



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 09.03.2022

DELIVERED ON : 14.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.106 of 2019

and

C.M.P(MD)No.2809 of 2019

Mari @ Shanmuganandham

... Appellant/Respondent/Plaintiff

Vs

Soosaipandi

... Respondent/Appellant/Defendant

PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree made in A.S.No.60 of 2012, dated 31.03.2015 on the file of the Principal Sub Court, Tenkasi, reversing the judgment and decree, dated 24.06.2010 made in O.S.No.1075 of 2004 on the file of the Principal District Munsif Court, Tenkasi.

For Appellant : Mr.T.S.R.Venkataramana

For Respondent : Mr.F.X.Eugene

JUDGMENT

The plaintiff is the appellant herein.

2. The plaintiff filed O.S.No.1075 of 2004 before the Principal District Munsif Court, Tenkasi, for declaration of title and consequential permanent injunction. The plaintiff prayed for recovery of possession as an alternative prayer. The suit was decreed by the trial Court. The defendant filed A.S.No.60 of 2012 before the Principal Sub Court, Tenkasi. The learned Subordinate Judge allowed the appeal and dismissed the suit. As against the same, the plaintiff has filed the above Second Appeal.

3. The plaintiff has contended that the suit schedule properties originally belonged to the defendant. The defendant sold the said properties in favour of the plaintiff for a sale consideration of Rs.50,000/- on 20.12.2001 under Exhibit A1. Pursuant to the said sale deed, possession was also handed over to the plaintiff on the same day. The plaintiff and the defendant entered into a reconveyance agreement under Exhibit A2. As per the said reconveyance agreement, if the sale consideration of Rs.50,000/- was repaid with 3% interest within a period of twelve months, the defendant would be entitled to reconveyance, otherwise defendant would not be entitled to claim reconveyance.



4. According to the plaintiff, the period fixed under Exhibit A2 reconveyance deed expired on 20.12.2002. Within the said period, the defendant has not come forward to repay the sale consideration and get reconveyance in his favour. In cases of reconveyance agreement, time is always is the essence of the contract.

5. The plaintiff further contended that in the year 2004, the defendant approached the plaintiff with a request for reconveyance and the plaintiff has refused, on the ground that the time has lapsed. The defendant was disturbing the plaintiff by lodging police complaints also. Hence, the present suit for declaration of title, permanent injunction or the alternative recovery of possession.

6. The defendant filed a written statement contending that he borrowed a sum of Rs.40,000/- from the plaintiff on 20.12.2001, agreeing to pay interest at the rate of 3%. Only as a security for the said loan amount, he had executed Exhibit A1 sale deed in favour of the plaintiff. Thereafter, on the same day, a reconveyance deed was entered into between the plaintiff and the defendant. Though the defendant offered the sale consideration on 20.12.2002, the plaintiff refused to receive the same and rejected his request for execution of reconveyance deed.

7. The defendant further contended that pursuant to Exhibit A1 sale deed, possession was not handed over to the plaintiff. In fact, the defendant has leased out the property to one Seenisamy and one Samy who are running two shops in the suit schedule property. According to the defendant, the possession of the entire suit schedule property is with the plaintiff through the lessees. Despite the request by the defendant for reconveyance deed, the plaintiff with a *malafide* intention to grab the property has refused to receive the same. Hence, he lodged a police complaint before Superintendent of Police, Tirunelveli on 22.11.2004. The defendant further contended that time is not the essence of the contract with regard to Exhibit A2 reconveyance deed. Hence, the defendant prayed for dismissal of the suit.

8. The learned trial Judge after considering Exhibit A1 sale agreement and Exhibit A2 reconveyance agreement arrived at a finding that Exhibit A1 is a sale deed and not a mortgage by conditional sale. Under Exhibit A1 sale deed, there is no reference about any reconveyance or creditor-debtor relationship. Hence, the trial Court arrived at a finding that Exhibit A1 is only a sale deed. The trial Court also found that Exhibit A2 is a reconveyance agreement, under which the defendant has to repay the sale consideration of Rs.50,000/- within a period of twelve months with 3% interest. Though the defendant has contended that he offered the said amount, there is no proof for the same. The police complaints from the defendant have emanated only in the year 2004 and not within the twelve months period or immediately after the expiry of the twelve



9. The trial Court also arrived at a finding that with regard to reconveyance agreements, time is always the essence of the contract. Since the defendant has not repaid the sale consideration within the stipulated time, the defendant has lost his right of reconveyance. Hence, the plaintiff is the absolute owner of the suit schedule properties.

10. The trial Court also found that the witnesses examined on the side of the defendant will disclose that the plaintiff is not in possession of the suit schedule properties. However, the trial Court found that since the plaintiff is having title to the suit schedule properties and the defendant is not legally entitled to be in possession of the suit schedule properties, it proceeded to grant the alternative prayer of recovery of possession.

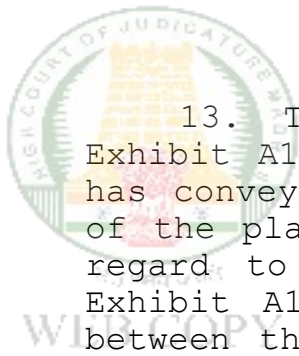
11. The First Appellate Court held that the plaintiff has not established the fact that time is the essence of the contract with regard to Exhibit A2 reconveyance agreement. The First Appellate Court further found that since D.W.2 and D.W.3 are in possession of the suit schedule properties which is confirmed by the Commissioner's report, Exhibit A1 sale deed has not been acted upon. Since Exhibit A1 sale deed has not been acted upon, the plaintiff has not become the title holder of the suit schedule properties. Hence, the plaintiff is not entitled to seek declaration of title. The possession is admittedly with the defendant who is the owner of the suit schedule property. Hence, the plaintiff is not entitled to the prayer for recovery of possession. Based upon the said findings, the First Appellate Court reversed the judgment and decree of the trial Court and dismissed the suit. As against the same, the plaintiff has filed the above Second Appeal.

12. The Second Appeal has been admitted on the following substantial questions of law:

"(1) When Exhibit A1 is admitted by the defendant and when admission is the best proof of law, whether the First Appellate Court is right in reversing the judgment of the trial Court on the ground that Exhibit A1 was not acted upon, more particularly when there was no pleading for that?

(2) Is not the judgment of the First Appellate Court is hit by Section 91 of the Indian Evidence Act?

(3) Whether the judgment of the learned Subordinate Judge can be sustained in view of the provisions of Section 8 of the Transfer of Property Act, Section 19 of the Indian Easement Act r/w the paragraph notice in Section 3 of the Transfer of Property Act?"



13. The learned Counsel for the appellant contended that Exhibit A1 document is a pure sale deed under which the defendant has conveyed his title over the suit schedule properties in favour of the plaintiff. There is no clause in Exhibit A1 sale deed with regard to reconveyance. There is also no recital or clause in Exhibit A1 sale deed with regard to creditor-debtor relationship between the plaintiff and the defendant. Hence, the plaintiff has become the absolute owner of the suit schedule property as per Exhibit A1.

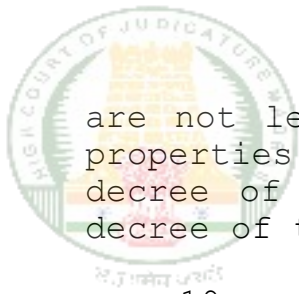
14. The learned Counsel for the appellant further contended that under Exhibit A2, the plaintiff has agreed to reconvey the suit schedule properties in favour of the defendant, provided, the defendant pays the sale consideration of Rs.50,000/- within a period of twelve months with 3% interest. This is also only a reconveyance agreement. Since the reconveyance clause is not embodied in Exhibit A1 sale deed, Exhibit A1 sale deed can never be considered to be a mortgage by a conditional sale.

15. He further contended that the time fixed under Exhibit A2 reconveyance agreement had expired on 20.12.2002. Even though the defendant has contended in his written statement that he offered the said amount on 20.12.2002, there is no oral or documentary evidence to support the said case. That apart, all the proceedings initiated by the defendant have emanated only in the year 2004. As per Exhibit A2 reconveyance agreement, after 20.12.2002, the defendant has lost his right to get a reconveyance in his favour.

16. The trial Court has relied upon the judgments of the Hon'ble Supreme Court to arrive at a finding that time is the essence of the contract with regard to reconveyance agreements. In reconveyance agreements, only the purchaser has to show his readiness and willingness to pay the amount within the time stipulated in the agreement. However, the First Appellate Court has erroneously held that the plaintiff has not established that the time is the essence of the contract in reconveyance agreements.

17. The learned Counsel for the appellant further contended that the defendant himself has admitted that Exhibit A1 sale deed has come into force only based upon the said sale deed, Exhibit A2 agreement reconveyance deed has been entered into. There is no plea on the part of the defendant that Exhibit A1 sale deed has not been acted upon. However, the First Appellate Court has erroneously arrived at a finding that Exhibit A1 sale deed has not been acted upon, when there is no such pleadings on the side of the defendant.

18. The plaintiff has established his title to the suit schedule properties. Even assuming that the possession is not with the plaintiff, the First Appellate Court ought to have confirmed the decree for recovery of possession on the basis of title, because the



are not legally entitled to be in possession of the suit schedule properties. Hence, he prayed for setting aside of the judgment and decree of the First Appellate Court and restore the judgment and decree of the trial Court.

19. Per contra, the learned Counsel for the respondent/defendant contended that the entire transaction is only a loan transaction. The defendant has executed Exhibit A1 sale deed in favour of the plaintiff only as a security for the loan amount. Exhibit A2 reconveyance agreement was entered into between the plaintiff and the defendant whereunder the plaintiff has agreed to reconvey the suit schedule properties in favour of the defendant provided the pays a sum of Rs.50,000/- along with 3% interest within a period of twelve months. A combined reading of Exhibits A1 and A2 will disclose that the entire transaction is only a loan transaction and the First Appellate Court was right in holding that Exhibit A1 sale deed has not been acted upon.

20. The learned Counsel for the respondent further contended that the combined reading of Exhibits A1 and A2 will also disclose that it is only a mortgage by conditional sale. In case, if the defendant has repaid the amount, the defendant will get a reconveyance deed in his favour. But on the other hand, if he failed to pay the amount, the sale will get confirmed in favour of the plaintiff. Such clauses found in Exhibit A2 reconveyance agreement, will clearly show that it is only a mortgage by conditional sale and Exhibit A1 transaction is not an out right sale in favour of the plaintiff.

21. The learned Counsel for the respondent further contended that when Exhibit A1 transaction is a mortgage by conditional sale, he is entitled to redeem the properties on payment of the amount. The time limit fixed for the payment of the mortgage money will amount to clog on redemption and the same is void. Since the plaintiff is only a mortgagee, the suit for declaration of title and recovery of possession is not maintainable.

22. The learned Counsel for the respondent further contended that admittedly possession was not handed over, pursuant to Exhibit A1 sale deed. The defendant is enjoying the suit schedule properties through D.W.2 and D.W.3, who has constructed shops in the suit schedule property. The retention of possession by the defendant will also strengthen the fact that Exhibit A1 transaction is only a mortgage and not a sale. He further contended that the plaintiff has not explained how he did not get possession over the suit schedule properties despite getting Exhibit A1 sale deed in his favour. Hence, viewed from any angle, the plaintiff is not entitled to a decree for declaration of title and recovery of possession. Hence, he prayed for dismissal of the Second Appeal.



23. I have carefully considered the submissions made on either side.

24. The execution of Exhibit A1 sale deed by the defendant in favour of the plaintiff is admitted. The execution of Exhibit A2 reconveyance agreement is also admitted by both the parties. The scope of Second Appeal relies upon the interpretation of Exhibits A1 and A2.

25. A perusal of Exhibit A1 indicates that the defendant has executed a registered sale deed in favour the plaintiff on 20.12.2001. As per the said sale deed, possession was also handed over on the date of sale deed. There is no reference about any reconveyance or creditor-debtor relationship in Exhibit A1 sale deed.

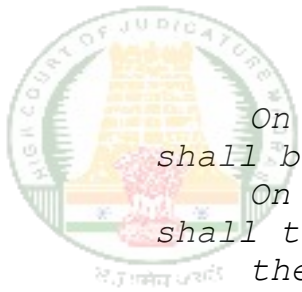
26. Exhibit A2 is the reconveyance agreement, dated 20.12.2001 entered into between the plaintiff and the defendants. As per the said reconveyance agreement, if the defendant repays the sale consideration along with 3% interest within a period of twelve months, the plaintiff has agreed to reconvey the suit schedule properties in favour of the defendant. In case, if the amount is not paid within a period of twelve months, the defendant would not be entitled to claim reconveyance and the sale will get confirmed. A combined reading of Exhibits A1 and A2 will clearly indicate that, after the sale deed under Exhibit A2 reconveyance agreement has been entered into between the parties. There is no reference about any loan transaction or creditor-debtor relationship even in Exhibit A2 reconveyance agreement. Only condition that has been imposed under Exhibit A2 is that the defendant has to repay the sale consideration of Rs.50,000/- Hence, we can safely come to a conclusion that under Exhibit A1, there is an out right sale in favour of the plaintiff by the defendant. Only accepting the said conveyance, the defendant has sought for reconveyance from the plaintiff subject to repayment of the sale consideration.

27. The learned Counsel for the respondent had contended that a combined reading of Exhibits A1 and A2 will disclose that it is only a mortgage by conditional sale and it will not confer title upon the plaintiff. As discussed earlier under Exhibit A1 sale deed, there is no reference about reconveyance or creditor-debtor relationship. Unless the clause for reconveyance is found in the sale deed itself, the sale cannot be considered to be a mortgage by conditional sale. Section 58 (c) of the Transfer of Property Act, 1882 reads as follows:

"58(c) Mortgage by conditional sale.-Where the mortgagor ostensibly sells the mortgaged property-

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

<https://hcservices.ecourts.gov.in/hcservices/>



On condition that on such payment being made the sale shall become void, or

On condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

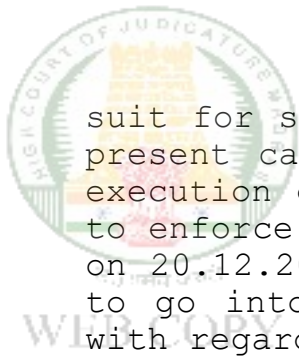
provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale".

28. The judgment of the Hon'ble Supreme Court in **2018 (11) SCC page 172** in paragraph No.14 has held as follows:

14. The essentials of an agreement, to qualify as a mortgage by conditional sale, can succinctly be broadly summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58 (c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property, and the transaction value, along with the duration of time for reconveyance, are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors, along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner".

29. In view of the above said supreme Court judgment, it is clear that the execution of a separate agreement for reconveyance either contemporaneously or subsequently shall militate against the agreement, being considered as a mortgage by conditional sale. In the present case, a separate agreement has been entered into in Exhibit A2, as a reconveyance agreement. Either in Exhibit A1 sale deed or in Exhibit A2 reconveyance agreement, there is no reference about creditor-debtor relationship. Hence, in view of the above said Supreme Court judgment, the contention of the learned Counsel for the respondent that Exhibit A1 transaction should be treated as a mortgage by conditional sale cannot be accepted.

30. The learned Counsel for the appellant has contended that time is essence of the contract as far as reconveyance agreements are concerned. On the other hand, the learned Counsel for the respondent has contended that time is not the essence of the contract even in respect of reconveyance agreements. The issue whether time is the essence of the contract or not will arise, only if the reconveyance agreement holder approaches the Court with the



suit for specific performance of the reconveyance agreement. In the present case, even though the reconveyance agreement holder admits execution of Exhibit A2, he has not initiated any legal proceedings to enforce the said agreement, despite lapse of twelve months period on 20.12.2002. Hence, this Court finds that it may not be necessary to go into the issue whether time is the essence of the contract with regard to reconveyance agreement or not.

31. The learned Counsel for the respondent has further contended that possession was not handed over pursuant to Exhibit A1 sale deed and the same was retained by the defendant. In fact, the defendant has let out the property in favour of D.W.2 and D.W.3. According to the learned Counsel for the respondent, the tenants have been examined as D.W.2 and D.W.3 to establish the case that the defendant alone is in possession of the suit schedule properties through the said tenants. Since the possession was not handed over as per Exhibit A1 agreement, it will establish that the sale deed has not been acted upon. The trial Court as well as the Appellate Court have also found that plaintiff is not in possession of the suit schedule properties. However the learned Counsel for the appellant has contended that he has also prayed for an alternative prayer for recovery of possession. In case, if the Court arrives at a finding that plaintiff is not in possession of the suit schedule properties. The sale deed has been executed by the defendant on 20.12.2001. The present suit for recovery of possession has been filed by the plaintiff on 13.12.2004. The defendant has not established his right to be in possession of the suit schedule properties. When the plaintiff has established his title over the suit schedule properties, his right to recover possession is automatic, if the suit has been filed within the period of limitation unless the defendant establishes his legal right to be in possession of the suit schedule properties. In the present case, the defendant has not initiated any proceedings, pursuant to Exhibit A2 reconveyance agreement to get a reconveyance deed in his favour and hence, even assuming that the defendant is in possession of the suit schedule properties he is not in lawful possession. His possession cannot be protected under law. Hence, the plaintiff is entitled to a decree for recovery of possession.

32. The First Appellate Court has taken up a special plea that Exhibit A1 sale deed has not been acted upon. It is not the case of either of the parties. In fact, the defendant has admitted Exhibit A1 sale deed and entered into a reconveyance agreement with the plaintiff. The defendant has also pleaded that he offered the amount as per Exhibit A2 reconveyance agreement but the plaintiff refused to execute a reconveyance deed. In the light of the said pleadings of the defendant in the written statement, the finding of the First Appellate Court that Exhibit A1 sale deed has not been acted upon is not legally sustainable and the same is liable to be set aside.



33. In view of the above said discussions, the substantial questions of law are answered as follows:

(i) When Exhibit A1 sale deed and Exhibit A2 reconveyance deed have been admitted by the defendant, the First Appellate Court was not right in holding that Exhibit A1 has not been acted upon, when there is no pleading to that effect.

(ii) The recitals in Exhibit A1 or Exhibit A2 does not disclose any creditor-debtor relationship and in such an event, the First Appellate Court had erred in holding that the document has been executed as a security and the same is hit by violation of Section 91 of the Indian Evidence Act.

(iii) The judgment of the learned First Appellate Court is not sustainable in view of the provisions of Section 3 and 8 of the Transfer of Property Act.

34. In view of the above said discussion all the substantial questions of law are answered in favour of the appellant. The judgment and decree of the First Appellate Court are set aside. The judgment and decree of the trial Court are restored. Therefore, the Second Appeal stands allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

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Sub Assistant Registrar(CS)

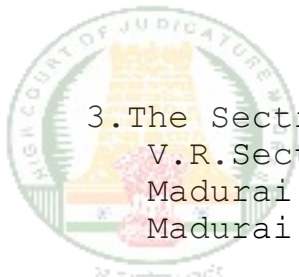
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Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

TO

1. The Principal Sub Judge, Tenkasi

2. The Principal District Munsif, Tenkasi



3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2C)

+1 CC to M/s.F.X.EUGENE, Advocate (SR-12242[F] dated 15/03/2022)

+1 CC to M/s.T.S.R.VENKAT RAMANA, Advocate (SR-12095[F] dated 15/03/2022)

Judgment made in
S.A(MD)No.106 of 2019
14.03.2022

KM(CO)
GC(28.03.2022) 10P 7C