

Lakshmi vs Muthusamy on 16 September, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2011

CORAM:

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Second Appeal No. 1541 of 1998
and

C.M.P.No.13533 of 2004

1. Lakshmi
2. Sellavel
3. Pachayee

... Appellants

VS

Muthusamy

...Respondent

. . .

Prayer:- Second Appeal filed under Section 100 of C.P.C against the judgment and dec

. . .

For Appellants : Mr. T.Murugamanicakm

For Respondent : Mr. T.P.Manoharan

. . .

J U D G M E N T

The defendants in O.S.No.24 of 1996 on the file of the Subordinate Judge, Bhavani are the appellants and the plaintiff in the suit is the respondent herein.

2. The said suit was filed for specific performance based on a registered Sale Agreement dated 31.08.1994 entered into between the defendants and the plaintiff. The suit was dismissed by the trial Court. As against the same, an appeal was preferred by the plaintiff in A.S.No.27 of 1997 on the file of the I Additional District Judge cum Chief Judicial Magistrate, Erode. By decree and judgment dated 13.02.1998, the lower appellate Court allowed the appeal thereby setting aside the decree and judgment of the trial Court and decreed the suit as prayed for. As against the same, the defendants are before this Court with this Second Appeal.

3. The case of the plaintiff as could be culled out from the plaint is as follows: The defendants are the absolute owners of the suit property. On 31.08.1994, the defendants entered into a sale agreement with the plaintiff by which the defendants agreed to sell the suit property to the plaintiff for a valuable consideration of Rs.40,000/-. A sum of Rs.30,000/- was paid at the time of execution of the sale agreement itself as advance. The balance of sale consideration was, thus, Rs.10,000/-. As per the agreement, it was agreed upon that the plaintiff should pay the balance of sale consideration within five years from the date of sale agreement and get the sale deed executed in his favour. Ever since the date of agreement, the plaintiff was always ready and willing to perform his part of agreement and to get the sale completed in his favour. But the defendants did not come forward to receive the balance of sale consideration and to complete the sale in favour of the plaintiff. In those circumstances, the plaintiff issued a legal notice on 04.01.1996 to the defendants calling upon them to perform their part of contract. No reply whatsoever was sent by the defendants nor did they come forward to complete the sale in favour of the plaintiff. Therefore, the plaintiff filed the present suit for specific performance.

4. In the written statement, the defendants contended that it is true that they are the absolute owners of the suit property. But it is not true that they intended to sell the suit property to the plaintiff and further they did not execute the sale agreement dated 31.08.1994 with an intention to sell the suit property. Further, it is contended that they have never agreed to sell the suit property for Rs.40,000/- and they did not receive a sum of Rs.30,000/- as stated in the plaint. According to their specific case, the plaintiff is doing money lending business along with few other persons including one Mr.Uthirakumar under the name and style of "Sabari Arul Finance" at Oricheri Pudur village. The second defendant borrowed a sum of Rs.4,000/- from the said finance, thereby agreeing to repay the said amount with interest at the rate of 12%. But the second defendant was not able to pay the interest regularly for the said amount to the said concern. While so, his father had fallen seriously ill due to paralysis. In order to meet out the medical expenses for his ailing father, who was hospitalised in a private hospital at Erode, the second defendant borrowed yet another sum of Rs.10,000/- from the said "Sabari Arul Finance". As per the terms of the loan, the second defendant should have paid a sum of Rs.1,250/- per month for a total period of 10 months. Accordingly, he paid the dues for five months. The balance he could not pay since in the meanwhile, his father died. The balance amount to be paid to the said finance corporation was Rs.9,000/- under the above two transactions, besides interest. Since the second defendant could not pay the said amount, the plaintiff and other partners of the finance corporation along with few others, convened a Panchayat and in the Panchayat they wanted the defendants to execute a sale agreement as though the defendants had agreed to sell the property for Rs.40,000/- as a security for the loan amount. Since the defendants could not meet the pressure brought upon them for repayment of the loan amount and since the above alternative suggestion was believed to be true, they executed the said sale agreement dated 31.08.1994. The defendants were assured even before the execution of the sale agreement that as and when the defendants repay the loan amount of Rs.9,000/- with interest, the sale agreement would be cancelled and returned to them. Believing the same, the defendants executed the sale agreement. It is further stated by the defendants that the property would be worth more than 7,00,000/- . Therefore, according to them, they would not have agreed to sell the property for a paltry sum of Rs.40,000/- only. Therefore, though the sale agreement is a registered document, the same cannot be enforced in law for the reasons stated above. Thus, according to the

defendants, the suit is liable to be dismissed.

5. Based on the above pleadings, the trial Court framed the following issues:

- "i. Whether the plaintiff is entitled for a decree for specific performance?
- ii. Whether the sale agreement dated 31.08.1984 was needed to be acted upon?:
- iii. Whether the Panchayat alleged by the defendants is true and if so, whether it would bind the plaintiff?
- iv. To what relief the plaintiff is entitled for"

6. In order to prove their respective claims, the parties have let in evidence both oral and documentary. On the side of the plaintiff, he was examined as P.W.1 and as many as six documents were exhibited. Ex.A.1 is the sale agreement in question. Ex.A.2 is the legal notice issued by the plaintiff. Exs.A.3 to A.5 are postal acknowledgments. Ex.A.6 is the original title deed standing in the name of Mr.Karuppa Gounder. On the side of the defendants, the second defendant was examined as D.W.1 and one K.L.Periyasamy was examined as D.W.2 and as many as five documents were exhibited. Ex.B.1 and B.2 are the receipts for repayment of the amount towards loan secured by the second defendant to Sabari Arul Finance. Ex.B.3 is the letter from Sabari Arul Finance for repayment of the loan amount. Ex.B.4 is the demand notice from the Sabari Arul Finance for repayment of the loan amount and Ex.B.5 is the legal notice issued on behalf of one R.Uthirakumar.

7. Having considered all the above materials, the trial Court dismissed the suit and the same was reversed by the lower appellate Court. That is how, the defendants are before this Court with this second appeal.

8. While admitting the second Appeal, this Court framed the following substantial questions of law:

- "1. Whether the judgment of the lower appellate Court is vitiated in that it has not followed the principles laid down in A.I.R.1982 S.C page 1 wherein it has been held that an agreement of sale need not be strictly construed in terms of Section 92 of the Indian Evidence Act, when there is evidence to show that the agreement was intended to be a security for a financial transaction?
2. Whether the lower appellate Court misread the evidence and failed to consider the materials on record in granting the relief of specific performance as prayed for in the plaint ?"

9. During the course of hearing, this Court found that an additional substantial question of law in respect of the burden of proof should also be framed. Accordingly, the following additional substantial question of law is framed:

"Whether the lower appellate Court was right in fastening the burden of proof on the defendants that the said sale agreement was obtained by undue influence ?"

10. The learned counsel on either side advanced arguments on the additional substantial question of law as well. As a matter of fact, both the counsel argued the matter on 15.09.2011 at length on all the substantial questions of law as well as on facts and at the request of the learned counsel for the respondent/plaintiff for further arguments, the matter was adjourned from yesterday to today. Today also, the learned counsel on either side have advanced arguments at length on all the substantial questions of law including the additional substantial question of law and also placed reliance on a number of judgments, which I will make reference at the appropriate stages of this judgment.

11. The learned counsel for appellants would take me through the oral as well as documentary evidence and submit that though the sale agreement is a registered one, the presumption arising thereof is rebutted by way of documents as well as oral evidence. The learned counsel would submit that the loan transaction between "Sabari Arul Finance" and the second defendant has been duly established. The learned counsel would further submit that the fact that the plaintiff is one of the partners of "Sabari Arul Finance" is also not disputed. The learned counsel would further point out that Mr. Uthirakumar is yet another partner of the said finance concern and he has demanded repayment of Rs.20,000/- from the plaintiff under Ex.A.5. All these aspects, according to the learned counsel, would go to show that the plaintiff was in a dominant position over the defendants and accordingly, they got the sale agreement executed in his favour by undue influence. The said sale agreement is, therefore, voidable, the learned counsel contended. Since the defendants have avoided the said agreement, the same cannot be enforced. Therefore, according to the learned counsel, the lower appellate Court was not right in decreeing the suit.

12. Per contra, the learned counsel appearing for the respondent/plaintiff would vehemently contend that there was no issue before the lower appellate Court about the voidability of the contract on the ground of undue influence. Therefore, according to him, the arguments advanced by the learned counsel for the appellants that the sale agreement is voidable at the option of the defendants on the ground of undue influence, cannot be heard at all. The learned counsel would further submit that when the execution of sale agreement is admitted, the defendants are precluded from letting in any oral evidence contrary to the terms of the contract in view of the bar contained in Section 92 of the Evidence Act. The learned counsel would further submit that since the sale agreement is a registered document and the execution of the same is also not disputed, there shall be a presumption that it contains only the truth and the terms of the contract are, therefore, enforceable in law. The learned counsel would further submit that assuming that the second defendant has secured loan from the finance corporation, namely, "Sabari Arul Finance, it has got nothing to do with the sale agreement. The sale agreement has not been executed in favour of "Sabari Arul Finance" and it has been executed only in favour of the plaintiff. Incidentally, the plaintiff is also a partner of the finance corporation. On that score, according to the learned counsel, it cannot be held that the plaintiff was in a dominant position over the defendants. Thus, according to the learned counsel, the essential requirements of Section 16(3) of the Indian Contract Act have not been in any manner satisfied by the defendants and therefore, the burden has not been shifted upon the plaintiff

to prove the absence of undue influence. The learned counsel would further submit that the lower appellate Court has considered all the above facts and has rightly decreed the suit, which does not require any interference at the hands of this Court.

13. I have considered the above submissions. As of now, there is no dispute between the parties that the sale agreement under Ex.A.1 was executed by the defendants in favour of the plaintiff. The main dispute is as to whether the sale agreement was intended to be acted upon and the terms of the agreement are true. In order to resolve this dispute, the question whether the defendants are free to let in any evidence contrary to the terms of the sale agreement, in view of the bar contained in Section 92 of the Indian Evidence Act needs to be answered first. The learned counsel relies on a judgment of this Court in *Mrs.K.Rajeswari & Others Vs M.V.Shanmugam* reported in 2011-4, Law Weekly, 164, wherein this Court has held in paragraph 13 of the judgment as follows:

"As per Section 92 of the Indian Evidence Act, since Ex.A.1 sale agreement is a registered document, the appellants/defendants are excluded from letting in any oral agreement contra to the written registered document. Proviso 3 to Section 92 of the Indian Evidence Act shows that the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of the property, may be proved and so, it is the duty of the appellants/defendants to prove the same. Except the oral ipse dixit of the appellants/defendants and Exs.A.12 and 14, no other document or no supporting evidence is available."

14. There can be no doubt that a party to a contract is debarred from letting in any evidence contradicting, varying, adding to or subtracting from its terms. But there are also provisos to Section 92 of the Indian Evidence Act. The first proviso to Section 92 of the Indian Evidence Act permits letting in any evidence to prove 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. In the case relied on by the learned counsel, it was not argued before the Court that the facts of the said case would fall within any of the provisos to Section 92 of the Indian Evidence Act. It was in those circumstances, the learned Judge has held that the evidence let in by the party to the contract in order to contradict the terms of contract cannot be permitted.

15. In the case on hand, the facts are totally distinguishable. In this case, in the written statement, it has been very clearly stated that there was no consideration passed at all. Further, it has also been stated that the sale agreement was obtained from the defendants by making a representation that the said sale agreement would never be enforced and as soon as the loan amount is repaid, the same will be cancelled and returned to the defendants. This shows that there was a specific pleading regarding undue influence and fraud played upon the defendants. In such view of the matter, I hold that the evidence let in by the defendants in this case to prove that the sale agreement was not intended to be acted upon since it was not supported by consideration and since it was obtained by undue influence and fraud, cannot be eschewed from consideration. Thus, the first argument of the learned counsel for the respondent based on the judgment of this Court in *K.Rajeswari's* case deserves only to be rejected.

16. Next, the legal issue involved is the applicability of Section 16 of the Indian Contract Act. The contention of the learned counsel for the appellants is that under Section 16(3) of the Indian Contract Act, the burden is upon the plaintiff to prove the absence of undue influence on his part in the matter of execution of Ex.A.1 sale agreement. To the contra, it is the contention of the learned counsel for the respondent that the burden is only upon the appellants/defendants to prove the same. For this proposition, the learned counsel for the respondent relied on a judgment of the Hon'ble Supreme Court in Krishnamohan Kul alias Nani Charan kul and another Vs Pratima Maity and others reported in (2004) 9 Supreme Court Cases 468. The learned counsel placed reliance on paragraph 12 of the said judgment wherein the Hon'ble Supreme Court has held as follows:

"The onus to prove the validity of the deed of settlement was on Defendant 1. When fraud, mis-representation or undue influence is alleged by a party to the suit, normally, the burden is on him to prove such fraud, undue influence or mis-representation. But when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, mis-representation or undue influence is upon the person in the dominating position, and he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case, the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the court watches with jealousy all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position. This principle has been ingrained in Section 111 of the Indian Evidence Act."

17. In my considered opinion, this judgment, instead of supporting the case of the plaintiff, would only go to support the case of the appellants/defendants. That was a case where the fiduciary relationship between the plaintiff and the defendant was pleaded. In those circumstances, the Hon'ble Supreme Court has held that it is the initial burden of the party, who pleads such relationship to prove the same. In our case, what is pleaded is not fiduciary relationship between the plaintiff and the defendants, instead it is pleaded that the plaintiff was in a position to dominate the will of the defendants to obtain unfair advantage over the defendants. Before discussing this issue further, let me extract Section 16 of the Indian Contract Act, which reads as follows:

"16. 'Undue influence' defined: (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:

a. where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or b. where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. "

18. A close reading of Section 16 would go to show that sub-section (2) creates a fiction of domination on the part of certain persons on the will of others. Sub-Section 2 (a) states that where a person holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, it shall be deemed that such person is in a position to dominate the will of the other. Therefore, what is required of for the defendants in this case is to prima facie prove the real or apparent authority of the plaintiff over the defendants. It needs to be underlined that it is not required in all cases that in order to presume domination the authority should be proved to be real. Instead, according to sub-Section 2(a) of the Indian Contract Act, it would suffice if an "apparent authority" over the other is proved.

19. In this case, the plaintiff is admittedly a partner of the finance corporation, namely "Sabari Arul Finance". From Exs.B.1 to B.4, it has been clearly established that the second defendant had borrowed money and he was not in a position to repay the same. It is also not in dispute that the second defendant's father was suffering from paralysis and he was in the hospital undergoing treatment and ultimately, he died. Thus, it has been established that the second defendant was in need of money to meet the medical expenses of his father. The first loan secured by the second defendant was prior to 02.08.1994. Ex.B.1 would go to show that a sum of Rs.10,000/- had been borrowed by the second defendant from "Sabari Arul finance". The term of repayment is ten installments. On 02.08.1994, the second defendant has paid a sum of Rs.1,250/- towards monthly installment. This document is not in dispute. Ex.B.2 is another receipt issued by "Sabari Arul Finance" for repayment of loan amount on 29.10.1990. Ex.B.1 relates to the loan account No.69 whereas Ex.B.2 relates to the loan account No.104. As per Ex.B.1, the principal amount was Rs.10,000/- whereas according to Ex.B.2, the principal amount is Rs.4,000/- Therefore, these two receipts relate to two different loans extended by "Sabari Arul Finance" to the second defendant. Thus, it is crystal clear that even before the execution of Ex.A.1, sale agreement, the second defendant had secured loan from "Sabari Arul Finance". Ex.B.3 is a letter from "Sabari Arul Finance" dated 09.02.95. In the said letter, it has been stated that though the second defendant secured loan four years before, the same was not repaid in toto. This would go to clearly show that from 1991 onwards the loan amount was due from the second respondent to "Sabari Arul finance". Ex.B.4 is yet another letter dated 11.01.1995 from "Sabari Arul Finance". In this letter, it is clearly

stated that the loan amount secured by the second defendant was Rs.10,000/-. It is further stated in the said letter that unless the amount was repaid within four days, action would be taken against him. Ex.B.5 is a legal notice issued by one R.Uthirakumar, who is admittedly a partner of the said Finance corporation. It is dated 08.07.1995. It is stated in the said notice that on 10.07.1994, the second defendant borrowed a sum of Rs.20,000/- and executed a promissory note to repay the same with interest at the rate of 12% p.a. It is further stated in the said notice that despite demand, the amount had not been repaid and therefore, legal action would be taken for the same. All these documents would clearly go to show that atleast from the year 1991, the second defendant had fallen in huge arrears towards the loan obtained from "Sabari Arul Finance", in which, the plaintiff and one Uthirakumar are the partners. During cross examination, P.W.1 has tacitly admitted that he was a partner of the said finance corporation besides Uthirakumar. It is also in evidence that the second defendant and his family members were in a financial crunch and they were not in a position to repay the loan amount. The plaintiff and Uthirakumar being the creditors, were, therefore, in a dominating position over the defendants. From the evidences available, it has been clearly established by the defendants that the plaintiff was holding authority over the defendants which is, if not real, atleast apparent. Once this is so proved, it shall be deemed as per Section 16(2) of the Indian Contract Act, that the plaintiff was in a position to dominate the will of the defendants. Thus, the defendants have satisfied the legal requirements of Section 16 of the Indian Contract Act. Thus, they have proved undue influence.

20. The learned counsel for the respondent would submit that mere proof of domination over the will of the defendants would not be sufficient and instead it is the duty of the defendants to prove that the sale agreement was not executed for consideration. This argument is based on Section 101 of the Evidence Act. In my considered opinion, but for the special rule of evidence, provided in Section 16 of the Indian Contract Act, Section 101 of the Evidence Act would have come to rescue the plaintiff. Section 101 of the Evidence Act is a general provision relating to the burden of proof whereas Section 16 of the Contract Act is a special provision in respect of the burden of proof of undue influence in the matter of a contract. Therefore, Section 16 of the Contract Act shall have overriding effect over Section 101 of the Evidence Act. A close reading of Section 16 (2) of the Contract Act would go to show that once the initial burden of proving the position of the plaintiff to dominate the will of the defendant is discharged, the burden is shifted on the plaintiff to prove absence of undue influence. In other words, onus is cast upon the plaintiff to prove that the transaction was fair, reasonable and true (See para 12 of the judgment of the Hon'ble Supreme Court in Krishnamohan Kul 's case cited supra)

21. Now, the question is whether the plaintiff has discharged the burden of proving absence of undue influence. The plaintiff has examined only himself to speak about the execution of the sale agreement and he has not examined any other person including the attestors of the document to speak about the genuineness of the sale agreement. But the contention of the learned counsel for the respondent is that since the sale agreement (Ex.A.1) is a registered document, there shall be a presumption that the contents of the said document are true and genuine. For this proposition, the learned counsel relied on a judgment of the Hon'ble Supreme Court in Vimal chand Ghevarchand Jain and others VS Ramakant Eknath Jadoo reported in (2009) 5 Supreme Court Cases, 713. In paragraph 36 of the said judgment, the Hon'ble Supreme Court has held as follows:

" If the appellants were able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that the apparent state of affairs was not the real state of affairs. It was for the defendant in a case of this nature to prove his defence. The first appellate court, therefore, in our opinion, misdirected itself in passing the impugned judgment insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration."

22. Placing reliance on the said judgment of the Hon'ble Supreme Court, the learned counsel would submit that since in this case, Ex.A.1 is a registered sale agreement, there shall be a presumption of the genuineness of the document and the burden to prove the contrary is upon the defendants. The said argument, though attractive, does not persuade me. The presumption as stated in the judgment of the Hon'ble Supreme Court is very limited, only to presume the execution of the sale agreement and thereafter, the onus will be on the respondent to show that the apparent state of affairs was not the real state of affairs. That is not a case where Section 16 of the Indian Contract Act which provides for the burden of proof of absence of undue influence, was dealt with by the Hon'ble Supreme Court. That is a case where the Hon'ble Supreme Court was concerned with Sections 91, 92 ,103 and 114 of the Evidence Act. As I have already stated, in this case, though there may a presumption of execution of Ex.A.1, that will not be suffice for the plaintiff to contend that the transaction indicated in the said sale agreement is true and genuine in view of Section 16 of the Indian Contract Act. In this case, since the defendants have proved the position of the plaintiff to dominate the will of the defendants, the burden to prove absence of undue influence is very heavy upon him. Therefore, the judgment of the Hon'ble Supreme Court relied on by the learned counsel for the respondent does not in any manner go to advance the case of the plaintiff. It is not explained to the Court as to why the other persons, such as, the attestors of Ex.A.1 who would have witnessed a sum of Rs.30,000/- being paid by the plaintiff to the defendants and in respect of the other terms agreed upon between the parties have not been examined. Even the scribe has not been examined. In the absence of any other witness, who was a witness to the sale agreement being entered into between the plaintiff and the defendants, in my considered opinion, going by the factual background such as the dominating role the plaintiff had over the defendants, I am of the view that it is not safe to rely on the evidence of P.W.1 alone to hold absence undue influence on the part of the plaintiff. Thus, in my considered opinion, the plaintiff has failed to discharge his burden of proving the absence of undue influence and thus the transaction is genuine.

23. As per Section 19(A) of the Indian Contract Act, if an agreement for sale has been obtained by undue influence, it is voidable and the same can be avoided at the option of the party whose consent was so caused by undue influence. In this case, by filing the written statement, the defendants have avoided the contract. Therefore, in law, the said contract cannot be enforced.

24. At this juncture, I have to refer to the next argument advanced by the learned counsel for the respondent, who would submit that though fraud is also alleged, the same has not been proved. A perusal of the written statement would go to show that there was a plea that fraud was played upon the defendants to execute the sale agreement in as much as the defendants gave assurance that the

sale agreement would be kept without enforcing and the same would be returned if the loan amount is repaid. Thus, by giving false assurance amounting to fraud, the document was obtained.

25. There is no special provision in the Indian Contract Act regarding the burden of proof of fraud. There is no legal presumption in favour of the person who pleads fraud. As per Section 101 of the Evidence Act, fraud is a fact which is to be proved by the person who pleads fraud. Section 17 of the Indian Contract Act defines fraud as follows:

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent or to induce him to enter into the contract"

1. the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. the active concealment of a fact by one having knowledge or belief of the fact;
3. a promise made without any intention of performing it;
4. any other act fitted to deceive;
5. any such act or omission as the law specially declares to be fraudulent."

26. Here, sub-Section 3 of Section 17 needs to be underlined, which suggests that a promise made without any intention of performing it amounts to fraud. In this case, according to the defendants, a promise was made that the sale agreement will be kept as a security and the same would be returned to the defendants as soon as the loan amount was repaid. According to the learned counsel for the respondent, this aspect has not been proved by the defendants at all. The learned counsel would point out that though it is alleged that the sale agreement was obtained at the instance of Panchayatdars, no Panchayatdar has been examined. I find some force in the argument of the learned counsel for the respondent in this regard. In this regard the defendants would have examined the Panchayatdars. However they have examined an independent witness as D.W.2. His evidence would go to show the circumstances under which the sale agreement Ex.A.1 was executed. The circumstances, which I have culled out herein above, the position of the defendants and the evidence of D.Ws 1 and 2 would all go to prove that a false assurance was given by the plaintiff that the sale agreement would be returned as soon as the repayment of loan amount was made. Thus, in my considered opinion, the defendants have also proved fraud on the part of the plaintiff.

27. Yet another contention of the learned counsel for the respondent is that there was no issue regarding undue influence and fraud and thus the plaintiff had no occasion to meet the said pleas. I have given my anxious consideration to this submission; but I find no force in the same for, there were pleadings, the parties had identified the disputes (issues), contested the same and let in evidence. So, absence of an issue in this respect has not caused any prejudice to the plaintiff resulting in failure of justice. Therefore, this argument is rejected.

28. Lastly, one of the terms of Ex.A.1 needs to be considered. According to the same, out of the total consideration fixed at Rs.40,000/-, a sum of Rs.30,000/- was paid and the balance of Rs.10,000/- was to be paid in five years . It needs to be noticed that the plaintiff is not a poor man. He was doing money lending business. He was also a partner of the "Sabari Arul Finance". Whether such an affluent person would have gained five years' time to pay a paltry sum of Rs.10,000/- is another suspicious circumstance. D.Ws.1 and 2 would say that the property would be worth more than Rs.7,00,000/- whereas, the sale agreement was entered into only for partly sum of Rs.40,000/- . This also creates some more doubt about the genuineness of Ex.A.1. These suspicious circumstances also go to support the case of the defendants.

29. In view of the foregoing discussions, I hold that Ex.A.1 is not a genuine document and it is voidable because it suffers from the vices of undue influence as well as fraud. Therefore, there can be no decree passed for specific performance based on the said document. Accordingly, I answer all the substantial questions of law. The lower appellate Court has failed to consider these aspects in their proper perspective.

30. In the result, the appeal is allowed; the decree and judgment of the lower appellate Court is set aside and the suit shall stand dismissed. No costs. Connected miscellaneous petition is closed.

Index:Yes
Internet;yes
pal

16.09.2011

S. NAGAMUTHU, J.

To

1. The Subordinate Judge,
Bhavani
2. The I Addl.District Judge cum
Chief Judicial Magistrate,
Erode.

Dt .16.09.20