

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NOS.922 AND 923 OF 2011

1. M. Lakshmanan (Deceased)

2. L. Padmavathi

3. L. Selvakumar

4. L. Yamunarani

5. L. Suresh Kumar

6. L. Madan Kumar

7. L.Gokula Kumar

(Appellants 2 to 7 brought on record as LRs.
of the deceased sole appellant vide
order of this Court dated 29.01.2018 & 8.2.2018
made in C.M.P.No.15502 of 2017 &
CMP.2584/18 in S.A.NO.923/2011)
in S.A.No.922 of 2011)

... Appellants in both S.As./
Plaintiffs

-Vs-

1. Prema Bakkiyanathan

...1st Respondent/2nd
Defendant in S.A.No.922/2011

2. The Managing Director,
Tamil Nadu Housing Board,
Anna Salai, Nandanam,
Chennai - 600 035.

...2nd Respondent
in S.A.No.922 of 2011/
1st Respondent

1. The Managing Director,
Tamil Nadu Housing Board,
Anna Salai, Nandanam,
Chennai - 600 035.

...1st Respondent/1st Defendant
in S.A.NO.923/20121

2. Prema Bakkiyanathan

...2nd Respondent
in S.A.No.923 of 2011/
2nd Respondent

PRAYER IN BOTH S.As.: Second Appeal filed under Section 100
C.P.C. against the judgment and decree dated 27.07.2010 in
A.S.Nos.544 and 546 of 2009, respectively, on the file of the

Additional District Judge, Fast Track Court - V, Chennai, reversing the judgment and decree dated 05.11.2007 made in O.S.No.5412 of 2003 on the file of the VI Assistant Judge, City Civil Court, Chennai.

For Appellants : Mr.V.Manisekaran
in both S.As.

For R1 in S.A.N.922/11 : Mr.S.D.Venkateswaran
& R2 in S.A.923/11

For R2 in S.A.922/11
& R1 in S.A.923/2011 : M/s.R.Jayaseelan

C O M M O N J U D G M E N T

These Second Appeals have been filed against the judgment and decree dated 27.07.2010 in A.S.Nos.544 and 546 of 2009, respectively, on the file of the Additional District Judge, Fast Track Court-V, Chennai, reversing the judgment and decree dated 05.11.2007 made in O.S.No.5412 of 2003 on the file of the VI Assistant Judge, City Civil Court, Chennai.

2. The plaintiff is the appellant in these Second Appeals. For the sake of convenience, the parties will be hereinafter referred to as per the rank in the suit.

3. The plaintiff filed a suit in O.S.No.5412 of 2003 to set aside the sale deed executed by the 1st defendant in favour of the 2nd defendant and to grant mandatory injunction directing the 1st defendant to execute the sale deed in his favour.

4. Originally, the Tamil Nadu Housing Board (TNHB for short) introduced a scheme of subsidized rate of construction of houses and allotted the same to economically weaker section of society and the labourers through Labour Department. As per that scheme, the plaintiff was allotted a Flat. At a later point of time, the Government in G.O.Ms.No.128, Housing and Urban Development Department, dated 24.03.1997 decided to sell the Flats to the allottees. The plaintiff had also paid the full sale consideration, a sum of Rs.9,600/- on 06.08.1997 in respect of Flat No.281, Thiru.Vi.Ka.Nagar, Sembium, Chennai. A bill bearing No.A.R.057612 was issued, but unfortunately lost by the plaintiff. He applied for a duplicate bill. Out of sympathy, the plaintiff permitted the second defendant to reside in one room in the suit property, viz., Flat No.281.

5. The first defendant/TNHB, did not execute the sale deed. When he made a request to the first defendant / TNHB, to

his shock, a communication in letter No.P.7/4897/97 dated 27.01.2003 was sent by the first defendant that a sale deed was executed in favour of the second defendant on 28.12.1999. On verification, he came to know that the sale deed bearing Document No.2180/2001 dated 28.12.1999 was registered in favour of the 2nd defendant. When confronted with the action of the 1st defendant, no reply was forthcoming. Based on this cause of action, he filed the suit to set aside the sale in favour of the second defendant and to execute the same in his favour.

6. The first defendant / TNHB, filed a written statement denying the averments and questioning the maintainability of suit for want of issuance of a pre-suit notice as per Section 138 of TNHB Act. It was stated that the Labour Department made an allotment in favour of plaintiff in the year 1997 and another allotment order dated 21.04.1998 in favour of the second defendant with respect to the suit property without ascertaining the earlier allotment. Since the 1st defendant cannot issue two sale deeds, he executed the sale deed dated 28.12.1999 in favour of the second defendant, who got the latest allotment and informed the plaintiff by its letter dated 27.01.2003. The plaintiff ought to have taken steps against the Labour Department to cancel this subsequent allotment and should have approached the Housing Board for registration of sale deed. Having failed to implead the Labour Department as necessary party, the suit is liable to be dismissed for non-joinder of parties.

7. The 2nd defendant also filed a written statement denying the averments and would contend that she purchased the property from the plaintiff for sale consideration of Rs.1,25,000/- and the plaintiff had executed the General Power of Attorney registered as Document No.1105/1994 and she was put in legal possession of the property. The plaintiff had transferred his allotment in her favour. The sale consideration of Rs.9,600/- was paid by her. Considering the large scale transfer of tenements by allottees to third parties, for huge consideration, the 1st defendant, upon representation, received balance sale consideration from the occupier and executed the sale deed in their favour. Accordingly, the sale deed dated 28.12.1999 was executed in her favour. Now, the plaintiff has filed the suit with ulterior motive to extract money by hook or crook filed the suit without impleading the Labour Department, who allotted the property.

8. Before the Trial Court, the defendants 1 and 2 have not let in evidence. Based on the plaintiff's evidence and documents, the Trial Court, decreed the suit in favour of the plaintiffs on 05.11.2007, against which, the defendants filed two independent appeals. The Lower Appellate Court, taking into

consideration the elaborate cross examination and admission made by the plaintiff and the maintainability of the suit as per Section 138 of the Tamil Nadu Housing Board Act, 1961, and on other points, allowed both the appeals and set aside the decree passed by the trial Court and dismissed the suit filed by the plaintiff.

9. Against the judgment and decree of the Lower Appellate Court, the above-said Second Appeals have been preferred by the plaintiff. It was admitted on the following questions of law:-

"a) Whether the plaintiff being the first allottee by the Labour Department as a labourer and paid the entire sale consideration, is entitled for sale deed from the first defendant.

b) Whether the plaintiff being the first allottee and paid the entire sale consideration and given possession to the 2nd defendant for the loan obtained by him, is entitled for sale deed from the first defendant.

c) Whether the first defendant Tamil Nadu Housing Board can execute a sale deed in respect of a property which was allotted in favour of the plaintiff under the Labour Department, but has paid the entire sale consideration, subsequently executed the sale deed in favour of the 2nd defendant who is a stranger to the allotment order is valid in eye of law.

d) Whether the 2nd defendant having admitted that he purchased a property from the plaintiff without getting sale deed from the first defendant Tamil Nadu Housing Board is entitled to get sale deed from the first defendant Tamil Nadu Housing Board."

10. The first defendant / TNHB constructed houses for economically weaker section and labourers and allotted the same through Labour Department. At the first instance, allotment with respect to the suit property Flat No.281 was made in favour of the plaintiff in the year 1997 and thereafter, in favour of the second defendant in the year 1998. Later, as per G.O.Ms.No.128, Housing and Urban Development Department, dated 24.03.1997, Government had taken a decision to sell the properties to those allottees. Value of the suit property was fixed at Rs.9,600/- and the same was paid in the name of the plaintiff vide Receipt No.57612 dated 06.08.1997. However, sale deed was given to the

second defendant on 28.12.1999 and was registered as document No.2180/2001. Plaintiff wrote a letter to the first defendant not to register the property in anybody else name. The first defendant in return communicated by its letter No.P7/4897/97 dated 27.01.2003 that sale deed was executed in favour of the second defendant. Since there was no favourable reply to the request, the present suit was filed by the plaintiff for a decree to set aside the sale deed executed in favour of the second defendant and to execute a sale deed in his favour.

11. The first defendant raised the issue of maintainability, for, a suit shall be filed against it only after sixty days after issuing a legal notice as per Section 138 of the TNHB Act. The power to allot the properties lies with the Labour Department. Without ascertaining the previous allotment in the year 1997, second allotment was made in the year 1998. Considering the large scale transfers made by the allottees in favour of third parties on receipt of higher sale consideration, the sale deed was registered in favour of the occupier after receiving the balance sale consideration and after verifying the representation made by them. The first defendant had executed the sale deed only to an allottee and undertook to abide by the decision of the Court.

12. Conversing the contention of the plaintiff, the second defendant would submit that the plaintiff had sold the property to her for a sale consideration of Rs.1,25,000/- in the year 1994 itself. He also executed a registered power of attorney bearing registration no.1105/1994 and also executed a promissory notice evidencing payment. The second defendant was put in legal possession of the property and has been residing there ever since 1994. The sale consideration was paid by her in the name of the plaintiff in the year 1997 and it was not paid by the plaintiff as claimed by him. The suit is filed with an intention to grab the property and to extract more money.

13. From the evidence of the plaintiff, it is found that the plaintiff categorically admitted that he borrowed from the second defendant and executed a power of attorney in the year 1994. The second defendant was put in possession and he was residing with his son elsewhere. These material facts are suppressed in the plaint. Eventhough, the plaintiff claimed that he had remitted the entire sale consideration in the year 1997, the original receipt was not available. The plaintiff admitted that it was missing and he applied for a duplicate copy. Further, the long gap between 04.08.1997, the date on which the entire sale consideration was paid till 2003, the communication of the first defendant, the reasons for not taking steps for getting the sale deed executed in his favour was not explained. The plaintiff had not chosen to request the first

defendant to execute the sale deed. On the other hand, would request TNHB not to execute the sale deed in favour of third parties. Hence, it is very clear that the plaintiff has not approached the Court with clean hand and filed the suit with incorrect details, suppressing the material facts.

14. It is also pertinent to note that the power of attorney was cancelled by the plaintiff on 02.07.1997 after receipt of legal notice from the second defendant, on 27.06.1997 followed by another legal notice dated 09.07.1997 after cancellation of the power of attorney. Thus, it could be seen that before and after the cancellation of power of attorney, the second defendant caused legal notices to the plaintiff. Even thereafter, the plaintiff did not take any steps to get the sale deed registered in his name. This only go to show that plaintiff had knowledge about the developments, yet kept quite. In that event, the contention of the second defendant that she had remitted the sale consideration on 04.08.1997 and got the allotment order in her favour in the year 1998 sounds plausible. The evidence of the plaintiff further reveals that as contended by him, he did not take possession of the property even after cancellation of power of attorney, unilaterally. All these facts were elicited through cross examination of the plaintiff.

15. Though the Trial Court decreed the suit as evidence was not let in on behalf of the defendants, the Lower Appellate Court proceeded in the right direction that plaintiff shall succeed on his own merits and not on the pit falls on the side of the defendant. The elaborate cross examination of the plaintiff brought forth the falsity, lack of merit and the untenable claim of the plaintiff.

16. Whether the plaintiff had paid the sale consideration itself was not proved by him by producing the original receipt or even duplicate receipt. Eventhough the first defendant has admitted the receipt of the payment from the plaintiff, the factum is disputed by the second defendant. Even after the payment of the sale consideration in the year 1997, as to how the second allotment was made in the year 1998 has not been explained. In such circumstances, the burden is on the plaintiff to prove that he was entitled for the sale deed and he had taken earnest steps in that direction. He cannot plead ignorance after having paid such a huge amount, which was at that time his lifetime savings. But the circumstances leads to show that in the year 1994 itself, the second defendant was put in legal possession and continued to be there. He has not marked any document to show his possession and the documents relied on by him such as Ration Card were rejected as fabricated for the purpose of the case. There is no explanation as to why he had failed to get the sale deed from 04.08.1997 after having paid

the entire sale consideration, by itself will disentitle the plaintiff to get the sale deed in his favour.

17. Secondly, the first defendant had considered the request made by the second defendant, verified the occupancy and on payment of balance sale consideration, on the basis of an allotment order from the Labour Department, executed the sale deed. The second allotment order by the Labour Department was not challenged by the plaintiff. The fact remains that there was an allotment order and balance sale consideration was paid by the occupier, namely the second defendant. The presumption of the Lower Appellate Court that the plaintiff agreed for the transfer of allotment in favour of the second defendant cannot be ignored. The request was made by the plaintiff vide Ex.A requesting the first respondent, not to execute the sale deed in favour of anybody else, by itself show that the plaintiff had definite knowledge that somebody else is entitled to it and they are taking steps to get the sale executed in their favour. Thus, it can be inferred that the second defendant, by virtue of allotment order and payment of balance sale consideration got the sale deed registered in her favour.

18. Thirdly, as discussed in the previous paragraph, the first defendant executed the sale deed on the basis of an allotment order issued by the Labour Department in favour of the second defendant. It is nobody's case that there was no second allotment and that she was not in occupation of the property. It is amply proved by the admission of the plaintiff that the second defendant was in possession. In such circumstances, the second defendant cannot be considered as a stranger and the execution of the sale deed by the first defendant to the second defendant is valid.

19. Fourthly, initially the plaintiff was restrained from executing a sale deed for ten years as per the terms and conditions of TNHB Act vide Ex.A2. To overcome the legal embargo, the plaintiff presumed to have executed the registered power of attorney. Later, the subsequent allotment order was issued in favour of the second defendant. Presumably, the allotment order itself could have been issued with the consent of the plaintiff. In that event, there is no necessity for the second defendant to purchase the property from the plaintiff, rather, she got it executed from the first defendant directly. As found by the Lower Appellate Court on the basis of the judgment that the plaintiff, till he gets the sale deed executed by the first defendant in his favour, remains only as a lessee. He does not get any vested right to sell. Even the status of the lessee stood forfeited by the subsequent allotment order by the Labour Department. Therefore, the purchase directly made

from the first defendant does not suffer any infirmity and the plaintiff has no role to play in between.

20. Apart from the above, as per Section 138 of the TNHB Act, there is a mandatory requirement of issuing a pre-suit notice. The suit has to be filed after sixty days after the notice. Curiously, in the instant case, the statutory notice was issued only after filing the suit. Further, as per Section 88 of the TNHB Act, there is a bar of Civil Courts jurisdiction. When there is failure to comply with the mandatory requirements the suit is not maintainable.

21. Besides this, the entire cause of action arises out of the allotment order issued by the Labour Department, without whose presence the rights of the parties cannot be decided. The suit is bad for non-joinder of necessary party namely, the Labour Department.

22. From the foregoing discussions, this Court is of the view that the questions raised by the appellant in the Second Appeals are not questions of law but are questions of fact. The Lower Appellate Court has rightly decided issues based on evidence. Hence, the Second Appeals merit no consideration and accordingly, dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
Fast Track Court - V, Chennai.
 2. The VI Assistant Judge, City Civil Court,
Chennai.
 3. The Section Officer, VR Section, High Court, Madras.
- + 1 cc to M/s. V. Manisekaran, Advocate Sr.12789
+ 1 cc to M/s. S.D. Venkateswaran, Advocate Sr.12678
+ 1 cc to M/s. G. Jayaseelan, Advocate Sr.12915
+ 1 cc to Mr. V. Manisekaran, Advocate SR.12790 (29/10/2018)
+ 1 cc to M/s. S.D. Venkateswaran, Advocate Sr.12679 (29/10/2018)

S.A.NOS.922 AND 923 OF 2011

NRI (CO)
EU (29/10/2018)