IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HONOURABLE **MR.JUSTICE RMT.TEEKAA RAMAN**

A.S.Nos.876 of 2008 and 1062 of 2012

Judgment reserved on 28.03.2024	Judgment pronounced on 06.06.2024

1.Saraswathy
2.N.Velumani
3.Minor Nithish Kumar
Rep.by his Natural Guardian and father,
N.Velumani
4.Minor Saran Priya
Rep.by his Natural Guardian and father,
N.Velumani. ... Appellants in A.S.No.876 of 2008

N.Manoharan ... Appellant in A.S.No.1062 of 2012

Vs.

N.Manoharan ... Respondent in A.S.No.876 of 2008

1.Saraswathy
2.N.Velumani
3.Minor Nithish Kumar
4.Minor Saran Priya
Minors 3 and 4 rep.by their Guardian
and natural father N.Velumani ... Respondents in A.S.No.1062 of 2012

Common Prayer: These Appeals are filed under Section 96 of Code of Civil

Procedure, against the common judgment and decree dated 31.03.2008 made in O.S.No.296 of 2005 on the file of the Additional District cum Sessions Court / Fast Track Court No.2, Coimbatore.

A.S.No.876 of 2008:-

For Appellants : Mr.T.M.Hariharan
For Respondent : Mr.M.Aravind Subramaniam, Senior Counsel For Mr.K.Madhan Kumar

A.S.No.1062 of 2012:-

For Appellant : Mr.M.Aravind Subramaniam, Senior Counsel For Mr.K.Madhan Kumar
For R1 : Mr.P.Saravan Sowmiyam
For R2 to R4 : Mr.T.M.Hariharan

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COMMON JUDGMENT

The defeated defendants are the appellants herein in A.S.No.876 of 2008.

2. Challenging the grant of the alternative relief in O.S.No.296 of 2005 for the refund of the money decree of Rs.7 lakhs along with 6% interest, the defendants have preferred this appeal.

3. The plaintiff is the appellant herein in A.S.No.1062 of 2012.

4. The plaintiff filed a suit in O.S.No.296 of 2005 on the file of the learned Additional District Judge (Fast Track Court No.II), Coimbatore, seeking the relief of specific performance of the suit sale agreement Ex.A1 and, in the alternative, a refund of the advance amount under Exs.A1 and A2 - receipt.

5. After trial, the learned Judge has rejected the main relief of specific performance and granted the money decree for the refund of the advance amount. Therefore these two appeals have been preferred.

6. For the sake of convenience, the parties are referred to as per their ranking before the trial Court.

7. Parties are referred to as plaintiff - agreement holder and defendants-landlords. The plaintiff - agreement holder,. filed in O.S.No.296 of 2005 before the trial Court for the main relief of specific performance of Ex.A1 sale agreement dated 01.08.2001. The suit was filed on 28.06.2005.

8. The plaint proceeds on the basis that the defendants are the owners of the suit property measuring 2 grounds, 1052 sq.ft, namely 2 cents, 180 sq.ft, in the Uppilipalayam village.

9. The terms of the agreements are the sale consideration fixed at Rs.7 lakhs, Advance paid Rs.1 lakh and time fixed for paying balance amount is one year.

10. The plaint further proceeds that under Ex.A2 dated 31.05.2004, a further payment of Rs.6 lakhs was received by the landlady and possession was delivered and original sale deed Ex.A3 dated 28.10.1957 in favour of the defendant was handed over. Ex.A2 alleged receipts is on the non-judicial stamp paper and not a revenue stamp. Ex.A1 agreement is dated 01.08.2001. Ex.A2 receipt is dated 31.05.2004. Ex.A4 is a legal notice issued by the defendant - land lady terminating Ex.A2 through the legal notice dated 04.06.2005 whereby, he has informed the plaintiff that under Ex.B3, cancelling General Power of Attorney granted in favour of the plaintiff's wife in Ex.A24. On 20.06.2005, plaintiff had issued a legal notice seeking the

specific performance of Ex.A1 agreement marked as Ex.A5. Acknowledgment is Ex.A6.

11. The defendant-landlady has filed a suit in O.S.No.1077 of 2005 for the relief of permanent injunction restraining the plaintiff from suit property. After the trial, it was dismissed, and no appeal has been filed.

12. The trial Court has formulated as many as 4 issues namely:

(i) whether the plaintiff is entitled to the relief of specific performance as prayed for?

(ii) whether the plaintiff is entitled for the alternative relief and

(iii) To what other relief the plaintiff is entitled to?

(iv) Additional issues, namely, whether the alleged receipt dated 31.05.2004 is true and valid, are fabricated as contended by the defendant.

13. The other suit filed by the defendant-landlord for injunction, namely, O.S.No.778 of 2007, was also taken up by the very same District Judge since the suit, parties, and reliefs are connected in nature. A Joint trial

was conducted, and joint evidence has been taken, with evidence in common recorded.

14. During the trial, on behalf of the plaintiffs, P.W.1 to P.W.4 were examined, and Exs.A1 to A28 were marked. On behalf of the defendants, D.W.1 to D.W.3 were examined and Exs.B1 to B9 were marked; and court documents Exs.X1 and X6 were marked and the suit for injunction in O.S.No.778 of 2007 was dismissed. No appeal has been preferred. In the present suit in O.S.No.296 of 2005, the trial Court has partly decreed the alternative relief and rejected the main relief , resulting in two appeals.

15. Based on the grounds of appeal, the learned Senior counsel appearing for the appellant in A.S.No.1062 of 2012 would contend that:

(i) no issues have been framed with regard to the readiness and willingness. The Court below has rendered a finding that the cancellation of the agreement is only after 4 years. This point was not taken into consideration, and the signature of the defendant in Ex.A2 receipt was not disputed, nor any application was filed under Section 73 of the Indian Evidence Act.

(ii) pursuant to the agreement registered as part performance of the sale suit agreement Ex.A1, possession was handed over to him. Ex.A8 to Ex.A17 are the rental agreements for the years 2004, 2005, 2006, 2007 for the three set of people. The receipts issued thereof are marked as Ex.A20. He contends that based on the rental income, he paid a loan of Rs.10,50,000/- to the bank and print the evidence of Ex.D.W.2, Vijayakumar, bank staff.

(iii) The Senior Advocate also mentioned that though the defendant filed another suit in O.S.No.1017 of 2005 for permanent injunction, that suit was dismissed. However, the defendant did not choose to file any appeal. O.S.No.296 of 2005 was filed by the appellant for specific performance. After trial, the Court accepted the payment under Ex.A2, ordered for alternative relief of refund of advance amount of Rs.7,00,000/- with 6% interest, however, denied the main relief of specific performance.

(iv) As against refusal of main relief, A.S.No.1062 of 2012 is filed. As against the grant of alternative relief, the defendant has preferred A.S.No.876 of 2008.

(v) Ex.A24 is a general power of attorney executed by the defendant/owner in favour of the wife of the plaintiff. The said Ex.A24 was cancelled vide Ex.B3 on 03.06.2005. Further, drawing my attention to the pleadings set, the learned Senior counsel would contend that at one stage the defendant has pleaded that the plaintiff had taken the signature in the blank paper and in Ex.A2, but there are no pleadings. However, in the evidence as D.W.1, he could state that no such receipt was executed by him and hence, the evidence of DW1, Velumani is without any pleadings.

(vi) Yet another point, he could agitate is that he had denied the transaction with regard to the balance of the amount in the sense that for some other transaction some receipt has been issued and the same was manipulated for this case. No notice was issued by the defendant before the cancellation of the power of attorney given in favour of the wife of the plaintiff on 03.06.2005. The power of attorney given to wife of the plaintiff is cancelled and on 04.06.2005, the defendant issued a notice terminating Ex.A1, suit sale agreement.

(vii) He also brought my attention to the evidence of D.W.3, the official from Income Tax Department through whom Ex.X5 and Ex.X6 were marked and hence, prayed for grant of main relief.

16. Mr.T.Hariharan, learned counsel appearing for the appellant in

A.S.No.876 of 2008 and the respondents 2 to 4 in A.S.No.1062 of 2012 would contend that the appellant in A.S.No.1062 of 2012 is the plaintiff in O.S.No.296 of 2005. The plaintiff filed a suit for specific performance of the sale agreement. After notice, the defendant filed the written statement, inter alia, alleging that the sale agreement was never intended to be agreement of sale. It was only executed as a security for the amount received. There was an earlier business transaction between the parties and simultaneously, a similar kind of sale agreement was also entered between the parties. The defendant also disputed Ex.A2 receipt on multiple grounds, inter alia, stating that was not revenue stamped but typed on the non-judicial stamp paper purchased three years before, which was next date to the agreement of sale. The defendant also pleaded that power of attorney executed by the defendant in favour of the plaintiff's wife was only by way of security for the money transaction between the parties and the same was cancelled under Ex.B3 general power of attorney. After exchange of pre-suit legal notice under Exs.A4,A5 and A24 General Power of Attorney was executed by the defendant in favour of the wife and also contended that pending the suit, plaintiff has forcibly entered into possession and got the attornment of tenancy from the tenant.

17. The points for determination is that:

(i) Whether the plaintiff is ready and willing to perform his contract?

(ii) Whether the suit is maintainable in the absence of declaratory relief challenging the termination of the suit sale agreement

(iii) Whether the relief of specific performance, the plaintiff is entitled to?

(iv) Whether Ex.A10 is true and valid legally binding as pleaded by the plaintiff or fabricated document as pleaded by the defendant?

(v) Whether the plaintiff is entitled for the main relief?

(vi) Whether the order passed by the trial Court granting alternative relief is sustainable in law?

(vii) To what other relief?

18.After hearing the submissions of the learned Senior Counsel appearing for the appellant in A.S.No.1062 of 2012 and Mr.T.Hariharan, learned counsel for the appellant in A.S.No.876 of 2008, I find that the trial Court has formulated a comprehensive question as to whether the plaintiff is entitled for specific performance of the suit sale agreement wherein had a discussion that whether the plaintiff is ready and willing to perform his part of the contract. A comprehensive point of issue has been framed and specific evidence has been let in evidence by parties and contention raised on that score and court also discussed regarding readiness and willingness on the part of the plaintiff in a separate paragraphs and hence non framing of separate issue as to ready and willing will take the back seat.

19. On re-appreciation of the evidence of P.W.1 and P.W.2, D.W.2 is a court witness through whom Ex.X1 to Ex.X4 were marked (Bank Officer examined on court witness summons) So also D.W.3 is a Income Tax Officer who was examined on the basis of court summons and marked Exs.X5 and X6 which are discussed infra. Ex.A1 is the suit sale agreement dated 01.08.2001 and terms of the agreement are already extracted supra. Ex.A3 is the parent document of the suit property. Under Ex.B3, the power deed given to plaintiff's wife was cancelled by the defendant - landlord on 03.06.2005 following thereby Ex.A4 legal notice was issued by the defendant - landlord on 04.06.2005 whereby the agreement Ex.A1 was terminated. The relief sought for in the suit is for the relief of specific performance of the suit sale

agreement.

20. In this connection, the decision reported in *2013 15 SCC 27 [I.S.Sikandar (Dead) by LRs Vs.K.Subramani and others],* the Hon'ble Supreme Court has held that once the defendant terminated the suit sale agreement in the absence of any permit seeking the declaratory relief that termination of agreement of sale is bad - in - law suit for specific performance is not maintainable.

21. The Hon'ble Supreme Court by relying upon the decision reported in *(2013) 15 Supreme Court Cases 27*, wherein it is further held that once a party to a contract has repudiated the contract, it is not necessary for the other party to tender the amount payable under the contract in the manner provided in the contract in order to successfully claim the specific performance of the contract by placing reliance upon the judgment of this Court in *International Contractors Ltd. V. Prasanta Kumar Sur*, wherein this Court has explained the above legal position.

22. In the instant case, Ex.A1 is suit sale agreement which was basis for the suit for specific performance. Admittedly under Ex.B3 as early as on 03.06.2005, the power deed given to the wife of the plaintiff including power of alienation was terminated and revoked consequent thereto under Ex.A4 and hence in the absence of declaratory relief to challenge the Ex.A4 the present suit for specific performance is not maintainable on the legal issue. On the factual basis, this Court finds that under Ex.A1 suit sale agreement dated 01.08.2001 the period of limitation was fixed as one year. As stated supra, the suit was filed after 28.06.2005, namely after 4 years. No plausible explanation much less any explanation is forthcoming from the plaintiff for the inordinate delay of 4 years and hence, on the point of limitation also, this Court finds that the suit is out of time.

23. The learned counsel for the plaintiff-agreement holder has relied upon Ex.A2 - receipt dated 31.05.2005 for the payment of Rs.6 lakhs.

24. The learned counsel for the defendant-landlord has relied upon the endorsement made in Ex.A2 which is a stamp paper purchased on 02.08.2001 and it is not on the revenue receipt however it is on non judicial paper and

hence would contend that Ex.A2 is a fabricated document for the purpose of this case. In this connection, the plaintiff has relied upon the evidence of P.W.3 and P.W.4 while the defendant has relied upon Court witnesses of D.W.1 and D.W.2 and Ex.X1 to Ex.X5.

25. Admittedly, the defendant-landlord filed a suit for permanent injunction but not filed for recovery of possession and the same was dismissed. No appeal has been filed.

26. The learned counsel for the tenant-agreement holder would contend that the agreement holder is already a tenant and hence he is in possession of the property pursuant to part performance of the agreement. The possession was handed over under Ex.A2 and hence without the relief of recovery of possession, the suit is bad in law.

27. My attention was drawn to Ex.A24 power of attorney executed by the defendant - landlord in favour of the wife of the plaintiff giving power of alienation also which was marked as Ex.A24 dated 01.08.2001 namely the

date of the agreement Ex.A1 and hence Ex.A1 and Ex.A24 came into existence on the very same day.

28. For the reasons best known, Ex.A24 was not mentioned in the plaint. Thus this Court finds that the plaintiff has not pleaded nor even whisper intention in the plaint as well as in the evidence regarding Ex.A2 creates a serious doubt in the mind of the Court. The said power of attorney is by the defendant landlord in favour of the plaintiff wife under Ex.A24 appears to have been cancelled under Ex.B3 on 03.06.2005, followed thereby Ex.A4 legal notice issued by the defendant through his advocate terminating Ex.A1 sale agreement assumes significance.

29. On perusal of the oral evidence of P.W.1 and D.W.1 and Ex.A24 this Court finds that under Ex.A24 the defendants had executed power of attorney in favour of the plaintiffs wife and there is no sufficient explanation on the part of the plaintiff as to why no sale deed was executed by using Ex.A24 after paying the entire sale consideration under Ex.A2 which would create strong suspicion and fatal to the case of the plaintiff.

30(a). It remains to be stated that under Ex.XX2 and XX3 the cheque was issued in favour of N.Ranganathan and G.Senthil Kumar and no evidence had been let in by the plaintiff to substantiate that the money drawn by the said persons was on behalf of the plaintiff and the same was given to the defendants under Ex.A2.

(b) Further the evidence of D.W.2 would clearly establish that under Ex.XX2 and XX3 the money was not given to the plaintiff by the bank.

(c) The evidence of D.W.3 would clearly show that the plaintiff had not mentioned any of the transactions said to have been taken place between the defendants in the income tax accounts, which would prove that the case of the plaintiff is false.

31. It remains to be stated that Ex.A2, it appears that Ex.A2 was in the stamp paper purchased at the time of executing Ex.A1. These vital part of the case has elicited in the cross-examination of P.W.1 appears to be last sight by the trial Court consequently erred in grant of alternative relief of refund.

32. Hence, this Court holds that Ex.A2 is a fabricated document created for the purpose of case by the plaintiff. The plaintiff has not established for

entire consideration has been passed to the defendant under Ex.A2. Furthermore Ex.A2 is not on a revenue stamp but on the non judicial stamp paper whereby alleged that the possession of the property was given by a landlord-defendant. It remains to be stated that as per the evidence of Ex.A1 as a tenant in possession of the property and hence, this Court finds that grant of alternative relief by the trial Court based upon Ex.A2, which is held to be fabricated and for the reasons stated in the preceding paragraphs and hence, I have no hesitation to hold that Ex.A2 is not proved in the manner known to law especially when P.W.3 has admitted that his signature under Ex.A2 differs with that of Ex.B2 and hence the **Appeal Suit No.876 of 2008 filed by the defendant stands allowed.**

33. A.S.No.1062 of 2012 is filed seeking the relief of specific performance of the suit sale agreement. As discussed supra, date of the agreement Ex.A1 is 01.08.2001 and there is no plausible explanation for the inordinate delay of more than 3 years as a suit was filed beyond period of 3 years and that the plaintiff has not expressed any ready and willingness to complete the sale transaction and it is only after cancellation of termination of Ex.A1 under Ex.A4 on 04.06.2005 that 3 years after Ex.A1 by the defendant,

the plaintiff issued Ex.A5 legal notice only on 26.05.2005. For almost 4 years, there was totally silent on the part of the plaintiff assumes significance.

34. Furthermore, as discussed supra, the suit was not filed for the specific performance simplicitor and not challenged the validity of the termination of Ex.A1. In the absence of declaratory relief seeking to declare the termination of suit sale agreement Ex.A1 under Ex.A4 by the defendant, the suit itself is not maintainable.

35. Furthermore, there is a delay of more than 3 years and hence suit is barred by limitation. Furthermore for more than 4 years the plaintiff has not averred that he is ready and willing to perform his contract and there is no positive evidence let in by the plaintiff that he had taken steps to complete the sale transaction and hence, I find he is not ready and willing to perform his part of the contract.

36. Accordingly, the above points are answered against the appellant in

A.S.No.1062 of 2012 and similar finding on a different analysis rendered by the trial Court is hereby confirmed and I find that no reason to interfere with the rejection of the specific performance relief by the trial Court.

37. In the result,

(i) **A.S.No.876 of 2008 is allowed and A.S.No.1062 of 2012 is dismissed.**

(ii) The decree and judgment and O.S.No.296 of 2005 granting the alternative relief to the plaintiff, is hereby set aside. Consequently, O.S.No.296 of 2005 stands dismissed.

(iii) A.S.No.1062 of 2012 challenging the rejection of specific relief by the plaintiff in O.S.No.296 of 2005 dated 31.03.2008 also stands dismissed. In the result, O.S.No.296 of 2005 stands dismissed in entirety.

(iv) There shall be no order as to costs.

06.06.2024

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Index : Yes / No
Neutral Citation : Yes/No

To
1.The Additional District cum Sessions Court / Fast Track Court No.2,

Coimbatore.
2.The Section Officer,VR Section, High Court,Madras.

RMT.TEEKAA RAMAN, J.

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Judgment in
A.S.Nos.876 of 2008 and 1062 of 2012

06.06.2024