Rajiah Nadar vs Manonmani Ammal on 13 January, 1999

Equivalent citations: AIR1999MAD213, 1999(1)CTC245, (1999)IIMLJ563, AIR 1999 MADRAS 213, (1999) 2 MAD LJ 563 (1999) 1 MAD LW 536, (1999) 1 MAD LW 536

ORDER

1. This Second Appeal is directed against the judgment of the learned District Judge, Tirunelveli, in A.S.No.148 of 1984 reversing the judgment of the learned Subordinate Judge, Tuticorin, in O.S.No.217 of 1982. The defendant in the suit is the appellant in the present Second Appeal.

2. The suit was filed for specific performance of contract of sale praying for a decree directing the defendant to execute a sale deed on receiving the balance of Rs.6,250 within the date to be specified by the Court, failing which the Court to execute the sale on behalf of the defendant. According to the plaintiff, the suit property belongs to the defendant and the defendant entered into an agreement of 11.10.1981 with the plaintiff to sell the property for a consideration of Rs.15,750 and had received an advance of Rs. 5,500 on that date itself and had executed a written agreement to that effect. As per the conditions of the agreement, the defendant should execute a sale deed at the expense of the plaintiff in three months time after receiving the balance of Rs.10,250. According to the plaintiff, after the execution of the sale agreement, the defendant had received Rs.4,000 on 28.10.1981 from the plaintiff as part of the balance due and had made endorsement on the back of the agreement itself. Though the plaintiff was requesting the defendant to execute a sale deed, the defendant was evading the execution of the same giving one excuse or another. The Plaintiff was always ready and willing to perform her part of contract during the agreed period and continues to be ready to pay the balance and to get the sale deed in her name. Even now she was ready to perform her part of the contract. Only recently the plaintiff came to know that the defendant was wantonly delaying the execution and with a view to sell the property to the third parties for higher price and therefore, on 14.9.1982 the plaintiff had sent a notice through her advocate to the defendant for fixing the date of execution of the sale deed. The defendant had received the notice, but did not send any reply. Hence the suit.

3. The defendant in the written statement while disputing the suit claim would state that he did not enter into a contract of sale with the plaintiff and did not receive Rs.5,500 as advance much less on 11.10.1981. The further contention that the defendant had received Rs.4,000 on 28.10.1981 towards the sale was also false. The claims of the plaintiff as having been ready and willing to perform the contract and that the defendant was evading were not true and tenable. According to the defendant, the husband of the plaintiff entered into a contract of sale with the defendant with reference to the eastern 5 cents of land lying east of the suit property for a sum of Rs.15,750 on 10.10.1981 and got the signature of the defendant in blank papers stating that the sale agreement will be executed in the name of his son, Chandrasekaran. The plaintiff had nothing to do with the suit property. On receipt of the balance amount of Rs.10,250, the husband of the plaintiff got the signature of the defendant in the sale deed on 11.3.1982 in the name of his wife, Manonmaniammal instead of in the name of

his son as agreed upon in respect of eastern 5 cents. After the registration of the said documents it appears that the husband of the plaintiff had utilised the signature obtained by him for the sale agreement in the name of Chandrasekaran and forged the suit agreement in the name of the plaintiff. The claim of payment of Rs.4,000 was also denied as false and the endorsement was also a rank forgery. The defendant would further plead that after the execution of the sale deed dated 11.3.1982 for Rs.11,000 the defendant had nothing to do either with the plaintiff or the husband of the plaintiff. After the receipt of suit notice, the defendant threatened the plaintiff's husband for taking criminal action for the forgery of the alleged agreement and the husband of the plaintiff promised to drop the proceedings and hence the defendant did not send any reply.

4. An additional written statement was filed by the defendant contending that the suit property including the house thereon were easily worth Rs.40,000 on the alleged date of sale agreement and the said fact itself would prove that the defendant could not have agreed for selling the property to the plaintiff for a sum of Rs.15,750. Therefore, the defendant would reiterate that the plaintiff has created a fraudulant sale agreement with his signature and the sale agreement in question was a forged and invalid document.

5. On the basis of the said pleadings and the evidence both oral and documentary, the trial Court disbelieved Ex.A.1 the sale agreement and with the result the suit was dismissed. However, on appeal, the lower appellate Court did not agree with the findings of the trial Court. The lower appellate Court held that the suit agreement was proved and that the plaintiff had also established that she was ready and willing to perform her part of the contract. With the result, the appeal was allowed and the suit was decreed as prayed for. Hence the present Second Appeal by the defendant.

6. At the time of admission only one substantial question of law had been framed. During the hearing of the Second Appeal, the appellant had filed C.M.P.No.8623 of 1998 for raising four additional grounds of substantial question of law. After the respondent had filed counter and after hearing both sides by an order dated 10.12.1998 the said petition was allowed permitting two additional substantial questions of law to be raised. With the result, the following three substantial questions of law arises for consideration:-

> (1) Whether the lower appellate Court overlooked the legal position that the non-examination of the plaintiff is fatal in a case of specific performance when the plaintiff alone has to plead and to prove that she was ready and willing to perform her part of the contract H.G. Krishna Reddy v. Thimmaiya, .
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> (2) Whether the finding of the lower appellate Court that Ex.A.1 is true, is based on no evidence at all.
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> (3) Whether the lower appellate Court was correct in law in granting specific performance when he comes to a Court with a false case.

7. Though three different questions have been framed as substantial questions of law, basically there is only one issue which is the central point for all the three questions. The only issue which

ultimately arises for consideration is the truth or otherwise of the suit agreement, namely Ex.A.1. The case of the appellant/defendant is that his signature had been obtained in blank papers in connection with the prior understanding between the parties in having agreed to sell another property which is adjacent to the suit property and that the plaintiff had misused those papers and had manipulated those papers for the purpose of the present suit. Therefore, this Court has to see as to whether the document has been properly proved and whether both sides have established their mutual claims.

7 a. On the issue pertaining to the non-examination of the plaintiff as a witness in terms of Section 16(c) of the Specific Relief Act (hereinafter called" the Act") learned counsel for the appellant relies heavily at least on two judgments of this Court. A Division Bench of this Court in the judgment reported in Krishna Reddy and Co. v. Thimmiah, , held that the failure on the part of the plaintiff agreement holder to have examined himself as a witness and to have subjected himself to cross-examination would be hit by the mandatory requirement under Section 16(c) of the Act to prove the readiness and willingness on the part of the plaintiff. Reliance is also placed on another judgment of another Division Bench of this Court reported in S.K.M. Mohammed Amanulla v. T.C.S. Ramansangu Pandian and others, 1993 (I) M.L.J. 464 in support of his contention that in the absence of proper explanation for non-examination of the plaintiff as a witness, the Court was entitled to draw adverse inference.

8. Learned counsel for the appellant would also point out that while the trial Court had elaborately considered this issue and has recorded a finding that there was no proper pleading or proof in terms of Section 16(c) of the Act, the appellate Court had not properly considered the said issue. It is true that the appellate Court had dealt with the issue of readiness and willingness in paragraph 12 of its judgments which is a short paragraph of three Sentences in which there is no discussion at all and there is absolutely no reference to the non-examination of the plaintiff, much less any explanation for the non-examination of the plaintiff.

9. Mr.V. Shanmugham, learned counsel for the respondent would however submit that P.W.1 is none other than the husband of the plaintiff and would therefore be a competent witness in the place of his wife and that Section 16(c) by itself did not require that the plaintiff alone was competent to speak about the readiness and willingness.

10. It is true that the rulings relied upon by learned counsel for the appellant hold that the failure to examine the plaintiff would amount to non-compliance of the requirements under Section 16(c) of the Act. But such observations are not to be understood as if the failure of the plaintiff himself or herself to get into the box would be fatal to a suit for specific performance. In fact an analysis of the judgment reported in Mohammed Amanullah v. Ramasangu Pandian, 1993 (I) M.L.J. 464 would show that it was open to the parties to adduce proper reasons for the non-examination of the plaintiff, but on the facts and circumstances of the particular case no reasons have been adduced and hence adverse inference was drawn against the plaintiff. It is also needless to point out that in our society husband and wife share a fiduciary relationship and even now all transactions on behalf of womenfolk in a family are carried on only by the menfolk, especially the husband in the case of wife. But it is also equally true that the relationship of husband and wife is not to be treated as an

exception to the mandatory requirement under Section 16(c) of the Act. It would be open to and also the duty of the plaintiff to plead and prove the reasons for the non-examination of the plaintiffs. In this background a perusal of the judgment of the trial Court and the appellate Court shows that the appellate Court had not at all considered this issue. In view of my ultimate decision to remit this appeal to the appellate Court for various reasons, I wish to say nothing further on this issue as to whether the plaintiff or her husband had properly explained the reasons for non-examination of the plaintiff.

11. As regards proof of Ex.A.1, the signature is admitted by the plaintiffs, but the contents are denied. On this issue, it is further contended by learned counsel for the respondent that the defendant had put forward inconsistent pleas. According to him in the original written statement the defendant had pleaded that Ex.A.1 was a rank forgery. But in the additional written statement and in the oral evidence the defendant had given a go- by to the original pleadings and had contended that his (defendant) signature had been obtained in blank papers and that the text of the document had been manipulated and that the plaintiffs had created fraudulant sale agreement by using his signature. On an analysis of the pleadings and the evidence both oral and documentary, I am unable to agree with the contention of the learned counsel for the respondent. The pleadings have to be read in its entirety. In the original written statement itself after stating in paragraph No.2 that the suit agreement was rank forgery, in paragraph No.3 the defendant had stated in detail the circumstances under which his signature had been obtained in blank papers and that it appeared to the defendant that the plaintiff had utilised his signature. The endorsement was also pleaded to be false and a rank forgery. In the additional written statement also after stating that the value of the property was Rs. 40,000 and that therefore, the defendant could not have agreed for selling it for a price of Rs.15,750, the defendant would further plead that the plaintiff has created the fraudulant sale agreement with his signature. Therefore, I do not find any inconsistency in the pleadings of the defendant. For the same reason there is no need to further dilate upon this issue as raised by learned counsel for the respondent to the effect that the appellate Court was justified in comparing the signature of the defendant in Ex.A.1 with other admitted signatures.

12. In this background, learned counsel for the appellant relies on a judgment of a Division Bench of this Court in Ethirajulu Naidu v. K.R.C.Chettiar, . The Division Bench has held that execution of a document implies intelligent and conscious appreciation of the contents thereof, where the defendant admitted only that he had put his signature only on a blank piece of paper which according to him had possibly been utilised for fabricating the document, the onus of proving due execution must be thrown on the plaintiff. Reference was also made to a judgment of the Supreme Court in Dattatraya v. Rangnathgopal Rao and others, holding that if the person signing the document pleads ignorance then in certain circumstances it may be necessary for the party seeking to prove the document to satisfy the Court that the executant had knowledge of its contents. Per contra, learned counsel for the respondent relies on the observation of the Supreme Court in the very same judgment which is to the effect that a party seeking to prove the execution of a document was not required to prove that the executant knew the contents thereof when the executant denies having signed it and pleads that it is a forgery. Therefore, having regard to the nature of the dispute, this issue naturally leads to the discussion of the evidence pertaining to the very execution of Ex.A.1. According to learned counsel for the appellant, in contrast to the judgment of the trial Court which

had the advantage of watching the quality and demeanour of the witnesses and the detailed discussion by the trial Court, the appellate Court had failed to consider the evidence in proper perspective.

13. Only two witnesses have been examined by the plaintiff and P.W.1 who is the husband of the plaintiff, is not a witness to the document, P.W.2 is an attesting witness and one Abbas who is alleged to be the scribe of the document has not been examined. P.W.2 is none other than an employee of P.W.1 and therefore, his evidence requires careful scrutiny. As the learned counsel for the appellant had rightly pointed out certain glaring and vital contradiction between the evidence of P.W.1 and P.W.2 had not at all been noted or referred to by the appellate Court. According to P.W.1 he was not present when the document was written and signed by the parties. In this context he would state as follows:

14. The evidence of P.W.2 is rather contrary to such evidence. This is what P.W.2 has to say on the execution of Ex.A.1.

15. The lower appellate Court has failed to notice or much less referred to the following features, which arise for consideration out of the evidence of P.Ws.l and 2 regarding the actual execution of Ex.A.1.

> (a) According to P.W.1 he was not present when the document was either written or signed but P.W.2 would say that the document was executed in the presence of P. W.1.
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> (b) According to P.W.1 the document "might have been" written at the residence of the scribe. P.W.2 would say that the document was executed at the office of the plaintiff at Kalavasal.
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> (c) P.W.1 would state that Ex.A.1 was not attested by the witnesses when he saw the document and later he had sent it to P.W.2 for signing the document as a witness. Therefore, it is irresistible to conclude that on the admitted evidence of P.W.1, P.W.2 had not signed the document as a witness simultaneously when the document was alleged to have been executed by the defendant and that P.W.2's signature was obtained much later on the directions of P.W.1.

16. I wish to say nothing further on this aspect lest it should prejudice the case of either parties before the appellate Court which has to go into the merits of the case again. Suffice it to say that these vital contradictions pointed out above had not at all been noticed by the appellate Court.

17. When I had indicated my inclination to remit the appeal for reconsideration, Mr.V. Shanmugam learned counsel for the respondent would contend very vehemently that this Court while exercising its jurisdiction under Section 100 C.P.C. will not interfere with pure findings of fact, by substituting its own assessment of the evidence. He would also refer to various rulings on this issue to support his contention that the High Court ought not to interfere with the findings of fact, even if the

conclusions of the appellate Court were not palatable to the High Court. Reference was made to the oft-quoted judgment of the Supreme Court in Ramachandra v. Ramalinga, holding that the High Court cannot interfere with the conclusions of fact recorded by the appellate Court, however, erroneous the said conclusions may appear to be to the High Court. Reliance was also placed on the observations of the Supreme Court in the following judgments:-

> In the judgment reported in Kshitish Chandra v. Commr. of Ranchi, , it was held that the High Court had exceeded its jurisdiction in reversing the concurrent findings of the fact. The observations contained in the judgment reported in Dudh Nath Pandey v. Suresh Chandra Bhattasali, to the effect that the High Court had made a fresh appraisal of evidence and had come to a different conclusion contrary to the findings of the first appellate Court and that the High Court cannot do so in its exercise of its power under Section 100 C.P.C., were also sought to be relied upon.

18. In the judgment reported in P. Velayudhan v. K.I. Moidu, 1990 (Supp.) S.C.C. 9 the Supreme Court held that the High Court ought not to have reappraised the evidence and interfered with the findings of facts arrived at by the first appellate Court.

19. In the judgment reported in Dr. Ranbir Singh v. Asharfi Lal, the Supreme Court held that the High Court was not justified in reappreciating the evidence and substituting its own conclusions recorded by the Courts of fact without formulating any substantial question of law.

20. High Court's interference in the Second Appeal with concurrent findings of fact of the trial Court and the appellate Court on the ground of probability was also held to be unjustified by the Supreme Court in its judgment reported in Ramanuja Naidu v. V. Kanniah Naidu, .

21. In the Judgment reported in Navaneethammal v. Arjuna Chetty, the Supreme Court held that interference with the concurrent findings of the fact of the Courts below must be avoided unless warranted by compelling reasons and that the High Court was not expected to reappreciate the evidence just to replace the findings of the lower appellate Court. Even assuming that another point of view was possible on the appreciation of the same evidence, that should not have been done by the High Court.

22. On the basis of the above mentioned judgments, learned counsel for the respondent would contend that the points on which submissions have been made on behalf of the appellant, was purely within the domain of the factual findings and hence cannot be entertained.

23. The scope of interference of findings of fact in a Second Appeal and the rulings on the said issue are as old as the Code of Civil Procedure and in the words of the Supreme Court in Ramachandra v. Ramalinga, it is an old familiar question. The jurisdiction of the High Court under Section 100 C.P.C. is very peculiar. It is neither as wide as under Section 96 (Appeals) nor as restricted as under Section 115 C.P.C. (Revision). The term "question of law" and "substantial question of law" as occurring in Section 100 C.P.C. both prior to and after 1976 Amendment has always been understood and interpreted as to include questions of fact as concluded by the Courts below which

would be vitiated if based on no evidence or on perverted appreciation of evidence resulting in conclusions which could not have been arrived at by any reasonable person or by completely ignoring the material evidence on record. The bulk of the Second Appeal litigants, belong to the middle class and poor sections of the society and it has to be borne in mind that a Second Appeal for all practical purposes would be the final stage of the litigation and interference by or even admission of any appeal by the Supreme Court as against the judgments of the High Court, is conceivable only in a very few cases. As such the Supreme Court as well as the various High Courts have always been alive to the situation that in the interest of justice it would be necessary not to ignore improper appreciation of evidence or to turn a blind eye to glaring mis-reading of the evidence by the Subordinate Courts. In fact in the very judgments relied upon by learned counsel for the respondent such as reported in Ramachandra v. Ramalinga, and Navaneethammal v. Arjuna Chetty, it has been held that if a finding of fact had been recorded by the appellate Court without any evidence then such a finding can be successfully challenged in Second Appeal and if there were circumstances of compelling reasons warranting such interference. Therefore, the fact remains that a question of fact is not a taboo for Section 100, C.P.C. It is also well settled that an appellate Court cannot interfere and set aside the findings of the trial Court which had the advantage of watching the demeanour of the witnesses, unless there are very strong and compelling reasons to reverse the judgment.

24. In the present case as I had already pointed out the only issue which arises for consideration is the truth of the execution of Ex.A.1 agreement and that there is absolutely no reference in the judgment of the appellate Court to the evidence of the parties pertaining to the execution of the document, nor about the vital contradictions as between the evidence of P.W.1 and P.W.2. In a suit which seeks to deprive a person of his rights over his property merely on the basis of an agreement, even if the said agreement had been proved, the law requires (Section 20 of the Specific Relief Act) the Courts to be "guided by judicial principles and capable of corrections by a Court of appeal". When the appellate Court had failed to consider vital aspects of the evidence even as regards the proof of the execution of the agreement, this Court has to step in to correct the error.

25. In the background of these facts, perusal of the following judgments rendered by the Supreme Court reveal that there is no justification to construe Section 100 in a very narrow and restricted sense and the recent trend has been in favour of keeping an open eye as against the glaring misreading, misquoting or failure to consider crucial evidence. These judgments will also show that the Supreme Court had not only upheld the interference by the High Court against the findings rendered by the first appellate Court, but also as against the concurrent findings of fact by both the lower Courts on several grounds.

26. In Sonawatia v. Sri Ram, the Supreme Court held that in cases where the appellate Court had arrived at its conclusions by ignoring important evidence on record such findings are not binding in the Second Appeal.

27. In Ram Dayal v. Ganga Prasad Singh, 1969 (I) S.C.W.R. 1069 it was held by the Supreme Court that though ordinarily the High Court will not interfere with concurrent findings of the fact, where the High Court had held that the decision of the Courts below were passed on fabricated document, the High Court was justified in interfering with the findings of fact in the Second Appeal.

28. In the judgment reported in Radha Nath v. Haripada, , it was held that on proved and admitted facts it was open to the High Courts to interfere with the contrary findings of the Courts below.

29. In Madan Lal v. Gopi, , it was held by the Supreme Court that though whether a person was in a fit state of mind to execute the adoption was a question of fact, yet where both the Courts below had ignored the weight of preponderating circumstances and allowed their judgments to be influenced by inconsequential matters, the High Court was justified in reappreciating the evidence and in coming to its own independent conclusions.

30. In Surain Singh v. Mehenga, , the Supreme Court held that when both the Courts below had recorded diverse findings and where the material evidence and the relevant circumstances had not been adverted to by the appellate Court, the High Court was justified in interfering with the finding of fact.

31. In Kochukakkada Aboobacker v. Attah Kasim, , the Supreme Court held that where the trial Court and the first appellate Court did not consider the relevant documents in a proper perspective, the High Court was entitled to reconsider the evidence. In D.S. Thimmappa v. Siddaramakka, , it was held that where the first appellate Court failed to draw the proper inference from proved facts and to apply law in proper perspective, the High Court in Second Appeal was justified in drawing proper inference from such proved facts and that such interference by the High Court was proper.

32. In the Judgment in Sitaramacharya v. Gururajacharya, , the Supreme Court held that in a case where the trial Court relied on certain admission made by the respondent in certain earlier proceedings, but the appellate Court had taken the view that the admissions were made under compelling circumstances, it was held that the High Court ought to have interfered with the findings of the appellate Court that the High Court erred in dismissing the Second Appeal holding that the findings of the appellate Court were findings of fact.

33. In Major Singh v. Rattan Singh, the Supreme Court dealing with a case as to whether a Will was validly executed and the trial Court and the first appellate Court had concurrently found that the Will was not validly executed and the High Court on evidence held that the rejection of the evidence of the attestators was not correct, the Supreme Court held that the High Court was justified in interfering with the concurrent findings.

34. In the Judgment reported in Mehurnnisa v. Visham Kumari, AIR 1998 S.C. 427 the Supreme Court dealt with an issue of bona fide requirement of the landlady starting a clothing business and held that the lower appellate Court while reversing the judgment of the trial Court failed to give due importance to certain facts, it was held that the interference by the High Court was justified.

35. In the Judgment of this Court reported in Muthu Goundar v. Poosari (a) Palaniappan, , P. Sathasivam, J. held that if the finding of the lower appellate Court was based on surmises, the same can be interfered with.

36. In the judgment reported in Rahamathulla Shuthari (a) Peer Hazarath v. The Muslim Jamath of Eachampatti Etc. & others, 1998 (I) L.W 413, S.S. Subramani, J. held that failure of the lower Courts to consider the materials of evidence on record, would entitle the High Court under Section 103 to consider the evidence and to come to a different conclusion.

37. In the judgment reported in Rajammal v. Ramasami and three others, K. Sampath, J. held that in a case of the genuineness of a will where the appellate Court had ignored the weight of circumstances and allowed its judgment to be influenced by inconsequential matters, it was held that the High Court was entitled to interfere with under Section 100 C.P.C.

38. Therefore, on a consideration of the settled proposition of law as regards the scope of interference of the findings of facts recorded by appellate Court and having regard to the error committed by the appellate Court in failing to consider the circumstances under which Ex.A.1 came to be executed, the findings of the appellate Court cannot be sustained. Therefore, I am inclined to hold that the appeal requires to be remanded to the lower appellate Court for reconsideration on the merits of the appeal especially in the context as to whether the requirements under Section 16(c) of the Act had been fulfilled or not in the context of failure to examine the plaintiff as a witness and as to whether the plaintiff has properly established the truth and of the execution of Ex.A.l. The lower appellate Court is directed to dispose of the appeal within two months from the date of receipt of a copy of Judgment alongwith the records.

39. In the result, the Second Appeal is allowed and the judgment and decree of the lower appellate Court are set aside and the matter is remanded to the lower appellate Court for fresh disposal as indicated above. No costs.