

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2018

PRONOUNCED ON : 05.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1247 of 2003

T.Krishnan

Appellant

...

Vs.

1. B.Shivarajan

2. Lakshmi

3. Devaki

4. Saraswathi

5. Nirmala

6. Vijayalakshmi

7. Indira

8. Lalitha

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 07.02.2003 passed in A.S.No.41 of 2002 on the file of the District Court, The Nilgiris at Udagamandalam confirming the Judgment and Decree dated 31.01.2002 passed in O.S.No.220 of 1998 on the file of the District Munsif Court, Udagamandalam.

For Appellant

: Mr.J.Antony Jesus

For Respondent
Nos.1 to 3

: Mr.R.Vijayaraj Naren
for Mr.R.Rajaram

For Respondent
Nos.4 to 8

: No appearance
Set exparte
(vide order dt.27.02.2018)

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 07.02.2003 passed in A.S.No.41 of 2002 on the file of the District Court, The Nilgiris at Udagamandalam, confirming the Judgment and Decree dated 31.01.2002 passed in O.S.No.220 of 1998 on the file of the District Munsif Court, Udagamandalam.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for permanent injunction.

4. The case of the plaintiffs, in brief, is that the suit property originally belonged to one Joghee Gowder, the grandfather of the plaintiffs 1, 4 to 8 and the father-in-law of the plaintiffs 2 & 3 and after his death, it devolved on his son J.Bhojan, the father of the plaintiffs 1, 4 to 8 and the husband of the plaintiffs 2 & 3, who died on 19.02.1997 and after his death, the plaintiffs succeeded to the suit property and has been in exclusive possession and enjoyment of the same. The plaintiffs had also moved the authorities concerned for including their names in the revenue records and accordingly, the names of the plaintiffs had been recorded in respect of the suit property and the objections had been putforth by the defendant with reference to the same and after due enquiry, the authority concerned finding that the plaintiffs have title and

possession of the suit property, accordingly, passed an order of sub division by allotting the suit property in favour of the plaintiffs and an appeal preferred by the defendant as against the same had come to be dismissed and while so, the defendant caused a legal notice dated 24.04.1998 claiming that he is in possession and enjoyment of the suit property, following the sale agreement dated 26.05.1988 and to the same, the plaintiffs sent a reply dated 15.05.1998 putting forth the true state of affairs and the claim of the defendant that he has been put in possession and enjoyment of the suit property following the sale agreement dated 26.05.1988 by the deceased J.Bhojan is false and no such sale agreement had been executed by J.Bhojan in favour of the defendant and if really, any such agreement had come into existence, the defendant would have taken appropriate steps to enforce the same and obtained the sale deed from the deceased J.Bhojan and on the other hand, inasmuch as the alleged sale agreement is not a true document, no further steps had been taken by the defendant with reference to the same and hence, the defendant has no right, interest or title over the suit property in any manner and on the other hand, inasmuch as the defendant, in the guise of the abovesaid sale agreement, attempted to interfere with the plaintiffs' possession and enjoyment of the suit property, according to the plaintiffs, they had been necessitated to institute the suit against the defendant for appropriate reliefs.

5. The case of the defendant, in brief, is that the suit laid by the plaintiffs is not maintainable either in law or on facts. The allegation that on the death of Joghee Gowder, the property devolved on J.Bhojan is correct. However, the further allegations that on the demise of J.Bhojan, the plaintiffs succeeded to the suit property and the plaintiffs are in exclusive possession and enjoyment of the suit property are false. By an agreement of sale dated 26.05.1988, J.Bhojan agreed to convey the suit property, which is commonly known as Addadhari, to the defendant for a total sale consideration of Rs.55,000/- and accordingly, in part performance of the abovesaid sale agreement, the defendant had been put in possession and enjoyment of the suit property and by way of the sale agreement, the defendant paid the entire sale consideration and it is only the defendant, who is enjoying the suit property by raising a tea garden thereon and the sub division proceedings initiated by the plaintiffs would not in any manner confer any title, possession and enjoyment of the suit property in their favour and with reference to the discrepancy of the survey number in the sale agreement, the same is due to a bona fide mistake and the boundaries of the property described in the sale agreement and the name of the field would reveal that it is the subject matter of the sale agreement dated 26.05.1988 and the allegation that the defendant is not in possession and enjoyment of the suit property and on the other hand, attempting to disturb the plaintiffs' possession and enjoyment of the suit property is false. The defendant is entitled to

remain in the possession and enjoyment of the suit property in part performance of the sale agreement dated 26.05.1988 and hence, there is no cause of action for the suit and the suit is liable to be dismissed.

6. In support of the plaintiffs' case, PW1 was examined and Exs.A1 to A15 were marked. On the side of the defendant, DWs1 to 4 were examined and Exs.B1 to B7 were marked.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Courts below were pleased to accept the plaintiffs' case and accordingly, decreed the suit in favour of the plaintiffs. Aggrieved over the same, the present second appeal has been preferred by the defendant.

8. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

" (i) Whether the findings of the Courts below are vitiated by the failure to consider the specific defence raised in the suit and spoken to by the witnesses examined by the defendant.

(ii) Whether the Courts below are right in holding Ex.B-5 is not enforceable, after having found it executed."

9. From the averments contained in the respective pleadings of the parties concerned, it is found that there is no dispute that the suit property originally belonged to Joghee Gowder. It is also found that on the demise of Joghee Gowder, the suit property devolved on his son J.Bhojan. It is thus found that J.Bhojan was admittedly the owner of the suit property. It is further seen that the plaintiffs are the legal heir of the deceased J.Bhojan, who died on 19.02.1997. It is thus found that as the legal heirs, the plaintiffs are entitled to succeed to the suit property. Now, it is the case of the plaintiffs that they had succeed to the suit property following the demise of J.Bhojan and according to them, the suit property has been in their possession and enjoyment and further, according to them, inasmuch as the defendant, without any legal entitlement, caused interference to their possession and enjoyment in respect of the suit property, according to them, they had been necessitated to lay the suit against the defendant for appropriate reliefs.

10. The defendant claims to be in possession and enjoyment of the suit property following the sale agreement alleged to have been entered into between him and the deceased J.Bhojan dated 26.05.1988. According to the defendant, the abovesaid sale agreement was entered into between J.Bhojan and him in respect of the suit property and pursuant to the same, it is his case that he parted with the entire sale consideration of Rs.55,000/- to J.Bhojan and thereby, he was put in

possession and enjoyment of the suit property and thus, according to the defendant, he is in possession and enjoyment of the suit property in part performance of the sale agreement dated 26.05.1988 and thereby, it is his case that the plaintiffs are not entitled to disturb his possession and enjoyment of the suit property.

11. As seen from the defence projected by the defendant, he seeks right to retain the possession and enjoyment of the suit property by invoking the provisions contained in Section 53-A of the Transfer of Property Act. The sale agreement dated 26.05.1988 has been marked as Ex.B5. Even as per Ex.B5, it is found that the survey number of the suit property has not been mentioned in the said document. However, it is the case of the defendant that considering the boundaries mentioned therein as well as the common local name given to the suit property as spelt out in the said document, it is his case that only in respect of the suit property, the abovesaid sale agreement has come to be effected. Be that as it may, it has to be seen whether the defendant is entitled to retain the possession and enjoyment of the suit property in part performance of the sale agreement marked as Ex.B5 as against the true owners of the suit property i.e. the plaintiffs.

12. Materials placed on record go to show that the initiatives of the plaintiffs to incorporate their names in respect of the suit property in the

revenue records ended in their favour and the challenge made by the defendant with reference to the same ended in vain. It is thus found that the revenue authorities also had, on accepting the plaintiffs' title, possession and enjoyment of the suit property, thought it fit to include in their names in the revenue records in respect of the suit property and the materials with reference to the same are found to be in support of the plaintiffs' case.

13. Be that as it may, it has to be further seen whether the defendant is entitled to retain the possession of the suit property on the footing that he has been put in possession and enjoyment of the same at the time of the sale agreement Ex.B5 as recited therein. The plaintiffs have disputed the sale agreement projected by the defendant marked as Ex.B5. According to them, no such agreement had been entered into between J.Bhojan and the defendant in respect of the suit property. Further, it is also the case of the plaintiffs that inasmuch as the defendant has not made out a case to retain the possession and enjoyment of the suit property in part performance of the sale agreement Ex.B5 as per the provisions contained in Section 53-A of the Transfer of Property Act, it is contended that the defendant's defence should be rejected.

14. In this connection, reliance is placed upon by the plaintiffs' counsel on the decision reported in **(2004) 8 Supreme Court Cases**

614 (Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (Dead) Through LRs.) and as per the abovesaid decision, it is found that the transferee in part performance of the contract should satisfy the various conditions for seeking the defence contemplated under Section 53-A of the Transfer of Property Act. The conditions has been spelt out in the abovesaid decision as follows:

"8. It is seen that many a times a transferee takes possession of the property in part-performance of the contract and he is willing to perform his part of the contract. However, the transferor somehow or the other does not complete the transaction by executing a registered deed in favour of the transferee, which is required under the law. At times, he tries to get back the possession of the property. In equity, the Courts in England held that it would be unfair to allow the transferor to take advantage of his own fault and evict the transferee from the property. The doctrine of part-performance aims at protecting the possession of such transferee provided certain conditions contemplated by Section 53-A are fulfilled. The essential conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act that have been culled out of this

Court in Shrimant Shamrao Suryavanshi V. Pralhad Bhairoba Suryavanshi, (2002) (3) SCC 676, are: (SCC p.682, para 16)

"16 (1) There must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and

(6) the transferee must have performed or be willing to perform his part of the contract."

9. If these conditions are fulfilled then in a given case there is an equity in favour of the proposed transferee who can

protect his possession against the proposed transferor even though a registered deed conveying the title is not executed by the proposed transferor. In such a situation equitable doctrine of part-performance provided under [Section 53-A](#) comes into play and provides that:

"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."

10. Protection provided under [Section 53-A](#) of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance of such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party."

15. If really, a sale agreement had been entered into between J.Bhojan and the defendant as put forth by the defendant and marked as Ex.B5 and if really, the defendant had parted with the entire sale consideration, pursuant to the same, it does not stand to reason as to why the defendant did not proceed further in the matter and obtain the sale deed in respect of the suit property from J.Bhojan. If really, the sale agreement Ex.B5 had come into existence and if really, the defendant had paid the entire sale consideration as put forth by him, nothing prevented the defendant from enforcing the sale agreement and if even thereafter, according to the defendant, J.Bhojan had refused to execute the sale deed following the sale agreement, he should have initiated appropriate legal proceedings with reference to the same and endeavoured to obtain the sale deed pursuant to therein. It is found that the defendant, as a transferee, should have performed and be willing to perform his part of the contract and should have done all the acts in furtherance of the contract to ensure that the contract is put into action. However, it is found that though it is the claim of the defendant that he has paid the entire sale consideration, if the abovesaid case of the defendant has an element of truth, as a prudent person, he would have taken further appropriate steps against J.Bhojan for completing the sale consideration. On the other hand, it is found that no step at all has been taken by the defendant for completing the sale transaction. It is the case

of the defendant that on the date of the sale agreement itself, he has paid the entire sale transaction. If so, then what prevented him from acting further in terms of the contract entered into for completing the sale transaction has not been explained by the defendant. In such view of the matter, the case of the defendant that he had been put in possession and enjoyment of the suit property, pursuant to the sale agreement by J.Bhojan as such cannot be believed and accepted.

16. To cap it all further, as even admitted by the defendant, the survey number of the suit property has not been given in Ex.B5 sale agreement. According to the defendant, only the common local name of the field is given and it is stated that the boundaries are mentioned, however, when according to the defendant, the survey number itself is not correctly mentioned and only the common local name of the field has been given, merely from the same, it cannot be construed that the parties had been in consensus *ad idem* to enter into the sale agreement only in respect of the suit property as putforth by the defendant. It is found that the description of the property in the sale agreement Ex.B5 is not found to be co-related with the suit property as such, it is therefore highly doubtful whether the sale agreement is pertaining to the suit property as determined by the Courts below.

17. The contention putforth by the defendant's counsel that inasmuch as he had paid the entire sale transaction and as he had performed his part of the contract wholly, nothing remains to be done further on his part and only J.Bhojan should have come forward to execute the sale deed and therefore, his contention that the defendant is entitled to retain the possession of the suit property as per the provisions contained in Section 53-A of the Transfer of property Act, are found to be unacceptable. When the payment of the sale consideration to J.Bhojan itself is being disputed by the plaintiffs, if really, the defendant had paid the entire sale consideration, then, as to what prevented him further to act in terms of the contract and to institute further action as against J.Bhojan has not been explained by the defendant. This itself would go to show that even assuming for the sake of arguments that Ex.B5 sale agreement is a true document, when the defendant has failed to establish that he has done further acts in terms of the recitals contained in the sale agreement to ensure the completion of the sale transaction, it is found that the conditions stipulated by the Apex Court for seeking the benefits of Section 53-A of the Transfer of Property Act, having not been satisfied by the defendant as above discussed, it is seen that the Courts below had rightly rejected the defence version and upheld the plaintiffs' case.

18. The defendant is seeking a right to be in the possession and enjoyment of the suit property as against the true owners only on the basis of the sale agreement. However, when it is found that the defendant has failed to act in furtherance of the recitals contained in Ex.B5 and thereby, Ex.B5 had been rendered unenforceable due to the inaction of the defendant and further, when the defendant has failed to establish the veracity or genuineness of Ex.B5 as such and further, failed to establish that Ex.B5 in fact relates to the suit property, as rightly determined by the Courts below, it is found that only the plaintiffs are in possession and enjoyment of the suit property and in such view of the matter, the defendant cannot be allowed to cause interference to their possession and enjoyment by way of projecting the sale agreement Ex.B5, the genuineness of which has been failed to be established by the defendant in the manner known to law. Accordingly, it is found that the defendant having failed to establish the veracity and genuineness of Ex.B5 sale agreement, his inaction in enforcing the same as per law and his entitlement to seek the benefits of Section 53-A of the Transfer of Property Act, in pursuance thereof and further, when it is noted that the conditions stipulated by the Apex Court with reference to the same having not been satisfied by the defendant in any manner, further, when it is found that the defendant has failed to establish his possession and enjoyment of the suit property pursuant to the sale agreement Ex.B5 and on the other hand, when ample and acceptable evidence had been

projected by the plaintiffs to show that they are the true owners and in possession and enjoyment of the suit property and their possession and enjoyment as well as their title had been upheld by the concerned authorities as above noted and the challenge made by the defendant with reference to the same having ended in vain, it is found that no interference at all is necessitated to upset the well considered findings of the Courts below. The substantial questions of law formulated in this second appeal are answered in favour of the plaintiffs and against the defendant.

In conclusion, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

05.04.2018

Index : Yes / No

Internet : Yes / No

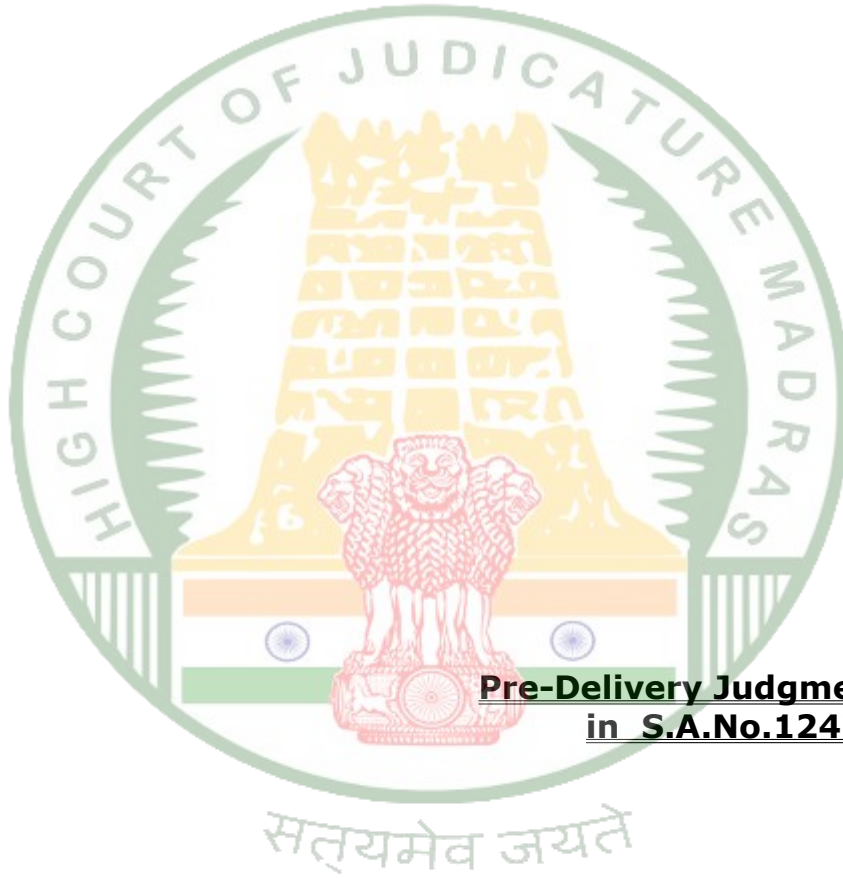
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To

1. The District Court, The Nilgiris at Udagamandalam.
2. The District Munsif Court, Udagamandalam.
3. The Section Officer, V.R. Section, High Court, Madras.

T.RAVINDRAN, J.

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**Pre-Delivery Judgment made
in S.A.No.1247 of 2003**

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