

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.8.2017

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

S.A.No.526 of 2017

1. S.Pathiporanam
2. K.Sundaram
3. S.Kaviarasu
4. S.Mutharasu
5. S.Illavarasi

Represented by their Power
Agent Mr.N.S.Muthu ...Appellants/ Appellants/Plaintiffs

M.Balakrishnan Vs.
...Respondent/Respondent/Defendant

Second appeal filed under Section 100 of the Civil Procedure Code to set aside the judgment and decree of the Court of the XV Additional Judge, City Civil Court, Chennai dated 10.02.2017 made in A.S.No.327 of 2015 concurring the Judgment and Decree of the Court of the XVI Assistant Judge, City Civil Court, Chennai dated 15.7.2015 made in O.S.No.1230 of 2010.

For Appellants : Mr.P.Rajendrakumar

JUDGMENT

The brief facts of the case as follows:

The appellants are the plaintiffs in the suit. Plaintiffs have filed a suit in O.S.No.1230 of 2010 before the City Civil Court, Chennai for permanent injunction. According to the plaintiffs, the plaintiffs have authorised and nominated one Mr.N.S.Muthu, Power of Attorney to act, appear on behalf of the plaintiffs and to file a suit through a Deed of General Power of Attorney, dated 19.4.2006. The suit property belongs to the first plaintiff through a Deed of Settlement, dated 4.8.1998 executed by the second plaintiff's father Ezhumalai. By virtue of settlement deed, the plaintiffs are in absolute possession and enjoyment of the suit property. On 27.10.2010, the defendant/respondent with 10 of his henchmen attempted to forcibly entered into the suit property and put up a thatched structure. The respondent/defendant has filed a suit in O.S.No.5060 of 2007 for specific performance against the first

plaintiff. The aforesaid suit was decreed in favour of the defendant/ respondent herein. The respondent/defendant has suppressed the service of summons and obtained exparte decree. Further, the respondent/defendant trespassed into the suit property. Hence, the plaintiffs/appellants have filed the present suit for permanent injunction. The respondent herein has filed written statement contending that the defendant denied the contentions of the appellants/plaintiffs. It is the case of the defendant that the defendant has filed a suit in O.S.No.5060 of 2007 before the V Fast Track Court, Chennai for specific performance of sale agreement and the same was decreed on 22.9.2008 in favour of the defendant. Thereafter, the respondent/defendant filed E.P.No.1291 of 2013 for execution of the sale deed. In pursuance of the said decree, the Execution court executed the registered Sale deed dated 11.11.2009, vide Doc. No.5036 of 2009, on the file of S.R.O., Virugambakkam in favour of the defendant pertaining to the suit schedule mentioned property. Therefore, by virtue of Sale deed executed in favour of the respondent/defendant, the respondent/ defendant has become an absolute owner of the suit property. After considering the evidence of P.W.1, P.W.2 and Ex.A1 to A9 on the side of the plaintiff, D.W.1 and Ex.B1 to B4 on the side of the defendant, the trial Court dismissed the suit. Challenging the judgment and decree, the plaintiffs have preferred an appeal in A.S.No.327 of 2015 before the XV Additional District Judge, City Civil Court, Chennai.

2. Before the Appellate Court, the plaintiffs/appellants raised ground that the appellants have been in possession of the suit property and also produced the documents before the Court below to prove that the appellants/plaintiffs were in actual possession and enjoyment of the suit property. Further, it is stated that by virtue of registered sale agreement dated 19.12.2005, appellants/plaintiffs are the absolute owner of the property. The Appellate Court after considering the submissions made by both sides, held that the respondent/defendant has filed the suit in O.S.No.5060 of 2007 and obtained exparte decree on 22.9.2008. Thereafter, through Execution proceedings in E.P.No.1291 of 2013, the defendant has taken possession of the suit property. Referring to the decision of this Court in S.Samboornam Vs. P.V.Kuppusamy reported in 2007(3) CTC 529 wherein it was held that even in the absence of any prayer for possession, once a suit for specific performance is decreed the court has got every power to order delivery of possession. Hence, rejected the contention of the appellants/ plaintiffs that the defendant has not sought for relief of recovery of possession in O.S.No.5060 of 2007, the defendant had no right to file execution petition for recovery of possession and dismissed the Appeal suit.

3. According to the appellants/plaintiffs, the respondent/defendant has filed suit for specific performance in O.S.No.5060 of 2007, has not sought for the relief of recovery of possession in the prayer of the suit. Therefore, without specific prayer for delivery of possession, execution petition is non-executable and the said E.P. is not maintainable. By relying upon the judgment of this Court in S.Samboornam vs. P.V.Kuppusamy (supra), the Appellate court rejected the contention of the appellants/plaintiffs and dismissed the appeal.

4. Challenging the judgment and decree of the Appellate court, the appellants/plaintiffs have filed the present Second appeal before this Court raising the following substantial questions of law:

- (i) Can relief under Section 22(1) of Specific Relief Act, being a statutory right be curtailed on by a party by playing fraud on the parallel proceedings ?
- (ii) Whether the executing court can go beyond the decree when the defendant is claiming possession through execution proceedings when the suit is not for possession in parallel proceedings ?
- (iii) When a party is playing fraud consistently in different courts, can be entitled to have equitable relief thereby ignoring the title owners ?
- (iv) Whether a decree obtained by fraud is a nullity and is it enforceable ? Further, can an illegality be allowed to continue just for the sake of non challenging it ?
- (v) Whether the absence of any prayer for possession once suit for specific performance is decreed can a court has got power to order delivery of possession ?

5 Heard the learned counsel for the appellants/plaintiffs and perused the materials available on record.

6 On perusal of the substantial questions of law and the materials on record, the learned counsel for the appellants/plaintiffs would mainly relying upon the suit filed by the respondent/ defendant in O.S.No.5060 of 2010 for specific performance wherein the respondent/defendant has not prayed for the relief of recovery of possession. Without obtaining such consequential relief, the Execution Court cannot pass orders beyond the scope of the decree. Even though decree passed in O.S.No.5060 of 2010 and the same is non-executable decree, therefore, execution petition is not maintainable and the

present relief as prayed for in the suit is not maintainable. The Courts below without considering the said factum of the legal position, rejected the relief as prayed for by the plaintiffs/appellants is erroneous and unsustainable.

7. This court by considering the similar issue, in case of in S.Samboornam Vs. P.V.Kuppusamy (supra), has held as follows:

'23 In K.M.Rajendran vs. Arul Prakasam, 1998(3) CTC 25 : AIR 1998 Mad. 336, it was held that in a Suit for specific performance of an agreement to transfer an immoveable property, once a decree for specific performance is granted, it includes the term for delivery of possession and it is unnecessary for the Court to direct such delivery of possession expressly because the Court was directing the enforcement of the entire agreement, including the agreement to delivery of possession.'

8 It is clear from the aforesaid decision of this Court even though, in the absence of prayer for recovery of possession, once the suit for specific performance decreed, it includes the term for delivery of possession to execute the decree. Further, the appellants/ plaintiffs have filed the present suit for permanent injunction, after knowing the exparte decree passed against the appellants/plaintiffs, the appellants without challenging the exparte decree before the concerned court or set aside the exparte decree passed against the appellants. The present suit filed for permanent injunction is unsustainable and therefore, both the Courts have concurrently held that the relief prayed for by the plaintiff was negatived and rightly dismissed the suit.

9. There is no error or illegality in the judgment and decree passed by the courts below, therefore, this Court is not inclined to interfere with the judgment and decree passed by the Courts below. Hence, there is no substantial question of law involved to entertain the Second Appeal.

The Second appeal fails and accordingly dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS VI)

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Sub-Assistant Registrar

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To

1. The XV Additional Judge, City Civil Court, Chennai
2. The XVI Assistant Judge, City Civil Court, Chennai

+1 CC to Mr.P. Rajendrakumar, Advocate sr 60933.

S.A.No.526 of 2017

GR(CO)
SP(10/11/2017)



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