



S.A.No.954 of 2012

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.07.2024

PRONOUNCED ON : 19.07.2024

CORAM

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

S.A.No.954 of 2012

M.Gnanasekaran

...

Appellant

Vs.

1.V.Rajendiran
Rep.by Power Agent,
V.Rajasekar.

2.V.Rajamani

...

Respondents

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgment and Decree of the Principal District Judge, Cuddalore, dated 13.07.2012 in A.S.No.21 of 2012, reversing the Judgment and Decree of the 1st Additional Subordinate Court, Cuddalore, dated 09.02.2012, in O.S.No.117 of 2009.

For Appellant	: Mr.D.Ravichander
For R1	: Given up
For R2	: Mr.R.Rajavelavan

JUDGMENT

Challenge in this second appeal is made to the Judgment and Decree dated 13.07.2012, in A.S.No.21 of 2012, on the file of the Principal District



S.A.No.954 of 2012

Court, Cuddalore, reversing the Judgment and Decree dated 09.02.2012, in O.S.No.117 of 2009, on the file of the 1st Additional Subordinate Court, Cuddalore.

2. For the sake of convenience, the parties are referred to as per their rankings in the Trial Court.

3.The case of the plaintiff, in brief, is that the suit property originally belonged to the 2nd defendant, who sold the same to the 1st defendant on 16.05.1996. The 1st defendant executed a registered power of attorney to one Rajasekar, on 30.12.2008, authorizing him to sell the suit property. In pursuance of the same, the power agent of the 1st defendant agreed to sell the suit property to the plaintiff on 09.01.2009 for Rs.4,50,000/- and received an advance amount of Rs.2,00,000/-. One year time was stipulated at the instance of the 1st defendant, who had undertaken to vacate the 2nd defendant, who is in permissive possession of the same and to clear the mortgage loan in favour of the Cuddalore Co-operative Housing Society, Cuddalore. The plaintiff is always ready to perform his part of the contract.



S.A.No.954 of 2012

In spite of repeated demands, the 1st defendant neither vacated the 2nd defendant nor cleared the encumbrance as agreed by him and evaded his part of the contract. The plaintiff came to know that the 1st defendant attempted to alienate the suit property and defraud the plaintiff and hence, the plaintiff was constrained to file the suit for specific performance. If the Court holds that the plaintiff is not entitled to specific performance, he prays alternatively for refund of advance amount with interest at 12% per annum with costs and also to create a charge over the suit property.

4. The second defendant contested the suit, denied the allegations in the plaint and filed a written statement, contending that the suit for specific performance and delivery of possession of the suit property is collusive and it is barred by limitation. Since the plaintiff is a henchman, the suit document has been set up by the 1st defendant, who is a puppet in his hand. This suit property belongs to the second defendant and the sale deed emerged on 16.05.1996, but it was a sham and nominal document as it was executed as a security for the debt incurred from the 1st defendant. The execution of the power of attorney deed dated 30.12.2008 is denied and is not true and valid



S.A.No.954 of 2012

and the power agent has no locus standi to execute any agreement for sale in favour of the plaintiff. The plaintiff, 1st defendant and his brother Rajasekar/power agent, in order to snatch the property, colluded together, created a sale agreement on 09.01.2009 to defeat his right in the suit property and attempted to trespass into the same. The execution of the sale agreement between the plaintiff and the 1st defendant on 09.01.2009, the second defendant is in permissive possession of the suit property and subject to the clearance of the mortgage in favour of the Cuddalore Co-operative Housing Society, Cuddalore, the 1st defendant had purchased the property from the second defendant are false. There is no question of willingness and readiness since the 1st defendant through the power agent could not have executed any sale agreement in favour of the plaintiff, as he had no possession at all. The attempt of alienation, seeking direction to clear the encumbrance, prayer for specific performance and alternatively for refund of advance amount are also denied. There is no cause of action for the suit and the suit framed is not maintainable and liable to be dismissed.

4.1.The suit property originally belonged to one Kannammal W/o Venugopal Chettiar, second defendant's mother, who had executed a settlement on 10.05.1995, in favour of the second defendant and the second



S.A.No.954 of 2012

defendant along with his mother and family members have been residing in the suit property till date, which is a residential house. The 1st defendant filed O.S.No.25 of 1996, before the Principal Subordinate Court, Cuddalore, for specific performance and delivery of possession against the second defendant. Pending suit, sale deed dated 16.05.1996 was executed, but possession was not given. Therefore, E.P.No.161 of 1991 was filed for delivery and after contest, it was dismissed. The said order had become final and there was no revision. The possession of the suit property continues to remain with the second defendant. This defendant has also dealt with the property by raising loan in Cuddalore House Building Co-operative Society and the loan is still subsisting. There is no question of permissive possession. This defendant has also perfected title by way of adverse possession from 16.05.1996 and since then, he has been in continuous possession without any interruption to the knowledge of all, including the 1st defendant and thus, pleaded to dismiss the suit.

5. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

1. Whether the suit is barred by limitation?

2. Whether the sale deed dated 16.05.1996



S.A.No.954 of 2012

is to be considered as sham and nominal and whether the said deed was made for the debt incurred from the 1st defendant?

3. Whether the power of attorney deed dated 30.12.2008 is valid?

4. Whether the sale agreement dated 09.01.2009 is true, valid and binding on the defendants?

5. Whether the plaintiff has got cause of action for filing this suit?

6. Whether the 2nd defendant is in permissive possession of the suit property?

7. Whether the 2nd defendant has prescribed title by adverse possession?



S.A.No.954 of 2012

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8. Whether the plaintiff is entitled for the relief prayed for?

9. To what other relief, the plaintiff is entitled to?

6. Before the Trial Court, in support of the plaintiff's case, PWs 1 to 5 were examined, 4 documents were marked as Ex.A.1 to Ex.A.4 and Ex.X1 to Ex.X6 were marked with objections. On the side of the defendants, DWs 1 & 2 were examined and 27 documents were marked as Ex.B.1 to B27.

7. On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the Trial Court decreed the suit as prayed for.

8. Aggrieved over the same, the second defendant had filed A.S.No.21 of 2012, before the Principal District Court, Cuddalore. The First Appellate Court, after considering the entire materials and evidence on record, allowed the appeal partly and set aside the decree and judgment of the lower Court and dismissed the suit in respect of the second defendant and confirmed the



S.A.No.954 of 2012

judgment and decree of the lower Court for specific relief and other reliefs except possession in respect of the 1st defendant. Aggrieved by the same, the plaintiff has filed the present second appeal.

9. The second appeal has been admitted on the following substantial questions of law:

1) Whether the lower appellate Court misunderstood and misapplied the law declared by the Supreme Court in AIR 2005 SC 2813?

2) Whether the lower appellate Court is right in holding that Issue Nos.5, 6 and 7 framed in the suit were out of the scope and purview of the suit?

10.The learned counsel for the appellant submitted that the plaint schedule property was originally owned by the second respondent herein, who sold the same to the first defendant Rajendiran on 16.05.1996 vide Ex.A1 sale deed. The 1st defendant Rajendiran had executed a Registered Power of Attorney deed Ex.A2 to one Mr.V.Rajasekar on 30.12.2008, authorizing him to sell the suit property. In pursuance of the power of attorney deed, his power agent entered into a registered sale agreement with the plaintiff on



S.A.No.954 of 2012

09.01.2009 and agreed to sell the plaint schedule property to the plaintiff without any encumbrance for a sale consideration of Rs.4,50,000/- and received an advance of Rs.2,00,000/- and agreed to complete the sale transactions within the period of one year. The second defendant is in permissive possession of the plaint schedule property. The first defendant undertook to vacate the second defendant and clear the mortgage loan in favour of the Cuddalore Co-operative Housing Society, Cuddalore, subject to which the first defendant had purchased the property from the second defendant. Since the first defendant had evaded to complete the sale transaction, the plaintiff was constrained to file the suit.

11.The learned counsel further contended that the First Appellate Court failed to consider Exs.X.4, X5 & X6 consent agreement executed by this defendant to vacate the premises within three months. It exposes the fact of permissive possession. During the course of cross examination, the defendants admitted Exs.X.4, X5 & X6. The Court below had not considered this evidence properly. The sale deed Ex.A1 is a forged document, which is not a sham and nominal document as contended by the second defendant. It upheld that pending suit, the defendants executed a sale deed in favour of the



S.A.No.954 of 2012

first defendant. The suit is not barred by limitation as the second defendant is not claiming title by adverse possession. This being permissive possession, the suit is not barred by limitation. The First Appellate Court misunderstood and misapplied the law declared by the Hon'ble Supreme Court in **AIR 2005 SC 2813** and the learned counsel reiterated the other grounds raised in the grounds of appeal and thus, pleaded to allow the appeal. To support his arguments, he relied on the judgment in **Manickam alias Thandapani and Another Vs. Vasantha** reported in **2022 SCC Online SC 2096**.

12.The learned counsel for the appellant further submitted that the plaintiff had filed a suit for specific performance and the Trial Court decreed the suit as prayed for. The First Appellate Court confirmed the decree and judgment of the Trial Court with regard to the specific performance of the agreement and directed to execute the sale deed, but dismissed the suit against the second defendant. Admittedly, he is in permissive possession. So, delivery of possession has to be directed to the first and second defendants. If the suit is dismissed against the second defendant, the specific performance agreement becomes invalid. Therefore, this second appeal is concerned only to the dismissal of the suit against the second defendant. He further



S.A.No.954 of 2012

contended that the second defendant alone had filed a written statement and contested the suit. His contention that he executed the sale deed Ex.A1 dated 16.05.1996 in favour of the first defendant as sham and nominal, is falsified by the evidence. The sale deed has been executed by the second defendant in favour of the first defendant, pending suit by the first defendant against the second defendant in O.S.No.25 of 1996 for specific performance of the agreement. The sale deed executed in favour of the first defendant by the second defendant, agreed thereby to vacate the property within three months subject to discharge of mortgage loan in favour of the Cuddalore Co-operative Housing Society, Cuddalore. The First Appellate Court failed to consider Exs.X4, X5 & X6 consent agreement executed by the second defendant in favour of the first defendant and agreed to vacate the possession of the plaint schedule property. The second defendant being in permissive possession has no right to continue in the possession. The First Appellate Court failed to appreciate the evidence properly and erroneously dismissed the suit against the defendant which is liable to be set aside.

13.The learned counsel for the respondents supported the judgment of the First Appellate Court and contended that the alleged sale deed Ex.A.1 is a



S.A.No.954 of 2012

sham and nominal document. In pursuance of the same, first defendant had not taken possession from the second defendant. E.P.No.161 of 1991 was filed for delivery by the first defendant and the same was dismissed. It is evidenced before the Trial Court by proceedings Ex.B9 and B10. This defendant claimed independent title and possession of the contracted property. He is a third party to the contract. The scope of the suit for specific performance of contract cannot be enlarged into a suit for title and possession, which is not permissible in law. As the decree in a suit for specific performance of the contract for sale is passed, again delivering the right, title and interest of the third party in respect of the contract property, would not at all be possible in the same suit. Therefore, the First Appellate Court had rightly dismissed the suit against the second defendant. There are no perverse findings, no substantial questions of law involved in this appeal and thus pleaded to dismiss the appeal. To support his arguments, the learned counsel for the respondent relied on the following judgments.

(i) *Kasturi Vs. Iyyamperumal and others reported in AIR 2005 SC 2813.*

(ii) *Bharat Karsondas Thakkar Vs. Kiran Construction Company and others reported in (2008) 13 SCC 658.*

(iii) *Ms.Leelavathi W/o.Kuppusamy @ Kuppuraj, Salem, Vs. Sri*



S.A.No.954 of 2012

Venkateswara Finance rep. by its Proprietor, K.Vijaya Baskar, reported in (2009) 7 MLJ 761.

(iv) K.R.Andu Gowder and two others Vs. Saroja and 13 others reported in 2023 (6) CTC 19.

(v) Bagyalakshmi and three others Vs. Kanagaraj and two others reported in 2017 (1) MWN (Civil) 647.

14.I have considered the matter in the light of the submissions made on either side and perused the materials on records as well as the Judgments passed by the Courts below.

15.On perusal of the records, it is seen that the plaintiff had filed a suit for specific performance of the sale agreement dated 09.01.2009, executed by the first defendant in favour of the plaintiff for a total sale consideration of Rs.4,50,000/- and an advance of Rs.2,00,000/- was also received. One year time was fixed for completing the sale transaction. According to the plaintiff, the second defendant is in permissive possession and the first defendant undertook to vacate him and clear the mortgage loan and hand over the possession. Since he failed to do so, the suit has been filed before the Trial Court. The first defendant remained ex-parte. The second defendant filed a



S.A.No.954 of 2012

written statement and contested the suit. According to the second defendant,

the sale deed dated 16.05.1996 Ex.A1 executed by the second defendant in favour of the first defendant is sham and nominal. A perusal of Ex.A1 sale deed dated 16.05.1996 shows that it is not a sham and nominal sale deed. On a perusal of the records, it is seen that the first defendant had filed a suit against the second defendant in O.S.No.25 of 1996, before the Principal Subordinate Court, Cuddalore, for specific performance and deliver of possession against the second defendant. Pending suit, the second defendant executed a sale deed dated 16.05.1996 as out of Court settlement and the first defendant agreed to clear the mortgage in favour of the Cuddalore Co-operative Housing Society, Cuddalore, subject to this, sale deed was executed. In this circumstances, there is no ground to hold that the document is sham and nominal.

16.The submission of the learned counsel for the respondent is that E.P.No.161 of 1997 filed by the first defendant against the second defendant was dismissed and delivery of possession was not given since E.P.No.161 of 1997 was dismissed and that order became final. The first defendant had not taken the possession from the second defendant and the second defendant is in continuous possession. To support this argument, he relied upon Exs.B9



S.A.No.954 of 2012

and 10, certified copy of the dismissal order in E.P.No.161 of 1997. This argument is unsustainable and unacceptable in view of Ex.X6 consent agreement executed by the second defendant to vacate the premises within a period of three months and admitted during the cross examination of the second defendant. In this circumstances, the arguments placed by the learned counsel for the respondent is not acceptable and is rejected.

17.The First Appellate Court relied upon the decision of the Hon'ble Supreme Court *in Kasturi Vs. Iyyamperumal and others* reported in *AIR 2005 SC 2813* and found that the second defendant claimed title independently to the contract property and therefore dismissed the suit against the second defendant. In view of Section 22 of the Specific Relief Act, the relief of possession is inherent in a decree for specific performance. Therefore, the relief for possession in favour of the successful plaintiff in a suit for specific performance cannot be considered as a separate and distinct one and the same is only a ancillary and consequential one. Therefore, the principles settled by the Supreme Court in *Manickam alias Thandapani and Another Vs. Vasantha* reported in *2022 SCC Online SC 2096* is applicable to the case on hand. Therefore, the finding of the First Appellate Court and



S.A.No.954 of 2012

dismissal of the suit against the second defendant is erroneous while granting the relief of specific performance to the plaintiff.

18. In view of the above, the findings of the First Appellate Court are erroneous, it is liable to be set aside and accordingly, set aside. The substantial questions of law formulated in the second appeal are accordingly answered.

19. For the aforesaid reasons, the judgment and decree of the Trial Court, dated 09.02.2012, in O.S.No.117 of 2009, on the file of the 1st Additional Subordinate Court, Cuddalore is confirmed and the second appeal is allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

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19.07.2024

Index : Yes/No

Internet: Yes/No

Speaking order/Non-Speaking order

Neutral Citation : Yes/No



S.A.No.954 of 2012

To

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- 1.The Principal District Court, Cuddalore.
- 2.The 1st Additional Subordinate Court, Cuddalore.



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S.A.No.954 of 2012

V.SIVAGNANAM, J.

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Pre-Delivery Judgment made
in S.A.No.954 of 2012

19.07.2024