(2011) 01 MAD CK 0419

In the Madras High Court

Case No : S.A. (MD) No. 964 of 2010 and M.P. (MD) No. 2 of 2010

R. Subbiah and Jeganathan @ Jeganathaperumal APPELLANT

Vs

Guruvammal RESPONDENT

Date of Decision : 03-01-2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 92

Citation : (2011) 01 MAD CK 0419

Hon'ble Judges : P.R. Shivakumar, J

Bench : Single Bench

Advocate : D. Nallathambi, for the Appellant; R. Devaraj, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Shivakumar, J.—The Plaintiffs, who were successful before the trial Court, namely the Court of the District Munsif, Kovilpatti in O.S. No. 59 of 2007 have come forward with the present Second Appeal, since the decree passed by the trial Court in favour of the Appellants was reversed by the lower appellate Court by the impugned judgment and decree of the lower appellate Court, namely the Court of the Subordinate Judge, Kovilpatti dated 24.02.2010, made in A.S. No. 39 of 2009.

2. The arguments advanced by Mr. D. Nallathambi, learned Counsel for the Appellants were heard. The judgments of the Courts below and other documents produced in the form of typed set of papers along with the memorandum of Second Appeal were also perused.

3. The admitted factual matrix is as follows:

The Appellants/Plaintiffs were the owners of the suit property, namely a house property bearing door No. 43-A (New door No. 2/35), Thalavaipuram @ Gopalapuram Village, Aasur Group, Kayathar Sub Registration District. It is a house built up on a site extending 1217 square feet.

The said property had been originally purchased by the father and mother of the Appellants herein/Plaintiffs. On 23.10.1996, both the Appellants (Plaintiffs) executed a registered sale deed marked as Ex.B.1, a certified copy of the same has also been marked as Ex.A.2, in favour of the Respondent/Defendant conveying the property for a sale consideration of Rs. 15,000/-. Somehow or other, after the execution of the said sale deed and at the time of the filing of the suit, the Appellants/Plaintiffs came to be in possession of the suit property.

A substantial amount was also paid in the name of the Appellants/Plaintiffs to the Panchayat Board in respect of the suit property as property tax. Under such circumstances, the dispute has arisen between the Appellants and the Respondent regarding the title of the suit property and also the nature of the transaction made under Ex.B.1, pursuant to which the suit concerned in the Second Appeal came to be filed.

4. It is the contention of the Appellants/ Plaintiffs that though Ex.B.1 was executed as a sale deed and the same was registered, it was not intended to be a real sale transaction and on the other hand, the same was executed as a collateral security for the repayment of a loan advanced by the Respondent/ Defendant, who according to the Appellants was a money lender. The further contention of the Appellants/ Plaintiffs is that the document having been executed only as a collateral security for the repayment of loan, was the reason why the Appellants were allowed to be in possession and enjoyment of the suit property and to make payment of the property tax to the local authority.

5. It is the further contention of the Appellants/Plaintiffs that for a sum of Rs. 15,000/- borrowed from the Respondent/Defendant in 1996, interest was paid every month regularly up to 22.10.2006 at the rate of 9% p.a.; that on 23.10.2006 at the time of making payment of the interest for the last month, the Appellants/Plaintiffs requested the Respondent/Defendant to reconvey the property after getting the principal amount as the loan was intended to be repaid in 10 years; that the Respondent/Defendant agreed for the same but wanted a few weeks time to execute the reconveyance deed and that subsequently at the instigation of the enemies of the Appellants/ Plaintiffs, the Respondent/ Defendant refused to honour his commitments and issued a notice under Ex.10, calling upon the Plaintiffs to vacate and deliver vacant possession of the suit property, for which a reply was sent under Ex.A.20, the service of which is evidenced by Ex.A.21.

6. Based on the above allegations, the Appellants/Plaintiffs prayed for the following reliefs:

(i) a declaration that the sale dated 23.10.1996, was one executed as a security for the repayment of loan and not a genuine sale transaction;

(ii) a permanent injunction against the Respondent/Defendant not to disturb the peaceful possession and enjoyment of the Appellants/Plaintiffs;

(iii) a mandatory injunction directing the Respondent/Defendant to execute a registered reconveyance deed after receiving the principal amount of debt.

7. The suit was resisted by the Respondent/ Defendant denying the plaint averments regarding the nature of the transaction and the alleged loan transaction. It was contended therein that the sale transaction under Ex.B.1 was a genuine one. It was also contended by the Respondent/Defendant that on the date of sale deed, she got possession of the suit property, but the Appellants/ Plaintiffs, after a lapse of an year from the date of sale, wanted the Respondent/ Defendant to let out the property to the Plaintiffs for a monthly rent of Rs. 150/-; that since the Respondent''s/ Defendant''s two sons were serving in the army, she agreed for letting out the said property for the rent to the Appellants/ Plaintiffs and that since the request made by the Appellants for the marriage of the daughter of the first Appellant to Ramamoorthy, the 3rd son of the Respondent/Defendant was turned down by the Respondent/Defendant, the Appellants/Plaintiffs stopped making payment of rent and thereafter, created documents in their favour and filed the suit as a frivolous attempt.

8. The learned District Munsif, Kovilpatti framed as many as four issues and tried the case. The Appellants/Plaintiffs, besides examining the first Appellant as P.W.1, examined one Indra as P.W.2. Apart from those two witnesses no other witness was examined on their side. 21 documents were produced on the side of the Appellants/Defendants. The Respondent/Defendant figured as the sole witness on her side and the sale deed dated 23.10.1996, executed by the Plaintiffs in favour of the Defendant, marked as Ex.B.1, is the only document produced on her side.

9. The learned District Munsif, Kovilpatti upon considering the evidence, rendered a finding that the transaction under Ex.B.1 sale deed was not a real transaction and it was in fact intended to be a security for the repayment of the loan of Rs. 15,000/- advanced by the Respondent/Defendant to the Appellants/ Plaintiffs and that hence, the Appellants/Plaintiffs were entitled to the relief of declaration, permanent injunction and mandatory injunction as prayed for in the plaint.

10. The correctness of the judgment and the decree drawn there from was challenged by the Respondent/Defendant before the lower appellate Court, namely Sub Court, Kovilpatti, in A.S. No. 39 of 2009. The learned Subordinate Judge, Kovilpatti after hearing both sides and upon reappreciating the evidence produced on record by both parties before the trial Court, came to the conclusion that the trial Court did not approach the problem properly; that the Appellants herein/Plaintiffs, who had taken a stand that Ex.B.1 sale deed was not a genuine sale transaction but was a document intended to be a security for the repayment of the loan, failed to discharge the burden cast upon them by adducing sufficient and proper evidence; that the trial Court on the contrary had simply pointed out the weakness and lacunae found in the defence plea of the Appellants/ Defendants to hold that the Appellants/ Plaintiffs were entitled to the reliefs sought for and that such an approach made by the trial Court was not in tune

with the recognized principles of law. Thus, the lower appellate Court, by its judgment dated 24.02.2010, allowed the appeal, set aside and reversed the judgment and decree of the trial Court and consequently dismissed the suit of the Appellants herein/Plaintiffs with costs holding that they had not proved their case.

11. Challenging the judgment and decree of the lower appellate Court dated 24.02.2010, the Appellants/ Plaintiffs have come forward with the present Second Appeal on various grounds set out in the grounds of Second Appeal.

12. u/s 100 of Code of Civil Procedure, an appeal from the decree of the appellate Court shall lie to the High Court only on a substantial question of law. Order 42 Rule 2 of CPC also enjoined a duty on the High Court to formulate substantial question of law as required u/s 100 of Code of Civil Procedure, in case the Court decides not to dismiss the appeal without sending notice to the opposite party or to the lower Court.

13. In this case, the Appellants have formulated the following questions of law and projected them as substantial questions of law involved in this Second Appeal:

A) When this Appellants/ Plaintiffs, continuing in possession and paying property tax and all the revenue records stands in the name of this Plaintiff despite the sale deed (Ex.A.2), whether the Lower Appellate Court is correct in dismissing the suit filed by this Appellant and thus warrants interference u/s 100 of Code of Civil Procedure.

B) When the Plaintiffs/Appellants produced all revenue records to prove their possession even after the execution of sale deed (Ex.A.2) and the Respondent failed to prove the plea of tenancy with this Plaintiff on permissive possession, whether the Lower Appellate Court is correct in reversing the well considered judgment of the trial Court and hence warrant interference u/s 100 of Code of Civil Procedure.

C) Whether the Lower Appellate Court is correct in reversing the judgment of the trial Court, when the Defendant accepted that her family is doing money lending business and further admitted that this Appellants are in possession and enjoyment of the house in dispute and thus warrants interference u/s 100 of Code of Civil Procedure.

14. Upon considering the above said suggestions made on behalf of the Appellants that those are questions of law to be considered and decided in this Second Appeal in the light of the finding recorded by the Courts below, this Court is of the considered view that the Appellants have not substantiated their contention that the Second Appeal involves any substantial question of law that has got to be decided by this Court. All the questions suggested by the Appellants as substantial questions of law are nothing but questions relating to appreciation of evidence adduced before the trial Court.

15. In Second Appeals normally the Court will not attempt to appreciate evidence unless it is pleaded and Court is also satisfied that any question of fact has been not only decided erroneously but such a finding could be termed perverse. In this case, though it has not been specifically stated in the grounds of appeal, the learned Counsel for the Appellants suggested the following as substantial question of law:

Whether the party to a document executed as a sale deed can be allowed to contend that such a document was not intended to be a genuine sale deed, but intended to be a security for the repayment of loan?

The said question has been sought to be projected as substantial question of law by the learned Counsel for the Appellants even though the same has not been formulated and incorporated in the grounds of appeal as a substantial question of law involved in this case. Even assuming that Section 92 of Indian Evidence Act, 1872 shall not be a bar on the party to a document to question the nature of the document against the recitals found therein and that when the transaction itself is sought to be claimed to be otherwise than which is reflected under the document, the same can be sought to be proved by advancing parole evidence, that question has not arisen in this case as a substantial question of law.

16. It is well known proposition of law that he who takes a plea that a document of which he is a party is not of the nature reflected by the recitals therein and that it was intended to be a collateral security for some other purpose, shall be bound to prove it by sufficient, reliable and tangible evidence. In this case, it is not in dispute that Appellants/Plaintiffs executed Ex.B.1 document knowing fully well that it was a sale deed. It is also not in dispute that they were very much aware of the sale consideration quoted therein, purchaser under the document and the several conditions incorporated therein. Fully aware of the nature and contents of the document, the Appellants/ Plaintiffs had executed the said document. When such is the case, normally the executants of such a document cannot be allowed to contend that it was intended to be a security for some other purpose. It is not the case of the Appellants/Plaintiffs that the document was not a genuine transaction and it was only a sham and nominal deed. On the other hand, the Appellants/ Plaintiffs agreed that it was a sale transaction, but they had pleaded a collateral agreement to the effect that in the event of repayment of the amount quoted as sale consideration with interest within a particular period, the purchaser under the said document should reconvey the said property by executing a proper sale deed in favour of the Appellants/Plaintiffs. That is the reason why, averments have been made in the plaint to the effect that the Respondent/Defendant, after receiving the interest on 23.10.2006 for the previous month, agreed to execute a sale deed after receiving the principal amount, but later on went back from the said promise. The plea of the Appellants/Plaintiffs can in other words be termed a plea of agreement for reconveyance on payment of the sale consideration quoted in the disputed sale deed along with interest at an agreed rate. Even then, the Appellants/Plaintiffs

have chosen to seek only the relief of mandatory injunction for execution of such a reconveyance deed rather than the relief of specific performance.

17. Though there may be some discrepancies in coining the relief sought for, it is true that in proper case, the relief can be moulded and appropriate relief can be granted. The Plaintiffs can succeed their case based on the strength of their own evidence. The Plaintiffs cannot simply point out the weakness on the defence case of the Defendant and on that basis claim the relief prayed for, unless the law prescribes casting of the burden on the Defendant under given circumstances. In this case, it cannot be disputed the burden of proving the Plaintiffs'' case that the transaction under Ex.B.1 was only a transaction of security for repayment of loan heavily lies on the Appellants/Plaintiffs.

18. The trial Court, without considering the scope of the evidence adduced on the side of the Appellants/Plaintiffs, was simply carried away by the fact that the Respondent/Defendant was not able to prove under what circumstances the Appellants/ Plaintiffs were put in possession after execution of the sale deed in favour of the Respondent/Defendant and the further fact that the Appellants/ Plaintiffs had produced receipts obtained from the local authorities for the payment of property tax. On that basis alone, it held that the Appellants/ Plaintiffs were entitled to the reliefs. Even then, while framing the last clause of the operative part of the judgment, the learned trial Court has simply stated that the Respondent/ Defendant should execute the sale deed in favour of the Appellants/Plaintiffs and got it registered after receiving Rs. 15,000/- being the principal amount together with interest at the agreed rate. No finding was given as to what was the rate at which subsequent interest was awarded. The trial Court also failed to consider the strength of the evidence of the Appellants/ Plaintiffs adduced through P.W.1, the interested witness that interest was paid up to 22.10.2006 at the rate of 9% p.a. What was the actual amount paid and what were the dates on which the interest was paid have not been furnished. It is quite unnatural and improbable for a person who was forced to execute a sale deed as security for the repayment of a loan to make payments of interest without even getting receipts as acknowledgment. The said aspect also was not considered by the trial Court. The documents produced by the Appellants/ Plaintiffs as Exs.A6 to A18 were also not properly considered by the trial Court.

19. On the other hand, the learned lower appellate Judge referring to the serial numbers, book numbers and the dates of issue as noted in those receipts and also absence of any date in several receipts, has arrived at a conclusion on fact that those receipts could not be genuine and should have been procured for the purpose of the claim made in the suit. Such a finding of fact made by the lower appellate Court, which is the final Court appellate on fact, cannot be interfered with by this Court, unless the same is proved to be perverse. The attempt made by the learned Counsel for the Appellants in this respect, according to the view of this Court has ended in failure.

20. What other evidence has been adduced on the side of the Appellants/

Plaintiffs and whether they are sufficient to discharge the burden of proof cast upon the Appellants/Plaintiffs has got to be considered next. The mere fact that the Appellants/Plaintiffs were admittedly in possession and enjoyment of the property and they were making payments of property tax to the local authority may help the Appellants/Plaintiffs to establish the plea of adverse possession, but that alone will not be enough to arrive at the conclusion that the sale transaction entered into between the parties was only a transaction intended to be collateral security for repayment of loan. The mere fact that the sale deed was initially impounded by the registering authority on the ground that the property was undervalued also will not be enough to discharge the burden of proof cast on the Appellants/Plaintiffs to show that the said transaction was intended to be security for the repayment of loan.

21. When an admitted document is sought to be projected as a document not intended to be acted upon, but intended to be a security for some other purpose, the person making such a plea should prove the same by reliable evidence. In this case, except the interested testimony of P.W.1, the first Plaintiff, there is no other evidence to show the nature of the transaction under Ex.B.2 to be otherwise. No person who negotiated the transaction, no person who attested the deed and no person who was present at the time of either execution or registration of the deed was examined on the side of the Appellants/Plaintiffs to prove their case. The Appellants/Plaintiffs have also failed to examine any other person to show that interest was paid as alleged in the plaint for about 10 years. Not even a scrap of paper has been produced by the Appellants/Plaintiffs to show payment of interest at any point of time. The lower appellate Court has analysed the evidence in a proper manner and has correctly held that the Appellants/ Plaintiffs had failed to discharge their burden of proof of the plea raised by them regarding the nature of the Ex.B.1 document. Such a finding of the lower appellate Court made on a proper appreciation of evidence, which is also a finding on fact, cannot be termed either infirm or defective, much less perverse to be interfered with in this Second Appeal.

22. One more aspect, which was not cited by the lower appellate Court can also be added to strengthen the above said decision arrived at. According to the Appellants/Plaintiffs, the Respondent/Defendant was a money lender and she had chosen to get a sale deed for the amount lent by her with the oral understanding that the property would be reconveyed on payment of principal and interest. But the interest quoted by the Plaintiffs in the plaint is 9% p.a., which works out to 75 paise per hundred per month. The transaction admittedly took place in the year 1996. Even the interest charged by banks for various loans at that point of time was more than the rate and it was even twice the rate for some kind of loan. If at all that amount was invested in fixed deposit that would have earned more than than the interest that was stated to be payable under the transaction. That will also give rise to an inference against the plea of the Plaintiffs.

23. For all the reasons stated, this Court comes to the conclusion that there is no

defect or infirmity in the judgment and decree of the lower appellate Court; that no question of law has been proved to be erroneously decided by the lower appellate Court; that no substantial question of law is proved to have arisen for deciding in this Second Appeal and that the Second Appeal is liable to be dismissed at the stage of admission itself.

24. Accordingly, this Second Appeal is dismissed. Consequently, connected M.P. (MD) No. 2 of 2010 is also dismissed. However there shall be no order as to costs as the Second Appeal is dismissed at the admission stage itself.