



S.A.(MD)No.143 of 2019

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 23.06.2025

CORAM

THE HON'BLE MR.JUSTICE **G.ARUL MURUGAN**

S.A.(MD)No.143 of 2019
and
C.M.P.(MD)No.3326 of 2019

Ponmayan @ Pommayan

... Appellant/1st Respondent/
Plaintiff

Vs.

1.K.Mahendran

... 1st Respondent/Appellant/
4th Defendant

Ramasamy (died)

2.Rajagopal

3.Raja

... Respondents 2&3 / Respondents 2&3 /
Defendants 2 &3

(R2 & 3 are set exparte
in the trial Court)

PRAYER : Second Appeal filed under Section 100 Cr.P.C., against the judgment and decree dated 20.04.2018 passed in A.S.No.32 of 2016 on the file of the Additional Sub Court, Dindigul, reversing the judgment and decree dated 29.07.2016 passed in O.S.No.128 of 2010 on the file of the District Munsif, Nilakottai, Dindigul District.



S.A.(MD)No.143 of 2019

WEB COPY

For Appellant

: Mr.S.Muniyandi

For Respondents

: No appearance for R1

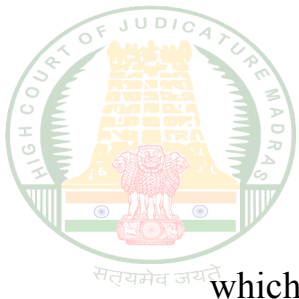
: R2 & R3 *Exparte* vide EB

JUDGMENT

This second appeal has been filed challenging the judgment and decree dated 20.04.2018 passed in A.S.No.32 of 2016 on the file of the Additional Sub Court, Dindigul, reversing the judgment and decree dated 29.07.2016 passed in O.S.No.128 of 2010 on the file of the District Munsif, Nilakottai, Dindigul District

2. The plaintiff is before this Court on Appeal. The parties are referred to, as per the litigative status before the trial Court.

3. According to the plaintiff, the suit property belongs to the defendants 1 and 2. The second defendant executed a mortgage deed on 30.05.1992 in Ex.A1 by receiving a sum of Rs.40,000/- and on execution of the mortgage, the plaintiff was put in possession of the property on the same day. Thereafter, the plaintiff is in possession and enjoyment, for



S.A.(MD)No.143 of 2019

WEB COPY

which the plaintiff is paying kist. It is the further case of the plaintiff that again on 06.06.1992, the second defendant further received a sum of Rs.10,000/- and made an endorsement in the mortgage deed, as such, in total, a sum of Rs.50,000/- is due and payable by the defendants 1 and 2. The plaintiff has further pleaded that while the mortgage was in subsistence, on 19.03.1994, in Ex.A2, the defendants 1 and 2 had entered into a sale agreement with the plaintiff and his wife agreeing to sell the suit property for the sale consideration of Rs.1,20,000/-. Thereafter, again, on 18.04.1995, the plaintiff and his wife had entered into an another sale agreement in Ex.A3, agreeing to purchase the suit property for the sale consideration of Rs.1,22,400/- from the first defendant, in which, the second defendant stood as a witness. According to the plaintiff, he has on several occasions requested the defendants 1 and 2 to execute the sale deed, in pursuance to the sale agreement dated 18.04.1995 in Ex.A3, for which, the first defendant informed that in respect of the sale deed through which he purchased the suit property, the sale deed has not been released from the registration in view of the deficit of stamp and therefore, on receipt of the sale deed, they will come forward and complete the sale. However, on 21.08.2007, they paid the

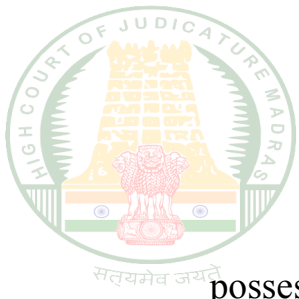


S.A.(MD)No.143 of 2019

WEB COPY

deficit stamp duty and received the original sale deed and since they went ahead to sell the suit property in favour of the fourth defendant, the plaintiff issued a legal notice on 26.01.2008, for which, the fourth defendant alone sent a reply on 20.02.2008. Since the defendants 1 and 2 had entered into a sale agreement with the fourth defendant by giving power of attorney in favour of the third defendant and as per the sale agreement dated 07.02.2008, it is stated that the sale consideration of Rs. 1,50,000/- has been fixed, out of which, an advance of Rs.1,40,000/- has been paid and the sale will be completed, on receipt of the balance sale consideration, the plaintiff has come up with the suit, praying for permanent injunction.

4. The defendants 1 to 3 remained *ex-parte* and the fourth defendant, who is the purchaser of the suit property, had resisted the suit by filing a written statement. According to the fourth defendant, the first defendant, who is the absolute owner of the suit property had executed a power of attorney in favour of the third defendant on 31.10.2007 empowering him to sell the property, based on which, an agreement of sale was entered into with the fourth defendant on 07.02.2008 and the



S.A.(MD)No.143 of 2019

WEB COPY

possession of the suit property was handed over to him and he is in possession and enjoyment of the suit property. In pursuant to the sale agreement, the first defendant represented by the third defendant power agent had also executed a sale deed in favour of the fourth defendant on 14.09.2010. The fourth defendant is paying kist to the suit property and carrying on cultivation, as such, sought for dismissal of the suit.

5. During trial, the plaintiff examined himself as P.W.1 and his wife as P.W.2 and marked Ex.A1 to Ex.A11. On the side of the defendants, the fourth defendant examined himself as D.W.1 and marked Ex.B1 to Ex.B13.

6. The trial Court, after analyzing the documents and evidences, came to the conclusion that the plaintiff is entitled for the relief and decreed the suit, granting permanent injunction. The trial Court had mainly come to the conclusion observing that when the sale agreement in Ex.A3 was entered into, the first defendant was not having any objection which shows the existence of mortgage in Ex.A1. After notice was issued to the defendants, the sale deed has been executed in favour of the fourth



S.A.(MD)No.143 of 2019

WEB COPY

defendant, after entering into a sale agreement, which was only for the purpose of defeating the rights of the plaintiff. The trial Court mainly relied on the mortgage claimed by the plaintiff in Ex.A1, in decreeing the suit.

7. Aggrieved by the decree of the trial Court, the fourth defendant preferred an Appeal. On appeal, the lower Appellate Court by judgment and decree dated 20.04.2018, reappraised the evidence and allowed the appeal, reversing the judgment and decree of the trial Court. The lower Appellate Court found that when the mortgage deed in Ex.A1 is not registered and further when the plaintiff has not come up with the relief, seeking for specific performance, based on the agreement entered into, the suit for bare injunction filed by them cannot be sustained. The lower Appellate Court also found that the plaintiff failed to prove that he has been in continuous possession of the suit property, even after 1992, till the filing of the suit, particularly, when even as per the sale agreement relied on by him in Ex.A3, the possession was not handed over. Assailing the judgment and decree of the lower Appellate Court, the plaintiff is before this Court on appeal.

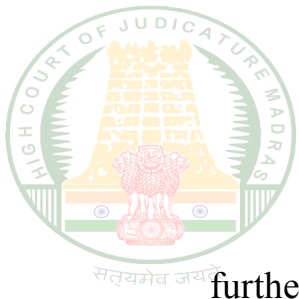


S.A.(MD)No.143 of 2019

WEB COPY

8. The appeal has not been admitted and this Court, by order dated 01.04.2019, only issued notice to the respondents.

9. The learned counsel appearing for the appellant/ plaintiff argued that the mortgage was entered into by the plaintiff with the defendants 1 and 2 and on receipt of the loan amount, he was put in possession of the suit property. His further contention is that when the plaintiff had been in possession from the year 1992, subsequently, the defendants 1 and 2 had also come forward with the sale agreements in Ex.A2 and Ex.A3 and only due to the fact that the original sale deed was not released from Registrar Office, the completion of the sale was delayed. It is the further contention of the learned counsel that immediately on coming to know that the sale deed was released from the Registrar office and the first defendant was intending to create encumbrance, a legal notice was issued, but, however, to defraud the claim of the plaintiff, nominal sale transaction with the fourth defendant was entered into through the third defendant', who stood as a power of attorney and even after filing the suit, they went ahead and completed the sale transaction which will not bind the plaintiff. The learned counsel



S.A.(MD)No.143 of 2019

WEB COPY

further submitted that when the plaintiff was put in possession of the suit property and he is in possession and enjoyment by carrying out cultivation, he is entitled to maintain the suit for permanent injunction, which has also been established by filing of the kist receipts. He further contended that the trial Court by considering the plaintiff's possession and analyzing the document, had rightly decreed the suit. However, the lower Appellate Court had erroneously reversed the finding on misappreciation of the evidence, which is perverse and sought for interference of this Court.

10. Eventhough the respondents have been served and the name of the counsel is printed in the cause-list, there is no appearance on the side of the respondents. Heard the learned counsel for the appellant and perused the materials available on record.

11. Admittedly, the first defendant, viz., Ramasamy, is the absolute owner of the suit property. The suit property is situated in Survey No. 36/4, which was purchased by the first defendant. The plaintiff claims that a mortgage deed was executed in his favour by the second defendant



S.A.(MD)No.143 of 2019

WEB COPY

on 30.05.1992 in Ex.A1, based on which, he was put in possession and enjoyment of the suit property. When it is admitted that the first defendant, viz., Ramasamy, is the owner of the suit property, it is not made clear as to how the plaintiff had advanced the loan amount to the second defendant and he had executed a mortgage in favour of the plaintiff in Ex.A1. Though the second defendant is the son of the first defendant, still the first defendant, when he is the absolute owner of the suit property, having acquired the property by purchase vide registered sale deed and when he was alive, the second defendant has no right over the suit property. As such, even in this regard, the plaintiff cannot claim any accrued right through the mortgage executed by the second defendant, who received a loan amount of Rs.40,000/-, and a further loan of Rs.10,000/- subsequently, by way of an endorsement. This availing of loan and execution of the mortgage if any by the second defendant in favour of the plaintiff, will not bind the first defendant or the suit property in any manner.

12. The plaintiff claims that on receipt of the loan amount of Rs.40,000/- by the second defendant and by executing the mortgage deed



S.A.(MD)No.143 of 2019

WEB COPY

in Ex.A1, he was put in possession of the suit property and he was allowed to carry on cultivation and receive the usufruct in lieu of the mortgage executed. In effect, the plaintiff claims that an usufructuary mortgage was executed in his favour by the mortgage deed in Ex.A1. An usufructuary mortgage could be executed as per Section 58 (d) of the Transfer of Property Act, 1882, whereby, the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property in lieu of interest. For easy reference, Section 58 (d) of the Transfer of Property Act, 1882, reads as under:

“58. “Mortgage”, “mortgagor”, “mortgagee”,
“mortgage-money” and “mortgage-deed” defined.—

(a) ...

(b)

(c) ...

(d). *Usufructuary mortgage.—*

*Where the mortgagor delivers possession
or expressly or by implication binds himself to
deliver possession of the mortgaged property to the
mortgagee, and authorises him to retain such possession
until payment of the mortgage-money, and to receive the*



WEB COPY



S.A.(MD)No.143 of 2019

rents and profits accruing from the property

or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.”

13. As such, the claim made by the plaintiff through the transaction in Ex.A1 is that usufructuary mortgage was created by the second defendant in favour of the plaintiff. Even apart from the observation in the preceding paragraph that the second defendant has no semblance of any right to create any mortgage in the suit property, still the mortgage has to be registered. Section 17 of the Registration Act deals with the document of which registration is compulsory. As per Section 17(1)(b) of the Registration Act, all the documents shall be registered other than the non-testamentary instruments, which purport or operate to create, declare, assign, limit or extinguish right, in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, the registration of the document is compulsory. Admittedly, in this case,



S.A.(MD)No.143 of 2019

WEB COPY

the plaintiff claims that a sum of Rs.40,000/- has been advanced as a loan to the second defendant, for which, the usufructuary mortgage in Ex.A1 is created in his favour.

14. Further Section 49(c) of the Registration Act deals with the effect of non-registration of documents required to be registered. As per the provision, no document required by Section 17 of the Act, to be registered shall be received as evidence of any transaction, affecting such property or conferring power, unless it has been registered. However, as per the proviso, the document could be used as evidence for collateral purposes. In the instant case, when the mortgage in Ex.A1 has not been registered, still the deed has been received in evidence and marked as Ex.A1. Even though the document has been marked, still when Ex.A1 mortgage deed is to be mandatorily registered as per Section 17 of the Registration Act, unless it is registered it cannot be received in evidence as per Section 49 of the Act, but however, the plaintiff could use the document for any other collateral purpose. When the main relief sought for by the plaintiff in the suit is for permanent injunction regarding possession, the plaintiff cannot merely rely on the document in Ex.A1



S.A.(MD)No.143 of 2019

WEB COPY

alone, to establish the relief claimed by him. Therefore, in view of the fact that the second defendant was not having any right or power to execute the mortgage deed by handing over the possession of the suit property, which admittedly belongs to the first defendant and the reliance of the plaintiff completely on Ex.A1, to sustain his relief of possession cannot be legally sustained.

15. The plaintiff claims that after the mortgage was executed by the second defendant in Ex.A1, the first defendant, who is the admitted owner of the suit property, had executed a sale agreement joining along with the second defendant in favour of the plaintiff and his wife in Ex.A2 on 19.03.1994. As per the sale agreement, the first defendant agreed to sell the suit property for a sale consideration of Rs.1,20,000/-, while so, it is the claim of the plaintiff that he has again entered into a sale agreement after a period of one year, i.e., on 18.04.1995 with the first defendant, in which, the second defendant stood as an attester. As per the second sale agreement in Ex.A3, it was agreed by the plaintiff to purchase the suit property for a sum of Rs.1,22,400/-. The plaintiff has not made it clear as to what was the purpose for entering into the second



S.A.(MD)No.143 of 2019

WEB COPY

sale agreement when there is a first sale agreement in respect of the suit property and what happened to the earlier sale agreement entered. However, a perusal of the second sale agreement entered into in Ex.A3, reveals that no averments had been made in respect of any mortgage created or the earlier sale agreement entered into or the possession having been handed over or being vested with the plaintiff. The admitted agreement in Ex.A3 reveals that as on the date of execution of the sale agreement dated 18.04.1995, as claimed by the plaintiff, the possession of the suit property was not with the plaintiff. Assuming that the said sale transaction has been entered into by the first defendant along with the second defendant through Ex.A2 and Ex.A3, the plaintiff did not choose to seek for a relief of specific performance to execute the sale agreement, thereby get the sale transaction completed, even based on the second sale agreement in Ex.A3 dated 18.04.1995. The time for filing the suit for specific performance, based on the sale agreement also lapsed in the year 1998 itself. Whiles, the plaintiff had come up with the suit for the relief of bare injunction as against the defendants in the year 2010.



S.A.(MD)No.143 of 2019

WEB COPY

16. It is the vehement contention of the learned counsel that on coming to know that the first defendant is intending to create an encumbrance in favour of the fourth defendant, they have issued a legal notice and only after the notice issued, sale agreement was entered into in favour of the fourth defendant and after filing of the suit, sale transaction has been completed with the fourth defendant and therefore, the sale deed executed in favour of the fourth defendant, will not bind the plaintiff and the sale deed in his favour is null and void.

17. This Court is not able to accept the arguments advanced in this regard, for a simple reason that when admittedly the first defendant is the owner of the suit property and there is no mortgage or any case made out as against the first defendant and the plaintiff also did not choose to proceed to claim a relief of specific performance, based on sale agreement in Ex.A2 and Ex.A3, the first defendant, being the absolute owner of the property, cannot be permanently restrained from exercising his rights over it. As the rightful owner, it is open to the first defendant to deal with the property in any manner he deems fit and he holds an absolute right to the property.

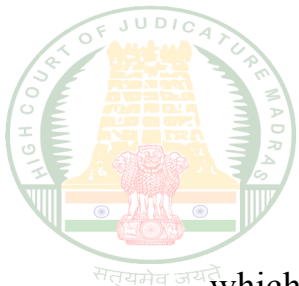


S.A.(MD)No.143 of 2019

WEB COPY

18. As such, when the agreement has been entered into with the fourth defendant and the subsequent sale deed has also been executed in favour of the fourth defendant, the plaintiff does not have any right to seek a relief as against the fourth defendant.

19. The lower Appellate Court has rightly by relying on the document in Ex.A3 found that the plaintiff has not established that he has been in possession of the suit property from 1992 till the date of filing of the suit. When the plaintiff has filed the tax receipts through Ex.A10 for the years 1993, 1998 and 2002, the defendants have filed Ex.B8 tax receipts paid for the years 2009, 2010, 2011 and 2015 in respect of the suit property. When the plaintiff has come up with the suit claiming for permanent injunction, he has to establish that he was in possession of the suit property on the date of filing of the suit. When the plaintiff could not substantiate his possession through the mortgage deed in Ex.A1 and has not proved with any other document that he had been in possession of the suit property on the date of filing of the suit, the lower Appellate Court had rightly analyzed this aspect and arrived at a finding of fact,



S.A.(MD)No.143 of 2019

which is based on the available materials and records.

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20. When the trial Court had mainly relied on the loop holes and weakness in the case of the defendants and decreed the suit on mere assumption, the lower Appellate Court had rightly arrived at a finding, based on the available materials and reversed the judgment and decree of the trial Court. This Court is not able to find any illegality or perversity in the findings of the lower Appellate Court. Further, no substantial question of law arises in the appeal for consideration.

21. In view of the above, the Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
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23.06.2025



WEB COPY



S.A.(MD)No.143 of 2019

G.ARUL MURUGAN,J.

LS

To

- 1.The Additional Sub Court,
Dindigul.
- 2.The District Munsif,
Nilakottai,
Dindigul District
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.

SA.(MD)No.143 of 2019

23.06.2025