



C.M.S.A. No.18/2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
17.10.2023	01.11.2023

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

C.M.S.A. NO. 18 OF 2004

1. Durairaj Adhiyamaan (Decd.)
 2. R.Kalyani
 3. G.Uma Rani
 4. K.Selvi
 5. D.Prabhu Adhiyamaan
- (Apps. 2 to 5 brought on record
As LRs of deceased 1st appellant
Vide order in CMP Nos.16985 to
16987/2005 dated 10.11.2005)

.. Appellants

- Vs -

1. G.Somasundaram
2. Ramu Thondamar

.. Respondents

Civil Miscellaneous Second Appeal filed under Order XXI Rule 104 r/w
Section 100 of the Code of Civil Procedure against the judgment and decree
dated 21.09.2001 in C.M.A. No.6/2001 on the file of the Addl. District Judge,
Nagapattinam, confirming the judgment and decree dated 25.4.2000 in E.A.



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No.1/1998 in E.P. No.75/1997 in O.S. No.309/1994 on the file of the Addl. Sub Court, Nagapattinam.

For Appellants : Mr. K.Selvaraj

For Respondents : Mr. V.K.Vijayaraghavan

JUDGMENT

Assailing the concurrent findings recorded by the courts below in favour of the respondents herein by holding that the claim of the appellants is barred by limitation, the present civil miscellaneous second appeal has been filed by the first appellant.

2. Pending the appeal, which dates two decades back, the first appellant having passed away, appellants 2 to 5, the legal heirs of the deceased first appellant, have been brought on record to defend the appeal. For the sake of convenience, the array of the parties will be referred to as 'appellants' and 'respondents' in the order, as they are arrayed before this Court in the present appeal.



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3. The case of the appellants, in brief, as projected before the courts below is that the petition mentioned properties in issue originally belonged to one Sarathambal, wife of one deceased Somu Pillai. After the death of the said Somu Pillai, the said Sarathambal gave the petition mentioned properties in favour of her sons and daughter born through her husband, viz., Somu Pillai, viz., Ganesan, Ramachandran, Gangadharan, Kannan, Panchanathan and Lalitha Devi under a release deed dated 5.4.1974, before going to live along with one Mariappan. Since the said release, the legal heirs of Somu Pillai, aforesaid, have been in enjoyment of the petition mentioned properties with full right and, thereafter, the said properties were sold to the 1st appellant herein under a sale deed dated 20.04.1992. Since the said sale on 20.4.1992, the 1st appellant is in possession and enjoyment of the suit properties.

4. It is the further case of the appellants that the attempt of the 2nd respondent to forcibly occupy the petition mentioned properties from the appellants having went in vain, cases and counter cases were filed before this court with regard to survey No.346/2 on the question of issuance of patta.



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Thereafter, the 2nd respondent filed suit in O.S. No.171/1993 along with I.A. No.469/1993 before the Sub Court, Nagapattinam, against the 1st appellant in which the interim application was dismissed and the suit stood transferred to the District Munsif Court, Mannargudi and renumbered as O.S. No.312/1996. Pending the said suit, the 1st appellant filed O.S. No.182/1996 for injunction against the 2nd respondent and as the suit filed by the 2nd respondent was withdrawn for filing a fresh suit, the suit filed by the 1st appellant was left to be dismissed. Once again, the 2nd respondent filed suit in O.S. No.198/1997 before the District Munsif Court, Mannargudi against the 1st appellant.

5. It is the further case of the 1st appellant that the 2nd respondent, in collusion with the 1st respondent to usurp the petition mentioned properties, caused the 1st respondent to file a suit in O.S. No.309/1994 for specific performance and left the suit undefended, leading to the passing of an ex parte decree in favour of the 1st respondent. Thereafter, the 1st respondent, armed with the said decree, which has been obtained by fraud and practice of collusion with the 2nd respondent, filed E.P. No.23/1996 and E.P. No.63/1996, which were not pursued with ending in dismissal. However, thereafter, the



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1st respondent filed E.P. No.75/1997 against the 2nd respondent and forcibly took possession of the petition mentioned property from the 1st appellant through court.

6. It is the further case of the 1st appellant that the 1st appellant, since the date of purchase of the petition mentioned property has been in possession and enjoyment of the petition mentioned properties and the collusive act of the 1st respondent in forcefully dispossessing the 1st appellant from the petition mentioned properties and, therefore, the appellants are entitled for a sum of Rs.750/- per month towards mesne profits and that the 1st respondent has no right to the said property and, therefore, the 1st appellant filed E.A. No.1/1998 in E.P. No.75/1997 in O.S. No.309/1994 on the file of the Addl. Sub Court, Nagapattinam.

7. The said claim of the 1st appellant was resisted by the respondents by contending that the petition mentioned properties absolutely belonged to the 2nd respondent and that the 1st respondent agreed to purchase the said properties from the 2nd respondent for a sum of Rs.1,50,000/- by executing a



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sale agreement dated 9.4.1992 and paid a sum of Rs.50,000/- to the 2nd respondent and as the 2nd respondent, after receiving the amount of Rs.50,000/- did not proceed to have the contract for specific performance performed, the 1st respondent, to enforce his rights, sought a decree for specific performance by filing a suit in O.S. No.309/1994 and a decree was passed in his favour based on which the 1st respondent had a sale deed executed through Court and, thereafter, sought execution of the said decree by filing execution petition.

8. It is the further case of the 1st respondent that to prove his right and possession over the suit property, the payment towards kist and house tax made by the 2nd respondent was filed and based on the above, the execution petition filed for delivery of possession of the properties from the 2nd respondent was ordered and the 1st respondent took delivery of possession of the petition mentioned property from the 2nd respondent through court on 28.11.1997. It is the further case of the respondents that the claim of the appellants that the suit properties were owned by their vendor, viz., the legal heirs of Somu Pillai, are wholly false and not correct.



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9. The Addl. Subordinate Judge, based on the pleadings and evidence, both oral and documentary, adduced by the parties, while framed four questions for consideration, went on to hold that the 1st respondent though purchased the suit property through court from the 2nd respondent through sale deed, Ex.B-68, dated 14.3.1997, on the basis of the court decree, however, there is no acceptable material to hold that the 2nd respondent had any ownership over the suit properties. The Court further went on to hold that the right of the 2nd respondent to hold the suit property from the vendor of the appellants is only on the basis of an agreement and that the 2nd respondent had not derived any title to the suit property and in the absence of any sale deed between the said Sarathambal and the 2nd respondent, the claim of the 1st respondent that the petition mentioned properties absolutely belonged to the 2nd respondent is wholly incorrect. The trial court further held that the claim of the 1st respondent to hold the suit properties in representative capacity from the 2nd respondent, as the agreement holder of the said Sarathambal, which is based on an alleged sale agreement entered into between the 2nd respondent and Sarathambal cannot be accepted for the



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reason that the said sale agreement had also not been placed before the Court.

10. The trial court further held that the notice Exs.B-67 dated 29.8.1974, which is in response to the notice Ex.B-66, dated 22.8.1974, caused by the 2nd respondent, and the withdrawal of the suits Exs.A-21 to A-23 filed by the 1st appellant and the 2nd respondent cannot be the basis to draw any inference in favour of the 2nd respondent to hold that the sale agreement between the said Sarathambal and the 2nd respondent is indeed a sale, which puts the 2nd respondent in possession of the suit property and the failure of the 1st appellant to prove the said fact through affidavit of Sarathambal would also not be fatal to the case of the appellants. Accordingly, the trial court accepted the case of the appellants that the suit properties originally belonged to the legal heirs of Somu Pillai through Ex.B-2, release deed and the further purchase of the same by the 1st appellant under Ex.A-16 and, accordingly, held that the petition mentioned properties belong to the 1st appellant.



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11. However, the trial court, on the question of possession and enjoyment of the suit property and redelivery of possession of the same from the 2nd respondent to the 1st respondent held that the suit property was in possession and enjoyment of the 2nd respondent by taking into consideration Ex.A-3, patta transfer order dated 24.2.1994, Ex.A-15, order passed in CMA No.15/1996 and Ex.A-19, order in patta transfer proceedings dated 9.7.1993 and Exs.A-21 and A-22 regarding the withdrawal of the earlier suits shows that the litigation between the 1st appellant and the 2nd respondent dates back farther to 1992 and in the backdrop of the aforesaid documents, the stand of the 1st appellant that he has been in possession and enjoyment of the suit properties since its purchase is wholly unbelievable. Further, the trial court held that no documents have been filed by the 1st appellant to show that the vendor of the 1st appellant was in possession and enjoyment of the suit properties and, therefore, their possession has not been established. The trial court further held that the notices Ex.B-66 dated 22.8.1974 and the reply notice, Ex.B-67 dated 29.8.1974 coupled with the delivery of possession taken by the 1st respondent through Court clearly reveals that the 2nd respondent was in possession of the properties since 1965, which also stands



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established through Exs.B-1 to B-65, the documents relating to house tax, electricity charges, etc., and the mere fact that application for interim injunction filed by the 2nd respondent in C.M.A. No.15/1996, marked as Ex.A-15 is not ground to infer that the 2nd respondent had been dispossessed from the property. Therefore, the trial court held that the 1st appellant was not in possession and enjoyment of the properties and that the 2nd respondent was in possession and enjoyment on the date of delivery of possession and, therefore, the claim of the 1st appellant is barred in view of Articles 66 and 67 of the Limitation Act and, accordingly, held the issues in favour of the respondents and dismissed the execution application filed by the 1st appellant aggrieved by which the appeal was filed by the 1st appellant before the appellate court.

12. The appellate court, in C.M.A. No.6/2001, vide its judgment and decree dated 21.09.2001, based on the oral and documentary evidence, held that the 2nd respondent had been enjoying the suit property by having possession as a tenant under Sarathambal and that to the said end, an agreement was entered into and based on the said agreement, the 2nd



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respondent was in possession and enjoyment of the suit property, which have been proved through documents relating to the further construction of the building. The appellate court further held that the possession and enjoyment of the 2nd respondent further stands proved by the notice, which has been issued in the name of the 2nd respondent relating to house tax, which have been marked as Exs.D-1 to D-5 and the receipts evidencing the payment of house tax, viz., Exs.D-14 and 15 to 18, 19 to 28, 29 to 33 and 34 to 39, which are receipts towards the payments made. The first appellate court further held that the notice Ex.B-66 clearly establish that the 2nd respondent was in possession and enjoyment of the property even three years prior to the said notice and that the said property was under the enjoyment of the 2nd respondent as tenant since 1966 stands established. On the basis of the aforesaid documentary evidence and coupled with the fact that the agreement for specific performance entered into between the 2nd respondent and the 1st respondent, which had ended in decree in favour of the 1st respondent on the basis of which possession has been ordered in favour of the 1st respondent and, accordingly, execution proceedings were carried to its logical conclusion by handing over possession in favour of the 1st respondent



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from the 2nd respondent clearly establish the possession at the hands of the 2nd respondent. The 1st appellate court, on the basis of the said finding, relying on Article 67 of the Limitation Act, which bars the landlord to recover possession of a property from a tenant beyond a period of twelve years, held that the claim of the 1st appellant is barred by limitation and, accordingly, concurred with the view taken by the trial court and dismissed the appeal. Aggrieved by the said concurrent findings rendered by both the courts below, the present civil miscellaneous second appeal has been filed by the appellants.

13. The case was taken up for admission on 16.6.2004, on which date the case was admitted for hearing by this Court, the following substantial questions of law were raised by the appellant for determination in the present appeal :-

- i) *Whether the ex parte decree which was obtained for specific performance by the 1st respondent in collusion with the 2nd respondent is binding on the appellant.*
- ii) *Whether the registered sale deed which was executed by the original owner in favour of the appellant prevail over*



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- the alleged oral agreement of sale between the judgment debtor and the vendor of the appellant.*
- iii) *Whether the courts below are right in holding that the provisions of Sections 66 and 67 of Limitation Act would apply against the appellant who is the absolute owner and is in possession of the property from the year 1992.*
 - iv) *Whether the courts below have erred in accepting the oral evidence of the respondents when there is no specific plea in the pleadings.*
 - v) *Whether the courts below have erred in not accepting the fair and decretal orders of the Subordinate Courts, Nagapattinam in which it is categorically held that the appellant is in possession of the properties.*

14. Learned counsel appearing for the appellants submitted that both the courts have concurrently held that the sale of the suit property in favour of the 1st appellant by the legal heirs of Somu Pillai, pursuant to the release deed, Ex.A-2, executed by the said Sarathambal, stood established and that the title to the said suit property lay at the hands of the 1st appellant. That being the concurrent finding of the courts below, the finding that possession and enjoyment of the property at the hands of the 2nd respondent has been established and that the tenancy having been established the rigours of



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Article 67 of the Limitation Act stands attracted is wholly a misconceived application of law by the courts below, as the tenancy between the 1st appellant and the 2nd respondent has not been proved, as there was no tenancy at all between the 1st appellant and the 2nd respondent at any point of time.

15. It is the further submission of the learned counsel that the patta, which stood in the name of the 1st appellant, erroneously having been transferred by the Tahsildar, the same was set aside by the Assistant Settlement Officer and also the District Revenue Officer in the appeal proceedings, as is evidenced by Ex.A-3 and A-19 clearly shows that the property was all along being enjoyed by the appellants.

16. It is the further submission of the learned counsel that even the wrong mutation of patta in the name of the 2nd respondent was put in issue in a revision petition filed for cancellation of patta in respect of another portion of land in survey No.346/12 at the instance of the vendor of the appellant,



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which clearly shows that the fraud perpetrated by the respondents in usurping the properties of the appellants.

17. It is the further submission of the learned counsel that all the material documents, viz., property tax, house tax, etc., marked as Exs.A-16, A-18 and A-20 stand in the name of the appellants and only to grab the properties from the appellants, the respondents have colluded to file O.s. No.309/1994 for specific performance and the manner of the 2nd respondent in not contesting either the suit or the execution proceedings resulting in an ex-parte decree clearly reveal the collusion between the respondents. Further, Ex.A-67, the agreement of sale, which is alleged to have been entered into between the 2nd respondent and the vendor of the appellant, viz., Sarathambal in the year 1976, which has not fructified into a sale deed conveying the property to the 2nd respondent clearly establish that the property was at the hands of Sarathambal, which was later transferred through a sale deed in favour of the 1st appellant. Therefore, the 2nd respondent, being an agreement holder, cannot have any title to execute the alleged sale agreement dated 9.4.1992 with the 1st respondent and this



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clearly establishes that O.S. No.309/1994, filed by the 1st respondent, claiming specific performance is a fraud played on the court to obtain an ex parte decree in favour of the 1st respondent.

18. It is the submission of the learned counsel that the ex parte decree for specific performance obtained in O.S. No.309/1994 is a nullity, as it was obtained by playing fraud and the execution proceedings in E.P. No.75/1197 against the 2nd respondent, who was not in possession of the properties and by force vacated the tenants of the appellant from the petition mentioned property is clearly indicative of the fraud played by the respondents.

19. It is the further contention of the learned counsel that once both the courts have conclusively held that the 2nd respondent has no title or ownership over the petition mentioned properties, the 2nd respondent has no right to convey the property to the 1st respondent by means of a sale agreement, which has been accepted under Ex.B-67 and this clearly show that the 2nd respondent was not in possession. However, inspite of coming to the said finding and holding that there exists no link between the appellants



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and the respondents, the application of provisions of Article 67 of the Limitation Act to hold that the 2nd respondent was a tenant in the premises under the vendor of the appellant is wholly erroneous, as even according to the 2nd respondent, as evidenced by Ex.B-67 dated 29.8.1974 that the 2nd respondent was not a tenant under the vendor of the appellant, but was only an agreement holder and, therefore, the provisions of Article 67 of the Limitation Act would not be applicable. Further, when all the documentary evidence in the form of revenue records such as patta, kist, house tax standing in the name of the appellant, the possession taken over from the tenants of the appellant and handed over to the 1st respondent is wholly erroneous and the aforesaid facts having not been properly appreciated by the courts below resulting in an erroneous concurrent decision deserves to be set aside and redelivery of possession, as sought for by the appellants, requires to be granted in favour of the appellants and, accordingly, pray for allowing this appeal.



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20. In support of the aforesaid submissions, learned counsel placed reliance on the decision of the Apex court in ***S.P.Chengalvaraya Naidu (Dead) By LRs. – Vs – Jagannath (Dead) by LRs & Ors. (1994 (1) SCC 1)***.

21. Per contra, learned counsel appearing for the respondents submitted that the redelivery sought for by the appellants under Order XXI Rule 99 of the Code of Civil Procedure and that being the case, it is incumbent upon the appellant to prove his possession. However, no material whatsoever has been placed by the appellant to prove his possession.

22. It is the further submission of the learned counsel that Exs.R-66 and R-67, the notice and reply notice exchanged between the vendor of the appellants and the 2nd respondent clearly establish that possession was at the hands of the 2nd respondent and that being the case, limitation stands squarely attracted to the case on hand, as even according to the said notices, the 2nd respondent has been in possession of the property since 22.10.1974 and ib abd after 21.10.1986, the period of twelve year having elapsed, Article 67 comes into operation.



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23. It is the further submission of the learned counsel that the possession of the property with the vendor of the appellant has not been established by the appellants prior to their purchase on 20.04.1992 and that being the case, Exs.R-66 and R-67 clearly establish the tenancy between the 2nd respondent and the vendor of the appellant, the inaction on the part of the vendor of the appellant is nothing but a deemed forfeiture of the property, thereby entailing the possession at the hands of the 2nd respondent.

24. It is the further submission of the learned counsel that after issuance of Ex.R-66, no order of eviction was obtained by the vendor of the appellant to eject the 2nd respondent and in the absence of the vendor of the appellant taking any action to evict the 2nd respondent, the provisions of Article 67 of the Limitation Act comes into play and applying the same, both the courts have concurrently held that the on the date of sale of the property on 20.04.1992, the vendor of the appellant was not in possession of the property.



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25. It is the further submission of the learned counsel that the 2nd respondent had entered into an agreement of sale and partial sale consideration had also been passed on to Sarathambal before the panchayatadars and, therefore, the 2nd respondent acquires right and title to deal with the property. It is the further submission of the learned counsel that the appellants have not taken steps as per Order XXI Rule 35 CPC and the fact that Ex.A-66 admits the possession of the 2nd respondent by the vendor of the appellant and no steps having been taken by the appellants to dispossess the 2nd respondent from the suit property, the bar under Article 67 of the Limitation Act squarely stands attracted.

26. In support of the aforesaid contentions, learned counsel for the respondents placed reliance on the following decisions :-

- i) *Madhavan – Vs – Kannammal & Ors. (1990 (2) LW 274);*
- ii) *S.R.Selvaraj & Ors. – Vs – Krishna Rathi Ammal & Ors. (2012 (5) LW 565);*
- iii) *Amresh Tiwari – Vs – Lalta Prasad Dubey & Anr. (2000 (4) SCC 440);*



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- iv) *Smt. Shakuntala S.Tiwari – Vs – Hem Chand M.Singhania (AIR 1987 SC 1823);*
- v) *Nand Ram (D) thro' LRs & Ors. – Vs – Jagdish Prasad (D) Thro' LRs (2020 (5) LW 784);*
- vi) *M.Mariyappan – Vs – K.Chandradevi (D) & Ors. (2017 (3) LW 728);*
- vii) *Mrs. Shanbagavalli – VS – Mr.Nagooran & Anr. (2022 (2) LW 188); and*
- viii) *R.Tamilselvi – Vs – A.Sangamuthu & Ors. (2017 (1) LW 193)*

27. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the decisions relied on by the learned counsel on either side and the relevant provisions of law to which this Court's attention was drawn with reference to the substantial questions of law raised by the appellant.

28. The whole genesis of the case revolves around the aspect of tenancy and the possession of the 2nd respondent pursuant to the said tenancy and in view of the predecessor-in-title to the appellant putting an



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end to the tenancy and no action alleged to have been taken by the predecessor-in-title, the bar under Article 67 of the Limitation Act is pressed into service to denude the right of the appellants to the suit property. Though such a contention is advanced on behalf of the respondents, while on the one hand, the 2nd respondent claims to be a tenant under the vendor of the appellant and claims to be in possession of the property since 1967, to claim the benefit of the limitational bar under Article 67 of the Limitation Act, however, in the same breath, the 2nd respondent claims that he is not a tenant under the vendor of the appellant, as he had entered into a sale agreement with the vendor of the appellant for the purchase of the suit property which is the tenor of the reply notice, Ex.A-67. Such a stand canvassed by the 2nd respondent, it is to be pointed out, is mutually contradictory, thereby, it sabotages the stand of the 2nd respondent than giving it a lending hand to attract the bar under Article 67 of the Limitation Act. When even according to the 2nd respondent he is not a tenant under the vendor of the appellant as is evidenced from Ex.A-67, the reply notice sent by the 2nd respondent to the notice of quit sent by the vendor of the appellant, Ex.A-66, and more particularly, it is the claim of the 2nd respondent in the said notice that the



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case of tenancy itself is false, it does not lie in the mouth of the 2nd respondent to claim that the rigors of Article 67 of the Limitation Act would stand attracted to the case on hand.

29. The whole fulcrum of the case of the 2nd respondent hinges upon the tenancy alleged to exist between the vendor of the appellant and the 2nd respondent, which alone would pave the way for enforcing the limitation prescribed under Article 67 of the Limitation Act and the said tenancy having disputed by the 2nd respondent himself, merely because tenancy is claimed by the vendor of the appellant cannot be the basis for the 2nd respondent to claim that he was a tenant and limitation would stand attracted. As per the own contention of the 2nd respondent, the respondents have to stand or fall on their own case and only for support, could they take the aid of the documents and stand of the opposite party. When the 2nd respondent had outrightly rejected the tenancy claimed by the vendor of the appellant, it is not open to the respondents to plead limitation, which is entwined with the concept of tenancy, as Article 67 comes into play only between a landlord and a tenant.



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30. Article 67 of the Limitation Act deals with recovery of possession by the landlord from a tenant for which limitation of twelve years is prescribed. The whole case of the respondents is premised on the basis that the landlord, viz., the vendor of the appellant had accepted the tenancy of the 2nd respondent since 16.1.1965 and that Ex.A-66 notice had been issued on 22.8.1974 and no action having been taken within the period of 12 years, limitation stands attracted. However, the said contention stands destructed by the very own stand of the 2nd respondent in Ex.A-67, the reply notice to Ex.A-66, wherein the tenancy had been alleged to be false by the 2nd respondent. Further, it is the stand of the 2nd respondent in Ex.A-67 that the 2nd respondent, through a sale agreement claims to have purchased the suit property from Sarathambal, though in actuality, no sale deed had been executed nor the full alleged purchase price of the land had been paid to Sarathambal. Yet, the said sale agreement, which is the fulcrum of the possession of the 2nd respondent has not been marked as a document to show continuous possession.



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31. Further, as evidenced from Ex.A-66, there was a lease between the vendor of the appellant and the 2nd respondent and the tenancy allegedly stood terminated with effect from 30.09.1974. However, the claim of the 2nd respondent in Ex.A-67 is to the effect that he is the owner of the premises, but as rightly observed by the courts below, there exists no right or title in favour of the 2nd respondent as no sale deed had come to be executed in favour of the 2nd respondent. However, there is a categorical finding recorded concurrently by both the courts below that the 1st appellant had, in fact, purchased the suit property from the legal heirs of Somu Pillai, who had inherited the said property by virtue of the release deed, Ex.A-2, executed by Sarathambal for valid consideration. Therefore, the title to the property vests with the 1st appellant, which has been clearly recorded. Therefore, on and from the said purchase, the 1st appellant becomes the landlord of the said suit property.

32. In the aforesaid backdrop, Article 67 of the Limitation Act assumes significance. Article 67, which prescribes a period of limitation of twelve years on the landlord to recover possession from the tenant from the date the



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tenancy is determined. It is the case of the 2nd respondent that the determination of tenancy by the landlord, viz., the vendor of the appellant is on 22.8.1974 and, therefore, the twelve year period comes to an end on 21.8.1986. Since no action was taken by the vendor of the appellant, the bar on limitation stood attracted. However, as aforesaid, the tenancy has not been accepted by the 2nd respondent in Ex.A-67, the reply notice and, in fact, it is the case of the 2nd respondent that by virtue of an alleged sale agreement entered into with Sarathambal, he has become the owner of the suit property.

33. It is evident from Ex.A-66 that the vendor of the appellant had made a pointed accusation that the 2nd respondent has not paid the rent towards the lease. However, contrarily, the 2nd respondent has taken a stand in Ex.A-67 that he claim title to himself on the basis of the sale agreement alleged to have been entered into with Sarathambal by paying a sum of Rs.1250/- and, thereafter, by payment of further sums. From the said admission of the 2nd respondent, the 2nd respondent loses his privileges and rights as a tenant by forfeiture.



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34. It is well settled position of law that clear and absolute denial of title will have the effect of forfeiture of one's right as tenant. In the present case, the 2nd respondent had denied the title of the vendor of the appellant in an unambiguous and unequivocal expression, thereby forfeiting his tenancy. Further, it is to be pointed out that though in Ex.A-67, the 2nd respondent claims that he has entered into a sale agreement with Sarathambal way back in the year 1966, yet, for reasons best known to the 2nd respondent, the 2nd respondent has not taken any steps to put the said Sarathambal on terms by seeking the relief of specific performance by filing suit. The 2nd respondent had kept silent for almost three decades and, out of blue, in the year 1992, more particularly, on 9.4.1992 the alleged sale agreement is said to have been entered into between the respondents.

35. One other fact that stares writ large on the act of the 2nd respondent is the fact that in Ex.A-67, there is a categorical assertion that some amount has been paid to Ganesan, who is one of the legal heir of Somu Pillai, and it is also found in the said document that certain balance amount



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remains to be paid, yet, no steps have been taken by the 2nd respondent to pay the said amount and have the sale deed executed in his favour. In fact, Ex.A-67 is dated 29.8.1974 in which itself there is a categorical assertion that amounts have been paid to Ganesan, yet the 2nd respondent has not taken any steps to have the sale deed executed in his favour. Further, the stand of the 2nd respondent that it is not open to the appellant to contend on the basis of Ex.A-67 that the 2nd respondent was only an agreement holder and not a tenant of the suit property is wholly unsustainable, as the 2nd respondent is tied by his document, Ex.A-67, wherein it is his admitted stand that he is not a tenant but an agreement holder, who had entered into an agreement with Sarathambal to purchase the suit property. When it is the stand of the 2nd respondent that he is an agreement holder, for the purpose of attracting the provisions of the Limitation Act, more particularly Article 67, the claim of tenancy cannot be relied on by the 2nd respondent to defeat the rights of the appellants.

36. Further, it is to be pointed out that the suit in O.S. No.309/1994 filed by the 1st respondent against the 2nd respondent for specific



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performance was decreed on 17.2.1995 but even before the said order, patta in respect of the suit property was given in the name of the 1st appellant and all the documents relating to property tax, house tax, etc., which are marked as Exs.A-4 to A-7, have been mutated in the name of the 1st appellant. Further, the District Revenue Officer had also approved the patta in the name of the 1st appellant and the patta, as well as the sale deed in respect of the suit property stands in the name of the 1st appellant. However, the 1st appellant is not the landlord of the 2nd respondent and no tenancy is claimed by the 2nd respondent against the 1st appellant. All the rights with regard to tenancy is claimed only as against the vendor of the appellant and the limitation under Article 67 is imposed only upon the vendor of the appellant. However, when the 2nd respondent himself had disputed the tenancy and had claimed his right over the suit property as an agreement holder, the rigors of Article 67 of the Limitation Act would not come into play and both the courts below have miserably failed to appreciate the aforesaid admissions in Exs.A-66 and A-67 and have gone in a tangent to hold that the possession of the suit property was with the 2nd respondent and, therefore, the decree obtained by



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the 1st respondent, which has since been executed is perfectly in order and redelivery of possession cannot be granted is wholly illegal and unreasonable.

37. Further, there is a categorical finding rendered by the appellate court that possession of the suit property was taken from the hands of the appellant and was handed over to the 1st respondent in execution of the decree passed in the suit for specific performance. This clearly shows that after the purchase of the suit property, the suit property was under the possession and enjoyment of the appellants, which is also substantiated by necessary documents, in the form of patta, house tax receipts, etc. Such being the case, the case of the 2nd respondent that he was in possession and enjoyment of the suit property since 1966 is wholly erroneous.

38. Further, it is to be pointed out, as aforesaid, that the 2nd respondent has not taken any steps to have the specific performance enforced, though it is alleged that a oral sale agreement was entered into with Sarathambal and thereafter, in the panchayat a written sale agreement was entered into. In fact, O.S. No.198/1997 has been filed by the 2nd



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respondent against the appellants, but not against the vendor of the appellant. Yet without any semblance of right or title to the suit property, in the year 1992, on the alleged claim of possession, said to have been with the 2nd respondent, the sale agreement dated 9.4.1992 had come to be entered into between the 1st and 2nd respondent in which some amount is alleged to have changed hands. When the 2nd respondent had no right or title to the property, merely because a sale agreement had been entered into between the 1st and the 2nd respondents, the court below, before which the suit for specific performance was laid had decreed the suit in favour of the 1st respondent without ascertaining about the title of the 2nd respondent to the property.

39. The claim of the 2nd respondent that his possession stands protected is wholly erroneous as Section 53-A of the Transfer of Property Act postulates six conditions, which come into play to aid the transferee, subject to fulfilment of the conditions by the transferee. The following postulates are *sine qua non* for basing a claim on Section 53A of the Transfer of Property Act:-



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- i) *There must be a contract to transfer for consideration any immovable property;*
- ii) *The contract must be in writing, signed by the transferor, or by someone on his behalf;*
- iii) *The writing must be in such words from which the terms necessary to construe the transfer can be ascertained;*
- iv) *The transferee must in part performance of the contract take possession of the property, or of any part thereof;*
- v) *The transferee must have done some act in furtherance of the contract;*
- vi) *The transferee must have performed or be willing to perform his part of the contract.*

40. A proposed vendee cannot protect his possession of the immovable property on the basis of an oral agreement. A written agreement is *sine qua non* for applicability of the equitable doctrine of part performance enshrined under Section 53A. **(See : Nathulal – Vs – Phool Chand (1969 (3) SCC 120 : Sardar Govind Rao – Vs – Devi Sahai (1982 (1) SCC 237).** Further, in the absence of the pleadings and evidence of all the essential conditions, making out a defence of part performance to protect possession claimed by the 2nd



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respondent, would not be attracted. (*See : Hazilal Jugal Kishore (AIR 1999 MP 104)*).

41. Applying the ratio in the aforesaid decisions to the facts of the present case, it could be stated without contradiction that there is no written agreement, which has been placed on record, before the courts below as to the sale agreement alleged to have been entered into with the vendor of the appellant. The whole claim of the 2nd respondent is that there was an oral sale agreement with Sarathambal, which will not protect his possession and in the absence of a written agreement, though the 2nd respondent, even in the suit filed against the appellant in O.S. No.198/1997 claim a written agreement, in the absence of marking the same, the possession claimed by the 2nd respondent would not stand protected. In the case on hand, the compliance of the six conditions enumerated under Section 53A of the Transfer of Property Act has not been established and such being the case, the possession claimed at the hands of the 2nd respondent so as to enable the claim for specific performance by the 1st respondent and the consequent decree passed in favour of the 1st respondent are wholly without any legal



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sanctity and are not enforceable. When none of the ingredients of Section 53A have been fulfilled, the further action of the 2nd respondent in entering into a sale agreement with the 1st respondent resulting in the decree on the basis of the suit for specific performance laid by the 1st respondent is nothing but a calculated attempt to grab the suit property from the vendor of the appellant and, thereby from the appellant as well.

42. Further, one other aspect, which is also of importance to be noted here is Section 54 of the Transfer of Property Act. The whole alleged claim of the 2nd respondent to the property rests on the alleged agreement of sale alleged to have been entered into with the vendor of the appellant and the 2nd respondent. It is not the case of the 2nd respondent that full sale consideration has been paid. Even, Ex.A-67, the reply notice issued by the 2nd respondent, there is an alleged categorical admission that only part payment has been made and full payment has not been made. Further, it is also not evidenced from Ex.A-67 that a sale deed had been executed between the parties, which has been registered.



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43. In this backdrop, Section 54 of the Transfer of Property Act assumes significance. In order to constitute sale, there must be a transfer of ownership from the vendor of the appellant to the 2nd respondent. Further, to claim sale and purchase of a property, three ingredients should stand fulfilled, viz., (i) *possession had already been delivered to the vendee; (ii) there was mutation of names in the municipal records; (iii) stamp for the sale deed stood only in vendee's name and (iv) some amount in cash was also paid by the vendee as part of consideration making sale deed to be real as fully supported by consideration.* In the case on hand, there is no fulfilment of the conditions. Therefore, necessarily there is no sale that has gone through as mandated u/s 54 of the TP Act. Such being the case, which stands established by the materials available on record, the 2nd respondent does not get any right or title to enter into a sale agreement with the 1st respondent to part with the property by way of sale. Only when the seller is competent to enter into a sale, as provided for u/s 54 of the TP Act, a suit for specific performance could be entertained and in the absence of any right and title to the seller, viz., the 2nd respondent, the sale agreement cannot give any right



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to the 1st respondent to claim specific performance from the 1st respondent by filing a suit.

44. In the aforesaid scenario, the act of the respondents in obtaining a decree without the 2nd respondent holding any valid title to the suit property is nothing but an act of fraud perpetrated on the court by the respondents. Further, there is no material placed before this court with regard to the decree obtained by the 1st respondent. In this regard, the decision of the Apex Court in *Chengalvaraya Naidu case (supra)*, relied on by the appellants squarely stands attracted.

45. Decisions have been relied on by the respondents to canvass the contentions with regard to the relationship of landlord and tenant between the vendor of the appellant and the 2nd respondent for the purpose of invoking Article 67 of the Limitation Act. This Court is not even for a moment questioning the ratio laid down in the said decisions, but is only of the view that the said decisions would in no way further the case of the 2nd respondent. When the courts below, in unequivocal terms, have held that the right and



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title to the property vest with the appellant and that the persons, who were in occupation of the premises, who were dispossessed through the amin on the basis of the decree obtained by the 1st respondent in the execution proceedings, were tenants under the appellant, the possession of the 2nd respondent at the material point of time, subsequent to the sale of the property by the vendor of the appellant having not been proved, the application of limitation prescribed under Article 67 of the Limitation Act to claim that the claim is barred by limitation, which has been held in favour of the respondents is wholly erroneous and illegal. Therefore, the decision in *Shenbagavalli's case* relied on by the respondents is not applicable to the case on hand.

46. Further, the decisions with regard to applicability of limitation under Article 67 of the Limitation Act would also not stand attracted to the case, as the relationship of landlord and tenant between the appellant and the 2nd respondent is not made out, as on the date when possession is sought to be taken from the persons, who were under occupation of the premises, the said persons were tenants under the appellants, as is evident from the



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findings recorded by the courts below. Such being the position, which has not been contested by the respondents, the application of Article 67 of the Limitation Act does not stand attracted.

47. Insofar as the decision in *Shenbagavalli's case* with regard to the duty and failure of the appellants to object and file application under Order XXI Rule 35 CPC, it is to be pointed out that the appellant was not a party in the suit which had been instituted for specific performance on which decree was passed followed by the execution proceedings. After the execution of the decree by effecting delivery in favour of the 1st respondent by removing the persons, who were in occupation of the suit property, the present application has been filed by the appellants for redelivery of possession and merely because there was no objection at the time of delivery, when the appellants were not aware of the same, cannot be a ground to negate the claim of the appellants for redelivery. Therefore, the said decision cannot be of any assistance to the respondents.



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48. Insofar as the decision in *Tamilselvi's case*, with regard to the continuing tenancy rights inspite of the agreement of sale, it is to be pointed out that it is not the case of the 2nd respondent that he was a tenant under Sarathambal, and all along, it has been his case that he had entered into a sale agreement for purchase of the property. Such being the case, the 2nd respondent cannot make a U-Turn and claim that he was a tenant under the vendor of the appellant solely for the purpose of attracting the limitational bar under Article 67 of the Limitation Act.

49. The possession of the 2nd respondent under the vendor of the appellant till the year 1974 by virtue of Ex.A-66 and A-67 could be countenanced, but the further continuance beyond 1974, more particularly after the sale of the suit property to the appellant has not been established. However, contrary to the stand of the respondents, through documents, viz., house tax receipts, patta, etc., the appellants have established their possession, which is further strengthened by the fact that the persons, who were evicted from the property pursuant to the execution proceedings were tenants under the appellants, which finding has been rendered by the courts



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below. Such being the case, this Court cannot draw any presumption that the 2nd respondent was in possession of the suit property even subsequent to the purchase of the suit property by the appellants. Therefore, once the possession has transferred hands to the appellants, the rigor of Article 67 would not stand attracted and in the absence of any steps having been taken by the 2nd respondents to impose upon the vendor of the appellant to honour his part of the contract by parting with the property in his favour and also in the absence of any written agreement even with regard to such a sale agreement having been entered into between the vendor of the appellant and the 2nd respondent, the case of the respondents that the 2nd respondent was in continuous possession and that the persons, who were evicted from the property were tenants under him have not been established. However, all the aforesaid facts have not been rightly appreciated by the courts below while rejecting the claim made by the appellants in the application filed under Order XXI Rule 99 CPC.

50. Rightly, the appellants have filed the application under Order XXI Rule 99 CPC. Order XXI Rule 99 CPC provides that *where any person other*



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than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession. In the case on hand, the appellants, who had purchased the property from the legal heirs of Somu Pillai on the basis of the release deed executed by Sarathambal, the wife of Somu Pillai, had rightly invoked Order XXI Rule 99 CPC and filed the application, where his rightful possession is sought to be dispossessed by the decree holder, who had obtained the sale deed through court in a case for specific performance.

51. However, what has missed the attention of the courts while rejecting the application is the fact that for the purpose of considering the said application under Order XXI Rule 99 and 100 CPC, what is required to be considered was as to whether the applicant herein claimed a right independent of the judgment-debtor or not. In the case on hand, as aforesaid, independent of the judgment-debtor, viz., the 2nd respondent, the appellants had a right, as a rightful purchaser of the suit property from the



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legal heirs of Sarathambal on the basis of a valid sale deed and the said application ought to have been considered and adjudicated on merits as the same was not claimed through or under the judgment debtor.

52. In the aforesaid backdrop, when the decree had been obtained by the 1st respondent by perpetrating fraud by fabricating a document with regard to alleged sale agreement between the respondents on 9.4.1992 when the 1st appellant purchased the property from Sarathambal on 20.04.1992, the above act clearly shows that only for the purpose of defeating the legitimate rights of the appellants, the sale agreement had come to be entered into between the respondents. In spite of the sale deed being entered into between the appellants and Sarathambal the 2nd respondent has not taken any steps to nullify the sale deed by invoking Article 67 of the Limitation Act, but had left it to the hands of the 1st respondent to file a suit for specific performance and leaving the said suit to be decreed ex parte as also the execution proceedings to the same fate, had played a fraud on the court by obtaining the said decree, which cannot be allowed by this Court by keeping its eyes closed when justice is made a mockery of leading to travesty



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of justice. Accordingly, all the substantial questions of law raised are answered in favour of the appellant and against the respondents.

53. For the reasons aforesaid, the judgment and decree passed by the first appellate court confirming the judgment and decree of the trial court is wholly perverse, arbitrary and unreasonable and the same deserves to be set aside by allowing the present appeal. Accordingly, the impugned judgment and decree are hereby set aside and the present civil miscellaneous second appeal is allowed. There shall be no order as to costs.

01.11.2023

Index : Yes / No

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To

1. The Addl. District Judge
Nagapattinam.
2. The Addl. Sub Judge,
Nagapattinam.



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C.M.S.A. No.18/2004

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
C.M.S.A. NO. 18 OF 2004**

**Pronounced on
01.11.2023**



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