

(2007) 04 MAD CK 0083

In the Madras High Court

Case No : Second Appeal No. 50 of 2002

A.P. Nesamani and Others

APPELLANT

Vs

R. Govindasamy and R. Parasuraman

RESPONDENT

Date of Decision : 24-04-2007

Acts Referred:

Contract Act, 1872 — Section 63
Limitation Act, 1963 — Article 54

Citation : (2007) 04 MAD CK 0083

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : S. Parthasarathy, S.C. for P. Srinivas, for the Appellant; Hema Sampath, S.C. for R. Subamanian, for the Respondent

Judgement

S. Ashok Kumar, J.—The plaintiffs aggrieved over the concurrent findings of the courts below dismissing the suit as well as the Appeal Suit, have preferred this Second Appeal.

2. The gist of the plaintiffs' case is as follows:

The suit was filed by one Munusamy (appellant 1 and 2's father) for specific performance of contract for sale. According to the plaintiff, the defendants agreed to sell the suit agricultural lands as described in Schedule to the plaint situated in Kazhipattur Village No. 37, Chengalpattu Taluk at the rate of Rs. 1200/= per cent on 25.4.1988 to the first plaintiff, Munusamy. The defendants who are brothers executed fresh agreement on 15.5.1988 affirming the earlier agreement by furnishing exact survey Number and extent as per the recent survey. Time was not the essence of the contract. They also received a sum of Rs. 33,400/= in pursuance of the agreement. The payments have been accepted for the items XI to XIV in the agreement. The first defendant issued a slip in favour of the first plaintiff detailing the payments made till 4.1.1989. The first plaintiff was always ready and willing to perform his part of the agreement. The defendants also delivered possession of the suit properties in pursuance of the sale agreement

and they are in possession of the lands since then and cultivating the lands by raising crops. However, they did not executed the sale deed and they did not receive the lawyer's notice. Hence the suit for the relief stated above.

3. The first defendant filed a written statement contending as follows:

No slip was passed by him in favour of the first plaintiff with details of payments made til 14.1.1989. No amount was received from the first plaintiff and the signature in the slip has been forged. The agreement of sale dated 15.5.1988 is not enforceable. The first defendant is only having a share in the properties and the first plaintiff know of the same and the shares to the other sharers. The first plaintiff asked the defendant to execute the sale deed and he stated that he will tackle the other sharers and he would obtain the signature of the second defendant. No amount was paid as mentioned in the agreement. The time was intended and agreed to be the essence of the contract in the agreement of sale dated 15.5.1988. The plaintiff having not performed his part of the contract within the time stipulated, he is not entitled for any relief. No document was produced by the plaintiff that the properties comprised in the agreement dated 25.4.1988 were given new survey numbers with different extents and different classification of the lands. The properties comprised in the agreement dated 25.4.1988 are nothing to do with the properties comprised in the agreement dated 15.5.1988.

4. The second defendant filed a separate written statement wherein he has stated as follows:

The first agreement dated 25.4.1988 is unenforceable. The alleged sale in favour of the first plaintiff is denied. The portion of the agreement was found torn and removed purposely and another unconnected list of paper containing payment was found pasted. No amounts were received as per the said endorsements. In the agreement dated 15.5.1988, there is no mention about the earlier agreement. The lands mentioned in the subsequent agreement are the ancestral joint family properties of the father of the defendants 1 and 2 who died intestate in 1969 leaving his widow Muniammal and two sons namely the defendants 1 and 2 and daughters Kanniammal and Kamallammal as his heirs. So the first defendant alone is not the absolute owner of the said properties and as such the plaintiff cannot claim specific performance with respect to the items covered in the agreement dated 15.5.1988. The second defendant did not receive Rs. 13,500/= on 15.5.1988.

5. On behalf of the plaintiffs, P.Ws 1 and 2 were examined and Exs.P.1 to P.15 were marked. On behalf of the defendants, D.Ws.1 and and 2 were examined and Exs.D.1 to D.14 were marked. The trial court on consideration of the oral an documentary evidence dismissed the suit holding that the subsequent agreement dated 15.4.1988 is not proved by the plaintiff, the properties belong to other sharers as well, whereas in Ex.A.2 agreement only the signature of D.1 alone found, and further the suit is barred by limitation. The plaintiff filed an Appeal in

A.S. No. 82 of 2000 in the court of the Principal District Judge, Chengalpattu and the learned Prl.District Judge dismissed the appeal conforming the finding of the trial court apart from holding that the two agreements are distinct as they relate to different properties. Hence this second appeal by the plaintiffs.

6. At the time of admission of this Second Appeal, the following substantial questions of law were framed:

1. Whether the refusal to perform the terms of the agreement would not constitute the date for reckoning the limitation under Article 54 of the Limitation Act?

2 Whether the first defendant who has executed the agreement is entitled to resist the suit on the plea that the other members of his family are co sharers when he has entered into the agreement knowing fully well regarding the same and whether such defence can be taken in the face of clear and cogent evidence that consideration was passed on to the defendants?

7. As regards the issue of limitation, though as per Ex.A.2 agreement the completion of contract has been stipulated within four months i.e., before 14.8.1988, since payment has been received till 17.3.1991, it cannot be stated that the parties to the agreement have treated time as the essence of the contract. In the present case, the appellants were put in possession of the suit properties immediately on the date of agreement and in spite of continuous transactions and communications, the date for fixing the performance was not materialised and the limitation ought to have been construed from the date on which the performance is refused. Therefore, the mere fact that the suit was filed only on 12.4.1993 is not a bar under Limitation when the refusal to perform the agreement is only on 11.2.1993 under Ex.P.8, reply to lawyer's notice given by both the defendants. The payments received by the defendants on various dates till 11.2.1993 would only show that the defendants were not particular about the time stipulated in the agreement to execute the sale deed or final payment. It is also to be noted that even as per Article 54 of the Limitation Act, for filing a suit for specific performance, the period of limitation is three years from the time fixed for the performance of the agreement, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

8. In S. Brahmanand and Others Vs. K.R. Muthugopal (D) and Others, , the Hon"ble Supreme Court with regard to applicability of first part of Article 54 of Limitation Act has held as follows:

The High Court went wrong in not giving full effect to the import of the letter dated 18.6.1992. The letter shows that both the parties knew that the suits which were dismissed on 10.6.1992, were technically filed by T but that T had been put up by defendants 3 and 4 who were unsuccessful in the eviction petition. In such circumstances, the defendant's representation to the plaintiffs would amount to a request for forbearance from insisting on performance. Thus, although the original agreement of 10.3.1989 had a fixed date for performance

but by the subsequent letter, the defendants made a request for postponing the performance to a future date without fixing any further date for performance. That was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in extending the time for performance, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 permits it. An agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus in the present case, there was a variation in the date for performance. What was originally covered by the first part of Article 54 thenceforth fell within the purview of the second part thereof.

9. As far as the present case is concerned, as already stated, the conduct of the parties would clearly establish that time was not considered by them as essence of the agreement. It is to be seen that as per Ex.A.15, letter dated 9.9.1991 written by the second defendant to the first defendant, he has only requested the plaintiff to increase the rate at least to a sum of Rs. 2,500/= per cent and get it registered as any sum below that is not acceptable for her sister who is also having a share in the suit properties. It is also stated at the end of the letter that if the rate is not acceptable for him, he can get back the amounts. Therefore, it has to be necessarily held that the period of limitation for the present case has to be reckoned only from the date of refusal of performance and if so, the suit is well within the period of limitation.

10. As regards enforceability of Ex.A.2, dated 15.4.1988, the case of the plaintiffs is that since the survey number and extents were not correctly mentioned in Ex.A.1, dated 25.4.1988 another deed of sale agreement dated 15.5.1988 under Ex.A.2 mentioning the correct extents and survey numbers was executed. However, though the second agreement dated 15.5.1988 proceeds as if the document has been executed by defendants 1 and 2, only the first defendant has put his signature and the second defendant did not sign the said agreement. It is the case of the appellants that since the first defendant being the elder brother of the second defendant and since Ex.A.2 is executed only to mention the correct survey numbers and exact extents of the suit properties, the said document binds the second defendant also.

11. As per the first agreement, the defendants agreed to convey the suit properties at Rs. 1200/= per cent and received an advance amount of Rs. 6000/= on 25.4.1988 itself. Thereafter the first plaintiff made payments in piecemeal from 16.5.1988 till 17.3.1991 and totally a sum of Rs. 33,400/= which payments have been endorsed by the defendants in the agreement itself. The first defendant also passed a slip under Ex.A.3, on 4.1.1989 detailing the payments made to him till that date. It is the case of the plaintiffs that they were also put in possession of the suit properties. The same is denied by the defendants.

12. In his evidence, the second defendant admitted that he and his elder brother,

first defendant jointly executed Ex.A.1 and he received the payments which have been endorsed in the deed of Ex.A.1. He has further admitted that he is the graduate and before the agreement of sale Ex.A.1 he got the consent of his elder brother, the first defendant. D.W.2 also admitted in his evidence that he received Rs. 24,000/= on 11.12.1988, Rs. 2000/= on 10.10.1989 and another sum of Rs. 1000/= on the same day and Rs. 500 on 13.1.1990 and also a sum of Rs. 1000/= on 18.2.1990. It is further stated by D.W.2 in his evidence with regard to Ex.A.2 that he has not enquired about Ex.A.2 with his elder brother and there have been only a mistake in the reply notice Ex.A.8 about typing the survey Number as 219/2E.

13. In Ex.A.14 letter dated 18.9.1989 the second defendant stated that the plaintiff can register 35 cents of land near his land and requested to pay Rs. 3000/= urgently for the marriage of his elder sister. In Ex.A.15 letter it is stated by him that since his sister informed through her Advocate that she is also entitled to the share in the property agreed to be sold, he met her and requested her to sign in the sale deed and made her to consent for the same. It is also the evidence of D.W.2 even before Ex.A.1 agreement there was an agreement for sale regarding Survey No. 238 which has expired and not acted upon. It is also his evidence that the amount received as per Ex.A.1 agreement agreeing to pay Rs. 1,200/= per cent has not been repaid by him. This would only show that Ex.A.2 has been executed only to rectify the defects in Ex.A.1 and therefore it cannot be stated that both are different. It is also the finding of the courts below that apart from defendants 1 and 2, Komala their sister is also having equal shares in the suit properties. However, since A.2 agreement is not signed by the second defendant, the same cannot be enforced as against the second defendant. It is admitted by both sides that there was a mediation and the plaintiffs demanded at least half of the properties so that they can have a pathway to reach their properties since they are having lands adjacent to the suit properties. But the conciliation and mediation did not fructify. Therefore, as far as the first defendant is concerned, he is bound by Ex.A.2 agreement with regard to his share in the suit properties. As far as the readiness and willingness on the part of the plaintiffs to perform their part of the agreement, it is to be seen that they were always willing and ready to perform, apart from producing documentary evidence before the trial court as to their means to purchase the suit properties and it is only the defendants who have prolonged the issue without executing the sale by saying that their sister who is having a share in the suit properties is not amenable to the rates agreed to by them.

14. In the above circumstances, the decisions relied on by the learned Senior Counsel appearing for the respondents in 1998 (I) LW 301 (Koothapadayachi and Anr. v. Arjuna Pillai and two Ors.); Amirtham Vs. Subbian and Others, ; Smt. Chand Rani (dead) by LRs. Vs. Smt. Kamal Rani (dead) by LRs., ; Indravathi Vs. Kamala, ; and 2002 2 LW 422 (K. Jayakumar v. Robert and 6 Ors.) which judgments dealt with either the readiness and willingness of the parties to the agreement or as to the issue whether the parties have extended the time by

their conduct viz., whether time was the essence of the contract, in view of the reasoning given in the foregoing paragraphs, are not applicable to be facts of the present case. So also, the decisions in Kalianna Gounder Vs. Palani Gounder and Another, ; 2002 (4) LW 816 (Purushottem Reddy and Anr. v. Pratap Steels Ltd.) and Lourdu Mari David and others Vs. Louis Chinnaya Arogiaswamy and others, have been relied upon by the learned Senior Counsel for the proposition that there are material alterations between the two agreements and therefore the party who approaches the court should come forward with clean hands. But as already discussed, particularly, as this Court held that Ex.A.2 is only a continuation of Ex.A.1 agreement, which has been executed only to include the Survey Numbers and correct extents of the suit properties which have been left out, and more particularly in view of the fact that when D.W-2 in his letter marked as Ex.P.15 has only stated that since his sister only demands a higher amount per cent, it cannot be held that there is material alterations in the pleadings or the plaintiffs have approached with unclean hands and therefore, the above decisions also cannot be pressed into service.

15. In the result, the Second Appeal is partly allowed, holding that the first respondent is liable to execute a sale deed in respect of his half share in the suit properties. No costs.