



WEB COPY



A.S.No.1144 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 17.03.2025

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

A.S.No.1144 of 2024
and CMP.No.29393 of 2024

S.Ashwin

... Appellant

Versus

1.Senthilvel
2.Shanthi

... Respondents

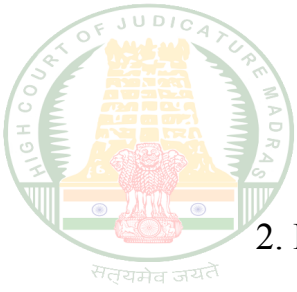
Prayer: Appeal filed under Section 96 of Code of Civil Procedure, to set aside the judgment and decree dated 12.06.2024 made in O.S.No.721 of 2023 on the file of the IV Additional District Court at Coimbatore.

For Appellant : Mr.G.Prabhakar

For respondent : Mr.Ma.Pa.Thangavel
for Mr.M.Logesh for R1
Mr.S.Sithirai Anandham for R2

JUDGMENT

Challenging the decree and judgment of the Trial Court decreeing the suit for specific performance, the present appeal came to be filed by the second defendant.



A.S.No.1144 of 2024

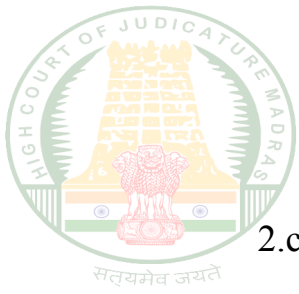
2. Brief facts leading to filing of the case is as follows:

WEB COPY

2.a. The defendants have executed an agreement of sale for sale of suit property for a total sale consideration of Rs.11,86,000/- and received a sum of Rs. 5 lakhs as advance and agreed to complete the sale within a period of 8 months. On 24.11.2023, defendants together received a sum of Rs.5 lakhs through the bank transfer. Therefore, the plaintiff has to pay remaining sale consideration of Rs.1,86,000/- however, the defendants have not come forward to execute the sale deed. Hence, the plaintiff issued a legal notice on 16.06.2023 and thereafter, the suit has been filed.

2.b. Based on the above pleadings, the Trial Court has framed the following points:

Whether the plaintiff is entitled for the decree of Specific Performance and for delivery of possession of the suit property or as an alternative remedy seeking pray for directing the defendants to return back the advance amount of Rs.10,00,000/- along with interest of Rs.11,32,658/- and with costs?



2.c. On the side of plaintiff, plaintiff himself was examined as PW1 and marked Exs.A1 to A9. Since the defendants remained exparte, exparte decree came to be passed and the same has been challenged by the second defendant in this appeal.

3. The learned counsel for the appellant submitted that summons has not been served to the appellant and the Trial Court proceeded to pass exparte decree and judgment. Further, the decree is only an exparte decree and there was no issues framed with regard to the readiness and willingness on the part of the plaintiff. In the absence of any issues with regard to the readiness and willingness, particularly, in a suit for specific performance, decree cannot be sustained in the eye of law.

4. Whereas, the learned counsel for the respondents submitted that summons have been duly served, in fact, the first defendant being the mother of the second defendant received the summons. Therefore, it is a deemed service. Hence, the contention that summons has not been served to the appellant cannot hold any water.

5. In light of the pleadings and submissions of the learned counsel for either



A.S.No.1144 of 2024

side, now, the points arise for consideration are as follows:

WEB

- (i) Whether the exparte decree has been passed without summons being served on the appellant?
- (ii) Whether the decree and judgment passed exparte without framing any issues particularly with regard to the readiness and willingness sustained in the eye of law?

6. Heard the learned counsel for either and perused the materials placed on record, particularly, this Court called for records and perused the summons.

Points (i) & (ii)

7. Summons of course has been served on the first defendant/mother of the second defendant on 10.10.2023 @ 5:45 pm. For the second defendant, summons has have been served on the first defendant at the same time. It is relevant to note that service on the adult member of the defendant family is also valid in the eye of law provided it has to be established that there is no likelihood of the concerned person being found at the residence within a reasonable time and he has not appointed any agent to accept service of summons on his behalf, service may be

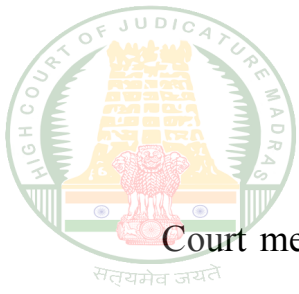


A.S.No.1144 of 2024

made on any adult member of the family. Only in that scenario, service of adult member of the family is a valid service.

8. Whereas, a perusal of the summons makes it clear that summons were served only on 10.10.2023 @ 5:45 pm for the hearing date on 12.10.2023. On 12.10.2023, appellant was set exparte by the Trial Court. Serving Officer has not filed any affidavit to the effect that he has made enquiry and second defendant presence in the house within reasonable time is not possible, therefore, he has served summons on the first defendant. In the absence of such indication, it cannot be said that there was a valid service of summons. Further, it is also relevant to note that in a suit for specific performance, the strict pleading that the plaintiff has to aver has been removed by amended Act, but the fact remains that the readiness and willingness has to be proved to get equitable relief.

9. Though discretion has been taken away now by the amended act, viz., The Specific Relief (Amendment) Act, 2019, but readiness and willingness is sine qua non for grant of specific performance. Such being the legal position, the Trial Court ought to have gone into that issue and decided the suit, whereas, the Trial



A.S.No.1144 of 2024

Court merely on the ground that the defendant being *exparte* had granted decree.

WEB COPY This Court is of the view that such a decree cannot be valid in the eye of law, particularly, in a suit for specific performance.

10. It is also one another submission made by the learned counsel for the respondents that first defendant has not filed appeal as against the *exparte* decree. Therefore, decree cannot be set aside. It is relevant to note that when the decree passed on a ground common to both the defendants, even such decree has not been challenged by one of the decree holder, still the decree can be set aside in whole as per Order 41 Rule 4 of CPC.

11. Such view of the matter, the judgment and decree of the Trial Court is set aside and this Court is of the view that re-trial is absolutely necessary for effective adjudication of the lis. Accordingly, the matter is remanded back to the Trial Court for fresh disposal of the suit on its own merits. The defendants shall file written statement within a period of one month from the date of judgment, thereafter, the Trial Court shall frame the issue and dispose of the suit within a period of four months thereafter.



A.S.No.1144 of 2024

WEB COPY 12. In view of the above, the appeal stands allowed. No costs. Consequently, connected miscellaneous petition stands closed.

17.03.2025

Index : Yes / No

Speaking/non speaking order

dhk

Note: Registry is directed to return the original records to the Trial Court forthwith.

To,

1. The IV Additional District Judge
IV Additional District Court, Coimbatore

2. The Section Officer
VR Section, Madras High Court

N. SATHISH KUMAR, J.



WEB COPY



A.S.No.1144 of 2024

dhk

A.S.No.1144 of 2024

17.03.2025