



S.A.No.530 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.10.2023

CORAM

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

S.A.No.530 of 2017

Parasuraman

... Appellant

VS.

1.Selvi

2.Sivagami

3.Dhanam

4.Sagundala

5.Anjalai

6.Renuga

... Respondents

PRAYER: Second Appeal is filed under Section 100 of Civil Procedure Code, to set aside the Judgment and Decree dated 15.02.2017 made in A.S.No.27 of 2010 on the file of the Court of the Subordinate Judge at Kanchipuram in confirming the Judgment and Decree dated 08.02.2010 made in O.S.No.3 of 2006 on the file of the Court of the District Munsif cum Judicial Magistrate at Uthiramerur.



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For Appellant : Mr.Y.Jyothish Chander

For Respondents : Refused

J U D G E M E N T

The 1st defendant is the appellant. The husband of the 1st respondent and father of the respondents 2 to 6 namely Perumal filed a suit for declaration of title and recovery of possession. The suit was decreed by the Trial Court and the appeal filed by the appellant was also dismissed. Hence, the appellant is before this Court.

2. According to the respondents, the suit property was purchased by the above said Perumal on 15.07.1976. After purchase, the father of the respondents 2 to 6 enjoyed the property and constructed a terraced house in the suit property in the year 1980. The appellant and the other defendant in the suit tried to interfere with the possession of the respondents based on a sale agreement allegedly executed by the said Perumal. Hence, initially the respondents' predecessor Perumal filed a suit for bare injunction against the appellant and other defendant. During the pendency of the suit, the



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defendants said to have trespassed into the suit property and hence, the suit prayer was amended by seeking declaration of title and recovery of possession.

3. The appellant herein filed a written statement and claimed that the suit property was purchased out of joint family funds in the name of elder Member namely Perumal. After purchase, there was a oral partition between father of the appellant-Ethiraj and said Perumal. The southern portion of the suit property was allotted to the share of respondents' predecessor Perumal and northern portion was allotted to the share of appellant's father Ethiraj. The Government also issued patta in the name of appellant's father by recognising his possession of half share. After death of the appellant's father, he has been in possession and enjoyment of the suit property. It is further alleged by the appellant that Perumal executed a Sale Agreement in favour of the appellant on 20.09.1993 agreed to convey his half share in the suit property in favour of the appellant for a sale consideration of Rs.3,000/- by receiving an advance of Rs.2,500/-. On the date of agreement, possession was handed over to the appellant. Thereafter, the balance sale consideration of Rs.500/- was also paid to the said Perumal. The above said Perumal



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executed a fresh Sale Agreement on 27.05.1996 acknowledging the receipt of entire sale consideration and agreed to execute the sale deed as and when called upon by the appellant.

4. It is further averred by the appellant that he has been in possession and enjoyment of the suit property from 20.09.1993 onwards and though he was always ready and willing to get the sale deed executed and the same was evaded by said Perumal by one reason and other. Since the appellant has been in possession and enjoyment of the suit property pursuant to the sale agreement, he constructed a terraced house in the suit property in the year 1997. The appellant also obtained electricity service connection to the building put by him and he has been paying electricity charges to the Board regularly. The appellant also claimed that by virtue of his possession pursuant to oral partition and sale agreement, he has prescribed title over the suit property by way of adverse possession and as a consequence, sought for dismissal of the suit.

5. Before the Trial Court, the 1st respondent/wife of the above said Perumal was examined as PW.1 and 4 documents were marked on behalf of



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the respondents as Exs.A1 to A4. The appellant was examined as DW.1 and attestor to the Sale Agreement executed by Perumal in favour of the appellant was examined as DW.2. The appellant marked 19 documents in support of his claim of possession over the suit property and the same were marked as Exs.B1 to B19.

6. The Trial Court on appreciation of oral and documentary evidences available on record, came to the conclusion that respondents are entitled to title of the suit property under Ex.A1-Sale Deed executed in favour of Perumal. As far as the defence raised by the appellant that he was put in possession of suit property under Sale Agreement is concerned, the Trial Court said the appellant failed to prove his readiness and willingness to perform his part of the contract and hence, decreed the suit for declaration and recovery of possession as prayed for.

7. Aggrieved by the same, the appellant has preferred an appeal in A.S.No.27 of 2010. The First Appellate Court concurred with the findings of the Trial Court and dismissed the appeal. Aggrieved by the same, the unsuccessful 1st defendant is before this Court.



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8. The learned counsel appearing for the appellant tried to assail the judgment and decree of the Courts below on the ground that the possession of the suit property was handed over to the appellant under Ex.B2-Sale Agreement and therefore, he has been in possession and enjoyment of the suit property in part performance of the Sale Agreement. The learned counsel further submitted that though the registered Sale Agreement has not been executed in his favour in pursuance of the Sale Agreement, the same can be used as a shield in a suit for recovery of possession. In this regard, the learned counsel relied on the judgment of the Hon'ble Apex Court in ***Shrimant Shamrao Suryavanshi vs. Pralhad Bhairoba Suryavanshi*** reported in ***(2002) 3 SCC 676***.

9. Based on the submission made by the learned counsel appearing for the appellant, the following substantial question of law is framed for consideration:-

“Whether an agreement vendee in possession of property in part performance of sale agreement is entitled to use the same as a shield in a suit for recovery of possession?”

10. Though notice was sent to the respondents, they refused to receive



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notice and hence, it was treated as deemed to service and the names of the respondents are printed in the cause-list. There is no representation for the respondents.

11. It is admitted case that the suit property was purchased in the name of Perumal under whom the respondents are claiming title. It is specific case of the appellant that the suit property was purchased out of joint family funds and subsequent to the purchase, the property was orally divided between the Perumal and father of the appellant namely Ethiraj. It is specific case of the appellant that after purchase in the name of Perumal, there was a partition and Northern half portion was allotted to the share of Perumal and Southern half portion was allotted to the father of the appellant. Thus, each entitled to 4 ½ cents in the suit property. The said fact has been referred to in the sale agreement between Perumal and appellant, which is marked as Ex.B2. Though respondents denied execution of Ex.B2-Sale Agreement. The appellant examined one of the attessor to the document as DW.2 and proved the execution.

12. When Ex.B2-Sale Agreement was shown to 1st respondent, who



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was examined as PW.1, she could not say whether the signature found in sale agreement was that of her husband or not. She has gone to the extent of saying that she did not know her own signature and also that of her husband. PW.1 also admitted that DW.2, who was examined on behalf of the appellant was President of the Panchayat at that point of time. She further admitted there was no enmity between her family and DW.2. Therefore, the appellant has succeeded in proving due execution of Ex.B2-Sale Agreement.

13. In Ex.B2-Sale Agreement, there is a clear recital that after purchase of the suit property in the name of Perumal, he and his brother Ethiraj namely father of the appellant enjoyed the property. Further, it was also recited in the sale agreement that Perumal agreed to sell his 1/2 share in the property in favour of the appellant. The recital in Ex.B2 that Perumal agreed to convey his 1/2 share in the property in favour of the appellant supports the case of oral partition pleaded by the appellant. Ex.B2 also recites that the entire sale consideration of Rs.3,000/- was paid by the appellant to Perumal and possession of the suit property was also handed over to the appellant under the Sale Agreement. The relevant recital in



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Ex.B2-Sale Agreement reads as follows:-

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“... .. ஆக கிரயத்தொகை மூலாயிரமும் நான் பூராவும் பெற்றுக்கொண்டபடியால் நீ எப்போது வேண்டுமானாலும் கிரயப்பத்திரம் எழுதி பதிவு செய்துக்கொள்ளவும். உன்னால் இயலாமல் போனால் இதன்படிக்கு நீ சகல விதமானப்பாத்தியங்களுடன் ஆண்டு அனுபவித்துக்கொள்ளவேண்டியது.”

Therefore, it is clear that the appellant paid the entire sale consideration and he was also given possession under the sale agreement.

14. In the case on hand, Ex.B2 is a written agreement of sale. Under the agreement, the possession of the property was handed over to the appellant, there is a recital in the sale agreement that entire sale consideration has been paid by the appellant to the respondents. Therefore, all essential ingredients of Section 53A of the Transfer of Property Act, 1882 are duly complied and hence, the appellant is entitled to use his possession as shield against the transferor or any persons claiming under him.



15. In ***Shrimant Shamrao Suryavanshi vs. Pralhad Bhairoba***

Suryavanshi reported in (2002) 3 SCC 676, the Hon'ble Apex Court while considering the question, observed as follows:-

“20. It is, therefore, manifest that the Limitation Act does not extinguish a defence, but only bars the remedy. Since the period of limitation bars a suit for specific performance of a contract, if brought after the period of limitation, it is open to defendant in a suit for recovery of possession brought by a transferor to take a plea in defence of part-performance of the contract to protect his possession, though he may not be able to enforce that right through a suit or action.

(emphasis supplied)

21. In the present case, it is not disputed that the transferee has taken possession over the property in part-performance of the contract. It is also not disputed that the transferee has not brought any suit for specific performance of the agreement to sell within the period of limitation. It is also not disputed that the transferee was always and is still ready and willing to perform his part of the contract. Further, the view taken by the High Court in judgment under appeal was overruled by the Full Bench of the Bombay High Court in the case of Mahadeo Nthuji Patil v. Surjabai Khushalchand



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Lakkad which, according to our view, lays down the correct view of law. In that view of the matter these appeals deserve to be allowed.”

16. The appellant failed to seek specific performance of the agreement by filing the suit within the time stipulated by law. As per the law laid down by the Hon'ble Apex Court in the above mentioned judgment, even if the suit for specific performance is barred by limitation, still a person, who is in possession of the property in part performance of the sale agreement is entitled to use the same as shield in a suit for recovery of possession filed by the transferor under the agreement or any other person claiming under him. The law laid down by the Hon'ble Apex Court in the above said case, is squarely applicable to the facts of the present case. Hence, the relief of recovery of possession granted by the Court below is liable to be set aside. Accordingly, the question of law framed is answered in favour of appellant.

17. Though the respondents able to establish their title under Ex.A1-



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Sale Deed in favour of Perumal, in view of the law laid down by the Hon'ble Apex Court in the above mentioned case law, they are not entitled to recover the possession from the appellant. Hence, the judgment and decree passed by the Courts below is partly set aside with regard to relief of recovery of possession.

18. Accordingly, the second appeal is partly allowed by setting aside the judgment and decree passed by the Courts below in respect of relief of recovery of possession. In other respects, the judgment and decree passed by the Courts below is confirmed.

In Nutshell:-

(a) The second appeal is partly allowed.

(b) The judgment and decree passed by the Courts below in respect of relief of recovery of possession is set aside and the suit is dismissed in respect of relief of recovery of possession.



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(c) In respect of other relief, the judgment and decree passed by the

Courts below are confirmed.

(d) In the facts and circumstances of the case, there will be no order

as to costs.

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Index : Yes/No
Speaking order : Yes/No
Neutral Citation : Yes/No
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To

1.The Subordinate Judge,
Kanchipuram.

2.The District Munsif cum Judicial Magistrate,
Uthiramerur.



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S.SOUNTHAR, J.

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