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SA.(MD)No.417 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 10/07/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVA**

SA(MD)No.417 of 2021
and
CMP(MD)No.5560 of 2021

Murugesan : Appellant/Respondent/
Defendant
Vs.

Vijayalakshmi : Respondent/Appellant/
Plaintiff

PRAYER:-Second Appeal is filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree, dated 11/10/2018 passed in AS No.28 of 2017 on the file of the Additional District Judge (FTC), Theni, reversing the judgment and decree, dated 20/01/2017 passed in OS No.156 of 2012 on the file of the Subordinate Judge, Uthamapalayam.

For Appellant : Mr.V.Meenakshisundaram

For Respondent : Mr.S.Alagarsamy

J U D G M E N T

This Second Appeal is filed seeking an order to set aside the judgment and decree, dated 11/10/2018 passed in AS No.28 of 2017 by the Additional District Judge (FTC), Theni, revering the judgment and decree, dated 20/01/2017 passed in OS No.156 of 2012 by the Subordinate Judge, Uthamapalayam.



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2. Brief averments in the plaint:-

The defendant namely Murugesan entered into a sale agreement in respect of the suit properties with the plaintiff on 15/09/2011. The total sale consideration was fixed at Rs.6,20,000/-. On the date of sale agreement, Rs.6,00,000/- was paid towards the advance amount. After the sale agreement, the plaintiff was always ready and willing to get the sale deed executed by paying the balance amount. But, the defendant evaded. So notice was issued on 25/08/2012 expressing his willingness and readiness. The defendant received the notice and replied the same with unfair allegations. So, the suit is laid for specific performance of the contract, dated 15/09/2011 and for costs.

3. The defendant filed written statement which contains the following averments:-

The plaint 1st item was assigned to Bommi by the Tamil Nadu Government Adi Dravidar Welfare Board and as per the condition of Jaari Patta, the assignee Bommi should not alienate the property and she should construct a house or otherwise, the Government will get back the property. The plaint 2nd item was purchased jointly in the name of the defendant and Rajendran. The defendant was not allotted 2nd item in the oral partition. He never



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agreed to sell the suit property to the plaintiff for a sale consideration of Rs.6,20,000/-. He never executed the sale agreement on 15/09/2021. The plaintiff has never paid the advance amount of Rs.6,00,000/- to the defendant on the date of the sale and the plaintiff has never agreed to pay the balance sale amount of Rs.20,000/- within one year from the date of sale agreement. The defendant has executed a sale agreement for Rs.6,20,000/-, dated 15/09/2011 only during the police enquiry. It was obtained by the police under threat, coercion, compulsion and force.

4.On the basis of the pleadings, the trial Court formulated the following issues:-.

1.Whether the plaintiff is entitled to the relief as prayed for in the plaint?

2.To what other reliefs?

5.To substantiate the contention on the part of the plaintiff, 2 witnesses were examined and marked 5 documents on his side. On the side of the defendant, 2 witnesses were examined and 6 documents were marked.



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6.At the end of the trial process, the trial court dismissed the suit without any costs.

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7.Against which, AS No.28 of 2017 was preferred by the plaintiff before the Sub Court, Theni. The appellate Court allowed the appeal and decreed the suit as prayed for with costs.

8.Against the reversal findings of the first appellate Court, this second appeal has been preferred by the defendant.

9.At the time of admission, the following substantial questions of law were framed:-

a)As per Section 169(c) of the Specific Relief Act, it is mandate for the plaintiff to aver and prove his/her readiness and willingness, whether the approach of the Lower Appellate Court in reversing the decree of the Trial Court on the ground that it is unnecessary to devolve on the point of readiness and willingness without any defense in written statement, is correct in law?



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b)Whether Section 92 of the Indian Evidence Act bars the Defendant/Appellant herein to take a defense that the suit sale agreement is executed as not intended as sale transaction but only as a collateral security for the loan transaction pleaded in the written statement?

c)Co-joint reading of Ex.A5,Ex.B.1 and Ex.B.2 and deposition of DW2 made very clear and highly probabilize the defense of this Appellant/Defendant that Ex.A.1 sale agreement is not intended as sale agreement but only as collateral security for loan transaction pleaded in the written statement, whether the First Appellate Court is correct in decreeing the suit for specific performance?

d)Even the terms of Ex.A.1 suit sale agreement that major part of the sale consideration (I.e.) 6 lakhs paid as advance and further payment of remaining Rs.20,000/- has to be paid in one year,



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itself create doubt regarding the nature of transaction between parties to the deed and in such event whether the Lower Appellate Court is correct in exercising the discretion conferred on Section 20 of the Specific Relief Act in favour of Plaintiff/Respondent herein?

10. Heard both sides.

11. A reversal finding, against which, this second appeal is preferred.

12. The learned counsel appearing for the appellant/defendant would submit that it is a case of judgment of reversal, he had right and liberty to support the main finding of the trial court with regard to the genuineness and enforceability of the disputed sale agreement. So, according to him, he has not preferred any cross appeal against the findings of the trial court before the first appellate court. Only the plaintiff filed the appeal. Even in the first appellate court itself, even though, such an argument was advanced, that was not considered by the first appellate court on the ground that the finding with regard to the genuineness of



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the disputed sale agreement required no reconsideration.

But went on to render a finding that since no defence was taken by the appellant herein regarding the readiness and willingness on the part of the plaintiff in the written statement, the finding of fact recorded by the trial court was upset and decreed the suit as prayed for with costs. According to him, he got right and liberty to advance his argument on the main issue on the reliability of the document, since the substantial question of law is also framed on that aspect, which extracted above as (b).

13.Before we go further, we may briefly keep in mind the defence of the appellant.

14.As stated in the preamble portion of the judgment, the disputed document namely Ex.A1 was not intended to be acted upon as sale agreement. It was out and out a security document executed under threat, force and compulsion towards discharge of a loan transaction that took place between the plaintiff and the defendant namely the appellant herein. When fraud, coercion and threat is pleaded, it is the duty of the appellant herein to bring on record the probable defence. Though, the primary duty is cast upon the plaintiff to prove the genuineness of the document, the true intention namely



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consensus between the parties, it is a registered sale agreement, naturally the genuineness may not be come in the way of disputed document. The circumstance under which Ex.A1 came into existence must also be taken into account. Unfortunately Ex.B2 the entire file, which was brought on record during the course of the trial was not properly proved as per law.

15.Before that, we must also address one point, whether the appellant can plead against the specific recitals in the registered document under Ex.A1.

16.This issue is no more troubling the courts. Now let us go the law decided by the Hon'ble Superme Court, which is also followed in very number of cases that section 92 of the Indian Evidence Act (Previous Act) does not bar a party to plead and prove that a particular contract was not intended to be acted upon as a contractual agreement.

17.We can refer to the judgment of the Hon'ble Supreme Court, which was followed by this court right from ***Gangabai Vs. Chhabubai [1982(1)SCC 4]*** upto the case in ***Ishwar Dass Jain Vs. Sohan Lal (AIR 2000 SC 426)***. The following principle is well recognized:-



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..with reference to Section 92(1) held that it is permissible to a party to a Deed to contend that the Deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties."

and this principle of law is followed till date.

18.In view of the settlement of law, we need not elaborate on this point by extensively citing various judgments, unnecessarily loading this judgment.

19.Coming back to the point, as mentioned above, to discredit the reliability of the document, the background circumstance was relied by the appellant.



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20.As mentioned above, a complaint was given by the plaintiff against the defendant with regard to some transactions. (I use the word 'some transactions' with a meaning). The complaint is not denied by the plaintiff, so also her husband. But they say that it was with reference to some other transactions and not relating to the present issue of the sale agreement. But contra is the plea of the appellant stating that there was an issue with reference to the present transaction and no other transactions exist between them.

21.Before we go into detail with regard to the complaint, as mentioned above, when the plaintiff says that the complaint was with reference to some other transactions, she ought to have disclosed all those things, either by way of sending the rejoinder or to the reply notice sent by the appellant, when such a specific issue was raised.

22.Even during the course of the evidence, the plaintiff has not come forward to say in respect of which transaction, the complaint was given. So, it appears that the plaintiff has not chosen to give true and acceptable explanation on that issue.



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23.Plea of specific performance is an equitable relief. A person, who comes to the court seeking an equitable relief must come with clean hands disclosing all those circumstances to his/her conscience. Absolutely, this conscience is lacking on the part of the plaintiff.

24.The appellant also missed the golden opportunity of bringing on record the statement given by the plaintiff before the Police enquiry in a proper manner. When the plaintiff denies the relationship of the complaint to the present subject matter, her statement which was recorded by the Enquiry Officer must have been brought on record in a proper manner.

25.When it was pointed out to the learned counsel appearing for the appellant, at the time of hearing, he fairly admitted, that opportunity was missed by the defendant namely the appellant herein. So, any statement recorded by the Enquiry Officer and the finding recorded by him, cannot be taken as proved.

26.Suffice to say that the complaint was given by the plaintiff against the appellant herein, enquiry was conducted and the complaint was closed stating that there was compromise between the parties.



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27. Another evidence is available in favour of the appellant under Ex.B1, which was allegedly entered between the parties on the date of Ex.A1 itself. Ex.B1 also cannot have any evidentiary value because as per section 92 of the Indian Evidence Act, the recital in a registered document, it can be varied only another registered document. Here, it is not registered. Even Ex.B1 was not confronted with the plaintiff, but the plaintiff says that no such document came into existence on the date of Ex.A1. But the circumstance gives some sort of indication as to the probability of the defence taken by the appellant.

28. In the light of the above, now let us go further to another circumstance, which is relied by the appellant.

29. According to the appellant, the date of alleged sale agreement, is dated 15/09/2011. According to the plaintiff on the date itself, she paid Rs.6,00,000/- leaving the balance amount of Rs.20,000/- to be paid by her and the time fixed for the performance of the contract is one year. There is no reason for fixing such a long time, when 99% of the alleged sale amount has been paid. According to him, another circumstance, which is



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available to say that it is out and out a security document obtained under threat and coercion. It is further submitted that no such real transaction occurred between the plaintiff and the defendant herein. In this context, it is submitted that absolutely Ex.A1 is not supported by any consideration. For that purpose, he is referring to the evidence of PW1 on this aspect. On the date of Ex.A1, the plaintiff was in possession of the money.

30.Now whatever it may be, fixing one year time assumes importance. The reason for fixing one year time stated by the plaintiff and PW2 is that for measuring the property, such a time is mentioned. Absolutely, there is no recital in the document. When we see the time mentioned in Ex.A1, in the light of the surrounding circumstance, as stated, it creates doubt with regard to the real intention of the parties. So, this is the another circumstance available in favour of the appellant herein. If really the time was mentioned for the purpose of measurement, the parties ought to have taken steps in the meantime. Absolutely, there is no evidence on record to show the same. The reason assigned by the plaintiff in this regard is also not acceptable and not supported by any evidence.



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31.At the end of one year period only, demand notice was issued. But nowhere in the notice, it has been stated that time period was fixed for making measurement. It has been stated that the defendant attempted to mortgage the property.

32.Regarding consideration, it is admitted by the defendant in the reply notice that they are ready to pay Rs.3,50,000/- admitted by them during the police enquiry. It is seen that no consideration was passed on the date of Ex.A1 in the form of Rs.6,00,000/- cash.

33.In the light of the above said discussion, we will see whether the plaintiff was ready and willing to perform her part of contract.

34.This has been correctly addressed by the trial court by stating that within the time, no step has been taken by the plaintiff to take the sale deed executed, the readiness and willing was not proved. But the appellate court, as stated above, took a different stand that sending of notice and depositing the amount of Rs.20,000/- into the court are sufficient enough to say that the plaintiff was ready and willing to perform her part of contract.



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35.As stated above, the appellate court has recorded a finding that since there is no plea or defence with regard to the readiness and willingness, the trial court ought not to have addressed that point. But it is quite against the fundamental law with regard to specific performance.

36.In a suit for specific performance, it is mandatory on the part of the plaintiff to plead and prove her readiness and willingness as per Section 16(c) of the Specific Relief Act. In the factual circumstances of the case, this plea has now become irrelevant. The inaction on the part of the plaintiff for whole one year will show that Ex.A1 was not intended to be acted upon by sale agreement.

37.Per contra, the learned counsel appearing for the respondent would submit that the observation and finding made by the appellate court is sufficient enough to show that he was ready and willing to perform his part of contract. But the trial court and the first appellate court failed to take into account the surrounding circumstances.



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38.As the evidence shows the plaintiff lies before the court even to her own conscience to the parties may lie, but not the circumstances. The circumstance stands against the case of the plaintiff. So, this is sufficient enough to deny the relief to her. But however, liberty is available to the plaintiff to recover the admitted amount of Rs.3,50,000/- from the defendant namely the appellant. The time taken during this proceedings may be deducted while computing the period of filing the suit.

39.In a normal circumstances, this court would have directed the defendant to return the admitted the amount of Rs.3,50,000/-. But that would be possible, only Ex.A1 is supported by consideration. But here, the cause of action for recovery of Rs.3,50,000/- is completely different cause of action. So liberty is granted to the respondent herein. That will do justice between the parties.

40.For all these reasons stated above, I am of considered view that the finding of facts recorded by the appellate court that Ex.A1 is genuine document intended to be acted upon the sale agreement requires interference and that finding is set aside. Similarly, the finding of the first appellate court that the plaintiff was ready



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and willing to perform his contract and Ex.A1 sale agreement was acted upon as stated above is required to be interfered.

41.The substantial questions of law that have been framed are answered accordingly.

42.For these reasons stated above, this second appeal is **allowed**. The suit filed by the plaintiff is dismissed and the decree passed by the trial court is restored to file by setting aside the decree and judgment passed by the first appellate court, of course with the above said liberty to the plaintiff to take steps to recover Rs.3,50,000/- the admitted amount of the appellant through appropriate proceedings.

10/07/2024

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To,

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1.The Additional District Judge,
FTC, Theni.

2.The Sub Judge,
Uthamapalayam,
Theni District.

3.The Section Officer,
VR/ER Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

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