



S.A.No.362 of 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

S.A.No.362 of 2013

and

M.P.No.1 of 2013

1. Andi Gounder
S/o.Mayya Gounder
 2. Sundarrajan
S/o.Andhi Gounder
 3. Sivakumar
S/o.Andhi Gounder
- .. Appellants
- vs.
- Malayan
S/o.Annamalai Gounder
- ..Respondent

Second Appeal filed under Section 100 of CPC against the judgment and decree of the learned Principal District Judge, Salem dated 18.07.2012 made in A.S.No.45 of 2011 reversing the judgment and decree of the learned Additional Sub-Judge, Salem dated 13.11.2009 made in O.S.No.192 of 2008.

For Appellants	:	Mr.R.Nalliyappan
For Respondent	:	Mr.R.P.Ruban Chakravarthy representing Mr.S.Kaithamalai Kumaran



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J U D G M E N T

The present Second Appeal arises out of the judgment and decree of learned Principal Judge at Salem in A.S.No.45 of 2011 dated 18.07.2012 in reversing the judgment and decree of the learned Additional Subordinate Judge, Salem in O.S.No.192 of 2008 dated 13.11.2009. O.S.No.192 of 2008 on the file of Subordinate Court, Salem was a suit to declare that the sale deed dated 28.06.2001 executed by the plaintiffs in favour of the defendant is vitiated and should be declared only as a Mortgage Deed. No consequential relief has been prayed for.

2. It is the case of the plaintiffs that on 28.06.2001, the plaintiffs had gone to the Sub-Registrar's Office for registering a Mortgage Deed as a security for the loan of Rs.55,000/- taken by the plaintiffs from the defendant. The defendant, according to the plaintiffs had swindled them and instead of getting the Mortgage Deed executed had got the sale deed executed in his favour. The plaintiffs came to know of this fact only on 21.07.2008 when they applied for an Encumbrance Certificate for the property. On that day, they came to know that the defendant had played a fraud on them and had obtained a Sale Deed instead of Mortgage Deed.



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3. The case of the defendant is that the suit property belongs to the plaintiffs' family by virtue of three sale deeds dated 05.07.1962, 14.04.1969 and 23.04.1984. It is the specific case that three items of the property situated at S.No.31/2B3 to an extent of 0.13.5 hectares, S.No.39/1B to an extent of 0.17.0 Hectares and S.No.39/2B to an extent of 0.82.5 Hectares were sold by the plaintiffs, who are father and two sons on 28.06.2001. He stated that this document was registered in Document No.244 of 2001 and that on and from the date of purchase he has been in possession and occupation of the same. He categorically denied the averments that what he had entered into was a loan transaction and that the plaintiffs had borrowed a sum of Rs.55,000/- agreeing to repay the same together with interest at the rate of Rs.1100/- per month. The defendant further pleaded that the plaintiffs' unlawful attempt to trespass into the property forced him to lodge a police complaint in May of 2008 and that subsequently, the present suit has been filed in June 2008. He also stated that the documents which had been filed along with the plaint do not relate to the suit schedule mentioned property.



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4. On the basis of these pleadings, the following issues were framed by the trial Court.

- " 1. Whether the plaintiffs are in possession and enjoyment of the suit properties?*
- 2. Whether the alleged sale deed dated 28.06.2001 is executed in favour of the defendant is bona fide?*
- 3. Whether the plaintiff is entitled for the suit claim?*
- 4. To what other reliefs?"*

5. On behalf of the plaintiffs, the first plaintiff examined himself as P.W.1 and his son was examined as P.W.2 and on the side of plaintiffs, Ex.A1 to Ex.A5 were marked. The defendant entered into witness box and marked Ex.B1 to Ex.B6.

6. Learned trial Judge decreed the suit on the ground that the defendant was unable to state as to (i) how many trees were in and over the property (ii) The defendant's documents are all subsequent to the suit and (iii) the defendant had not examined the attesting witnesses to the sale deed.



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7. Aggrieved by the said judgment and decree, the defendant filed A.S.No.45 of 2011. Learned Appellate Judge on the basis of the admission of the plaintiffs in the cross-examination as well as on the ground of the burden placed on the plaintiffs not having been discharged, allowed the appeal and dismissed the suit.

8. Aggrieved by the said judgment and decree, the present second appeal has been filed before this Court. The second appeal was not admitted by this Court but notice regarding admission had been ordered on 23.11.2015. Notice has been served and Mr.S.Kaithamalai Kumaran had entered appearance for the respondent.

9. Mr.R.Nalliyappan, learned counsel for the appellant would suggest the following substantial questions of law arise for consideration in the present appeal:

" a) Whether the Lower Appellate Court was right in holding that the plaintiffs are precluded from challenging the sale deed in view of the provisions of Section 91 (Section 92) of the Evidence Act



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overlooking the provisions to the said Section which enable a party to plead and prove invalidating circumstances?

b) Whether the Lower Appellate Court was right in holding that Ex.A2-series does not relate to the suit property more so when it is not the case of the defendant that the plaintiffs own some other agricultural land in the village in question?

c) Whether the findings of the Lower Appellate Court are perverse in view of the fact that the Lower Appellate Court has not adverted to the entire evidence on record?

d) Whether the Lower Appellate Court was right in reversing the findings of the trial Court without disclosing any reason for its inability to agree with the findings of the trial Court?"

10. Mr.R.P.Ruban Chakravarthy, learned counsel representing Mr.Kaithamalai Kumaran, would argue that none of these questions of



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law arise for consideration in the present second appeal. He would urge that the requirements of Order VI Rule 4 of the Civil Procedure Code, 1908 [CPC] has not been complied with in the plaint and further the appellants having admitted the execution of the sale deed in the witness box are not entitled to plead otherwise before this Court.

11. I have carefully considered the arguments on either side and I have gone through the records.

12. It is pertinent to point out that in a suit as in the present nature, the burden of proof is very heavy on the plaintiffs to show that what had been executed by them is a Mortgage Deed and not a Sale Deed. Unless and until, initial burden is discharged, I cannot ask like has been done by the trial Court, to call upon the defendant to prove otherwise.

13. It is the positive case of the plaintiffs that what had been executed was only a Mortgage Deed. In order to substantiate the same, no one other than his own son, a co-executant of the document had been examined. On the date of execution of the Mortgage Deed, the first



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plaintiff was aged 41 years, the second plaintiff was aged 20 years and the third plaintiff was aged about 18 years. The certified copy of the sale deed has been marked as Ex.P1 and a copy has been marked as Ex.D1. A perusal of Ex.D1 shows that two persons namely, one Murugan and one Ms.Deepa had attested the documents as witnesses. The plaintiffs ought to have examined the attestors to the said document in order to substantiate his case. Even if the attestors were not available, the plaintiffs should have examined some independent witnesses in order to substantiate their case. Except the interested testimony of the first plaintiff and that of his son, the second plaintiff, no other person had been examined in order to discharge the heavy burden that are laid on them.

14. Now, turning to the evidence of P.W.1, during the course of his cross-examination, he has admitted to the fact that he had in fact executed the sale deed in favour of the defendant. This statement of P.W.1 has been accepted by P.W.2 during his cross-examination. That takes away the basis of the plaintiffs' claim.



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15. As rightly contended by Mr.R.P.Ruban Chakravarthy, learned counsel where a plea of fraud or undue influence or coercion is pleaded, it is the duty of the plaintiffs to specifically plead and prove the same. This view has been laid down by the Hon'ble Supreme Court in ***Ladli Parshad Jaiswal Vs. The Karnal Distillery Co. Ltd., Karnal and others*** reported in ***1962 SCC OnLine SC 38***. Unless and until, the strict rules as required under Order VI Rule 4 of CPC is complied with, the plaintiff cannot succeed in a suit of undue influence, coercion or misrepresentation. The plaint is deliciously vague as regards the misrepresentation that had been practiced by the plaintiffs.

16. Now I turn to the submission that was made by Mr.R.Nalliyappan, that though the sale had been executed in the year 2001, the revenue records continue to show the name of his client which shows that the document had never been executed in favour of the defendant.

17. The conclusion that Mr.R.Nalliyappan wants me to draw is that what was executed is only a Mortgage Deed and the defendant did not



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approach the revenue authorities for the purpose of mutation of revenue records in his favour. This stand has been explained by the defendant on the following terms. It is an admitted fact that the plaintiffs usurped 2 acres 75 cents in the aforementioned three survey numbers. Out of 2 acres 75 cents, they had alienated 2 acres 25 cents and had retained an extent of 50 cents over which a house property had been constructed.

18. A perusal of the sale deed does not disclose any house property having been alienated and therefore, the production of the house tax records does not improve the case of the plaintiffs. Apart from that, the factum that the revenue records had not been mutated does not mean that no sale deed had been executed. If this submission is to be accepted then no sale transaction for which revenue records have not been mutated could be saved from cloud of litigation that can be initiated by an unscrupulous vendor.

19. The trial Court had erred on two grounds namely, casting the burden of proof on the defendant to prove that what he had been executed in his favour was only a sale deed and not a mortgage deed and



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secondly, had given a flimsy reason that since the defendant is unable to state as to how many trees are available in the property, he is not the owner by virtue of the impugned sale deed.

20. The burden of proof can be shifted onto the purchaser, if and only, the persons who have executed the document come within the protective cloth thrown over them as in the case of pardanashin women, illiterate person all those of advanced age etc., In all other case, the burden of proof is on the plaintiffs to prove by way of independent witnesses that the document that he had executed was not the document which finally was registered. All the plaintiffs are of mature age and sound judgment and under such circumstances, the burden is on them to prove their averments in the plaint. Reading of the evidence shows that in the cross-examination by the defendant, the plaintiffs have given away their case though not totally.

21. Apart from that, there is another serious infirmity that the plaintiffs instead of asking for further relief in the suit as required under Section 34 of the Specific Relief Act, 1963 had sought for the relief of



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mere declaration. A suit for mere declaration is not maintainable as consequent relief should have been sought but it has not done so.

22. For all these reasons, I do not find the substantial questions of law that Mr.R.Nalliyappan has framed for admission arise in the present case. There is no question of law much less substantial question of law in the appeal. Hence, the appeal is not admitted but it is dismissed.

23. In fine, the Second Appeal is dismissed. The judgment and decree of the Court of learned Principal Subordinate Judge in A.S.No.45 of 2011 dated 18.07.2012 in reversing the judgment and decree of the Court of learned Additional Subordinate Judge, Salem in O.S.No.192 of 2008 dated 13.11.2009 stands confirmed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

07.02.2024

Index:Yes/No

Neutral Citation:Yes/No

Speaking Order / Non-speaking order

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To

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

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V. LAKSHMINARAYANAN, J.

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