

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 03.04.2019

CORAM:

THE HONOURABLE MR. JUSTICE **M.M.SUNDRESH**

AND

THE HONOURABLE MR. JUSTICE **C.SARAVANAN**

Review Application No. 7 of 2018

R.Ananda Padmanabhan (deceased)

- 1.Prabhavathi
- 2.Balaveena
- 3.Balasarvanan

...Applicants

Vs.

R.Vadivel Gounder(deceased)

- 1.R.Arumugam
- 2.Maladevi
- 3.V.Bhuvaneswari

...Respondents

Prayer: Review Application filed under Order 47 Rule 1 & 2 of C.P.C against the judgment and decree dated 09.10.2017 passed in A.S. No. 670 of 2009.

For Applicants : Mr.V.Singan

For Respondents : Mr.V.Lakshminarayanan
for Mr.V.Subramanian

JUDGMENT

(Delivered by M.M.SUNDRESH, J.)

Seeking review of the order passed by a Division Bench in confirming the order of the learned trial Court in decreeing the suit for specific performance, the present application has been filed.

2. Learned counsel appearing for the applicants/appellants made only one submission. It is submitted that there is an error apparent of the face of the record. The judgment and decree rendered by the trial Court, as confirmed by this Court, has to be termed as nullity. When once it is termed as nullity coupled with the fact that there is a lack of jurisdiction involving a question of law, then the review would be maintainable since it will amount to a void judgment.

3. In substance, the learned counsel has submitted that Ex.A1 speaks about the possession having been handed over in favour of the respondents by the appellants. Though the suit has been filed for specific performance and for permanent injunction restraining the applicants/appellants from alienating or encumbering the suit property, in the absence of any registration done as governed under Section 17 (1-A) of the Indian Registration Act, the suit ought to have been

dismissed as not maintainable. Section 49 of the Registration Act only speaks about the effect of non-registration of documents required to be registered. To buttress his submission, learned counsel has relied upon the following decisions: (i) *Kiran Singh and others v. Chaman Paswan and others* reported in AIR 1954 SC 340; (ii) *Maritime Electric Co., Ltd v. General Dairies, Ltd* reported in AIR 1937 PC 114; (ii) *P.Jayarama Pillai v. Union Bank of India and another* reported in 1991 2 MLJ 43; (iv) *National Bank for Agriculture and Rural Development v. M/s. Gautham Constructions & Fisheries Pvt Ltd.*, reported in 1991 1 LW 411, and (v) *Palaniammal & Others v. M. Ravi Shankiar and another* reported in 2013-1-L.W.998.

4. Learned counsel for the respondents has submitted that such a plea has never been raised either before the Court below or before this Court and that is the reason why no issue has been raised on that account. The first appellate court in exercise of the power under Section 96 of Code of Civil Procedure, is the final court of fact and law. What has been not raised and argued upon cannot be permitted to be raised by way of review before this Court. Even otherwise, Section 17(1-A) of the Registration Act only prevents a party from taking umbrage under Section 53-A of the Transfer of Property Act, 1882.

Therefore, the direction cannot be sought for on the premise that the agreement speaks about handing over of the possession. Hence, it cannot be applied to those cases where a plaintiff goes to the Court seeking a relief for specific performance based upon unregistered agreement which contains a statement that possession has been handed over by the defendant.

5. Learned counsel further submitted that we are dealing with a case where the applicants/appellants have denied the very existence of Ex.A1 itself. Even in the legal notice issued and in the averments made in the plaint, it has been stated that the possession has not been handed over. It is also the case of the applicants, being the defendants, that possession has not been handed over. Under those circumstances, the review application will have to be dismissed. To buttress his submission, he relied upon the decision in *Minor Ravi Bharathi v. P. Balasumramani and another* reported in 2014 8 MLJ 562.

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6. Admittedly, the plea sought to be raised has not been raised throughout the proceedings before the trial Court and also at the time of deciding the appeal by the Division Bench of this Court. However,

we do not want to stand on technicalities. The scope of the review is well known. Though there is a distinction between Order 47 and Section 114 of the Civil Procedure Code, when both the provisions are put together, this Court is not required to adopt a technical approach in all circumstances. In any case, we do not want to reject this application on that ground.

7. Section 17(1-A) of the Registration Act has come into being with effect from 24.09.2001. Ex.A1 is dated 17.09.2003. Therefore, there is no difficulty in holding that the aforesaid document has come into the existence after the introduction of Section 17(1-A) of the Registration Act. However, as rightly contended by the learned counsel appearing for the respondents Section 17(1-A) coupled with Section 49 would only deny the relief sought for seeking protection with regard to possession under Section 53-A of the Transfer of Property Act, 1882.

8. Section 53-A deals with the part performance and it can be only used as a shield and not as sword. Thus, Section 17(1-A) would not take away the right of the party to seek specific performance notwithstanding the fact that the said document is not registered. In

the case on hand, it is the case of the plaintiffs seeking a relief by taking umbrage under Section 53-A of the Transfer of Property Act, 1882. On the contrary, the relief is with respect to the execution of the document for permanent injunction restraining the defendants from alienating or encumbering the suit property. Such a stand has also been taken in the legal notices issued. This is also the case of the applicants before us in the suit and as well as in the grounds of appeal. In such view of the matter, we are of the view that the review application will have to be dismissed.

9. Learned counsel appearing for the applicants submitted that if the agreement contains a statement that possession is handed over in favour of the agreement holder and the same is not registered, not only the relief under Section 53-A of the Transfer of Property Act, but even the plea for enforcement of the same by way of specific performance cannot be entertained. The said submission, in our considered view will lead to absurdity. If it is accepted, the cases in which there is no covenant in respect of handing over the possession, involving the agreements not registered, suits for specific performance can be maintained as against the other cases where the clauses qua handing over of possession are incorporated. Therefore, it will lead to a

dichotomy between the two similarly placed agreements. Where higher rights have been granted, it cannot be said that even the basic right cannot be enforced.

10. At this juncture, the learned counsel for the appellants drew the attention of this Court to a judgment of the learned Single Judge of the Court in *Palaniammal & Others v. M. Ravi Shankiar, supra*, wherein it has been held as under:-

"23. As per section 17(1-A) of the Registration Act, an agreement for sale relating to any immovable property, for reaping the benefits of section 53-A of Transfer of Property Act, 1882, shall be registered. An intending purchaser, who enters into an agreement for sale with the owner of the property and got delivery of possession of the property, cannot claim the benefits under section 53-A of the Transfer of Property Act unless the deed of agreement for sale which contemplates such delivery of possession is registered. But the said provision shall not affect the right of a transferee for consideration who has no notice of the contract or of the part performance thereof. It is not as if all the agreements for sale referring to instance of delivery of possession shall be compulsorily registered under section 17(1-A) of the Registration Act. Only when the agreement for sale which speaks about delivery of possession is filed to claim benefit of part

performance as contemplated under section 53-A of the Transfer of Property Act, court will have to find out whether the document was registered or not. If such document was not registered then the benefit of section 53-A of Transfer of Property Act cannot be claimed by the prospective purchaser of the property.

24. If the plaintiffs had not claimed benefits under section 53-A of the Transfer of Property Act seeking for protection with regard to possession which they got under Exs.A1 and A3 documents, in that case, the registration is not mandatory”

11. The aforesaid passages would clearly show that even the learned Single Judge therein has not laid down any law to the effect that the unregistered agreement cannot be pressed into service in seeking the relief of specific performance. The learned Single Judge has stated that it cannot be used for seeking any claim of the benefit of part performance as contemplated under Section 53A of the Transfer of Property Act, 1882, which is not the case before us. Thus, we do not find any merit warranting interference. In view of the above finding arrived at, this Court does not intend to traverse the other decisions relied upon by the learned counsel.

In view of the above, the review application stands dismissed.

No costs.

(M.M.S.,J.)

(C.S.N.,J.)

03.04.2019

Index : Yes/No
ssm

To

The Sub Assistant Registrar
Original Side
High Court, Madras.



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M.M. SUNDRESH,J.
AND
C.SARAVANAN,J.

(ssm)



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