



A.S(MD)Nos.189 & 190 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

**RESERVED ON : 31.01.2024
DELIVERED ON : 28.03.2024**

CORAM:

THE HONOURABLE MR.JUSTICE P.DHANABAL

A.S(MD)Nos.189 & 190 of 2015
and
C.M.P(MD)Nos.4892 & 6773 of 2023

A.S(MD)No.189 of 2015:

P.Karthikeyan

... Appellant/Plaintiff

Vs.

Kannan @ Rajendran

... Respondent/Defendant

Prayer : Appeal Suit is filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree passed in O.S.No.48 of 2004, dated 02.07.2008 on the file of the Additional District Court (Fast Tract Court No.I), Thoothukudi by allowing this appeal.

For Appellant : Mr.M.Vallinayagam
Senior Counsel
for Mr.D.Nallathambi

For Respondent : Mr.Lakshmi Gopinathan
for M/s.Polax Legal Solutions



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A.S(MD)No.190 of 2015:

Karthikeyan

... Appellant/2nd Defendant

Vs.

1.R.Vasanth

... 1st Respondent/Plaintiff

2.Kannan @ Rajendran

... 2nd Respondent/1st Defendant

Prayer: Appeal Suit is filed under Section 96 of Civil Procedure Code, to set aside the judgment and decree passed in O.S.No.40 of 2005, dated 02.07.2008 on the file of the Additional District Court (Fast Tract Court No.I), Thoothukudi by allowing this appeal.

For Appellant : Mr.M.Vallinayagam
Senior Counsel
for Mr.D.Nallathambi

For R-1 : Mr.M.P.Senthil

For R-2 : Mr.Lakshmi Gopinathan
for M/s.Polax Legal Solutions

COMMON JUDGMENT

These Appeal Suits have been preferred as against the common judgment and decrees passed in O.S.Nos.48 of 2004 and 40 of 2005 on the file of the Additional District Judge (Fast Tract Court No.1),
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Thoothukudi. The appeal in A.S(MD)No.189 of 2015 has been filed as against the decree and judgment passed in O.S.No.48 of 2004 and the appeal in A.S(MD)No.190 of 2015 has been filed as against the decree and judgment passed in O.S.No.40 of 2005.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

3. The brief averments of the plaint in O.S.No.48 of 2004 are as follows:

The plaint schedule property originally belonged to the defendant and the plaintiff and the defendants entered into agreement to sale of property on 18.03.2000. On the date of agreement itself, the defendant received a sum of Rs.2,25,000/- as advance of sale price and the sale price was fixed as Rs.18,93,000/- (i.e.,) Rs.3,00,000/- per acre. The time fixed for the completion of contract is 17.01.2001. The balance amount has to be paid by three installments. The plaintiff has to pay a sum of Rs. 2,75,000/- on 17.06.2000. On 17.09.2000, a sum of Rs.4,50,000/- has to

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be paid and the remaining amount has to be paid on or before 17.01.2001. The defendant endorsed in the agreement for receipt of Rs. 2,25,000/- on 17.06.2000. The plaintiff was always ready and willing to pay the next installment of Rs.4,50,000/- on 17.09.2000. But the defendant demanded more money than the agreed amount and thereafter, mediation was convened and the plaintiff agreed to pay an additional amount of Rs.4,25,000/- and the total price would come to a sum of Rs. 23,18,000/-. The said mediation was happened on 03.11.2000 and on the same day itself, the plaintiff paid a sum of Rs.1,68,000/- to the defendant and the same was also endorsed in the agreement and the time was also extended till 30.04.2001. The plaintiff totally paid a sum of Rs. 6,18,000/-. The plaintiff has taken the possession of the land and made improvements by spending more money. The plaintiff was throughout always ready and willing to perform his part of contract but the defendant is evading from executing the sale deed. Therefore, the plaintiff sent a notice dated 28.10.2003 to the defendant by expressing his willingness to get sale deed by paying the balance sale consideration. But the defendants after receipt of notice sent a reply, dated 03.11.2003



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with false averments. Therefore, the plaintiff filed a suit for specific performance of contract.

4. The brief averments of the written statement filed by the defendant are as follows:

The agreement, dated 18.07.2000 did not contain the averments that S.F.No.26/2A in this acre 8.71 western side acre 1.36 and there was no any mention about the four boundaries for the property. But the suit has been filed for the property 26/2A 1, 8 acre and 71 cents, in this eastern side 1 acre 36 cents. Therefore, there is a material alteration in respect of the identification of the property. The four boundaries mentioned in the plaint are all false. The first item of the property belonged to one Koppammal and she executed a settlement deed in favour of her grand-son Vasanth through settlement deed, dated 27.08.2002. On and from the date of settlement deed itself, the said Vasanth has been in possession and enjoyment of the first item of the property. The said Koppammal died on 29.11.2003. Therefore, S.F.No. 25/5 3 acre 11 cent is belongs to one Vasanth and he also filed a suit in

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O.S.No.50 of 2004 on the file of the Sub Court, Kovilpatti. On the date of agreement, 6 acre 31 cents were included in the agreement and the price was fixed as Rs.3,000/- per cent. The total price is Rs.18,93,000/- and on the date of agreement itself, the defendant received a sum of Rs.2,25,000/-. In S.No.25/2, one Rudrappan was also had right of 84 cents over the property, after knowing that the plaintiff insisted the defendant to sign in the agreement. The defendant only received a sum of Rs.2,00,000/- and Rs.25,000/- was given to Rudrappan. He also made an endorsement in the said deed. As per the agreement, within the date of 11.06.2000, the plaintiff has to pay a sum of Rs.2,75,000/- and within 17.09.2000, the plaintiff has to pay a sum of Rs.4,50,000/- and the balance amount of Rs.9,68,000/- has to be paid on or before 17.01.2001. But the plaintiff has not paid the above said amount as mentioned in the agreement. Per contra, on 17.06.2000, he only paid a sum of Rs.2,25,000/-. Therefore, breached the conditions of the contract. In the meantime, the value of the property was also increased. When the defendant approached the plaintiff to pay the balance amount to get sale deed on 17.09.2000, the plaintiff represented that he has no money and

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he agreed to pay an excess amount of Rs.7,00,000/- since the value of the property was increased and also extended the time till 30.04.2001. Therefore, the plaintiff has to pay a sum of Rs.25,93,000/- and he has to pay the balance amount on or before 30.04.2001. On that date (i.e.,) 03.11.2000, the plaintiff paid a sum of Rs.18,000/- and the same was endorsed in the agreement. The balance amount would be paid on the next day. But he did not pay the balance amount as agreed by him. The averments that the plaintiff agreed for excess amount of Rs.4,25,000/- is false. The plaintiff has altered the contention of the agreement and Rs. 7,00,000/- was altered as Rs.17,00,000/- and thereby, the plaintiff is not entitled to the relief. The plaintiff ought to have paid the balance amount on or before 30.04.2001 and to get sale deed, but he failed to do so. The time is the essence of contract and thereby, the plaintiff is not entitled for specific performance and also the amount of advance all forfeited. The plaintiff was not ready and willing to perform his part of contract. Now the value of the property increased and thereby, the plaintiff is not entitled to the relief of specific performance of contract. Hence, the suit is liable to be dismissed.



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5. Based on the above said pleadings, the Trial Court has framed the following issues:

- "1. தாவா கிரைய ஒப்பந்த பத்திரம் செல்லத்தக்கதா?
2. கிரைய ஒப்பந்தப் பத்திரத்தில் காலவரம்பு முக்கியமானதா?
3. வாதி ஒத்துக்கொண்டுள்ளபடி தாவா தொகையைச் செலுத்தாததினால் கிரைய ஒப்பந்தப் பத்திரத்தை அவராகவே ரத்து செய்துவிட்டார் என்பது சரியா?
4. தாவா சொத்தின் அனுபவத்தில் வாதி உள்ளார் என்பது சரியா?
5. வாதிக்கு கிடைக்கக்கூடிய இதர பரிகாரம் என்ன?"

6. The brief facts of the plaint averments in O.S.No.40 of 2005 are as follows:

Originally, the suit property belonged to one Sorna Manikkam through sale deed, dated 16.02.1966. The said Sorna Manikkam sold the property to Koppammal through sale deed, dated 16.08.1966. On and from the date of sale itself, the Koppammal had been in possession and enjoyment of the property. The said Koppammal is none other than the



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parental grand-mother of the plaintiff. The said Koppammal executed a settlement deed in favour of the plaintiff, dated 27.08.2002 and the same day, possession was also handed over to the plaintiff. On and from the date of settlement itself, the plaintiff has been in possession and enjoyment of the suit property. While so, the first defendant, who is the father of the plaintiff attempted to alienate the suit property to third parties and he had bad habits. Particularly, he attempted to alienate the property to the second defendant, as if the property belongs to him. In fact, the plaintiff alone is enjoying the property as his absolute property. The plaintiff on 15.01.2004 came to know that the first defendant has executed a sale agreement in favour of the second defendant. The first defendant has no right, title, interest and possession over the property to execute any kind of deed to anybody. If any document created by the first defendant, it shall not bind the plaintiff. The second defendant has attempted to convert the suit property into plots. He has no right to do so and also he attempted to interfere with the plaintiff's possession and enjoyment of the suit property. Therefore, he filed the suit for the relief of declaration and permanent injunction.



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7. The brief averments of the written statement filed by the second defendant are as follows:

The plaintiff and the first defendant colluded each other and filed the suit only to defeat the second defendant's valuable rights over the suit property. Already the defendant has filed a suit in O.S.No.83 of 2003 and thereafter, the plaintiff and the first defendant colusively filed this suit. It is true that the scheduled property belonged to Koppammal. The Koppammal had three grand-sons, namely, the plaintiff, Dinesh and one Mani. The first defendant managed the joint family and the properties of the Koppammal. The plaintiff need money for sending his brother, namely, Mani to abroad. For that, Koppammal and the first defendant approached the second defendant to sell the property. Therefore, the first defendant and the said Koppammal received the advance amount. However, the first defendant on behalf of his mother, since she is a female, he signed for himself and on behalf of his mother. That is why the advance amount of Rs.2,25,000/- was paid by splitting that

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Rs.2,00,000/- paid to the first defendant and Rs.25,000/- paid to Koppammal through Rudrappa Naicker. Again on 17.06.2000, the first defendant received a sum of Rs.2,25,000/- and assured that he will pay a sum of Rs.1,26,000/- to Koppammal. Again on 03.11.2000, the first defendant received a sum of Rs.1,68,000/- and assured that Rs.68,000/- will be given to Koppammal. Thereafter, the first defendant and the said Koppammal demanded more money and the plaintiff also agreed to pay Rs.4,25,000/- as excess money for the suit property. To that effect, the first defendant has endorsed in the agreement, on 03.11.2000. The plaintiff was present at the time of agreement and the endorsement made by the first defendant. The possession of the property was also given to the defendant. The defendant also made improvements in the suit property. After knowing very well that the possession of the property was given to the defendant on 03.11.2000, the plaintiff, the said Koppammal executed the settlement deed and the same is not valid in the eye of law. Therefore, the suit is liable to be dismissed.

8. Based on the above said pleadings, the Trial Court has framed



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the following issues:

1. தாவா சொத்து வாதிக்கு தனித்து பாத்தியப்பட்டது என்ற விளம்புகைப் பரிகாரமும் தாவா சொத்தை எதிர்வாதியோ அவரது ஆட்களோ வாதியின் அனுபவத்தை இடைஞ்சல் செய்யக் கூடாதென்று நிரந்தர உறுத்துக்கட்டளைப் பரிகாரமும் வாதி பெறத் தகுதி படைத்தவரா?

2. தாவா சொத்தை 1ம் எதிர்வாதி 2ம் எதிர்வாதிக்கோ அல்லது வேறு நபருக்கோ கிரையமோ, வில்லங்க பாராதீனம் செய்யவோ கூடாதென்ற நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் வாதி பெறத் தகுதி படைத்தவரா?

3. 2ம் எதிர்வாதியோ அவரது வாரிசுகளோ, ஆட்களோ 1ம் எதிர்வாதியிடம் செய்து கொண்ட கிரைய ஒப்பந்தத்தின் அடிப்படையில் தபசில் சொத்தை பிளாட்டுக்களாக பிரிவினை செய்து கிரையம் செய்யக் கூடாதென்ற நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் வாதி பெறத் தகுதி படைத்தவரா?

4. இதர பரிகாரம் என்ன?

9. Before the Trial Court, joint trial was conducted and the



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evidence was recorded in O.S.No.40 of 2005. On the side of the plaintiff in O.S.No.40 of 2005, P.W.1 and P.W.2 were examined and marked Exhibits A.1 to A.11. On the side of the first defendant in O.S.No.40 of 2005, D.W.1 was examined and also marked Exhibits B.1 to B.6. That apart, Exhibits C.1 and C.2 were also marked.

10. The Trial Court after considering the evidences adduced on both sides, decreed the suit in O.S.No.40 of 2005 and dismissed the suit in O.S.No.48 of 2004 in respect of specific performance and alternative prayer of written of advance amount was ordered. As against the decree and judgment passed in O.S.No.40 of 2005, the defendant has preferred the appeal in A.S(MD)No.190 of 2015. As against the decree and judgment passed in O.S.No.48 of 2004, the plaintiff has preferred the appeal in A.S(MD)No.189 of 2015.

11. The grounds in A.S(MD)No.189 of 2015 are as follows:

1. The judgment and decree of the Trial Court is against law, weight of evidence and probabilities of the case.



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2. The Trial Court ought to have issued notice to the appellant / plaintiff, once the Counsel appearing for him reported no instructions and without doing so deciding the case on merits is unsustainable and against the law.

3. When the Trial Court has come to the conclusion that the agreement, dated 18.03.2000 is true and further held the plea of the respondent that the said agreement became cancelled automatically is unsustainable and unacceptable ought to have decreed the suit for specific performance.

4. The Trial Court failed to consider that the alleged settlement deed is a subsequent document created in the year 2002 to defeat the agreement, dated 18.03.2000 by the respondent and his son Vasanth.

5. The dismissal of the suit for specific performance in entirety is against law.

6. The finding of the Trial Court that the appellant herein is not ready to perform is part of the contract is erroneous.

7. The finding of the Trial Court that the appellant / plaintiff has not chosen to examine himself is biased and untenable, since the



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appellant / plaintiff did not know the further proceedings of the trial on account of his Counsel reported no instructions.

8. The Trial Court has committed error by deciding the case on merits relying upon the evidence on the side of the respondents alone, when there is no evidence on the side of the appellants.

9. The Trial Court has failed to consider the fact that the settlement deed is subsequent to the sale agreement and the other suit in O.S.No.40 of 2005 is a subsequent suit after the appellant herein filed the suit for specific performance in O.S.No.48 of 2004.

10. The Trial Court ought to have rejected the evidence of P.W.1, since he and his son played fraud upon this appellant after receiving huge amount.

11. The Trial Court ought not to have decided the case on merits and ought to have dismissed the suit for default.

12. When "no instruction" is reported on the side of the plaintiff and when there is no evidence on the side of the plaintiff the procedure adopted by the Trial Court examining the defendant as D.W.1 and deciding the case on merits is unsustainable and unknown to law of

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procedure.

13. The judgment and decree passed by the Trial Court suffer from grave factual and legal infirmities.

14. In any point of view the judgment and decree of the Trial Court has to be set aside."

12. Grounds in A.S(MD)No.190 of 2015 are as follows:

1. The judgment and decree of the Trial Court is against law, weight of evidence and probabilities of the case.

2. The Trial Court ought to have passed *ex parte* decree against this appellant / second defendant, when the Counsel appearing for this appellant reported no instructions.

3. The Trial Court ought to have issued notice to this appellant / defendant, when the Counsel appearing for this appellant reported no instructions as held by the Hon'ble Supreme Court.

4. The Trial Court failed to note that the settlement deed relied by the first respondent / plaintiff is a created document by the respondents, namely, the father and son only to defeat the valuable right of this

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appellant under the sale agreement, dated 18.03.2000.

5. The Trial Court below has failed to note that the Koppammal herself agreed to sell the property to this appellant and received the valuable part payment of the sale consideration.

6. The Trial Court without passing an *ex parte* decree, decreed the suit on merits on the ground that the first respondent / plaintiff proved his case, since there is no contra evidence on the side of the appellant. This approach of Trial Court vitiates the entire proceedings.

7. The finding of the Trial Court that the second respondent herein, namely, the son of Koppammal has no right to enter into the sale agreement in respect of the property belong to his mother is incorrect.

8. The Trial Court has not dealt with the issues involved in the suit in proper perspective.

9. In any point of view the judgment and decree of the Trial Court has to be set aside."

13. During the pendency of the appeal, the appellant in A.S(MD)No.189 of 2015 has filed a petition to receive the additional



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document under Order 41, Rule 27 of CPC and to examine the mediators and other witnesses.

14. The brief averments of the petition filed by the petitioner are as follows:

The petitioner is the appellant herein and he filed a suit for specific performance of contract and the same was dismissed. As against the same, the present appeal has been preferred. Before the Lower Court, the learned Counsel appearing for the petitioner reported 'No instruction'. As such, there was no evidence adduced on the side of the petitioner before the Trial Court. Already he filed a petition in I.A.No.63 of 2008 to set aside the *ex parte* decree and the petition was dismissed on 17.09.2008. As against the order, he filed appeal in C.M.A(MD)No.276 of 2009 on the file of this Court and the same was also dismissed on 20.07.2009 and the suit in O.S.No.48 of 2004 was also dismissed through common judgment, dated 02.07.2008. As against the same, he filed Miscellaneous Appeal in C.M.A(MD)No.277 of 2009 and both the appeals were dismissed by a common judgment, dated 20.07.2009. As

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against the same, the Special Leave Petitions were preferred before the Hon'ble Supreme Court and the Hon'ble Supreme Court also dismissed the SLP's on 13.11.2009 by observing that in view of the fact that the petitioner can challenge the impugned judgment on merits in an appeal under Section 96 of CPC. Accordingly, the present appeals have been preferred. Due to the procedure adopted by the Trial Court, he could not let in evidence and judgment was delivered. The petitioner is having good case. The plaintiff clearly averred in the plaint in respect of mediation and thereby, those mediators have to be examined and also the petitioner developed the properties and he spent so much of money and those documents are also have to be marked. Therefore, the petition mentioned documents have to be marked and the witnesses have to be examined.

15. Brief averments of the counter filed by the respondent are as follows:

The petition is not maintainable, already joint trial was ordered to try both suits in O.S.No.48 of 2004 and O.S.No.40 of 2005. On the side

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of the plaintiff, P.W.1 and P.W.2 were examined as Exhibits A.1 to A.11 were marked. On the side of the defendant, D.W.1 examined and Exhibits B.1 to B.6 were marked. The petitioner after examination of D.W.1, filed petition for appointment of Commissioner and the same was dismissed, against which Civil Revision Petition was filed before this Court and the same was allowed and Commissioner was appointed and after inspection filed report and plan. Then filed petition to re-open the case for adducing evidence and the same was also allowed by the trial Court and thereafter, adjourned the case on several hearings. But the petitioner failed to adduce any evidence. Hence, the evidence was closed and decree and judgment was passed. Thereafter, the petitioner filed petition to set aside the *ex parte* decree and the same was dismissed by the Trial Court that the decree and judgment are not *ex parte* decree and the same are contested decree. As against the same, preferred appeal before this Court and this Court also dismissed the appeals. Again the said orders were challenged before the Hon'ble Supreme Court and SLP's were also dismissed by directing the petitioner to avail the appeal remedy and now filed this appeal. Therefore, already ample chances given to the

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petitioner, he failed to avail those opportunities. The reasons stated in the petition are not come under the purview of Order 41, Rule 27 of CPC. Hence, this petition is liable to be dismissed.

16. The learned Counsel appearing for the appellant in both the appeals would contend that the appellant / plaintiff filed a suit in O.S.No. 48 of 2004 for the relief of specific performance of contract and the defendant in that suit agreed to sell the property for a sum of Rs.18,93,000/- and he already received a sum of Rs.2,25,000/- towards advance of sale price and thereafter, it was agreed by the parties to pay the sale price on three installments. Accordingly, on 17.06.2000, a sum of Rs.2,25,000/- was paid and thereafter, the second installment due is 17.09.2000. When the plaintiff ready to pay the amount of Rs.4,50,000/- as per the agreement for second installment, the defendant refused to receive the amount and he demanded excess money and thereby, the mediation was conducted and as per the mediation, sale price of Rs.4,25,000/- was increased. Thereby, the total amount was fixed as Rs.23,18,000/-. Since the defendant failed to execute sale deed, the legal

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notice was issued on 28.10.2003, but the defendant replied on 03.11.2003 by stating that on 27.08.2002, the first item of the property was settled in favour of his son Vasanth through settlement deed by one Koppammal. The said settlement deed was after the agreement between the plaintiff and the defendant. Based on the above said settlement deed also, the settle has filed a suit for the relief of declaration and injunction in O.S.No.40 of 2005. Both the suits were tried together. After completion of plaintiff side witnesses, the Counsel for the appellant herein reported 'No instruction', but the Trial Court has decreed the suit based on the available evidence without giving opportunity to the appellant / plaintiff. Already the appellant / plaintiff filed a petition and the same were dismissed and as per the order of the Hon'ble Supreme Court, the present appeals have been preferred. The appellant herein has filed a petition to receive the additional document and to examine the witnesses as additional evidence, since no evidence was adduced by him before the Trial Court. Therefore, the said petition has to be allowed and the appellant was always ready and willing to perform his part of contract. The defendant only failed to execute the sale deed in favour of

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the appellant. Therefore, the present appeals are liable to be allowed by setting aside the decrees and common judgment passed by the Trial Court.

17. To support the contention of the learned Counsel appearing for the appellant, he relied upon the following judgments:

i) N.Natarajan Vs. The Executive Officer, Chitlapakkam Town Panchayat, Having office at Chitlapakkam, Chennai-600 064, Tambaram Taluk, Kancheepuram District reported in 2015 (2) L.W 531,

ii) T.Kalyanasundaram Vs. M.S.Arumuganayakar reported in 2005 (4) CTC 451 and

iii) Janakiramaiah Chetty Vs. A.K.Parthasarathi and Others reported in 2003 (2) CTC 242.

18. The learned Counsel appearing for the first respondent would contend that the appellant herein has filed a suit in O.S.No.48 of 2004 for the relief of specific performance of contract and the first respondent



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herein has filed a suit in O.S.No.40 of 2005 and both the suits were jointly trialed by the Additional District Judge - Fast Track Court No.I, Thoothukudi and after adducing evidence on the side of the plaintiff and after cross-examination by the appellant herein, they have not appeared before the Court and not adduced any evidences. Therefore, the Trial Court has closed the evidences and passed the common judgment. The appellant has failed to adduce any evidence before the Trial Court even after opportunities given to him. Therefore, now the documents sought to be received are noway helpful to decide the case and the reasons stated by the petitioner are not in accordance with the provisions of Order 41, Rule 27 of CPC. Already the Trial Court has categorically discussed about the evidences and came to a fair conclusion that the appellant is not entitled to the relief of specific performance of contract and already the property was settled to the first respondent through settlement deed, dated 27.08.2002. Therefore, the property is not available for sale and the Trial Court also ordered for return of advance amount. Therefore, the Trial Court judgment and decree is in order and the present appeal is liable to be dismissed.

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19. The learned Counsel appearing for the respondents relied the following judgments :

i) Bhanu Kumar Jain Vs. Archana Kumar and Another reported in 2005 (1) LW 582 and

ii) S.Ramachandra Rao Vs. S.Nagabhushana Rao and Others reported in 2022 (3) MWN (Civil) 679.

20. This Court had heard both sides and perused the records and after hearing both sides and perusing the records, the points for determination in A.S(MD)No.189 of 2015 are as follows:

1. Whether the C.M.P(MD)No.4892 of 2023 is to be allowed or not?
2. Whether the entire suit property belongs to the defendant?
3. Whether any material alteration in the agreement?
4. Whether the plaintiff was always ready and willing to perform his part of contract?
5. Whether the time is essence of contract?

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6. Whether the plaintiff is entitled to decree for specific performance of contract?

7. Whether the decree and judgment passed by the Trial Court are sustainable in law and on facts?

8. To what relief the appellant is entitled to?

21. The points for determination in A.S(MD)No.190 of 2015 are as follows:

1. Whether the settlement deed, dated 27.08.2022 in favour of the plaintiff is valid in the eye of law?

2. Whether the plaintiff is in possession and enjoyment of the suit property?

3. Whether the plaintiff is entitled to relief of declaration in respect of the suit property?

4. Whether the plaintiff is entitled to relief of permanent injunction as against the defendants from creating encumbrance over the property?

5. Whether the plaintiff is entitled to decree as against the first defendant not to convert the properties into plots?



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6. Whether the decree and judgment passed by the Trial Court are sustainable in law and on facts?

7. To what relief the appellant is entitled to?

22. Before the Trial Court both the suits in O.S.No.48 of 2004 and O.S.No.40 of 2005 were jointly tried and common judgment was passed. During trial, this appellant being plaintiff in O.S.No.48 of 2004 and second defendant in O.S.No.40 of 2005 cross-examined the plaintiff side witnesses and after examination of D.W.1, has not appeared before the Trial Court and the Trial Court after giving ample opportunities, closed the evidence and passed the judgment. After the judgment, the appellant herein filed petition before the Trial Court to set aside the *ex parte* decree passed against him and the same was dismissed and the matter went up to Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the S.L.P's with a direction to the petitioner to work out remedy through filing appeal. Thereafter, these appeals have been filed.

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Point No.1:

23. The appellant herein has filed a petition under Order 41, Rule 27 of CPC to receive the additional documents and to examine the witness on his side. According to the petitioner, before the Trial Court, joint trial was conducted and in connected suit in O.S.No.40 of 2005, the evidence was recorded. Since he is the defendant in that suit, after completion of plaintiff side evidences, the defendant was unable to appear before the Court and to examine the witnesses. But the Trial Court has closed the evidences and passed the common judgment without adducing any evidences on the side of the defendant in the suit in O.S.No.40 of 2005. Therefore, in order to give fair chance to him, the witnesses have to be examined and documents in respect of the improvements made by him to be marked. Therefore, the petition has to be allowed. The defendants have vehemently objected that already the Trial Court has granted ample opportunities, despite that they have not adduced any evidences and the Counsel for the petitioner reported 'No instruction' and thereafter, he filed a petition to set aside the *ex parte* decree and the same was dismissed. The matter went up to the Hon'ble

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Supreme Court. The Hon'ble Supreme Court also dismissed the SLP's and thereby, now the petition mentioned documents cannot be received and the reason stated by the petitioner are not within the purview of Order 41, Rule 27 of CPC. Therefore, the petition is liable to be dismissed.

24. This Court had heard both sides and perused the materials available on record.

25. On perusal of records, it is observed that already the Trial Court has given ample opportunities, but the petitioner has not availed the opportunities and thereafter, he filed a petition to set aside the *ex parte* decree and the same was dismissed. The matter went up to the Hon'ble Supreme Court and the Hon'ble Supreme Court directed the appellant to agitate his case through this appeal. The petitioner has not stated valid reasons for non production of the document before the Trial Court. Already before the Trial Court ample chances given to the petitioner but he failed to avail those opportunities. The records shows

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that after examination of D.W.1, the petitioner filed petition for appointment of Commissioner and the same was dismissed and then as per the order of this Court in Civil Revision Petition, Advocate Commissioner was appointed and he filed report and plan after inspection. Thereafter, the Trial Court adjourned the case on several times for examination of witnesses on the side of the petitioner, but he did not appear. This attitude of the petitioner shows his intention in conducting the case before the Trial Court.

26. Further the petitioner, not even pleaded in the pleadings about the quantum of amount spent by him and the Commissioner report also available. As per the Commissioner report, there is no evidence that the property was converted into plots and the developments were made in the property. Further, the petitioner himself admitted the ownership of Koppammal and the plaintiff side witnesses were cross-examined by the petitioner and the available evidences are sufficient to dispose the case and thereby, the documents are not essential to decide the case.



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27. The learned Counsel for the appellant has relied the judgment by contending that the Appellate Court has power to record additional evidence if it is required for pronouncing judgment:

i) *N.Natarajan Vs. The Executive Officer, Chitlapakkam Town Panchayat, Chitlapakkam reported in 2015 (2) L.W 531.*

28. On a careful perusal of the said judgment, it is clear that it is not necessary for party to make an application, satisfaction of the Appellate Court that additional evidence is required for pronouncing judgment satisfactorily or for substantial clause.

29. Further he relied the following judgments:

i) *T.Kalyanasundaram Vs. M.S. Arumuganayakar reported in 2005 (4) CTC 451 and*

ii) *Janakiramaiah Chetty Vs. A.K.Parthasarathi and Others reported in 2003 (2) CTC 242.*

30. On a careful perusal of those judgments, they will not be



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applicable to this case, because they are referred to Order 17, Rule 2 and Order 9, Rule 13 of CPC.

31. In the case on hand, already Order 9, Rule 13 petition was attained finality through judgment of the Hon'ble Supreme Court.

32. The learned Counsel appearing for the respondent had relied the following judgments:

i) Bhanu Kumar Jain Vs. Archana Kumar and Another reported in 2005 (1) LW 582 and

ii) S.Ramachandra Rao Vs. S.Nagabhushana Rao and Others reported in 2022 (3) MWN (Civil) 679.

33. On a careful persual of the said judgments, it is clear that once the appeal against the order of Order 9, Rule 13 under Order 43, Rule 1 of CPC is dismissed, the application cannot raise the same contention in the first appeal, if it be held that such a contention can be raised both in first appeal as also in the proceedings arising from an application under

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Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law and it is also clear that principles of *res judicata* can be invoked not only in separate subsequent proceedings, they also get attracted in subsequent stage of the same proceedings and once an order made in the course of proceeding because final, it would be binding at the subsequent stage of these proceedings.

34. In view of the above said judgments, it is clear that once the petitioner raised the ground in Order 9, Rule 13 petition and the same was already decided, the same grounds cannot be raised in this appeal. The petitioner failed to avail the opportunities before the Trial Court, and further there is no sufficient pleading in respect of the documents sought to be received. Therefore, the petitioner is not entitled to the relief through this Civil Miscellaneous Petition. Therefore, the Civil Miscellaneous Petition is liable to be dismissed. Accordingly, this Civil Miscellaneous Petition is dismissed.

Point No.2:

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35. According to the plaintiff, in O.S.No.48 of 2004 he entered into agreement with the defendant and he is also one of the owners of the property. His mother Koppammal was also owner of the property for the first item. Since the property was managed by this defendant, he executed agreement on behalf of Koppammal. But on perusal of the agreement, there is no recitals in respect of the same and the plaintiff having knowledge about the ownership of the Koppammal had entered into agreement with the defendant. It is not the case of the plaintiff that the defendant has mis represented about the share of the Koppammal and in the pleadings, he categorically admitted that at the time of giving advance he paid a sum of Rs.2,25,000/- and Rs.2,00,000/- was given to defendant and Rs.25,000/- was given to the Koppammal through one Rudrappa Naicker. Therefore, the plaintiff had knowledge about the ownership of the property while entering into agreement despite that he has not obtained any sale agreement from the said Koppammal. Moreover, the plaintiff has not even obtained signature of the said Koppammal in the suit agreement. Therefore, the plaintiff has not produced any documents to show that the entire suit property belongs to

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the defendant and he himself admitted the ownership of the Koppammal.

Per contra, the plaintiff in O.S.No.40 of 2005 has produced the settlement deed in his favour for the first item of the suit property and also examined P.W.1 and P.W.2 and proved that the first item of the suit property belongs to son of the defendant. Moreover, the plaintiff not even examined any witnesses. Therefore, the plaintiff failed to prove that the suit properties are exclusively belongs to the defendant. Thus the point is answered.

Point No.3:

36. According to the defendants, the plaintiffs altered the dates, amount and the description of property in the agreement. This Court also perused the agreement. In the agreement, there are some alterations made and further as per the Exhibit A.1, copy of the agreement, there is no any four boundaries mentioned in the agreement and as per the agreement in Exhibit A.5, there is an alteration and location of the property is also altered. On seeing naked eye in the agreement, there are some alterations. The plaintiff has not given any explanation about the alteration made in

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the agreement. According to the plaintiff, after agreement due to escalation of market value of the property, they agreed to pay excess of Rs.4,50,000/-. According to the defendant, they agreed for Rs.7,00,000/- of excess amount than the agreement amount and to that effect, the D.W.1 deposed about the extra agreed amount. While so, the amount in agreement in Exhibit A.5 also altered and it shows the alteration. Thereby, the defendants proved that there are some material alterations in the agreement and thus the point is answered.

Point No.4:

37. According to the plaintiff, he was always ready and willing to perform his part of contract. But the defendants evading from executing the sale deed. Per contra, the defendant contention is that he agreed to sell the property and received the advance of Rs.2,25,000/- and thereafter they agreed to receive the amount on three installments and after payment of one installment, the second installment was not paid by the plaintiff and thereafter, the plaintiff and defendants agreed to enhance the sale price and thereby, Rs.7,00,000/- for increase of sale price but the

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plaintiff stated that only Rs.4,25,000/- was increased. The plaintiff has not issued notice immediately after the lapse of period of sale agreement as per the recitals of the agreement and he only issued notice after two years. The plaintiff has not adduced any evidence and not filed any documents to prove his readiness and willingness. Therefore, he failed to prove that he was always ready and willing to perform his part of contract.

Point No.5:

38. It is admitted fact that in the sale agreement time fixed for three installments. According to the plaintiff, the time fixed for sale is not essence of contract. According to the defendant, three installments time was fixed. But the plaintiff failed to pay the amount, as per the time fixed in the agreement. There is a specific mention about the time and payment and thereby, the time is essence of contract. It is well settled law that only because of time fixed in the agreement, it cannot be said that the time is essence of contract, unless there is a specific mention about the reasons, in the agreement. In this case, there is no any reason stated in

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the agreement about the time is essence of contract. Moreover, in the agreement itself, three installments mentioned for payment and after the agreement, amounts also paid through some installments. Therefore, the said conduct of the parties shows time is not essence of contract. Had the time is essence of contract, the defendant ought to have mention the specific terms in the agreement and he ought to have issued notice immediately after lapse of agreement period, but not done so. Therefore, the time is not essence of contract. Thus the point is answered.

Point No.6:

39. The plaintiff has filed a suit for specific performance of contract and this Court already in the previous point decided that there was material alteration in the agreement and also the plaintiff was not ready and willing to perform his part of contract and the property also not belonged to the defendant. Further the plaintiff failed to impelad the Koppammal, who alleged to have received the advance of sale amount and after knowing that the settlement deed was executed in respect of first item of the property in the name of plaintiff in O.S.No.40 of 2005,

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he has not impleaded them as party to this suit. Thereby, the plaintiff is not entitled to decree for specific performance. Thus the point is answered.

Point Nos.7 & 8:

40. The Trial Court in the judgment elaborately discussed about the evidences adduced by the parties and also after perusing the records held that there are some material alterations in the agreement and the plaintiff was also not ready and willing to perform his part of contract and the plaintiff failed to issue notice immediately after the expiry of the agreement period and the plaintiff issued notice after two years from the date of agreement and thereby, he failed to prove the readiness and willingness and dismissed the relief of specific performance. However, granted money decree to return of advance amount and the defendant has not preferred any appeal as against the money decree passed by the Trial Court. Therefore, the Trial Court has passed reasoned judgment and there is no infirmity or perversity found on the judgment of the Trial Court. Hence, the Trial Court judgment and decree are liable to be confirmed

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and the present appeal has no merits and deserves to be dismissed. Thus the points are answered.

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Point Nos.1 to 3:

41. The plaintiff has filed a suit for declaration and permanent injunction. According to the plaintiff, the suit property belonged to his parental grand-mother and she executed settlement deed in his favour on 27.08.2002 and he has been in possession and enjoyment of the property pursuant to the settlement deed as his absolute property. On the side of the plaintiff, he examined himself as P.W.1 and also examined P.W.2 and marked Exhibits A.1 to A.11. According to the plaintiff, the property originally belonged to his parental grand-mother, Koppammal and she executed a settlement deed, dated 27.08.2002 and the same was also not denied by the defendant. The plaintiff also produced the settlement deed as Exhibit A.3 and the parental deeds in the name of his predecessor as Exhibits A.1 and A.2. Further he examined the attesting witnesses of

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settlement deed as P.W.2 and he deposed about the execution and attestation of the settlement deed Exhibit A.3 and the defendants also cross-examined the witnesses and nothing elucidated in favour of the defendant. Thereby, he proved that the property was settled in his favour and thereafter, the plaintiff also produced parental documents for the suit property and also he produced the patta in his name as well as his predecessor name and he also produced kist receipt to the property. Therefore, he proved that the property belongs to him through settlement deed. The plaintiff has produced the Exhibits A.1 to A.3 and examined P.W.2 attesting witnesses of settlement deed Exhibit A.3 and thereby, proved that the suit property was settled him through settlement deed, dated 27.08.2002. Further he deposed as P.W.1 that he is in possession and enjoyment of the property by paying kist after transerring the patta in his name. The plaintiff also produced Exhibits A.4 to A.10 pattas and tax receipt in the name of plaintiff and his predecessors. Therefore, the plaintiff proved that the property exclusively belongs to him and he is in exclusive possession and enjoyment of the property and his father first defendant has no any right over the property. The defendants have not



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adduced any contra evidence to rebut the plaintiff side evidence.

Moreover, the second defendant admitted the title of the Koppammal in respect of the suit property through pleadings. Therefore, the plaintiff is entitled to the relief of declaration in respect of the title of the property.

Point Nos.4 and 5:

42. The plaintiff has sought for the relief of permanent injunction restraining the defendants from alienating the property to third parties and also not to convert the property into plots. According to the plaintiff, the defendants attempted to alienate the properties to third parties and also attempted to convert the properties into plot and thereby, he sought for the reliefs. The plaintiff in his evidence categorically deposed about the attempts made by the defendants to create encumbrance over the property and this Court also in the previous point decided that the plaintiff is the absolute owner of the property and the plaintiff is in exclusive possession over the suit property. Therefore, the plaintiff is entitled to the relief of permanent injunction as prayed for in the suit.

Thus the points are answered.



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Point Nos.6 and 7:

43. The Trial Court in the common judgment categorically discussed about the entitlement of the reliefs by the parties and also after considering the available evidences and the records, correctly came to a fair conclusion and decreed the suit in favour of the plaintiff. The Trial Court discussed about the title deeds Exhibits A.1 to A.3 and Exhibit A.11 and also referred the Exhibits A.4 to A.10 for the possession and passed reasoned and elaborate judgment on merits. Therefore, there is no any perversity or infirmity found in the judgment and decree passed by the Trial Court and it does not warrant interference. Therefore, this appeal has no merits and deserves to be dismissed. This Court in the previous points decided that the appellant has failed to prove his case. Per contra, the first respondent proved his case through sufficient evidences and then by the appellant is not entitled to any relief through this appeal. Accordingly, the points are answered.

44. In the result, C.M.P(MD)No.4892 of 2023 in A.S(MD)No.189



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of 2015 stands dismissed.

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45. In the result, the appeal suit in A.S(MD)No.189 of 2015 stands dismissed by confirming the decree and common judgment passed in O.S.No.48 of 2004 on the file of the Additional District Court (Fast Track Court No.I), Thoothukudi. There shall be no order as to costs.

46. In the result, the appeal suit in A.S(MD)No.190 of 2015 stands dismissed by confirming the decree and common judgment passed in O.S.No.40 of 2005 on the file of the Additional District Court (Fast Track Court No.I), Thoothukudi. There shall be no order as to costs.

28.03.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
BTR

To

1.The Additional District Court (Fast Tract Court No.I),
Thoothukudi.

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2. The Section Officer,
Vernacular Record,
Madurai Bench of Madras High Court,
Madurai.

P.DHANABAL, J.

BTR

Judgment made in

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