BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 14.03.2025

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
and
THE HONOURABLE MR.JUSTICE M.JOTHIRAMAN

A.S(MD)Nos.81 & 82 of 2017

A.S.(MD)No.81 of 2017 : -

Soosainathan (died)

1.Nambikkai Mary

2.Britto Arokkiaraj

3.Peter Amalraj

4.Felix Raj

5.Amala Deepa .... Appellants / Defendants 3 to 7

Vs.

1.Sivakumar ... Respondent / Plaintiff

2.Pushpanathan ... Respondent / 2nd Defendant

Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and Decree dated 29.09.2016 passed in O.S.No.59 of 2012 on the file of the Additional District Judge (Fast Track Court) at Kumbakonam.

For Appellants : Shri.V.Raghavachari, Senior Counsel for Mr.S.Ramesh

For Respondents : Mr.H.Lakshmi Shankar
for Mr.T.V.Sivakumar for R1

:Mr.Raguvaran Gopalan
for Mr.K.Prabhakar for R2

A.S.(MD)No.82 of 2017 : -

Soosainathan (died)

1.Nambikkai Mary

2.Britto Arokkiaraj

3.Peter Amalraj

4.Felix Raj

5.Amala Deepa .... Appellants / Plaintiffs 2 to 6

Vs.

1.Sivakumar

2.Manali Sri Ramakrishna Mudaliar Family Trust
(Srirangam Vedha Paatasalai)
Represented by its Hereditary Trustee,
Dr.M.R.Srinivasan, S/o.Manali Ramakrishnan,
Anna Salai, Guindy,
Chennai-600 032. ... Respondents / Defendants

Prayer : Appeal Suit filed under Section 96 of Civil Procedure Code, against the Judgment and Decree dated 29.09.2016 passed in O.S.No.58 of 2013 on the file of the Additional District Judge (Fast Track Court) at Kumbakonam.

For Appellants : Shri.V.Raghavachari, Senior Counsel
for Mr.S.Ramesh

For Respondents : Mr.H.Lakshmi Shankar
for Mr.T.V.Sivakumar for R1

: No appearance for R2

COMMON JUDGEMENT

(Judgment of the Court was made by G.R.SWAMINATHAN, J.)

Heard the learned Senior Counsel appearing for the appellants and the learned counsel appearing for the first respondent.

2.A.S.No.81 of 2017 arises out of O.S.No.59 of 2012 for specific performance. A.S(MD)No.82 of 2017 arises out of O.S No.58 of 2012 for recovery of possession. The suit for specific performance was filed by the first respondent herein, whereas the appellants filed the suit for recovery of possession. Both the suits were tried together. By a common Judgment dated 29.09.2016, the suit for specific performance was decreed and the suit for recovery of possession was dismissed. Challenging the same, these appeals have been filed.

3.The fate of A.S No.82 of 2017 will depend upon the outcome of A.S No.81 of 2017. The suit schedule comprises three items (totally measuring 4 acres and 19 cents). The case of the plaintiff/first respondent herein is as follows:

The suit properties are nanjai lands that originally belonged to Sri Manali

Ramakrishna Mudaliar Family Trust. Soosainathan and Pushpanathan (the first and second defendants respectively) were their cultivating tenants. They purchased the suit schedule properties from the trustees vide two registered sale deeds dated 30.04.2008 for a valid consideration. While so, the plaintiff/first respondent herein had earlier entered into sale agreement dated 25.07.2007 with the first and second defendant. The total sale consideration was fixed at Rs.45,35,635/-. A sum of Rs.2,10,000 was paid towards advance. The time for completing the sale transaction was fixed as three months. The plaintiff made several payments in installments and this was duly recorded in the supplementary agreement dated 02.04.2008 entered into between them. Possession was handed over to the plaintiff on 11.04.2008. The plaintiff paid a sum of Rs. 26,64,500 to the first and second defendant towards sale consideration. The first and second defendants extended the period of agreement by another year on 14.07.2009. Though the plaintiff was always ready and willing to perform his part of the agreement and approached the first and second defendant several times for execution of sale deed in his favour, they evaded execution. Hence the suit for specific performance came to be filed.

4.The defendants filed written statement controverting the averments in the plaint. The execution of agreement to sell dated 25.07.2007 and receipt of Rs. 25,64,500 was admitted. However the execution of the supplementary agreement dated 02.04.2008 was denied as fabricated. The agreement dated 25.07.2007 became inexecutable because of the objection to the sale of the property raised by the HR&EC department. The defendants requested the plaintiff to take back the amount paid and this fact is also captured in the reply to the legal notice dated 27.10.2012. They filed a suit for mandatory injunction in O.S. No 272/2012. However the same was withdrawn since the trust was not made a party.

5. The trial court framed the necessary issues. The plaintiff examined himself as P.W.1. One Ekambaram who had attested Ex.A1-sale agreement was examined as P.W.2. On the side of the plaintiff, Ex.A1 to Ex.A37 were marked. Soosainathan examined himself as D.W.1. On his side, Ex.B1 to Ex.B23 were marked. As already stated, the relief of specific performance was granted and the suit for recovery of possession was dismissed.

6. The points that arise for determination in this appeal are as follows:-

a)Whether the suit for specific performance was hit by limitation?

b)Whether the first respondent herein had shown his continuous readiness and willingness throughout?

7.It is not in dispute that the suit property originally belonged to Manali Sri Ramakrishna Mudaliar Family Trust. It is also not in dispute that the defendants, namely, Soosainathan and Pushpanathan were recorded as cultivating tenants in respect of the suit properties. The first respondent herein entered into sale agreement dated 25.07.2007 with the said Soosainathan and Pushpanathan. The total sale consideration was fixed at Rs.45,35,635/-. A sum of Rs.2,10,000 was paid towards advance. The time for completing the sale transaction was fixed as three months. The suit for specific performance came to be instituted on 19.11.2012.

8.The learned Senior Counsel appearing for the appellants filed written arguments and took us through its contents. He pointed out that the sale agreement was entered into on 25.07.2007 and a period of three months was also fixed for completion of the transaction. Since the suit was only filed on 19.11.2012 when it ought to have been instituted by 13.07.2009, the suit itself is barred by limitation. Hence, the relief could not have been granted in favour of the first respondent when the suit was filed belatedly. He contended that granting the relief of specific performance is discretionary and that this discretion ought not to have been exercised in favour of the first respondent. He pointed out that the entire case of the first respondent herein rests on Ex.A2. The learned Senior Counsel took us through its contents and pointed out that the said document bears the date 02.04.2008. But in the body of the document, there is a reference to a bank transaction that had taken place on 03.04.2008. Since it is impossible that the document bearing the date 02.04.2008 could refer to a transaction that took place only on the next day, this Court should reject this document in *toto* as concocted. In Ex.A2/Ex.A37, the periodical payments allegedly made by the first respondent have been recorded. Endorsement made on 14.07.2009 reads that on the said date, a sum of Rs.25,000/- was received by Soosainathan from the first respondent and that he had agreed for extending the time for performance by one more year from the said date. If Ex.A2 as well as Ex.A37 – endorsements are rejected, obviously, the suit would be time barred.

9.The question that calls for consideration is whether Ex.A2 has to be rejected. In Exhibit A3 legal notice dated 20.10.2012, there is an express reference to the agreement dated 02.04.2008. But the genuineness of the agreement was not disputed in Ex.B13 reply notice dated 26.10.2012. It is true that in the written statement filed in O.S No.59 of 2012, it has been pleaded that Ex.A2 is not a true document. But in the cross examination, P.W.1-Sivakumar was not at all challenged on the discrepancy relating to the dates in Ex.A2.

10.The learned counsel for the first respondent draws our attention to the decision reported in ***1994 (1) LW 296 (Vaithilingam Pillai Vs. Minor Maruganandham)***. The Hon'ble Division Bench after following the earlier precedent held as follows:-

> " **9.** In this connection, the learned counsel for the respondent drew the attention of this court to the decision in ***A.E.G. Carapiet v. A.Y. Derderian (A.I.R. 1961 Calcutta 359 at page 362)*** where a Division Bench held:—
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> "(10.) The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that was going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the house of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks to question with regard to this, then he must be taken to

accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice first by springing surprises upon the party then he has finished the evidence of his witnesses and when he has further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

10. The learned counsel for the respondent drew our attention to another decision reported in *Cuni Lal* v. *Hartford Fire* Insurance. (A.I.R. 1958 Punjab 440 at page 444). Where also the earlier quoted English decision in *Browne* v. *Dunn* was quoted and it was held:

"**It is well established rule of evidence that a party should put to each of his opponent witnesses so much of his case as concerns that particular witness. If no such questions are put, the court presume that the witness account has been accepted.** If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation".

11.In this case, the plaintiff's explanation was not demanded to explain this discrepancy between the two dates ie., 02.04.2008 and 03.04.2008. This issue cannot be raised only at the time of argument. That apart, the learned counsel appearing for the first respondent pointed out that the date of Ex.A2 was written in hand on 02.04.2008. The learned counsel would come out with an explanation that Ex.A2 was a printout subsequently taken and that this date 02.04.2008 was hand-written. We find the counsel's explanation to be quite acceptable. In any event, the appellant did not challenge the plaintiff or P.W.2 on this aspect. The failure to cross-examine on this aspect has seriously undermined the case now put forth by the appellant. We are not inclined tto accept the argument of the learned senior counsel on this score. It is pertinent to note that DW1 in his cross examinationa admits the signatures in Ex.A2 to be that of his and his brother's. He also admitted that he had received various amounts and had made endorsements in Ex.A2 at different points in time. Since the contents of the document bearing the details regarding the payment particulars and the signatures have been admitted by DW1, we hold that Ex.A2 is a valid document.

12.The facts involved in this case are also highly peculiar. When the sale agreement was entered into in the year 2007, admittedly, Soosainathan and Pushpanathan were not the owners of the land. They were only cultivating tenants. The land belonged to Manali Sri Ramakrishna Mudaliar Family trust. The understanding between the parties was that the cultivating tenants would obtain the sale deed in their favour from the trust and thereafter, Soosainathan and Pushpanathan would execute the sale deeds in favour of Siva Kumar. It is the case of the appellants that Sivakumar barged into the property some time in the year 2011. That led to filing of O.S.No.272 of 2012 before the Principal District Court, Kumbakonam by them. The plaint filed in the said suit was marked as Ex.A7. In the said plaint, Paragraph No.6 reads as follows:-

> "2012 சித்திரை மாதத்தில் தாவா சொத்துக்களின் டிரஸ்டி கிரயம் செய்ய முடியாது என்றும் நாங்கள் 1422 பசலி முதல் எப்பொழுதும் போல் தாவா நிலங்கள் சாகுபடி செய்து குத்தகை நெல் அளக்க கேட்டார். நாங்கள் 13.06.2012 அன்று எதிர்மனுதாரரை தாவா சொத்தில் சந்தித்து கிரயம் செய்ய முடியாது என்றும் எதிர்மனுதாரர் எங்களிடம் கொடுத்த தொகை பூராவையும் நாங்கள் அவரிடம் திரும்ப கொடுப்பதாக கூறி தாவா சொத்தில் உள்ள ஆக்கிரமிப்புகளை அகற்றி தாவா சொத்துக்களை சுவாதீனம் விட கேட்டோம்."

13.Thus, on the own showing of the first and second defendant, the understanding was holding good even as late as in April 2012. In Paragraph No. 6 of the said plaint, Soosainathan and Pushpanathan had averred that only on 13.06.2012, they met the plaintiff and told him that the transaction has become frustrated and become impossible of performance. The Hon'ble Supreme Court in the decision reported in ***(2022) 14 SCC 793 (P.Daivasigamani vs S.Sambandan)*** had held that the period of limitation would start running from the date when the plaintiff notices that the performance was refused by the defendant and not from the date of the execution of the agreement in question. The date on which the performance is refused therefore becomes the crucial date for computing limitation. Therefore, 13.06.2012 should be taken as the starting point for computing limitation. The specific performance suit was filed on 19.11.2012. Therefore, by no stretch of imagination, the suit can be said to be barred by limitation. The first point is answered accordingly.

14.The next question that calls for consideration is whether the plaintiff has proved that he was always ready and willing to perform the contract as per the mandate set out in Section 16(c) of the Specific performance Act, 1963. As already noted above, Soosainathan and Pushpanathan refused performance only on 13.06.2012. The plaintiff sent Ex.A3-legal notice on 20.10.2012 itself demanding specific performance of the agreement. The reply to the said notice was given on 27.10.2012 (Ex.A6). In the said reply notice, the fact that the sale agreement was entered into on 25.07.2007 was admitted. The only stand taken in the reply notice is that since the registration formalities had been put on hold on the ground that the suit properties are the Trust properties, the transaction became impossible of performance. It is seen from the evidence on record that the land owners / Trust had executed the sale deeds dated 30.04.2008 (Ex.A32 to Ex.A35) in favour of Soosainathan and Pushpanathan. On account of the objection received from the HR & CE Department, the registration department declined to complete the registration formalities. Hence, the Trust filed W.P.(MD)Nos.8690 & 8691 of 2009 (Ex. A29 and Ex.30). The writ petitions were eventually dismissed as not pressed in the year 2013. But in the meanwhile, the documents were released on 28.11.2012. It is interesting to note that the documents were received by P.W.2-Ekambaram. It appears that the said Ekambaram (P.W.2) had been authorised to receive the document. It is further seen from the evidence on record that the sale consideration payable to the Manali Sri Ramakrishna Mudaliar Family Trust came from the plaintiff Sivakumar's accounts. Sivakumar had paid the amount to Soosainathan and Pushpanathan who thereafter handed over the same to the Trust. It was Sivakumar who facilitated the filing of the writ petition also. The understanding between the parties was that once Soosainathan and Pushpanathan took the sale deeds in their names, they would thereafter convey the suit properties by executing the sale deed in favour of Thiru.Sivakumar. Thus we are of the view that Thiru.Sivakumar cannot be blamed for waiting till 2012 in filing the suit for specific performance. This is because, the sale deeds executed in favour of Soosainathan & Pushpanathan in the year 2008 were not released by the registration department till December 2012. Only when Sivakumar became confident that the document would be released, he chose to file the suit. It is also seen from the evidence on record that Sivakumar had paid a sum of Rs.25,64,500/- towards fulfilment on his part of the contract. He had to pay only the balance amount of Rs.19,71,135/-.

15.Our attention is drawn to the decision reported in ***(2023) 4 SCC 239 (Basavaraj Vs. Padmavathi)*** in which it was held that unless the court has directed the plaintiff to deposit the money in Court, adverse inference cannot be drawn against the plaintiff for not depositing it. Moreover, the first defendant in his proof affidavit admits that certain amounts were received from the plaintiff for meeting litigation expenses. This indicates the plaintiff's continuous readiness and willingness. In Ex.A3 legal notice, the plaintiff had averred his readiness and willingness to pay for which he approached the first and second defendant on 20.10.2009, 07.09.2011. 01.06.2012 and 30.09.2012. This has not at all been controverted in the reply to the legal notice. Even in the plaint filed in O.S.No. 272 of 2012 (Ex. A7), the readiness or willingness of the plaintiff herein or his capacity to pay the rest of the consideration has not been questioned. After a careful re-appreciation of the evidence on record, we hold that the plaintiff has proved his readiness and willingness to pay the reminder of the consideration. The second point is answered accordingly.

16.The court below had rightly decreed the suit for specific performance. It is submitted by the learned counsel for the first respondent that even though Soosainathan as well as Pushpanathan suffered decree for specific performance, it was only Soosainathan who chose to file A.S.No.81 of 2017 whereas Pushpanathan had chosen to abide by the decree passed by the court below. Soosainathan died during the pendency of the suit and only his legal heirs are continuing the contest.

17.After a careful perusal of the evidence on record, we also find some force in the contention of the learned counsel for the first respondent/plaintiff that Soosainathan and Pushpanathan were in a fiduciary capacity and in that capacity, they had entered into the agreement. We confirm the decree for specific performance granted by the court below. We however make it clear that even without making the balance payment of Rs.19,71,135/-, he had been in possession of the property. While the learned senior counsel for the appellant would contend that Sivakumar had forcibly taken possession, the learned counsel for the first respondent would claim that he was put in possession by Soosainathan and Pushpanathan. Be that as it may, we make it clear that Sivakumar has to make some additional payment since he had been in possession even without paying the balance amount. The balance amount came to be deposited only on 19.11.2012.

18. While dictating this order in the open Court, we posed a question as to whether the plaintiff would be willing to pay any further sum to the appellants. The learned counsel for the first respondent after getting instructions submitted that Sivakumar would pay a further sum of Rs.20,00,000/- to the appellants in A.S.MD.No.81 of 2017. Recording the said undertaking by the first respondent, A.S.(MD)No.81 of 2017 is disposed of in the following terms:-

> "(I)The decree for specific performance granted by the court below in O.S.No.59 of 2012 is confirmed.
>
> (II) Sivakumar is directed to deposit a sum of Rs.20,00,000/- within 8 weeks from the date of receipt of copy of this order to the credit of O.S.No.59 of 2012. The legal heirs of the appellant in A.S.No.81 of 2017 are entitled to withdraw the said amount and they are mandated to execute the sale deed in favour of the first respondent within a period of four weeks thereafter. In the event of failure on the part of the appellants in A.S.(MD)No.81 of 2017, who come forward to execute the sale deed, the executing Court will execute the sale deed in favour of the first respondent."

19.In view of the confirmation of the decree for specific performance in A.S.(MD)No.81 of 2017, A.S. (MD)NO. 82 of 2017 is dismissed.

[G.R.S., J.] [M.J.R., J.]
14.03.2025

rmi/skm

To:

The Additional District Judge (Fast Track Court) at Kumbakonam.

<u>Copy to:</u>

The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court, Madurai.

G.R.SWAMINATHAN, J

and

M.JOTHIRAMAN, J.

rmi/skm

A.S(MD)Nos.81 & 82 of 2017

14.03.2025