



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 25.11.2022

Pronounced on : 02.12.2022

CORAM :

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.S.No. 2 of 2019

Mr. P.Sethumadhavan

... Plaintiff

Vs.

Mr. K.A.Liyagath Ali

... Defendant

PRAYER: Plaint filed under Order VII Rule 1 CPC read with Order IV Rules 1 & 2 of OS Rules, to pass a Judgment and Decree

a) directing him to deliver vacant possession of the entire ground floor portion of the premises bearing Old door No. 50, New Door No. 95, Santhome High Road, Santhome, Chennai – 600 028, morefully described in the schedule hereunder, to the plaintiff;

b) directing the defendant to pay to the plaintiffs Rs.30,000/- being damages for wrongful use and occupation of the suit property for the period from 01.10.2015 to 01.10.2018 at Rs.30,000/- per month;



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c) directing the defendant to pay to the plaintiff Rs.30,000/- per month, as and for future damages for wrongful use and occupation of the suit property from the date of filing of the suit to the date of delivery of possession of the suit property to the plaintiff together with interest at 12% at the rate of twelve per cent per annum; and

d) directing the defendant to pay to the plaintiff the cost of the suit.

For Plaintiff : Mr. S.Parthasarathy
Senior Counsel
for Mr. Navin Balaji

For Defendant : Mr. N.A. Nissar Ahmed

JUDGMENT

The suit had been filed seeking a Judgment and Decree against the defendant to deliver vacant possession of the entire ground floor portion of the premises bearing Old Door No. 50, New Door No.95, Santhome High Road, Chennai, 600 028, and for a direction to the defendant to pay a sum of Rs.30,000/- per month as damages for wrongful use and occupation of the suit property for the period between 01.10.2015 and 01.10.2018 and for a further direction against the defendant to pay future



damages at Rs.30,000/- per month for wrongful use and occupation of the said property from the date of filing of the suit till date of delivery of possession together with interest at 12% p.a, and for costs of the suit.

2. The plaintiff P.Sethumadhavan claimed that he was the absolute owner of the entire property including the ground and first floor of land and building at Old Door No. 50, New Door No. 95, Santhome High Road, Chennai – 600 028 and further claimed that the defendant was in possession of the ground floor and running a departmental store and was also residing in a portion of the property. The title to the property, originally vested with the maternal grandmother of the plaintiff, Lakshmikanthammal. She died on 18.02.1990. The mother of the plaintiff P.Suseela Ammal succeeded her as her only legal heir. She executed a Will dated 03.02.1993 registered as Document No. 50 of 1993 in the Office of the Joint Sub Registrar II, Kancheepuram bequeathing the property in favour of the plaintiff and his brother P.Ramamurthy. She died on 02.09.1995. Thereafter, the brother Ramamurthy had executed a release deed dated 30.10.2003 registered as Document No. 2875 of 2003 on the file of the Sub Registrar, Mylapore, relinquishing his claim to his



undivided one half share in the suit property in favour of the plaintiff.

The plaintiff thus became the absolute owner of the entire property.

3. The plaintiff further stated that his mother P.Suseela Ammal, during her life time, had borrowed a sum of Rs.14,00,000/- lakhs from M/s. Park Town Benefit Fund and had mortgaged the suit property. She had borrowed the sum into two separate installments of Rs.7,00,000/- each. By January 2001, the amount had crystallised to Rs.17,00,000/-. It had been further stated that in October 2000, the defendant approached the plaintiff and his brother offering to purchase the property for a sale consideration of Rs.43,50,000/-. A tri-partite agreement was made ready and the plaintiff, his brother Ramamurthy, his sister Jayakumari and the husband of a pre-deceased sister, Ragunath were termed as parties of the first part, the creditor, M/s. Park Town Benefit Fund was termed as party of the third part and the defendant was termed as the party of the second part. In the agreement, there was an obligation on the defendant to pay a sum of Rs.5,00,000/- to M/s. Park Town Benefit Fund through the plaintiff on the date of signing the agreement. The defendant was to pay Rs.14,25,000/- to the plaintiff and Rs.5,00,000/- to M/s. Park Town



Benefit Fund through the plaintiff on the date of registration of sale deed with respect to only the ground floor portion. An obligation was placed on the defendant to make the said payments within a period of six months and get a sale deed with respect to the ground floor portion. After the sale of the ground floor portion, the defendant was under obligation to pay a sum of Rs.5,00,000/- as advance for the first floor portion. He should pay the balance sale consideration and get the sale deed registered for the entire building within one year from the date of registration of the sale deed of the ground floor. The plaintiff further stated that while the plaintiff, his brother and the defendant went over to M/s. Park Town Benefit Fund, the defendant, instead of giving cash of Rs.5,00,000/- gave a post dated cheque for the said sum. The authorised signatory of M/s. Park Town Benefit Fund refused to sign the agreement. The plaintiff came to know that the cheque issued was dishonoured. The agreement therefore fell through.

4. The plaintiff complained that the defendant was never ready and willing to perform his part of the agreement, consequent to the agreement. The plaintiff claimed that the defendant had paid only an



amount of Rs.12,60,000/- in instalments. It was specifically stated by the plaintiff that the defendant had not fulfilled his part of the obligation under the agreement dated 07.01.2001. The defendant however tried to enter into the property necessitating the plaintiff and his brother to file O.S.No. 3624 of 2001 before the City Civil Court at Chennai, seeking protection of possession of the said property.

5. It was specifically stated that an order of interim injunction was also granted and more importantly, further specifically stated that the defendant broke open the main gate and doors of the property and trespassed into the said property and occupied the ground floor portion illegally. The defendant also established a commercial shop called M/s. Maharaja Departmental Store. In view of the conversion of electricity connection from domestic to commercial, it was necessary to retain the electricity supply, necessary letters had been issued by the plaintiff. The plaintiff claimed that the possession of the defendant was unlawful.

6. The plaintiff further claimed that the defendant was liable to pay damages for use and occupation. The plaintiff had issued a notice



dated 17.10.2001 calling upon the defendant to pay a sum of Rs.28,469/- per month towards damages for use and occupation. The defendant issued a reply dated 11.11.2001 claiming that he had been put in possession by an agreement dated 19.07.2001. The defendant also claimed that he was entitled for protection under Section 53(A) of the Transfer of Property Act, 1882. The plaintiff denied and disputed lawful possession of the defendant and further asserted that the defendant was not entitled for protection as claimed.

7. The plaintiff further stated that, acting as the power of attorney agent of his brother, he filed C.S.No. 873 of 2006 seeking delivery of vacant possession and damages. During the pendency of the suit, the plaintiff became the absolute owner of the suit property. The suit was resisted on the ground that the brother of the plaintiff was not entitled to any share in the property. That contention was accepted by the Court and the suit was dismissed on 05.11.2014. An Appeal was preferred in O.S.A.No. 56 of 2015. By Judgment dated 02.07.2018, the Division Bench held that the plaintiff cannot maintain the suit as power of attorney agent of the brother, since the brother had already



relinquished his title. The Division Bench however left it open for the plaintiff to file a fresh suit as owner and seek appropriate reliefs. It was under these circumstances that the suit had been filed for recovery of possession and for damages for use and occupation and for future damages at Rs.30,000/- per month.

8. The defendant filed a written statement and contended that he was in lawful occupation of the suit property from the year 2001. It was therefore contended that the suit is barred by the law of limitation. It was also contended that the suit is barred by the principles of resjudicata in view of the dismissal of the earlier suit in C.S.No. 873 of 2006 which Judgment was also confirmed in Appeal in O.S.A.No. 56 of 2015 by Judgment dated 02.07.2018. It was also claimed that the suit was barred under Order 2 Rule 2 of the Code of Civil Procedure. The defendant also stated that under the agreement dated 07.01.2001, the total sale consideration was fixed at Rs.43,50,000/-. In accordance with the agreement, the defendant also handed over a post dated cheque of Rs.5,00,000/- in favour of M/s. Park Town Benefit Fund but the authorised signatory of M/s. Park Town Benefit Fund refused to sign the



agreement and therefore, the cheque was not honoured. The defendant claimed that he had paid a sum of Rs.13,60,000/- to the plaintiff on various dates pursuant to the agreement dated 07.01.2001. The defendant specifically claimed protection under Section 53(A) of the Transfer of Property Act, 1882.

9. The defendant also claimed that he is running a departmental store and is also residing in the ground floor with his family. The defendant further claimed that the plaintiff also signed a memorandum of understanding dated 09.07.2001 called “Samadhana Pathiram”. Two advocates of this Court had signed as witnesses. It was specifically agreed that the defendant should be put in possession after the plaintiff received the payments as stated in the memorandum of understanding. It was therefore contended that his possession was lawful. It was further stated that the plaintiff had also issued a letter to the Electricity Board affirming the possession of the defendant and the running of a departmental store by the defendant. It was stated that the amount paid by the defendant was to a sum of Rs.12,60,000/- and a further sum of Rs.1,00,000/- was paid to the erstwhile tenant. These amounts were held



by the plaintiff, to redeem the property from mortgage. The defendant further stated that he is ready and willing to pay the balance sale consideration and perform his part of the obligation. He also stated that the plaintiff had obtained Letters of Administration relating to the Will executed by his mother only on 30.08.2010. He specifically stated that there was no breach of the agreement dated 07.01.2001 or the memorandum of understanding dated 09.07.2001. The defendant specifically denied that he was liable to pay damages for use and occupation and also future damages. The defendant finally stated that the suit should be dismissed.

10. On the basis of the above pleadings, the following issues were framed for trial:-

“(i) Whether the suit is barred by limitation?;

“(ii) Whether the suit is barred by res judicata on account of the earlier suit, namely C.S.No. 873 of 2006?;



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(iii) Whether the suit is barred under Order II Rule 2(3) of CPC on account of the failure to claim the relief claimed herein in the earlier suits namely C.S.No. 873 of 2006 & O.S.No. 3624 of 2001?;

(iv) Whether the defendant is entitled for protection under Section 53A of the Transfer of Property Act?;

(v) Whether the plaintiff is entitled for relief of recovery of possession from the defendant?;

(vi) Whether the plaintiff is entitled for damages of Rs.30,000/- per month along with 12% interest from defendant for wrongful use and occupation of the suit property from 01.10.2015 to 01.10.2018?;

(vii) Whether the plaintiff is entitled for future damages along with 12% interest?;

(viii) Whether the plaintiff is entitled for cost of the suit from the defendant?; and

(ix) Whether the parties are entitled to any other relief? ”



11. During the course of evidence, the plaintiff examined himself as PW-1 and marked Exs. P-1 to P-14. Ex.P-2 was the certified copy of the agreement of sale dated 07.01.2001. Ex.P-4 was the release deed dated 30.10.2003 executed by the brother of the plaintiff. Ex.P-7 was the copy of the letter dated 15.09.2001 addressed by the plaintiff to the electricity board. Exs.P-8 & P-9 were the notices exchanged between the parties. Exs. P-10 to P-12 were the pleadings and Judgment in C.S.No. 873 of 2006. Ex.P-14 was the copy of the Judgment in O.S.A.No. 56 of 2015.

12. The defendant examined himself as DW-1 and marked two documents, namely, his Aadhar Card and ration card as Exs. D-1 and D2.

13. It is pertinent to point out that along with the written statement, the defendant had also filed a copy of the memorandum of understanding dated 09.07.2001 but for reasons best known, the defendant had not exhibited the said document during the course of evidence. Even if it is to be contended that the original was with the plaintiff, the defendant had not issued any notice calling upon the plaintiff to produce the original of the said document.



14. Heard arguments advanced by Mr. S.Parthasarathy, learned Senior Counsel for Mr. Navin Balaji, learned counsel for the plaintiff and Mr. N.A. Nissar Ahmed, learned counsel for the defendant.

15. It is the contention of Mr. S.Parthasarathy, learned Senior Counsel that the title of the property finally crystallised on to the plaintiff that the defendant had unlawfully taken possession of the ground floor of the property. The plaintiff and his brother, his sister and the husband of another sister on the one hand, M/s. Park Town Benefit Fund on the other hand and the defendant had entered into a tri-partite agreement on 07.01.2001. That document was marked as Ex.P-2. There were specific conditions imposed on the defendant. The property was under mortgage with M/s. Park Town Benefit Fund. The property was agreed to be sold for a total consideration of Rs.43,60,000/-. The defendant was under obligation to pay a sum of Rs.5,00,000/- initially to M/s. Park Town Benefit Fund. The cheque issued on that account was returned dishonoured. The defendant was also under obligation to pay a sum of Rs.14,25,000/- towards sale consideration for the ground floor alone and the plaintiff and his brother/sister / brother-in-law were under obligation to execute sale deed for the ground floor in the first instance.



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16. The learned Senior Counsel pointed out that the defendant had not paid the said amount. He had also not expressed readiness and willingness by instituting a suit for specific performance. After the sale deed for the ground floor was executed, the defendant should pay further amounts to M/s. Park Town Benefit Fund and also paid the balance sale consideration and obtain registration for the first floor portion. It is the contention of the learned Senior Counsel that the defendant had paid a sum of Rs.12,60,000/- on various dates but it was contended that the said amounts were not paid as agreed under the agreement. The learned Senior Counsel specifically pointed out that the defendant had not produced the agreement dated 09.07.2001 by which he claimed lawful possession.

17. With respect to issue of limitation, the learned Senior Counsel pointed out that the Division Bench in O.S.A.No. 56 of 2015 by Judgment dated 02.07.2018 had granted permission to the plaintiff to institute an appropriate suit and the suit had been filed within a reasonable time from the said Judgment. The learned Senior Counsel also stated that the appeal was dismissed only on technical grounds as



the plaintiff cannot be the power of attorney agent of his brother, who had no right to act as principal as he had relinquished his share of the property. It was therefore contended that the issue of res judicata cannot be applied under the present circumstances.

18. The learned Senior Counsel further stated that the suit cannot also be said to be barred under Order II Rule 2 of CPC since the plaintiff had filed the suit for recovery of possession and for damages which is an entirely separate cause of action. The learned Senior Counsel stated that the defendant continued to be in unlawful occupation and also stated that the amount of Rs.30,000/- claimed as damages per month had been determined by the calculation as provided under Section 4 of the Tamilnadu Buildings (Lease and Rent Control) Act, 1960 as amended. It was therefore contended that the defendant has to vacate and hand over possession. The learned Senior Counsel further stated that the amount of Rs.12,60,000/- received by the plaintiff can be adjusted towards the arrears of damages. It was therefore contended that the suit should be decreed.



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19. Mr. N.A.Nissar Ahmed, learned counsel on behalf of the defendant disputed and contested the claims of the learned Senior Counsel. According to the learned counsel, the defendant was in lawful occupation to the knowledge of the plaintiff. There was an agreement of sale entered into between the parties. Whenever the plaintiff wanted money, the defendant had been advancing amounts and in this manner had paid a sum of Rs.13,60,000/- which also included a sum of Rs.1,00,000/- paid to vacate the erstwhile tenant. The learned counsel also pointed out that the plaintiff had affirmed the lawfulness of the possession of the defendant by addressing a letter to the electricity board. The learned counsel further stated that the earlier suit having been dismissed on the same cause of action and which had been filed for the very same relief, the present suit is not maintainable and barred by the principles of res judicata. The learned Counsel further stated that the relief sought in the present suit was not claimed in the earlier suit both before this Court in C.S.No. 873 of 2006 and before the City Civil Court in O.S.No. 3624 of 2001 and therefore stated that the present suit is also hit under Order II Rule 2(3) of CPC . The learned counsel specifically stated that since the plaintiff was put in possession consequent to an



agreement entered into in writing by the parties, the plaintiff was entitled for protection under Section 53(A) of the Transfer of Property Act, 1882. The learned counsel also challenged the quantum of damages sought and stated that the defendant is not liable to either pay the damages or to handover vacant possession as claimed by the plaintiff. The learned counsel therefore urged that the suit should be dismissed.

Issue No.1:

20. The plaintiff claimed to be absolute owner of the property bearing Old Door No. 50, New Door No. 95, Santhome High Road, Chennai. It is the contention of the plaintiff that the defendant was in possession of the ground floor portion and it has been specifically contended that the defendant had unlawfully entered into possession. Even otherwise, it is contended that a tri-partite agreement was entered into along with M/s. Park Town Benefit Fund with whom the property was mortgaged on 07.01.2001. The plaintiff had, along with his brother, instituted O.S.No. 3624 of 2001 seeking to protect possession of the ground floor portion. On that particular date, the only issue which



prevailed between the parties was the threat of possession by the defendant.

21. It is claimed by the defendant that subsequently the possession of the defendant had been regularised by a memorandum of understanding dated 09.07.2001. That document had not been produced before the Court. It had been filed as a document along with written statement but the defendant, for reasons best known, had not produced it as evidence nor had issued notice to the plaintiff to produce the original of the said document. Therefore, there is no document as on date which recognises the possession of the defendant. The only document which can be relied on him is the agreement of sale dated 07.01.2001. Thereafter, the plaintiff acting for himself and acting on behalf of his brother as power of attorney agent had filed C.S.No. 873 of 2006. That suit ended in dismissal on 05.11.2014 which Judgment was confirmed in O.S.A.No. 56 of 2015 by Judgment dated 02.07.2018. The Division Bench had specifically granted permission to the plaintiff to institute a separate suit for appropriate reliefs. The relevant portion of the Judgment of the Division Bench is as follows:-



“9. Accordingly, this appeal stands dismissed for the reasons stated supra. The findings given in the suit with regard to all the other issues also stand set aside. We also make it clear that it is open to P.Sethu Madhavan, who is the owner of the entire suit property, to maintain an independent suit against the respondent, if he is otherwise legally entitled to.”

22. The plaintiff has instituted the present suit in his capacity as the owner of the property asserting title. Article 65 of the Limitation Act provides a period of 12 years for possession of immovable property based on title. The suit had been certainly filed within the period of limitation. It had certainly been filed within 12 years from the date of Judgment in O.S.No. 56 of 2015. I would therefore answer the issue of limitation against the defendant and hold that the suit is not barred by the law of limitation.

Issue No.2:

23. This issue surrounds the question of res judicata. The earlier suit in C.S.No. 873 of 2006 was filed by the plaintiff on his behalf and on behalf of his brother as power of attorney agent. On the date, when that



suit was instituted, his brother had an undivided one half share in the suit property. Subsequently, however, he had released his undivided one half share by a release deed dated 30.10.2003 which was marked as Ex.P-4. Since the brother was no longer the owner of the property, the power of attorney had become otiose. Taking note of that fact, the suit was dismissed and subsequently the Appeal was also dismissed.

24. The relief sought in that suit was for delivery of vacant possession and for payment of damages for wrongful use and occupation. The relief in the present suit is also the same but there is one vital difference namely, the present suit has been filed by the plaintiff as the title holder of the entire property.

25. Section 11 of the Code of Civil Procedure relating to res judicata makes that provision applicable only when the issues had been heard and finally decided in a previous suit by a Court of competent jurisdiction. The earlier suit in C.S.No. 873 of 2006 had not returned any finding on the right to recover possession and the liability to pay damages. The decision rendered was that the suit suffered from a formal



defect. The brother of the plaintiff, who had given a power of attorney holding that he was entitled to one half undivided share became not so entitled to such share during the pendency of the suit. Therefore, by no stretch of imagination can it be stated that the issues raised in the present suit had been finally heard and decided in the previous suit. The issue of res judicata is therefore not applicable and the issue is answered in favour of the plaintiff and against the defendant.

Issue No. 3:

26. This issue surrounds Order II Rule 2(3) of CPC. The said rule is a protection for a litigant against multiplicity of litigations filed against him.

27. Order II Rule 2(3) of CPC is as follows:-

***“Order 2 Rule 2 of the code of Civil
Procedure, 1908, reads:***

**2. Suit to include the whole claim:**

1.

2.

3. *Omission to sue for one of several reliefs:*

A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

28. The first suit before the City Civil Court in O.S.No. 3624 of 2001 was filed to protect possession of the property. It was an injunction suit. The cause of action was the entry of the defendant in the ground floor portion. The reliefs sought in the second suit and the reliefs sought in the present suit are the same. There was no omission to sue for any specific relief in C.S.No. 873 of 2006. The relief of recovery of possession was sought and the relief of damages for use and occupation was also sought. When the suit before the City Civil Court was filed, the need for recovery of possession did not arise as it was primarily to



prevent interference with peaceful possession. Even the defendant claimed that he was put in lawful possession by a memorandum of understanding dated 09.07.2001 and the suit before the City Civil Court was filed even earlier on 26.06.2001. Therefore, the plaintiff cannot be faulted for omitting to sue for any other relief.

29. To repeat, C.S.No. 873 of 2006 was dismissed on the ground that the suit suffered from a formal defect. The issues raised were not adjudicated on merits. Therefore, I would answer this issue also against the defendant and in favour of the plaintiff.

Issue No.4:

30. This issue surrounds the claim of the defendant that he is entitled for protection under Section 53(A) of the Transfer of Property Act.

31. Section 53(A) of the Transfer of Property Act is as follows:-



“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, 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: Provided that nothing in this section shall affect



the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof ”

32. The provision requires possession on the basis of a contract in writing. The defendant claims that he was put in possession by a memorandum of understanding which he termed as “Samadhana Pathiram” dated 09.07.2001. That document has never been produced as an exhibit. The plaintiff was also not issued with notice to produce that particular document. On this very initial aspect, the claim of the defendant fails. Even if it is to be presumed that the tri-partite agreement under Ex. P-2 dated 07.01.2001 gave lawful permission to the defendant to take possession, that agreement also had an in built conditions to be performed by the defendant.

33. The provision also stipulates that the defendant who takes possession should perform acts in furtherance of the contract. The obligation placed on the defendant in furtherance of the agreement dated 07.01.2001 was to pay a sum of Rs.5,00,000/- to M/s. Park Town Benefit Fund on the date of signing the agreement. Instead of paying by cash,



the defendant issued a post dated cheque. M/s. Park Town Benefit Fund therefore refused to sign it. The cheque was dishonoured. There was no possibility of M/s. Park Town Benefit Fund of ever signing the agreement. On the first aspect itself, there was failure to perform the obligation by the defendant. The defendant was also under obligation to pay Rs.14,25,000/- to the plaintiff and another sum of Rs.5,00,000/- and seek registration of sale with respect to the ground floor. The defendant had not paid either one of the two sums as agreed.

34. It is the contention of the defendant that on various dates he had paid a total sum of Rs.13,60,000/-. This included a sum of Rs.1,00,000/- paid to the erstwhile tenant in the ground floor. By any mathematical calculation even if it is to be admitted that the defendant had paid a sum of Rs.13,60,000/- to the plaintiff, it is still less than the obligation to pay a sum of Rs.14,25,000/- to the plaintiff to seek registration of sale deed of the ground floor. The defendant had again failed to perform his part of the agreement. He had also not paid the subsequent instalment of Rs.5,00,000/- to M/s. Park Town Benefit Fund. Therefore, the defendant can never seek protection of possession under



the agreement dated 07.01.2001, namely, Ex.P-2. The agreement which he relies on namely, the memorandum of understanding dated 09.07.2001 has not been filed as a document before the Court and not produced as evidence. Thus by no stretch of imagination can the defendant's possession be termed as lawful.

35. During the course of cross examination of the defendant, the following answers are relevant:-

“Q18: I put it to you that as per Ex.P2 agreement you are liable to pay 17 lakhs to the Park Town Benefit Fund.”

A: Witness shown the agreement Ex.P2, he says he doesn't remember.

Q19: Whether there are recitals in the agreement Ex.P2 to show that after paying some considerable amount to the plaintiff, the suit property has to be registered in favour of you?



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A: Yes.

Q20: *As on date, how much did you paid to the plaintiff pursuant to the Ex.P2 agreement?;*

A: I have approximately paid Rs.14 lakhs to the plaintiff.

Q21: *What is the mode of the above payment to the plaintiff as per Ex.P2?*

A: It is both by Cheque and Cash.

Q22: *Do you remember as to how much did you paid in Cash as well as Cheque?*

A: I do not remember.

Q31: *I put it to you that as on date you have paid the plaintiff only a sum of Rs.12,60,000 and not Rs.14 lakhs?*



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A: I do not remember.

Q39: *Whether it is true, in the reply notice you have been put on possession pursuant to the agreement dated 09.07.2001?*

A: Yes.”

36. It is clear that the defendant had vague answers and did not give any specific answer as to whether he was put in possession under Ex.P-2 agreement dated 07.01.2001 and whether he had performed the obligation as necessitated under the said agreement. It is clear as crystal that he had failed to perform his part of the agreement. I hold that the defendant is not entitled for any protection under Section 53A of the Transfer of Property Act.

37. The learned counsel for the defendant had relied on the Judgment of the Hon'ble Supreme Court in **2002 3 SCC 676 [Shrimant Shamrao Suryavanshi & Another Vs. Pralhad Bhairoba Suryavanshi]**, the relevant portion of paragraph No. 20 is held as follows:-



“20. It is, therefore, manifest that the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to a defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action. ”

38. The defendant has a right to claim part performance but he must perform his obligation first and in this case, he has failed to do so and therefore, I hold the defendant is not entitled for protection under Section 53A of the Transfer of Property Act.

39. The learned Senior Counsel for the plaintiff had relied on **(2007) 14 SCC 87 [A.Lewis and Another Vs. M.T.Ramamurthy and Others]**. The relevant portion at paragraph No. 11 is as follows:-



“11. As rightly pointed out by the High Court, the existence of right to claim protection under Section 53-A of the Transfer of Property Act would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform his part of the contract and convey his willingness. On the other hand, the factual finding is that there was no intimation by defendant Nos. 3 and 4 to perform their part of contract to claim protection of Section 53-A of the Transfer of Property Act. Likewise, as rightly concluded by the courts below, there is no material to show that the plaintiff had notice of agreement of sale Ex.D-1 in favour of defendant Nos. 3 and 4. The conclusion of the High Court that defendant Nos. 3 and 4 or even defendant No.1 who claims through them are not entitled to protection of Section 53-A of the Transfer of Property Act is acceptable and the argument contrary to the said conclusion is liable to be rejected. ”

40. None of the above conditions have been satisfied by the defendant and therefore, he is not entitled for protection under Section



53A of the Transfer of Property Act. The issue is therefore answered against the defendant and in favour of the plaintiff.

Issue No.5:

41. Since the plaintiff has established title and since it has been found that the defendant is not entitled for any protection under Section 53A of the Transfer of Property Act, and since the suit is not barred either by Law of Limitation or under Order II Rule 2 CPC and the principles of res judicata do not apply, I hold that the plaintiff is entitled for recovery of possession. The issue is answered in favour of the plaintiff.

Issue Nos.6 & 7:

42. The plaintiff has claimed damages of Rs.30,000/-. The defendant had not let in any evidence to the contrary. Even in the plaint, justification was made of the quantum on the basis of Section 4 of the Tamilnadu (Lease and Rent Control) Act 1960. I would therefore hold that the quantum of Rs.30,000/- is reasonable. The property is situated in



the main road in the heart of the City. The defendant has been in occupation and has not paid any amount towards the agreement of sale to justify to continue in occupation. Therefore, I hold that the issues should be answered in favour of the plaintiff and against the defendant.

Issue No. 8:

43. The plaintiff has filed the suit for recovery of possession and the defendant had been in unlawful occupation of a commercial portion and has put it to commercial use. The plaintiff had certainly suffered loss owing to this occupation by the defendant. I hold that the plaintiff is entitled for costs of the suit. The issue is answered in favour of the plaintiff.

Issue No.9:

44. In the result, the suit is decreed as prayed for with costs.

45. The defendant is directed to vacate and hand over vacant possession within a period of one month from the date of receipt of a



copy of this Judgment. Since the plaintiff admitted to receipt of Rs.12,60,000/- from the defendant and since the defendant's claim that he had paid a sum of Rs.1,00,000/- to the erstwhile tenant, is not contested, I would hold that while calculating the recovery of damages, the sum of Rs.13,60,000/- should be set off against the amount payable by the defendant.

.12.2022

Index :Yes/No

Internet:Yes/No

vsg

Speaking/Non Speaking Order

1. List of Witnesses Examined on the side of the Plaintiff:-

P.W.1 – Mr. P.Sethumathavan

2. List of Exhibits on the side of the Plaintiff:-

1. Ex.P1 is the Will along with probate order dated 03.02.1993 executed by the mother of the plaintiff along with certified copy of the probate order in O.P.No. 74 of 2006;



2. Ex.P2 is the certified copy of Agreement of Sale dated 07.01.2001 entered with the defendant;
3. Ex.P3 is the original General power of Attorney dated 12.09.2002 executed by the brother of the plaintiff in favour of the plaintiff;
4. Ex.P4 is the original Release Deed dated 30.10.2003 executed by the brother of the plaintiff;
5. Ex.P5 is the certified copy of the plaint in O.S.No. 3624 of 2001 dated 26.06.2001;
6. Ex.P6 is the certified copy of the Order passed in I.A.No. 10272 of 2001 in O.S.No. 3624 of 2001, Ad-Interim Injunction passed against the defendant dated 27.06.2001;
7. Ex.P7 is the certified copy of the Letter dated 15.09.2001 addressed by the plaintiff to the Electricity Board Authorities;
8. Ex.P8 is the certified copy of the Legal Notice dated 17.10.2001 sent on behalf of the plaintiff;
9. Ex.P9 is the certified copy of the Reply Notice dated 11.11.2001 sent on behalf of the defendant;
10. Ex.P10 is the certified copy of the Plaint in C.S.No. 873 of 2006 on the file of High Court, Madras dated 23.08.2006;
11. Ex.P11 is the certified copy of the written statement filed in C.S.No. 873 of 2006 on the file of High Court, Madras, dated 10.08.2007;



12. Ex.P12 is the certified copy of the Judgment and Decree passed in C.S.No. 873 of 2006 dated 05.11.2014;
13. Ex.P13 is the certified copy of the Memorandum of Grounds in O.S.A.No. 56 of 2015 dated 25.02.2015; and
14. Ex.P14 is the certified copy of the Judgment and Decree passed in O.S.A.No. 56 of 2015 dated 02.07.2018.

3. List of Witnesses Examined on the side of the Defendant:-

D.W.1 – Mr. K.A. Liyagath Ali

4. List of Exhibits on the side of the Defendant:-

1. Ex.D1 is the photocopy of the Aadhar Card of the defendant (verified with original and returned); and
2. Ex.D2 is the photocopy of the Ration Card of the Defendant (verified with original and returned)

02.12.2022

Vsg



WEB COPY



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C.V.KARTHIKEYAN, J.

vsg

**Pre-Delivery Judgment made in
C.S.No. 2 of 2019**

02.12.2022