



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on: 18.11.2016

Delivered on: 15.12.2016

CORAM :

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

Second Appeal (MD) No.342 of 2013

and

M.P.(MD) No.2 of 2013 and M.P.(MD)No.1 of 2014

1.Sudanthiradevi

2.Kandasamy

3.Santha Devi

4.Sehivakanan

5.Ganesan

: Appellants/Respondents 4 to 8/
LRs. of the deceased Plaintiff

-Vs-.

1.Jahir Hussain : 1st Respondent/Appellant/2nd Defendant

2.Damodran : 2nd Respondent/2nd Respondent/1st Defendant

[Cause title accepted vide order dated 25.04.2013 made in M.P.(MD) No.1 of 2013 in S.A.(MD)SR.No.12509 of 2013 by BRJ)

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, praying to set aside the decree and judgment dated 13.07.2012 rendered in A.S.No.11 of 2006 on the file of the Subordinate Judge, Camp at Melur, reversing the decree and the judgment dated 01.12.2005 rendered in O.S.No.533 of 2004, on the file of the District Munsif of Melur, by allowing this Second Appeal.

For Appellants : Mr.S.Subbiah

For Respondent 1 : Mr.R.Subramanian

For Respondent 2 : No appearance

JUDGMENT

The legal representatives of the plaintiff in the suit in O.S.No.533 of 2004 on the file of the District Munsif Court, Melur, are the appellants in the above Second Appeal.

2.The suit in O.S.No.533 of 2004 was filed for bare injunction restraining the the defendants 1 and 2 from interfering with the peaceful possession and enjoyment of the suit property by the plaintiff.



3.The brief facts as set out in the plaint in O.S.No.533 of 2004 are as follows:

3.1.The first defendant is the owner of the suit property and he entered in to a sale agreement on 03.11.1997 in respect of the suit property. As per the above sale agreement, the total sale consideration was fixed as Rs.5,00,000/- and a sum of Rs.3,00,000/- was paid by the plaintiff to the first defendant on the date of sale agreement dated 03.11.1997. The period of completion of sale was three years. Pursuant to the sale agreement, the plaintiff was put into possession and enjoyment of the suit property on 06.11.1997 by way of a different document dated 06.11.1997. The plaintiff is running a shop in the name of "Mathangi General Merchants".

3.2.Though the period specified in the agreement dated 03.11.1997 expired on 02.11.2000, another agreement of sale by way of extension was entered into between the plaintiff and the first defendant wherein both parties agreed to extend the period by another 1½ years from 02.11.2000. An additional advance amount of Rs.1,00,000/- was also paid to the first defendant in terms of the fresh agreement for extension of time dated 02.11.2000. However, the first defendant with the connivance of the second defendant made an attempt to interfere with the plaintiff's possession on 12.07.2004 and the threat of forcible dispossession continues. Hence, the plaintiff is constrained to file the suit for bare injunction. The suit property is a shop building bearing Door No.632 in Ward No.19 measuring an extent of 8½ feet East-west and 22 feet North-south.

4.The suit was contested by both the defendants. The second defendant filed a written statement *inter alia* pointing out that the suit for injunction without seeking to enforce the alleged agreement of sale by filing a suit for specific performance is not maintainable. According to the second defendant, the suit property does not belong to the first defendant alone as the property originally belonged to the first defendant and others who succeed to the property from a common ancestor. It is also contended by the second defendant that the suit property was purchased by him from all the owners of the property under a valid registered sale deed dated 24.01.2000. After the purchase, the second defendant claimed that he is in possession and enjoyment of the suit property after effecting mutation in the revenue records and changing the house sites in his favour. Hence, the second defendant contended that he is in physical possession and enjoyment of the suit property. Since the plaintiff has not proved his readiness and willingness, the defendants also raised a plea that the plaintiff is not entitled to a decree for injunction as he does not have any right even under Section 53A of the Transfer of Property Act, for his failure to prove that he was ready and willing to perform his part of



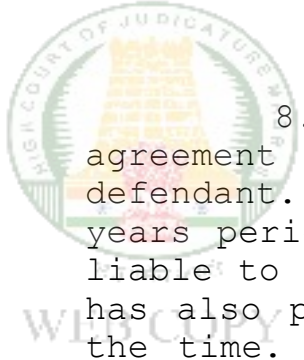
contract.

5.The trial Court decreed the suit simply on the ground that the plaintiff was put in possession pursuant to the agreement of sale and that he has proved his possession as on the date of the suit. Since the second defendant has purchased the suit property during the subsistence of an agreement of sale, the trial Court found that the sale deed obtained by the second defendant is not proper and valid. There was no discussion by the trial Court about the other issues with regard to the exclusive right of the first defendant and the right of plaintiff under Section 53A of the Transfer of Property Act. Aggrieved by the judgment and decree of the trial Court, the second defendant preferred an appeal in A.S.No.11 of 2006 on the file of the Sub Court, Melur. The appellate Court reversed the findings of the trial Court and dismissed the suit. During the pendency of appeal before the lower appellate Court, the plaintiff died and his legal heirs were impleaded as respondents. Hence, the present Second Appeal has been filed by the legal heirs of the plaintiff.

6.The learned counsel for the appellants submitted that the appellate Court has not given sufficient reasons to reverse the findings of the trial Court and that in a suit for permanent injunction, the appellate Court has travelled beyond the scope of the suit and thereby failed to protect the plaintiff's settled possession. When the plaintiff has proved possession, the decree for injunction cannot be refused to the plaintiff. Since the plaintiff, though was an agreement holder, was put into possession of the suit property by his vendor pursuant to the sale agreement, the possession of the plaintiff ought to have been held as lawful and the lower appellate Court ought to have granted a decree for injunction. Even assuming that that second defendant is the owner of the suit property, he cannot interfere with the possession of the appellants otherwise than due process of law and the remedy of the second defendant is only to institute a suit for recovery of possession. Having regard to the submissions of the learned counsel for the appellants, it is necessary to state the following facts which are not in dispute.

7.The plaintiff has entered into a sale agreement under Ex.A1 dated 03.11.1997 in respect of the suit property. Though a sum of Rs.3,00,000/- was paid to the first defendant on the date of agreement, it was specifically agreed between the plaintiff and the first defendant that the sale should be completed within three years from the date of agreement i.e., on or before 02.11.2000. The sale agreement specifically refers to the following clause as :

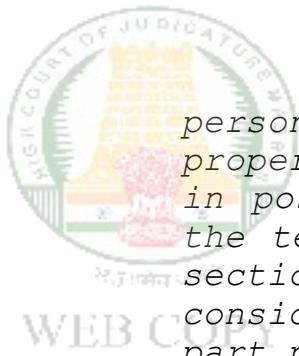
"தவறினால் 2வது நபர் தான் கொடுத்துள்ள அட்வான்ஸ் தொகையை 1வது நபரிடம் பெற்றுக் கொண்டு இந்த உடன்படிக்கையை இருவரும் சேர்ந்து ரத்து செய்து கொள்ள வேண்டியது முன்று வருஷங்கள் கழித்து 2வது நபர் 1வது நபரைக் கிரையம் செய்து கொடுக்கும் படி கேட்க எவ்வித உரிமையுமில்லை இருவரும் சம்மதித்தால் அப்போதுள்ள நிலைமைக்குத் தக்கபடி வேறு ஒப்பந்தம் எழுதிக் கொள்ளலாம்."



8. It is not the case of the plaintiff that the sale agreement was not completed due to the conduct of the first defendant. In terms of the sale agreement, after expiry of three years period mentioned under the document Ex.A1, the agreement is liable to be cancelled. In terms of the agreement, the plaintiff has also pleaded that there was a subsequent agreement extending the time. Since the plaintiff has not come forward to complete the sale, the plaintiff is liable to hand over possession, even as per the agreement which he had entered into under Ex.A1. It is not in dispute, in the meanwhile, that the first defendant along with the other co-owners have executed a sale deed in favour of the second defendant on 24.01.2000. Mere agreement of sale does not create any interest in immovable property and hence, the subsequent sale is valid subject to the right of previous agreement holder to enforce the agreement even against the purchaser. In this case, no suit has been filed for specific performance of the agreement of sale. The plaintiff relied upon the subsequent agreement under Ex.A3 dated 02.11.2000. After executing the sale deed in favour of the second defendant, the first defendant or any other co-owner has no subsisting interest over the suit property and hence, the agreement under Ex.A3 dated 02.11.2000 is invalid and cannot bind the second defendant in the suit. The learned counsel for the appellants mainly relies upon the fact that the possession of the suit property was handed over to the plaintiff under a separate document under Ex.A2 dated 06.11.1997. Since it is the claim of the plaintiff that he was put in possession of the property in pursuance of the sale agreement it was contended by the learned counsel for appellant that the possession is protected under Section 53A of the Transfer of Property Act.

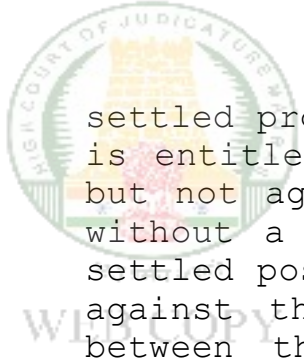
9. Section 53-A of the Transfer of Property Act reads as under:

"53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that 2[***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and



persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract: Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

10. Section 53-A of the Act gives protection to the agreement holder who was in possession pursuant to the sale agreement. Only a person who has done some act in furtherance of the contract can claim the benefit of Section 53-A of the Act. The person in possession must be a person who has performed or willing to perform his part of contract. Having regard to the admitted facts that the plaintiff is not ready and willing to perform his part of contract within the reasonable time and that the plaintiff has not filed a suit for specific performance, the suit for bare injunction is not maintainable. The conduct of the plaintiff would clearly disclose that the plaintiff is not willing to perform his part of contract. Further, the other conditions for invoking Section 53-A of the Act have not been complied with by the plaintiff. In such circumstances, it is not permissible in law to protect the plaintiff's possession merely by virtue of Section 53-A of the Act. It is well settled that by pleading part performance under Section 53-A of the Act, an agreement holder is not entitled to any protection by filing the suit for injunction restraining the lawful owner from interfering with his peaceful possession and enjoyment. While an agreement holder who is put into possession pursuant to an agreement of sale, upon proving the requirements of the provisions is entitled to get shelter under Section 53-A of the Act as a defendant in a suit, he cannot get protection to his unlawful possession by seeking an injunction. Section 53-A of the Act cannot entitle a person to use this provision as a weapon. In this case, the plaintiff is not even entitled to any protection as he has not proved his readiness and willingness apart from establishing that he has done something in furtherance of the contracts. Further, in this case, the suit is for permanent injunction restraining the defendant from interfering with his possession. If the suit had been for permanent injunction restraining the defendant from enjoying suit property otherwise than due process of law, things would have been different. But, having regard to the fact that the plaintiff has come forward with a false case claiming absolute right, this Court may not be justified even for granting lesser relief, as the plaintiff is not entitled to any indulgence or for exercising discretion in his favour. The learned counsel for the appellant relied upon a judgment in **Ramesh Chand Ardawatitya v. Anil Panjwani** reported in (2003) 7 SCC 350 wherein the Hon'ble Supreme Court has observed that an agreement holder who was put into possession is entitled to protect his possessory right against another trespasser or a person who has no title. It is a well



settled proposition of law that a person by showing his possession is entitled to a decree for permanent injunction against any one but not against the true owner. The person who is in possession without a valid title even if such person proves that he is in settled possession, is not entitled to get a decree for injunction against the lawful owner. The law has recognised distinction between the rights and remedy. Similarly, the law has also recognised the rights and privileges of parties as plaintiff and as defendant. Hence, the questions of law raised in this appeal are answered against the appellants. The suit for injunction cannot be granted in favour of the appellant. The lower appellate Court has given valid reasons in support of its conclusions to reverse the judgment and decree of the trial Court.

11. In that view of the above, the Second Appeal fails and accordingly, this Second Appeal is **dismissed**. The judgment and decree of the lower appellate Court rendered in A.S.No.11 of 2006 reversing the judgment and decree of the trial Court in O.S.No.533 of 2004 is confirmed. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CSII)

/True Copy/

Sub Assistant Registrar

SRM

TO

1 The Subordinate Judge (Camp)
Melur

2 The District Munsif
Melur

+1cc to Mr. R. Subramanian Advocate Sr.No. 81336

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Judgment made in
Second Appeal (MD) No.342 of 2013

15.12.2016