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S.A.No.262 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.03.2024	Pronounced on: 15.03.2024
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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.262 of 2018

1.Rajini
2.Pottu Kanni

...Appellants

Vs.

1.Annamalai
2.Govindaraju
3.Chinnadurai

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the Judgment and Decree dated 30.06.2017 made in A.S. No.3 of 2016 on the file of the I Additional District cum Sessions Court, Salem confirming the Judgment and Decree dated 20.03.2015 made in O.S. No.183 of 2004 on the file of the Principal Sub Court, Salem.

For Appellants : Mrs.K.Ponmani
for Mrs.Zeenath Begum

For Respondents : Mr.V.C.Janardhanan
for Mr.C.Prabakaran

JUDGMENT



The plaintiffs who suffered concurrently before the Courts below in a suit for specific performance are the appellants herein.

2. The parties are described as per their litigative status before the Trial Court.

3. The material facts that are necessary for deciding the above Second Appeal are as follows:

4. The plaintiffs' claim is that he had entered into an agreement of sale with one Ramayammal and her sons, on 25.11.1997, for purchasing 1.3 acres of land, for a total sale consideration of Rs.2,00,000/-. According to the plaintiffs, six months was fixed for completing the transaction and the plaintiffs paid an advance of Rs.1,30,000/- on the date of the sale agreement. It is the further case of the plaintiffs that in and by an endorsement dated 30.04.1998, receipt of a further sum of Rs.35,000/- was acknowledged by the defendants and further the time for completion was extended by a further 32 months.



5. According to the plaintiffs again on 30.12.2000, a further sum of Rs.18,000/- was paid and the time was extended by further six months. A notice dated 01.06.2004 was issued to the defendant and the notice sent to Ramayammal was returned with the endorsement '*Dead*'. The second defendant refused to receive the notice. The suit was therefore, instituted seeking the relief of specific performance and also a permanent injunction.

6. The defendants 1 and 2 filed a written statement stating that they have received a sum of Rs.15,000/- from the plaintiff after signing a blank stamp paper. It is also contended that the second defendant was deaf and dumb and his signature was also obtained without his knowledge and further, the agreement was fabricated and the defendants never intended to sell the property. In fact, Ramayammal had bequeathed the property to her grandson, Gunasekaran under a registered deed dated 02.02.1998. The defendants sought for dismissal of this suit on these grounds.

7. The trial Court dismissed the suit finding that Ex.A1, sale agreement was not true and genuine and that the defence pleaded by the



defendants that it was only a loan transaction was found to be true. The trial Court also found that the suit was bad for non joinder of the grandson Gunasekaran, who became entitled to the suit property under the registered Will executed by Ramayammal.

8. On appeal, the First Appellate Court concurred with the findings of the trial Court and dismissed the Appeal.

9. Aggrieved by the concurrent findings rendered by the Courts below the above Second Appeal has been preferred by the Plaintiffs.

10. On 13.04.2018, the Second Appeal was admitted on the following substantial questions of law:-

'(i) Whether the suit agreement is a registered document and the defendants have not questioned the registration, whether a defence can be taken a defence, that the document is fabricated?

(ii) When there is no issue regarding readiness and willingness on the part of the appellants to perform their part of the suit agreement, whether can any finding can be rendered against the appellant, particularly when 87% of the sale consideration has been paid'

11. I have heard Mrs.K.Ponmani for Mrs Zeenath Begum, learned



counsel for appellants and Mr.V.C.Janardhanan, learned counsel for Mr.C.Prabakaran, the learned counsel for the respondents 1 to 3

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12. The learned counsel for the appellants would contend that the defendants having admitted the signatures, were bound by the agreement and atleast when Ex.A4, pre-suit notice was issued, the defendants ought to have sent a reply, and in fact, the second defendant refused to receive the notice and merely a sum of Rs.17,000/- was due and payable by the plaintiffs and the plaintiffs had always been ready and willing to perform their part of the contract. The findings of the Courts below regarding non-joinder is also challenged by the learned counsel for the appellants on the ground that the Will was not produced by the defendants and in such circumstances, the plaintiffs could not have been non suited for not impleading the grandson of Ramayammal.

13. The learned counsel would further state that the Courts below failed to see that the issue of readiness and willingness was not even an issue when the plaintiffs had admittedly parted with 87% of the sale consideration. She would also contend that when the sale agreement was a registered



instrument, the plea taken by the defendants that it was fabricated was wholly unsustainable. She would therefore, pray for the Second Appeal being allowed on the substantial questions of law framed by this Court.

14. Per contra, the learned counsel for the respondents Mr.V.C.Janardhanan, would state that it is the specific case of the defendants that the transaction was only a loan transaction, that too for a sum of Rs.15,000/-. He would also refer to the endorsements made in Exhibits A2 and A3, in and by which, it is alleged that a sum of Rs.30,000/ was paid on 30.04.1998 and time was extended by 32 months and similarly, in Ex.A3 where Rs.18,000/- was paid as further advance on 30.12.2000 and time was extended by six months. He would therefore, contend that Rs.1,30,000/- had been paid according to the plaintiffs even on the date of agreement, the extension of time, viz., 32 months and 6 months respectively under Exhibits A2 and A3, would only create a doubt with regard to the genuineness of the sale transaction alleged by the plaintiffs. He would contend that absolutely no reasons have been assigned for such arbitrary and unnatural extensions of time.



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15. He would also state that description of the property is not in terms of Order VII Rule 3 of Code of Civil Procedure, 1908 and admittedly the total available extent is 2.8 acres. He would refer to the sale agreement in Ex.A1 and a photostat copy of sale deed said to have been executed on the same day, in favour of the plaintiff for a lesser extent of 1 acre 37 cents alone. He would also refer to Sections 91 and 92 of the Indian Evidence Act, 1872 (in short 'Act') and contend that Proviso 1 to Section 92 of the Act, would squarely apply to the facts of the present case.

16. He would also place reliance on the decision of the Hon'ble Supreme Court in the case of *Smt.Gangabai Vs. Ghhabubai*, reported in (1982) 1 SCC page 4, for the proposition that oral evidence can be adduced to establish a document to be sham on the ground of existence of a different transaction. For the very same proposition, he would also place reliance on the case of *V.Anantha Raju and Another Vs. T.M.Narasimhan and others* reported in (2021) 17 SCC page 165, where the Hon'ble Supreme Court discussed the effect of Sections 91 and 92 of the Act in contracts reduced to



writing, and held that the evidence of an oral agreement was permissible when a party to the deed claims that the deed was not intended to be acted upon and was only a sham document. He would therefore pray for the dismissal of the Second Appeal, as both the substantial questions of law framed by this Court at the time of admission would not be required to be answered in favour of the appellants, in view of the mandate of Section 92 of the Evidence Act, 1872 and also in view of the total lack of bonafides on the part of the plaintiff, leave alone readiness and willingness.

17. I have carefully considered the rival submission advanced by the learned counsel on either side. I have also gone through the pleadings and the judgments of the Courts below besides also the decisions on which reliance has been placed by the learned counsel on either side.

18. It is the contention of the learned counsel for the appellant that Ex.A1 being a registered sale agreement, the defendants are bound by the terms and conditions set out thereunder and cannot let in any oral evidence contrary to the said document in view of the specific bar under Sections 91 92 the Indian Evidence Act, 1872. However, as rightly contended by the



learned counsel for the respondents, Mr.V.C.Janardhanan, the provisos to Section 92, are exceptions to the general Rule that no oral evidence of any oral arrangement or statement shall be admitted in evidence, for contradicting, varying, adding to, or subtracting from the terms of the document. Provisos 1 and 2, are relevant for the purposes of the present case and hence, I deem it fit and proper to extract the same:-

"92. Exclusion of evidence of oral agreement.--- When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1)- Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2)- The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document."

19. In terms of Proviso 1, it is permissible to prove a fact which would invalidate the document in question or which would entitle any person to a decree or order on the strength of a plea of fraud, intimidation, illegality,



want of due execution, want of capacity in any contracting party, want of failure of consideration or mistake in fact or law. In terms of Proviso 2, the existence of any separate oral agreement as to any matter on which a document is silent and not being inconsistent with the terms of the document, may be proved. Proviso 2, also sets out that the Court while considering the applicability of this Proviso 2 shall have regard to the degree of formality of the document.

20. According to the learned counsel for the respondent, the use of the word 'such' in Section 92 would refer to a contract set out and mentioned in Section 91 only. Therefore, as rightly contended by the learned counsel for the respondents, in order to come to Section 92, the hurdle under Section 91 has to be crossed and therefore, Sections 91 and 92, have to go hand in hand and cannot operate independently. In fact, Section 92, is nothing but a corollary of Section 91. It is now well settled law that the Rule embodied in Section 91 is nothing but '*the best evidence Rule*', for a party to prove the contents of document, the primary evidence viz., document itself has to be produced. However, the provisos to Section 92 enable the party to



the document to lead extrinsic or even oral evidence to establish the true character of the document in question.

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21. In the present case on hand, it is the specific case of the defendants that the transaction was only a loan transaction for a sum of Rs.15,000/- and taking advantage of the signed blank stamp paper, the sale agreement has been brought about which is nothing but fraud played by the defendants. In such circumstances, in my considered opinion, the first proviso to Section 92 would squarely apply and the defendants are entitled to lead oral evidence to contradict Ex.A1, sale agreement and establish that the transaction was not a sale transaction and it was only a loan transaction.

22. The Courts below have elaborately discussed the oral and documentary evidence adduced by the parties and found that the plaintiff had not examined the attesting witnesses to Ex.A1 and held that Ex.A1 was not proved to be a true and genuine transaction. The Courts have also found that the endorsement in Ex.A3 was created fraudulently and the case pleaded by the defendants that it was a loan transaction was highly probable and true.



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23. The First Appellate Court additionally went into the very necessity of executing an unregistered sale deed on the same date of the sale agreement, however and especially for a lesser extent of 1 acre 37 cents. Even though the said unregistered sale agreement was not marked in evidence, the First Appellate Court found the conduct of the plaintiff to be lacking in bonafides.

24. Additionally, one another reason that I find to dis-entitle the plaintiffs for equitable and discretionary for specific performance is that the plaintiff has miserably failed to establish readiness and willingness. Mere payment of 87% for the total sale consideration, even assuming without admitting the same to be true, would not in any way helps the plaintiff's case in establishing the readiness and willingness. The plaintiffs have to show the readiness and willingness for fulfilling all the obligations which remain to be full quit on his part. Even according to the plaintiffs' version in and by Ex.A3 endorsement, time was extended by six months on 30.12.2000 on which date according to the plaintiffs a sum of Rs.18,000/- was paid as a



further advance, leaving a balance of merely Rs.17,000/-. However, the plaintiffs issued a pre-suit notice only after three years viz., 11.06.2004 and thereafter, filed the suit by end of June 2004. The plaintiffs have not been able to show or justify their silence and inaction for three years after the period contemplated under Ex.A3 endorsement came to an end.

25. Therefore, viewed from any angle, especially since the plaintiff has not even established the validity and enforceability of Ex.A1, sale agreement and also in view of the fact that the defendants have probablised an arrangement viz., a loan transaction to the contrary, by successfully establishing their defence and entitled to the total benefit of the first proviso to Section 92 of the Indian Evidence Act, 1872, I do not find any necessity for interfering with the concurrent findings of the Courts below. Accordingly, this Second Appeal is dismissed. There shall be no order as to costs.

15.03.2024

Index :Yes/No
Internet : Yes/No



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Neutral Citation :Yes/No.

Speaking order/Non-speaking order
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To

- 1.The I Additional District cum Sessions Judge, Salem.
- 2.The Principal Sub Judge, Salem.

P.B.BALAJI, J.

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