BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 04.12.2023

Delivered On : **21.05.2024**

CORAM

THE HON'BLE MRS.JUSTICE L.VICTORIA GOWRI

A.S.(MD)No.166 of 2023
and
C.M.P.(MD)Nos.9104 and 10750 of 2023

R.Chidambaram ... Appellant

Vs.

K.Kuppusamy ... Respondent

PRAYER : Appeal Suit is filed under Section 96 of Civil Procedure Code r/w. Order 41 Rule 1 and 2 of C.P.C., to set aside the judgment dated 29.09.2022 made in O.S.No.19 of 2019 on the file of the learned Principal District Judge, Karur.

For Appellant : Mr.S.Vijayakumar
For Mr.V.Meenakshi Sundaram
For Respondent : Mr.K.Suresh

JUDGMENT

This Appeal Suit has been filed as against the judgment and decree dated 29.09.2022 passed in O.S.No.19 of 2019, on the file of the learned Principal District Judge, Karur, whereby partly allowing the suit for specific performance of agreement of sale dated 25.01.2017, by negating the plaintiff's claim for specific performance of contract in respect of the plaint schedule property in favor of the plaintiff.

2.On the other hand, the alternate relief, which has been sought for by the plaintiff in the above said suit seeking to direct the defendant to pay a sum of Rs.16,31,500/- with subsequent interest at a rate of 12% per annum and to create the charge over the plaint schedule property for a sum of the aforesaid amount with subsequent interest at a rate of 12% per annum, came to be partly allowed with the cost of the suit, by directing the defendant to pay a sum of Rs. 13,00,000/- with subsequent interest at a rate of 7.5% from the date of sale agreement, that is, 25.01.2017 till the date of decree and at a rate of 6% interest after the date of decree till the date of realisation, thereby creating a charge over the plaint schedule property for the said amount.

3.The defendant is the appellant herein and the plaintiff is the respondent herein. For the sake of convenience, the parties are referred to as per their ranking in the original suit.

4.**Case of the plaintiff in brief:-**

The defendant is the absolute owner in possession and title of the plaint schedule property. The defendant met the plaintiff and offered to sell the plaint schedule property to the plaintiff and the plaintiff also agreed to purchase the same from the defendant. Accordingly, on 25.01.2017, the defendant executed a registered agreement of sale in favor of the plaintiff, agreeing to sell the plaint schedule property for a sale price of Rs.14,00,000/- and on the date of the said agreement itself, the plaintiff paid a major portion of consideration i.e., an amount of Rs.13,00,000/- as an advance to the defendant, as recited in the said agreement of sale. The defendant also agreed to execute sale deed in favor of the plaintiff in respect of the plaint schedule property within 2 years i.e., within 24.01.2019 on receiving the balance sale consideration of Rs.1,00,000/- from the plaintiff. As per the terms and conditions of the sale agreement, the defendant agreed to execute the sale deed in favor of the plaintiff at his cost. The defendant also agreed to measure out his property before execution of the sale deed. The said sale agreement was duly stamped, executed and attested according to law. As such, the defendant is liable to execute the sale deed, receiving the balance sale amount of Rs.1,00,000/- from the plaintiff on or before 24.01.2019. The plaintiff had always been ready and willing to perform his part of contract of the said agreement by paying the balance sale consideration of Rs.1,00,000/- to the defendant and complete the sale deed at his cost. Though the plaintiff expressed his willingness and readiness to perform his part of contract of sale agreement by paying the balance sale price amount of Rs.1,00,000/- to the defendant and required him to complete the execution and registration of the sale deed, the defendant had been willingly and wantonly evading the execution of the said sale deed on receiving the balance sale price, giving lame excuses. As the balance sale consideration is very meager, the plaintiff has always been ready to give the said amount to the defendant in terms of the said sale agreement, as time is essence of contract. Hence, the plaintiff caused a legal notice dated 13.12.2018 to the defendant calling upon him to execute the sale deed on 19.12.2018 in his favour by receiving the balance sale consideration. The defendant on receiving the said legal notice on 16.12.2018 did not come forward either to execute the sale deed by receiving balance consideration or to reply the said legal notice. Hence, this suit.

5.**The case of the defendant in brief:-**

The defendant specifically denied the nature of transaction in the alleged agreement of sale and it is the specific case of the defendant that on 10.09.2013, the defendant borrowed a sum of Rs.10,00,000/- from the very same plaintiff and executed a registered mortgage deed on 10.09.2013 and the same was registered in Krishnapuram Sub-Registrar Office. Further, it was contended by the defendant that even after repayment of Rs.9,00,000/- towards principal and Rs.12,00,000/- towards interest, the plaintiff out of his greed demanded more amount and threatened and compelled the defendant and out of which compulsion, he executed the alleged sale agreement dated 25.01.2017 in favour of the plaintiff. The suit sale agreement is not intended for sale purpose, but it is only a loan transaction. So, the agreement is not enforceable in law. The defendant specifically pleaded that the alleged sale agreement was executed under compulsion and the same was not intended as a sale agreement in actual terms. That apart, it was also contended that it is only a collateral security for the loan transaction with the plaintiff.

6.On the basis of the aforesaid pleadings, the following issues have been framed by the learned Trial Court:-

> *"1.Whether the suit sale agreement is genuine? Legally enforceable? Executed with passage of consideration?*
>
> *2.Whether the plaintiff had always been ready and willing to perform the essential terms of the sale agreement which are to be performed by him ?*
>
> *3.Whether the plaintiff is entitled to the relief of specific performance of agreement of sale ?*

4.Whether the plaintiff is entitled for the alternate relief sought by him for payment of a sum of Rs.16,31,500/- with subsequent interest by the defendant in case of failure by creating a charge over the suit schedule property for the aforesaid amount and for cost ?

5.Other reliefs to which the plaintiff is entitled to ?"

7.After framing issues, the plaintiff was examined as P.W.1. The attester to the suit sale agreement, namely, Karuppasamy, the uncle of the defendant was examined as P.W.2 and the document writer, namely, Yathirajan was examined as P.W.3. On the side of the defendant, the defendant was examined as D.W.1. Four documents were marked on the side of the plaintiff and two documents were marked on the side of the defendant.

8.On considering the oral and documentary evidence and the arguments put forth by the respective parties, the learned Trial Court partly allowed the suit by negating the relief of specific performance, but by decreeing the alternate relief of refund of advance amount with interest thereby, creating a charge on the plaint schedule property.

9.Challenging the same, the defendant/appellant has filed this Appeal Suit in A.S.(MD)No.166 of 2023.

10.The learned counsel appearing for the appellant submitted that the alleged sale agreement dated 25.01.2017, which is a registered document was not actually intended as a sale agreement and it is only a collateral security for the loan transaction. He further submitted that, when the defendant asserts that there was a different transaction altogether and what is recorded in the suit sale agreement was intended to be of no consequence whatever, for the said purpose, oral evidence is admissible to show that the alleged sale agreement executed in favour of the plaintiff was never intended to operate as a sale agreement, but that was some other agreement altogether not recorded in the said sale agreement as entered into between the parties. Hence, it is clear that there is no legal impediment for the defendant to raise a plea and lead evidence with regard to the real intention of the parties to the suit sale agreement and to establish that in spite of the existence of a registered written agreement, the intention of the parties is completely different.

11.He further insisted that the plaintiff failed or suppressed to plead the existence of Ex.B1, that is, the registered mortgage deed dated 10.09.2013 between himself and the defendant and this suppression in the plaint itself would go to the root of the matter, more particularly when the plaintiff has approached the learned Trial Court for a discretionary relief of specific performance. That apart, in the evidence of P.W.1, it is stated that even before the date of sale agreement, the transaction between the parties were finalized and if so, it is a continuation of the mortgage deed, that is, Ex.B1, relationship. In such circumstances, he contended that the plaintiff starts his pleading in the plaint only from 25.01.2017 and it is a serious note, which would raise a cloud on the nature of transaction in Ex.A1 sale agreement.

12.He further contended that the most important material available on record is that no common prudent man will redeem the mortgage by paying Rs. 13,00,000/- and agree to sell the property to the very same person/mortgagee and execute another document, that is, a sale agreement, on the same day. The redemption receipt is for Rs.10 Lakh when P.W.1 has categorically stated in his evidence that it is agreed to redeem the mortgage for an amount of Rs. 13,00,000/-. It is on the same day, that is, on 25.01.2017 by paying Rs. 10,00,000/-, the defendant redeemed the mortgage dated 10.09.2013 and had agreed to sell the same property for Rs.14,00,000/- and the same is highly improbable and impracticable. He further contended that the attester P.W.2, namely, Mr.Karuppasamy and another attester Mr.Ramakrishnan, were the readymade stock witnesses supporting the plaintiff in Ex.B1 dated 10.09.2013 and Ex.A1 dated 25.01.2017 and redemption receipt Ex.B2 dated 25.01.2017. This is also an improbable factual event that raises cloud on the nature of the Ex.A1 suit agreement. The important factual material available on record is that the sale agreement Ex.A1 was presented between 03.00 p.m. to 04.00 p.m., on 25.01.2017 before Krishnapuram Sub-Registrar Office. But it was given document No.102 of 2017. At the same time, Ex.B2 redemption receipt was presented for registration by 04.00 p.m. to 05.00 p.m., on 25.01.2017, but numbered as document No.101 of 2017. This aspect also raises cloud on the nature of document/real intention of the parties on 25.01.2017. This unnatural event of assigning document numbers vice versa for the documents presented second being given document No.101 of 2017 and the document presented first was given document No.102 of 2017, which obviously raises doubt and *prima facie* cloud on the intention of the parties on that day.

13.The next aspect available on record is that the plaintiff never chose to produce both the mortgage deed of the year 2013 and redemption receipt dated 25.01.2017. When the plaintiff pleaded a registered sale agreement dated 25.01.2017, the minimum fairness requires him to plead the redemption receipt registered on the same day between the same parties. This unfairness creates the doubt on the nature of the transaction in Ex.A1. All the said factual material evidence on record clearly establishes a cloud on the nature of the transaction under Ex.A1 alleged sale agreement and also establishes that there is no intention to execute a sale agreement. Always there cannot be any direct evidence to prove the intention of the parties to the written agreement, which is different from the terms of the written document.

14.He further insisted that the plaintiff who alleged to have paid more than 90% of the total sale consideration will not take two years for the payment of the remaining meagre amount of Rs.1,00,000/- and get the sale completed. Hence, absolutely there is no convincing reason stated as to why the plaintiff sought for two years time for paying the balance sum of Rs.1,00,000/- for getting the sale deed executed, more particularly, when the fact remains that the plaintiff is in a dominant position as a mortagee under Ex.B1 dated 10.09.2013 over the defendant. Thus, he concluded that, it is very evident from Ex.A1 alleged sale agreement dated 25.01.2017 that, even though the same carries a nomenclature as sale agreement, actually it is not so intended between the parties and hence, it is not a true, valid and genuine sale agreement. On this aspect, the approach and finding of the learned Trial Court with respect to the issue No.1 is unsustainable in law and thereby, granting a decree for refund of the advance amount is also illegal and unsustainable.

15.He finally submitted that the learned Trial Court granted decree for return of advance amount with interest and also created a charge in respect of the suit schedule property. The suit schedule property is the only residential house, wherein, the defendant is residing with his family. Except this property there is no other property available to the defendant and hence, the return of advance of amount with creation of charge in the suit schedule property amounts to undue advantage to the plaintiff/decree holder. On that ground alone, the decree granted by the learned Trial Court is bad in the eye of law. On the basis of which, he sought for allowing the Appeal Suit.

16.Per contra the learned counsel appearing for the plaintiff/ respondent submitted that though the defendant has pleaded that he had paid a sum of Rs. 12,00,000/- towards interest and Rs.9,00,000/- towards principal, no documentary evidence has been exhibited before the learned Trial Court for proving the aforesaid contention. He further insisted that the defendant has failed to prove the alleged payments by any means and that it is impossible to believe the case of the defendant that the suit sale agreement is executed by acknowledging the advance amount of Rs.13,00,000/- because the plaintiff threatened that he will initiate legal action on the basis of the mortgage deed, unless the defendant pays off Rs.1,00,000/- towards the mortgage debt. He further contended that, no prudent person can execute a registered document for Rs.13,00,000/-, when he is only liable to pay a sum of Rs.1,00,000/- and hence, the theory of the defendant cannot be accepted even on the face of it. The fact that the execution of the sale agreement and its registration are not disputed by the defendant gains significance in the context of this case. That apart, the plaintiff has also established the fact of execution of suit agreement as well as the payment of advance amount under the suit agreement by examining himself as P.W.1 and by examining P.W.2 and P.W.3. Nothing has been elicited from P.W.1 to P.W.3 with regard to the execution and registration of sale agreement and hence, the plaintiff has discharged his burden in establishing his case.

17.In response to the argument advanced by the learned counsel for the defendant/appellant with regard to the sequence of registration of suit sale agreement and discharge receipt, the learned counsel submitted that once the document is registered, it takes effect from the date and time of its execution. So, the time of execution of a particular document is relevant and not the time of registration. Four months time has been granted under the Registration Act to register a document from the date of its execution. As such the time of execution is relevant for considering the sequence of documents. In the case on hand, as per the evidence of P.W.1 to P.W.3, the discharge receipt has been executed first and thereafter, the suit agreement was entered into between the plaintiff and defendant and it is also relevant to mention that the sequence of registration number has been rightly given in the order of sequence of execution. He further contended that, both the plaintiff and the defendant were fully aware of the fact that they were going to execute two documents namely discharge receipt and suit sale agreement on the same day and hence, there had been a consensus Ad-idem among the parties with regard to those documents. Though the defendant has pleaded coercion and misrepresentation, no details have been given and no evidence has been let in with regard to the aforesaid aspect. Further no independent witness was examined on the side of the defendant to substantiate his case.

18.In addition to that in response to the argument of the counsel for the defendant with regard to the suppression of earlier mortgage deal and execution of discharge receipt on the date of sale agreement in the plaint, the learned counsel submitted that since the earlier mortgage has been discharged even prior to the execution of suit agreement, the plaintiff felt that it is not necessary to plead the same in his plaint when he filed a suit for specific performance, on the basis of the suit agreement. The non-disclosure of the earlier transaction may not amount to suppression he insisted.

19.He further submitted that, the existence of early mortgage has been readily admitted by the plaintiff while addressing cross-examination. So, there is no intention on the part of the plaintiff to suppress anything much less the mortgage deed and its discharge. It is also relevant to note that the defendant has not issued any reply to the legal notice issued by the plaintiff prior to the filing of the suit. Non-issuance of reply is very much fatal to the case of the defendant. He further argued that, though it has been contended by the defendant that P.W.2 is a stock witness of the plaintiff, it has been established by the said P.W.2 that he is none other than the uncle of the defendant and he has been brought by the defendant. D.W.1 also admits that P.W.2 is his uncle in his evidence. He further submitted that, nothing has been explained by the defendant as to why P.W.2, despite being a relative, deposed against the defendant. Hence, the theory of stock witness as argued by the learned counsel for the defendant/appellant is not sustainable, he contended. He further relied upon the evidence of the defendant who deposed his evidence as D.W.1 that the defendant entered into the sale agreement only for the purpose of getting more money instead of losing everything by retaining the mortgage liability on the date of the sale agreement. Thus, contending that the plaintiff has proved his case and the same has been rightly appreciated by the learned Trial Court, the learned counsel pressed for dismissal of the Appeal Suit.

20.Heard the learned counsel appearing on either side and carefully perused the materials placed before this Court.

21.Having regard to the pleadings, evidence and the submissions made by the learned counsel appearing on either side, the following points arise for consideration in this Appeal:-

> *"1.Whether Section 92 of the Indian Evidence Act, 1872, prohibit to lead evidence regarding the intention of the parties to the written agreement in spite of existence of written agreement?*
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> *2.Whether the defendant established that in spite of existence of registered written agreement, the intention of the parties had been completely different?*
>
> *3.Whether the failure of the petitioner to plead the existence of Ex.B1 that is the registered mortgage deed dated 10.09.2013 and the registered redemption receipt dated 25.01.2017 marked as Ex.B2 would go to the root of the matter when the plaintiff has approached the trial court for a discretionary relief of specific performance?*
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> *4.Whether the learned Trial Court erred by granting for a return of advance amount with interest thereby creating a charge in respect of the suit schedule property thereby partly allowing the*

suit in O.S. No. 19 of 2019 on the file of the learned District Judge, Karur?"

22.On 25.01.2017, the defendant executed a registered agreement of sale in favor of the plaintiff, agreeing to sell the plaint scheduled property for a sale price of Rs.14,00,000/- and on the date of the said agreement itself, the plaintiff paid a major portion of consideration i.e., an amount of Rs. 13,00,000/- as advance to the defendant, as recited in the said agreement of sale. The defendant had also agreed to execute a sale deed in favor of the plaintiff in respect of the plaint scheduled property within two years i.e., within 24.01.2019, on receiving the balance sale consideration of Rs.1,00,000/- from the plaintiff. The aforesaid contention of the plaintiff was not fully agreed upon by the defendant. The defendant though admitting the execution of agreement of sale, contended that it is not at all intended to be an actual sale agreement in real terms, but it is a loan transaction.

23.The case of the defendant is that he availed a loan of Rs. 10,00,000/- from the plaintiff on 10.09.2013 by executing a registered mortgage deed which is marked as Ex.B1 at the time of cross-examining the plaintiff i.e., P.W.1. The contention of the defendant is that, he had paid a sum of Rs.12,00,000/- towards interest and Rs.9,00,000/- towards principal for the loan, which he had availed from the plaintiff. But the plaintiff without issuing any receipt to the defendant had demanded an additional amount of Rs.1,00,000/- and threatened the defendant that he will bring the property for auction. Due to the threat, the defendant executed the suit sale agreement in favor of the plaintiff. The suit sale agreement is not intended for sale purpose, but it is only a loan transaction. So, the suit sale agreement is not enforceable in law. Though it is not pleaded by the defendant in his written statement, it is his further case that on the date of suit sale agreement, the earlier mortgage was redeemed and registered discharge receipt was executed by the plaintiff and on the same day, the sale agreement was also registered. In fact, the discharge receipt was presented before the Sub-Registrar subsequent to the presentation of the suit sale agreement.

24.The contention of the defendant is that, the same would show that the suit agreement is never intended towards sale of the suit property, but only towards loan transaction and the same has been executed by the defendant only due to the threat made by the plaintiff. It is his further case that, the earlier mortgage deed was suppressed by the plaintiff and the plaintiff had not disclosed anything as to the mortgage and the execution of the discharge receipt on the date of sale agreement in his plaint. The plaintiff with the intention of proving his case had examined himself as P.W.1. While examining himself as P.W.1, the suit sale agreement dated 25.01.2017 was marked as Ex.A1, the sale deed in the name of the defendant dated 28.01.2010 was marked as Ex.A2, the suit notice dated 13.12.2018 issued by the plaintiff to the defendant has been marked as Ex.A3 and the acknowledgement card of the defendant receiving and acknowledging the receipt of legal notice dated 16.12.2018 has been marked as Ex.A4. However, at the time of cross-examination, the defendant's counsel marked the simple mortgage deed dated 10.09.2013 executed by the defendant in favour of the plaintiff as Ex.B1 and the mortgage discharge receipt for an amount of Rs.10,00,000/- executed by the plaintiff dated 25.01.2017 has been marked as Ex.B2. To corroborate his evidence, the plaintiff examined one Thiru.Karuppasamy, who had signed as the second attesting witness in the suit sale agreement as P.W.2. That apart, the plaintiff also examined one Thiru.Athirajan, who was the scribe of the aforesaid suit sale agreement as P.W.3. The first attesting witness who signed in the suit sale agreement, namely, Thiru.Ramakrishnan, was not alive at the time of trial before the learned Trial Court. The testimony of Thiru.Karuppasamy, who deposed his evidence as P.W.2 narrated that, on 25.01.2017, the defendant agreeing to sell the plaint schedule property for a sale consideration of Rs.4,00,000/- had executed Ex.A1 sale agreement dated 25.01.2017 in favor of the plaintiff.

25.He had further deposed that, the covenants of the aforesaid suit sale agreement was drafted by the scribe only as directed by the plaintiff and defendant together. He also confirmed that the plaintiff had paid an advance of Rs.13,00,000/- to the defendant on the same day. It was agreed by both the parties that the entire sale transaction should be completed within a period of two years by the plaintiff paying the remaining sale consideration of Rs. 1,00,000/- to the defendant and the defendant on receipt of the same, has to measure the plaint schedule property by metes and bounds and thereafter execute a sale deed in favor of the plaintiff. He further deposed that the defendant having received the advanced amount of Rs.13,00,000/- from the plaintiff in the presence of the attesting witness Thiru.Ramakrishnan and in his presence, the defendant after reading the complete contents of the sale agreement, had signed before the two attesting witness in the aforesaid sale agreement. He categorically deposed that the defendant had signed in each and every sheet of the aforesaid suit sale agreement after thoroughly reading the same. He deposed with clarity that the defendant had signed in the third page as well and following which, the first attesting witness Thiru.Ramakrishnan had signed and below the same, the second attesting witness, that is, himself, had signed and thereafter, the scribe who drafted the aforesaid suit agreement had also made his signature in the suit agreement. He also submitted that the plaintiff had also made his signature in the aforesaid document, that is, Ex.A1. The evidence of the plaintiff as P.W.1 along with the evidence of the second attesting witness Thiru.Karuppasamy as P.W.2 and one Thiru.Ethirajan, the scribe of the Ex.A1 suit agreement as P.W.3, would duly prove the testimony of each other. It is pertinent to record that, the person who deposed his evidence as P.W.2, that is, Thiru.Karuppasamy, is the cousin of the defendant. The defendant having agreed the execution of the suit sale agreement, that is, Ex.A1, in his written statement, has built upon his case by contending that the said suit sale agreement is not intended for sale purpose, but it is only a loan transaction. Section 92 of the Indian Evidence Act, 1872, is extracted as follows:-

> *"Section 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:*
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> *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.*
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> *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 existing facts."

26.The Hon'ble Apex Court in ***Smt.Gangabai v. Smt.Chhabubai*** reported in ***AIR 1982 Supreme Court 20,*** has dealt with a similar case and the relevant portion of which is extracted as follows:-

"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, varying, adding to, or subtracting from, its terms And the first proviso to 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 recorded in the document, was entered into between the parties."

27.In yet another case of ***Roop Kumar v. Mohan Thedani*** reported in ***2003 (06) SCC 595***, the Hon'ble Apex Court has dealt with an agreement of agency cum license and the portion, which is relevant to the facts and circumstances of this case is extracted as follows:-

> *“22.This Court in Gangabai v. Chhabubai and Ishwar Dass Jain v. Sohan Lal 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.”*

28.From the law laid down by the Hon'ble Supreme Court in the aforesaid judgments, it is clear that an enquiry into reality of transaction is not excluded merely by the availablity of writing reciting the transaction. Hence, I have no hesitation to observe 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. Hence, there is no legal impediment for the defendant to raise a plea and lead evidence with regard to the real intention of parties in Ex.A1 and to establish that, in spite of the existence of a registered written suit agreement, the intention of the parties had been completely different. For the said purpose, the defendant Chidambaram had let his evidence as D.W.1 in this regard. However, other than his oral evidence, his evidence was not corroborated by any supporting documentary or the evidence of any other independent witnesses. It is the defendant alone who was examined as D.W.1 supporting his case. It is categorically contended by the defendant's counsel that no common prudent man will redeem the mortgage by paying Rs.13,00,000/- and agree to sell the property to the very same person, that is, the mortgagee and execute another sale agreement on the same day. The evidence deposed by Thiru.Kuppusamy as D.W.1 itself would cast a cloud on his contention as to the genuinity of the execution of the sale agreement. The cross-examination of D.W.1 on 24.08.2021 is extracted herein:-

> *“கருப்புசாமியிடம் நான் சொத்தை விற்பனை செய்யவேண்டும் என்று சொல்லவில்லை, கடன் வேண்டும் என்று கேட்டேன். வாதி என்னை மிரட்டி ஒப்பந்தம் வாங்கினார். பணத்தைக்கொடு அல்லது பத்திரம் எழுதிக்கொடு என்று மிரட்டினார். வாதி மிரட்டியது சம்மந்தமாக நான் போலீஸ் மூலம் நடவடிக்கை எடுக்கவில்லை. வாதி அனுப்பிய வழக்கறிஞர் அறிவிப்பிற்கு நான் என்ன காரணத்திற்காக பதில் அனுப்பவில்லை என்றால் நான் பதில் அனுப்பியுள்ளேன். என்ன விவரம் கண்டு பதில் அனுப்பினேன் என்று எனக்கு தற்போது ஞாபகமில்லை. வா.சா.ஆ.1 கிரய ஒப்பந்தத்தை வாதிக்கு தாவாச்சொத்தை கிரயம் செய்வதற்கு ஒப்புக்கொண்டு, முழுமனதுடன் ஏற்படுத்தினேன் என்றால் சரியல்ல. வாதியை ஏமாற்றும் எண்ணத்தில் அதை மறுத்து சாட்சியம் அளிக்கிறேன் என்றால் சரியல்ல. வுாதி நல்ல வசதியுடையவர். துாவாச்சொத்தின் மதிப்பை காட்டுவதற்கு நான் ஆவணம் தாக்கல் செய்யவில்லை. நான் வாதியிடம் ஏற்கனவே*

வாங்கிய கடனுக்கு அசலும், வட்டியும் செலுத்திவிட்டேன் எனவும், அதற்கு வாதி ரசீது தரவில்லை என பொய்யாக கூறுகிறேன் என்றால் சரியல்ல. அசல் வட்டியை செலுத்தியபிறகும், வாதி மேலும் ரூ. 2 இலட்சம் கேட்டார் என கூறுவதும் தவறு என்றால் சரியல்ல. கூடுதலாக பணம் தருகிறேன் என வாதி ஆசைவார்த்தை கூறினார். அதனால் ஒப்பந்தம் எழுதிக்கொடுத்தேன். வுாதி அதிகம் பணம் தருவார் என்ற ஆசை பத்திரம் எழுதிக்கொடுத்தேன். என்னுடைய முதல்விசாரணை வாக்குமூலம் பத்தி 14, 15, 16 ஆகியவற்றில் வாதி என்னை மிரட்டினர் என்று கூறியுள்ளது தவறு என்றால் சரியல்ல.“

29.In his evidence, the plaintiff had admitted the execution of simple mortgage by the defendant in his favour for an amount of Rs.10,00,000/- on 10.09.2013, which is marked as Ex.B1. He has categorically deposed that the defendant failed to pay the interest as well as the principal amount for nearly 3 years and thereafter, when the same was demanded by the plaintiff to the defendant, the defendant voluntarily communicated that he is intending to sell the plaint schedule property and if interested the plaintiff could purchase the same. Thereafter, he further admitted that the plaintiff and defendant together calculated the total liability of the defendant and arrived at an amount of Rs. 16,07,500/-. He further deposed that the defendant himself informed the plaintiff that he is likely to rotate an amount of Rs.13,00,000/- from a known person and on receipt of the same, he would discharge his liability. He further deposed that before 2 days from the date of the suit agreement, that is, on

23.01.2017, the plaintiff required the defendant to pay the principal and interest, which he is entitled to pay to the plaintiff. He further reiterated that, he demanded the debt amount to the defendant before 1 week from the date of the suit agreement and that the defendant had requested the plaintiff himself to purchase the said property before 2 days from the date of the sale agreement.

30.The plaintiff further in his evidence stated that, on 25.01.2017, of the total liability of Rs.16,07,500/-, the defendant paid an amount of Rs.13,00,000/- to him and pursuant to the same, the plaintiff had executed discharge receipt dated 25.01.2017 in favor of the defendant. Since the deal with respect to the purchase of the plaint schedule property was finalized between the plaintiff and the defendant before 2 days from the date of the sale agreement, the defendant as agreed between them had executed an agreement for sale on 25.01.2017 for a sale consideration of Rs.14,00,000/- with respect to the plaint schedule property on receipt of an advance amount of Rs.13,00,000/- and on the condition that the remaining amount of remaining sale consideration of Rs.1,00,000/- has to be paid by the plaintiff to the defendant within a period of 2 years from the date of agreement and the same was duly registered. Though the plaintiff had received an amount of Rs.13,00,000/- from the defendant, he had executed a discharge receipt dated 25.01.2017 only for an amount of Rs.10,00,000/- and a perusal of the said sale receipt which is marked as Ex.B2 would reveal the same. The pleadings of the plaintiff in his plaint and the evidence deposed by him as P.W. 1 has cast a cloud on his contentions as follows:-

1)The total liability which the defendant owe to pay to the plaintiff as on 25.01.2017 had been Rs.16,07,500/- only.

2)The defendant paid an amount of Rs.13,00,000/- towards the discharge of his mortgage on 25.01.2017, for which the plaintiff having received Rs.13,00,000/- had executed a discharge receipt dated 25.01.2017 for an amount of Rs.10,00,000/- in favor of the defendant.

3)On the same day that is on 25.01.2017, the same amount that is Rs.13,00,000/- which was paid by the defendant to the plaintiff was further paid back by the plaintiff as an advance amount towards the advance sale consideration of the suit sale agreement dated 25.01.2017, as executed by the defendant.

4)The plaintiff failed to explain why he executed Ex.B2 discharge receipt dated 25.01.2017 for an amount of Rs.10,00,000/- when the outstanding debt as on 25.01.2017 had been Rs. 16,07,500/-?

5)Having paid an amount of Rs.10,00,000/- along with the interest incurred for the aforesaid amount on 25.01.2017 and redeemed the mortgage dated 10.09.2013 with respect to the plaint schedule property why the defendant executed an agreement for sale on 25.01.2017 by agreeing to sell the same property for an amount of Rs.14,00,000/- on receipt of Rs.13,00,000/- as advance amount?

31.To understand the nature of the entire transaction, it is necessary to analyze the deposition of the defendant Thiru.Chidambaram, who had deposed his evidence as D.W.1. The defendant had pleaded in his written statement and further he deposed in his evidence that, on 10.09.2013, he executed a mortgage deed with respect to the simple mortgage deed with respect to the plaint schedule property for an amount of Rs.10,00,000/- and the same is marked as Ex.B1 and of the total principal amount of Rs.10,00,000/-, he had already paid an amount of Rs.9,00,000/- towards the principal amount and Rs.12,00,000/- towards interest. However, the plaintiff failed to issue any receipt for the aforesaid payments. Thereafter, for the remaining debt amount of Rs.1,00,000/-, the plaintiff continued threatening the defendant in many ways and finally compelled the defendant to execute an agreement of sale with respect to the plaint schedule property for the remaining debt amount of Rs.1,00,000/- and he also demanded interest for the aforesaid amount of Rs.1,00,000/- for which, the defendant did not agree upon as to the claim of the plaintiff. Though the defendant had paid the principal amount of Rs.9,00,000/- and interest of Rs. 12,00,000/- for a debt of Rs.10,00,000/-, the plaintiff continued to claim Rs. 2,00,000/- towards principal and the incurring interest for the aforesaid amount and further compelled the defendant to execute a sale agreement in case of failure of repayment of the said amount as demanded by him. Compelled by the demand made by the plaintiff, the defendant heeded to his demand fearing that the plaintiff may bring his sole residential property, that is, the plaint schedule property for sale for the liability to which the defendant owe to pay the plaintiff, on the compulsion of the plaintiff without passage of any sale consideration, that is, the advance amount of Rs.13,00,000/- as claimed by the plaintiff, the defendant had executed the suit sale agreement dated 25.01.2017. From the pleadings and evidence of the defendant, the following facts in issue goes unresolved:-

> *"1]Having paid an amount of Rs.9,00,000/- towards principal and Rs.12,00,000/- towards interest as claimed by the defendant, why the defendant did not insist the plaintiff to issue a discharge receipt recording the actual amount paid by him towards discharge of the mortgage dated 10.09.2013 ?*
>
> *2]why the defendant executed an agreement of sale on 25.01.2017, with respect to the plaint schedule property when the demand of the plaintiff even in terms of the defendant himself had been only an amount of Rs.2,00,000/- ?"*

32.A careful analysis of the aforesaid unresolved facts in issue, which have evolved out of the pleadings and evidence of both the plaintiff and the defendant, the pertinent point is that both the parties have agreed upon by their respective pleadings and evidence as to the factum of execution of the suit sale agreement dated 25.01.2017. That apart, the defendant in his cross examination dated 07.07.2022, has specifically deposed his evidence that he had executed the said suit agreement only believing the plaintiff's inciting words of paying more amount to the defendant. He had clearly admitted in his cross examination that only because of his desire that the plaintiff would pay more amount, he had executed the said agreement of sale. Though the passage of the advance sale consideration to a tune of Rs.13,00,000/- has been categorically denied by the defendant, the same has not been corroborated by adducing additional oral evidence by letting in evidence of reliable witnesses or by producing sufficient documentary evidence.

33.On the other hand, the plaintiff has satisfactorily with the aid of P.W. 2, that is, the second attesting witness of the suit sale agreement and the scribe of the suit sale agreement who deposed their evidence as P.W.2 and P.W.3 has duly proved that the plaintiff had paid an amount of Rs.13,00,000/- to the defendant on the date of execution of the sale agreement, that is, on 25.01.2017. That apart the learned Trial Court had fairly dealt with the instant case and proceeded to conclude that the plaintiff had duly proved the execution of the suit sale agreement dated 21.01.2017. Though the defendant had categorically contended that, the Ex.A1 suit sale agreement was submitted before the Sub-

Registrar Office for registration between 03.00 p.m., to 04.00 p.m., on 25.01.2017 and that, the mortgage discharge receipt was submitted before the Sub-Registrar Office between 04.00 p.m., to 05.00 p.m., on 25.01.2017, the Sub-Registrar Office had registered the said documents, that is, the mortgage discharge receipt as document No.101 of 2017 and Ex.A1 suit agreement as document No.102 of 2017. Relying upon the time of submission of the aforesaid documents, that is, Ex.A1 and Ex.B.2 before the Sub-Registrar Office, the defendant categorically contended that the suit sale agreement was executed at the first instant and only thereafter, the Ex.B2 mortgage discharge receipt came to be executed by the plaintiff. However, the learned Trial Court relying upon Section 47 of the Registration Act concluded that a registered document shall operate only from the time, which it would have commenced to operate, if registration thereof had been required or made and not from the time of its registration. Further the learned Trial Court relying upon the evidence of P.W.2 has observed that, both the documents were executed in the office of P.W.3 and that the Ex.B2 receipt was executed at the first instance and thereafter, Ex.A1 suit agreement came to be executed. It is further observed by the learned Trial Court that, the documents as executed would come into effect only as and when it was executed and not on the time when it was submitted for registration. The learned Trial Court further observed that, by the execution of the mortgage deed in favor of the defendant as early as in the year 2010 with respect to the suit property, the plaintiff had acquired an interest over the plaint schedule property. By executing a simple mortgage with respect to the suit property in favour of the plaintiff, in terms of Section 58 of the Transfer of Property Act, a clear interest has been created with respect to the plaint schedule property in favour of the plaintiff. However, an agreement for sale is something which will not create any interest with respect to the plaint schedule property, in terms of Section 54 of the Transfer of Property Act. Hence, the learned Trial Court proceeded to conclude that any prudent man will never cancel an existing simple mortgage, by the strength of which, an interest has been created with respect to the plaint schedule property in his favour, and further execute an agreement of sale with respect to the same property, by which no interest would be created in favour of the plaintiff with respect to the suit property.

34.Having made the said observation, the learned Trial Court concluded that the defendant had miserably failed to prove with appropriate evidence, both oral and documentary, before the learned Trial Court, with respect to the execution of the suit sale agreement, as the one was only with respect to a loan transaction, which was prevailing between the plaintiff and defendant.

However, the learned Trial Court rightly decided that the plaintiff had miserably failed to prove before the learned Trial Court with appropriate evidence that he was always ready to perform his part of agreement by paying the remaining amount of Rs.1,00,000/- towards the balance sale consideration within a period of two years from the date of execution of the sale agreement, calling upon the defendant to execute a sale deed in his favour. Making a clear observation that the plaintiff never took diligent steps till 13.12.2018 by issuing a legal notice to the defendant calling upon to execute a sale deed, the learned Trial Court rightly concluded that the plaintiff failed to satisfy the Court with regard to the readiness and willingness as mandated under Section 16(c) of the Specific Relief Act and thereby, non-suited the plaintiff for the relief of specific performance. However, the learned Trial Court has granted the alternate relief of refund of advance amount with interest and cost.

35.Making a clear observation that the admission made by the defendant both in his written statement as well as his evidence that he had executed the suit agreement dated 25.01.2017 in itself would go to the root of his defence. That apart, the defendant had failed to prove his case by appropriate oral and documentary evidence that the said sale agreement was not at all acted upon and that the same was only a document created for a loan transaction.

36.In view of the same, this Appeal Suit fails and the judgment and decree dated 29.09.2022 in O.S.No.19 of 2019 on the file of the learned Principal District Judge, Karur, is hereby confirmed. In the result, this Appeal Suit is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

21.05.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
Mrn

To

1.The District Judge,
Karur.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

L.VICTORIA GOWRI, J.

Mrn

Order made in
A.S.(MD)No.166 of 2023

21.05.2024