



S.A.(MD) Nos.1379 and 1380 of 1998

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.11.2024

PRONOUNCED ON : 06.12.2024

CORAM : JUSTICE N.SESHASAYEE

S.A.Nos.1379 & 1380 of 1998

S.A.No.1379 of 1998:

Kamala ... Appellant/Respondent/Plaintiff

Vs

Adaikalam (Died) ... Respondent/Appellant/Defendant

2.Murugan

3.Baskar

4.Muniswaran

5.Aachi

... Respondents 2 to 5

[Respondents 2 to 5 were brought on record as LR's of the deceased sole respondent vide order dated 01.04.2022 made in C.M.P.(MD) Nos.3242, 3244 and 3246 of 2021 in S.A.No.1379 of 1998]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 09.01.1998 made in A.S.No.101 of 1997 on



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the file of the Sub Court, Pudukkottai reversing the judgment and decree dated 11.10.1996 made in O.S.No.1107 of 1994 on the file of the Principal District Munsif's Court, Pudukkottai.

S.A.No.1380 of 1998:

Kamala ... Appellant/Respondent/Defendant

Vs

Adaikalam (Died) ... Respondent/Appellant/Plaintiff

2.Murugan

3.Baskar

4.Muniswaran

5.Aachi

... Respondents 2 to 5

[Respondents 2 to 5 were brought on record as LR's of the deceased sole respondent vide order dated 01.04.2022 made in C.M.P.(MD) Nos.3228, 3229 and 3230 of 2021 in S.A.No.1379 of 1998]

Prayer: Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 09.01.1998 made in A.S.No.102 of 1997 on the file of the Sub Court, Pudukkottai reversing the judgment and decree dated 11.10.1996 made in O.S.No.1106 of 1994 on the file of the Principal District Munsif's Court, Pudukkottai.



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In both Appeals:

For Appellant : Mr.Anand Chandrasekar
for M/s.Sarvabhauman Associates

For Respondents : Mr.J.Barathan for R2 to R5

COMMON JUDGMENT

These appeals arise from two independent suits. A certain Kamala had initially laid O.S.12/1993 before the District Munsiff Court, Aranthangi for declaration of her title over the suit properties and for also for their recovery against certain Adikalam. Adaikalam on his part, not only resisted the said suit, but on his part had laid O.S.31 of 1993 before the same Court.

1.2 Later both the suits were transferred from the District Munsiff Court, Aranthangi to the Principal District Munsiff Court, Pudukkottai, where they were taken on record as O.S.No.1107 of 1994 (previously O.S.No.12 of 1993) and O.S.No.1106 of 1994 (previously O.S.No.311 of 1993).



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1.3. Both these suits were tried jointly, evidence was recorded in O.S.No. 1107 of 1994 and were disposed of by a common judgment of the trial court, dated 11.10.1996, whereunder the trial court decreed the suit for declaration etc. filed by Kamala and dismissed Adaikalam's suit for specific performance. Challenging the said decrees of the trial court Adaikalam preferred A.S.101/1997 and A.S.102/1997 before the Sub Court, Pudukottai, and the first appellate court allowed both the appeals. Hence Kamala has come forward with these appeals. The parties therefore, would be referred to by their rank in O.S.No.1107 of 1994.

The Pleadings:

A. Plaintiff's case

2. In her plaint Kamala pleads as below:

- a) There are 8 items of suit-properties whose identity and description are not in dispute. These properties and others originally belonged to a certain Sathan. Sathan had three children viz., (a) Ramaiah (b) Kanniah; and (c) Kunjammal. After the demise of Sathan, his



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properties devolved equally on his children. In an oral partition among the children, the suit properties fell to the share of Kanniah.

- b) While so, on 12.02.1976, vide Ext.A.1 = Ext.B.1, Kanniah created a usufructuary mortgage as regards Items I, II, and 12 cents in Item-III in favour of a third party, who is also named Adaikalam, who was stated to be a cousin of the present defendant for securing a debt of Rs.500.
- c) Within about few months thereafter, vide Ext.A.2 = Ext.B.2, dated 15.08.1976, Kanniah gifted all the eight items of suit properties to his sister Kunjammal.
- d) On obtaining title, Kunjammal was said to have obtained a further loan from the same mortgagee ... and said to have discharged the same vide Ext.A.12, dated 21.03.1979. This document is styled as a '*mel othi document*'. (There is however, no specific pleading about Ext.A.12 in the plaint.)
- e) Kunjammal's had married certain Uthirapathi and it was a strained matrimony. The plaintiff was born out of Kunjammal's marriage with Uthirapathi.



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- f) After her separation from her husband, Kunjammal lived with the plaintiff at Ammapettai. She therefore, required her sister-in-law (wife of her other brother Ramaiah) to take care of her properties.
- g) In 1983 Kunjammal died at Ammapettai, whereupon the suit properties devolved on the plaintiff. She was a minor then.
- h) Since Kunjammal was not there to care the property, the defendant took advantage trespassed and occupied all the items of suit properties other than those which are covered under Ext.A.1 = Ext.B.1 usufructuary mortgage.
- i) Contending that since the defendant had been enjoying the properties covered under the *otti* (item 1,2 and 12 cents in items 3) for more than ten years, and since they are agricultural lands, the plaintiff is entitled to the benefit of Debt Relief enactments, and that the mortgage debts had been discharged statutorily.

It is in this backdrop, she laid the suit in O.S.No.12 of 1993 before the District Munsif's Court, Aranthangi for title and recovery of possession.



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(b) Defendant's case:

3. The defendant has not only contested the suit, but also filed another suit in O.S.No.31 of 1993 before the same Court for a specific enforcement of a sale agreement for the sale of Items 1 to 7 of the suit properties. The pleadings in defending O.S.No.12 of 1993 are substantially the same in his own suit in O.S.No.31 of 1993 and they may be summarised as below:

- a) It is true that the suit properties originally belonged to Sathan and later fell to the share of his son Kanniah. While so, on 12.02.1976 Kanniah had executed Ext.A.1 = Ext.B.1, mortgage in favour of a third party (another Adaikalam). On 14.04.1977 vide Ext.B30 endorsement in Ext.B1 mortgage deed, the mortgagee had made over his rights to the defendant. Thus the defendant became entitled to the rights of a mortgagee vis-a-vis items 1,2, and 12 cents in item 3.
- b) After obtaining the suit properties vide Ext.A.2 = Ext.B.2 gift deed, Kunjammal, had orally mortgaged the suit properties, other than those which are covered under Ext.A1 = Ext.B1 in favour of the defendant to secure a debt of Rs.2000/-. The defendant had thus been in possession and enjoyment of these properties as a mortgagee.



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- c) It is in the said background, on 14.04.1978, Kunjammal had sold the suit properties vide an unregistered sale deed for a total consideration of Rs.10,000/-. And, the defendant had paid Rs.7,500/- after adjusting Rs.500/- payable under Ext.B1 mortgage and Rs.2,000/- which Kunjammal herself had borrowed from the defendant. The sale deed also stipulated that if it is required to be registered duly, that may be done later. This portion of the said sale deed is marked as Ext.B4.
- d) Thereafter, the defendant could not find Kunjammal. In spite of his best efforts, he could not trace her. Indeed, he came to know of her death only from the averments in the plaint.

Now, on the strength of Ext.B4 clause in the unregistered sale agreement, the defendant had laid O.S.No.31 of 1993 for specific performance.

(c) Plaintiffs contention to defendant's suit:

4. Kunjammal was illiterate and she never executed any so called unregistered sale deed such as the one which defendant projects.

The Trial:



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5. As outlined earlier, both these suits were tried jointly and evidence was recorded in O.S.No.1107 of 1994. For the plaintiff, she had examined herself as P.W.1. She also examined P.W.2 to P.W.5 as independent witnesses. She had produced Ext.A.1 to Ext.A.15. For the defendant, he examined himself as D.W.1 and he had examined two other independent witnesses as D.W.2 and D.W.3. Besides, he also examined certain Adaikalam as D.W.4 and he is the mortgagee under Ext.A.1 = Ext.B.1 and the assignor of Ext.B.30 document. The defendant had produced Ext.B.1 to Ext.B.30. Besides, the trial Court has also marked certain letter dated 14.10.1992 said to have been written by the plaintiff's father to P.W.3 and this is marked as Ext.X.1.

6. On appreciating the evidence before it, the trial Court chose to dismiss the suit for specific performance filed by the defendant in O.S.No.1106 of 1994 and decreed the suit for declaration and for recovery of possession filed by the plaintiff in O.S.No.1107 of 1994. The line of reasoning of the trial Court is that:

a) After obtaining Ext.A.2 = Ext.B.2 gift deed, Kunjammal had executed



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a *mel othi* vide Ext.A.12 dated 21.03.1979 in favour of D.W.4, the original mortgagee under Ext.A.1 = Ext.B.1. In this document, the defendant has signed as an attestor, but the defendant contends that about a year prior to the execution of Ext.A.12, Kunjammal had executed Ext.B.4, an unregistered sale deed dated 14.04.1978 with a clause for obtaining a registered sale deed as and when the defendant requires. Given the fact, the date of Ext.B.4 is anterior in point of time in Ext.A.12, it is improbable that Ext.B.4 could be true, since the defendant had attested Ext.A.12-*mel othi*.

- b) *Vis-a-vis* Ext.B.4, Kunjammal was illiterate and it is not adequately established by the defendant that she knew the contents of the document that she was executing. In other words, it is a case of *non est factum* as Kunjammal cannot be credited with the knowledge of executing that which she had executed and in the process, it rejected the testimony of D.W.4 who is one of the attestors to Ext.B.4 document.
- c) The defendant has come out with alternate and multiple inconsistent pleas such as seeking title to the entire property under Ext.B.4,



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seeking specific performance on the strength of Ext.B.4, seeking part performance on the strength of Ext.B.4 and seeking title on grounds of adverse possession and all of them cannot co-exist. In other words, the Court found that the defendant was uncertain about the nature of right he has *vis-a-vis* the suit properties.

7. Challenging the decrees passed by the trial Court, the defendant preferred twin appeals in A.S.Nos.101 of 1997 and 102 of 1997 before the first appellate Court. There he tasted success when the first appellate Court allowed both his appeals. The points which weighed with the first appellate Court for reversing the decrees of the trial Court are: (a) Ext.A.12 cannot be acted upon because it was not specifically pleaded in the plaint in O.S.No. 1107 of 1994; and (b) when the alleged signature of the defendant in Ext.A. 12 is compared with those found in his pleadings in the suit, they do not show similarity. When Ext.A.12 goes, then Ext.B.4 has to be reckoned for consideration and here for proving execution of Ext.B.4, the first appellate Court relied on the testimony of D.W.4. Significantly, while the suit for specific performance was confined to Items 1 to 7, the first appellate Court



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has dismissed the suit of the plaintiff even as concerning Item-VIII. This is curious, but the learned counsel for the appellant informs the Court that somewhere in the oral evidence, it is indicated that Item 8 had already been sold by Kunjammal in favour of a stranger, though there are no specific details about it or available either in the pleadings or in the documentary evidence.

8. Challenging the decrees of the first appellate Court, these appeals are preferred and they were admitted for considering the following substantial questions of law:

“(i) Whether the first appellate Court committed an error in negating the relief of declaration and possession as prayed for in the suit in O.S.No.1107 of 1994?

(ii) Whether the first appellate Court committed an error in allowing the suit in O.S.No.1106 of 1994 and granting the relief of specific performance as prayed for in the said suit in O.S.No.1106 of 1994? and

(iii) Whether the first appellate Court misread the evidence and failed to consider the materials on record in both the



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suits in not granting the reliefs asked for by the appellant/plaintiff in both the suits?”

9. The learned counsel appearing for the appellant submitted that:

- a) The defendant has come up with multiple set of defences and alongside, he also presses one of the defences to provide a cause of action for his suit for specific performance in O.S.No.1106 of 1994. Ext.B4 is styled as a sale deed, and towards the concluding portion of the document, the vendor says that if the document is required to be registered, it will be done as and when the purchaser/the defendant requires it. This would imply that the document ought to be registered in law and despite that, they attempted to transact a sale of an immovable property for a consideration well over Rs.100/-. If at all the purchaser had to exercise his right, he had to exercise his right within the statutorily prescribed four months time provided under Section 23 of the Registration Act, because the document is already executed and nothing needs to be performed except registration of the



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document. When this is not done, then the right which the purchaser may have obtained under Ext.B.4 will stand forfeited to him.

- b) Alternatively, even if it is considered that the right survives beyond the four months period provided under Section 23 of the Registration Act, it ought to be exercised within a reasonable period. Article 54 of the Limitation Act will apply only if there is a demand and denial in all cases where time is not stipulated for performance. When mutual contractual obligation is already performed, a mere registration is no longer governed by the Specific Relief Act and Article 54 of the Limitation Act, but only by Sec. 23 of the Registration Act.

10.1 Knowing full well that Ext.B4, is an 'unregistered sale deed', on which he rests his cause of action, Mr. Bharathan, the counsel for respondents 2 to 5 (the heirs of Adaikalam and the plaintiff in the suit for specific performance), compartmentalised his submissions into two distinctive parts: (a) justifying the suit for specific performance as his first line of defence; and (b) building an argument founded on Sec.53A of the Transfer of Property Act (henceforth TP Act) as his second line of defence.



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10.2 On facts, the learned counsel submitted:

- a) P.W.1 had deposed that she was barely 10 years when her mother died and that ever since, she was under the care of her aunt Podisal (P.W. 2), and later under the care of one Chithra (not examined), which implied that she was essentially staying elsewhere and not at the address given in Ext.B.3 and Ext.B.28. These at least make a strong possibility to support the case of the defendant that he searched for someone to execute the sale deed and could not trace one.
- b) Inasmuch as Ext.B.4 was admitted, it instantly implies that the plaintiff's mother Kunjammal had received the entire consideration. Here is the situation where the plaintiff wants to dispossess the defendant after receiving the entire sale consideration, only because the document was not registered. If the protection under Section 53 A of the Act was available to the transferee, notwithstanding the fact that the document was not registered, then her claim necessarily have to fail for it is barred by both in statute and also in equity.
- c) If the clause in Ext.B4 that provides the cause of action for instituting



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a suit for specific performance is taken as a stand alone clause, then it does not provide any period of limitation. The moment the defendant found an obstruction to his title, he knew the person against whom he may have to seek the specific performance and has laid the suit.

- d) If the suit for specific performance laid by the defendant is decreed, the defendant would end up paying the stamp duty and the registration duty at the market value of the property as on today. Therefore, the revenue is only likely to gain many force than what it would have received when Ext.B.4 was executed.

10.3 On the aspect of applicability of Sec.53A of the Transfer of Property Act, Mr. Bharathan argued:

- a) the stipulation in Ext.B4, and the subsequent non-registration of the document would not imply that the defendant cannot defend his possession. Under Section 53A of the TP Act, the defendant had entirely performed his part of the contractual obligation. And he having performed it, he is entitled to the benefit of Section 53A of the



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TP Act. Reliance was placed on the ratio in ***Ramesh Chand (Died) Through Legal Representatives and others Vs Nand Lal and others*** [(2019) 5 SCC 807]; ***Union of India and another Vs K.C.Sharma and Company and others*** [(2020) 15 SCC 209]; ***Shrimant Sharmrao Suryavanshi and another Vs Pralhad Bhairoba Suryavanshi (Dead) By LRs and others*** [(2002) 3 SCC 676]; and ***K.Hutchi Gowder Vs H.Bheema Gowder*** [AIR 1960 Madras 33].

- b) Paragraph 4 of Section 53A of the Act provides that a transferee is entitled to the protection against dispossession even if the instrument of transfer of title to the immovable property has not been made in accordance with law. He submitted that though for effecting a valid sale, registration is mandatory both in terms of Section 54 of the Act read along with Section 71 of the Registration Act, 1908, as well as the Stamp Act yet its non-compliance would not disentitle the plaintiff from seeking protection under Section 53A of the Act. In that sense, paragraph 4 of Section 53A of the Act operates as a proviso to Section 23 of the Registration Act. Reliance was made to ***Maneklal Mansukhbhai Vs Hormusji Jamshedji Ginwalla and Sons*** [1950



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SCC 83 : 1950 SCC OnLine SC 8]; *Bala Vs Heeralal and others* [1988 MPLJ 781]; *Hamzabi and others Vs Syed Karimuddin and others* [(2001) 1 SCC 414] and *D.V.Babu and others Vs Subbulakshmi and others* [2014 SCC OnLine Mad 8604].

- c) The expression 'willingness' of a transferee to perform his part of the contract in paragraph 3 of Sec.53A can be sustained both legally and factually. 'Willingness' in the context may be divided into two parts:
- (i) demonstrating the willingness of the transferee on facts; and (ii) the effect of non-registration as constituting fraud on both Stamp Act and Registration Act. If the second aspect is considered first, Proviso to Section 53A of the Transfer of Property Act must be read along with Proviso to Sec. 49 of the Registration Act. The proviso to Sec. 53A of the T.P. Act *inter alia* provided that a transferee under the transfer which was not completed in the manner would still qualify for invoking the equitable doctrine of Section 53A of the Transfer of Property Act. a similar provision was inserted to Section 49 of the Registration Act which provides that “*an unregistered document affecting immovable property and required by this Act or the Transfer*



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of Property Act, 1882 (IV of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Special Relief Act, 1877 (I of 1877), or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882 (IV of 1882) or as evidence of any collateral transaction not required to be effected by registered instrument” Both these provisos were inserted respectively into the respective provisions vide Act 20 of 1929 and Act 21 of 1929. Now a portion of this proviso has been deleted vide Act 48 of 2001 which came into effect on 24.09.2001. However, inasmuch as a suit was laid in 1994, the law as it stood at that time may have to be looked into.

11. In response, the learned counsel for the plaintiff would contend that for the application of Sec.53A of the TP Act, two conditions are mandatory:

- a) The document must be a written sale agreement and not a completed sale deed. If it is not, then every unregistered sale deed will have the effect of a title document which is not the intent of the legislature; and



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- b) If Sec.53A of the TP Act has to be applied, complying with four pre-conditions stipulated in the Act is mandatory. Indeed, the Act secures an agreement holder's possession only after he has complied with these requirements. This is amplified by the use of the proposition 'then', the opening word of paragraph 4 of Sec.53A, which comes after the conditions for invoking the said provision were stipulated. Reliance was placed on the authority in ***M/s.Jacobs Private Limited Vs Thomas Jacob*** [AIR 1995 Kerala 249].
- c) Any purchaser, who obtains possession under a written sale agreement, must be willing to perform his part of the contract, and this willingness does not stop by mere payment of consideration, but extends to doing such things as are necessary for completing the sale. In other words, the willingness to perform is not limited to perform the contractual obligation arising out of a contract for a sale of an immovable property, but should extend to doing such things as are necessary to transfer valid title within the meaning of Sec. 54 of the TP Act. Indeed, the requirement regarding the registration is an implied term of any contract for sale of an immovable property.



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Reliance was placed on *Kalavakurti Venkata Subbiah Vs Bala Gurappagari Guruvi Reddy* [(1999) 7 SCC 114], *Valambalachi Vs Duraiswami Pillai* [AIR 1928 MAD 344], *Manicka Goundan Vs Elumalai Goundan minor rep.by its guardian Ammakannu Ammal and others* [(1956) 2 MLJ 536].

- d) To prove his willingness, the defendant has produced Ext.B.3 and Ext.B.28 both of which are inland letters dated 10.03.1977 and 16.03.1977 respectively addressed by Kunjammal's husband to the defendant. Even though these letters are prior to Ext.B.4, sale agreement dated 14.04.1978, in the sender's address column, the address of the sender is indicated. Since the burden is on the defendant to have the document registered, in the context of Section 53A of the Transfer of Property Act, the minimum he ought to have done is to approach Kunjammal and seek her to execute a registered document at his expense. It is proof of this fact that the defendant was willing to perform his part of the contract which perhaps is the only term of contract to be performed on his side. In this regard, the plaintiff would plead in his suit that he could not contact his vendor



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because her whereabouts are not known. Inasmuch as Ext.B.3 and Ext.B.28 provides the address of Kunjammal, the minimum he was required to do is to contact her. Secondly, in his evidence, he merely deposes that some time in 1982, he went in search of the vendor, but she was reported to have died by then. Here the plaintiff says that her mother died only in 1983 and this aspect was not controverted during her cross-examination. D.W.1 has also deposed in his cross-examination that on coming to know of Kunjammal's death, not required either her husband or the relatives of Kunjammal to execute the sale deed. So far as the plaintiff is concerned, the defendant says that he did not know that Kunjammal ever had a daughter and, he did not choose to issue notice to Kunjammal or her husband any time between Ext.B.4 and the date of her death.

- e) If the defendant had to be qualified for invoking Section 53A of the Act, he must demonstrate his willingness within reasonable time and not after 16 years since the execution of Ext.B.4. Reliance was placed on *A.Lewis vs M.T.Ramamurthy* [(2007) 14 SCC 87].
- f) While it is permissible for the defendant to plead alternate and



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inconsistent plea, it is impermissible for him to press all the pleas simultaneously. In his pleading, he makes an assertion that what was executed was a sale deed. This is also his line of cross-examination when P.W.1 was entered into box wherein he would suggest to her that the defendant has been in possession under an unregistered sale deed. Having struck to the possession, Ext.B.4 is an unregistered 'sale deed'. It is not given to the defendant to change the character of the same into sale agreement for the purpose of Section 53A of the Act.

g) So far as the authority reported in ***K.Hutchi Gowder Vs H.Bheema Gowder*** [AIR 1960 Madras 33] is concerned, the quintessence of the judgment is that the vendor should co-operate with the purchaser in completing the sale. That proposition cannot be disputed. To state it differently, any agreement holder who has not proved his willingness to perform his part of the contract to the fullest which includes the necessity to approach the vendor to complete the sale cannot rely on this passage.

h) Even going by Ext.B.4, the burden is cast on the defendant to approach Kunjammal to complete the sale. However, the factum of



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the willingness as required under Section 53A of the Act as canvassed by the learned counsel appearing for the appellant is accepted that will grant premium to fraud on Registration Act for every purchaser can then bypass both Stamp Act and Registration Act by resorting to sale such as a one styled in this case.

A sale agreement for yet to be transformed into a valid sale has two parts: (a) performing the executory part of the contract by both the parties and (b) registering a sale deed. In cases involving the sale of an immovable property and unencumbered immovable property, the executory part of the contract is payment of consideration. Once the purchaser pays the consideration and seeks execution of the document, the acts needed to register the sale deed would be the obligation of the vendor in terms of sale agreement. In a given case, if consideration is entirely paid, that may only imply the part performance of the contractual obligation and for what still remains to be performed is the execution of the sale deed. So far as the execution of the sale deed is concerned, again it can have and if this is separated from the remaining part of the contract, it will be an executory contract the purchaser should seek registration of the document and the vendor should perform his



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obligation by participating in the registration of the document.

Discussion & Decision

12. A suit for declaration of title and recovery of possession Vs a suit for specific performance based on Ext.B4, an unregistered sale deed. The fact that the defendant had laid a suit for specific performance implies that it is in his ability to establish his cause of action that will be determinative of whether plaintiff should be granted the relief that she had sought, for the title of the plaintiff is otherwise conceded.

13. Before delving into the controversy, this court can grant a decree for the plaintiff straight away as regards item 8 of the suit properties. This is neither a part of any mortgage nor is it a part of Ext.B4. And focus of the defendant has been to defend his title/possession based on Ext.B4 and not otherwise. But, this document does not deal with item 8.

14. Turning to the controversy at hand, if the defendant has to succeed in his suit, it rests largely in his ability to establish that the document which



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the plaintiff's mother Kunjammal had executed in favour of the defendant, dated 14.04.1978 is a sale agreement. The defendant was not a signatory to this document. The document is styled as a sale deed. This document is in Tamil, and it has a clause which if translated to English would read that the vendor undertakes to have the document registered if the purchaser (the defendant) requires it to be registered. This portion (whatever that is now referred to as the translation) alone was marked as Ext.B4. In other words, this undertaking of Kunjammal, according to the defendant constitutes a promise, and this promise is sought to be enforced in his suit.

15.1 There is a procedural difficulty here. The entire document is not marked, for the objection was an unregistered sale deed. However, when the defendant did not assert title based on this document, then within the meaning of Proviso to Sec.49 of the Registration Act, it should have been admitted in evidence for collateral purposes. Indeed, an unregistered document can be admitted as an evidence in a suit for specific performance within the meaning of Proviso to Sec.49 of the Act. In the instant case, the defendant, after all use this document not as a sale deed, but only as a sale



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agreement. Whether this document could be treated as a sale agreement, and whether it can be so enforced are matters which involve the construction of the document and it falls within the domain of the court to decide. Now, with no other part of the document admitted in evidence except a portion thereof Ext.B4, the question would be what is the very document in relation to which specific enforcement should be granted.

15.2 Fortunately even though the plaintiff's counsel had brought to the notice of this Court what Ext.B4 represents, both sides literally took this court through the entire document to fix the context, which in effect has reduced what was admitted as Ext.B4 to inconsequence. And, this court had also read the entire document. And, the strategy of the defendant's counsel disclosed that he did not harp the enforceability of the document much, as he appear to have felt invoking Sec.53A of the T.P.Act was a safer option. More about it to follow. Still this court briefly deals with the issue.

16.1 Reading 'unregistered sale deed' dated 14.04.1978, it shows that it possesses all the elements necessary to constitute a completed sale deed,



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except its registration as required in law. In ***Hutchi Gowder case*** [AIR 1960 Mad 33 (DB)], it is held that the person who holds an unregistered document of conveyance cannot use it as an agreement to execute a transfer-deed in future, unless the plaintiff proves that the failure to have the deed registered was not due to any wrongful act or negligence on his part. In ***Valambalachi Vs Duraisami Pillai & another*** [AIR 1928 Mad 344 : 108 IC 782], a completed sale deed was not registered as in the present case. The court held that it cannot be treated as an agreement to seek specific performance following the dictum in ***Satyanarayana Vs Venkata Rao*** [AIR 1926 Mad 530 (DB)]. It is explained in ***Velambalachi case*** that a vendor who executes the sale deed is duty bound to have it registered and hand it over to the purchaser. If however, a completed sale deed is handed over before it is registered, by implication it should be gathered that the purchaser has undertaken to present the sale deed for registration. A person who agrees to sell and convey property is bound not only to execute a proper conveyance once but go on executing as many conveyances as may be required by the vendor in respect of the property. Accordingly, a purchaser, owing to his failure to register a document, loses his right under



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the document. Similar view expressed in *Manicka Goundan Vs Elumalai Goundan* [1956 (II) MLJ 536 (DB)]. It may however, be stated that in *Kalavakurti Venkata Subbaiah Vs Bala Gurappagari Guruvi Reddy* [(1997) 7 SCC 114] the Supreme Court has held that where a vendor under a sale deed refuses to have it registered, then a suit for specific performance to register a document and to hand over possession is maintainable.

16.2 If these authorities are carefully spread to create a plane for testing the case of the defendant, the following aspects emerge:

- a) that inasmuch as the defendant had obtained an unregistered sale deed from Kunjammal, he had undertaken the responsibility of presenting the document for registration. He did not do it since April, 1978 till he laid the suit in 1993.
- b) There is no case that the vendor had refused to co-operate the defendant in registering the sale deed in question. And this Court sees no reason as to why it was not registered, when both Kunjammal and the defendant had executed their respective obligations, and had done everything which were required to be done to complete the sale.



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The registration could have contemporaneously happened or at least within 4 months from the date of execution of the sale deed as stipulated in Sec.23 of the Registration Act. Obviously, the intent was to outmanoeuvre the requirements of Registration Act, which is but an obvious attempt to play fraud on the statute.

- c) It has come out in evidence that Kunjammal was related to the defendant, and hence his case that he did not know about the whereabouts of Kunjammal till 1982, is plainly not believable. And, there is no meaning in searching for Kunjammal beyond 4 months of execution of the document either.

The defendant is a party in default, more so when he had undertaken to present the document for registration in terms of the discussion in *Velambalachi case*. The sale deed which Kunjammal had executed in favour of the defendant, dated 14.04.1978 cannot be treated as a sale agreement. Consequently, the defendant cannot succeed in his suit for specific performance. S.A.1380 of 1998 which arises from O.S.1106 of 1994 deserves to be allowed.



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17. The game however, is not complete. Can the plaintiff succeed in her suit for recovery of property of item 1 to 7 of the suit properties which as mentioned earlier along are dealt with under the unregistered sale deed dated 14.04.1978. Here the defendant makes a smart move. Since he is in possession of the suit properties, a fact not in dispute, he brings in Sec.53A of the Transfer of Property Act as second line of his defence.

18. Sec 53A of the Transfer of Property Act reads as below:

Sec.53A Part Performance

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,



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and the transferee has performed or is willing to perform his part of the contract,
*then, notwithstanding that "**the contract, though required to be registered, has not been registered, or**" where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:*
Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Let the unregistered sale deed in question be understood in the plane of Sec.

53A. Its effect now is:

- a) There must be a contract to transfer an immovable property for consideration signed by the contracting party. The unregistered sale deed in question satisfies it.
- b) The terms of the said contract must be capable of being ascertained with reasonable certainty. There is no dispute on it. The terms of the



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document in question conveys an unequivocal idea that Kunjammal had sold plaint items 1 to 7 to the defendant, for a total consideration of Rs.10,000/-

- c) transferee had taken possession and if in possession, such transferee continues to be in possession. This is also satisfied vis-a-vis items 1 to 7.
- d) that the transferee has performed or willing to perform his part of the contract. Here, defendant has paid the entire sale consideration.
- e) That the document of conveyance, though required to be registered but not registered. Absolutely true in the present case. In the ultimate analysis the entire case is reduced to a debate on the consequence of non-registration of the 'sale deed' in question.

Does not the defendant entitled to defend his possession in a suit for recovery of possession?

19. First to the aspect of declaration of plaintiff's title. This is her principal prayer. Now, an unregistered sale deed by Kunjammal in favour of the defendant does not vest any title in the plaintiff, and hence it may appear



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that declaration of plaintiff's title will be an automatic option. That however, will not be, since unless the ancillary relief of recovery of possession can be given, there is no meaning in declaring plaintiff's title. Therefore, the defence of the defendant founded on Sec.53A of the TP Act has become increasingly critical to decide the outcome of the plaintiff's case.

20. *Ramesh Chand case* [(2019) 5 SCC 807] and *Hamzabi & Others Vs Syed Karimuddin & Others* [(2001) 1 SCC 414] are cases where the Supreme Court has declared that a mortgagee holding a sale agreement were entitled to the protection of Sec.53A, and that failure to institute a suit for specific performance is of no consequence and vide (2002) 3 SCC 676, even if the suit for specific performance is barred by limitation. In *K.C Sharma case* [(2020)15 SCC 209] the court has held that a holder of an agreement of lease but without a valid lease deed is entitled to Sec.53A protection. *Bala Vs Heeralal* [1988 MP LJ 781], Lahoti J, as his Lordship then was , has held that the applicability of Sec.53A does not depend upon the legality or validity of the transfer, since paragraph 4 of Sec.53 A takes care of it. Person



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who claim right to be in possession under Sec. 53 A prescribes his own title to be in possession, and is not in possession under the previous owner by permission.

21.1 Here is a scenario where everything short of registration, a sale deed had been executed, and possession had also been handover to the defendant. In effect it has satisfied all the criteria required to be fulfilled in paragraph 1 to 3 of Sec.53A had been complied with. And, in terms of paragraph 4 of Sec.53A, *if a contract, though required to be registered, has not been registered*, a provision which was later dropped vide Act 48/2001, but very much in vogue in 1978 when the document was executed, the defendant should be entitled to protect his possession under Sec.53A of the Act.

21.2. Here, the learned counsel for the plaintiff has argued that the willingness of the defendant to perform his of the contract, which is one of the pre-condition for invoking Sec.53A includes his readiness and willingness to have the document registered. This will involve an element of expense, and since the defendant had shown no interest to register the



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said 'sale deed', he cannot be considered to possess requisite willingness as to entitle him to invoke the benefit of Sec.53A of the Act. He proceeded to argue that in *Jacob Pvt. Ltd., Vs Thomas Jacob* [AIR 1995 Kerala 249] the Court has held that where a purchaser under a sale agreement agreed to perform his part of the contract only if the vendor had cleared income tax arrears cannot be said to be willing to perform his part of the contract and that the offer to perform its part of the contract was only conditional. In *A. Lewis & another Vs M.T. Ramamurthy & Others* [(2007)14 SCC 87] the Supreme Court had held that where a purchaser under a sale agreement did not do anything to have the sale deed registered and the vendor thereunder had sold the property to a third party, that the agreement holder cannot press into service Sec.53A.

22. The argument of the plaintiff's counsel hides the fallacy it attempts to cover. It is explained:

- a) The expression '*willingness*' as it appears in paragraph 3 of Sec. 53A of T.P. Act needs to be understood in the context of the right which a contract involving an immovable property creates in



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favour of the contracting party who is in possession of the immovable property. It does not and indeed, it cannot include the statutory requirement of having the document registered. As earlier noted in *Valambalachi case*, the Court has held that where a sale deed is executed, the principle obligation is on the vendor to have the document registered and hand it over to the purchaser, and if the vendor hands over the sale deed to the purchaser before registration, then the implication is that the purchaser has undertaken to register it. And in all cases where the purchaser does not register the document, then it is he who loses the right under the document. So far as the present case is concerned, Kunjammal had executed the sale deed and handed it over to the defendant without registering it, and the defendant too did not choose to register it. The consequence is that no title in the property gets vested in the defendant. But so far as his contractual obligation vis-a-vis Kunjammal is concerned, it has been fully performed. If no title is so vested, then Kunjammal had nothing to lose, whereas the defendant had everything to lose. The second



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aspect is that, if only the interpretation which the counsel for the plaintiff requires this Court to adopt is considered seriously, then it will render the phrase, “*the contract do not required to be registered, as not been registered as appeared*” in opening line of paragraph 4 of Sec.53-A, redundant. Therefore, the true import of the phrase '*willingness to perform his part of the contract*' might have to be understood to mean the contractual obligation of the defendant, and not complying with the statutory requirements.

- b) Turning to the authorities relied on by the counsel for the plaintiff, both can be distinguished on facts. In ***Lewis case***, the plaintiff lost his case based on Sec.53-A of T.P. Act not just because his sale deed was unregistered, but also because a third party purchaser had arrived at the scene in the meantime. Therefore, the Court was also under an obligation to protect the interest of the third party purchaser in terms of the last paragraph of Sec.53-A. Turning to ***Jacob Pvt.Limited case***, the Court has held that the purchaser offered to perform his part of the contract was conditional, not because it has anything to do with the registration



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of the document, but because the agreement holder made his willingness to perform conditional upon the other contracting parties doing something.

23. Turning to the facts of this case, it is not in dispute that since 14.04.1978 the defendant had been in possession of the suit property under an unregistered sale deed, after he had performed his obligation wholly. He therefore, satisfies all the requirements of Sec.53-A of T.P.Act, and hence he has every right to resist plaintiffs' prayer for recovery of possession.

24. Turning to the nature of relief that the plaintiff could be now granted, since the Court has already held that the unregistered sale deed cannot be construed as a sale agreement for the purpose of granting its principal relief, necessarily, plaintiff qualifies for the declaratory relief for declaring her title over the suit property. Turning to her right to seek recovery of possession, on facts this court finds that the defendant is entitle to retain possession, notwithstanding the fact it was not adequately pleaded. It is hardly of any consequence, application of Sec.53A of the TP Act only involves



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application of a statutory provision to a proven fact.

25. What now flows out of the above discussion is that the plaintiff can have title to the property for eternity, and so was the defendant who can be in possession for eternity. Neither would be benefited out of this solution, for neither can enjoy whatever remedy if fashioned in the manner indicated. In *Akkamma & others Vs Vemavathi & others* [(2021)18 SCC 371] the Supreme court was faced with an identical situation. In that case, plaintiff had laid a suit for declaration of title and an ancillary relief of prohibitory injunction, and the plaintiff lost the suit as the trial court found that the defendant was in possession even though the title was with the plaintiff, on the principle that when ancillary relief could not be granted the principal relief cannot be given. The plaintiff appealed this decree and before the first appellate court he attempted to amend the relief and sought recovery of possession in stead of injunction. This prayer for amendment was not allowed since the first appellate court had found that the relief of recovery of possession was barred by limitation. When the matter reached the Supreme Court, it concurred with the finding of the first appellate court, but



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proceeded to grant declaratory relief. It held:

“There is no bar in granting such decree for declaration and such declaration could not be denied on the reasoning that no purpose would be served in giving such declaration. May be such declaratory decree would be non-executable in the facts of this case, but for that reason alone such declaration cannot be denied to the plaintiff. Affirmative finding given by the trial court as regards ownership of the original plaintiff over the subject property. That finding has not been negated by the High Court, being the court of First Appeal. In such circumstances, in our opinion, discretion in granting declaratory decree on ownership cannot be exercised by the court to deny such relief on the sole ground that the original plaintiff has failed to establish his case on further or consequential relief.”

The facts of the present suit can be distinguished even though at the first blush it seems to possess a strong similarity to ***Akkamma's case***. In ***Akkamma***, there the plaintiff though had an opportunity to seek a consequential relief for delivery of possession which he did not seek, and when he attempted to seek it, it was denied to him, with the result, the right of the defendant to stay in possession on his title was not tested at all. In the



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present case, the plaintiff indeed had sought a consequential relief for delivery of possession, but lost it not on her title, but on the title of the defendant to stay in possession based on the operation of Sec.53A of the TP Act has conferred on him.

26. There can be hardly any doubt that granting declaratory relief is a discretion relief and it is influenced by multiple factors. Where granting a declaratory relief is futile and ineffective, why grant it?

The Result:

27. To conclude,

- a) S.A.1379 of 1998 is partially allowed and the plaintiff's title to item 8 of the suit is hereby declared and the heirs of the defendant (defendants 2 to 5) are required to deliver vacant possession of the said item to the plaintiff. Plaintiff may work out her right to obtain mesne profits separately. To that extent the decree of the first appellate court in A.S.101/1997, dated 09.01.1998 is modified. As to the rest the decree of the first appellate court will stand confirmed.



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b) S.A.1380 of 1998 is allowed, and the decree passed in A.S.102/1997, dated 09.01.1998 is set aside and the decree of the trial court in O.S. 1106 of 1994 is hereby confirmed.

c) No costs.

06.12.2024

Index : Yes / No
Speaking order / Non-speaking order
Neutral Citation : Yes / No

abr/ssb

To:

- 1.The Sub Judge, Pudukkottai.
- 2.Principal District Munsif, Pudukkottai.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE.J.,

abr/ssb

Pre-delivery Judgment in
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06.12.2024