

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 20.12.2017

Judgment pronounced on : 22.12.2017

CORAM

THE HONOURABLE MR.JUSTICE P. RAJAMANICKAM

S.A.No.840 of 1999

1.Sivasubramanian

2. Pandarinathan

3. Arumugam ... Appellants/Appellants/Defendants
Vs

1. Jayalakshmi (Deceased)

2. Sampath

3. Ravi

4. Murthy ... Respondents/Respondents/Plaintiffs 2 to 5

(Notice to 2nd respondent is dispensed with as per order dated 07.12.17 on the memo)

(As per the order passed on 06.12.2017, in the memo dated 06.12.2017 the respondent Nos.3 and 4 are recognized as legal representatives of the deceased first respondent)

Prayer : Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed by the Principal Subordinate Judge, Mayiladuthurai, in A.S. No.79 of 1998 dated 27.11.1998 in confirming the judgment and decree made in O.S. No. 122 of 1987 dated 31.03.1998 on the file of the Court of District Munsif, Sirkali.

For Appellants : A. Muthukumar

For Respondents: S. Sounthar (For, R1, R3 & R4)

: (R2 set exparte)

J U D G M E N T

This second appeal has been filed by the defendants against the Judgment and Decree dated 27.11.1998 passed in A.S. No.79 of 1998 on the file of the Principal Subordinate Judge, Mayiladuthurai confirming the Judgment and Decree dated 31.03.1998 passed in O.S.No.122 of 1987 on the file of the District Munsif, Sirkali.

2. The husband of the first respondent herein and father of the respondents 2 to 4 namely Muthumanickam had filed a suit in O.S. No.122 of 1987 on the file of the District Munsif, Sirkali, directing the defendants to surrender the possession of the suit property after removing superstructure and to direct the defendants to pay future profits. During the pendency of the suit, since the said Muthumanickam died, his legal representatives had been impleaded as plaintiffs 2 to 5. The learned District Munsif had decreed the suit as prayed for. Aggrieved by the same, the defendants preferred the first appeal in A.S.No.79 of 1998 on the file of the Principal Subordinate Judge, Mayiladuthurai. The learned First Appellate Judge had dismissed the said appeal confirming the Judgment and Decree passed by the Trial Court. As against the same, the defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial Court.

3. The averments made in the plaint are in brief as follows:

The first plaintiff namely Muthumanickam is the owner of the Suit Property. He borrowed a sum of Rs.3,000/- from the first defendant and Rs.1000/- from the second defendant in the year 1986. Subsequently, the defendants 1 and 2 obtained signatures of the first plaintiff in blank stamp papers while the first plaintiff was under the influence of intoxication. That being so, in the month of January 1987, the defendants 1 and 2 colluding together, trespassed into the Suit property and took possession. Hence, the first plaintiff issued a Lawyer's Notice dated 04.03.1987 calling upon the defendants 1 and 2 to surrender vacant possession of the suit property. The defendants 1 and 2, after receipt of the said notice, sent a reply with false averments. Hence, the first Plaintiff forced to file the above suit for delivery of possession and to pay future profits.

4. The averments made in the written statement filed by the defendants 1 and 2 are in brief as follows:

5.It is false to allege that the first plaintiff borrowed a sum of Rs.3,000/- from the first defendant and Rs.1,000/- from the Second defendant as hand loan in the year 1986 and subsequently, the defendants 1 and 2 obtained signatures of the first plaintiff in the blank papers when he was under the influence of intoxication. It is also false to allege that the defendants 1 and 2 assured that the signatures were obtained only as security for loan.

6. On 23.07.1984, the first plaintiff entered into an agreement of sale with the second defendant agreeing to sell of 0-11 cents on the eastern portion of the suit property for Rs.3,350/-. The first plaintiff received an advance of Rs.2,500/- on the same date and the agreement was reduced to writing and it was agreed to complete the same on or before 31.03.1985 and possession was also given to the second defendant. Subsequently, on 01.11.1985, the first plaintiff has received another sum of Rs.7,00/- from the second defendant and made an endorsement to that effect on the agreement itself as there is a balance of Rs.130 only from the second defendant. The second defendant was always ready and willing to perform his part of the contract. But, the first plaintiff was adopting various dilatory tactics. After taking possession of the 0-11 cents, the second defendant has put up a superstructure and residing in a portion of the house and in another portion, he is running a cycle shop.

7.Similarly, the first plaintiff entered into a sale agreement with the first defendant on 28.06.1984 agreeing to sell of 36 cents on the western side of the suit property for Rs.10,933/-. The first plaintiff received a sum of Rs.6,000/- as advance on the date of agreement itself to put the first defendant in possession of the said 36 cents. Since there was only 4 cents left, the first plaintiff has agreed to sell the said property also to the first defendant and put him in possession of the same. The first plaintiff has totally received a sum of Rs.5,171/-on various dates from the first defendant and signed in the note book maintained by the first defendant to vouch the money received by him. Further the first plaintiff received another sum of Rs.1,000/- from the first defendant by way of hand loan and the same has to be adjusted with the balance sale amount. As the first plaintiff put the first defendant in possession of the entire 40 cents in pursuance of the said sale agreement, after taking possession, the first defendant put up superstructure for his residence and paying property tax. The first defendant also put another residence in which his brother Arumugam (third defendant) is residing. Possession of the entire extent of the Suit property

has been handed over to the defendants 1 and 2 in pursuance of the sale agreement and as such they are entitled to retain the possession under Section 53A of the transfer of property Act. It is false to state that the defendants are trespassers. After receipt of the lawyer's notice, the defendants 1 and 2 have sent a reply appraising the real facts. Thereafter, Panchayat was convened and as per the decision of the Panchayat, another sale agreement was executed between the first plaintiff and first defendant on 18.03.1986 and it was also agreed that the first defendant has to pay Rs.18,000/- as sale consideration. On the date itself Rs.11,000/- was paid as advance and the balance amount has to be paid within 3 months. Therefore, the suit is misconceived and prayed for to dismiss the same.

8. Based on the aforesaid pleadings, the learned District Munsif has framed necessary issues and tried the suit. During the trial on the side of the plaintiffs, the first plaintiff was examined as PW1 and Ex. A1 to A3 were marked as exhibits. On the side of the defendants, as many as 6 witnesses were examined as Dws 1 to 6 and Ex. B1 to B35 were marked. The report and the plan filed by the Advocate Commissioner have been marked as Ex.C1 and C2 respectively. The learned District Munsif, after considering the materials placed before him, found that the alleged sale agreement was a genuine and valid agreement. It was also found that the defendants are trespassers. Accordingly, the learned District Munsif has decreed the suit directing the defendants to deliver the vacant possession within two months and with regard to future profits, the plaintiffs have to work out their remedies by taking separate proceedings under order 20 rule 6 CPC. Aggrieved by the same, the defendants preferred the first appeal in A.S. No.79 of 1998 on the file of the Sub Judge, Mayiladuthurai. The learned First Appellate Judge has dismissed the said appeal and confirmed the Trial Court's Judgment and decree. As against the same, the defendants have filed the above second appeal.

9. At the time of admission of the second appeal on the following substantial question of law was formulated:

" Whether the Courts below erred in placing of burden of proof upon the defendants when the plaintiffs admit the signature and execution of the documents Exs.B7 and B18?"

10. Heard Both sides.

11. The suit property is measuring about 51 cents situated in R.S. No.344 of 2013 of Perambur Village, Sirkali Taluk. It is an admitted fact that the suit property originally belonged to the first plaintiff namely Muthumanickam. He filed the above suit for recovery of possession and future profits alleging that

the defendants have trespassed into the suit property and they have taken the possession in the month of January 1997. The defendants resisted the same stating that the first plaintiff entered into a sale agreement with the first defendant on 28.06.1984 in respect of 36 cents and in pursuance of said agreement, he was put in possession and subsequently, the first plaintiff agreed to sell in respect of 4 cents and accordingly the first defendant was put in possession in that land also. It was their further case that on 23.07.1984, the first plaintiff entered into an agreement for sale with the second defendant in respect of 11 cents situated on the western portion of the suit property and that on the same date, the second defendant was put in possession in respect of the said 11 cents and therefore there are in lawful possession of the suit property as part performance of the agreements and not as trespassers as alleged by the first plaintiff.

12.The Trial Court found that the alleged agreements are not genuine and valid and it was also found that the defendants have trespassed into the said property and accordingly, the trial Court has passed Judgment and decree in favour of the plaintiffs. The First Appellate Court also confirmed the said judgment and decree. Since the findings of the Courts below are based on the facts, this Court cannot interfere with the said concurrent findings.

13.Even assuming that the first plaintiff had executed the sale agreements (Ex.B7 to Ex.B18) in favour of the defendants 1 and 2, and they were put in possession only in pursuance of the said agreements, they cannot take shelter under Section 53A of the Transfer of property Act. Section 53A reads as follows:

"53A. Part performance:

Where any person contracts to transfer for consideration any immovable 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 the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor 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."

(Emphasis Supplied)

14. From the reading of the aforesaid provision, it is clear that the transferee should have performed or willing to perform his part of the contract. The Sale agreement (Ex.P7) was said to have been executed on 23.07.1984 in which it is stated that the sale should be completed on 31.03.1988. In the endorsement said to have been made by the first plaintiff, it is stated that on 01.11.1989, the first plaintiff has received Rs.7,000/- towards advance, but for completing the sale time was not extended. Another Sale agreement (Ex.P18) was said to have been executed on 28.06.1988 wherein time has not been stipulated for completing the sale. Since time was not stipulated to complete the sale, the defendants should have filed the suit for specific performance within 3 years from the date they had notice that performance is refused. Admittedly, in this case, the first plaintiff has sent a Lawyer's notice to the defendants 1 and 2 vide Ex.A2 dated 04.03.1987 stating that the defendants 1 and 2 are trespassers. Subsequently, the first plaintiff had filed the above suit on 15.04.1987 stating that he has not executed any sale agreement as alleged by the defendants 1 & 2 in their reply notice. The defendants should have filed the suit for specific performance within three years at least from the date of filing of the suit. Till date, the defendants have not filed any suit for specific performance. So, it is clear that the defendants have not performed their part of contract within the limitation prescribed under the law.

15. Therefore, the defendants cannot retain the possession when the plaintiffs seeking relief of delivery of possession through Court. The defendants are bound to deliver the possession of the suit property. Accordingly, the question of law is answered against the appellants.

16. In the result, the second appeal is dismissed confirming the Judgment and Decree of the Courts below. Considering the facts and circumstances of the case, the parties are directed to bear their own costs.

Sd/-

Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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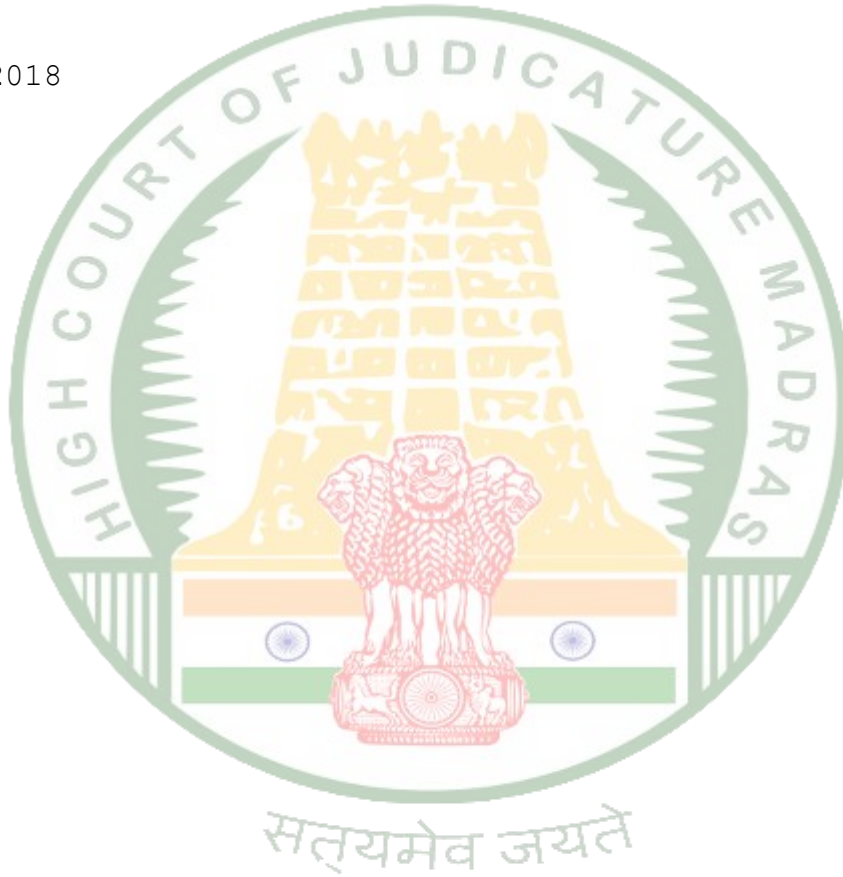
1.The Principal Subordinate Judge,
Mayiladuthurai

2.The Court of District Munsif,
Sirkali.

+1cc to M/s.Muthukumar, Advocate sr.no.92038

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