



S.A.No.897 of 2011
and M.P.No.1 of 2011

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2023

CORAM

THE HONOURABLE MRS. JUSTICE **R.HEMALATHA**

S.A.No.897 of 2011 &

M.P. No.1 of 2011

P. Subramanian

...Appellant

Vs.

1. Mariasundari @ Sundari

2. Kulandaisamy

... Respondents

Prayer : Second Appeal filed under Section 100 CPC, 1908 against the decree and judgment dated 07.09.2010 passed in A.S. No.30 of 2009, on the file of the I Additional Sub Court, Salem, reversing the decree and judgment dated 15.11.2008 passed in O.S. No.2123 of 2004, on the file of the II Additional District Munsif, Salem.

For Appellant : Mr.T.S.Vijaya Raghavan

For R1 & R2 : No appearance.

JUDGMENT

The appellant is the 2nd defendant in O.S. No.2123 of 2004 on the file of the II Additional District Munsif, Salem. The 1st



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respondent/plaintiff filed the suit for specific performance of contract and also for a declaration that the sale deed executed by the 1st defendant in favour of the 2nd defendant as null and void and for a consequential relief of permanent injunction restraining the 2nd defendant from interfering with her peaceful possession and enjoyment of the suit property.

2. For the sake of convenience, the parties are referred to as per their ranking in the trial court and at appropriate places, their rank in the present appeal would also be indicated.

3. The case of the plaintiff in nutshell is as follows:

- i. The suit property is a house site in Block No.11, T.S. No.4, Salem Town, admeasuring 437 sq. ft along with a tiled house put up in the front portion of the property.
- ii. The plaintiff has been in possession and enjoyment of the suit property in pursuance of the oral agreement of sale on 20.05.1988 between her and the 1st defendant. The 1st defendant also received a sum of Rs.8,000/- from her.



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- iii. On 31.10.1988, the 1st defendant, received another sum of Rs.7,000/- from her for constructing a house and executed a loan document (Ex.A1) in respect of the same.
- iv. Subsequently another sum of Rs.30,000/- was received by the 1st defendant from the plaintiff and he acknowledged the debt borrowed by him and executed a letter of acceptance on 14.07.1991 (Ex.A2).
- v. On 24.09.1991, the 1st defendant agreed to sell the suit property in favour of the plaintiff (Ex.A3) for a total sale consideration of Rs.32,000/- and agreed to deduct the sale price from the amount of Rs.50,000/- borrowed by him. He further agreed to pay the balance amount of debt in instalments.
- vi. Though the plaintiff requested the 1st defendant to perform his part of the contract by executing a sale deed in her favour, the 1st defendant did not come forward to fulfill his obligations under the contract.
- vii. To the shock and surprise of the plaintiff, the 1st defendant executed a sale deed dated 29.07.1991 (Ex.B2) in favour of the 2nd



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viii.Hence she filed the suit for the reliefs as stated above.

4. The suit was resisted by the defendants on the following grounds:

- i. The 1st defendant never borrowed any amount from the plaintiff and did not promise the plaintiff to sell the suit property in her favour.
- ii. The allegation of the plaintiff that she demanded the 1st defendant on 30.11.1991 and 05.12.1991 to execute the sale deed in her favour is totally false.
- iii. The 1st defendant had, in fact, sold the suit property in favour of the 2nd defendant for a valuable sale consideration of Rs.31,147/- on 29.07.1991 itself through a registered sale deed (Ex.B2).
- iv. He also handed over possession of the suit property to the 2nd defendant. As on the date of filing of the suit, the 2nd defendant is a lawful owner of the suit property and therefore there is no cause of action for filing the suit. The description of the suit property is also



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They therefore prayed for dismissal of the suit.

5. On the basis of the above pleadings, the trial court framed the following issues:

- 1) Whether the 1st defendant borrowed a sum of Rs.45,000/- from the plaintiff on various dates?
- 2) Whether there was an agreement of sale between the plaintiff and the 1st defendant in respect of the suit property?
- 3) Whether the defendants are duty bound to execute the sale deed in favour of the plaintiff?
- 4) Whether the sale deed executed by the 1st defendant in favour of the 2nd defendant is not valid?
- 5) Whether the plaintiff is entitled for a permanent injunction as prayed for by her?

6. In the trial court, the plaintiff examined herself and three



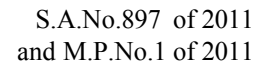
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other witness and marked Ex.A1 to Ex.A9. The 2nd defendant examined himself and marked Ex.B1 to Ex.B5.

7. After full contest, the learned II Additional District Munsif, Salem, dismissed the suit filed by the plaintiff vide his decree and judgment dated 15.11.2008 on the following grounds:

- i. Though it is alleged by the plaintiff that there was an oral agreement of sale between her and the 1st defendant during the year 1988 and that several amounts were borrowed by the 1st defendant, the plaintiff did not adduce any acceptable evidence to substantiate the same.
- ii. The mortgage deed (Ex.A1) dated 31.10.1988 does not mention the property which was mortgaged in favour of the plaintiff by the 1st defendant.
- iii. Moreover, the mortgage deed dated 31.10.1988 has not also been registered.
- iv. The evidence of P.W.2 to P.W.4 does not help the case of the plaintiff as they admitted that they did not personally know about



- v. The contention of the plaintiff that the 1st defendant agreed to sell the property for Rs.32,000/- and the sale consideration of Rs.32,000/- was deducted from Rs.50,000/- borrowed by the 1st defendant had also not been substantiated.
- vi. The plaintiff mainly relies on Ex.A3 dated 24.09.1991 to show that there was an agreement of sale in favour of the plaintiff in respect of the suit property. However, there is no specific mention in Ex.A3 that the sale consideration of Rs.32,000/- had to be deducted from the borrowed amount of Rs.50,000/-.
- vii. The plaintiff has not explained as to why she did not get the sale deed executed in her favour on the date of Ex.A3 especially when the entire sale consideration was paid by her.
- viii. The persons who signed Ex.A3 have not been examined to prove the said document.
- ix. The 1st defendant had no saleable interest in the suit property on the date of agreement of sale as he had already sold the suit property in favour of the 2nd defendant.



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x. The 2nd defendant had also adduced sufficient documentary evidence (Ex.B1 to Ex.B9) to show that he was put in possession of the suit property in pursuance of the sale deed dated 29.07.1991

8. Aggrieved over the decree and judgment passed by the trial Court, the plaintiff filed A.S.No.30 of 2009 before the I Additional Subordinate Court, Salem. The learned Subordinate Judge, Salem, after analysing the oral and documentary evidence adduced on both sides allowed the appeal and decreed the suit filed by the plaintiff vide his decree and judgment dated 07.09.2010 on the following grounds :

- i. The plaintiff by adducing Ex.A1 to Ex.A9 proved that there was an agreement of sale between her and the 1st defendant even in the year 1988.
- ii. Ex.A3 sale agreement has not been denied by the 1st defendant and the plaintiff has been in possession of the suit property.
- iii. The 1st defendant also did not give any reply to the notice dated 24.11.1991(Ex.B1) sent by the plaintiff.
- iv. The 2nd defendant did not adduce any acceptable evidence to show



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that he was put in possession of the suit property pursuant to the sale deed dated 29.07.1991 (Ex.B2) executed by the 1st defendant in his favour.

9.Now the present second appeal is filed by the 2nd defendant, the purchaser of the property from the 1st defendant, on the following substantial question of law:

"Whether the Lower Appellate Court was right in granting the relief of specific performance when the appellant had purchased the property prior to the agreement of sale which was sought to be enclosed by the 1st respondent ? "

10. Heard, Mr.T.S.Vijaya Raghavan, learned counsel for the appellant. Learned counsel for the 1st respondent filed a memo dated 16.12.2021 seeking permission of this Court to withdraw his vakalat for the 1st respondent since there was no response from his client. There is no representation on behalf of the 1st respondent even though her name was printed in the cause list.



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11. Mr.T.S.Vijaya Raghavan, learned counsel for the appellant contended that the plaintiff mainly relies on the agreement dated 24.09.1991 (Ex.A3) to show that there was an agreement of sale between her and the 1st defendant. Though in the plaint the plaintiff had stated that the entire sale consideration of Rs.32,000/- was deducted from the amount of Rs.50,000/- borrowed by the 1st defendant, the same does not find a place in Ex.A3. According to him, this has been taken into account by the trial Court and on the contrary, the first appellate Court had wrongly held that there was an agreement of sale between the plaintiff and the 1st defendant as it has not been specifically denied by both the defendants 1 & 2. He also contended that the plaintiff had earlier filed a suit in O.S.No.1050 of 1991 before the same Court for permanent injunction restraining the defendants from interfering with her possession and enjoyment of the suit property and the said suit was dismissed. The appeal filed by her was also dismissed. His specific contention is that even in the suit in O.S.No.1050 of 1991 she has mentioned about the sale agreement between her and the 1st defendant. In fact she filed the suit



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only for a bare injunction without reserving any right to file a separate suit for larger relief of specific performance of contract under Order II Rule 2 CPC and on this ground also the present suit is liable to be dismissed. His another contention is that on the date of the sale agreement i.e. on 24.09.1991 the 1st defendant did not have any saleable interest in the suit property and therefore, the plaintiff cannot get a decree in her favour. He also drew the attention of this Court to the interim order of stay granted by this Court at the time of admitting the present second appeal and contended that despite the order of interim injunction the trial Court had executed a sale deed in favour of the plaintiff in E.P.No.304 of 2011 in O.S.No.2123 of 2004 and hence the same should be set aside.

12. At the outset, it may be observed that the plaintiff before filing the present suit in O.S.No.2123 of 2004 seeking for specific performance of contract, had filed a suit in O.S.No.1050 of 1991 before the very same Court seeking for permanent injunction against the defendants in pursuance of the sale agreement between her and the 1st



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defendant without reserving any right to file separate suit seeking for larger relief of specific performance of contract under Order II Rule 2 CPC. Hence the present suit is not maintainable. Moreover, the suit in O.S.No.1050 of 1991 was dismissed and the appeal filed by her also was dismissed by the first appellate Court. Therefore, the contention of the plaintiff that she has been put in possession of the suit property pursuant to the sale agreement cannot be accepted.

13. The plaintiff, in order to substantiate that the 1st defendant borrowed various amounts from her and agreed to sell the suit property in her favour, relied on Ex.A1 and Ex.A2, which are dated 31.10.1988 and 14.07.1991. While Ex.A1 states that the 1st defendant borrowed a sum of Rs.7,000/- from the plaintiff Ex.A2 states that a sum of Rs.50,000/- was borrowed by him on various dates and the same would be repaid with interest in instalments on every Sunday. The 1st defendant had denied the execution of these two documents and the plaintiff in order to substantiate the same had examined PW2 to PW4. All of them admitted that they did not witness the 1st defendant borrowing a sum of



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Rs.50,000/- on various dates from the plaintiff.

14. Ex.A3 is dated 24.09.1991. It is stated in Ex.A3 that the 1st defendant agreed to execute the sale deed in respect of the suit property and that the entire amount of sale consideration of Rs.32,000/- was received on the same date. On the contrary, in the plaint the plaintiff had pleaded that the 1st defendant agreed to deduct the sale consideration of Rs.32,000/- from Rs.50,000/- borrowed by him and promised to repay the balance amount to her. The plaintiff has not also examined the witnesses who had subscribed their signature in Ex.A3 as witnesses, especially, when the 1st defendant had denied the execution of the said agreement. In any event, on the date of the sale agreement i.e. 24.09.1991, the 1st defendant did not have any saleable interest in the suit property as he had already sold the same in favour of the 2nd defendant vide a registered sale deed dated 29.07.1991 (Ex.B2). Moreover, the plaintiff in her notice dated 24.11.1991 had stated thus :

"2.Till 14.07.1991 you had not given a single pai towards



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the loan received by you from my client. On the other hand on 14.07.1991 you approached for the original deed stating that you would raise a bank loan pledging your house, and pay back the entire amount due to my client. On the same you had given a written promise accepting your debt of Rs.50,000/- and took the original deed.

.....

6.Suspecting your conduct my client on enquiry came to know that you had already sold the property to one Subramanian on 29.07.1991 itself, on a registration deed."

Thus it is seen that the plaintiff even on the date of filing of the suit knew that the suit property was sold in favour of the 2nd defendant on 29.07.1991 itself. There is also no whisper about the specific performance of contract. The suit was filed in the year 2004 and it is hopelessly barred by limitation. It is also pertinent to point out that the plaintiff in her notice dated 24.11.1991 (Ex.B1) had only requested the 1st defendant to pay the amount of Rs.50,000/- due to her within a period of



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15 days from the date of notice and she did not request the 1st defendant to execute a sale deed in her favour. The 2nd defendant had adduced sufficient documentary evidence to show that pursuant to Ex.B2 sale deed he was in possession of the suit property. The trial Court had infact analysed the entire documentary evidence adduced on the side of the plaintiff and the defendants and rightly concluded that the plaintiff is not entitled for specific performance of contract and for a declaratory relief as prayed for by her. On the contrary, the first appellate Court had not only held that the sale agreement Ex.A3 is true and valid but also held that the sale deed executed by the 1st defendant in favour of the 2nd defendant is null and void. The observation of the first appellate Court is not based on any evidence on record and it is not known as to why the first appellate Court reversed the findings of the trial Court when the trial Court had given cogent reasons for dismissing the suit.

15. The findings of the first appellate Court are mainly based on the ground that the 1st defendant did not send any reply to the notice Ex.B1 issued by the plaintiff. The fact remains that even in Ex.B1 the



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plaintiff did not seek for specific performance of contract and she already knew that a sale deed was executed by the 1st defendant in favour of the 2nd defendant.

16. It is most unfortunate that the trial Court even after communication of the stay order passed by this Court had proceeded further in E.P.No.304 of 2011 in O.S.No.2123 of 2004 and executed a sale deed in favour of the plaintiff on 19.01.2021 and got the sale deed registered on 05.04.2021. Thereafter, the execution petition was terminated. Even in the sale deed executed by the Court the learned IV Additional District Munsif, Salem, had observed as follows:

"அசல் வழக்கின் 2-ம் பிரதிவாதி சுப்பிரமணி மாண்புமிகு சென்னை உயர்நீதிமன்றத்தில் இரண்டாவது மேல்முறையீட்டு வழக்கு எண்.897 / 2011-ஐ தாக்கல் செய்துள்ளார். ஆனால் தீர்ப்பின் செயலாக்கத்திற்கு தடையாணை ஏதும் பிறப்பிக்கப்படவில்லை. இதுகுறித்து வாதி மரியசுந்தரி (எ) சுந்தரி 30.04.2019 தேதியிட்ட பிரமாண பத்திரிக்கை தாக்கல் செய்துள்ளார். அதை கனம் நீதிமன்றம் ஏற்று வழக்கு நடவடிக்கை குறிப்பில் பதிவு செய்துள்ளது. மேலும் சார்பு நீதிமன்ற தீர்ப்பை எதிர்த்து முதல் பிரதிவாதியான குழந்தைசாமி மாண்புமிகு சென்னை உயர்நீதிமன்றத்தில் 2-ம் மேல்முறையீடு



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தாக்கல் செய்யவில்லை. மாண்புமிகு சேலம் முதன்மை மாவட்ட நீதிபதி அவர்களின் உத்தரவுக்கிணங்க புதிதாக ஏற்படுத்தப்பட்ட 4-வது கூடுதல் மாவட்ட உரிமையியல் நீதிமன்றத்துக்கு இந்த வழக்கு மாற்றப்பட்டது. பின்னர் எதிர்மனுதாரர் குழந்தைசாமிக்கு அறிவிப்பு மற்றும் வரைவு கிரய பத்திரத்தின் நகலும் சார்பு செய்யப்பட்டது. அதன் பின்னரும் எதிர்மனுதாரர் குழந்தைசாமி தரப்பில் மரியசுந்தரி (எ) சுந்தரி பெயருக்கு கிரயம் செய்து கொடுப்பதற்கு எவ்வித நடவடிக்கையும் மேற்கொள்ள முன்வரவில்லை. பதிலுரையும் தாக்கல் செய்யவில்லை. இதனை அடுத்து அடியில் கண்ட சொத்தை எதிர்மனுதாரர் / முதல் பிரதிவாதிக்காக சேலம் சார்பு நீதிமன்ற தீர்ப்பாணை படியும், இந்நீதிமன்ற உத்தரவு படியும் சேலம் நான்காவது கூடுதல் மாவட்ட உரிமையியல் நீதிபதி பதவி வகிக்கும் திரு.R.மகேஷ் B.A.,L.L.B., (Hons) LLM ஆகிய நான் மரியசுந்தரி (எ) சுந்தரிக்கு ஏற்படுத்தி கொடுக்கும் கிரய பத்திரம் சரி.”

It is seen from the records that a memo was filed by the 1st defendant on 27.09.2012 before the I Additional District Munsif, Salem in E.P.No.304 of 2011 stating that an order of stay was granted in the present second appeal. Notice was also served on the plaintiff as is seen from the endorsement found in the said memo. A copy of the memo was filed along with the typed set of papers. When the execution of the sale deed was brought to the knowledge of this Court, this Court, on 21.01.2022



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"3. At the time of admitting this appeal, this Court, by an order dated 07.09.2011 granted an interim stay of all further proceedings pursuant to the judgment and decree dated 07.09.2010 made in A.S.No.30 of 2009 on the file of the I Additional Subordinate Judge, Salem. In fact, the said interim order has not been granted by fixing the time limit. The copy of the same has also been served to the II Additional District Munsif, Salem, where the original suit in O.S.No.2123 of 2004 pertaining to A.S.No.30 of 2009 was filed. Even after knowing the same, during the pendency of this appeal, in E.P.No.304 of 2011, the learned IV Additional District Munsif, Salem passed an order for executing the sale deed in favour of the plaintiff/first respondent herein. Further, the sale deed has also been executed on 22.02.2021 and the same was registered. In the sale deed dated 22.02.2021, the learned IV Additional District Munsif, Salem has clearly averred that there was no stay granted in respect to the execution of the judgment and decree passed in A.S.No.30 of 2009. The said averment found in the sale deed executed by the



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learned IV Additional District Munsif, Salem would reveal the fact that he has not verified the order passed by this Court. The said act committed by the learned IV Additional District Munsif, Salem is nothing but a violation of the order passed by this Court.

4. Hence, it would be appropriate to call for an explanation immediately from the learned IV Additional District Munsif, Salem, in this regard.

Accordingly, the learned IV Additional District Munsif, Salem, submitted his explanation in D.No.1234/2022 dated 28.01.2022 stating *interalia* that the stay order passed by this Court was not available in the case bundle and that the respondents even after repeated adjournments did not file a copy of the order passed by this Court. The learned IV Additional District Munsif, Salem could have verified the status of the case through online or could have contacted the Registry and verified whether any stay order was passed in S.A.No.897 of 2011 before proceeding further in E.P.No.340 of 2011 in O.S.No.2123 of 2004. The decree and judgment passed by the first appellate court is totally



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erroneous. The IV Additional District Munsif, Salem, had gone one step further by executing a sale deed even without verifying the stay order passed by this Court and the explanation offered by him is not at all convincing and therefore, the Registry is directed to place the matter before the vigilance committee for taking disciplinary proceedings against Mr.D.Saravanan, the then IV Additional District Munsif, (FAC), II Additional District Munsif, Salem.

17. In the facts and circumstance, the sale deed executed by the IV Additional District Munsif, Salem, is set aside invoking Article 227 of Constitution of India. The substantial question of law is answered against the plaintiff.

18. In the result,

- i. the Second Appeal is allowed. No costs. Consequently connected miscellaneous petition is closed.
- ii. The decree and judgment dated 07.09.2010 passed in A.S. No.30 of 2009, on the file of the I Additional Sub Court, Salem, is set



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- iii. The sale deed executed by the IV Additional District Munsif, Salem, is set aside invoking Article 227 of Constitution of India.
- iv. The decree and judgment dated 15.11.2008 passed in O.S. No.2123 of 2004, on the file of the II Additional District Munsif, Salem, is upheld.

17.03.2023

Index: Yes/No
Internet: Yes/No
Speaking/Non-Speaking order
bga

To

1. The I Additional Sub Court, Salem
2. The II Additional District Munsif, Salem.
3. The Section Officer, VR Section, High Court, Madras.



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