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S.A.No.803 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2023

CORAM

THE HONOURABLE MR.JUSTICE **P.DHANABAL**

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- 1.A.Sengottaiyan (died)
- 2.S.Saraswathi
- 3.S.Baby
- 4.S.Jothi
- 5.S.Kokhila
- 6.S.Padma

(sole Appellant died, A2 to A6 brought on record as legal heirs of the deceased sole Appellant vide Court order dated 08.06.2002 made in C.M.P.Nos.14092 and 14093 of 2017 in S.A.No.803 of 2002)

...Appellants

-Vs-

- 1.P.Mani
- 2.Sengoda Gounder(died)
(Set Ex-parte in O.S.)
- 3.Muthammal
- 4.Sellammal
- 5.Nallammal
- 6.Gowrisankar

...Respondents

Prayer:- Second Appeal is filed under Section 100 of CPC praying to prefer this Memorandum of Grounds of Second Appeal against the Judgment and Decree made in A.S.No.91 of 2001 on the file of the II Additional District Judge, Salem, dated 18.02.2002, reversing the Judgment and Decree made in O.S.No.246 of 1993 on the file of Sub Court, Sangagiri, dated 22.12.2000.



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For Appellants : M/s.Hema Sampath, Senior Counsel
assisted by B.Balavijayan

For R1 : M/s.C.S.Kiran

JUDGMENT

This Second Appeal has been preferred as against the judgment and decree passed in A.S.No.91 of 2001 on the file of the District Judge, Salem, dated 18.02.2002, reversing the judgment and decree passed by the Trial Court in O.S.No.246 of 1993 on the file of the Sub Court, Sangagiri, dated 22.12.2000.

2. The first respondent herein filed a suit for specific performance and the same was dismissed by the Trial Court. As against the said Decree and Judgment, the first respondent/plaintiff has filed the first appeal in A.S.No.91 of 2001. The first Appellate Court reversed the Judgment of the trial Court and decreed the suit and granted specific performance. As against the judgment and decree passed by the first Appellate Court, the present Second Appeal has been filed by the second defendant in the suit. During the pendency of the appeal, the appellant died and his LRs have been impleaded as parties.



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WEB COP 3. The gist of the plaint averments are as follows:

The properties mentioned in the suit schedule are absolute property of the first defendant and he purchased the property under the sale deed dated 06.07.1955. On 07.07.1993, the first defendant and the plaintiff entered into an agreement for sale in respect of the suit schedule property for a sum of Rs.50,000/-. On the same day itself, the first defendant received an amount of Rs.10,000/- towards advance of sale price and the balance amount has to be paid on or before the end of February 1994. The sale agreement was duly registered and the plaintiff was always ready and willing to perform his part of contract. But, the first defendant evaded from executing the sale deed as agreed in the agreement. Therefore, the plaintiff issued a notice dated 21.09.1993 calling upon the first defendant to execute the sale deed after the receipt of the balance sale price. The first defendant issued a reply stating that he had already sold the properties to the second defendant under the sale deed dated 23.09.1993. The said sale deed dated 23.09.1993 is sham and nominal and the same is not binding on the plaintiff. Further, the first defendant, in his reply to the notice, had made false averments that the suit properties are ancestral and joint family properties of the first defendant and his son Ramasamy and he, along with his son, entered into an sale agreement with the second defendant on



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16.06.1993 to sell the properties. The defendants are bound to execute the sale deed in favour of the plaintiff. The second defendant has attempted to alienate the property on 20.10.1993. Therefore, the plaintiff sought an order of injunction preventing the second respondent from alienating the property during the pendency of the suit or otherwise the first defendant is liable to pay a sum of Rs.50,000/- as compensation including the refund of advance amount paid by him.

4.The gist of the written statement filed by the second respondent are as follows: The suit is not maintainable either in law or on facts. The averment that the properties are ancestral properties of the first defendant is false. There was a partition between the first defendant and his brothers. In the partition dated 06.06.1955, the first defendant was allotted with lesser extent of land and his brother paid a sum of Rs.500/- to the first defendant to equalise his shares and out of the said amount, the first defendant purchased the suit property on 08.07.1955. Therefore, the suit properties are ancestral and joint family properties of the first defendant and his son Ramasamy. It is false to state that the first defendant and the plaintiff entered into an agreement for sale in respect of the suit property on 07.07.1993. Further, it is false to state that out of the sale price of Rs.50,000/-, the plaintiff paid a sum of Rs.10,000/- as advance to the first defendant and the sale has to be completed by the end of February



1994. Further, the averments with regard to said agreement are all false. The

second defendant entered into an agreement of sale with the first defendant and his son Ramasamy dated 16.06.1993. Pursuant to the same, the second defendant discharged the debts and thereafter, the first defendant and his son executed the sale deed in favour of the second defendant on 23.09.1993. Even on the date of agreement itself, the first defendant and his son parted with the the possession of the agricultural lands to the second defendant. Further, it was agreed that the first defendant should reside in the house situated in the suit properties. The sale deed dated 23.09.1993 is genuine and the second defendant purchased the property for a good and valuable consideration and the same is binding on the plaintiff. The agreement dated 07.07.1993 is not binding on the first defendant. Only in order to enrich and unlawfully gain and grab the cart track, the plaintiff has created the agreement of sale and come forward with the present suit at the instigation of his father in law. There is no cause of action for the suit and the suit is liable to be dismissed.

5. Based on the above said pleadings and after hearing both the parties, the trial Court has framed the following issues:

1) Whether the sale agreement dated 16.06.1993 is true, valid and binding upon the defendant?

2) Whether the suit is bad for non joinder of necessary parties?



3)Whether the plaintiff is entitled for charge over suit the property?

4)To what relief the parties are entitled to?

6.In order to prove the case of the plaintiff, he examined P.Ws.1 to 4 and marked Ex.A1 to A9. On the side of the defendants, D.Ws.1 to 3 were examined and Ex.B.1 to B6 were marked. After evaluating oral and documentary evidence adduced on either side, the trial Court has dismissed the suit with respect of specific performance and directed the first defendant to refund the advance amount of Rs.10,000/- along with 12% interest per annum. As against the decree and judgment, the plaintiff has filed an appeal before the District Court, Salem and on various grounds, the first Appellate Court has framed the following points for determination.

1)Whether the plaintiff is entitled to obtain the relief of specific performance as claimed in the suit; and

2)To what relief the appellant is entitled to?

7. During the pendency of the appeal, the second respondent has filed an application under Order XLI, Rule 27, CPC to receive additional documents and the same was also disposed of along with the appeal by the first Appellate Court. The first Appellate Court, after hearing the parties and perused the records, reversed the Judgment of trial Court and decreed the suit directing for specific performance. As against the decree and judgment of the first Appellate



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Court, the present Second appeal has been filed by the second defendant.

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8. This Court, at the time of admission, formulated the following substantial questions of law:-

1. Whether the Lower Appellate Court is correct in directing to execute the sale deed in favour of the first respondent in respect of the joint family property without impleading other co-owners.

2. Whether one of the co-owners of the joint family property is competent to enter into agreement for sale of the joint family property.

3. Whether the agreement of sale dated 07.07.1993 entered into between the 1st respondent/plaintiff and the 2nd respondent/1st defendant is valid in the eye of law and enforceable when there is agreement of sale already on 16.06.1993 entered into between the members of the joint family and the first defendant.

9. The learned Counsel appearing for the appellant would contend that the appellant/2nd defendant had purchased the property from the second respondent/1st defendant and his son Ramasamy for a good and valuable consideration on 23.09.1993. The first respondent/plaintiff filed the suit in O.S.No.246 of 1993 on the file of the Sub Court, Sankagiri for the relief of specific performance as against this appellant/2nd defendant and the second respondent/1st defendant. In fact, this appellant purchased the property and in



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order to defeat the valuable rights of the appellant over the property, the first respondent/plaintiff has created an agreement and filed the suit. The Trial Court after careful examination of the entire evidence of first respondent/plaintiff as well as the appellant/second defendant had rightly dismissed the suit by holding that the first respondent/plaintiff had failed to prove his case. The 1st Appellate Court failed to consider the evidence adduced by the appellant/second defendant in the proper and perspective manner and erroneously decreed the suit. In fact, the possession of the property was handed over to the appellant and the appellant has been in possession of the property. But, the first Appellate Court has failed to consider the same.

9.1.Learned counsel would further contend that in the agreement between the first respondent/plaintiff and the second respondent/1st defendant, there are suppression of material facts with regard to the house situated in the property and the appellant/2nd defendant has purchased the property with house and now, due to the escalation of price, the first respondent cannot be entitled to the relief of specific performance. If the relief of specific performance is granted to the first respondent/plaintiff, he would get unfair advantage. After the sale of property, the right of the appellant/2nd defendant is statutory right and the right of the first respondent/plaintiff is equitable right. The statutory right will prevail over the equitable right and the first Appellate



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Court failed to consider the same and erroneously decreed the suit in favour of the first respondent/plaintiff. Therefore, the Judgment of first Appellate Court is liable to be set aside by allowing this Appeal.

10.The learned Counsel appearing for the first respondent/plaintiff would contend that the first respondent entered into the sale agreement with the second respondent/1st defendant on 07.07.1993. As per the sale agreement, the sale price is fixed at Rs.50,000/-. On the date of sale agreement itself, the second respondent/1st defendant received a sum of Rs.10,000/- from the first respondent/plaintiff towards advance of the sale price and time fixed for execution of sale deed is end of February 1994. In the meantime, in order to defeat the valuable rights of the first respondent/plaintiff over the suit property, the second respondent/1st defendant and the appellant/1st defendant created the false agreement dated 16.06.1993 and the sale deed dated 23.09.1993. At the time of entering into the sale agreement with the first respondent/plaintiff, the second respondent/1st defendant executed the sale agreement, as if the property is the ancestral property and thereafter, the second respondent/1st defendant, along with his son, executed the sale agreement with the appellant/2nd defendant in order to defeat the rights of the first respondent/plaintiff over the property and the said sale deed is sham and nominal. Therefore, the said sale deed is not binding upon the first respondent/plaintiff. The first



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respondent/plaintiff was always ready and willing to perform his part of contract but the second respondent/1st defendant was evading to execute the sale deed after the receipt of balance sale consideration. Therefore, the first respondent/plaintiff has issued a notice to the second respondent/1st defendant on 21.09.1993 and the second respondent/1st defendant issued a reply with false averments. The first respondent/plaintiff has examined P.W.1 to P.W.4 and marked Exx.A1 to A9 and the appellant/2nd defendant has examined D.W.1 to D.W.3 and marked Exx.D1 to D6. The Trial Court without considering the evidence of the first respondent/plaintiff erroneously dismissed the suit and the first Appellate Court, after taking into consideration all the aspects, rightly decreed the suit and ordered for specific performance. Therefore, the present Second Appeal is liable to be dismissed.

11.This Court has framed the first substantial question of law:

1)Whether the lower appellate Court is correct in directing to execute the sale deed in favour of the first respondent/plaintiff in respect of joint family property without impleading other co-owners.

12.This is a case in respect of specific performance. The first respondent/plaintiff has filed a suit before the Trial Court as against the appellant/2nd defendant and the second respondent/1st defendant for the relief



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of specific performance. According to the first respondent/plaintiff, the second respondent/1st defendant is the owner of the property and he entered into the sale agreement with the second respondent/1st defendant for a sum of Rs.50,000/- and time fixed for sale is up to the end of February 1994. The sale price was fixed at Rs.50,000/- and on the date of agreement, Rs.10,000/- was received by the second respondent/1st defendant towards advance of sale consideration.

13. It is admitted by the second respondent/1st defendant that he received a sum of Rs.10,000/- from the first respondent/plaintiff. However, the contention of the second respondent/1st defendant is that the property is a joint family property and the second respondent/1st defendant cannot sell the property without co-sharers and thereby all the co-sharers of the properties have sold the property to the appellant/2nd defendant and thereby the first respondent/plaintiff is not entitled to the relief of specific performance of contract. The first respondent/plaintiff impleaded the appellant/2nd defendant, since he purchased the property from the second respondent/1st defendant. The second respondent/1st defendant entered into sale agreement with the first respondent/plaintiff and thereafter, the second respondent/1st defendant and his son Ramasamy and grand children sold the property to the appellant/2nd defendant by stating that the suit property is a joint family property of the



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second respondent/1st defendant and his son. While so, it is duty of the first respondent/plaintiff to implead the son and grand children of the second respondent/1st defendant as parties to the suit. But, the first respondent/plaintiff has failed to implead the son and grand children of the second respondent/1st defendant as parties to the suit. Though, the second respondent/1st defendant executed the sale agreement in favour of the first respondent/plaintiff by stating that the property belongs to him, the appellant/2nd defendant had purchased the property from the second respondent/1st defendant as well as his son and grand children stating that the property is an ancestral property of the second respondent/1st defendant and his son and grand children.

14.In order to decide the suit all the interested parties to the property have to be impleaded as parties to the suit. But, the first respondent/plaintiff has failed to implead the son and grand children of the second respondent/1st defendant. It is well settled law that in a suit for specific performance, right of title cannot be decided. However, in this case, already the property was sold by the second respondent/1st defendant and his son and grand children as if they are co-sharers of the property. Therefore, in this case, the son and grand children of the second respondent/1st defendant are proper and necessary parties to the suit and without impleading them, the suit cannot be decided



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effectively. The 1st respondent/plaintiff had knowledge about the sale of property after receipt of reply notice sent by the 2nd respondent/1st defendant, i.e., prior to suit. But the suit was filed without impleading all the parties who executed sale deed in respect of the suit property. Once the sale deed was executed by the parties in respect of the suit property prior to the suit, the 1st respondent/plaintiff ought to have filed the suit by impleading all the parties to sale deed, but the 1st respondent/plaintiff failed to implead all the parties of sale deed as parties to this suit and only implead the purchaser i.e., Appellant/2nd defendant. In this context, PW1 admitted in his evidence that he came to know about the sale of property through reply notice by the 2nd respondent/1st defendant. The date of reply notice has not been mentioned, however it was sent after sale deed in favour of Appellant/2nd defendant. From the above, it is clear that before filing the suit the 1st respondent/plaintiff had knowledge about the sale deed, but not impleaded all the share holders of the suit property. The sale agreement dated 16.06.1993 was executed by three persons and therefore, the aforesaid persons are necessary parties. Hence, the suit is bad for non-joinder of necessary parties. The first Appellate Court, without considering the above said aspects, erroneously decreed the suit directing the 2nd respondent/1st defendant to execute sale deed in favour of the 1st respondent/plaintiff.



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15.The learned counsel appearing for the 1st respondent/plaintiff argued that the Appellant/2nd defendant pleaded that the suit property is ancestral property of the 2nd respondent/1st defendant, but no evidence to prove the said contention. Though the DW2 was examined as witness his evidence cannot be considered without pleadings. The son of 2nd respondent/1st defendant was admittedly being separated for the 10 years prior to the agreement. Therefore, there is no proof for the ancestral property. In the absence of evidence to prove the ancestral nature of property the property will have to be considered as absolute property of 2nd respondent/1st defendant. To support his contention, he relied the judgment in D.S.Lakshmaiah and another Vs. L.Balasubramanyam and another reported in (2003) 10 SCC 310, where in the Hon'ble Supreme Court in Para 18 as follows:

"The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he



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purchased the property with his own funds and not out of joint family nucleus that was available."

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16. On careful perusal of the said judgment, it is clear that there is no presumption of a property being joint property only on account of existence of Joint Hindu family and the one who asserts has to prove that the property is a Joint family property. If however the person so ascerting proves that there was nucleus with which the joint family property could be acquired then would be presumption of the property being joint and onus would shift on the person who claims it to be self acquired property. In the case on hand the Appellant/2nd defendant pleaded that the suit property was a joint family property and all the members of the joint family had executed sale agreement and then sale deed in his favour and he also examined DW2 and he deposed about the ancestral property and also produced the sale deed executed by Joint family members. So the appellant/2nd defendant proved that the property is joint family property of 1st respondent/2nd defendant. Now the onus is shifted to 1st respondent/plaintiff to prove that the property is separate property of the 2nd respondent/1st defendant and the sale deed is sham and nominal. But no rebuttal evidence adduced by the plaintiff to that regard. Therefore the contention of the 1st respondent/plaintiff is not acceptable to that regard and the said case law will not be help to the case of 1st respondent/plaintiff.



17. Therefore, as discussed supra, this Court is of the considered of the view that the 1st appellant Court is not correct in directing to execute sale deed in favour of the 1st respondent in respect of the Joint family property without impleading other co-owners. Thus, the first substantial question of law is answered.

18. Second substantial question of law is whether one of the co-owners of a joint family property is competent to enter into an agreement for sale of the joint family property. It is admitted fact that the first respondent/Appellant entered into an agreement with the second respondent/1st defendant and the sale deed also stands in the name of the second respondent/1st defendant and thereby, the first respondent/plaintiff had entered into an agreement with the second respondent/1st defendant. However, the first respondent/plaintiff had the knowledge about the co-owners of the property after purchase by the Appellant/second defendant and filed the suit by impleading the purchaser as 2nd defendant. However, the first respondent/plaintiff failed to take steps to obtain sale deed in his favour from all the share holders of the properties. Even, according to the second respondent/1st defendant he is one of the co-owner and he entered into an agreement and it is for the first respondent/plaintiff to get the sale deed executed to the extent of his share. But the suit is not filed for the shares of the second respondent/1st defendant alone and the suit is filed for the



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entire properties. The second respondent/1st defendant had 1/2 share over the property and he could enter into agreement only in respect of his 1/2 share alone over the suit property and he has no right to enter in to sale agreement for entire property.

19. The learned counsel for the appellant has argued that even assuming that the suit property is a joint family property, the second respondent/1st defendant, being a Karta of the family, can sell the property for the welfare of joint family. In this case, there is no recitals in the agreement that the suit property was sold for the benefit of joint family and there is no recitals in the agreement about the Karta of the joint family and thereby the contention of the appellant that the joint family property can be sold by Karta on behalf of other members of Joint family is not acceptable.

20. Further, the learned counsel appearing for the 1st respondent/plaintiff also argued that even assuring that the property is ancestral, any adult member of such HUF is competent to alienate the property notwithstanding others even the existence of minor's share and right to alienate itself is not taking away, while so, the son of 2nd respondent/1st defendant has not challenged the suit agreement. Hence the sale agreement cannot be questioned on the ground of the property being an ancestral property. To support his contention, he relied the judgment in 1.Sri Narayan bal and others Vs. Sridhar sutar and others held in



para 5 as follows:

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"The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property."

2. N.S.Balaji Vs. Presiding Officer, Debt Recovery Tribunal and others reported in 2023 SCC Online SC 1266 wherein the Hon'ble Supreme Court held in para 2 and 3 as follows:

"2.The position on the rights of a Karta vis-a-vis an HUF property is well settled. This Court in Sri Narayan Bal V. Sridhar Sutar has held that the Karta has the right to sell/dispose of/alienate an HUF property, even if a minor of the family has undivided interest.

3.Thus, the father of the petitioner herein, as the Karta of the HUF, was entitled to mortgage the HUF property. The son(s) or other member(s) of the HUF need not be consenting parties to the mortgage. Post alienation is not for legal necessity or for betterment of the estate, which is not the assertion established in the present case."

21.On a careful perusal of the judgments, it is clear that the karta of undivided joint family is right to sell/dispose of /alienate an HUF property. In the case on hand the sale agreement EX.A1 was not executed as a Kara of HUF and it was executed as individual capacity of 2nd respondent/1st defendant. Hence, the said case laws will not be applicable to the present facts of the case.



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Therefore, the second respondent/1st defendant is not entitled to enter into agreement with the first respondent/plaintiff for the entire suit property.

Therefore, the joint family property cannot be sold without the co-owners.

Thus, the second substantial question of law is answered.

22. Third substantial question of law is Whether the agreement of sale dated 07.07.1993 entered into between the first respondent and the appellant is valid in the eye of law and enforceable, when there is agreement of sale already on 16.06.1993 entered into between the members of Joint family as the 1st defendant.

23. It is an admitted fact that the second respondent/1st defendant executed an agreement dated 07.07.1993 in favour of the first respondent/Appellant. According to the Appellant, the second respondent/1st defendant, along with his son, executed another agreement on 16.06.1993 in favour of the appellant/2nd defendant. The 1st respondent/plaintiff contention is that he entered in to agreement with 2nd respondent/1st defendant and in order to prove the said agreement PW1 to 3 were examined and they have deposed about the execution and passing of consideration of Rs.10,000/- towards advance of sale price. Particularly the PW2 who is the attesting witness of the agreement categorically deposed about the payment of advance and the execution of agreement Ex.A1. Moreover, the 2nd respondent/1st defendant



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who executed the agreement, admitted the execution of Ex.A1 agreement and he was examined as DW2. But he denied the purpose of execution and stated that it was executed at the instigation of father in law of 1st respondent/plaintiff to have a pathway to father in law of 1st respondent/plaintiff. But no sufficient evidence to prove the said contention of DW2 that the agreement was executed to have a pathway to the father in law of the 1st respondent/plaintiff. Moreover, DW2 being 1st defendant to the suit was set exparte, but examined as witness. Therefore, as stated above the 1st respondent/plaintiff has proved the execution of agreement dated 07.07.1993.

24.Further, the learned counsel appearing for the 1st respondent/plaintiff argued that the appellant/2nd defendant did not challenge the Ex.A1 and the suit notice was issued on 21.09.1993 but sale deed was executed on 23.09.1993, thereby the sale deed in favour of appellant is not genuine and he is not a bonafide purchaser. Therefore, the plaintiff is entitled for decree for specific performance through Ex.A1 agreement which is registered and there is a presumption, since the agreement was registered one. To support his contention he relied on judgment in Vimal Chand Ghevarchand Jain and others Vs. Ramakant Eknath Jadoo reported in (2009) 5 SCC 713, wherein the Hon'ble Supreme Court para 19 held that as follows:



"The deed of sale dated 29.06.1978 was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. The respondent was the son of the vendor. He was an attesting witness. In his written statement, he categorically denied execution of the said deed of sale. He also denied that he had attested the document. He even did not examine himself before the learned trial Judge. His witnesses merely proved his possession. The fact that the respondent's father was put in possession with effect from 01.07.1978 was (sic not) in dispute. What was in dispute was the character of his possession. Did he continue to possess the godown as owner thereof or on the basis of leave and licence was the question, which was not considered in its proper perspective by any of the three courts below."

25. On a careful reading of the said judgment it is clear that the registered document carries a presumption that the transaction was genuine one, but in this case the 1st respondent/plaintiff has proved the Ex.A1, sale agreement, but at the same time, the sale deed in favour of appellant/2nd defendant was executed by all the members of the Joint family also registered and thereby it carries the presumption that the transaction is genuine one, and the 1st respondent/plaintiff has to prove that it is sham and nominal, but no sufficient evidence adduced by the plaintiff/1st respondent to that effect.



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26. In order to prove the agreement dated 06.06.1993 executed in favour of Appellant is concerned, the defendant examined DW1 to DW3. DW3 is the attesting witness of the agreement dated 06.06.1993, and he deposed about the attestation and execution of the agreement. More over, the DW2 who executed the document also admitted the execution of agreement in favour of Appellant.

27. The learned appearing for the 1st respondent/plaintiff argued that the 2nd respondent/1st defendant did not file written statement and remain exparte and no pleading on his behalf, however he was examined as DW2 and his evidence cannot be considered at all. To support of his contention he relied the Judgment in 1.Uttam Chand Vs. Nathu Ram (2020) 11 SCC 263, wherein the Hon'ble Supreme Court held in Para 15 as follows:

"15.The matter has been examined by a Constitution Bench in M.Siddiq (Ram Janmabhumi Temple-5 J.) v.Suresh Das wherein, it has been held that a plea of adverse possession is founded on the acceptance that ownership or the property vests in another, against whom the claimant asserts possession adverse to the tile of the other. The Court held as under:

1143. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous possession which meets the requirement of being



nec vi nec claim and nec precario. To substantiate a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidences, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading Para 11(a), it becomes evident that beyond stating that the Muslims have been in long, exclusive and continuous possession beginning from the time when the Mosque was built and until it was desecrated, no factual basis has been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

The ingredients must be set up in the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings without evidence will not establish a case in law."

2) Bachhaj Nahar Vs. Nilima mandal and another in (2008) 17 SCC 491, wherein the Hon'ble Supreme Court held in para 17 as follows:



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"It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contain the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider the case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."



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28. On a careful reading of the said judgment, it is clear that without pleadings evidence cannot be adduced. In the case on hand 1st defendant who was set exparte in the suit was examined as witness as DW2 and he deposed about the execution of agreement in favour of appellant/2nd defendant dated 16.06.1993. The Appellant/2nd defendant pleaded that the 2nd respondent/1st defendant executed agreement in his favour and thereby it cannot be said that no pleadings. Further the 2nd respondent/1st defendant was set exparte in the suit, and was examined as DW2. There is no bar to examine the parties who were set exparte as witness in the same suit.

29. It is well settled law that the exparte order passed as against the party under Order 9 Rule 7 is for the particular proceedings of that date and in subsequent proceedings the party can participate without setting aside the earlier order passed by the Court. If the party against whom exparte order passed wants to agitate the previous order passed against him, then the permission under Order 9 Rule 7 is necessary. The said principle was clarified by the Hon'ble Supreme Court in Sangram Singh case reported in AIR 1955 SC 425. Therefore, the contention of the learned Counsel for the 1st respondent/Appellant is not acceptable to that regard. Therefore, the execution of agreement dated 06.06.1993 also proved in accordance with law. In the



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agreement dated 07.07.1993, the second respondent alone executed the agreement in favour of the first respondent/plaintiff. In the agreement dated 16.06.1993, the second respondent/1st defendant along with his son and minor grand children being a joint family member executed the sale agreement in favour of the appellant/2nd defendant. Moreover, in pursuance of the sale agreement, the second respondent/1st defendant and his son along with minor grand children had sold the property to the appellant. Both the agreements have been proved in accordance with law, but the agreement dated 16.06.1993 in favour of the Appellant/2nd defendant is the first agreement and the agreement dated 07.07.1993 in favour of 1st respondent/plaintiff is subsequent to earlier agreement and the agreement dated 16.06.1993 was acted upon but the 2nd agreement was executed without proper parties.

30.It is well settled law that as far as specific performance is concerned, it is discretionary and equitable relief. Once the appellant/2nd defendant got sale deed from the second respondent/1st defendant and his son, it is a statutory right and as far as the 1st respondent/plaintiff who is the agreement holder is concerned, it is equitable right and statutory right will prevail over the equitable right. Since, the appellant/2nd defendant purchased the property from all the share holders which is his statutory right, the first respondent/plaintiff is



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dismissed the suit.

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32. In view of the above said discussions made in the substantial question of law, the decree and judgment passed by the 1st Appellate Court are set aside and the judgment and decree passed by trial Court is restored and the suit is dismissed.

33. In the result, this 2nd appeal is allowed and the decree and judgment passed in AS.No.91/2001 on the file of II Additional District Judge, Salem dated 18.10.2002 are set aside and the decree and judgment passed in O.S.No.246 of 1993 on the file of Sub Court, Sangagiri dated 22.12.2000 are confirmed. No costs.

18.12.2023

Internet : Yes

Index : Yes/No

Speaking order/Non-speaking order



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P.DHANABAL, J

rjr

To

- 1) The II Additional District Judge, Salem.
- 2) The Sub Court, Sangagiri.

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18.12.2023