
(2010) 10 MAD CK 0268

Madras High Court

Case No: Appeal Suit No. 851 of 2006

Subbaian

APPELLANT

Vs

Semalai Gounder

RESPONDENT

Date of Decision: Oct. 27, 2010

Acts Referred:

- Evidence Act, 1872 - Section 91, 92
- Specific Relief Act, 1963 - Section 16(C)

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: A.K. Kumaraswamy, for the Appellant; R.T. Doraisamy, for the Respondent

Final Decision: Allowed

Judgement

M. Venugopal, J.

The Petitioner/Plaintiff has filed the present Appeal as against the judgment and Decree dated 11.08.2006 in O.S. No. 4 of 2005 passed by the Learned Additional District Judge (Fast Track Court-II), Gobichettipalayam.

2. The trial Court viz., the Learned Additional District Judge (Fast Track Court-II), Gobichettipalayam in the judgment in O.S. No. 4 of 2005 has among other things observed that "Ex.A.1 Sale Agreement dated 15.10.2001 is not a true document in respect of the suit properties to be purchased from the Respondent/Defendant by the Appellant/Plaintiff and further as per Ex.A.1 Sale Agreement the Respondent/Defendant on 15.10.2001 has not received a sum of Rs. 4,50,000/- as an advance and as such as per Ex.A.1 Sale Agreement the Appellant/Plaintiff is not entitled to claim the relief of specific performance or the alternative relief prayed for by him in the suit and resultantly dismissed the suit with costs."

3. Before the trial Court 3 issues have been framed for adjudication in the trial of the suit. On the side of the Appellant/Plaintiff witnesses P.W.1 and P.W.2 have been examined and Exs.A.1 to A.7 have been marked. On the side of the

Respondent/Defendant witnesses D.W.1 and D.W.2 have been examined and Exs.B.1 to B.12 have been marked.

4. Being dissatisfied with the judgment and Decree passed by the trial Court in the main suit, the Appellant/Plaintiff as an aggrieved person has projected the present appeal before this Court.

5. The points that arise for consideration in this Appeal are:

(i) Whether the Ex.A.1 Sale Agreement dated 15.10.2001 is a true one?

(ii) Whether the Appellant/Plaintiff is entitled to claim the relief of specific performance by directing the Respondent/Defendant to execute the Sale Deed in respect of the suit properties or whether the Appellant/Plaintiff is entitled to claim the sum of Rs. 5,32,200/- together with interest at 12% per annum from the Respondent/Defendant?

The Contentions, Discussions and Findings on Point Nos. 1 and 2:

6. According to the Learned Counsel for the Appellant/Plaintiff the trial Court has committed an error in holding that Ex.A.1 Sale Agreement dated 15.10.2001 is not supported by consideration by over-looking the recitals in the said document and infact D.W.1 (Respondent/Defendant) has admitted the execution of the same and the same has been executed by him towards the amount advanced to him by Appellant/Plaintiff.

7. The Learned Counsel for the Appellant/Plaintiff urges before this Court that the trial Court has failed to note that as per Section 92 of the Indian Evidence Act, 1872, it is not open to any of the parties to seek to prove the terms of contract or of passing of consideration and further that D.W.1 in his evidence has admitted that he owe a sum of Rs. 4,50,000/- to the Appellant/Plaintiff on the date of Ex.A.1 Sale Agreement.

8. It is the contention of the Learned Counsel for the Appellant/Plaintiff that the trial Court has not appreciated the independent evidence of P.W.2 in regard to the execution of Ex.A.1 Sale Agreement by the Respondent/Defendant and in any event the trial Court has erred in dismissing the suit in entirety without considering the alternative plea for refund of advance paid to the Respondent/Defendant.

9. In short, it is the submission of the Learned Counsel for the Appellant/Plaintiff that the trial Court has not adverted to the material factual aspects of the case in a proper perspective, which has resulted in serious miscarriage of justice and therefore, prays for allowing the Appeal in the interest of justice.

10. In response, the Learned Counsel for the Respondent/Defendant submits that the trial Court on a scrutiny of the oral and documentary evidence and taking note of the relevant attendant circumstances of the present case, has come to a resultant conclusion that Ex.A.1 Sale Agreement dated 15.10.2001 is not a true one and

consequently, dismissed the suit with costs and the same need not be interfered with by this Court sitting in Appeal.

11. It is the evidence of P.W.1 (Appellant/Plaintiff) that Ex.A.1 is a Sale Agreement dated 15.10.2001 entered into between him and D.W.1 (Respondent/Defendant) and on the date of Ex.A.1 Sale Agreement itself the Respondent/Defendant has handed over Ex.A.2 and A.3 Sale Deeds dated 13.12.1989 and 30.08.1990 respectively and as per Ex.A.1 Sale Agreement he has been ready to pay the amount and to complete the sale and since the Respondent/Defendant has not executed the Sale Deed in respect of the suit property, he issued Ex.A.4 Lawyer's Notice dated 12.04.2002 to the Respondent/Defendant and Ex.A.4 Notice has been sent by his Lawyer through Registered Post on 15.04.2002 to the Respondent/Defendant and the Returned Cover is Ex.A.7.

12. P.W.1 in his evidence has deposed that he knows the Respondent/Defendant from the year 1999 and is doing Tobacco business and that he along with six others at Punjai Puliampatti Village started a firm Thirumagal Finance in the year 1999 and closed the same in the year 2000 and during the year 1999 he paid an advance of Rs. 25,000/- to the Respondent/Defendant for purchasing one acre of land and entered into an Agreement and since the Respondent/Defendant has asked him to purchase two acres belonging to him he has not agreed for the same and hence the Respondent/Defendant has returned the advance amount of Rs. 25,000/- with interest viz., Rs. 28,000/- and subsequently in the year 2000 paid an advance of Rs. 4,50,000/- for purchasing the suit property at a Sale Consideration of Rs. 4,75,000/- and in the year 1999 within six months from the date of entering into Sale Agreement after the amount along with interest has been received and the Sale Agreement has been cancelled between them.

13. According to the evidence of P.W.1 it is not correct to state that he has taken his co-brother and introduced the Respondent/Defendant and talked about the sale and paid an advance of Rs. 2,00,000/- and entered into an Agreement of sale and however it is not correct to state that while he lent money on loan to anyone used to enter into a Sale Agreement for purchasing the property of that person at a low rate and it is not correct to state on 21.10.1999 and 19.04.2000 he has registered the Sale Agreements in his favour and advanced a loan of Rs. 25,000/- and Rs. 2,00,000/- to the Respondent/Defendant.

14. Continuing further it is the evidence of P.W.1 that on 21.10.1999 he has entered into a Sale Agreement in regard to the purchase of a property for Rs. 30,000/- and that document is Ex.B.1 Sale Agreement and Ex.B.1 Sale Agreement has been cancelled by them on 15.10.2001 as evidenced by Ex.B.2 Sale Agreement Cancellation Deed and for purchasing the suit property in the year 2001 he has entered into a Sale Agreement with the Respondent/Defendant but he is not remembering the date of Sale Agreement and he has entered into a Sale Agreement in respect of Respondent/Defendant's Crusher, one acre five cents of land, the

house with service connection and he has received the parent document to find out the encumbrance.

15. P.W.1 in his evidence has stated that it is not correct to state that he has given the loan to Respondent/Defendant and for that amount inclusive of interest Ex.A.1 Sale Agreement has been obtained by him and he has also further stated that Ex.A.1 Sale Agreement is barred by limitation.

16. P.W.2 in his evidence has stated that the P.W.1 (Appellant/Plaintiff) is a Tobacco Merchant and that the Respondent/Defendant is running a Crusher and he knows both of them and the Sale Agreement dated 15.10.2001 between Appellant/Plaintiff and Respondent/Defendant has been written in the office of the Document Writer Natarajan and while he has been going that way at about 11.00 to 12.00 a.m. in the morning he has been called by the Respondent/Defendant and another witness Samiyappan and when he has gone there the Sale Agreement has been written and it has been made ready and he has signed in the said document totally in three places and he has read the recitals of the Ex.A.1 Sale Agreement.

17. The Evidence of P.W.2 is to the effect that only for cancellation of two documents for the amount and with interest it is not correct to state that Ex.A.1 Sale Agreement has been written.

18. D.W.1 (Respondent/Defendant) in his evidence has stated that on 19.04.2000 he has executed Ex.B.3 Sale Agreement in favour of the Appellant/Plaintiff and he has cancelled the Ex.B.3 Sale Agreement on 15.10.2001 as per Ex.B.4 Cancellation Deed.

19. D.W.1 (in his cross examination) has deposed that in Ex.A.1 Sale Agreement dated 15.10.2001 in each page his signature is found and before affixing the same in each page in Ex.A.1 Sale Agreement he has read the contents of the document and signed the same and in Ex.A.1 document it is written as Sale Agreement and that in Ex.A.1 witness Samiyappan belongs to his caste.

20. D.W.1 in his further evidence has stated that as per Ex.B.1 Sale Agreement dated 21.10.1999 entered into between him and the Appellant/Plaintiff and as per the Ex.B.3 Sale Agreement dated 19.04.2000 between one Ponnusami and himself the interest when calculated in the loan comes to Rs. 2,15,000/- and inclusive of the expenses towards document writing for a sum of Rs. 4,50,000/- he has executed Ex.A.1 Sale Agreement dated 15.10.2001 and he has agreed to sell the Crusher unit only willingly and indulged in sale talk.

21. Apart from the above, it is the evidence of D.W.1 that it is not correct to state that as per Ex.A.1 Sale Agreement dated 15.10.2001 he has received a sum of Rs. 4,50,000/- from the Appellant/Plaintiff and executed the said document in his favour.

22. D.W.2 in his evidence has deposed that he only introduced the Respondent/Defendant to the Appellant/Plaintiff and recommended him for loan

and helped the Respondent/Defendant to receive a loan of Rs. 25,000/- from the Appellant/Plaintiff in the year 1999. It is the further evidence of D.W.2 that at the time of Ex.A.1 Sale Agreement dated 15.10.2001 he has come to know through Appellant/Plaintiff that for the loan mentioned in Ex.B.1 Sale Agreement dated 21.10.1999 no interest has been paid and as per Ex.B.3 Sale Agreement for the loan per month for Rs. 100/- interest of Rs. 5/- has been talked about in his presence and at that time when Ex.A.1 Sale Agreement dated 15.10.2001 has been written, from the Appellant/Plaintiff the Respondent/Defendant has not obtained any amount and only for the principal and interest due in respect of Ex.B.1 and B.3 two documents Ex.A.1 Sale Agreement for Rs. 4,50,000/- has been written and since the Appellant/Plaintiff has demanded for the writing of a document in respect of principal and interest amount of Rs. 4,50,000/- the said documents have been written for the said amount.

23. At this stage, the Learned Counsel for the Appellant/Plaintiff cites the decision of the Honourable Supreme Court [Tamil Nadu Electricity Board and another Vs. N. Raju Reddiar and another](#), wherein it is observed as follows:

...There is no document whatsoever in support of the aforesaid so called after tender discussion and the acceptance of the terms in the said discussion to the effect that rate would be charged on multi slab basis. Then again if the Plaintiff had appended the letter to the tender indicating that he would be charging on multi slab basis there was no occasion to have any after tender discussion or to raise the issue of rate being accepted on multi slab basis. The so called statement of DW-1 therefore is wholly unacceptable and in the eye of law also cannot be taken into account to vary the terms of the written contract. The Division Bench of the High Court committed obvious error in allowing the variance of the terms of the written contract relying upon such statement of DW-1 and granted the decree on multi slab basis.

24. He also relies on the decision [Aniglase Yohannan Vs. Ramlatha and Others](#), wherein the Honourable Supreme Court has observed that "the basic principle behind provision Section 16(c) of the specific relief is that any person seeking benefit of specific performance of contract must establish that his conduct blemishless through out entitling him to specific relief and the Court has to grant relief based on conduct of person seeking relief on perusal of plaint and if the conduct of Plaintiff entitles him to get relief he should not be denied the relief."

25. The Learned Counsel for the Appellant/Plaintiff invites the attention of this Court to the decision [Rathinam Chettiar Vs. Embar Naidu and another](#), wherein it is observed that the Plaintiff/Purchaser establishing that he was always ready and willing to pay balance consideration and get sale deed executed and need not produce documents to show that he is having money with him to pay sale consideration.

26. He further cites the decision of Honourable Supreme Court [P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another](#), wherein the Honourable Supreme Court has held that the nature of the document and intention of the parties must be gathered from the document by reading in its entirety and further it is held that rise in price of immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale.

27. Yet another decision of Honourable Supreme Court [H.P. Pyarejan Vs. Dasappa \(Dead\) by LRs. and Others](#), is cited on the side of Appellant/Plaintiff to the effect that "it is sufficient if readiness and willingness can be inferred from pleadings and merely because they are differently worded, it will not militate against the Plaintiff."

28. The Learned Counsel for the Respondent/Defendant submits that Ex.A.1 Sale Agreement dated 15.10.2001 is only for the purpose of security of amount already borrowed by the Respondent/Defendant from the Appellant/Plaintiff dated 21.10.1999 and 19.04.2000 and therefore Ex.A.1 Sale Agreement dated 15.10.2001 is void abinitio in law.

29. However, the case of the Appellant/Plaintiff is that the Respondent/Defendant for Rs. 4,75,000/- as agreed to sell the suit property on 15.10.2001 in the presence of witnesses and has received an advance of Rs. 4,50,000/- and the balance of Rs. 25,000/- is to be paid by the Appellant/Plaintiff within six months from the date of Ex.A.1 Sale Agreement dated 15.10.2001 and if that balance amount is paid then the Sale Agreement has to be executed by the Respondent/Defendant in favour of the Appellant/Plaintiff or in favour of person mentioned by the Appellant/Plaintiff.

30. Admittedly, the Ex.A.1 Sale Agreement dated 15.10.2001 executed by the Respondent/Defendant in favour of Appellant/Plaintiff is a registered one. The Sale Agreement, which is registered before the Puliampatti Sub-Registrar Office dated 15.10.2001 refers to a Sale Agreement in respect of PunjaManavari and other items of properties for a sale consideration of Rs. 4,75,000/-. The Ex.A.1 Sale Agreement dated 15.10.2001 is typed in Tamil. A reading of the recitals in Ex.A.1 Sale Agreement dated 15.10.2001 entered into between the Respondent/Defendant and the Appellant/Plaintiff shows that the Respondent/Defendant has agreed to sell his properties mentioned in the Schedule thereto and that he has received a sum of Rs. 4,50,000/- in the presence of witnesses (i) R. Ramiyappan S/o Ramasami, Pungampalli and R. Thangarasu S/o Ramasami Pu.Puliampatti. In Ex.A.1 Sale Agreement the name of the Document Writer is mentioned as Natarajan S/o. V.K. Arangasami, District Registration No. B. 391/GCP of 1984 with his address. The name of the Typist who typed the Ex.A.1 Sale Agreement is mentioned as N. Jayanthi with her address.

31. It is to be pointed out that Section 91 of the Indian Evidence Act, 1872 relates to evidence of terms of a contract, grants and other disposition of properties reduced to a form of document. This Section merely prevents proving the contents of a

writing otherwise than by writing itself. It is indeed a declaration of the doctrine of the substantive law, viz., in the case of a written contract, that of all proceedings and contemporaneous oral expressions of the thing are merged in the writing of displaced by it as per decision [Roop Kumar Vs. Mohan Thedani](#), . As a matter of fact, Section 91 of the Act is based on what is sometime described as "best evidence rule". It is after the document has been produced to prove its terms u/s 91, then the ingredients of the Section 92 of the Act come into operative place for the purpose of excluding evidence of any oral agreement or statement, for the purpose of varying, contradicting, adding to or subtracting from its terms. Section 91 will be frustrated without the help of Section 92. Section 92 will be inoperative without the help of Section 91. Sections 91 and 92 of the Indian Evidence Act, 1872 in effect supplement each other. However, the two Sections differ in some particulars. Section 91 of the Act infact applies to all documents, whether they purport to dispose of rights or not. Whereas Section 92 of the Act applies to documents which dispose of property. To put it differently, Section 91 of the Act applies to documents which are bilateral and unilateral. But Section 92 of the Act is confined only to bilateral documents and also it applies only between parties to the document or their representatives in interest.

32. Generally, where a contract of sale of which specific performance is sought, is uncertain. No oral evidence can be allowed to add to its terms. Section 92 of the Indian Evidence Act, 1872 is not a bar for a party to show that there has been no agreement between the parties and an oral evidence to prove the real intention of the parties is different from that exposed by the terms of documents is admissible. Also Section 92 of the Act will not restrain a person from proving the true contract is different from what is mentioned in the document as per decision of this Court [Arumoorathi Chettiar Vs. Secondary Education Committee of Vallala Sangam of Vadugupatti](#), .

33. Though P.W.2 (2nd Identifying witness in Ex.A.1 Sale Agreement dated 15.10.2001) before the trial Court has stated that it is not correct to state that only for the cancellation of two documents for the amount together with interest, only Ex.A.1 Sale Agreement has been entered into.

34. However, it is the evidence of D.W.2 (1st Identifying witness in Ex.A.1 Sale Agreement dated 15.10.2001) before the trial Court that only for the principal and interest amount in respect of Ex.B.1 and B.3 two documents Ex.A.1 Sale Agreement has been written for an amount of Rs. 4,50,000/- and since the Appellant/Plaintiff has asked the Respondent/Defendant to execute a Sale Agreement for the principal and interest amount of Rs. 4,50,000/- the said document has been executed and however in Ex.A.1 it is written that as if the Respondent/Defendant has received a sum of Rs. 4,50,000/- from the Appellant/Plaintiff.

35. D.W.1 (Respondent/Defendant) has also in his evidence before the trial Court has stated that as per Ex.A.1 Sale Agreement he has not received a sum of Rs. 4,50,000/- in cash and only for Exs.B.1 and B.3 principal and interest amount for a sum of Rs.

4,50,000/- he has executed Ex.A.1 Sale Agreement.

36. In short, the evidence of D.W.2 (1st Identifying witness in Ex.A.1 Sale Agreement) corroborates that the evidence of D.W.1 (Respondent/Defendant) to the effect that Ex.A.1 Sale Agreement has been entered into by the Respondent/Defendant in favour of Appellant/Plaintiff for the principal and interest amount of Rs. 4,50,000/- as per Ex.B.1 and B.3 documents. Hence, this Court opines that the evidence of D.W.1 and D.W.2 are worthy of credence and they are accepted by this Court. Hence, this Court comes to an inescapable conclusion that the Respondent/Defendant has not agreed to sell the suit property as per Ex.A.1 Sale Agreement dated 15.10.2001 in favour of the Appellant/Plaintiff and to this extent Ex.A.1 Sale Agreement is not a true and valid one in the eye of law. But it cannot be lost sight of that the Respondent/Defendant has to pay a sum of Rs. 4,50,000/- to the Appellant/Plaintiff and only for the due amount Ex.A.1 Sale Agreement has come into existence, in the considered opinion of this Court. Since the Appellant/Plaintiff is not entitled to the relief of the specific performance, yet he is entitled to claim a sum of Rs. 4,50,000/- from the Respondent/Defendant together with interest at 12% per annum from 15.10.2001 till date of realisation together with proportionate costs and accordingly, the Points 1 and 2 are answered and consequently, the Appeal filed by the Appellant/Defendant succeeds.

37. In the result, the Appeal is allowed, leaving the parties to bear their own costs. Resultantly, the judgment and Decree passed by the trial Court viz., the Learned Additional District Judge, (Fast Track Court No. 2), Gobichettipalayam dated 11.08.2006 passed in O.S. No. 4 of 2005 are set aside by this Court for the reasons assigned in this Appeal.

38. The Respondent/Defendant is directed to pay a sum of Rs. 4,50,000/- (Rupees Four Lakhs and Fifty Thousand only) together with interest at 12% per annum from the date of Ex.A.1 Sale Agreement dated 15.10.2001 till date of realisation along with proportionate costs to the Appellant/Plaintiff within a period of three months from the date of receipt of copy of this judgment.