

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

Tr.A.S.No.874 of 1994 and A.S.No.425 of 1993

[The Appellant in both the appeals Natarajapillai died and his legal representative has been brought on record as the second appellant]

1. Natarajapillai (deceased)
2. R.Kumar Appellants in Tr.AS.874 of 1994

1. Natarajapillai (deceased)
2. R.Kumar Appellants in AS.425 of 1993

Vs

Balaji Vivekanand Respondent in Tr.AS.874 of 1994

1. Balaji Vivekanand
2. V.Kannan Respondents in AS.425 of 1993

Prayer in Tr. A.S.No.874 of 1994

This appeal is filed against the Judgment and Decree, dated 30.04.1992 made in O.S.No.14 of 1991, on the file of the Sub Court, Mayiladuthurai, is against the appellants herein is liable to be set aside.

Prayer in A.S.No.425 of 1993

This appeal is filed to set aside the decree and judgment, dated 30.04.1992 passed in O.S.No.150 of 1989, on the file of the Sub Court, Mayiladuthurai, is against the appellants herein.

Tr.A.S.No.874 of 1994 and A.S.No.425 of 1993

For Appellants : Mr.S.Sounthar

For Respondents : No appearance

C O M M O N J U D G M E N T

The above appeals are listed for hearing today. The respondents have not been served. When the matter came up for hearing on 21.10.2016, the learned counsel for the appellant Mr.S.Sounthar, was directed to take private notice to the respondents and the counsel had filed Affidavit of Service today. Both the covers sent to respondents 1 and 2 have been returned as "Unserved".

2. In view of the fact that the appeals are nearly two and half decades old, I requested the counsel to argue the matter on merits and upon hearing Mr.S.Sounthar, learned counsel appearing for the appellants in both the appeals, I find that the appellant, in spite of the best efforts of the learned counsel Mr.S.Sounthar, is unable to make out a case for interference. Hence, I deem it fit to dispose of the appeals without waiting service of notice on the respondents any further.

3. The Appeal in A.S.No.425 of 1993 arises out of the suit in O.S.No.150 of 1989 filed by the appellant herein before the Sub Court, Mayiladuthurai, seeking specific performance of the agreement of sale, dated 19.10.1986 entered into between him and the second defendant. According to the plaintiff, the suit properties have been purchased by the second defendant in the name of his minor son, the first defendant and as such, though the sale deed stands in the name of the first defendant, the second defendant is entitled to enter into an agreement. The plaintiff would further contend that sale price was fixed as Rs.60,000/- and he paid an advance payment of Rs.10,000/- to the second defendant on 19.10.1986. He would further contend that he paid a further sum of Rs.30,000/- to Dr.Usha, wife of the second defendant and mother of the first defendant on 19.01.1997. He would contend that since the defendants failed to execute the sale deed as agreed, he has come forward with the above suit.

4. The first defendant filed a written statement contending that the suit properties are his exclusive properties having been purchased from out of the resources left by his mother Dr.Vijayalakshmi. The truth, validity and binding nature of the agreement dated 19.10.1986 was also denied by the first defendant.

5. It is also claimed by the first defendant that after his mother's death in the year 1981, the second defendant, his father had married again in the year 1982 and after the said second marriage, the second defendant had forsaken the interests of the first defendant. The claim of the plaintiff that the

suit property was purchased by the monies belonging to the second defendant in the name of the first defendant, was specifically denied and the capacity of second defendant to enter into a contract with reference to property that belongs to the first defendant, was also in dispute.

6. The first defendant in O.S.No.150 of 1989, had filed a suit for recovery of possession in O.S.No.14 of 1991 contending that the suit properties belong to him absolutely and the second defendant in O.S.No.150 of 1989 is not entitled to enter into any sale agreement and as such, the plaintiff in O.S.No.150 of 1989, who is a defendant in O.S.No.14 of 1991 is not entitled to continue the possession of the suit property. The said suit was contested by the defendant therein, the plaintiff in O.S.No.150 of 1989, contending that he is in possession, pursuant to the agreement of sale and that he had performed his part of the contract and he is entitled to protection under Section 53-A of the Transfer of Property Act. As such, a suit for possession cannot lie.

7. Both the suits were tried together and the following issues were framed in O.S.No.150 of 1989:-

- (i) Whether the agreement of sale dated 19.10.1986 is enforceable?
- (ii) Whether the suit properties are the absolute and exclusive properties of the first defendant as alleged in his written statement?
- (iii) Whether the agreement of sale dated 19.10.1986 is enforceable against the first defendant?
- (iv) Whether the plaintiff is entitled to get a decree for specific performance as prayed for? and
- (v) To what relief did the plaintiff is entitled?

8. The following issues were framed in O.S.No.14 of 1991:-

- (i) Whether the sale agreement dated 19.10.1986 is true and will it be binding on the plaintiff?
- (ii) What is the date of birth of the plaintiff?
- (iii) Whether the suit is barred by limitation?
- (iv) Whether the mesne profits claimed is excessive? And
- (v) To what relief the plaintiff is entitled to?

9. It appears from the records that witnesses were examined in O.S.No.150 of 1989 viz., the suit for specific performance and documents were also marked in the said suit. The plaintiff in O.S.No.150 of 1989 had examined himself as PW-1 and another person was examined as DW-1 on the side of the defendants. The plaintiff has produced Ex.A1 to A14 and defendants have produced Ex.B1 to B8. On a consideration of the oral and documentary evidence, the learned Subordinate Judge, Mayiladuthurai, came to the conclusion that the date of birth of the plaintiff is 03.12.1969 and he attained majority on 03.12.1987. On the question of limitation also, the learned Judge came to the conclusion that the suit is not barred by limitation. The learned Subordinate Judge also came to the conclusion that the second defendant is not entitled to enter into an agreement relating to the property owned by his son. The learned Subordinate Judge came to the conclusion that the agreement entered into by the second defendant without obtaining permission of the Court, will not be binding on the first defendant and the same cannot be enforced by way of suit for specific performance.

10. On the aforesaid findings, the learned Subordinate Judge came to the conclusion that the suit in O.S.No.150 of 1989 is liable to be dismissed. As regards the relief of possession prayed for by the plaintiff in O.S.No.14 of 1991 viz., the first defendant in O.S.No.150 of 1989, the learned Subordinate Judge came to the conclusion that inasmuch as the plaintiff in O.S.No.150 of 1989 has been denied the relief of Specific performance, the suit for possession will stand decreed. Of course, the learned Subordinate Judge found that the plaintiff has paid a sum of Rs.40,000/-, [in O.S.No.150 of 1989] to the second defendant pursuant to the agreement, since no alternative relief was sought for, the relief for refund of advance was also denied.

11. Aggrieved by the said judgments and decrees of the Court below, the plaintiff in O.S.No.150 of 1989 has preferred the above appeals. The appeal in A.S.No.425 of 1993 has been filed against the decree in O.S.No.150 of 1989, which was originally filed before the District Court, Nagapattinam as A.S.No.126 of 1992. The said appeal has been transferred to this Court and re-numbered as A.S.No.874 of 1994. As the appeals arise out of common judgment, both the appeals are taken up together.

12. I have heard Mr.S.Sounthar, learned counsel for the appellant in both the appeals. The following questions arise for determination in both the appeals:-

1. Whether the plaintiff in O.S.No.150 of 1989 is entitled to specific performance of the contract dated 19.10.1986?
2. Whether the agreement dated 19.10.1986 having been entered into by the Guardian of the first defendant, could be enforced specifically against the first defendant?
3. Whether the plaintiff in O.S.No.14 of 1991 is entitled to recover a possession along with mense profits.

13. It is an admitted case of the parties that the sale deed in respect of the suit property stands in the name of the first defendant. The sale agreement dated 19.10.1986 has been entered into by the second defendant as the guardian of the first defendant. Though the plaintiff has contended that the suit properties were purchased by the second defendant out of his income, in the name of the first defendant, the said contention has not been proved in accordance with law.

14. The suit was filed in the year 1989, after coming into force of the Benami Transactions Prohibition Act. Therefore, the plaintiff cannot plead that the first defendant was only ostensible owner and the second defendant is the actual owner.

15. It is not the case of the plaintiff that the second defendant agreed to get the permission of the Court for sale of the minor's property. A valiant attempt was made by the plaintiff in O.S.No.150 of 1989 before the Trial Court and before this Court to show that the first defendant had the right to enter into an agreement by claiming that the property belongs to the joint family. The said argument has to be rejected on the sole ground that there has been no pleading in support of the said contention.

16. The pleading in the plaint is specific to the effect that the second defendant has purchased a property in the name of the first defendant and there was no plea regarding existence of any joint family or joint family having been possessed with the properties or the suit property was purchased out of the surplus that was available in the hands of the joint family. In O.S.No.150 of 1989, the plaintiff was aware of the fact that the property belongs to the minor/first defendant. There is enough and more evidence to attribute the said fact to the plaintiff. Therefore, in the absence of any evidence to show that the permission of the Court was obtained from the alienation, the said agreement cannot be upheld.

17. In view of the aforesaid position of law, the plaintiff in O.S.No.150 of 1989 will have to fail in the suit for specific performance. As regards the prayer for possession made by the first defendant in O.S.No.150 of 1989, primarily,

defendant claims protection under Section 53-A of the Transfer of Property Act, apart from the plea of limitation. The appellant, in order to claim protection under Section 53-A of the Transfer of Property Act, must show that there was a valid agreement and he was always ready and willing to perform his part of the contract as per the said agreement.

18. In view of the finding in O.S.No.150 of 1989 to the effect that the agreement itself is invalid, there is no question of the appellant claiming protection under Section 53-A of the Transfer of Property Act. On the question of limitation, it is contended that the suit is barred by limitation having been filed three years after plaintiff had attained majority. The suit is filed for recovery of possession. The period of limitation for recovery of possession is 12 years under Article 65 of the Limitation Act and cause of action would arise only from the date of the plaintiff in O.S.No.14 of 1991 attaining majority. The plaintiff had attained majority on 03.12.1987 and the suit has been filed in the year 1991. Therefore, there is no substance in the contention of the defendant that the suit in O.S.No.14 of 1991 is barred by limitation. For the forgoing reasons, I do not find any material irregularity or non-appreciation of the evidence by the learned Subordinate Judge, in order to enable me to interfere under Section 96 of the Code of Civil Procedure.

19. In fine, both the appeals are dismissed confirming the judgment and decree of the Trial Court and there shall be no order as to be costs in these appeals.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

kmi
To

1. The Sub Judge,
Mayiladuthurai.
2. The Section Officer,
V.R. Section,
High Court, Madras.

+lcc to Mr.T.Murugamanickam, Advocate, S.R.No.65778

Tr.A.S.No.874 of 1994 and
A.S.No.425 of 1993

RSY(CO)
CA(03/01/2017)