

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:19.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

SA.No.1206 of 2005 and
CMP.NO. 16686/2005

S.Aseervadam

.. Appellant/Defendant

Vs.

Kasthurirajan

... Respondent/Plaintiff

Prayer: Second Appeal filed under section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.40 of 2003 dated 29.06.2005 on the file of the learned Additional District Judge, (Fast Track Court No.V), Chennai confirming the Judgment and Decree passed in O.S.No.619 of 1996 dated 13.09.2002 on the file of the Learned IV Assistant Judge, City Civil Court, Madras and prays for setting aside the same for the following among other.

For Appellant : Mr.Abulu Kumar Rayarathinam
For Respondent : Mr.P.B.Ramanujam

JUDGMENT

The present Second Appeal on hand is filed against the judgment and decree passed in A.S.No.40 of 2003, confirming the judgment and decree passed in O.S.No.619 of 1996.

2. The ranking given in the Trial Court is followed as the ranking in the present judgment. The suit was filed to direct the defendant to quit and deliver the vacant possession of the suit property. The suit property was allotted by the Tamil Nadu Housing Board in favour of the plaintiff. The plaintiff has taken possession of the same in the year 1984 and was in possession and enjoyment of the same since then. As per the terms of the Tamil Nadu Housing Board, the plaintiff had put up construction in the suit property and got electricity and water connection in the name of the plaintiff. As the plaintiff was in urgent need of money, she entered into a sale agreement with the defendant in the month of April 1987. The total sale consideration fixed was Rs.1,50,000/- towards advance. On the date of the Agreement, the defendant paid only a sum of Rs.45,000/- by way of Demand Draft. Even then the plaintiff had granted a license to occupy the suit property and the defendant

was inducted into possession. The defendant had not acted as per the terms and conditions of the Agreement. The defendant failed to perform his part of contract as per the Agreement. In spite of the repeated approach made by the plaintiff, the defendant evaded the payment of balance sale consideration and the defendant has not paid the entire amount in single payment to the Tamil Nadu Housing Board as agreed earlier. The plaintiff has suffered a lot by way of interest and default interest and the agreement entered into by the defendant was time barred. The plaintiff instituted the suit on the ground that the Agreement became lapsed and therefore, the defendant has no authority to continue in the premises allotted to the plaintiff by the Tamil Nadu Housing Board. Admittedly, the Agreement was signed by the parties in April 1987 and till the institution of the suit in the year 1994, terms and conditions of the Agreement were not fulfilled by the defendant.

3. The defendant in his written statement averred that he paid Rs.50,000/- on 02.04.1987. Subsequently, the defendant made a payment of Rs.50,000/- on 07.05.1987 and thereafter, another sum of Rs.50,000/- was paid to the plaintiff by the defendant. The plaintiff gave a receipt for Rs.80,000/- after a lapse of 10 days and thereafter, the plaintiff demanded Rs.35,000/- and ask the defendant that he should get the Sale Deed within a period of one week. The defendant states that reposing trust on the plaintiff, he paid Rs.35,000/- and the receipt was issued for a sum of Rs.1,40,000/-. However, the plaintiff issued demand notice for a sum of Rs.25,200/- and the defendant paid the amount to the Housing Board on 27.03.1992 by way of pay order. Specifically, the plaintiff's Husband pacified the defendant that they will agree for a settlement on 25.11.1993. Accordingly, another amount of Rs.10,000/- was demanded for the purpose of executing the Sale Deed. The plaintiff signed the Sale Deed after receiving Rs.1,000/- and thereafter, the defendant was informed that the Sale Deed will be handed over after the execution of the Sale Deed by the Tamil Nadu Housing Board in favour of the plaintiff. The defendant claimed that he paid the entire sale consideration and an additional sum of Rs.25,200/- to the Housing Board and in spite of that, the plaintiff has not executed any Sale Deed in favour of the defendant and filed the Civil Suit for recovery of possession.

4. The Trial Court formulated the issue by stating Whether the plaintiff is entitled for the delivery of vacant possession of the suit property?.

5. The husband of the plaintiff was examined as P.W.1 and another one Mr.Subramanian was examined as P.W.2. The plaintiff has marked Exs.A1 to A7 as documents. The defendant had examined himself as D.W.1 and another Senthilathitan as D.W.2. The defendant had filed Exs.B1 to B5. Admittedly, the plaintiff and

the defendant were entered into an Agreement in the year 1987, in respect of the property allotted in favour of the plaintiff by the Tamil Nadu Housing Board. The plaintiff had taken possession of the suit property in the year 1984 itself and was in enjoyment of the same. With regard to Condition No.2, the Sale agreement reads as follows:

'2. The price for the schedule mentioned property is agreed to at Rs.1,50,000/- and the purchaser aid the sum of Rs.50,000/- to the Vendor as advance by demand draft No.005454 dated 02.04.1987, Indian Bank and the Vendor doth hereby admit and acknowledge receipt of the said sum of Rs.50,000/-. The purchaser agreed to pay another sum of Rs.90,000/- within 45 days from the day and by then the Vendor shall obtain nil balance certificate from TNHB. The balance amount is to be paid at the time of executing and registration of Sale Deed in favour of the Purchaser after getting Sale Deed from TNHB in favour of the Vendor herein''

6. The P.W.1/husband of the plaintiff deposed before the Trial Court that the defendant had not adhered to the above stated condition No.2 and not paid the instalments as per the Agreement. Thus, the plaintiff was constrained to issue a notice in Ex.A2, pointing out the failure of the defendant to perform his part of the Contract as per the Agreement marked as Ex.B1. The Trial Court while adducing the oral evidence of D.Ws.1 & 2 and the documents on the side of the defendant Exs.B1 to B5, found that the defendant had not complied with the condition No.2 stipulated in the Agreement in Ex.B1. Though, Exs.B3 and B5 are the receipts of the payment of some amounts, they themselves become the proof for the compliance of conditions No.2 of the Agreement. Further, no evidence has been adduced to show that he has taken steps to get the Sale Deed executed in furtherance of the Agreement. This apart, the plaintiff was the allottee of the suit property and therefore, the plaintiff is entitled for the possession of the suit property. The defendant has not established that he had spent money for the construction of the superstructure in that property and therefore, the issues were decided by the Trial Court in favour of the plaintiff and accordingly, the suit was decreed.

7. The defendant preferred the first appeal in A.S.No.40 of 2003 and the First Appellate Court also gone into the evidences and the documents produced by the respective parties and found that the documents marked by the defendant before the Trial Court are insufficient to establish that the defendant had complied with the condition No.2 of the Agreement entered into between the plaintiff and the defendant. The First Appellate Court further gone into the facts by stating that the defendant had deposed orally in respect of the constructions made by him in the suit property. However, no documents has been filed to

that effect and to establish that the defendant spend money for any such constructions. In the absence of any proof to the effect that the defendant had constructed property by spending his own money, the finding arrived by the Trial Court is to be accepted.

8. The First Appellate Court also independently found that the additional issues raised before the First Appellate Court cannot be considered, in view of the fact that the defendant did not raise any objections at the time of recasting of issues and no positive evidence was adduced by the defendant with regard to the fact that the plaintiff has under valued the suit property. Thus, inspite of the valuation of the suit with reference to the Tamil Nadu Court Fee and Suit Valuation Act, this Court declined to entertain the said issues as the defendant has not raised these issues before the Trial Court. When it was not taken up for trial before the Trial Court, this Court did not find any infirmity in respect of such finding by the First Appellate Court.

9. The Substantial questions of law now raised in the Second Appeal at the time of admission are as under:

1.While the trial Court had erred in omitting to frame the vital issue of competence of the respondent/plaintiff to re-possess the house constructed by the appellant / defendant and consequently the parties had gone through the existence of such dispute between them in law, whether the decree resulting in such proceedings, is sustainable?

2.When the respondent/plaintiff, by fraudulently representing her competence over the suit property, had transferred it to the appellant / defendant under Ex.B-1 which has been acted upon by him by constructing a house over it, whether the respondent / plaintiff is not estopped from making the suit claim unlawful under the "'Doctrine of feeding the grant by estopped'?"

3.While the appellant / defendant had been put in possession into the suit property under Ex.B1 by the respondent / plaintiff for a consideration and the appellant / defendant had part performed his part of the contract, whether the appellant / defendant is not entitled to protect his possession over the suit property under Section 53-A of the Transfer of property Act, 1882?

4. In the facts and the circumstances of the case, when both the parties to lis had been equally in wrong, whether the Courts below are right in not applying the established legal principles of In pari Delicto Potior Est Conditio Possidentis?

5. When Ex.B.1 and the schedule to the plaint in O.S.No.619 of 1996 describe the suit property to be a vacant house site, whether the respondent / plaintiff is entitled under to seek re-possession of the vacant site along with the construction made therein by merely valuing the relief for vacant site alone?

10. In respect of the First Question of law, the Trial Court as well as the First Appellate Court categorically found that the defendant had not filed any documents to establish that he has put up constructions in the suit property. Except the oral submission made by the defendant, there is no proof to establish that the defendant contributed money for the purpose of constructions. The defendant has failed to establish that he has spent money for the construction of the superstructure in the property and therefore, the Trial Court as well as the First Appellate Court arrived the conclusion that the defendant is not entitled for any relief. The issues though was not elaborately adjudicated by the Trial Court, the First Appellate Court again examined the documents filed before the Trial Court and arrived the conclusion that the defendant had not established the fact by way of evidences that he contributed his money for the construction of superstructure in the suit property. When the First Appellate Court considered this factor factually as well as with reference to the documents filed by the respective parties before the Trial Court, this Court is of an opinion that no further consideration is required in respect of the said question of law raised in the present Second Appeal as the same involves the facts submitted by the respective parties before the Trial Court as well as before the First Appellate Court.

11. This Court is of an opinion that the factual materials established by the competent parties both before the Trial Court as well as the First Appellate Court cannot be interfered by the High Court in a Second Appeal, more specifically, under Section 100 of the Code of Civil Procedures. Such a established facts concluded cannot be interfered with unless the same is perverse or totally in contravention with the facts pleaded by the parties before the Trial Court as well as before the First Appellate Court. In other words, in the absence of any such perversity in facts, the Second Appeal is to be dealt with, on the basis of the facts recorded by the Trial Court as well as by the First Appellate Court.

12. In respect of the Second Question of law, the same also consequently related to the First Question of law. The questions of law was formulated mainly on the ground that the defendant had constructed some superstructure in the suit property. Though, the Trial Court had not adjudicated elaborately, the First Appellate Court had considered the said point and arrived at a finding that the defendant had not established the fact

that he spend money for the construction of superstructure in the suit property. As far as the possession of the suit property is concerned, admittedly, the suit property was allotted by the Tamil Nadu Housing Board in favour of the plaintiff. The Tamil Nadu Housing Board handed over the possession to the plaintiff in the year 1984 and the plaintiff was in possession and enjoyment of the suit property. On account of certain financial crunches, the plaintiff entered into an agreement with the defendant for execution of a Sale Deed.

13. This Court is of an opinion that unless the Tamil Nadu Housing Board executes a Sale Deed in favour of the plaintiff, the plaintiff will be incompetent to execute the Sale Deed in favour of another third person. As on the date of the Agreement, the plaintiff was not holding any valid title of the property and therefore, the very agreement entered into between the plaintiff and the defendant was in violation of the terms and conditions of the Rules and Regulations of Tamil Nadu Housing Board. Unless, the title is transferred by the Tamil Nadu Housing Board in favour of the plaintiff, the plaintiff will not be entitled to alienate the property in favour of any other third person.

14. Under these circumstances, the defendant had not examined its legal impediments in respect of entering into an agreement for the purpose of execution of Sale Deed in favour of the defendant by the plaintiff. Thus, an agreement itself is not in accord with the Rules and Regulations of the Tamil Nadu Housing Board.

15. The defendant either was aware of the fact or not, the fact remains that the plaintiff at the time of entering into an agreement was not the absolute owner of the property, holding valid title in respect of the suit property. This being the factum of the case, the petitioner was incapable to execute the Sale Deed in favour of the defendant. Though these aspects were not adjudicated both by the Trial Court and the First Appellate Court, this Court is of an opinion that in the absence of any such valid title, the defendant cannot seek execution of the Agreement for executing the Sale Deed in his favour.

16. In respect of the fourth Question of law, this Court is of an opinion that both the parties had equally wrong in entering into an agreement. Noting the fact that the petitioner was not holding the valid title over the suit property and when both the parties are not having capacity to enter into the agreement and for execution of the Sale Deed, this Court is of an opinion that the defendant cannot claim that the Sale Deed is to be executed in his favour. The trial Court as well as the First Appellate Court had appreciated the facts and

circumstances and arrived at a conclusion that the property in question was allotted in favour of the plaintiff by the Housing Board and he was handed over with the possession and enjoyment of the property and whenever transaction done subsequently by the plaintiff in favour of the third person, the same cannot have any implication in respect of title of the property.

17. This being the principles to be followed by the Trial Court as well as by the First Appellate Court, this Court do not find any perversity or infirmity and accordingly, the Second Appeal deserves no merit consideration. Thus, the judgment and decree dated 29.06.2005 passed in A.S.No.40 of 2003 on the file of the learned Additional District Judge (Fast Track Court No.V), Chennai, confirming the judgment and decree passed in O.S.No.619 of 1996 dated 13.09.2002 on the file of the learned IV Assistant Judge, City Civil Court, Chennai stands confirmed. Accordingly, the present second appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The IV Assistant Judge,
City Civil Court, Madras.
2. The Additional District Judge,
(Fast Track Court No.V), Chennai.

Copy To

The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr. Abdu Kumar Rajaratnam, Advocate, S.R.No. 78696
+1cc to Mr..B.Ramanujam, Advocate, S.R.No. 78631

SA.No.1206 of 2005

VGII (CO)
GN (24/12/2018)