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S.A.No.327 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.10.2024

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THE HONOURABLE MR. JUSTICE K. RAJASEKAR

Second Appeal No.327 of 2022
and
Civil Miscellaneous Petition No.6829 of 2022

Vinayagamoorthy

... Appellant

-Vs-

Karthikeyan

... Respondent

Second Appeal filed under Section 100 of Civil Procedure Code against the Judgment and Decree dated 27.08.2021 in A.S.No.11 of 2020 on the file of the Principal District Court, Villupuram reversing the Judgment and Decree dated 11.04.2019 in O.S.No.353 of 2016 on the file of the I Additional Subordinate Court, Villupuram.

For Appellant : M/s. R. Meenal
For Respondent : Mr.C.Munusamy

JUDGMENT

This Second Appeal filed challenging the reversing finding given by the Lower Appellate Court in decreeing the suit, after setting aside the



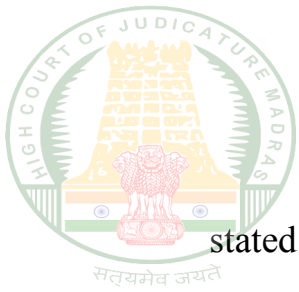
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Judgment and Decree passed by the Trial Court for refund of sale advance.

2. For the sake of convenience, the parties are referred as per their ranking before the Trial Court.

3. The case of the plaintiff is that on 16.02.2016, the defendant has entered into an agreement, to sell the suit property in favour of the plaintiff for a total consideration of Rs.1,74,000/-. On the same day, he has received a sum of Rs.1,50,000/- as advance and remaining balance sale consideration of Rs.24,000/- to be paid within a period of 11 months and agreement was also has executed. Even though, the plaintiff was ready and willing to perform on the part of his contract, the defendant avoided to execute the Sale deed. Hence, he has confined to issue legal notice on 16.07.2016 and the same was not received by the defendant hence, the suit was filed for specific performance.

4. The defendant has entered into appearance and filed written statement contending that, he has received a sum of Rs.1,50,000/- only as a loan transaction, to meet out some educational expenses. He has also



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stated that, he has approached the plaintiff through one Siva. On the date of execution of Sale agreement, Rs.1,45,000/- was paid to him after retaining Rs.5,000/- as interest and for the purpose of ensuring repayment, the plaintiff has demanded execution of the agreement of sale, accordingly, agreement of sale was also entered on 16.02.2016. The defendant has also paid a sum of Rs.5,000/- as interest on 26.06.2016 through one Siva and subsequently, during 3rd week of July 2016, he was ready to discharge the loan. However, the plaintiff has refused to receive the same and demanded execution of Sale deed, hence, confined to issue legal notice dated 01.08.2016 calling the plaintiff to receive the loan amount and to cancel the agreement for sale whereas, without accepting the same, the suit has been filed.

5. Based on the pleadings and evidences, the Trial court has framed the following issues:

“1. Whether the plaintiff is entitled to specific performance and possession of property as sought for?

2. Whether plaintiff is entitled to alternative remedy as sought for?

3. Whether the sale agreement has been executed as a security for amount of Rs.1,50,000/- borrowed by defendant from plaintiff?



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4.To what relief plaintiff is entitled to?”

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6. After hearing the parties and recording the evidences, the Trial Court has come to a conclusion that the said transaction has been entered between the parties only as a loan transaction and it is not an agreement of sale and accordingly, ordered for refund of total advance sale consideration.

7. Aggrieved over the same, the plaintiff has filed an appeal before the Principal District Court, Villupuram and the Appellate Court, after hearing both parties has held that, the defendant is not entitled to lead parole evidence against the recitals in the agreement for sale and the defendant has also failed to probabalise his case that the transaction has taken place is only a loan transaction thereby, dismissed the claim of the defendant and allowed the appeal and consequently, decreed the suit for specific performance.

8. Aggrieved over the same, this Second Appeal has been filed by the defendant and this Court by order dated 20.04.2022, admitted the Second Appeal with following substantial question of law:

“1.Whether the Lower Appellate Court is right



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in holding that the sale and suit agreement is a genuine sale transaction, even though, the Trial Court has accepted the case of the defendant that the suit agreement is only a security for the loan transaction?”

9. The learned counsel appearing for the appellant has submitted that there is ample evidence placed on record to prove the nature of transaction as a loan transaction and the same has not been considered by the Lower Appellate Court. The evidence of attestors P.W.2 and D.W.2 was brushed aside by the Lower Appellate Court and thereby the findings of the Lower Appellate Court is perverse. The Trial Court has rightly accepted the case of the defendant and the plaintiff has failed to prove the transaction as agreement for sale thereby, pleased to set aside the Judgment and Decree of the Lower Appellate Court.

10. Per Contra, the learned counsel appearing for the respondent/plaintiff invited my attention to the findings of the Lower Appellate Court, more particularly, the defence of the defendant that, he has obtained loan for the purpose of meeting out educational expenses, whereas, there was no evidence placed on record to show that the amount



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was received for meeting out the educational expenses. He has also submitted that there is no evidence placed on record to show that the defendant has regularly paid interest for loan transaction and the evidence of D.W.2 is also not believable since there was already dispute regarding the sale of land between the defendant No.2 and the plaintiff. He has also contended that the parole evidence could not be lead in this case against the contention of the written argument Ex.A1-agreement of sale.

11. I have considered the submissions made on both sides and also perused the records.

12. The major question is to be decided by this Court is whether the parties herein are entitled to lead parole evidence in contradiction of recitals in Ex.A1 - Agreement for sale.

13. Section 92 - Exclusion of evidence of oral agreement as follows:

“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



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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 1 [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:

Proviso (3).-The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).-The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).-Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with the express terms of the contract:

Proviso (6).-Any fact may be proved which shows in what manner the language of a document is related to



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existing facts.

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14. The Scope of Proviso (1) of Section 92, was considered by Apex Court in ***Gangabai Smt Vs. Chhabubai Smt (AIR 1982 SC 20)*** and in para 11 held as follows: “the next contention on behalf of the appellant is that sub-s.(1) of s.92 of the [Evidence Act](#) bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parole evidence in support of the contention. [Section 91](#) of the Evidence Act provides that when the terms of contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-s.(1) of [S.92](#) declares that when the terms of any 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,



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varying, adding to, or subtracting from, its terms And the first proviso to **WEB CC** [S.92](#) says that 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 contradicting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-S.(1) of [S.92](#) applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub- section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not



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recorded in the document, was entered into between the parties.

WEB COPY [Tyagaraja Mudaliyar and another v. Vedathanni](#). The Trial Court was right in permitting the respondent to lead parole evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the parole evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail”.

15. In *Parvinder Singh vs. Renu Gautam and Others (2004 (4) SCC 794)*, relevant paragraph No.9, it is held that, “An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. [Tyagaraja Mudaliyar Vs. Vedathanni](#), *AIR (1936) PC 70 : 63 IA 126* is an authority for the proposition that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different”.

16. It has been categorically held that the parole evidence to prove the nature of document is always permissible. In this case, the defendant has relied on not only his evidence to decide the nature of the documents



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but also, one of the attestor of Ex.A1-Agreement for sale is also been
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17. Before considering the defendant's evidence, the evidence of P.W.1 is to be considered. According to him, he has entered into an agreement for sale only for the purpose of purchasing the land, whereas, during cross examination, the defendant was able to elicit the fact that, he has not only entered into the agreement for sale with the defendant on that day and plaintiff had also entered into two other agreements for sale. Out of 3 agreements for sale entered by him, he has come forward to cancel two agreements for sale by way of Ex.B2 and Ex.B4. Though, plaintiff claims that he was not willing to purchase those lands. But Trial Court found this was not convincing answer, as to why those two properties were not been purchased. Before the Trial Court, the defendant has examined one of the agreement holder as D.W.2 and who has come forward to depose about Ex.B1and Ex.B2. His evidence shows that he had borrowed a loan of Rs.3,00,000/- from the plaintiff and agreement for sale was entered to receive the loan, and on repayment of the same, the agreement for sale entered between the plaintiff and D.W.2 was cancelled.

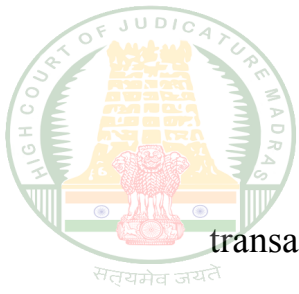


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18. The evidence of P.W.2 who is the attesor of Ex.A1-Agreement of sale, is also not convincing to prove the nature of the document. He has stated that he attested the agreement for sale entered between the plaintiff and defendant. He was not able to identify the other witnesses who attested Ex.A1. He has gone to the extent of agreeing to the fact that, for the purpose of loan transaction, the defendant has come forward to execute the sale agreement. This evidence has not been disputed by the plaintiff, he has not produced any explanation for the same.

19. In this background, now the evidence of defendant is to be considered. According to him, Ex.A1 was executed by him and same is for securing the loan transaction. He has borrowed a sum of Rs.1,50,000/- after agreement for sale was executed. During the cross examination of plaintiff, another agreement for sale also marked as Ex.B3 and it has been cancelled as Ex.B4. These documents concerned with another land. All these documents coupled with oral evidence of D.W.2 and D.W.1 convincingly, probabalise the case of the defendant that, it is a case of loan transaction. Since the defendant is able to probabalise his defence, the burden shifts on the plaintiff to show that, it is not a case of loan

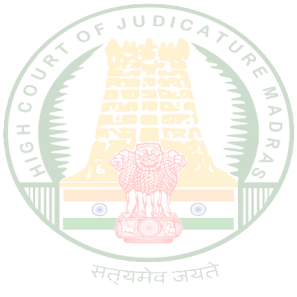


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transaction and he had entered into agreement for sale – Ex.A1 for the purpose of purchasing the land whereas, in this case, the plaintiff has failed to establish his case.

20. The Lower Appellate Court, on the premises that, no parole evidences are admissible, held and observed that, the defendant has not produced any documents to show his case that loan was borrowed for educational expenses, I am of the view that, this reason is not proper. The Lower Appellate Court totally avoided discussing the evidence of P.W.2, D.W.2, the defendant, and brushed aside their evidence, which is squarely in favour of the defendant. Thereby, the Lower Appellate Court has committed an error and the Judgment and decree passed by the Lower Appellate Court is liable to be set aside.

21. In the result, the Second Appeal is allowed. The Judgment and Decree dated 27.08.2021 in A.S.No.11 of 2020 passed by the Principal District Judge, Villupuram is set aside. The Judgment and Decree dated 11.04.2019 in O.S.No.353 of 2016 passed by the I Additional Subordinate Judge, Villupuram is restored. There shall be no order as to costs. Consequently, the connected miscellaneous petition stands closed.



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Index : Yes/No

Speaking Order: Yes/No

Neutral Citation Case : Yes/No

To:

1. The Principal District Judge,
Villupuram.
2. The I Additional Subordinate Judge,
Villupuram.
3. The Section Officer,
VR Section,
High Court of Madras.

K. RAJASEKAR,J.

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