

(2004) 11 MAD CK 0088

In the Madras High Court

Case No : Second Appeal No's. 1787 and 1788 of 2004 and C.M.P. No's. 14038, 14040 to 14042 and 15027 of 2004

Jayakumari Babu

APPELLANT

Vs

B. Amilnathan-now-B. Amalanathan, S. Kalaivani, R. Thulsi
and S. Narayani

RESPONDENT

Date of Decision : 18-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 20(2)
Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 — Section 10(1)
Transfer of Property Act, 1882 — Section 53(A)

Citation : (2004) 4 MLJ 708

Hon'ble Judges : S.K. Krishnan, J

Bench : Single Bench

Advocate : Krishnaswamy, R. Thenmozhi Shivaperumal, for the Appellant; C. Ramesh and K. Harishankar-R1 and S.D. Venkateswaran, Advocate-RR2 to 4, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Krishnan, J.—Second appeals filed against the judgments and decrees dated 15.4.2004 in A.S. Nos. 392 and 393 of 2003 respectively on the file of the IV Additional City Civil Court, Chennai.

2. The brief facts of the case of the plaintiff in O.S. No. 1648 of 1997 are as follows:- The plaintiff in O.S. No. 1648 of 1997 is the appellant in both the appeals on the file of the IV Additional City Civil Court, Chennai. The issue related to the relief of specific performance, this court deals with that suit whose adjudication will answer the relief sought for by the second defendant, the purchaser in his suit. The plaintiff in the above suit sought two reliefs namely;

(1) Based on the strength of execution of Ex. A1 that was executed by the first defendant in favour of the plaintiff dated 4.3.1974 wherein the plaintiff sought

for the relief of specific performance.

(2) Since the plaintiff claims that she is in possession by virtue of the said agreement dated 4.3.1974, she also prayed for permanent injunction against the defendants.

3. The plaintiff entered into an agreement of sale on 4.3.1974 wherein the first defendant accepted to sell the properties for a valuable consideration of Rs. 25,000/- and in furtherance of that acceptance, she paid a sum of Rs. 5000/- as advance and the balance of the said consideration would be paid in instalments. It is stated that under housing scheme, the Corporation of Madras allotted the house site to the husband of the first defendant, wherein the husband of the first defendant was employed in the Corporation of Madras. Under the said scheme, Ex. A1 is a lease-cum-sale agreement which was executed by Sundaram, the husband of the first defendant and according to the said agreement, on payment of dues by instalments towards sale proceeds, a sale deed was executed by the Corporation of Madras. The plaintiff claims that she discharged some debts and also paid the instalments to the Corporation of Madras for over six years and the balance amount has already been deposited by the first defendant in that court deposit at the time of institution of the said suit. Since the first defendant failed to convey the property to the plaintiff even after the sale deed had been executed by the Corporation of Madras, the plaintiff approached this court for seeking the relief of specific performance based on the said agreement dated 4.3.1974. It is stated by the plaintiff that the second defendant purchased the said property from the first defendant with full knowledge on the earlier agreement with the plaintiff and thereby he ignored the said earlier agreement. Since the second defendant attempted to interfere with the possession of the plaintiff, the plaintiff approached the court for the relief of permanent injunction.

4. The second defendant in this case has questioned the enforceability of the said sale agreement and he claims that he is a bonafide purchaser. According to him, he did not know about the alleged agreement entered into between the plaintiff and the first defendant. Further the second defendant had contended that since the plaintiff denied the relationship of landlord and tenant between the second defendant and herself, the second defendant treated the plaintiff as a trespasser and in that circumstances, the second defendant sought for the relief of declaration and delivery of possession by way of filing a separate suit.

5. It is contended by the first defendant that she never executed any agreement of sale in favour of the plaintiff and in fact she executed only a tenancy agreement and taking advantage of the first defendant's helpless situation and position and particularly after the death of the first defendant, the present suit has been filed by the plaintiff. It is contended that the plaintiff also aware of the terms and conditions of the lease-cum-sale agreement under Ex. A1 with the Corporation of Madras, which was entered into between the husband of the first defendant and the Corporation of Madras, wherein the terms referred in the said agreement prohibits the alienation of the property and also parting with the

possession till the entire instalments are being paid and the sale is being executed by the Corporation of Madras in her favour. Knowing fully well about the said terms and conditions referred in Ex. A1, the plaintiff could not have executed the agreement, Ex. A2 with the first defendant. Further the plaintiff has made the alleged payments over a period of six years at an irregular intervals and paid in small digits are not true. The first defendant states that the property sold to the second defendant for due consideration and he is entitled to the decree for declaration and injunction.

6. In the other suit filed later point of time by the second defendant against the plaintiff, the plaint and written statement in the said suit for almost in the same facts as that of the written statement and plaint in the earlier suit. Hence, it is not necessary to repeat the same once again. The said suit filed by the plaintiff was dismissed by the trial court and on her appeal in A.S. No. 392 of 2003, the Appellate court has confirmed the judgment and decree of the trial court. Aggrieved against the same, S.A. No. 1787 of 2004 has been filed. The other suit filed by the second defendant was decreed and on appeal in A.S. No. 393 of 2003, the appellate court has confirmed the same and aggrieved against the same, S.A. No. 1788 of 2004 has been filed.

7. The following substantial questions of law were framed for consideration at the time of admission of these second appeals. On the basis of the substantial questions of law these second appeals were admitted by this court.

1. Whether the courts below are correct and justified in decreeing O.S. No. 12668 of 1996 and in dismissing O.S. No. 16481 of 1997?

2. Whether the courts below are correct and justified in holding that the suit is barred by limitation when admittedly the suit is filed within 3 years from the date of accrual and accrual of cause of action is execution of sale deed in favour of the plaintiff/vendor?

3. Whether the court is correct and justified in holding that Ex. A2 agreement of sale is unenforceable, because some persons have not signed the same?

4. Whether the lower appellate court is correct and justified in holding that the defendant is not entitled to protection u/s 53(A) of the Transfer of Property Act?

5. Whether the lower court is correct in holding that the sale effected in spite of the order of injunction is valid?

6. Whether the lower appellate court is correct and justified in holding that the plaintiff in O.S. No. 12668 of 1996 is a bona fide purchaser for value without notice?

7. Are the courts below correct and justified in awarding damages as claimed and is not excessive as claimed?

8. A bare reading of questions of law raised in both the second appeals, this court is able to find that all the substantial questions of law resemble the issues

framed in the suit rather than the substantial questions of law. As far as the first substantial question of law is concerned, it is of a general nature as to whether the courts below are right in decreeing the suit of the respondent and dismissing the suit of the appellant. The first question of law does not raise neither the substantial question of law nor the question of law. With regard to the plea of law of limitation, the second question of law raised in both the appeals. This can be dealt with, while discussing the main issues. With regard to the third question of law, which deals with unenforceable nature of the agreement of sale-Ex. A2 and the fourth question of law related to the entitlement of the appellant seeking protection u/s 53(A) of the Transfer of Property Act. As far as the fifth question of law is concerned, it is raised in connection with the earlier injunction obtained by the appellant with regard to the alienation of the subject matter of the property. No question of law involved in the sixth and seventh questions of law, which are purely based on factual appreciation of the relevant facts.

9. When these second appeals came up for hearing before this court, the learned Senior counsel for the appellant, argued on the basis of additional question of law raised by way of filing an application. However, that was vehemently opposed by the respondent herein. While, dealing with the second appeal u/s 100 CPC, the guidelines declared by the Apex Court as reported in *Kshitish Chandra Purkait Vs. Santosh Kumar Purkait and others*, are as under:-

The High court can be satisfied;

i) that the case involved a substantial question of law and not mere question of law;

ii) that the reason for permitting the plea to be raised should also be recorded;

iii) that it has a duty to formulate the substantial question of law and put the opposite party on notice and give a fair and proper opportunity to meet the point;

10. It could be seen that the additional question of law raised by the appellant by way of filing a separate application raises a legal plea as to the maintainability of the suit and it is raised for the first time in the second appeal as an additional point, but the same was not pleaded even at the time of admission of the second appeal. As far as this additional question of law raised at the time of hearing, these appeals at the last moment is concerned, it ought not to be permitted to be canvassed in the second appeal as held by the Apex Court in the above decision. The following additional grounds are raised without any legal basis:-

1. On the very allegations contained in plaint that the defendant did not attorn tenancy, is the suit filed in the civil court maintainable without resort to provisions under Tamil Nadu Buildings (Lease and Rent Control) Act.

2. Is not the suit for recovery of possession barred in view of Tamil Nadu Buildings (Lease and Rent Control) Act?

It is seen that the additional grounds raised in these second appeals at the time

of hearing arguments, which are admittedly not raised in courts below viz., that the defendant/purchaser having contended in the plaint that the appellant has been inducted into the property as a tenant by his predecessor in title, the suit for possession is not maintainable by virtue of the provision to Section 10(1), if the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The relevant proviso reads as follows:-

"Provided further that when the tenant denies the title of the landlord or claims right of permanent tenancy, the controller shall decide whether the denial or claim is bonafide and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said Sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

It is an admitted fact that the appellant filed a petition raising additional ground at the time of hearing of these second appeals. It could be seen that this stand with regard to the maintainability of the suit u/s 10(1) proviso of the Act was not taken even before the first appellate court. In such circumstances the appellant is estopped from raising this plea for the first time in second appeal that too, at the time of hearing of these second appeals. Since the appellant has not taken the jurisdictional competence of trial court at the earliest point of time, it is not open to the appellant to raise such issue now at this stage. Reference is made to the case reported in Ramesh Chand Ardawatiya Vs. Anil Panjwani, of the said decision, it is stated as under:-

"Where there is a special tribunal conferred with jurisdiction or exclusive jurisdiction to try a particular class of cases, even then a Civil Court can entertain a civil suit of that class on availability of a few grounds. An exclusion of jurisdiction of Civil Court for availability of an alternate forum should be taken before the Trial Court and at the earliest, failing which the Higher Court may refuse to entertain the plea in the absence of proof of prejudice."

11. As far as this case is concerned, it is seen that there is no plea of prejudice taken at any point of time and in fact the appellant has sought for relief for specific performance which is entirely courts discretion. u/s 20(2) of Specific Relief Act, it is to be seen that the court can refuse to exercise the discretion of granting specific performance of a contract, where it gives the plaintiff an unfair advantage over the defendant and when both courts have held on facts that it is inequitable to grant specific performance, such discretion properly exercised by court below cannot be interfered in second appeal.

12. The judgment reported in 2002 SCC 689, it has been clearly stated by the Supreme Court that the plea pertaining to mixed question of fact and law cannot be allowed to be raised for the first time. It is to be noted that in Paragraph 9 of the said judgment, dealing with a bar of jurisdiction contained in special enactment viz., Public Premises (Eviction of Unauthorised Occupants) Act, cannot

be permitted to be raised for the first time in the Supreme Court. Further it is stated that a plea not raised earlier cannot be allowed to be raised at a later stage. The above stated decision directly applies to the present case and further the plea raised by the appellant before this court could not be allowed to be raised in these second appeals, that too, at the stage of final hearing of the appeals.

13. In one another judgment reported in Oil and Natural Gas Commission Vs. M.C. Clelland Engineers S.A., , it is held that when the pleadings are insufficient to lay a foundation and not available in evidence, the matter cannot be examined by High Court. Pleas raised should be substantial and adequate and not merely a bald allegation. Further it is to be noted that a bald plea on maintainability without sufficiency of pleading cannot be raised before the High Court in the Second appeal.

14. In support of his contention as to maintainability, the appellant relied on the judgment reported in EAST INDIA CORPORATION V. MEENAKSHI MILLS 1991(2) LW 654. This judgment has no application to the facts of the appellant's case. It is to be noted that this judgment reiterates Section 10(1) Proviso of the Act. This case relates to a landlord filing a suit for possession without compliance of Section 10(1) Proviso. In the instant case, the appellant had already filed a suit in civil court for specific performance and claiming possession of suit property in her own right based on the agreement of sale.

15. It is pointed out that the appellant having gone to a higher forum to establish her title and possession of the suit property, invocation of Section 10(1) Proviso becomes ineffective and inoperative for the reason that the title to the plaintiff has already been questioned in a civil court and the parties have joined in issue in a civil court. In such circumstances, the purchaser, the respondent herein has no other alternative right except to agitate before the same forum for safeguarding his title. Neither the Supreme Court judgment nor in the judgment of this court reported in P. Rukmani Vs. R. Narayani and Others, relied on by the appellant, dealt with a case, where the tenant has gone to civil court to establish his/her title to the suit property. In paragraph 13 of the judgment reported in P. Rukmani Vs. R. Narayani and Others, , this court has clearly stated the law that "Civil Courts jurisdiction is not explicitly barred and the Rent Control Act explicitly shows that subject to extraordinary powers of High Court and Supreme Court, such jurisdiction is impliedly barred except to the limited extent specially provided by the statute." Thus two factors clearly emerge from the admitted facts of this case.

a) A plea of jurisdiction is not raised at the earliest point both in trial court and appellate court, which is sought to be raised as additional ground by means of an application in the second appeal as the same was not raised even in main grounds of appeal.

b) Section 10(1) proviso of Tamil Nadu Buildings (Lease and Rent Control) Act

1960 has no application here as the tenant had already gone to Civil Court for adjudication of his rights in asserting title to the suit property. This being the extraordinary circumstances which prevents the landlord from invoking Section 10(1) of Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as tenant has already gone to a civil court for adjudication of his right, the Rent Control Court has no jurisdiction to go into the civil dispute as to title between the parties. In such circumstances this court finds that the maintainability of the suit raised by the appellant as an additional ground cannot be allowed to be raised for the first time in the second appeal. Even otherwise, for the reasons stated above there is no merit in the additional grounds raised.

16. As far as substantial questions of law raised in the main grounds of appeal are concerned, the appellant/plaintiff in O.S. No. 1648 of 1997 alleged to have entered into an agreement of sale with Rajeswari Ammal (first respondent) for the sale of the property on 4.3.1974 under Ex. A2. It is to be noted that in the said agreement, both parties have not signed and according to the terms referred in the said agreement, that out of the total sale consideration of Rs. 25,000/-, a sum of Rs. 5,000/- was paid as an advance and the rest is to be paid towards the discharge of instalments payable to the Corporation of Madras, who had in turn entered into a lease cum sale agreement with the husband of Smt. Rajeswari Ammal under Ex. A1, as stated above. As already discussed above, this agreement was not signed by both parties and on appreciation of the evidence let in by the plaintiff/ appellant and also considering the surrounding circumstances and after analyzing the same, both courts have concluded that the agreement is not true and it is unconscionable in its terms and it cannot be considered as an agreement. This being a question of facts, finding with regard to this has already been given by both courts, this cannot be entertained in second appeal as there is no substantial question of law has arisen. Further the payments made by the appellant towards the sale consideration over a period of six years cannot be considered as payments made by the appellant towards the sale consideration. It is to be noted that the appellant was in possession of the property without paying any compensation for occupation namely the rent for the relevant period. It is contended by the first defendant, Rajeswari Ammal that the contents of the agreement are contrary to real facts and even with regard to the recitals contained therein and it is also unconscionable. The case stated by the plaintiff/appellant that she was in possession and occupation of the property in pursuance of the sale agreement under Ex. A2 has not at all been believed by the both courts. In the said agreement it is stated that with regard to the handing over of possession to the appellant, possession should be given some time after the agreement, and part performance of sale agreement has not been established, as she was let in possession as a tenant on the date of agreement. This finding has been rendered by both the courts below on appreciation of evidence both documentary and oral. In such circumstances, this court does not find any infirmity in the said findings.

17. On careful analysis of Ex. A2, this court finds that the agreement under Ex.

A2 is one sided, unfair and unjust and cannot be enforceable at all in accordance with law. With regard to the relief sought for by the appellant u/s 53-A of Transfer of Property Act the agreement is one sided and un-enforceable and in view of the said finding and hence the appellant is not entitled to seek protection u/s 53-A of Transfer of Property Act.

18. As far as the relief sought for by the appellant with regard to specific performance, both courts have held that the said agreement is not at all proved and it is also inequitable to grant specific performance. It is to be noted that both courts have held that there is long and unexplained delay in enforcing the claim of specific performance by the appellant/plaintiff and in such circumstances the suit itself is barred by limitation. It is seen that the refusal of the first respondent to perform such agreement came to be known to the appellant/plaintiff, even during the year 1982 and based on that refusal of the first respondent the plaintiff/appellant filed the suit in O.S. No. 8449 of 1982 on the file of the City Civil Court, Madras for injunction restraining Rahjeswari Ammal from alienating the property and she also obtained the order of exparte injunction in that case.

19. It is pointed out that as the right for specific performance has arisen as early as in 1982 and in such circumstances, the plaintiff/appellant ought to have filed a suit even at that time. Relying on the judgments cited both courts below have rightly held that plaintiff/appellant is not at all entitled to specific performance. In support of the contentions, the plaintiff/ appellant relied on the following judgments:-

"1. AIR 2003 SCW 819 (Sarwankumar & Anr. -v.- Madhanlal Agarwal): In the instant case, where the Supreme Court dealt with the point about the executability of a decree which was passed without jurisdiction. That was a case where the tenancy of the building was governed by a special Act and the Supreme Court declared that such a decree passed by the Civil Court which had no jurisdiction, is in-executable.

2. AIR 2004 SCW 3927 (Madhava & Ors. -v.- Tanabai) deals with the case where the defendants in possession of the property as agreement holder who has not enforced his agreement of sale and is also barred by Limitation Act, can resist his possession as defence under certain conditions. This judgment adopts the reasoning of the Supreme Court reported in Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others, wherein to raise such a defence. The court has set out six conditions. If, all the six conditions are satisfied then alone the protection u/s 53(A) of Transfer of Property Act can be pleaded by the defendants. The conditions do put forth that the transferee must in part performance of the contract take possession of the property or any part thereof and the transferee must be willing to perform his part of the contract. In this case the courts below have concurrently held that there was no agreement enforceable between the parties and there was no readiness or willingness on the part of the transferee to perform the contract and is also inequitable to grant specific performance. In such circumstances the decisions relied on by the

appellant do not help her.

3. 2003 (2) TNLJ 186: As far as this case is concerned, a learned Single Judge of this court has observed that even in second appeal, pure questions of law can be raised in regard to the maintainability of the case for the first time. In the said judgment, the decision relied on by the respondent has not been referred to and therefore, this court is bound by the judgment of Supreme Court reported in Ramesh Chand Ardawatiya Vs. Anil Panjwani, . Therefore this court is of the view that the courts below have arrived at a correct conclusion accordingly decreeing the suit of the respondent and dismissing the suit of the appellant. It is clear that the relief of specific performance is barred by limitation and agreement of a sale is not enforceable for the reasons stated earlier and there is no evidence that the appellant was put into possession in the suit property based on the one sided agreement under Ex. A2.

20. In such circumstances protection u/s 53-A of Transfer of Property Act is not available. The reasoning given by the courts below with regard to earlier injunction obtained by the appellant will not in any way affect the conveyance in favour of the respondent. With regard to the purchase by plaintiff in O.S. No. 12668 of 1996, both courts below have held that he is a bonafide purchaser for value and he is not aware of the agreement of sale before purchase of the property, which fact has not been denied.

21. With regard to the damages claimed by the respondent is concerned, there is no evidence to show that it is excessive and therefore, this plea is also fails. As already discussed above there is no substantial question of law which needs a discussion but yet this court dealt with the case on merits and in such circumstances this court finds that there are no merits in both appeals. It is a fact that appellant is squatting over the property under the pretext of an agreement of sale but she has also not performed her part of obligations by making payment of the monthly instalments to Corporation of Madras as found in the alleged agreement. Even these payments stated by the appellant do not reflect that they were paid by the appellant. In such circumstances squatting on the property of the respondent, the damages claimed are quite just and proper. Even this plea of the appellant fails.

22. In the result, there is no substantial question of law that has arisen in both the above second appeals and accordingly both the second appeals are dismissed with costs. Consequently, no orders are necessary in C.M.P. Nos. 15027, 14038 & 14040 to 14042 of 2004 and they are closed.