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S.A. No.1007 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.03.2024

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THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI

S.A.No.1007 of 2016

and

M.P.No.20739 of 2016

C.Gopalan

... Appellant

Vs

P.Muthusamy

... Respondent

PRAYER: Second Appeal filed Under Section 100 of the Civil Procedure

Code, against the Judgment and decree order dated 18.08.2015 made in A.S.No.6 of 2015 on the file of the Subordinate Court, Sathyamangalam and reversing the Judgement and decree dated 13.02.2006 made in O.S.No.203 of 2003 on the file of the District Munsif Court, Sathyamangalam.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.A.K.Kumarasamy, senior counsel
for Mr.Ma.P.Thangavel



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JUDGMENT

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The appellant has filed this Second Appeals against the Judgment and decree of learned Subordinate Judge, Sathyamangalam made in A.S.No.6 of 2015, dated 18.08.2015, reversing the Judgment and decree of the District Munsif Court, Sathyamangalam made in O.S.No.203 of 2003 dated 13.02.2006.

2. The appellant herein is the plaintiff in O.S.No.203 of 2003 before the learned District Munsif, Sathyamangalam, who filed a suit for the relief of specific performance against the respondent herein.

3. For the purpose of convenience, the parties herein are referred to as they are ranked in the suit.

4. According to the plaintiff the suit property belongs to the defendant and he offered to sell the same to the plaintiff on 29.03.2001 for sale consideration of Rs.21,000/- on the same day he had received a sum of Rs.19,000/- as an advance, and the balance amount of Rs.2000/- was to be

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paid to the defendant within one year from the date of the agreement.

Thereafter, the plaintiff demanded, but the defendant did not execute the sale deed. The defendant received a sum of Rs.1,000/- and made an endorsement on the back side of the agreement for a period of one more month. In the 2nd week of April 2002, the plaintiff demanded, but the defendant failed to execute the sale deed. Hence, a notice was issued on 26.02.2002. But no reply notice was send, instead, sent a false telegram. Plaintiff was always ready and willing to perform his part hence filed a suit for specific performance with an alternative remedy.

5. By way of written statement the defendant admits that he is the owner of the property but denies other allegations. He further contend that the plaintiff is the Son-in-law of his sister and he was a financier. Due to financial crisis, the defendant borrowed a loan for a sum of Rs.50,000/- and as security, he obtained a signature from him on an unfilled stamp paper and a blank promissory note. However, he was unable to pay the interest from February 2002 onwards. By using the blank papers with signatures, the plaintiff created a false agreement. A settlement was conducted with the



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help of Panchayadhars Ramasamy and Karuppusamy, wherein the defendant paid arrears of interest and thereafter he paid the interest up to October 2003, as he committed default, the plaintiff has filed a suit by filling one of the promissory note and also filed the present suit, based upon the alleged sale agreement. In fact, the suit agreement was not intended to execute to sell the property to the plaintiff, at most, he borrowed loan. Hence, he prayed to dismiss the suit as having no merits.

6. Before the trial Court, both the parties adduced evidence. The learned trial Judge framed three issues considering the oral and documentary evidence. The trial Court concluded that the sale agreement had not been disputed by the defendant, and the endorsement made in the agreement was also accepted by him. Though the plaintiff was ready, the defendant evaded, hence the suit was decreed in favour of the plaintiff. Challenging the said findings, the defendant preferred an appeal before the learned Subordinate Judge, Sathyamangalam, in A.S.No.6 of 2015. The learned lower Appellate Judge independently analysed the evidence of record and framed separate issues but did not agree to receive additional



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documents related after the suit. The learned lower Appellate Judge, by relying on the evidence of P.W.2 as well as D.W.2 concluded that there was a Panchayat held in respect of money transaction between the parties, and Ex.A2 sale agreement was not executed by the defendant with an intention to sell the property and the time extension made in the agreement was also not accepted. Accordingly, the appeal was partly allowed by dismissing the relief of specific performance and granted the alternative remedy, directing the defendant to refund a sum of Rs.20,000/- with interest at 9 % from the date of agreement till date of decree, thereafter 6 % until realization. Challenging the said findings, now the plaintiff has preferred this Second Appeal.

7. The Second Appeal was admitted on the following Substantial Questions of Law.

"(a) Whether the judgement and decree of the lower appellate Court is valid in law when there is no cause of action for the first appeal ?



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(b) Whether the judgment and decree of the lower appellate Court is sustainable when the trial decree has been satisfied by execution of sale deed by the executing Court and delivery of possession taken by the appellant / decree holder in execution proceeding ?

(c) Whether the judgement and decree of the lower appellate court is sustainable in the circumstances when the factum of execution of sale deed and the delivery of possession taken before filing of the first appeal itself was suppressed by the respondent and therefore there is no cause of action for the first appeal ?

8. The learned counsel for the appellant submitted that the Lower Appellate Court failed to take note of the fact that after the decree passed by the learned trial Judge, an execution petition was filed in E.P.No.24 of 2007 before the learned District Munsiff, Sathyamangalam. In spite of the notice, the defendant did not appear, therefore, based upon the order of the Court, the sale deed was registered in Document No.308/2008, and the possession



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also delivered to the decree holder on 03.11.2009. But the First Appeal was filed on 07.08.2015, challenging the trial Court decree by suppressing the execution of the sale deed and delivery of possession. Therefore, the decree passed by the appellate Court is non est-en in law. Further, he would submit that the Lower Appellate Judge failed to consider that through agreement Ex.A2, the plaintiff paid a major portion of the sale amount of Rs.19,000/- and a meagre amount Rs.2,000/- was left over, at the request of the defendant, subsequently, time was extended by the defendant by receiving a sum of Rs.1,000/-. To that effect, an endorsement was also made by A2 on the back side of the agreement, and the same was not denied by the defendant. In such circumstances, the lower Appellate Court ought to have confirmed the findings of the learned trial Judge, but erroneously dismissed the suit by reversing the findings of the trial Court, which is improper, erroneous and liable to be set aside.

9. By way of reply, the learned counsel for the respondent / defendant submitted that though there was a delay on his part to file the First Appeal, he filed application to condone the delay, which was dismissed before the



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First Appellate Court, against that dismissal, he preferred CRP in CRP.No.266 of 2011, and the same was dismissed. Challenging the same, he has preferred Civil appeal in SLP.No.14153 of 2014, wherein the Apex Court directed him to deposit a sum of Rs.15,000/- towards cost before the First Appellate Court. Accordingly, the delay was condoned, and first appeal was cleared. This fact was also admitted by the appellant. Therefore, as of now, the order of the execution Court to register the sale deed became infructuous.

10. Considering both sides' submissions, it reveals that, admittedly, the plaintiff and the defendant are close relatives. According to the defendant, due to financial crises, he borrowed a loan of Rs.520,000/- from the plaintiff, who is a financier, and repaid the interest. Later, he unable to pay the interest, thus a misunderstanding arose between them. Hence, a Panchayat was held, through which the defendant agreed to pay the interest regularly, and the same was accepted by the plaintiff. However, as there was a default on his part in the payment of interest, the plaintiff immediately issued a notice and filed the present suit. The learned Lower



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Appellate Judge rightly held that the agreement Ex.A2 was not executed with an intention to sell the property. On the other hand, those documents came into the picture as security for the loan transaction. However, the contention of the defendant is that it is a loan transaction and not intended to execute the sale agreement. When the defendant pleaded against the recitals of the records, the burden on him to prove the same by rebuttal evidence to the recitals as required provision under Section 92 of Evidence Act. The plaintiff was examined and one of the attesters examined as P.W.2. In fact, through P.W.2, the endorsement on the backside of the agreement was obtained by the plaintiff, which itself shows that the plaintiff was not aware of the alleged endorsement made by the defendant directly.

11. According to the defendant, it is only loan a transaction, so that there was Panchayat held wherein the plaintiff also agreed to receive the interest. The Panchayatars are examined as D.W.2 and D.W.3 on the side of the defendant. Both witnesses deposed that 'at the request of the defendant, there was a Panchayat held wherein they came to know the fact that there was money borrowed by the defendant from the plaintiff'. Thereafter, he



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was not able to pay neither the principle nor the interest. Hence, the dispute was arose, for which Panchayat was commenced in which they took participation. The evidence of D.W.2 and D.W.3 has not been contradictory by the plaintiff by extracting the discriminating evidence. Moreover, cross examination done on the side of the plaintiff also reveals that the plaintiff admits the Panchayat conducted by D.W.2 and D.W.3. According to the defendant, endorsement made on the back side of the agreement was executed in the presence of the Panchayatar. The said endorsement was marked as Ex.A5, one of the Panchayatars examined as D.W.3 deposed that the defendant borrowed a loan for which the defendant not able to pay the loan regularly, therefore, the Panchayat was held in the house of the plaintiff. Besides, Panchayat has not been denied by the plaintiff, therefore, defendant proved that the agreement was not intended to be executed by the defendant with an intention to sell his property to the plaintiff. On the other hand, as security for the loan transaction, the alleged agreement came into force. Though the defendant admits the signatures in the agreement, with the help of D.W.2 and D.W.3, he was able to establish that there was a Panchayat held in respect of payment of interest for the alleged loan



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borrowed by him by adducing such contra evidence. The defendant able to establish that the Ex.A2 agreement was not executed by him with an intention to sell the property. The evidence of DW2 and D.W.3 was rightly appreciated by the learned Lower Appellate Judge and needs no interference. The findings of the trial Court that the defendant admits the signature in the agreement itself sufficient to grant relief of Specific Performance in favour of the plaintiff as such is totally erroneous. Even assuming that the plaintiff is a bonafide purchaser, he must prove the same including this readiness and willingness. But during cross-examination, the plaintiff admits that he is not seeing the alleged endorsement made by the defendant on the back side of the agreement (Ex.P5). Further, he valued the property for a lesser price of Rs.21,000/-. But even at the time of the agreement, the property weighed more than 1 lakhs, and the same was proved by DW.3 for the defendant. If at all the plaintiff is ready to purchase the property for meagre amount of Rs.2,000/-, one year time to be fixed, but even that period plaintiff was not ready. But he relied the execution of time by the defendant by receiving Rs.1,000/-, made the alleged endorsement marked as Ex.P5. However, the endorsement was not in dispute, but the



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duty cast upon the plaintiff to prove that he was ready and willing to part with the agreement, but even after the issuance of notice near about 8 months later, the present suit was filed, which itself shows that the plaintiff was not ready to perform, and the same was rightly appreciated by the learned trial Judge. Since the execution proceedings as well as the delivery of possession ordered by the Court were set aside by permitting the defendant to proceed with first appeal on payment of cost by the Apex Court. Therefore, the arguments advanced by the appellant are that the defendant has no right to proceed with the first appeal as there is no cause of action as such are erroneous. Accordingly, questions of law 2 and 3 are answered. To support the contention of the appellant, the following authorities relied on by him.

(i) The judgement of the Honourable Supreme Court of India, reported in *MANU/SC/0985/2021, Sughar Singh vs. Hari Singh (Dead) through L.R.s and others*, in which reads as follows:

“10.What the defendant contended before the lower Court and equally here also is that it was only a loan



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transaction; that the sale agreement was only manipulated and brought about to hold a threat upon the defendant to secure the due repayment of RS.40,000/- lent by the plaintiff; and that it was never intended to be acted upon. When the defendant came with a plea stating that the intention of the parties was only to treat the same as a loan transaction, and it was never intended to be acted upon, which is inconsistent with the terms of the document, a duty is cast upon the defendant to strictly prove that it was a different transaction all together, and what was recorded in the document who came with such a plea, can well adduced evidence to show that Ex.A1 agreement though executed by him, was never intended to be operated as an agreement for sale, but only a loan transaction, which was not recorded in the document. After careful consideration of the available materials, the Court may hasten to say that the appellants have miserably failed to prove that it was a loan transaction, and the agreement was never intended to be acted upon. The defendant has not examined any independent witness or the attester to the document, nor has he placed acceptable materials to hold so. Except the interested testimony of the defendant, nothing more is available on record. The specific averments in the written statement runs as follows.

(Matter in vernacular omitted -Ed.)



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This part of the written statement would clearly be indicative of the fact that before executing Ex.A1 sale agreement the defendant had the full knowledge that it was an agreement Ex.A1 sale agreement, the defendant had the full knowledge that it was an agreement for sale in respect of the plaint schedule mentioned property, and it was also registered. Hence, the contention of the appellants' side that the defendant signed the document without knowing the contents of the same cannot be countenanced.”

(ii) The judgement of this Court, reported in **SCC online 2009(6) CTC 301, T.G.Pongiannan Vs. K.M.Natarajan and others**, in which reads as follows:

“13.The conduct of the defendants should be taken note of. Even though the registered agreement to sell Ex.A1 emerged as early as 30.08.1999, the defendants have not chosen to, as per their own version, repay the loan or send any notice calling upon the plaintiff to return Ex.A1.

14. The defendants have not proved by any shard or shred, scintilla or pint – sized, iota or molecule extent of evidence that any interest was paid by them to plaintiff towards the alleged loan. As such, this Court can only treat



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their plea as a false one. Had really D.W.1 (D1), as claimed in his Chief Examination Affidavit, paid 18% interest for the sum of Rs.75,000/- or so, then there would have been at least some pass book or note book or any chit, evidencing the same.

15. The above excerpt would clearly exemplify and display that in fact, even though in the registered sale agreement there is a clear acknowledgement that a sum of Rs.1,00,000/- was received from the plaintiff by the defendants, the latter have chosen to contend as though only a sum of Rs.75,000/- was paid to them and that anticipating 18 % interest p.a. It was specified as one lakh. This again is a total variation from the registered deed, prohibited under Section 91 and 92 of the Indian Evidence Act.

16. The defendants would state that one Arunachalam alone introduced them to the plaintiff and he only arranged for the loan transaction. If that be so, the said Arunachalam should have been examined on the side of the defendant. At least, the defendants should have taken necessary steps to summon him as a witness to be examined before the Court. But they have not chosen to do so.

17. Even though the defendants contended that the sale consideration of Rs.1,25,000/- is not the real value of the property and that the plaintiff is trying to purchase the suit



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property for a song, nonetheless there is nothing to indicate or evince that the suit property was sought to be purchased by the plaintiff for abysmal low price.

18. It is a trite proposition of law that the adequacy of consideration is not germane for deciding the specific performance of an agreement to sell. Only if there is a prima facie case that fraud has been committed by one party as against the other, in such an event alone inadequacy of consideration would arise.

19. To the risk of repetition without being tautologous, In would like to highlight that none of the ingredients contemplated under the provisos to Section 92 of the Indian Evidence Act, has been found exemplified or evinced in the case of the defendants.

20. It is the case of the defendants that they, understanding the real nature of the transaction, entered into the said agreement to sell Ex.A1. However, they would contend that it was the plaintiff, who persuaded them to enter into such a transaction under Ex.A1, instead of a mortgage transaction, to avoid the cost of registration and stamp duty. As an after thought, if any plea is dished out so as to wriggle out of a registered document, it is not for the Court to render judicial help to him and that too when he never acted in a fair manner.”



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(iii) The judgement of this Court, reported in ***SCC online 2011(1)MWN (Civil) 580, V.Vaiyapuri Vs. M.Pavayi and others***, in which reads as follows:

“(E) Code of Civil Procedure, 1908 (5 of 1908), Section 100 – Second Appeal – Plaintiff proved sale agreement by examining witness – Burden shifts on defendant to disprove plaintiff’s contention -defendant failed to discharge onus – Trial Court discussed all factual issues, rendered detailed judgement, decreeing specific performance- First appellate Court misapplied concept of “ Onus of Proof” and reversed finding – It is trite proposition of law that burden of proof is ambulatory and not static – Held, decree of Trial Court restored.”

12. The authorities relied on by the appellant do not apply to the facts of the present case for the reason that the defendant established that the sale agreement was not exhibited with an intention to sell his property through the evidence of D.W 2 and D.W.3 as well as the conduct of the plaintiff, which itself proved that it is a loan transaction. Therefore, the Second

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Appeal is dismissed as having no merits, and the findings of the lower Appellate Court are confirmed. Thus, Issue (a) is answered. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

13. Accordingly, Suit is partly decreed, thus the defendant is directed to refund advance of Rs.20,000/- with interest of 9 % from the date of the suit till the date of decree and thereafter 6 % till the date of realization, to the petitioner.

27.03.2024

Index : Yes/No
Neutral Citation : Yes/No
Speaking/Non Speaking order

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To

1. The Subordinate Court, Sathyamangalam.
2. The District Munsif Court, Sathyamangalam.
3. The Section Officer, VR Section, High Court of Madras.

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T.V.THAMILSELVI, J.

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