed to decide the second appeal in order to see whether any substantial question of law arises for consideration in the second appeal. I am discussing the relevant facts and circumstances that would be germane to decide the second appeal.

9. Learned Senior Counsel Mr.M.K.Kabir would submit that the plaintiff, despite executing three sale deeds for 48 cents each in favour of the defendants 1 to 3, retained physical possession of the entire 1.44 acres. He would also draw my attention to Exs.A.20 and A.21, whereby, the plaintiff had obtained layout approval for 3 acres, under L.A.55/88 and L.A.52/88. The learned Senior Counsel would also state that the defendants had no role in the layout process and even the sale of plots was only at the request of the plaintiff and the purchasers of the plots were identified only by the plaintiff and the defendants merely executed the sale deeds in favour of the nominees of the plaintiff.



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10. The learned Senior Counsel would contend that the three sale deeds Exs.A.1 to A.3 were not valid sale deeds as there was no compliance of the mandate under Section 54 of the Transfer of Property Act, 1882, which requires two vital considerations viz., payment of sale consideration and also delivery of possession. Learned Senior Counsel would further state that merely because the sale deed has been executed in favour of the defendants, it would not result in the sale transaction being completed. He would also take me through the cross examination of P.W.1, where, no questions were even put to P.W.1, regarding payment of sale consideration, which is a mandatory component of a valid sale. He would also invite my attention to cross examination of D.W.1 regarding the payment of sale consideration to the plaintiff where D.W.1 has stated that the books of accounts do not contain the transactions reflected in Exs.A.1 to A.3.

11. Learned Senior Counsel would also place reliance on Ex.A.43, which is an affidavit of one R.Ravichandran, who was the original owner of the entire land and in the said affidavit, the said R.Ravichandran has stated that the sale consideration was paid only by N.R.Vatchala and the said



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N.R.Vatchala was originally running a business as proprietrix, before it was taken over in the year 1994, by Mr.V.Thirunavukkarasu and the proprietrix concern was converted as a partnership firm in the year 1994.

12. The learned Senior Counsel would place heavily reliance on the affidavit of the said R.Ravichandran, Ex.A.43, where, it is stated that N.R.Vatchala paid the entire sale consideration to him in the presence of V.Thirunavukkarasu and at the request of N.R.Vachala, the sale deeds were executed in favour of the defendants under Exs.A.1 to A.3. Learned Senior Counsel would state that the said Ex.A.43 has not been relied on by the first appellate Court, since the said R.Ravichandran has not been examined. Learned Senior Counsel would however state that only because of the objections raised by the defendants, the said R.Ravichandran could not be examined and therefore, they cannot take advantage of their own conduct and later contend that the affidavit of R.Ravichandran, Ex.A.43 cannot be looked into.

13. Learned Senior Counsel would also elaborate the steps taken by the plaintiff to examine the said R.Ravichandran. In fact, an interlocutory



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application was filed in I.A.No.1051 of 2009 to examine the said R.Ravichandran. The said application was dismissed by the trial Court. As against the said dismissal, the plaintiff preferred a revision, which too came to be dismissed and he would point out that only because the defendants resisted the attempt of the plaintiff to examine the vendor, R.Ravichandran, the interlocutory application and Civil Revision Petition came to be dismissed and in this connection, he would place reliance on the decision of the Hon'ble Supreme Court in the case of *Sudha Devi vs M.P.Narayanan and Others* reported in *AIR 1988 SC 1381*, wherein, the Hon'ble Supreme Court has held that an affidavit can be used as evidence, if sufficient reasons are available for the Court to entertain the same under Order 19 Rules 1 and 2 of Civil Procedure Code.

14. Learned Senior Counsel would also bring to my attention that pending the first appeal, the plaintiff also filed an application in CMP No.124 of 2017 for production of additional evidence in the form of Ex.A.44/confession statement, given by the vendor, R.Ravichandran before the Magistrate in Cr.No.100 of 2014 and Ex.A.45/Charge Sheet in Cr.No.100 of 2014. The first appellate Court allowed the said application and marked



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the said two documents as Ex.A.44 and Ex.A.45.

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15. Learned Senior Counsel, placing reliance on Ex.A.44 confession statement, would state that even the vendor R.Ravichandran has categorically stated that it was only N.R. Vatchala, who paid the sale consideration and that he never knew the defendants and that only at the request of N.R.Vatchala, the sale deeds were executed by the said R.Ravichandran in the names of the defendants.

16. Learned Senior Counsel therefore relying on the additional evidence viz., Exs.A.43 to A.45 would contend that the defendants were only name vendors and in order to do substantial justice to the parties, this Court can look into the affidavit of Ex.A.43. He would also place reliance on the decision of the Andhra Pradesh High Court in the case of ***Malakala Surya Rao and Others vs Gundapuneedi Janakamma*** reported in ***AIR 1964 AP 198***, where the Andhra Pradesh High Court has held that confession to a Police Officer may not be admissible as evidence in criminal proceedings, however, when it comes to civil proceedings, they can be used as evidence. He would therefore state that the findings of the first appellate Court that



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Exs.A.43 to A.45 would not be binding on the Civil Court as it is unsubstantiated and consequently has to be necessarily rejected and set aside.

17. The learned Senior Counsel would also refer to Section 136 of Indian Evidence Act, 1872, bestowing a discretion on the Judge to allow even a statement or any other document to be admitted as evidence. He would challenge the findings of the first appellate Court that without an order passed under Order 19 of Civil Procedure Code, the affidavit could not be relied upon, contending that the Court had discretionary power vested in it in view of Section 136 of Indian Evidence Act, 1872. The other reason given by the first appellate Court to refuse the affidavit of R.Ravichandran is that the defendants would lose an opportunity to cross examine the said R.Ravichandran. However, to this, the learned Senior Counsel would contend that it is only the defendants, who vehemently objected for R.Ravichandran being examined as a witness and therefore, the first appellate Court erroneously held that the defendants would lose their right of cross examination, if the affidavit of R.Ravichandran in Ex.A.43 is received and relied on as evidence.



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18. Learned Senior Counsel, with regard to possession of the suit property, would submit that even D.W.1 admitted that after execution of Exs.A.1 to A.3, sale deeds, possession was delivered to the plaintiff immediately and excepting for recitals in the sale deeds Ex.A.1 to A.3, no evidence whatsoever has been produced by the defendants to establish the fact that possession was with them and not with the plaintiff.

19. Learned Senior Counsel would also place reliance on Exs.A.4, 5, 6, 9, 10, 11, 20 and 21 for fortifying his contention that the plaintiff was always in possession of the suit property. He would also refer to the Advocate Commissioner's Report Ex.C.1, where the Commissioner has given a finding that the property was fenced and sign board of M/s Thiru Muruga Nagar was found on the site. Though apart from the above exhibits, learned Senior Counsel would again rely on Exs.A.43 and A.44, where the vendor R.Ravichandran has admitted that possession was only with the plaintiff. According to the learned Senior Counsel, under such circumstances, the plaintiff was the real owner of the suit property and the trial Court has rightly found that the plaintiff is entitled to the reliefs prayed for. However, the first appellate Court erroneously rejected Ex.A.43 and Ex.A.44 and proceeded to



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reverse the well considered findings of the trial Court. The learned Senior Counsel would also contend that the plaintiff has also exhibited Exs.A.26, 27, 28 and 30 to establish that the defendants are in financing business and they are habitual land grabbers, who indulge in commission of fraud and forgery etc., and these documents have not been properly appreciated by the first appellate Court.

20. The learned Senior Counsel would invite my attention to Section 52 of Indian Evidence Act, 1872, which reads as follows:-

52. In civil cases character to prove conduct imputed, irrelevant.-

“ In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.”

21. He would therefore seek to place reliance on the said Section to probabalise the conduct of the defendants in attempting to snatch away the suit property which actually belongs to the plaintiff.



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22. Regarding valuation of the suit, the learned Senior Counsel would submit that the first appellate Court has accepted the contention of the defendants that the suit has not been valued properly and consequently, court fee has been under paid. Learned Senior Counsel would state that the documents under challenge are Exs.A.1 to A.3 and the suit is only for declaration and permanent injunction and not for possession and therefore, proper court fee has been paid, which, the first appellate Court has not properly appreciated. He, therefore, would pray for the second appeal being allowed and would suggest the following substantial questions of law to be framed and answered in favour of the appellants:-

“ A. Whether the appellate Court was right in ignoring and refusing to consider vital evidence qua Ex.A.43 and other evidence relating to consideration paid on behalf of the plaintiff?

B. Whether the appellate Court has ignored material evidence relating to possession of the property and the same has been casually ignored without taking into account the concrete evidence let in by the



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plaintiff and ignorance of DWI qua the aspect of possession?

C. Whether the appellate Court judgment has satisfied the mandate of Order 41 Rule 31 while reversing the well considered judgment of the trial Court without framing the points of determination and reasons for disagreeing with the judgment of the trial Court?

D) Whether the appellate Court has failed to draw an adverse inference against the defendant for not choosing to examine the vendor as per the document inspite of several opportunities?

E) Whether the affidavit with respect to the fact in issue has been considered by the appellate Court in the right perspective leading to travesty of justice?

23. Learned counsel for the plaintiff would place reliance on the following decisions:-

i) Mumbai International Airport Private Limited vs Regency Convention Centre and Hotels Private Limited and Others [(2010) 7 SCC 417]



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ii) *Ashok vs The State of Maharashtra & Ors* (2022
(6) *Law Digital.in* 0624)

iii) *Kamta Prasad and others vs Smt.Vidyawati and
Others* (AIR 1994 Madhya Pradesh 181)

(iv) *Savitri Devi vs District Judge, Gorakhpur and
Others* [(1999) 2 SCC 577]

(v) *Committee of Management, Ratan Muni Jain
Inter College and another vs III Additional Civil
Judge, Agra and Others* (AIR 1995 Allahabad 7)

(vi) *Amit Kumar Shaw vs Farida Khatoon* (AIR 2005
SC 2209)

(vii) *S.Krishnan vs Rathinavel Naicker and others*
(2007-2-L.W 810)

(viii) *P.Bakkiammal and 12 others vs
R.Ramalakshmi and 40 others* (2007-3-L.W.14)



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24. All the above decisions are for the proposition that under Order I Rule 10 of Civil Procedure Code, the Court is bound to suo-motu implead proper and necessary parties and cannot refuse relief to the plaintiff on a technical objection that the purchasers of plot owners have not been impleaded as parties to the suit.

25. Per contra, Mr.Sriram, learned counsel for the defendants would state that the suit, as framed, was not maintainable for the simple reason that the plaintiff seeks to declare itself to be the real owner of the suit property measuring 1.44 acres, comprising in S.No.43 Part of Kulathur Village, Perambur Taluk, Chennai District. However, he would invite my attention to Paragraph No.6 of the plaint, where, even according to the plaintiff, at his request, the defendants have executed sale deeds in respect of 5 or 6 plots. Therefore, the submission of the learned counsel for the respondents is that when it is an admitted case of the plaintiff that a portion of the suit property has been sold, a declaration in its favour in the entire suit land of 1.44 acres, cannot be granted.



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26. Secondly, learned counsel for the respondents would also invite my attention to the reliefs sought for in the suit, where, apart from the relief of declaration, a relief of permanent injunction was sought for to restrain the defendants from alienating the suit properties to third parties. However, he would draw my attention to the decree passed by the trial Court, where, the relief of permanent injunction, restraining the defendants from disturbing the possession of the plaintiff has also been granted and confirmed by the first appellate Court. He would therefore state that without even a prayer for such a relief of permanent injunction, the Courts below have exceeded their jurisdiction in granting a relief not even prayed for. Further, according to the learned counsel, the prayer, seeking the relief of permanent injunction is only to restrain the defendants from alienating the suit property. Thus, it only indicates that the defendants alone are in possession of the suit property and the plaintiff did not even choose to seek for relief of recovery of possession and what all was prayed for was only the relief of declaration and a relief of permanent injunction restraining alienation alone.

27. Thirdly, learned counsel for the respondents would invite my



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attention to the evidence of P.W.1, who has categorically admitted that the sale deeds Exs.A.1 to A.3 are executed in favour of the defendants. He also admitted to sale of 6 plots prior to the filing of the suit itself. That apart, the plaintiff had also admitted in the cross examination that he has not been able to produce any documentary evidence to substantiate his claim that the sale deeds in favour of the defendants 1 to 3 were only in respect of security for the amounts borrowed from them and not true or valid sale deeds.

28. Fourthly, the learned counsel for the respondents would contend that the plaintiff claims to be a partnership firm and came to existence only on 07.02.1994, as seen from Ex.A.18. However, the sale deeds executed in favour of the defendants were even in 1987 and admittedly, the firm was not even in existence and therefore, the declaration as prayed for cannot be granted.

29. Fifthly, the learned counsel for the respondents would also point out to material interpolations at Page No.4 of Ex.A.18 and would state that in the absence of production of the original partnership deed, no weightage can be given to Ex.A.18 partnership deed, which was filed only as a photocopy



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and not the original. According to the learned counsel for the respondents, the case of the plaintiff is that N.R. Vatchala was carrying on business as sole proprietrix and plaintiff firm took over the proprietary concern and if Ex.A.18 is not available for consideration, then, the plaintiffs have virtually produced no evidence to substantiate the factum of the plaintiff taking over the business from N.R. Vatchala and consequently, the suit would have to necessarily fall.

30. Sixthly, learned counsel for the respondents would submit that even though the plaintiff has alleged the sale deeds to be sham and nominal, the sale deeds have not been challenged and therefore, mere declaratory relief to declare the plaintiff to be the real owner, cannot be sustained in the eye of law.

31. Seventhly, learned counsel for the respondents would refer to Exs.A.43 and A.44 and contend that the first appellate Court has rightly rejected both the said documents. According to the learned counsel for the respondents, even N.R. Vatchala was not examined by the plaintiff and the affidavit and confession statement could not be relied on without an opportunity being given to the defendants to cross examine R.Ravichandran.



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32. Lastly, learned counsel for the respondents would contend that the plaintiff has exhibited Exs.A.36 and A.37, the sale agreements entered into in March 1995 for sale of plots, which reflects the consideration of more than Rs.10,00,000/- for sale of 6 plots. However, the suit has been valued in respect of 21 plots at a mere Rs.1,00,000/- and therefore, the suit relief was grossly undervalued and hence the suit was liable to be dismissed even on this score.

33. Learned counsel for the respondents relied on the decision of the Hon'ble Supreme Court in the case of *Ayaaubkhan Noorkhan Pathan vs State of Maharashtra* reported in (2013) 4 SCC 465 for the proposition that affidavit is not evidence and the same cannot be relied upon.

34. I have carefully considered the arguments advanced by the learned Senior Counsel for the appellant and the learned counsel for the respondents. I have also gone through the oral and documentary evidence in line with pleadings of the plaintiff and the defendants before the trial Court, besides also the judgments of the trial Court and the first appellate Court.



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35. Admittedly, the plaintiff has approached the Court, seeking two reliefs, one for declaration to declare the plaintiff firm as the real owner of 1.44 acres in S.No.43 Part of Kulathur Village, Perambur Taluk, Chennai District and the other for a permanent injunction to restrain the defendants from alienating the suit property.

36. However, as already discussed, while recording the contentions of the learned counsel for the respondents, I have noticed the plaint averments that subsequent to lay out approval being granted by the competent authority, 5 or 6 plots have been sold in the year 1989 to third party purchasers soon after the layout approval was granted in the year 1988. The defendants also exhibited three sale deeds dated 07.06.1993 in Exs.B.6 to B.8 to establish that the three plots in the approved lay out have already been sold by them in June 1993. The plaintiff also admits that the sale deeds were executed by the defendants. Therefore, the suit property to an extent of 1.44 acres was not even available on the date of filing of the suit.



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37. That part, it is also seen that the defendants while seeking approval of the lay out have also executed gift deeds in favour of Corporation of Madras, under Exs.B.4 and B.5. The lands that have been gifted to the Corporation of Madras under Exs.B.4 and B.5 are also not available to be declared as the plaintiff's property. Thus, even on this preliminary issue, the plaintiff is not entitled to the relief of declaration as prayed for.

38. The sheet anchor of the argument of the learned Senior Counsel for the plaintiff revolves around Exs.A.43 and 44. Ex.A.43 is an affidavit of R.Ravichandran, who has sold the property to the defendants under Exs.A.1 to A.3 = Exs.B.1 to B.3. Admittedly, an application was taken out by the plaintiff to examine the said R.Ravichandran. However, the trial Court rejected the said application. The revision, preferred against the said dismissal of the interlocutory application, was also dismissed and even, according to the plaintiff, a Special Leave Petition was also filed before the Hon'ble Supreme Court and the same also came to be dismissed. The object of attempting to examine the said R.Ravichandran was only to establish that the sale consideration for Exs.A.1 to A.3 sale deeds were paid only by N.R.Vatchala, the then sole proprietrix, before the plaintiff firm took over the



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property.

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39. In a criminal case, filed by N.R. Vatchala, R.Ravichandran was examined and he has given his statement which has been marked as Ex.A.44. Both in Exs.A.43 and A.44, it is mentioned that N.R. Vatchala has paid sale consideration and on her instructions, the sale deeds were executed in the names of other persons. Even in the absence of R.Ravichandran and the inability of the plaintiff to examine him, nothing prevented the plaintiff to examine N.R.Vatchala, who is in fact, one of the partners of the plaintiff firm and she was the best person to speak about the payment of sale consideration by her to R.Ravichandran. Ex.A.18 is the partnership deed which has been filed on the side of the plaintiff. A certified copy of Ex.A.18 has also been produced by the learned counsel for the respondents before this Court, since according to the learned counsel for the respondents, there are material interpolations in the said partnership deed. On a perusal of the partnership deed, it is seen that N.R.Vatchala is a signatory to the partnership deed and she is also one of the partners of the newly constituted partnership firm “Thiru Muruga Real Estate”. The said partnership deed does not anywhere disclose that N.R.Vatchala was carrying on the business as sole proprietrix



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and that the Firm has taken over the assets and liabilities. At Page No.4 of the partnership deed, I find inclusion of the following sentence in the photostat copy of Ex.A.18, which has been marked before the trial Court “*Firm will take over the liabilities and assets of Thiru Muruga Real Estate owned by N.R.Vatchala*”.

40. According to learned counsel for the respondents, the said sentence has been included in the partnership deed and the original of the partnership deed has not been produced and therefore, it would clearly give rise to suspicion as to the genuineness of the said partnership deed itself. Moreover, if really the said N.R.Vatchala had paid the entire sale consideration to the vendor R.Ravichandran and on her instructions, the sale deed has been executed in favour of the defendants, assuming for a moment, without admitting that the said N.R.Vatchala was the owner of the lands, measuring 1.44 acres, then, there would have been a specific covenant in the partnership deed mentioning about the existence of the property, which is a valuable immovable property and a schedule to the partnership deed would have been drawn up and description of the immovable property been set out thereunder.



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41. However, strangely, the partnership deed is totally silent about the ownership of the suit property by the firm, especially, since the partnership deed has admittedly come into existence on 07.02.1994 and until such time, according to the plaintiff, the lands were belonging only to Thiru Muruga Real Estate. In any event, N.R.Vatchala would have been the ideal person to speak about the sale deeds in Exs.A.1 to A.3 = Exs.B.1 to B.3 and passing of consideration there under. Nothing prevented the plaintiff to examine their own partner to establish their contentions. Unfortunately, the plaintiff kept harping on Exs.A.43 and 44 in order to examine R.Ravichandran and in that process, they have missed the bus in not examining a crucial witness viz., one of their partners N.R.Vatchala. The first appellate Court has rightly drawn adverse inference against the plaintiff for non examination of the said N.R.Vatchala.

42. Coming to Ex.A.43, I find that it is an affidavit on an unstamped paper. Surprisingly, the certified copy of the said affidavit Ex.A.43, filed by the respondents before this Court does not even contain the signature of R.Ravichandran. However, in the typed set of papers, filed by the plaintiff, as appellant in the above second appeal, it is seen that the said affidavit has



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been signed by R.Ravichandran and notarised by an Advocate and Notary Public on 17.11.2014. The suit has been filed in the year 1999 and I see no reason as to why such an affidavit was even required from the said R.Ravichandran. Moreover, the document has emanated pending trial of the suit and therefore, much weightage cannot be given to the same.

43. Even otherwise, the plaintiff has failed in all his attempts to examine the said R.Ravichandran and just because the application was opposed by the defendants, when the Courts found the request to examine R.Ravichandran could not be entertained, thereafter, it is not open to the plaintiff to contend that they went all out to examine the said R.Ravichandran, but only because of the objections of the defendants, they could not examine him. In any event, as I have already found the plaintiff could have examined N.R.Vatchala, one of their partners and establish their contention that the sale deeds were only executed as security for loan transaction and not intended to be actual sale deeds in favour of the defendants.

44. Learned counsel for the respondents would also take me through



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the endorsements in Exs.A.1 to A.3 = Exs.B.1 to B.3 where the Sub Registrar has recorded an endorsement that sale consideration was paid by the respective purchasers to the vendor, before him. Learned counsel for the respondents would rely on these endorsements being made in official capacity and would contend that these official endorsements would override the averments in self serving affidavit of R.Ravichandran, who was admittedly not examined.

45. I do not find any evidence whatsoever having been adduced by the plaintiff to establish that the sale deeds Exs.A.1 to A.3 = Exs.B.1 to B.3 were sham and nominal transactions and real nature of the transactions were only a composite loan transaction. The burden of proof in such cases is very heavy on the plaintiff, who seeks declaration of title in his favour. In fact, having admitted the execution of the sale deeds in favour of defendants under Exs.A.1 to A.3 = Exs.B.1 to B.3, the plaintiff ought to have sought for declaration that the sale deeds were null and void and not binding on the plaintiff. By seeking a declaration that the plaintiff is the real owner of the suit lands, measuring 1.44 acres, the plaintiff has mischievously attempted to get over the limitation period in not challenging the sale deeds Exs.A.1 to



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A.3 which were all in October 1987. Therefore, I find that the plaint is only a result of astute legal drafting in order to cover up the lacuna and inability of the plaintiff to seek declaration of the sale deeds in favour of the defendants to be null and void. In fact, if the sale deeds had been challenged in time, it would have had serious repercussions because even for the sanctioning/approval of the lay out, the defendants were called upon to gift common areas and roads which have been done under Exs.B.4 and B.5 and if the sale deeds are declared to be null and void, it would even rock the foundation of the lay out approval itself, thereby, putting innocent third party buyers to peril.

46. In this connection, I also find that the third party purchasers are proper and necessary parties to the suit and especially when the plaintiff seeks declaration of the entire 1.44 acres in his favour. No doubt, the learned Senior counsel has relied on several decisions, where the Hon'ble Supreme Court and also this Court, where, the Courts have held that merely because the plaintiff has not chosen to implead a person, if the Court feels that presence of such person would be necessary to effectively adjudicate upon the issue, even the court can suo-motu implead the said parties. I have gone



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through the decisions relied on by the learned counsel for the appellants/plaintiff.

47. The principles that have been laid down by the Courts are that even though the plaintiff is the *dominus litus* and it is his call to choose to implead any person in the suit and he cannot be compelled to sue a person against whom he seeks no right, it is only a general Rule and Order 1 Rule 10 (2) Civil Procedure Code is an exception. No doubt, the Courts are vested with discretion under Order 1 Rule 10 (2) Civil Procedure Code. Even in the decision of the Hon'ble Supreme Court in the case of ***Mumbai International Airport Private Limited vs Regency Convention Centre and Hotels Private Limited and Others*** reported in [(2010) 7 SCC 417], cited supra, it is held that the Court has to exercise sound discretion, guided by law. Here, admittedly, I have already discussed about the plaintiff not seeking declaration of the sale deeds in favour of the defendants to be null and void and how the actual reliefs that ought to have been sought for by the plaintiff were clearly barred by limitation. In such circumstances, it is not proper to exercise discretion to implead third party purchasers, who are admittedly bonafide purchasers for valuable sale consideration. In fact, in paragraph



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No.24 of the said judgment, the Hon'ble Supreme Court has held as follows:

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“ 24.1. If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the Court may implead him having regard to the provisions of Rules 9 and 10(2) of Order 1. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party. ”

48. Discretion can be exercised by Court only in order to do substantial justice and not to create mayhem. Therefore, it is a clear case where the suit is liable to be dismissed for non-joinder of necessary parties. The plaintiff having failed to implead proper and necessary parties cannot attempt to shift the burden on the Court by invoking Order 1 Rule 10 (2) of Civil Procedure Code.

49. The first appellate Court has rightly re-appreciated the oral and documentary evidence on record and came to the conclusion that the plaintiff was not entitled to any relief. I do not find any substantial questions of law arising for consideration in the present second appeal and the suggested



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substantial questions of law are not even substantial questions of law to be adjudicated upon in the present Second Appeal.

. 50. In fine, the Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

08.03.2024

Index: Yes/No
Speaking Order/Non-Speaking Order
sr

To

1. I Additional City Civil Court, Chennai,
2. II Assistant City Civil Court, Chennai
3. The V.R.Section, High Court, Chennai.



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P.B.BALAJI,J.

SR

Pre-Delivery Judgment
in S.A.No.138 of 2018

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