



S.A.(MD) No.380 of 2008

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**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

**RESERVED ON : 01.09.2022**

**PRONOUNCED ON : 30.09.2022**

**CORAM : JUSTICE N.SESHASAYEE**

S.A.(MD) No.380 of 2008

Rengammal

... Appellant/Respondent/  
Defendant

Vs

T.R.K.Kumara Vijaya Poochya Naickar

... Respondent/Appellant/  
Plaintiff

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 31.07.2003 made in A.S.No.113 of 2003 on the file of Subordinate Court, Trichy as reversing the judgment and decree dated 28.02.2002 passed in O.S.No.354 of 1998 on the file of District Munsif Court, Manapparai.

For Appellant : Mr.M.Janakiramulu

For Respondent : Ms.J.Maria Roseline



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## **JUDGMENT**

**1.1** The suit is for bare injunction. It is an admitted fact that the plaintiff/respondent herein is the owner of the property. The plaintiff faced obstruction to his possession and hence the suit. The principal line of defence of the defendant is that a certain Palaniyandi was a cultivating tenant of the property in question. He died in 1988. Prior to his death Vide Ext.B.1-Mutchalika/Will dated 21.01.1987, he gave the property to the defendant, pursuant to which she has been cultivating the land contributing her physical labour.

**1.2** The dispute went to trial and both sides adduced oral and documentary evidences. A related fact that requires mentioning is that there is another suit between the same parties, wherein the present defendant appears as the plaintiff. That suit is O.S.No.33 of 1998 which the defendant herein as the plaintiff has laid for specific enforcement of certain oral agreement of sale that she claims to have entered into with the plaintiff herein through the latter's agent.



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**1.3** In O.S.No.33 of 1998, the present defendant had taken up a plea based on Ext.B.1. The original of Ext.B.1 herein came to be marked as Ext.A.1 in O.S.No.33 of 1998. The defendant herein has also examined one of the attestors of Ext.B.1 as P.W.2 in O.S.No.33 of 1998. Unfortunately, both this suit and O.S.No.33 of 1998 were tried separately. While the present suit is now pending in S.A.(MD) No.380 of 2008, O.S.No.33 of 1998 gave birth to S.A.(MD) Nos.867 of 2011 and 715 of 2011.

**1.4** Since O.S.No.33 of 1998 was essentially for specific performance, this Court Vide its judgment dated 23.08.2022 had confirmed the decree of the trial Court and dismissed the suit.

**2.** As earlier indicated, this suit is for bare injunction to keep the defendant away from disturbing the possession of the plaintiff and the defence is that the defendant is an assignee of the right of cultivating tenancy based on Ext.B-1 muchalika executed by her uncle Palaniyandi.

**3.** Both sides adduced oral and documentary evidences, and to resist Ext.B.1, on the basis of which the defendant claims right to be in possession of the



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property, the plaintiff relied on Ext.A.4 document executed by a certain Vyothiammal, the widow of Palaniyandi, in plaintiff's favour who as already indicated was the cultivating tenant of the property. In the ultimate analysis, the dispute is over the believability of Ext.A-4 Vs Ext.B-1.

4. The trial Court on appreciation of evidence before it, came to the conclusion that the plaintiff has not adequately proved his possession over the property and dismissed it. When the matter reached the first appellate Court in A.S.No.113 of 2003 at the instance of the plaintiff, there was a reversal in fortune for the plaintiff, as the first appellate Court chose to decree the suit, placing reliance on Ext.A.4, since the plaintiff admittedly was the owner of the property. Hence, the Second Appeal at the instance of defendant. The appeal was admitted for considering the following substantial question of law:-

*“Whether the judgment and decree of the Court below is perverse on account of its misconstruction of documents in Ex.A.4 and Ex.B.1?”*



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**5. Learned counsel for the appellant submitted:**

- That the defendant has laid her suit for specific performance in O.S.No.33 of 1998 on 20.01.1998 and the present suit for bare injunction is essentially a counter blast to the earlier suit, as it was filed on 15.12.1998.
- When the present suit was filed, it was not as if the plaintiff herein did not know about O.S.No.33 of 1998, wherein he figures as the first defendant. He pleads absolute innocence about that suit and makes a very innocent allegation in the plaint as if the defendant herein attempts to encroach into his property. Indeed even in O.S.No.33 of 1998, the present defendant had spoken about the *muchalika*/Will executed by Palaniyandi. Therefore, in fitness of things, the plaintiff herein ought to have made a fair statement in his plaint about it. But the plaintiff chose to ignore it. Ext.B-1 is the copy of the original, and the original was filed in O.S.No.33 of 1998 where it was marked as Ext.A-1. And, in his written statement in O.S.No.33 of 1998, the plaintiff herein as first defendant has not chosen to specifically deny this document. This would be evident from a bare reading of the



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testimony of P.W.1 and P.W.2 in O.S.No.33 of 1998 wherein certain questions during their cross examination as pertaining to Ext.A.1 was refused by the Court for want of pleadings. Even in the present suit, subsequent to the defendant pitching her defence on Ext.B.1, the plaintiff has not filed his rejoinder.

- If the deposition of P.W.2 in O.S.No.33 of 1998 is perused, it would show that he has spoken in his cross examination that both Palaniyandi and Vyothiammal were living separately in separate houses. Indeed Vyothiammal was not examined to prove Ext.A.4. This should not be ignored for appreciating the circumstances in which Palaniyandi had executed the document.
- The defendant claims that she has preferred an application before the concerned authority to register her as a cultivating tenant and if at all, that has to be decided only by the authority concerned.

**6.** Per contra, the learned counsel for the respondent made the following submissions:

- If the original of Ext.B.1 herein which was marked as Ext.A.1 in



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O.S.No.33 of 1998 is perused, it would show that the stamp paper for the document was purchased in the name of the defendant. This apart, even the testimony of P.W.2 in O.S.No.33 of 1998 is considered, he would say that at the time of execution of the document, the present defendant and her mother were present when Palaniyandi was alleged to have executed the *muchalika*.

- Ext.B.1 is a fabrication and the burden is on the defendant to come clean that the signature found in Ext.B.1 belonged to Palaniyandi. That was not done.
- When Vyothiammal was alive, it is difficult to believe that Palaniyandi would be in the best state of mind to ignore his natural heir in preference to the defendant herein. This apart, in her written statement, the defendant has mildly indicated about her knowledge about the execution of Ext.A.4 by Vyothiammal.

The defence is fraudulent as it is founded on an unbelievable and unreliable Ext.B-1, and inasmuch as this is a finding on fact, this Court may not interfere with the finding of the first appellate court when it is not perverse.



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7. The bottom-line here is the jurisdiction of this court under Sec.100 CPC, as was correctly stated by the learned counsel for the appellant. And the dispute is over Ext.A-4 Vs Ext.B-1.

8. The learned counsel for the appellant projected how the present plaintiff has positioned himself in O.S.No.33 of 1998, a suit for specific performance which the defendant herein had instituted, and how he failed to specifically deny Ext.B-1 *muchalika* despite the fact it was pleaded by the plaintiff therein, and the present suit after all can only be a counter blast to the suit for specific performance.

9. The point is, can a failure to deny specifically a fact relating to possession of the property not based on a sale agreement in a suit for specific performance will attract the consequences of Order VIII Rule 5 CPC in another suit where possession is the pivotal issue? In a suit for specific performance, the entire cause of action spins around the sale agreement, and possession of the agreement holder is only incidental, that too when it is claimed under the sale agreement. If an agreement holder



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claims possession of the property which is the subject matter of the sale agreement but outside the said agreement, then it will only have a recital value in a suit for specific performance. And Order VIII Rule 5 CPC mandates that the defendant shall specifically deny the material facts on which the plaintiff has found the cause of action for the suit, and it cannot be stretched to include incidental and other sundry facts not forming the core of cause of action. Secondly, Order VIII Rule 5 is suit specific, and it will have application only to a particular suit and not to another suit. Therefore, the defendant/appellant cannot derive significant advantage from the alleged failure of the present plaintiff to deny specifically Ext.A-1 therein (Ext.B-1 here) in the present suit. At the best it may be a relevant fact, but not a binding admission which might relieve the defendant herein of the burden of proving her possession independently based on Ext.B-1.

**10.** It is an admitted fact that a certain Palaniyandi was the cultivating tenant of the property and he is stated to have died in 1988. The natural heir of Palaniyandi is his wife Vyothiammal, and unless the defendant proves that Ext.B-1 is genuine, Vyothiammal would be the successor-in-interest to the



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tenancy rights of her husband. And, she is stated to have executed Ext.A-4 in favour of the lessor of the property surrendering her possession. The defendant in her written statement asserts that Vyothiammal had not executed any such document. To prove the same, the plaintiff has examined both the attestors to Ext.A-4 as P.W.2 and P.W.3. The reading thereof indicates that P.W.2 was working under the plaintiff but not P.W.3. As the point of execution of Ext.A-4 by Vyothiammal, nothing concrete has emerged to disbelieve their version. Ext.A-4 therefore stands proved, and to repeat it was executed by the one in whom right of tenancy will ordinarily devolve but for Ext.B-1 *muchalika* and the proof in aid of its execution.

**11.** Turning to Ext.B-1, the defendant had examined one of its witness in O.S.No.33 of 1998 (to remind the suit for specific performance) and not in this suit. And even according to the counsel for the appellant that the present plaintiff as defendant in that suit was not allowed to cross examine P.W.2, an attestor to Ext.B-1 (=Ext.A-1 in O.S.No.33 of 1998) on certain aspects touching upon the execution of the said document by Palaniyandi, because the plaintiff has not specifically denied or disputed this document



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in his written statement in OS.No.33 of 1998. This would imply that the testimony of P.W.2 cannot even be referentially looked into though it is permitted in terms of the phraseology of Sec.33 of the Evidence Act. Therefore, Ext.B-1 is not proved where this document is the shield anchor of the defence.

**12.** Turning to possession per se, according to the defendant, Palaniyandi had executed Ext.B-1 on 20-01-1987. And, Palaniyandi dies in 1988. The dispute between the parties arose towards the end of 1997 which culminated in a suit for specific performance. If the defendant had obtained possession of the suit property immediately on the execution of Ext.B-1 and had begun cultivation of the property by her own physical exertion, it is important for her to prove the same between January, 1987 and 1997. Except producing Ex.B-1, she has not produced any material to show that she was actually in possession of the suit property. This would have provided an outside support to lend a *prima facie* credence to Ext.B-1. This aspect too is ignored. And here Vyothiammal need not prove her possession, since she is a automatic choice as a heir to her husband's estate and her title and



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possession based on title would be presumed without any need to prove it.

Here the plaintiff finds himself in a position of absolute comfort.

**13.** Thus looking from every conceivable angle this Court finds that the judgement of the first appellate court is free of any shocking shortfalls as to warrant an interference under Sec.100 CPC. In conclusion this appeal is dismissed and judgment and decree dated 31.07.2003 made in A.S.No.113 of 2003 on the file of Subordinate Court, Trichy, is hereby confirmed. No costs.

**30.09.2022**

Internet: Yes  
Index: Yes/No

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To:

- 1.The Subordinate Judge,  
Trihcy.
- 2.The District Munsif,  
Manapparai.
- 3.The Section Officer, VR Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**N.SESHASAYEE, J.**

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**Pre-delivery judgment made in**  
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**30.09.2022**