

(2011) 06 MAD CK 0092

In the Madras High Court

Case No : S.A. No. 616 of 2011 and M.P. No. 1 of 2011

V.A. Siddique Basha

APPELLANT

Vs

Raman, Nandagopal, Boopathy and Manjula @ Dhanalakshmi

RESPONDENT

Date of Decision : 20-06-2011

Acts Referred:

Evidence Act, 1872 — Section 91, 92(1)
Specific Relief Act, 1963 — Section 23

Citation : (2011) 06 MAD CK 0092

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : S.N. Narasimhulu, for the Appellant; P.A. Sudesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—This second appeal is focussed by the Defendant, animadverting upon the judgment and decree dated 25.09.2007 passed

by the learned Principal District Judge, Vellore in A.S. No. 18 of 2007 confirming the judgment and decree dated 14.07.2005 passed by the

learned Subordinate Judge, Tirupattur in O.S. No. 205 of 2001.

2. The parties are referred to here under according to their litigative status and ranking before the trial Court.

3. A "resume" of facts absolutely necessary and germane for the disposal of this Second Appeal would run thus:

a) The Plaintiffs filed the suit seeking the following reliefs:

-to direct the Defendant to execute the sale deed for the schedule mentioned property to the Plaintiff by a fixed date and register the same at the

expenses of the Plaintiff, after receipt of the balance of sale price of Rs.

1,00,000/- in default of which this Court to receive the same as deposit

and execute the sale deed, registering the same at the Plaintiff's expenses and consequently order delivery of possession.

-or in the alternative directing the Defendant to refund the sum of Rs. 1,00,000/- together with interest at 24 per cent per annum from 31.10.1995

amounting totally Rs. 1,45,568/- till date and with future interest on Rs. 1,00,000/- from this date till date of full and final payment.

-to create a charge over the schedule mentioned property till the suit claim is fully and finally settled.

-to direct the Defendant to pay the Plaintiff the cost of this suit and other ancillary proceedings.

(extracted as such)

b) Written statement was filed by the Defendant, resisting the suit.

c) Whereupon issues were framed. On the side of the Plaintiffs, the third Plaintiff examined himself as PW1 along with P. Ws.2 and 3 and marked

Exs.A1 to A9. On the Defendant's side, the Defendant examined himself as DW1 along with DW2 and marked Ex.B1.

d) Ultimately the trial court granted the relief in favour of the Plaintiff directing the Defendant to repay the advance amount of Rs. 1 lakh with 6%

interest from the date of suit till realisation; as against which, appeal was filed, for nothing but to be dismissed by the appellate court confirming the

judgment and decree of the trial court.

4. Challenging and impugning the judgments and decrees of both the courts below, this Second Appeal has been filed by the Defendant on various

grounds suggesting the following substantial questions of law:

1. When both the lower appellate court and trial court framed all the issues and favoured in favour of the Appellant, how the suit may be decreed

on alternative remedy for the return of advance amount of Rs. 1,00,000/- to the Respondents?

2. When both the lower appellate court and the trial court come to the conclusion that Ex.A1, the certified copy of the sale agreement which was

filed by the Respondents and Ex.B1, the original sale agreement filed by the appellate herein is not Sale agreement, but it is only security for the

repayment of loan of Rs. 1,00,000/-, the very object of the case itself is defeated.

3. While the original sale agreement which is marked by this Appellant in the suit as Ex.B1, how both the lower appellate court and trial court

come to conclusion that a sum of Rs. 1,00,000/- as advance for the sale?

(extracted as such)

5. Heard both.

6. The indubitable and indisputable facts or at least the undeniable facts relating to this case would run thus:

The Defendant and the deceased first Plaintiff entered into a registered agreement to sell, whereby the former agreed to sell the immovable

property in favour of the latter, for a total sale consideration of Rs. 2 lakhs. The said agreement to sell would evidence that a sum of Rs. 1 lakh was

paid by the deceased first Plaintiff to the Defendant. According to the Plaintiffs, even though the deceased first Plaintiff was ready and willing to

perform his part of the contract, the Defendant did not come forward to honour his commitment in black and white in the said agreement to sell

Ex.A1. Whereupon the deceased first Plaintiff after issuance of pre-litigation notice and getting reply, filed the suit seeking specific performance of

the agreement to sell or in the alternative for the refund of the advance amount.

7. The contention of the Defendant is to the effect that in fact, the sum of Rs. 1 lakh was not paid by the deceased first Plaintiff to the Defendant;

however because of the persuasion made by the deceased first Plaintiff, he signed the agreement to sell as though he received the said amount; as

promised orally by the deceased first Plaintiff, the sum of Rs. 1 lakh was not paid by him to the Defendant; hence, the Defendant got back the

original agreement from the deceased first Plaintiff and kept with him and produced it before the court. Both the courts below as per the

Defendant, appropriately and appositely, correctly and acceptably, upheld the case of the Defendant that this is not a fit case for specific

performance of the agreement to sell; however, they fell into error in ordering refund of the sum of Rs. 1 lakh even though the said sum was not

paid by the deceased first Plaintiff to the Defendant.

8. In my considered opinion, the controversy got boiled down to the extent of considering as to whether the Defendant being the Appellant in the

second appeal is entitled to contend that he did not receive the sum of Rs. 1 lakh from the deceased first Plaintiff under the registered agreement to

sell Ex.A1?

9. Both the courts below referring to Section 92 of the Indian Evidence Act, acceptably and legally held that the Defendant cannot plead so, quite

antithetical to his commitment in black and white in Ex.A1, the agreement to sell.

10. At this juncture, I would like to recollect the following decisions of the Hon"ble Apex Court:

(i) Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, , certain excerpts from it would run thus:

11. The next contention on behalf of the Appellant is that Sub-section (1) of Section 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 parol evidence in support of the contention.

Section 91 of the Evidence Act provides that when the terms of a 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-

section (1) of Section 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 Section 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 contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by Sub-section (1) of Section

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 (Tyagaraja Mudaliyar v. Vedathanni). The trial court was right in permitting the Respondent to lead parol 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 parol 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.

(emphasis supplied)

(ii) P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another, . An excerpt from it would run thus:

7. Mr. G.V. Chandrashekhar, learned Counsel appearing on behalf of the Appellant, submitted that the learned trial Judge as also the High Court committed a serious error in construing the said document as an agreement for sale instead and place of an agreement for loan. It was urged that having regard to the fact that diverse amounts had been taken by the Appellant from the Respondents as also the fact that similar agreements for sale were entered into by and between the Appellant and other persons categorically demonstrate that he had merely borrowed some amount and the purported agreement for sale was not meant to be acted upon.

12. No part of the agreement supports the contention of Mr. Chandrasekhar that the same was not meant to be acted upon. It was signed by the parties. Two witnesses who had attested the signature of the parties to said agreement, Respondent 1 was allowed to continue to remain in possession of the premises in question as a tenant and not in part performance of the said agreement for sale, but it was not necessary for the parties to adopt the latter course only. The parties, on a plain reading of the

agreement, apparently intended to continue their relationship as landlord and tenant till a regular deed of sale was executed.

15. The decision of this Court in Dadarao whereupon reliance has been placed by Mr. Chandrashekhar is wholly misplaced. The terms of the

agreement therein was absolutely different. We need not dilate on the said decision in view of the fact that in a subsequent decision of this Court in

P.D'Souza v. Shondrilo Naiduit has been held to have been rendered per incuriam, stating: (SCC pp.657-58, paras 3436).

34. In Dadarao whereupon Mr. Bhat placed strong reliance, the binding decision of M.L. Devender Singh was not noticed. This Court furthermore

failed to notice and consider the provisions of Section 23 of the Specific Relief Act, 1963. The said decision, thus, was rendered per incuriam.

35. Furthermore, the relevant terms stipulated in Dadarao was as under: (SCC p.417, para 2)

2. ...""Tukaram Devsarkar, aged about 65, agriculturist, r/o Devsar, purchaser (GHENAR) - Balwantrao Ganpatrao Pande, aged 76 years, r/o

Dijadi, Post Devsar, vendor (DENAR), who hereby give in writing that a paddy field situated at Dighadi Mouja, Survey No. 7/2 admeasuring 3

acres belonging to me hereby agree to sell to you for Rs. 2000 and agree to receive Rs. 1000 from you in presence of V.D.N. Sane. A sale deed

shall be made by me at my cost by 15.04.1972. In case the sale deed is not made to you or if you refuse to accept, in addition of earnest money

an amount of Rs. 500 shall be given or taken and no sale deed will be executed. The possession of the property has been agreed to be delivered at

the time of purchase. This agreement is binding on the legal heirs and successors and assigns.

Interpreting the said term, it was held: (SCC p.418, paras 6-7)

6. The relationship between the parties has to be regulated by the terms of the agreement between them. Whereas the Defendants in the suit had

taken up the stand that the agreement dated 24.04.1969 was really in the nature of a loan transaction, it is the Plaintiff who contended that it was

an agreement to sell. As we read the agreement, it contemplates that on or before 15.04.1972 the sale deed would be executed. But what is

important is that the agreement itself provides as to what is to happen if either the seller refuses to sell or the purchaser refuses to buy. In that even

the agreement provides that in addition to the earnest money of Rs. 1000 a sum of Rs. 500 was to be given back to Tukaram Devsarkar and that

no sale deed will be executed"". The agreement is very categorical in envisaging that a sale deed is to be executed only if both the parties agree to

do so and in the event of any one of them resiling from the same there was to be no question of the other party being compelled to go ahead with

the execution of the sale deed. In the event of the sale deed not being executed, Rs. 500 in addition to the return of Rs. 1000, was the only sum

payable. This sum of Rs. 500 perhaps represented the amount of quantified damages or as the Defendants would have it, interest payable on Rs.

1000.

7. If the agreement had not stipulated as to what is to happen in the event of the sale not going through, then perhaps the Plaintiff could have asked

the Court for a decree of specific performance but here the parties to the agreement had agreed that even if the seller did not want to execute the

sale deed he would only be required to refund the amount of Rs. 1000 plus pay Rs. 500 in addition thereto. There was thus no obligation on

Balwantrao to complete the sale transaction.

36. Apart from the fact that the agreement of sale did not contain a similar clause, Dadarao does not create a binding precedent having not noticed

the statutory provisions as also an earlier binding precedent

17. The contention of the Appellant has been rejected both by the learned trial Judge as also by the High Court upon assigning sufficient and

cogent reasons. The agreement has been held to have been executed by the parties in support whereof large number of witnesses had been

examined. The High Court, in particular in its judgment, has categorically opined that when the Respondents served a notice upon the Appellant on

29.05.1981, it was expected of the Appellant to raise a contention that the said agreement was sham one or nominal one and was not meant to be

acted upon but it was not done. Failure on the part of the Appellant to do so would give rise to an inference that the plea raised in the suit was an

afterthought.

(emphasis supplied)

A mere perusal of those decisions would reveal that quite antithetical to the express provisions of Section 92 of the Indian Evidence Act, the

Defendant herein cannot contend that he did not receive the sum of Rs. 1 lakh at all.

11. I hark back to the legal adage ""preponderance of probabilities would govern the adjudication in civil cases"". If really, the events took place as

contended by the Defendant, then shortly after registration of Ex.A1, the Defendant would have sent some communication to the deceased first

Plaintiff calling upon him to pay the sum of Rs. 1 lakh as orally promised by him at the time of getting Ex.A1 registered. But that was not done so.

The agreement to sell was registered during the year 1999, whereas the deceased first Plaintiff issued the pre-litigation notice during the year 2001

as per Ex.A2, for which only the Defendant replied belatedly and as an after thought contending that even the said sum of Rs. 1 lakh was not paid

by the deceased first Plaintiff. The conduct of the Defendant has to be looked askance at. The normal conduct of a party who has been made to

sign a registered document as though he received a sum of Rs. 1 lakh even though he did not receive the said sum, should be viewed by applying

common sense. However, the learned Counsel for the Defendant would try to explain and expound the conduct of his client by pointing out that the

very thing that the Defendant got back the original registered document itself would be indicative of the fact that the deceased first Plaintiff himself

agreed that the said document should not be acted upon.

12. If really that was the intention of the deceased first Plaintiff and with that understanding the Defendant got back the said registered document,

then very easily he could have got an endorsement on the registered document itself ""as cancelled"". But he had not chosen to do so. Furthermore,

on the Plaintiff's side it is acceptably and convincingly, submitted that in the said registered document, in Sheet No. 2, the Defendant's signature

was missing and in order to get it signed by the Defendant, it was handed over to him; however, the Defendant did not return it, but ultimately filed

it in court.

13. Be that as it may, Section 92 of the Indian Evidence Act should be applied in stricto sensu. It is not the case of the Defendant that under

coercion or threat, he was made to sign the document. In such a case, the findings of both the courts below in view of Section 92 of the Indian

Evidence Act, that the deceased first Plaintiff paid a sum of Rs. 1 lakh in favour

of the Defendant under Ex.A2 cannot be found fault with.

14. The contention on the side of the Defendant is that the courts having chosen not to enforce the agreement to sell on various grounds, should

have also on the very same grounds rejected the alternative prayer of the Plaintiffs for refund of the amount.

15. In my considered opinion, such a contention is not tenable, as law enjoins the court to consider such prayer for refund. Even in the event of the

court coming to the conclusion that the agreement to sell being the discretionary relief should not be granted yet the court could consider the

feasibility of refunding the advance amount. In this case, both the courts below no doubt were reluctant to grant the relief of specific performance in

favour of the Plaintiffs; but they thought fit to order refund of the advance amount. I need not further dilate on that point in view of the judgments

and decrees of both the courts below and in the concurrent findings on facts.

16. Accordingly, I could see no question of law much less substantial question of law involved in this matter and in the result, this second appeal is

dismissed.

17. The learned Counsel for the Defendant would make an extempore submission to the effect that sufficient time may be granted for discharging

the decreetal dues.

18. I could see force in his submission and accordingly, I would like to grant six months' time for discharging the decreetal dues and to that effect

the Defendant shall file an affidavit of undertaking within 15 days from this date.

19. In the result, this second appeal is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition

is closed.