

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 04.07.2019

Judgment Pronounced on : 01.11.2019

CORAM :

THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.1508 of 2007
and M.P.Nos.1 & 2 of 2007

Dasaratharaman ... Appellant / Respondent /
Plaintiff

Vs

1.Sampath (Died) ... Respondent / Appellant /
Defendant

2.S.Amirthavalli

3.S.Balaji

4.Vedhavalli

5.Kanagavalli ... Respondents

(Respondents 2 to 5 are brought on record as L.Rs of the deceased
sole respondent Vide Order of Court dated 26.06.2019 made in
MP.No.1 to 3 of 2013 in S.A.No.1508/2007)

Prayer :- Second Appeal filed under Section 100 of CPC, against
the judgment and decree dated 18.07.2006 made in A.S.No.11 of
2006 on the file of the Subordinate Judge, Chidambaram reversing
the decree and judgment dated 29.11.2005 in O.S.No.5 of 2005 on
the file of the District Munsif cum Judicial Magistrate Court,
Portonovo.

For Appellant : Mr.P.Anbarasan

For Respondents : Ms.R.Meenal [R2 to R5]

JUDGMENT

The present appeal is preferred by the plaintiff. He was successful before the Trial court in his suit for recovery of possession in O.S.No.5 of 2005, but suffered a reversal in an appeal filed by the defendant in A.S.No.11 of 2006.

2.1 The substantial facts are admitted on either side. There are three items of suit properties, and they all belonged to the plaintiff. While so, on 21.01.1986, the plaintiff had executed a sale agreement in favour of the defendant for the sale of all the three items of suit properties for a total consideration of Rs.46,000/-. Out of it, the defendant had paid Rs.25,000/- as advance. For enforcing his right under this agreement, the defendant had laid O.S.No.99 of 1986 for specific performance. In the meantime, a certain senior lawyer in the locality attempted to mediate the dispute between the parties, and according to the plaintiff, it was agreed in that mediation that the defendant would pay an additional sum of Rs.21,000/-, apart from the balance consideration amount of Rs.21,000/- payable under the sale-agreement referred to above. This would mean that the defendant would have to now pay Rs.42,000/-. Thereafter, the defendant had paid Rs.22,000/- in three installments of Rs.3,000, 17,000, and 2,000/- respectively on 04.09.1991, 10-09-1991 and 07.01.1992. The suit for specific performance which the defendant had laid was not prosecuted, in view of the settlement arrived at between the parties.

2.2 It is an admitted fact on either side that in terms of the written agreement, the plaintiff had handed over the possession of the property to the defendant. The case of the plaintiff is that inasmuch as the defendant had not paid the balance consideration based on the compromise, he being a title holder is entitled to retrieve possession from the defendant, since the defendant had not gone ahead with his suit for specific performance, or revived his earlier suit in O.S.No.99 of 1986, which he had laid for that purpose.

3. The defendant/agreement holder would concede in his written statement about the meeting held during the pendency of his earlier suit for specific performance, pursuant to the effort of the senior counsel. However, he denied the plaintiff's allegation that he had agreed to double the balance sale consideration payable in terms of the original agreement. He also admits that Rs.22,000/- has been paid.

4.1 The case went for trial and before the trial Court, both the plaintiff and the defendant were examined as P.W.1 and D.W.1 respectively. Besides, the defendant had examined one Aravamudhan as D.W.2. According to the defendant, the sale consideration was paid to the plaintiff only through D.W.2, Aravamudhan (In fact there is no dispute as to the total amount paid and received).

4.2 The trial Court had taken a view that, inasmuch as no sale had taken place pursuant to the agreement of sale, and since title has not been transferred from the plaintiff to the defendant, the plaintiff continues to be the owner of the property, and declared his entitlement to have the possession of the suit property recovered from the defendant. As to the continuous possession of the defendant over the suit property for nearly 19 years since the date of the earlier written agreement between the parties, the trial Court ventured to investigate if the defendant has perfected title by adverse possession and decided against it. (This exercise in one sense was not required, since the defendant has not taken a plea of adverse possession). It partly decreed the suit, when it chose to deny the plaintiff his claim of mesne profits as it found that the defendant's possession of the suit property was not illegal.

4.3 Aggrieved by the same, the defendant took up the matter in first appeal. In the first appeal, the issue was whether the possession to the defendant could be secured under Section 53-A of the Transfer of Property Act, 1882. Relying on the judgment in Shrimat Shamrao Suryavansh and another Vs. Pralhad Bhairoba Suryavanishi and others [AIR 2002 SC 960], the first Appellate Court has held that, notwithstanding the bar of limitation for instituting a suit for specific performance, a transferee holding possession of a property pursuant to a written agreement of sale, is entitled to have his possession secured even beyond the period of limitation prescribed for bringing a suit for specific performance. Accordingly, it allowed the appeal and dismissed the suit.

5. The appellant/plaintiff, aggrieved by the dismissal of his suit by the first Appellate Court has now preferred this appeal and it is admitted to consider the following substantial questions of law;

"1.Has not the lower appellate Court erred in law in holding that the respondent is entitled to protection from the appellant under Section 53(A) of Transfer of Property Act particularly when the respondent lost his right under the agreement by dismissal of the suit in O.S.No.99 of 1986 by the Sub Court, Cuddalore?

2.Has not the Lower Appellate Court erred in law in granting Protection to the respondents possession of the property when the respondent neither pleaded nor proved all ingredients essential for specific performance of agreement for sale?"

6.1 The current controversy is all about if the defendant could hold on to his possession under Sec. 53-A of the Transfer of Property Act, and to understand it, the aid of following facts are required :

- According to the plaintiff, in the mediation process that had taken place during the pendency of O.S.No.99 of 1986, the defendant was stated to have agreed to pay a sum of Rs.21,000 towards balance of the sale consideration, and another Rs.21,000/- as additional consideration, since he had delayed the performance of his part of the contract for close to five years, which according to the plaintiff has injured his interest.
- The defendant however, would contend that in the mediation that had taken place, the defendant had agreed to pay no more than Rs.21,000, the balance sale consideration payable as per the original agreement of sale.
- And, the undisputed fact is that, since the mediation and following the out of Court settlement that the parties had arrived at, the suit for specific performance laid in O.S.No.99/1986 was dismissed for non-prosecution.

6.2 Be that as it may, post the mediation process, the defendant has made three payments. They are

Date	Amount (Rs.)
04.09.1991	3,000/-
10.09.1991	17,000/-
07.01.1992	2,000/-

The last of the payment, namely Rs.3,000 on 07.01.1992 was alleged to have been paid by D.W.2, who is the brother of the defendant. Ex.B1 shows all payments were received by the plaintiff through D.W.2, Aravamudhan. It is an admitted fact that for all the amounts were received, the plaintiff had executed receipts.

7. The learned counsel for the plaintiff/appellant contended that in relying on the authority of the Hon'ble Supreme Court in Shrimat Shamrao Suryavansh and another Vs. Pralhad Bhairoba Suryavanishi and others [AIR 2002 SC 960], the first Appellate Court had fallen in error in failing to ascertain if there is a written agreement still available for the defendant to claim specific performance, and if the defendant had performed his contractual obligation in terms thereof. Even in the aforesaid authority, the Supreme Court has reiterated the statutory precondition for invoking Sec.53-A of the Transfer of Property Act and inasmuch as the present defendant nowhere has established that he has been ready and willing to perform his part of the contract, he still would not be entitled to invoke the doctrine of part performance in terms of Sec.53-A of the Transfer of Property Act. Reliance was placed on the ratio in Rambhau Namdeo Gajre Vs Narayan Bapuji Dhotra (dead) Through Lrs [(2004) 8 SCC 614], A. Lewis & another Vs M.T. Ramamurthy & Others [(2007) 14 SCC 87] and Papammal (died) & Others Vs Sarojini & Others [2011-1-LW 819].

8. The learned counsel for the respondent however, would hold on to the position that in terms of the law declared by the Hon'ble Supreme Court in Shrimat Shamrao Suryavansh case, a purchaser under a written agreement of sale, and put in possession of the property to be purchased, will be entitled to defend possession notwithstanding the fact that the time for bringing a suit for specific performance is barred by limitation. In this case, admittedly, the consideration payable under the contract of sale is Rs.46,000/- and this amount has been paid in entirety. In fact, an additional sum of Rs.1,000/- has been paid by mistake. Since the defendant has performed his entire contractual obligation, he is entitled to have his possession of the suit property preserved in law.

Discussion & decision:

9. The issue here is the right of the defendant to invoke Sec.53-A of the Transfer of Property Act to defend his possession. It was not pleaded by him, but provided to him by the first Appellate Court.

10.1 It is too rudimentary principle that a mere agreement of sale of an immovable property does not create any right in the property. Even the doctrine of part performance that enables the purchaser to put in possession of the property in term of a written agreement to sell is circumscribed by the conditions stipulated in Sec.53A of the TP Act, only grants him the right to defend his possession against the vendor of the property, but at no time it enlarges his possession into absolute title, nor does it enable acquisition of prescriptive title through adverse possession. See, Pappammal case [2011-1-LW 819].

10.2 Having stated thus, it ought to be remembered, that the foundation for invoking Sec.53-A of the Transfer of Property Act is the availability of a written contract of sale of an immovable property, followed by the readiness and willingness of the purchaser under the agreement to perform his part of the contract. These are indispensable. It is hence necessary for this court to ascertain if the defendant has qualified himself on these two criteria for invoking the doctrine of part performance.

11. Let the basic facts, undisputed by either side be listed:

- Sometime in 1986 (some 33 years ago), the plaintiff had entered into an agreement of sale for the sale of the suit property to the defendant for a consideration of Rs.46,000/-. The agreement is not produced but, the evidence on record indicates that four months time had been stipulated for performing the respective contractual obligation of the parties. Possession of the suit property was handed over to the defendant herein.
- This was followed by O.S.No.99/1986, an out of Court settlement of dispute between the parties and consequent dismissal of O.S.No.99/1986, for non-prosecution.
- There still remains a dispute over the consideration payable in terms of the compromise. While the plaintiff (who was the defendant in O.S.99/1986), the balance sale

consideration payable under the agreement was doubled to Rs.42,000/-, the defendant, contends that there was no change as to the balance amount payable.

- While, in terms of the original sale agreement, the balance payable was Rs.21,000/- post compromise referred to above, the defendant had paid Rs.22,000/-. The last of the payment was on 07.01.1992.

12. Let these facts be tested for their quality to sustain the plea founded on doctrine of part performance of a contract of sale:

A. Is there a written agreement:

- A written agreement, in the context of the right it grants to seek its specific enforcement extinguishes itself when a suit for the same is actually laid. What thereafter determines the rights of the parties is the decree of the court, and not the original agreement that has provided the cause of action for the suit. It is not in dispute that based on a pendente lite oral compromise, defendant chose not to prosecute his O.S.99/1986 that he laid for specific performance of the original written contract. He made no efforts to keep alive the original agreement in terms of the compromise, nor chose to persist with the suit despite the compromise, nor secured to himself a right to institute a fresh suit on the same cause of action subject however to Order XXIII Rule 2 CPC. Nor the defendant thought it fit to record the terms of the compromise in writing to help himself with a fresh cause of action. In law, when O.S.99/1986 was dismissed (irrespective of the reasons or circumstances under which it came to be dismissed), what one has is the decree dismissing the suit, and not the original written agreement. The test here is: If the period for limitation for instituting a suit for specific performance is kept aside, or kept as a constant, is there a written agreement available for the purchaser under the agreement to institute a suit for specific performance? If the answer is in the affirmative, then he, as a defendant in a suit for recovery of property such as the one now before the Court, can defend his possession under Sec.53-A of the Transfer of Property Act, in terms of the law declared by the Hon'ble Supreme Court in Shrimat Shamrao Suryavansh case. If not, he cannot.

- If the test is now applied, after the dismissal of O.S.99/1986, is it permissible for the plaintiff to bring in another suit based on the original written contract of sale? In procedural law, it is prohibited under Order IX Rule 9 CPC. To state it differently, the decree in O.S.99/1986, irrespective of why and how it came to be dismissed, extinguishes all the right that flowed from the written sale agreement. The compromise, for all it matters, might only constitutes an oral agreement of sale, and the first appellate court ran into serious misconception in law, in premising that the original agreement of sale was still available.
- That compromise has only managed to novate the original contract, and this is complicated further by a dispute as to what the consideration payable by the defendant in terms of the compromise.

To conclude on this point, in the absence of a written agreement of sale, the defendant cannot invoke Sec.53A of the Transfer of Property Act.

B. Was the defendant ready and willing to perform his part of the contract:

This is a wasteful pursuit, but undertaken to inform the defendant, that even if his case that the original written contract is still alive, yet he has not proved that he has been ready and willing to perform his part of the contract. Even after the compromise, he has been paying only in installments. And, it is not his case, that the compromise provided him the option to pay the balance sale consideration in instalments. Here readiness and willingness of the holder of the agreement is same as the one provided under Sec.16(c) of the Specific relief Act (as it stood then). Added to this, is the dispute on balance sale consideration payable. Here, this court considers that the plaintiff is on a better footing. The reasons are:

- If according to the defendant, the balance sale consideration payable was only in terms of what remained to be paid in the original written contract, then he ought to pay only Rs.21,000/-. Why he paid Rs.22,000/- then?
- And, if according to him he had paid more than the entire balance sale consideration payable, why has he not required the plaintiff herein to execute the sale deed, or why has he not instituted a suit for specific performance, especially in the backdrop of his earlier experience with the plaintiff?

If the ordinary course of human conduct is the tool that the court looks to for appreciating the probability of the veracity of a fact, then it guides this court to decide against the defendant.

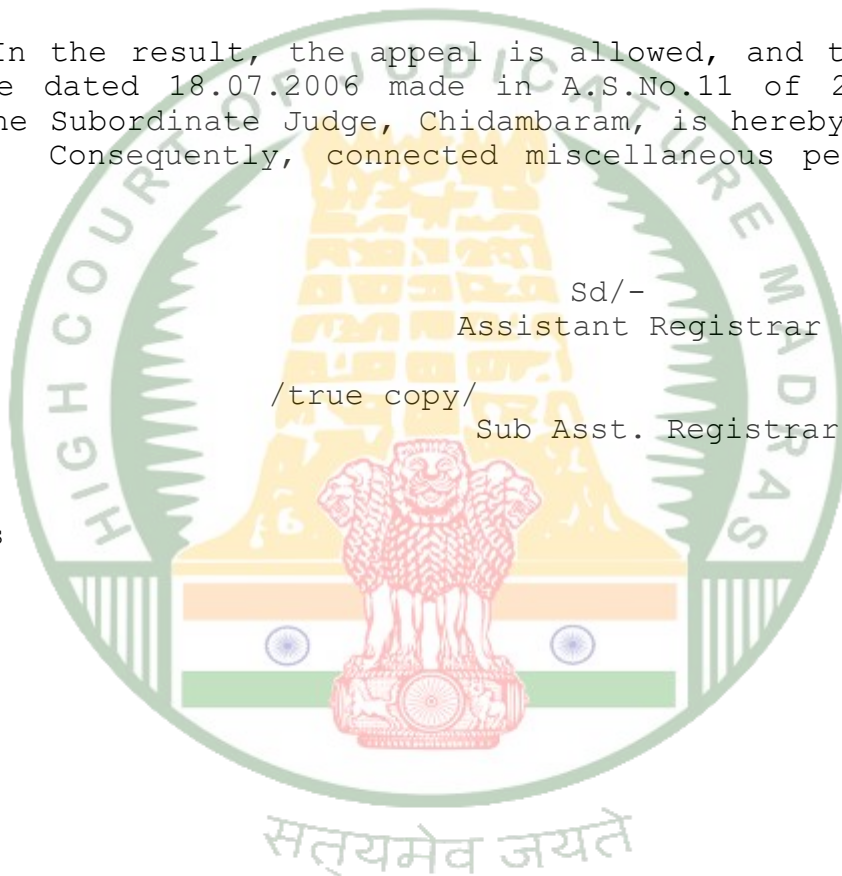
13. In the ultimate analysis, this Court finds that the defendant is not entitled to invoke doctrine of part performance, and cannot defend his possession. This Court, though briefly contemplated on directing the plaintiff to return the sale consideration in equity, yet it decided against it as the defendant has been in wrongful enjoyment of the suit property for few decades.

14. In the result, the appeal is allowed, and the judgment and decree dated 18.07.2006 made in A.S.No.11 of 2006 on the file of the Subordinate Judge, Chidambaram, is hereby set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

/true copy/
Sub Asst. Registrar

ssn/tsg/ds



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- 1.The Subordinate Judge, Chidambaram.
- 2.The District Munsif cum Judicial Magistrate, Portonovo.

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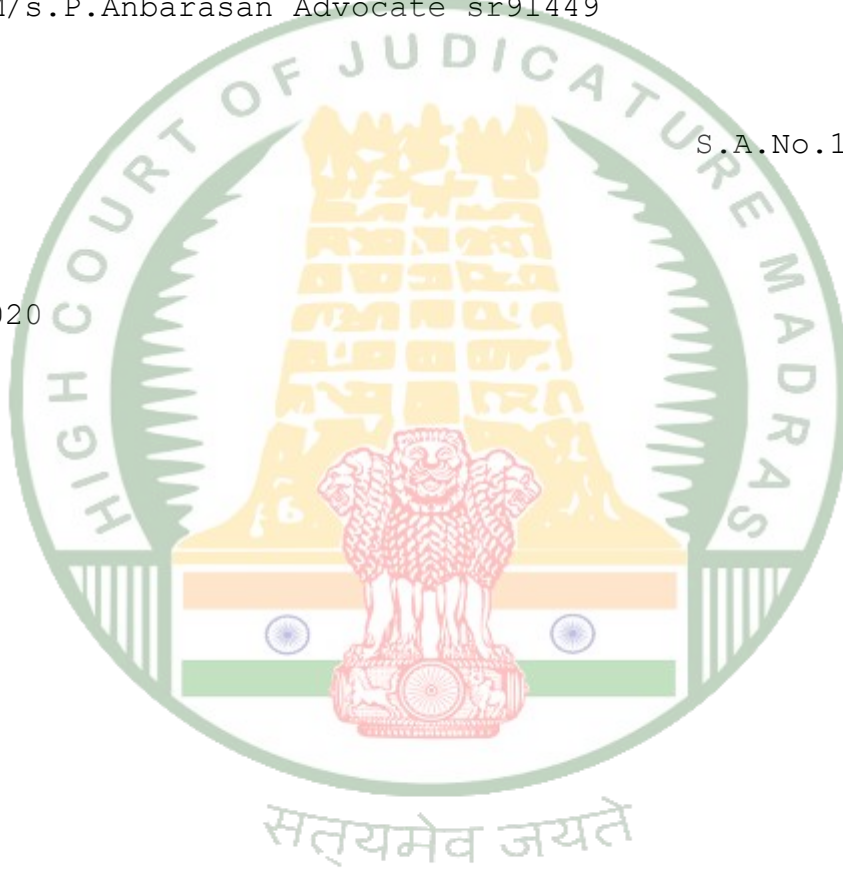
The Section Officer,
VR Section, High Court, Madras.

+1 cc to M/s.P.Meenal Advocate sr90921

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