IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	22.11.2022
Pronounced On:	23.01.2023

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

C.S.No.706 of 2003
&
C.S.No.381 of 2015

In C.S.No.706 of 2003:-

1.A.N.Viswanatha Rao (died)

2.Geetha V.Rao

3.Ramya V.Rao

4.Ramnath V.Rao

(Plaintiffs 2 to 4 brought on record
as LRs of deceased sole plaintiff as
per order dated 10.11.2021 made in
Appln.,Nos.3552 and 3553 of 2021) ...Plaintiffs

In C.S.No.381 of 2015:-

1.A.N.Viswanatha Rao (died)

2.Geetha V.Rao

3.Ramya V.Rao

4.Ramnath V.Rao

(Plaintiffs 2 to 4 brought on record

as LRs of deceased sole plaintiff as
per order dated 10.11.2021 made in
Appln.,Nos.3565 and 3566 of 2021)

Vs.

R.Mallika ...Defendant

PRAYER in C.S.No.706 of 2003:- This is a suit filed under Order IV Rule 1 of O.S.Rules and under Order VII Rule 1 C.P.C,

a)Directing the defendant to pay to the plaintiffs a sum of Rs.34,44,000/- together with interest on a sum of Rs.24,00,000/- at the rate of 18% per annum from the date of plaint till date of payment.

b)For costs of the suit to be paid by the defendant to the plaintiffs.

PRAYER in C.S.No.381 of 2015:- This is a suit filed under Order IV Rule 1 of O.S.Rules and under Order VII Rule 1 C.P.C,

a)For partition and separate possession of the plaintiff's undivided half share in the suit property.

b)Directing the defendant to pay the plaintiff a sum of Rs.73,000/- (Rupees Seventy Three Thousand) being the damages from 01.11.2014 to 12.01.2015 and at the same rate from the date of plaint till the date of handling over possession to the plaintiffs

c)For the costs of the suit.

In Both the Suits:-

For Plaintiffs : Mr.M.S.Subramanian

For Defendant : Mr.S.Parthasarathy
Senior Advocate for
C.Prakasam

COMMON JUDGMENT

C.S.No.706 of 2003:-

Suit in C.S.No.706 of 2003 is filed for recovery of a sum of Rs.34,44,000/- together with interest on a sum of Rs.24,00,000/- at the rate of 18% per annum from the date of plaint till date of payment and for costs.

2. Plaintiffs and defendant are neighbours. Defendant expressed her desire to purchase a portion of plaintiff's property situate opposite to the defendant's property. Due to the confidence plaintiff had on the defendant, he signed in agreements and sale deeds as drafted by the defendant. Plaintiff gave possession of the property to the defendant even in 1998, on the basis of an oral agreement. The first written agreement between the parties was entered in May 1999. After taking possession of the property in 1998, defendant put up a four-storeyed construction and she is in personal occupation of the ground floor. Other portions had been let out. Defendant is enjoying the rents and profits. The agreement between the plaintiff and defendant was to purchase 2680sqft., by the defendant from the plaintiff for a consideration of Rs.28,00,000/-. As per the written agreement dated 07.05.1999, the agreed price for the property is Rs.30,00,000/-. The

defendant had paid an advance of Rs.1.40 lakhs. The sale has to be completed on or before 06.02.2000. The time was considered as essence of the contract. Until the property is sold, defendant agreed to pay a sum of Rs.15,000/- per month from May 1999 till the completion of the sale. Defendant did not complete the sale in accordance with the agreement. Plaintiff wrote a letter to the defendant on 19.05.2000 intimating the defendant that she was liable to pay Rs.30,25,000/-. Further agreement dated 14.03.2001 was entered into between the parties. As per this agreement, the sale consideration was Rs.30,00,000/-. Defendant paid an advance of Rs.3,00,000/-. It was agreed that on payment of further sum of Rs.3,00,000/, an undivided 50% of the interest in the land will be conveyed. It was also agreed that on payment of further sum of Rs.3,00,000/-, sale deed will be registered. Another sum of Rs.2,00,000/- was to be paid within the period before the registration. Balance sum of Rs.19,00,000/- was to be paid later. Defendant agreed to pay a sum of Rs.30,000/- per month till entire amount is discharged. A sum of Rs.10,000/- per month will be paid to the plaintiff towards rent for the portion in the occupation of the defendant. Accordingly, sale deed for the undivided half share was executed on 14.03.2001. Out of total Rs.30,00,000/- sale consideration, defendant paid only Rs.6,00,000/-. Defendant is liable to pay Rs.24,00,000/-. Plaintiff issued a legal notice dated 07.02.2003. Defendant did not pay the amount. Therefore, this suit is filed.

3. The case of the defendant is that defendant is a home maker and she had all her dealings through her husband V.P.R.Ramesh. Allegations made against the defendant is not true. Plaintiff is a leading Advocate. Therefore, it is futile to say that defendant made the plaintiff to sign in the agreements and sale deeds as drafted by the plaintiff. Husband of the defendant came across a dispute between the plaintiff and one K.Ananthaiah, since deceased, in respect of a larger extent, including the suit property. K.Ananthaiah filed a suit against the plaintiff by availing the provisions under Madras City Tenants Protection Act. Having lost the suit he filed Second Appeal in S.A.No.1002/1989. Legal representatives of deceased K.Ananthaiah pursued the Second Appeal and that was dismissed on 14.08.1997. Despite that, plaintiff was not able to take absolute possession of the property. Since, the possession was with the family members of deceased K.Ananthaiya, plaintiff approached defendant's husband with a proposal to sell the property. Husband of the defendant thought fit to purchase the property to benefit the defendant. There was an agreement of sale dated 07.05.1999 entered into between the plaintiff and

the defendant, wherein, the plaintiff agreed to sell the property for a total consideration of Rs.30,00,000/-. Item No.2 of schedule 'A' to the sale agreement dated 07.05.1999 was described as separate in 'B' schedule. Though there was some delay on the part of the defendant, in paying the sale consideration, still the defendant paid the entire sum of Rs.15,00,000/- and got the sale deed executed on 14.03.2001. Plaintiff requested the defendant to take the sale deed for Rs.3,00,000/- for his own convenience. Only after receipt of Rs.15,00,000/- plaintiff executed the sale deed dated 14.03.2001. In respect of other undivided share of the plaintiff, plaintiff suggested the husband of the defendant to enter into a formal agreement dated 14.03.2001. Agreement was entered into between the parties for helping the plaintiff to come out of his accounting problems. However, that is taken undue advantage and in a wrong way by the plaintiff. Plaintiff demanded higher price and that was refused by the defendant's husband. Any normal human would not have agreed to execute the sale deed in respect of the property worth Rs.15,00,000/- for Rs.3,00,000/-. No right is reserved in sale deed dated 14.03.2001 to receive any further sale consideration. Agreement dated 14.03.2001 was executed only to help the plaintiff in his accounting purpose. The sale amount was reflected as per the request by the plaintiff in the sale deed. Plaintiff is not entitled for any claim. The suit is liable to be dismissed.

4. Based on the above pleadings, the following issues are framed for trial in C.S.No.706 of 2003:-

1)Whether the total amount paid by the defendant under the agreement is Rs.6,00,000/- as contended by the plaintiff or Rs.15,00,000/- as claimed by the defendant?

2)Whether the plaintiff is entitled to recover the balance consideration when he conveyed only a part of the property conveyed and not the entire property as per the suit agreement dated 14.03.2001?

3)Whether the plaintiff is entitled to a decree against the defendant for a sum of Rs.24,00,000/- along with an interest on the said amount at the rate of 18% per annum?

4)To what relief the parties are entitled?

C.S.No.381 of 2015:-

5. Plaintiff is the owner of the 'A' schedule property. There were some attempts to encroach the plaintiff's property and therefore he approached the defendant and her husband for help. Defendant offered to purchase a portion of 'A' schedule property for Rs.30,00,000/-. On an oral

agreement in 1997, defendant took possession of the property at her risk and cost. Defendant paid a sum of Rs.1,00,000/- on 09.09.1998 and further sum of Rs.40,000 on 19.09.1998. She undertook to pay the entire balance and complete the sale by January 1999. Defendant could not keep up her promise for the reason that she was not possessed of sufficient funds to complete the sale. Plaintiff agreed for extending the time and agreement of sale was entered on 07.05.1999. Defendant agreed to pay the balance Rs.28,60,000/- within a period of nine months. Time was the essence of the contract. Defendant agreed to pay interest with effect from May 1999 at Rs.15,000/- per month. If any default is committed in payment of monthly interest, it was agreed that plaintiff could cancel the agreement. There is a specific mention that if the balance of Rs.28,60,000/- is not paid, agreement shall automatically come to an end. Plaintiff could value the superstructure and pay the same to the defendant within a period of one year from the expiry of the agreement. Defendant could not perform her part of contract and therefore the agreement was treated as having come to an end. Thereafter, a fresh agreement was entered into on 14.03.2001. The original consideration of Rs.30,00,000/- was not altered. A sum of Rs.3,00,000/- was paid as advance on 01.03.2001. Further sum of Rs.3,00,000/- was to be paid within three days from 14.03.2001 and the defendants should take a registered sale deed in respect of 50% of the undivided share of the land. Remaining ½ share to be sold within three months on further payment of Rs.3,00,000/-. Out of the balance, a sum of Rs.2,00,000/- shall be paid in cash or gold before the second registration and the balance Rs.19,00,000/- to be paid in instalments of Rs.30,000/- per month on or before 10th of every English calender month till the entire sum of Rs.19,00,000/- is paid. It was agreed that encroachment by way of two huts should be removed and vacant possession should be obtained by the defendant at her own cost. Defendant paid Rs.3,00,000/- at the time of registration of the sale deed for undivided half share. Plaintiff issued a lawyer's notice dated 17.02.2003 and filed a suit in C.S.No.706 of 2003 claiming the balance consideration. Defendant filed a written statement claiming that a sum of Rs.15,00,000/- was paid. Possession of entire property was handed over to the defendant in 1998 itself and she commenced the construction. The permission granted was withdrawn by the notice dated 28.10.2014. Under these circumstances, this suit is filed for partition and separate possession of undivided half share of the suit property, for damages and and for other reliefs.

6. The case of the defendant is that this suit is barred under Order II Rue 2 C.P.C. for the reason that the cause of action for filing this suit was

available even when the plaintiff filed the earlier suit in O.S.No.706 of 2003. The defendant is a home maker and she had dealings through her husband V.P.R.Ramesh. The plaintiff is an Advocate having more than 50 years experience at the Bar. One Ananthaiah filed suit against the plaintiff claiming right under Madras City Tenants Protection Act and that was dismissed. The Second Appeal filed by him in S.A.No.1002 of 1989 was also dismissed. However, plaintiff was not able to take possession and therefore he approached the husband of the defendant with a request to purchase the property. An agreement of sale deed dated 07.05.1999 was entered into between the plaintiff and the defendant and the sale consideration was fixed at Rs.30,00,000. The oral agreement had been superseded by a later agreement in writing made on 07.05.1999 and another agreement dated 14.03.2001. Though there was some delay in paying the sale consideration, defendant paid the entire sum of Rs.15,00,000/- and got the sale deed dated 14.03.2001. For the convenience of the plaintiff, the sale consideration was shown as Rs.3,00,000/-. Plaintiff suggested the defendant to enter into agreement dated 14.03.2001. It was done to help the plaintiff to take care of his accounting problems. Plaintiff demanded a higher price. Suit in O.S.No.706 of 2003 was filed on false and untenable grounds. Defendant was put into possession of the property from 1988 in respect of the entire extent of 2680 sqft. The construction covers the entire 2680 sqft. There is no division by any measurement of specification of boundary regarding the half share covered under the sale deed dated 14.03.2001. Plaintiff has not disclosed the date on which the permission granted to the defendant and was allegedly cancelled. Defendant put up four floor construction "Mallika Towers" in 1998 by incurring huge expenses. Without a prayer for declaration for the cancellation of agreement dated 14.03.2001, this suit is not maintainable and the suit is barred by limitation. The defendant is entitled to protection under Section 53 A of Transfer of Property Act. Plaintiff is estopped from claiming any relief other than the relief which was sought for in C.S.No.706 of 2003. This suit is abuse process of law and is liable to be dismissed.

7. The case of the plaintiffs from the reply statement, in brief is as follows:-

Clause 4 of the agreement dated 07.05.1999, makes it clear that the defendant has been putting up constructions at her own risk and cost. Clause 6 of the agreement stipulates that if sum of Rs.28,60,000/- is not paid before agreed date, the agreement shall come to an end automatically and plaintiff was authorised to purchase the structure built by the defendant. As per the terms of the agreement defendant has not come forward to complete the sale within the specified period. Defendant unauthorisedly and illegally put up one plus three structure in the suit property. In the subsequent agreement dated 14.03.2001, defendant was given permission to construct in 50% of the 2846 sqft. There was no license given to defendant to put up superstructure earlier to 14.03.2001. Defendant has not obtained any sanction from the Corporation or CMDA for putting up construction. By the time, the agreement was entered on 14.03.2001, the entire construction was completed. When the earlier suit was filed, there was no cause of action to file the second suit for the reason that the payment of instalments at Rs.30,000/- per month as per the agreement dated 14.03.2001, would be over only by 14.06.2006. Therefore, the claim that this suit is barred under Order II Rule 2 C.P.C is not sustainable.

8. Based on the pleadings, the following issues are framed for trial in C.S.No.381 of 2015:-

1)Whether the suit for partition with a prayer for declaration is maintainable?

2)Whether the suit is barred by Order II Rule 2 of C.P.C.?

3)Whether the suit for partition is maintainable?

4)Whether permission was accorded to the defendant to put up construction and if so, is it revocable?

5)Whether permission was accorded to the defendant can be revoked under Section 60 (b) of the Indian Easements Act?

6)Whether the defendant is entitled to protection under Section 53-A of the Transfer of Property Act?

7)Whether the plaintiff is entitled for a judgment and decree as prayer for?

8)To what other relief, the plaintiff is entitled?

9. P.W.1 was examined and Exs.P1 to P13 were marked on the side of the plaintiffs. D.W.1 was examined and Exs.D1 and D2 were marked on the side of the defendant.

Issue Nos.1, 2 and 3 in O.S.No.706 of 2013
and
Issue Nos.1, 2, 3, 4, 5 and 6 in O.S.No.381 of 2015:

10. The parties in both the suits are same parties and the issues involved in both the suits are connected with each other. Therefore, both the suits are tried jointly. The term "Plaintiff" would refer to the plaintiffs in C.S.No.706 of 2003 namely i)A.N.Viswanatha Rao (Deceased), ii)Geetha Viswanatha Roa, iii)Ramya Viswanatha Roa & iv)Ramnath Viswanatha Roa

and the term “Defendant” would refer to R.Mallika.

11. The learned counsel for the plaintiffs submitted that as per the oral sale agreement entered into with the defendant in 1998, the possession of the suit property was handed over to the defendant. The defendant could not complete the sale within the agreed period. Therefore, Ex.P1 sale agreement was entered between the parties. A sum of Rs.1,40,000/- paid earlier was treated as advance. The sale has to be completed on or before 06.02.2000, until then, defendant has to pay Rs.15,000/- per month. The defendant started construction of compound wall and building, at her own risk and cost. Thereafter, Ex.P2 sale agreement was executed in respect of undivided 50% of the suit property. As per this agreement, the sale consideration was fixed at Rs.30,00,000/-. Defendant paid a sum of Rs.3,00,000/- as advance. On payment of another Rs.3,00,000/-, it as agreed to convey 50% of the undivided interest in the land. The remaining of 50% has to be purchased by the defendant on payment of Rs.3,00,000/- within three months from the date of agreement and prior to registration of sale, Rs.2,00,000/- or gold jewelleries worth Rs.2,00,000/- has to be paid /given to the plaintiffs. Balance sale consideration of Rs.19,00,000/- should be paid in instalments at the rate of Rs.30,000/-. Till the payment of Rs.19,00,000/-

defendant has to pay Rs.10,000/- to the plaintiff. These are all the main terms of the agreement. It is further submitted by the learned counsel for the plaintiffs that the defendant has not paid the sale consideration for the 50% of the property sold to the defendant through Ex.P12 sale deed. Defendant has also not observed the conditions and made payment for the sale of balance 50% of the property. Therefore, both the suits had been filed.

12. It is his further submission that through Ex.P5 sale agreement, the sale consideration for the entire property was fixed at Rs.30,00,000/-. For 50% of the property sold under Ex.P12, the sale consideration was Rs.15,00,000/-. However, at the instance of the defendant, the sale consideration was shown only as Rs.3,00,000/- in Ex.P12 sale deed. Plaintiffs received Rs.6,00,000/- as per Ex.P5 sale deed agreement for the sale of 50% of the suit property. Plaintiffs are entitled to receive balance Rs.9,00,000/- for the sale of 50% of the suit property through Ex.P12. However, it was wrongly claimed in the plaint that plaintiffs are entitled to claim Rs.24,00,000/- with interest. Plaintiffs are confining the claim only to Rs.9,00,000/- with interest for the reason that plaintiffs filed the suit in C.S.No.381 of 2015 for the relief of partition of remaining 50% of the property and for other reliefs.

13. In response, the learned counsel for the defendant submitted that the sale price was shown as Rs.3,00,000/- in the Ex.P12 sale deed only at the instance of plaintiffs to avoid the payment of income tax and capital gain tax. However, the defendant paid Rs.15,00,000/- for the sale of property under Ex.P12. Plaintiff has not approached the Court with clean hands. Deceased first plaintiff is an Advocate. If his claim is entertained, it would amount to paying premium on dis-honesty. With regard to the partition suit, no permission was sought under Order II Rule 2 C.P.C for filing this suit separately. The partition relief should have been asked even in C.S.No.706 of 2003. There is no evidence produced to support the damages claim. Defendant is in possession of the entire property from the year 1998. She constructed ground floor three floor buildings in the name of Mallika Towers. The construction was put up with the permission of the plaintiffs and it was constructed in the whole of property measuring 2680 sqft. It cannot be divided now. Ex.P1 agreement was superseded by Ex.P5 agreement. The suit is also laid on the basis of Ex.P5 agreement. Thus, it is submitted by the learned counsel for the defendant that plaintiffs are not entitled for any relief.

14. In reply, the learned counsel for the plaintiffs submitted that the construction in the suit property was carried out by the defendant at her own risk and cost. There is a specific recitals included in this regard in Ex.P1 sale agreement. At no point of time, plaintiffs permitted the construction of the building and no license was granted. Defendant's husband is a politician and former M.L.A. Using his money and muscle power, defendant constructed a building in the suit property without getting written permission and license from the plaintiffs or plan approval from the authorities.

15. From the case set out by the parties, it is clear that the suit property belongs to the deceased first plaintiff A.N.Viswanatha Rao and after his death, to plaintiffs 2 to 4. Even as per the admitted case of the plaintiffs, the defendant is the neighbour and when the defendant expressed willingness to purchase the suit property there was an oral agreement followed by Ex.P1 and Ex.P5 agreements. Execution of Ex.P1 and Ex.P5 agreements are admitted by both the parties. It is necessary to consider and understand Ex.P1 and Ex.P5 agreements to decide this case.

16. Ex.P1 agreement was executed between deceased A.N.Viswanatha Rao and defendant R.Mallika on 07.05.1999.

A.N.Viswanatha Rao and defendant R.Mallika entered into this agreement for the purchase of "B" schedule property. "B" schedule property is the land measuring 2680 sqft in T.S.No.9068, 7387 (Part) and 5746 (Part) in B.No.130 situate on the western side of Santhi Flats, No.1, Sivaji Street, T.Nagar, Chennai. R.Malliga orally offered to purchase this property on 15.09.1997 for a total sale consideration of Rs.30,00,000/-. She agreed to vacate the existing occupant in the “B” schedule property and take possession at her risk and cost. She paid a token advance of Rs.1,00,000/- on 09.09.1998 and another sum of Rs.40,000/- on 19.09.1998. The sale has to be completed by January 1999. Since, the defendant R.Malliga was not able to complete the sale by January 1999, she requested further time of nine months. A.N.Viswanatha Rao agreed to extend the time on conditions mentioned in the agreement. Some of the important conditions are as follows:-

i)R.Malliga has to pay Rs.28,60,000/- on or before 06.02.2000 and the period of nine months for the completion of sale shall be the essence of the contract.

ii)R.Malliga has to pay interest with effect from May, 1999 at Rs.15,000/- on the balance amount till the completion of sale.

iii)R.Malliga has been putting up compound wall and other construction in “B” schedule property from the date of earlier oral agreement on 15.09.1997 on her own and she has been doing so at her own risk and cost. This clause is relied by the learned counsel for the plaintiffs to show that the deceased first plaintiff A.N.Viswanatha Rao had never given any permission or license to the defendant R.Malliga to construct the building in the suit property.

iv)In case of default of payment of monthly interest of Rs.15,000/-, deceased first plaintiff A.N.Viswanatha Roa was given a liberty to cancel the agreement.

v)In case R.Malliga is unable to pay the sum of Rs.28,60,000/- before the due date, the agreement shall come to an end automatically.

vi)It is open to deceased A.N.Viswanatha Roa to value the structure, whether finished, semi finished or unfinished as per P.W.D. rate and as per his Civil Engineers Report and pay the amount to R.Malliga within a period of one year from the date of expiry of the agreement. Option was given to deceased A.N.Viswanatha Rao to invite offers from third party and pay the cost of construction.

17. As per this agreement defendant was given time till 06.02.2000 for paying the balance sale consideration of Rs.28,60,000/- and complete the

sale. On failing to complete the sale by making payment, deceased A.N.Viswanatha Rao was given option to pay for the superstructure. It was also made clear that failure to make payment before the agreed date, the agreement would automatically come to an end. It can be gathered from this agreement that the defendant was making construction in the property after entering into oral agreement on 15.09.1997 and was continuing with the construction.

18. As per admitted case of the parties, the sale had not taken place as per Ex.P1 agreement. According to the plaintiffs, the sale could not be completed in pursuance of Ex.P1 sale agreement for the reason that defendant had financial constraints and therefore, Ex.P5 agreement came to be executed.

19. The perusal of the Ex.P5 agreement shows that there is no mention about Ex.P1 agreement. This agreement was entered into between deceased plaintiff A.N.Viswanatha Rao and defendant R.Malliga on 14.03.2001. As per this agreement, the sale consideration was fixed at Rs.30,00,000/-. There is mention about an oral agreement. The important terms of this agreement are:-

i)On the date of agreement, that is on 14.03.2001, deceased A.N.Viswanatha Roa received a sum of Rs.3,00,000/- as advance from defendant R.Malliga.

ii)Within three days from 14.03.2001, a sum of Rs.3,00,000/- has to be paid by defendant R.Malliga to deceased A.N.Viswanath Roa for getting the sale deed registered in respect of undivided 50% of the property, which is described as item No.2 in the schedule.

iii)The defendant has to pay Rs.3,00,000/- within three months from 14.03.2001 for getting the sale executed in respect of balance 50% of the property.

iv)Prior to the date of registration further sum of Rs.2,00,000/- or gold jewels worth Rs.2,00,000/- should be paid/given to deceased A.N.Viswanatha Rao by the defendant.

v)The balance sale consideration of Rs.19,00,000/- has to be paid in instalment at Rs.30,000/- per month.

vi)Till the payment of Rs.19,00,000/- a sum of Rs.10,000/- per month should be paid by the defendant to the deceased A.N.Viswanatha Rao.

vii)Defendant had shown the value of the property sold in the document, less than the guideline value and therefore if any income tax issue arise, that has to be paid by the defendant R.Malliga.

viii)Defendant R.Malliga has to take steps for removing the encroacher at her own cost and risk.

ix)She can make any constructions if she wishes at her cost.

20. From this agreement, it can be gathered that sale consideration was fixed at Rs.30,00,000/- for the entire property measuring 2846 sqft and that a sum of Rs.3,00,000/- was paid as advance and another Rs.3,00,000/- was paid at the time of execution of Ex.P12 sale deed. There is no evidence to show as to whether the defendant paid a sum of Rs.3,00,000/- within three months from 14.03.2001 and thereafter Rs.19,00,000/- as per the terms of the agreement for the purchase of remaining 50% of the property. In Ex.P12, sale consideration for 50% of the undivided share is shown as Rs.3,00,000/-. The issue here is whether defendant paid Rs.15,00,000/- as claimed by her for the sale of Ex.P12 property or only Rs.6,00,000/- as claimed by the plaintiffs. The next issue is whether the payments had been made as per the schedule of payment given in Ex.P5 for the sale of remaining 50% of the property.

21. It is also necessary to look into other documents produced in this case. Ex.P2 is the notice dated 19.05.2000 requesting the defendant to

comply with the terms of the agreement dated 07.05.1999 and complete the sale. Failing compliance, it was warned that deceased plaintiff would initiate suitable legal action against defendant for the unauthorised and illegal construction made. Ex.P3 is the returned postal cover containing the notice with acknowledgement card. Ex.P4 is the acknowledgement for sending the notice through certificate of posting. Then on 17.02.2003, deceased A.N.Viswanatha Rao sent another notice to the defendant detailing about oral agreement between the parties, handing over possession of the property in 1998, execution of Ex.P1 and Ex.P5 sale agreements, non payment of Rs.24,00,000/- etc. Ex.P7 and Ex.P8 are the returned covers. Ex.P9 is another notice dated 28.10.2014 sent on behalf of deceased A.N.Viswanatha Rao to the defendant detailing the entire transaction surrounding Ex.P1 and Ex.P5 sale agreements, failure on the part of defendant to perform her part of contract and seeking surrender of possession of undivided half share. Ex.P10 is the acknowledgement card. Ex.P11 is the reply to Ex.P9 notice. These exhibits show that there had been exchange of notices between the deceased A.N.Viswanatha Rao and defendant with regard to Ex.P1 and Ex.P5 sale agreements. Deceased A.N.Viswanatha Raod had been pressing for the completion of sale in terms of Ex.P1 and Ex.P5 sale agreements. *Prima-facie* it appears that the defendant had not complied and performed her part of contract either as per Ex.P1 sale agreement or as per Ex.P5 sale agreement.

22. Defendant produced Ex.D1 and Ex.D2 to show that one Ananthaiah filed a suit against deceased A.N.Viswanatha Rao in O.S.No.5249 of 1988 claiming right in the suit property. That suit was dismissed and the appeal filed against the dismissal of the suit in A.S.No.45 of 1998 was also dismissed by this Court in S.A.No.1002 of 1989. Wife of Ananthaiah had given a written undertaking to the defendant that defendant can construct a building in the suit property. These documents were produced primarily for the reason to show that (1) There was a civil dispute between deceased Ananthaiah and deceased A.N.Viswanatha Rao in respect of the suit property, (2) Despite succeeding in the civil suit, deceased A.N.Viswanatha Rao was not able to take possession of the property and therefore, he offered the property for sale to the defendant, (3) Defendant succeeded in entering a compromise with the wife of the deceased K.Ananthaiah and securing possession. This is not new for the reason that even in Ex.P1 and Ex.P5 agreements, it is specifically mentioned that the defendant has to vacate the existing occupant/encroacher at her own cost and risk. Only after knowing that there are occupants in the property, the

defendant entered into Ex.P1 and Ex.P5 sale agreements. It is also clear that the possession of the property was handed over to the defendant even in the year 1998 and construction was started and going on when Ex.P1 sale agreement was entered into.

23. It is relevant to refer to the oral evidence of P.W.1 and P.W.2 to know why Ex.P5 sale agreement was not acted in full.

24. P.W.1 and D.W.1 have reiterated their pleadings in their proof affidavit. During the course of cross examination, P.W.1 admitted that he is an Advocate and in the suit filed by Ananthaiah, he claimed that the construction in the suit property put up by the defendant was unauthorised and illegal construction. When he asked the defendant to stop the construction, he was told that the construction was put up for protecting the property. Defendant instilled confidence that the sale would be completed sooner or later and therefore, he did not take any legal action for demolishing the construction. It is his evidence that the ground plus three floor construction was completed in 1998 - 1999. When Ex.P5 sale agreement was executed, the building was already there. Ex.P5 agreement was made at the instance of the defendant's husband to avoid stamp duty and

penalty. He denied receiving Rs.15,00,000/- for the sale of Ex.P12 undivided property. When his attention was brought to the clause in Ex.P5 agreement that the defendant can construct building at her cost, if she wishes, he claimed that he had not given any permission for putting a construction.

25. D.W.1 admitted that Ex.P1 and Ex.P5 are the true agreements and the recitals found in these agreements are true and correct. He stated that he did not remember when the defendant applied for plan approval and so far CMDA has not given any sanction. He admitted that there is a recital in Ex.P1 agreement that defendant has been putting up construction in the property at her own risk and cost. His wife is the proprietrix of Malliga Jewellery. He admitted that defendant sought extension of time of nine months as stated in Ex.P1 and time was considered as essence of the contract as per Ex.P1. He has no records to show that interest at the rate of 15,000/- was paid from May 1999 to the plaintiff as per Ex.P1 agreement. He admitted that it is not mentioned in Ex.P1 that defendant had been constructing the building in the suit property from 1997 and that defendant was constructing building and compound wall at her own risk and costs. Almost he admitted each and every terms of Ex.P1 sale agreement during

the course of his cross-examination. Since he was undergoing treatment for injuries sustained in the accident, he stated that, he could not receive Ex.P2 notice. Similarly he had also admitted the terms of Ex.P5 sale agreement with regard to the sale consideration of Rs.30,00,000/-, payment of Rs.3,00,000/- as advance, execution of sale deed in respect of undivided share, on payment of Rs.3,00,000/- within three days from the date of sale agreement etc.

26. When he was asked about the terms of the contract with regard to the purchase of other 50% of the property, he admitted that there is a clause that defendant has to pay Rs.3,00,000/- within three months from Ex.P5 and pay Rs.2,00,000/- either in cash or give jewelleries worth Rs.2,00,000/- before the registration of sale deed for the remaining 50% of the property. He admitted that balance Rs.19,00,000/- should be paid in instalment at Rs.30,000/- per month. He admitted that no such amount was paid and no receipt was obtained for payment of the amount. He also admitted that there is a clause to pay Rs.10,000/- per month to the plaintiff by the defendant till the payment of Rs.19,00,000/- is over. However, defendant has not produced any evidence to show that the payment of Rs.3,00,000/- and Rs.2,00,000/- or giving jewelleries worth Rs.2,00,000/-,

payment of Rs.19,00,000/- in instalments at Rs.30,000/- per month, payment of Rs.10,000/- per month towards expenses.

27. He admitted that Ex.P12 sale relates to undivided half share of total extent of 2846 sqft. Though he claimed that Rs.90,000/- was paid at the rate of Rs.30,000/- per month for three months, there is no evidence produced in support of this claim. As already stated, when he was asked as to whether he sent any notice from 2001 to till the date of filing a suit in O.S.No.706 of 2003 to the plaintiff calling upon her to receive the balance sale price and execute the sale deed in respect of the remaining undivided half share, he replied that he did not issue a legal notice, but orally defendant insisted the plaintiff. He admitted that the sale consideration was shown in Ex.P12 sale deed less than the guideline value and if any income tax problem is faced by plaintiff, defendant would bear the expenses. It is his evidence that a sum of Rs.10,60,000/- out of Rs.15,00,000/- was paid at the time of Ex.P12 sale deed. He also stated that he has not obtained any receipt for the payment of Rs.10,60,000/-. He has not also obtained any endorsement in Ex.P5 agreement with regard to the payment of Rs.10,60,000/-. He clearly admitted that so far no sale deed had been registered in favour of the defendant for the remaining half share.

28. From the careful analysis of the oral and documentary evidence, one thing which is clearly proved is that defendant has not paid any amount in respect of the remaining half portion of the suit property covered in Ex.P5 for the completion of sale. Therefore, plaintiff's possession in respect of the remaining undivided half portion is only in the capacity of an agreement holder. C.S.No.381 of 2015 is filed for partition of the remaining of 50% of the suit property. In the considered view of the Court, the plaintiffs are entitled for the relief of partition and other reliefs prayed in C.S.No.381 of 2015. The objection raised by the learned counsel for the defendant that the suit in C.S.No.381 of 2015 is barred under Order II Rule 2 C.P.C. cannot be accepted for the reason that when the earlier suit in C.S.No.706 of 2003 was filed, the cause of action for filing the suit for partition did not arise for the reason that the monthly instalment in terms of Ex.P5 sale agreement towards Rs.19,00,000/- has to be paid over a period spanning five years. Therefore, when there was no cause of action arose in 2003, for claiming partition, this Court is of the considered view that the suit filed in C.S.No.381 of 2015 is not barred under Order II Rule 2 C.P.C. Therefore, this Court is of the considered view that plaintiffs are entitled for the relief of partition and damages as claimed in C.S.No.381 of 2015.

29. So far as the claim of Rs.24,00,000/- in the plaint, now restricted to Rs.9,00,000/- by the plaintiffs during the course of argument, this Court is of the considered view that both the plaintiffs and defendant had shown value of the property as Rs.3,00,000/- in Ex.P12, less than the guideline value for the purpose of avoiding stamp duty, capital gain tax and income tax. Deceased first plaintiff is also a party to this fraudulent activity. He had not approached this Court with clean hands and therefore, this Court finds that plaintiffs are not entitled for recovery of money claimed in C.S.No.706 of 2003.

30. For the reasons stated above, this Court finds that there are suppression of material facts by the plaintiff and there was an intention to cheat the Government in the payment of taxes and dues due to the Government and therefore plaintiff is not entitled for recovery of any money as claimed in the plaint. Thus, issue Nos.1 to 3 in C.S.No.706 of 2003 are answered.

31. Issue Nos.1 and 3 in C.S.No.381 of 2015 are overlapping. However, this Court finds that the suit for partition is maintainable for issue Nos.1 and 3.

32. When Ex.P5 agreement was executed, there was already a ground plus three floor building in the suit property and therefore, the permission granted in Ex.P5 is not at all a valid permission. Under Ex.P1, there was no express permission granted to the defendant to construct the building. It was made clear that defendant was putting up construction at her own risk and cost. Thus, issue Nos.4 and 5 are answered.

33. The suit is not barred under Order II Rule 2 C.P.C. and the defendant is not entitled for protection under Section 53(A) of Transfer of Property Act for the reason that defendant has not performed his part of the contract by paying the sale consideration and complete the sale in respect of balance 50% of the suit properties. Thus, issue Nos.2 and 6 are answered.

Issue No.4 in C.S.No.706 of 2003
and
Issue Nos.7 and 8 in C.S.No.381 0f 2015

34. Plaintiff is entitled for the relief of partition and separate possession of undivided half share in the suit property and for past damages of Rs.73,000/- from 01.11.2014 to 12.01.2015 and future damages for use and occupation. The claim of future damages is relegated to an enquiry

under Order XX Rule 12 C.P.C. C.S.No.381 of 2015 is decreed with costs of the plaintiffs. C.S.No.706 of 2003 is dismissed without costs.

35. In the result,

(i) C.S.No.706 of 2003 is dismissed without costs.

(ii) Plaintiffs in C.S.No.706 of 2003 are not entitled for recovery of any money as claimed in the plaint.

(iii) C.S.No.381 of 2015 is decreed with costs of the plaintiffs.

(iv) Plaintiffs in C.S.No.381 of 2015 are entitled for partition and separate possession of half share in the suit property.

(v) Plaintiffs in C.S.No.381 of 2015 are also entitled for past damages of Rs.73,000/- (Rupees seventy three thousand only) from 01.11.2014 to 12.01.2015 and future damages for use and occupation.

(vi) The claim of future damages is relegated to an enquiry under Order XX Rule 12 C.P.C.

ep/mra **.01.2023**

<u>List of Witnesses examined on the side of the plaintiffs:-</u>

A.N.Viswanatha Rao (PW1)

<u>List of Exhibits marked on the side of the plaintiff:-</u>

Exhibits	Dated	Description
Ex.P1	07.05.1999	Original Sale agreement between plaintiff and the defendant
Ex.P2	19.05.2000	Copy of notice sent by A.N.Viswanatha Rao to defendant
Ex.P3	19.05.2000	Original returned cover sent by registered post with acknowledgment due
Ex.P4	19.05.2000	Original receipt of certificate of posting
Ex.P5	14.03.2001	Original Sale agreement between plaintiff and the defendant
Ex.P6	17.02.2003	The office copy of the lawyer's notice with registration receipt.
Ex.P7	17.02.2003	Original returned cover with RPAD
Ex.P8	17.02.2003	Original returned cover sent by courier.
Ex.P9	28.10.2014	Copy of Lawyer's notice
Ex.P10	12.11.2014	Original Postal acknowledgment card signed by defendant
Ex.P11	19.11.2014	Original reply notice by defendant's counsel to the plaintiff's counsel
Ex.P12	14.03.2001	Certified copy of the registered sale deed executed by A.N.Viswanatha Rao and his son in favour of the defendant.
Ex.P13	17.02.2003	Original Advocate notice sent by certificate of posting

<u>List of Witnesses examined on the side of the Defendant:-</u>

V.P.R.Ramesh (D.W.1)

List of Exhibits marked on the side of the defendant:-

Exhibits	Date	Description
Ex.D1	29.10.1997	Certified copy of judgment in S.A.No.1002 of 1989 on the file of this Court
Ex.D2	-	Original letter given by F.A.Odilia

23.01.2023

ep/mra

Index:Yes/No
Speaking Order: Yes/No

To

The Section Officer,
VR Section,
High Court of Madras.

G.CHANDRASEKHARAN.J.,

ep/mra

**Judgment in
C.S.No.706 of 2003
& C.S.No.381 of 2015**

23.01.2023