



S.A.(MD).No.57 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved on : 20.02.2023

Pronounced on : 27.02.2023

CORAM

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

S.A.(MD).No.57 of 2023
and
C.M.P.(MD).No.1638 of 2023

1.Samayammal

2.Baskar

3.Uthirapathy

4.Indiragandhi

... Appellants/ Appellants 1, 2, 4 & 5/
Defendants 1, 2, 4 & 5

Vs.

1.Senthilkumar

... Respondent / Respondent / Plaintiff

2.Mayilvahanan

... Respondent / 3rd Appellant / 3rd Defendant

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, to set aside the judgment and decree dated 21.03.2022 made in A.S.No.65 of 2018 on the file of the Principal Subordinate Court, Kumbakonam confirming the judgment and decree dated 03.07.2018 made in O.S.No.503 of 2015 on the file of the Principal District Munsif, Kumbakonam and dismiss the suit in toto.



WEB COPY



S.A.(MD).No.57 of 2023

For Appellants : Mr.Raguvaran Gopalan
For R-1 : Mr.K.Govindarajan
for Mr.S.Ponsenthilkumaran

JUDGMENT

The defendants are the appellants before us. The first respondent/plaintiff had filed the suit for recovery of possession from the appellants/defendants.

2. It is the case of the plaintiff that the suit schedule property belonged to one Habib Mohammed. He had executed a mortgage in favour of Mahalingam, the father of the appellants herein. The said Habib Mohammed had handed over possession at the time of execution of the said mortgage deed. While so, the said Mahalingam and the second defendant/second appellant herein entered into an agreement of sale with the said Habib Mohammed and thereafter, were in possession of the property. After the demise of the said Habib Mohammed, his legal heirs interfered with the possession of the suit schedule property. The appellants were in possession after the demise of their father, Mahalingam. Hence, the appellants filed a suit in O.S.No.23 of 2008 before the learned Principal District Munsif, Kumbakonam for permanent injunction restraining the legal heirs of the said Habib Mohammed from interfering with their



S.A.(MD).No.57 of 2023

possession. The said suit was decreed on 29.06.2011. Thereafter, the plaintiff/first respondent herein purchased the suit schedule property from the legal heirs of the said Habib Mohammed on 29.08.2011 by a registered sale deed. The first respondent thereafter filed O.S.No.252 of 2012 before the learned District Munsif, Kumbakonam against the appellants herein praying for injunction restraining them from interfering with his possession. The said suit was dismissed on 14.09.2015. The first respondent/plaintiff therefore filed the suit, which is the subject matter of this Second Appeal, for recovery of possession since there are two judgments before the learned District Munsif, Kumbakonam holding that the appellants/defendants are in possession of the property.

3. The appellants/defendants filed a written statement stating that they are in possession of the property pursuant to a mortgage deed executed by one Habib Mohammed in favour of their father, wherein, the said Habib Mohammed had handed over possession to the father of the appellants. Thereafter, the father of the appellants along with the second appellant had entered into an agreement of sale with the said Habib Mohammed on 16.08.1995 and their father was put in possession and they are entitled to protection under Section 53 A of the Transfer of Property Act. The appellants



S.A.(MD).No.57 of 2023

also claimed that in view of the finding in the two suits that they are in possession of the suit schedule property, the present suit was barred by *res judicata*. The appellants had also claimed that they had perfected title by adverse possession since their father and thereafter, after his demise, they have been in continuous, open and uninterrupted possession of the suit property since 1995.

4. Before the Trial Court, the first respondent/plaintiff examined himself as P.W.1 and marked exhibits A1 to A7. The fourth defendant/third appellant examined himself as D.W.1 and one Soundirarajan as D.W.2 on the side of the appellants/defendants. The judgment in O.S.No.23 of 2008 was marked as Ex.B1. The Trial Court held that the finding in the two suits mentioned by the appellants would not operate as *res judicata*, since both the suits dealt with a case of bare injunction and did not relate to recovery of possession. In fact, the earlier finding only established that the possession was with the appellants and did not go into the question of whether the first respondent is entitled for recovery of possession. The Trial Court further found that the appellants had not established the case of adverse possession. The appellants had claimed in their earlier suits that they were put in possession pursuant to a sale agreement and hence their stand that they had perfected title by adverse possession cannot



S.A.(MD).No.57 of 2023

be accepted. Further, the Trial Court found that since the appellants had not taken any steps to file a suit for specific performance, the agreement stands terminated and their possession is no longer protected under Section 53 A of the Transfer of Property Act. The Trial Court therefore held that the first respondent/plaintiff was entitled to recovery of possession from the appellants/defendants. However, the Court below had negated the first respondent's claim for compensation.

5. The appellants/defendants had challenged the said judgment before the Principal Subordinate Court, Kumbakonam in A.S.No.65 of 2018. The first Appellate Court had framed five points for consideration. The Appellate Court held that the first respondent/plaintiff had purchased the suit property from the legal heirs of the original owner, Mr.Habib Mohammed and held that the appellants have not established their case. In fact, the appellants had filed a suit stating that the said Habib Mohammed and his legal heirs, who are the predecessors in title of the first respondent/plaintiff, were disturbing the appellants' possession. Therefore, it cannot be held that the appellants were in continuous, uninterrupted possession hostile to the owner. The Appellate Court further found that the appellants' claim that they are in possession pursuant to the agreement dated 16.08.1995 cannot be accepted. The appellants have not



S.A.(MD).No.57 of 2023

come forward to pay the balance sale consideration and call upon the legal heirs of the said Habib Mohammed for execution of the sale deed. Therefore, the Appellate Court found that the appellants cannot claim right to be in possession on the basis of the agreement which was not sought to be enforced by the appellants.

6. (i) Mr.Raguvaran Gopalan, learned counsel for the appellants submitted that a suit for recovery of possession cannot be maintained against the appellants for two reasons:

a) The suit is barred by *res judicata*. In both suits in O.S.No.23 of 2008 and in O.S.No.252 of 2012, it has been held that the appellants were in lawful possession of the suit schedule property pursuant to the agreement in the year 1995 and therefore, the suit for recovery of possession is barred by *res judicata*.

b) Since the appellants had continued to be in possession of the suit property in part performance of the agreement dated 16.08.1995, the first respondent who claims under the legal heirs of Habib Mohammed, is debarred from enforcing against the appellants any right in respect of the property including suit for recovery of possession.



S.A.(MD).No.57 of 2023

(ii) The learned counsel for the appellants relied upon the following decisions:

a) judgment of the Hon'ble Supreme Court in the case of *Thakamma Mathew Vs. M.Azamathulla Khan and others* reported in *1993 Supp (4) SCC 492*,

b) judgment of the Full Bench of Bombay High Court in the case of *Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad and others* reported in *1994 Mh.L.J 1145* and

c) judgment of the Hon'ble Supreme Court in the case of *Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi and others* reported in *(2002) 3 SCC 676*

in support of his submission that where the transferee in part performance of the agreement of sale is in possession, it is open to him in a suit for recovery of possession to take a plea that his possession is protected under Section 53 A of the Transfer of property Act.

(iii) The learned counsel also relied upon the judgments of the Hon'ble Supreme Court in the case of *V.Rajeshwari Vs. T.C.Saravanabava* reported in *(2004) 1 SCC 551* and *Sulochana Amma Vs. Narayanan Nair* reported in *(1994) 2 SCC 14* in support of his submission that the decree of the Court



S.A.(MD).No.57 of 2023

based on equitable relief of injunction would operate as *res judicata* in a later suit for title between the same parties.

7. Mr.K.Govindarajan, learned counsel for the first respondent/Caveator submitted that the finding on facts of the Courts below are correct in law and there is no reason to interfere with those factual findings. No question of law has been raised in the above appeal. The appellants claimed that they continued to be in possession pursuant to the sale agreement and that they are entitled to protection under Section 53 A of the Transfer of Property Act. They have not established that there was a written agreement and that pursuant to the written agreement, they continued to be in possession. The said agreement was not marked by the appellants. The appellants have therefore not fulfilled the conditions required to get protection under Section 53 A of the Transfer of Property Act. Only the terms of written agreement would show that whether the appellants continued to be in possession pursuant to the sale agreement. It is their case that their father was put in possession even before the sale agreement pursuant to the mortgage executed by the said Habib Mohammed, who is the predecessor in title of the first respondent. When that being the case, in order to claim protection under Section 53 A of the Transfer of Property Act, the terms of the agreement which has to be in writing has to be established.



S.A.(MD).No.57 of 2023

Further, the finding in the earlier suits is that the appellants are in possession.

Those findings cannot bar a suit for recovery of possession, if the first respondent is otherwise entitled to recovery of possession. The issues involved in the earlier suits and in the instant suit are totally different. In fact, the first respondent accepts the finding of the earlier suits that the appellants are in possession and has accordingly prayed for recovery of possession. This suit therefore cannot be said to be barred by *res judicata* by any stretch of imagination.

8. Heard the learned counsel for the appellants and the learned counsel for the first respondent and perused the judgments of the Courts below and other records.

9. The admitted facts are that the appellants herein had filed a suit in O.S.No.23 of 2008 on the file of the learned Principal District Munsif, Kumbakonam for permanent injunction against the predecessors in title of the first respondent herein. In the said suit, there is a finding that the appellants are in possession of the property pursuant to the sale agreement entered into between the father of the appellants and the father of the first respondent's predecessors in title. There is also a finding that they are entitled to protection



10. It is the contention of the learned counsel for the appellants that this finding would operate as *res judicata* and no suit can be maintained against a person who is in possession of the suit schedule property pursuant to a sale agreement in view of Section 53 A of the Transfer of Property Act. It is the case of the appellants that since the character of possession has been affirmed in two suits, the possession of the appellants has to be protected under Section 53 A of the Transfer of Property Act. Since the nature and character of possession was directly and substantially in issue in the earlier suits, the Courts below erred in rendering a contrary finding. In any event, the suit itself is barred by principles of *res judicata*. The questions therefore are whether the suit filed by the first respondent/plaintiff for recovery of possession is barred by



S.A.(MD).No.57 of 2023

res judicata and as to whether the first respondent/plaintiff is entitled for recovery of possession when the appellants' possession is protected under Section 53 A of the Transfer of Property Act.

11. The Hon'ble Supreme Court in the case of ***Shrimant Shamrao Suryavanshi and another Vs. Pralhad Bhairoba Suryavanshi and others*** reported in **(2002) 3 SCC 676** held that the following conditions have to be established in order to claim the protection under Section 53 A of the Transfer of Property Act. The relevant portion of the judgment is extracted hereunder:

“16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:

(1) there must be a contract to transfer for consideration of any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;

(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;

(5) the transferee must have done some act in furtherance of the contract; and



S.A.(MD).No.57 of 2023

(6) the transferee must have performed or be willing to perform his part of the contract."

WEB COPY

12. In the instant case, we find that the appellants have claimed that originally the appellants' father was put in possession by virtue of a mortgage deed executed by one Habib Mohammed, who is the father of the first respondent's predecessors in title. Thereafter, the appellants' father continued to be in possession in part performance of the agreement dated 16.08.1995. The main condition to claim protection under Section 53 A is that there must be a contract and that contract must be in writing. But in the instant case, the appellants who claimed to be in possession in part performance of the contract have not produced the said contract, namely, the agreement dated 16.08.1995, before the Courts below. In the absence of a written contract, the appellants cannot claim the benefit of Section 53 A of the Transfer of Property Act. Since the contract has not been proved to be in writing, the essential condition for claiming the protection under Section 53 A of the Transfer of property Act has not been fulfilled. It is only the terms of the contract that would determine whether the appellants' father continued to be in possession in part performance of the sale agreement. In the absence of the said written contract, the Courts cannot infer that the appellants are in possession in part performance of the contract. That apart, we find that there is nothing to suggest that the appellants



S.A.(MD).No.57 of 2023

were ready and willing to perform their part of the contract. In view of the fact that the appellants have not established that they are entitled for protection under Section 53 A of the Transfer of Property Act, the first respondent can claim recovery of possession based on the fact that he is the owner of the suit schedule property.

13. As regards the contention that the findings of the Courts would operate as *res judicata*, this Court is of the view that the observations made in the earlier judgments were made in suits for permanent injunction. Primarily, the Court was concerned whether the possession was lawful or illegal. In that context, the Court found that the appellants were in possession pursuant to a sale agreement entered into between the father of the appellants and the father of the first respondent's predecessors in title. The question as to whether the appellants had fulfilled the conditions under Section 53 A of the Transfer of Property Act to protect their possession was not directly and substantially the issue before the Court in the two suits. The issue was whether their possession was legal. That apart, the observations of the Court in the earlier suits were not based on the agreement as such. The agreement dated 16.08.1995 was not marked in the earlier suits as well. Therefore, this Court is of the view that the findings rendered in a suit for permanent injunction where the question was



S.A.(MD).No.57 of 2023

whether the appellants were in lawful possession or not would not operate as *res judicata* in a suit for recovery of possession where the nature and character of possession and whether the appellants are entitled to protection under Section 53 A of the Transfer of Property Act to defend their possession is directly in issue.

14. In view of the above, we find that this is a case of a factual dispute as to whether the appellants have established the conditions to invoke protection under Section 53 A of the Transfer of Property Act and both the Courts below have found that they have not fulfilled the conditions. This Court also finds no infirmity in those factual findings. Thus, there is no question of law much less a substantial question of law in the above Second Appeal. Hence, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

27.02.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No
Lm



S.A.(MD).No.57 of 2023

To

- 1.The Principal Subordinate Court,
Kumbakonam.
- 2.The Principal District Munsif,
Kumbakonam.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



S.A.(MD).No.57 of 2023

SUNDER MOHAN, J.

Lm

Judgment made in
S.A.(MD).No.57 of 2023

27.02.2023