



A.S(MD)Nos.185 & 186 of 2010

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 23.06.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)Nos.185 and 186 of 2010

and

M.P(MD)No.1 of 2010

A.S(MD)No.185 of 2010

S.Murugesan

... Appellant

vs.

1)V.Parthasarathy Naidu (Died)

2)Leela

3)Venkatraman

(R2 and R3 were suo motu impleaded as

LRs of the deceased sole respondent

vide order dated 05.08.2021 in

A.S(MD)Nos.185 & 186 of 2010)

... Respondents

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 28.04.2010 in O.S.No.109 of 2007 on the file of Additional District Court (Fast Track Court No.1), Thanjavur.

For Appellant
For R2 & R3

: Mr.Raguvaran Gopalan
: Mr.H.Lakshmi Shankar for
Mr.G.Mohan Kumar



A.S(MD)Nos.185 & 186 of 2010

A.S(MD)No.186 of 2010

S.Murugesan

... Appellant

vs.

1)V.Parthasarathy Naidu (Died)

2)The Joint Sub Registrar No.1
Dr.Moorthy Road,
Kumbakonam,
Thanjavur District.

3)The District Registrar,
Dr.Moorthy Road,
Kumbakonam,
Thanjavur District.

4)The Government of Tamilnadu,
Represented by District Collector,
Thanjavur District.

5)Leela

6)Venkatraman

(R2 and R3 were suo motu impleaded as
LRs of the deceased 1st respondent
vide order dated 05.08.2021 in
A.S(MD)Nos.185 & 186 of 2010)

... Respondents

Appeal Suit filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 28.04.2010 in O.S.No.127 of 2008 on the file of Additional District Court cum Fast Track Court No.1, Thanjavur.



A.S(MD)Nos.185 & 186 of 2010

For Appellant : Mr.Raguvaran Gopalan
For R5 & R6 : Mr.H.Lakshmi Shankar for
Mr.G.Mohan Kumar

COMMON JUDGMENT

The appellant in both the appeals as plaintiff filed O.S.No. 127 of 2008 for the relief of specific performance against the deceased 1st respondent in both the appeals or in the alternative to repay the advance amount to him. The deceased 1st respondent in both the appeals as plaintiff filed O.S.No.109 of 2007 against the appellant herein for delivery of possession of the suit property, to pay a sum of Rs.5,11,500/- towards damages with interest at 12% per annum from the date of plaint till the date of payment and for a permanent injunction restraining the appellant from removing the burnt and unburnt bricks from the brick kiln put up in the suit property. The trial Court conducted a joint trial of both the suits and dismissed the suit O.S.No.127 of 2008 for specific performance, however, directed the 1st respondent herein/defendant to repay the advance amount of Rs.1,10,000/- to the appellant/plaintiff. In O.S.No.109 of 2007, the trial Court granted the relief of recovery of possession and dismissed the suit in respect of other reliefs.



A.S(MD)Nos.185 & 186 of 2010

Aggrieved by the common judgment and decree passed by the trial Court in both the suits, the plaintiff in O.S.No.127 of 2008 and the 1st defendant in O.S.No.109 of 2007 has filed these two appeals.

2. Brief plaint averments in both the suits are as follows:-

The suit property belonged to the deceased 1st respondent in both the appeals. With regard to the suit property, on 10.03.2005, a sale agreement was entered into between the 1st respondent and the appellant. The suit property was valued at Rs.400/- per kuli totally Rs.1,93,200/-. The appellant paid advance of Rs.1,00,000/- to the deceased 1st respondent on the date of sale agreement and agreed to pay the balance sale consideration within six months and it was agreed that the 1st respondent shall measure the property. As per the sale agreement, possession of the suit property was handed over to the appellant. According to the appellant, he was ready and willing to perform his part of contract, but the 1st respondent was dragging on to survey the suit property. Since the 1st respondent asked money to survey the property, the appellant paid a sum of Rs. 10,000/- in August 2005. Again, on 27.08.2005, the appellant paid a further sum of Rs.10,000/- to the 1st respondent towards advance.



A.S(MD)Nos.185 & 186 of 2010

According to the appellant, despite his repeated requests, the 1st respondent did not take steps to measure the property. To his shock and surprise, the 1st respondent issued an advocate notice dated 27.04.2007, to the appellant, stating that since the appellant trespassed into the suit property, removed sand and cut down the trees and put up a brick kiln, he is liable to pay the damages of Rs. 5,11,500/- and also to hand over possession of the suit property to the 1st respondent. According to the appellant, the allegations in the abovesaid notice are utterly false. Pursuant to the said notice, the 1st respondent filed O.S.No.109/2007 for recovery of possession and for damages and the appellant filed O.S.No.127/2008 for specific performance with alternative remedy of refund of the advance amount.

3. Brief averments in the written statement in both the suits are as follows:-

The 1st respondent is the owner of the suit property, wherein, 70 years old coconut trees 91 nos, 160 R.S.Pathy tress, 3 vaagai trees and other trees were standing. The 1st respondent agreed to sell the land in the suit property only and as per the sale agreement,



A.S(MD)Nos.185 & 186 of 2010

the 1st respondent measured the property on 27.08.2005 and received additional advance amount of Rs.10,000/- from the appellant. Despite repeated demands to perform his part, the appellant was evading. Since there was no proper response from the appellant, the 1st respondent visited the suit property and found out the cutting of trees and removal of sand and putting up of a brick making channel. Hence, he issued an advocate notice dated 27.04.2007 claiming damages and in the said notice, the 1st respondent cancelled the sale agreement. Thereafter, the 1st respondent filed O.S.No.109/2007. According to the 1st respondent, the appellant is not entitled to the relief of specific performance.

4. Based on the pleadings, the trial Court framed the following issues:-

O.S.No.127/2008:-

1. Whether the plaintiff was ready and willing to perform his part as per the sale agreement?
2. Whether the plaintiff asked the defendant to measure the suit property?
3. Whether on the date of sale agreement itself, possession



A.S(MD)Nos.185 & 186 of 2010

was handed over to the plaintiff?

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4. Whether the plaintiff cut down 91 coconut trees, 160 R.S.Pathy tress, 3 vaagai trees and one Nuna tree?

5. Whether the plaintiff removed 160 loads of sand from the suit property and sold it to third party?

6. Whether the plaintiff is entitled to the relief of specific performance?

7. Whether the plaintiff is entitled to receive the advance amount paid by him?

8. To what other reliefs, the plaintiff is entitled to?

O.S.No.127/2008:-

1. Whether the sale agreement dated 10.03.2005 is in force as per the statement of the defendant?

2. Whether the plaintiff is entitled to recovery of possession?

3. Whether the plaintiff is entitled to damages at Rs. 5,11,500/-?

4. Whether the plaintiff is entitled to the relief of permanent injunction?

5. Whether the plaintiff fails to perform the sale agreement?

6. To what other reliefs, the plaintiff is entitled to?



A.S(MD)Nos.185 & 186 of 2010

5. In order to substantiate the case of the plaintiff in both the suits, three witnesses were examined as PWs 1 to 3 and 6 documents were marked as Exs.A1 to A6. On the side of the defendants, four witnesses were examined as DWs 1 to 4 and 7 documents were marked as Exs.B1 and B7 were marked. Commissioner's report was marked as Ex.C1.

6. The trial Court, considering the pleadings, oral and documentary evidence, dismissed O.S.No.127 of 2008 for specific performance, however, directed the 1st respondent herein/defendant to repay the advance amount to the appellant/plaintiff. In O.S.No. 109 of 2007, the trial Court granted the relief of recovery of possession and dismissed the suit in respect of other reliefs. Challenging the common judgment and decree, the plaintiff in O.S.No.127 of 2008 and the 1st defendant in O.S.No.109 of 2007 has field these two appeals.

7. The learned counsel for the appellant would submit that the suit property originally belonged to the deceased 1st respondent herein. He entered into a sale agreement with the appellant for sale



A.S(MD)Nos.185 & 186 of 2010

of the suit property. As per the sale agreement, the sale consideration was fixed at Rs.400/- per kuli. Since the extent of land was not fixed, the total sale consideration was also not fixed. As per the sale agreement, the 1st respondent has to measure the suit property and though the appellant paid Rs.10,000/- for measurement during August 2005 and subsequently made further advance amount of Rs.10,000/-, the 1st respondent never came forward to measure the property, get the balance sale consideration and to execute the sale deed.

8. According to the learned counsel for the appellant, on the date of Ex.A1-sale agreement itself, possession of the suit property was handed over to the appellant and there were no trees in the suit property as alleged by the 1st respondent and it was only a vacant land. Despite repeated request of the appellant to perform his part, the 1st respondent did not do so and unilaterally cancelled the sale agreement without any valid reason and therefore, such cancellation is illegal and not binding on the appellant. Further, on false allegations that the appellant cut down the trees, the 1st respondent filed suit for damages and recovery of possession and absolutely,



A.S(MD)Nos.185 & 186 of 2010

there is no evidence to show that on the date of handing over the possession, trees were standing in the suit property and considering the same, the trial Court rightly dismissed the suit for damages.

9. It is further submitted that the Advocate Commissioner inspected the suit property without serving notice or intimating to the appellant and in his report, though the Commissioner has stated that there were marks which show that trees were cut and removed and there were pits which show that sand has been removed, during his cross examination, he has stated that he did not know when those trees were cut and removed. Therefore, the trial Court rightly appreciated the evidence in this regard and rejected the claim of damages, but however, the trial Court failed to consider that the appellant was always ready and willing to perform his part of contract. Even the recital in the sale agreement shows that sale price was fixed at Rs.400/- per kuli which means on that date of sale agreement, exact extent of land was not confirmed and there was a oral agreement between the parties to measure the suit property to find out the total extent. Since the 1st respondent did not complete the measurement, the appellant could not pay the balance sale



A.S(MD)Nos.185 & 186 of 2010

consideration without knowing the actual extent covered in the sale agreement, but he was always ready and willing to perform his part of contract which the learned trial Judge failed to consider and erroneously dismissed the suit for specific performance. Thus, he would pray for judgment of specific performance.

10. Pending appeals, the 1st respondent/the 1st defendant in O.S.No.127 of 2008 and the plaintiff in O.S.No.109 of 2007, died and his legal representatives were impleaded as respondents 2 and 3 in A.S(MD)No.185/2010 and respondents 5 and 6 in A.S(MD)No. 186/2010. The learned counsel for the contesting respondents would submit that the sale agreement, period of six months and receipt of Rs.10,000/- by the 1st respondent in August 2005 are admitted. The 1st respondent measured the suit property and was ready to perform his part, whereas, even after the measurement, the appellant was not ready and willing to perform his part of contract. According to the learned counsel, possession was not handed over to the appellant and he trespassed into the suit property, cut and removed the trees and sand, thereby, caused damages and therefore, the 1st respondent cancelled the sale



A.S(MD)Nos.185 & 186 of 2010

agreement. Though the learned trial Judge rightly appreciated the evidence that the appellant was not ready and willing to perform his part of contract, but however, failed to appreciate the evidence and also the Commissioner's report regarding damages and erroneously dismissed the claim of damages. Though the appellant stated that as per the sale agreement, possession of the suit property was handed over to him, there is no such recital in the sale agreement and rightly, the trial Court appreciated the same and denied the relief of specific performance. Thus, he would pray for dismissal of the appeals.

11. Heard both sides and perused the records.

12. Admittedly, the suit properties belonged to the deceased 1st respondent. He entered into a sale agreement on 10.03.2005 with the appellant for sale of the suit property and the sale price was fixed at Rs.400/- per kuli and the appellant paid advance of Rs. 1,00,000/- to the 1st respondent on the date of sale agreement. As per the sale agreement, suit property has to be measured by the 1st respondent and thereafter, balance sale consideration has to be paid



A.S(MD)Nos.185 & 186 of 2010

by the appellant within six months and then the 1st respondent has to execute the sale deed within six months. Though the 1st respondent stated that he received a sum of Rs.10,000/- from the appellant in the month of August 2005 and also measured the suit property, the appellant denied the fact stating that the 1st respondent had not measured the property, however, he admitted that a sum of Rs.10,000/- was received by the 1st respondent from him. According to the appellant, though he was ready and willing to perform his part of contract from the date of the agreement within a period of six months as per the agreement, till the filing of the suit, the 1st respondent did not measure the suit property and give specific extent covered in the sale agreement and therefore, the appellant could not pay the balance sale consideration, however, to show his bonafides, the appellant deposited the amount at the time of filing the suit. Though the appellant stated that he paid Rs. 10,000/- to the 1st respondent for measuring the suit property, when the 1st respondent has not measured the suit property within the period of six months fixed in the sale agreement, the appellant ought to have taken immediate steps for measurement and get the sale deed executed, whereas, he had not taken any steps even to



A.S(MD)Nos.185 & 186 of 2010

issue any notice and on the contra, the 1st respondent issued an advocate notice dated 27.04.2007 alleging trespass and damages by the appellant. Though the appellant has stated that on the date of sale agreement itself, possession was handed over to him, there is no such recital in the sale agreement, as such, he has not proved the said fact in the manner known to law. The sale agreement is on 10.03.2005, whereas the suit was filed in the month of June 2007, i.e., two years after the agreement.

13. Though the appellant stated that the 1st respondent did not measure the suit property and give specific extent covered in the sale agreement within six months and therefore, the appellant could not pay the balance sale consideration, however, to show his bonafides, the appellant deposited the balance sale consideration at the time of filing the suit, it is not known as to how the appellant arrived at the conclusion of total sale consideration at Rs.1,93,200/- when the actual extent of the property has not been measured and how the amount could be deposited at the time of filing the suit. Further, yet another doubt arises that when the appellant himself admitted that though in the agreement, handing over the possession



A.S(MD)Nos.185 & 186 of 2010

of the suit property has not been mentioned, but however, the 1st respondent handed over the possession to him at the time of agreement itself, if it is so, then the appellant himself could have very well measured the property with the help of a Surveyor, instead of giving a sum of Rs.10,000/- to the 1st respondent and waiting for measurement, but he has not chosen to do so and therefore, a doubt arises as to whether measurement had taken place or not and if the measurement had not taken place, how the appellant arrived at the total sale consideration and mentioned in the plaint. Thus, this Court finds that the appellant has not approached this Court with clean hands to get the discretionary relief of specific performance.

14. Being a plaintiff, the appellant has to prove his readiness and willingness to perform his part of contract, but in this case, he has not proved the same from the date of agreement till the filing of the suit throughout. Though the appellant examined two more witnesses, their evidence do not inspire the confidence of this Court and therefore, this Court is of the opinion that as a plaintiff, especially in a suit for specific performance which is a discretionary relief, must approach the Court with clean hands and prove that he



A.S(MD)Nos.185 & 186 of 2010

was always ready and willing to perform his part of contract.

Though the suit has been filed within the period of limitation, that by itself is not sufficient to get the relief of specific performance. Since the appellant stoutly denied about the measurement, this Court does not understand how he arrived at the amount and mentioned in the plaint. Therefore, there are clouds over the conduct of the appellant as to his readiness and willingness to perform his part which shows that the appellant has not approached the Court with clean hands and hence, the trial Court found that he is not entitled to the relief of specific performance and rightly dismissed the suit.

15. As far as A.S(MD)No.185/2010 filed against the decree for recovery of possession granted in O.S.No.109/2007, though the deceased 1st respondent filed the said suit for recovery of possession and also claiming damages, the trial Court rejected the relief of damages and the 1st respondent has not filed any appeal challenging the rejection of the claim for damages. Though in this case, the appellant has stated that on the date of agreement, the 1st respondent handed over possession of the suit property, the appellant has not proved that the respondent voluntarily handed



A.S(MD)Nos.185 & 186 of 2010

over possession. If anything pleaded contra to the recital in the agreement, the person who claims has to plead and prove it. Though the appellant examined two more witnesses and tried to establish his case, the said evidence do not inspire the confidence of this Court and they are only interested witnesses and they have not clearly spoken about the handing over of possession. Though in the sale agreement, it is not mentioned that the 1st respondent handed over the possession, if the 1st respondent intended to hand over possession of the suit property to the appellant, naturally, he would have mentioned the same in the sale agreement itself. Even the appellant himself admitted that the total extent of the suit property has not been mentioned in the sale agreement and without knowing the actual extent and without fixing the balance sale consideration, it is improbable on the part of the 1st respondent/vendor to hand over possession of the suit property to the appellant/vendee.

16. Though the appellant stated that he is in lawful possession of the suit property since the 1st respondent handed over possession to him, the 1st respondent stated that he never handed over possession to the appellant, whereas, the appellant trespassed



A.S(MD)Nos.185 & 186 of 2010

into the suit property and caused damages. While the trial Court disallowing the relief of specific performance, granted the relief of recovery of possession to the 1st respondent as owner of the property. If at all the possession handed over to the appellant, he should have taken shelter under Section 53A of the Transfer of Property Act, 1882, whereas, in this case, the appellant only filed the suit for specific performance and simply defended the suit filed by the 1st respondent for recovery of possession and damages. Though the Trial Court disallowed the relief of damages and granted recovery of possession, since the 1st respondent has not filed any appeal or cross objection and only the appellant has filed appeals, this Court need not go into deep about the finding of the trial Court regarding dismissal of the claim of damages.

17. The appellate Court being a fact finding Court, it has to re-appreciate the entire pleadings, oral and documentary evidence. On a careful perusal of the entire pleadings, oral and documentary evidence and also the common judgment and decree of the trial Court, this Court does not find any perversity or good reason to interfere with the said judgment.



A.S(MD)Nos.185 & 186 of 2010

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18. Accordingly, both the Appeal Suits are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

23.06.2022

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Index : Yes / No

Internet : Yes

To

The Additional District Judge,
Additional District Court cum
Fast Track Court No.1,
Thanjavur.



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A.S(MD)Nos.185 & 186 of 2010

P.VELMURUGAN, J.

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COMMON JUDGMENT MADE IN
A.S(MD)Nos.185 and 186 of 2010
DATED : 23.06.2022