

(1994) 10 KAR CK 0005

In the Karnataka High Court

Case No : M.F.A. No's. 462, 1174 and 2159 of 1994

Jayanthi R. Rai

APPELLANT

Vs

Paul D'silva

RESPONDENT

Date of Decision : 21-10-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Specific Relief Act, 1963 — Section 20

Citation : (1994) ILR (Kar) 3519 : (1995) 1 KarLJ 102

Hon'ble Judges : Mohan Kumar, J

Bench : Single Bench

Advocate : S. Vijayashankar and H.S. Chandramouli, for the Appellant;
Sundaraswamy, Ramdas and Anand for R-1 to R-3 and N.S. Krishnan, for R-4 to R-11, for the Respondent

Final Decision : Allowed

Judgement

Mohan Kumar, J

1. These Appeals are preferred by defendants in a suit for specific performance. Defendants Nos. 1 to 5 are the appellants in M.F.A.No.462/94, whereas defendants Nos. 6, 11, 12 and 13 are the appellants in M.F.A.No.1174/94. They are aggrieved by the order of the Court below appointing the plaintiffs as the Receiver of the plaint schedule property. The brief allegations in the plaint relevant for the purpose of the Appeals are as follows:

2. It is alleged by the plaintiffs that the defendants executed on 21-1-1981 an Agreement to Sell the plaint schedule property which is described as a coffee estate. The period stipulated for completion of the contract under the Agreement is 1 1/2 years from the date of the Agreement with an option to extend it by six months. According to the plaintiffs, before the completion of the contract several other formalities had to be completed so as to make the title of the vendors clear, that the vendees were to complete the Departmental procedures to enable the vendors to sell the property and these were undertaken by the plaintiff to be

completed on behalf of the vendors defendants and that after completing these formalities, the plaintiffs approached the defendants to perform their part of the contract when the defendants resiled. The suit was thereupon filed for specific performance of the contract on 1-10-1993.

3. Several contentions have been urged by defendants ranging from the defective nature of the plaint, want of proper pleading, nonpayment of correct Court fee, limitation, invalidity of the Agreement to Sell, the fraudulent conduct of the plaintiffs, etc. As the dispute in the Appeal lies in a narrow compass, it is not necessary for this Court to reiterate in detail the entire allegation in the pleadings except those that are relevant for the issue.

4. Main thrust of the defence is that the suit is barred by limitation. They deny the allegation that from the date of the agreement, i.e., 21-1-1981 till 1-10-1993, the plaintiffs were taking steps to clear the title of the defendants to convey the property and according to them, the plaintiffs had abandoned the agreement, that the plaintiffs are guilty of fraud, that most of the averments in the plaint are false, that some of the executants who were shown as parties to the Agreement were minors on the date of the Agreement and that they were not represented by their natural guardian and as such, the Agreement is not binding on them.

5. The orders under challenge were made on the two applications made by the plaintiffs. They moved I.A.No. I to appoint a Receiver for the plaint schedule property. Thereafter I.A.No. II was filed to appoint the plaintiffs themselves as Receiver. The plaintiffs alleged that the property is being wasted and neglected, that the reason for the sale of the property itself was for the reason that the defendants could not look after the property, that the averments in the written statement also confirm the allegations and their apprehensions. The defendants filed detailed objections and denied all the allegations. They have stated that the property was not neglected as alleged, that they are taking proper care of the same, that if a receiver is appointed, especially the plaintiffs as Receivers, the defendants will be put to considerable hardship and that they will lose the property. Though the defendants opposed both the applications, they were allowed by the trial Court and the plaintiffs were appointed as the Receivers. Against the order in I.A.No.II, M.F.A.No.462/94 and M.F.A.No. 1174/94 have been filed. And against the order in I A.No. I, M.F.A.(FR) No. 2393/94 has been filed,

6. The following points were urged by the appellants in these Appeals:

- i) The suit is barred by limitation and hence in such a suit, a receiver cannot be appointed;
- ii) Proper Court-fee has not been paid and, therefore, there is no validly instituted suit;
- iii) The plaintiffs are guilty of fraud and have approached the Court with unclean

hands. Hence, they have no right to seek equitable relief from the Court;

iv) This being a suit for specific performance, a receiver cannot be appointed;

v) There do not exist any grounds to appoint a receiver; and

vi) The circumstances material and relevant under Order 40 Rule 1, C.P.C. do not exist in the instant case to appoint a receiver, much less the plaintiffs as the receiver.

7. M/s. Vijayashankar and N.S. Krishnan on the one hand and Sri Sundaraswamy on the other, have elaborately argued the various aspects of the case. But, as regards the first three points are concerned, I think that at this stage this Court need not elaborately go into these questions except for the limited necessity to refer to them while considering the remaining questions. Those issues have to be tried by the trial Court after adducing evidence! Hence, any pronouncements may prejudice the trial of the suit.

8. Besides, as regards the contention that the suit is barred by limitation, it is submitted that the defendants filed I.A.No.XII before the trial Court to decide the said issue separately. This was accordingly decided in favour of the plaintiffs. The said order, I am told, is challenged in Revision before this Court and that the Revision is pending. As such, this Court may accept the said finding in I.A.No.XII for the purpose of this Appeal and proceed.

9. It is further submitted that as regards the question of Court- fee as well, that issue was also decided in favour of the plaintiffs as per the order of the trial Court dated 25-1-1994. Hence, for the present, this Court is bound by the finding entered by the trial Court in that behalf.

10. Now, regarding the averments made as regards the fraud etc., etc., are concerned, both sides have attempted to blame each other. The plaintiffs have urged that they were made to take appropriate legal steps to convert the land from "unredeemed" to "redeemed" to defend the partition suit, to defend the tenancy claim, and to obtain permission after approaching this Court to cut the trees. It is also contended by them that they put up a long stretch of road through the estate and had to expend considerable amount in that behalf. The plaintiffs allege that when they made the property ready for sale, the defendants found out certain others to purchase the same. Thus, according to them, the defendants are at fault.

11. All these allegations are denied by the defendants who in their turn contend that the plaintiffs have not incurred the amount of expenditure as alleged by them, that the declaration that the land is "redeemed land" was obtained as early as on 12-11-1982, that the executant of Power of Attorney who authorised the plaintiffs to take steps-for all these legal proceedings died on 20-9-1987 and this fact was known to the plaintiffs, that thereafter the plaintiffs had no authority to act on the basis of the said Power of Attorney, that the plaintiffs, in spite of that and knowing fully well that the Power of Attorney has come to an

end, put it to use in 1993 and all acts thus on the part of the plaintiffs are fraudulent and that the plaintiffs have not acted with clean hands.

12. All the above disputes may well be relegated to be decided in the suit. At this stage, the Court is mainly concerned with the propriety and correctness of the orders passed by the Court below in I.As.Nos.I and II. The main question that has been urged for consideration in these Appeals are that (i) in a suit for specific performance by enforcing an Agreement to Sell, could the plaintiffs be appointed as the receivers thus dispossessing the defendants and (ii) do there exist sufficient grounds in this suit for appointment of a Receiver.

13. In the well known case T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, the Madras High Court has held that a Court appointing a Receiver must examine and ascertain whether the following five requirements exist in the case:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has a very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conducting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a "de facto" possession since that might cause irreparable wrong. It would be different where the property is shown to be "in medio", that is to say, in the enjoyment of no one. And

(5) The Court, on the application made for the appointment of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. Case Law and Text Books Ref."

The first rule is that the relief is discretionary. Second requirement is that there should be an excellent chance of success for the plaintiff in the suit. As can be seen, in view of Section 20 of the Specific Relief Act, a decree for specific performance of the contract need not necessarily be granted in all suits for specific performance. That apart, in this particular case there is also a contention urged by some of the defendants that they were not parties to the Agreement at all (since they were not represented by their natural guardian). Hence, one cannot say that the plaintiffs have an excellent case. As regards the third requirement is concerned, the Agreement is of the year 1981, and all these years, i.e., for nearly 12 years, the plaintiffs had not taken any steps to enforce their right. Though the plaintiffs have a different story to tell, which no doubt is disputed by the defendants, the fact remains that they have allowed 12 years to

elapse between the date of the agreement and the date of the suit. This conduct negatives existence of any emergency demanding immediate action. As to the fourth requirement, I shall deal with the same separately. With respect to the fifth requirement, both sides have much to state about each other and there is nothing to choose from either of the versions. Hence, prima facie, in this case there do not exist any grounds to appoint a receiver and much less the plaintiffs themselves as receivers.

14. The question as stated which was strenuously argued was that in a suit for specific performance the plaintiffs cannot be appointed as the receivers of the property. In considering the contention, I may advert to the fourth requirement noticed above in *T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others*, Dealing with the question, it is stated as follows:

"(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a "de facto" possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be "in medio", that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less "in medio" is sufficient to vest a Court with jurisdiction to appoint a receiver. *Nilambar Das Vs. Mabal Behari Das and Others*, ; - *Alkama Bibi and Others Vs. Syed Istak Hossain and Others*, *Srimati Mathuria Debya Vs. Shibdoyal Singh Hazari and Others* : *Bhubaneshwar Prasad Narain Sinha Vs. Rajeshwar Prasad Narain Sinha and Others*, Otherwise a receiver should not be appointed in supersession of a bona fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred."

There is no case that the defendants obtained the property by fraud or otherwise. There is also no specific allegation that the property is "in medio" (except stating that the property is not being looked after). There is no allegation that there is scramble for possession. Over above that, the plaintiffs were sleeping over their rights for well over 12 years and it is suddenly that they have woken up and have started the litigation. Whatever may be the reason for the delay, this is also a circumstance to be noted to assess the allegations made by the plaintiffs.

15. In this behalf, it may be noticed that Section 54 of the Transfer of Property Act declares that an Agreement to Sell does not create any interest or charge in the property agreed to be sold. The contract for sale of land like any other

contract may fall through on account of fraud, coercion, misrepresentation, undue influence, mutual mistake, illegal or immoral object as consideration, failure or want of consideration, in addition to it being avoided on account of waiver, rescission, release, merger, etc., etc. Even in a suit for specific performance, the Court may refuse to decree the suit even if the contract is neither void nor voidable. Section 20 of the Specific Relief Act, 1963, holds that the grant of a decree for specific performance is discretionary and that the Court is not bound to grant such a relief merely because it is lawful so to do. Though by virtue of Clause (i) in Explanation in Section 10 of the Specific Relief Act, it can be contended that since the breach of contract to transfer immovable property cannot be adequately relieved by compensation in money, the normal rule in regard to the exercise of discretion is to decree the suit, nevertheless, it is not possible to hold that pending consideration of the question as to whether the discretion has to be exercised in favour of the plaintiff, the defendant, who is in possession of the property, has to be dispossessed and the property committed to the possession of the receiver.

16. We may also notice the following observation in the Decision in P.V. RAHEJA v. L.I. CORPN. OF INDIA :

"18. At the interlocutory stage, it is not necessary to examine the merits of the case. But these submissions merely highlight the fact that the plaintiff does not have an immediate right to possession of the property in respect of which they have entered into an agreement of sale. In fact specific performance of an agreement of sale is a discretionary remedy which may or may not be granted. It is quite possible that in a given case the party who asks for specific performance may, even when successful, get only damages in lieu of specific performance. Therefore, unless the plaintiff gets a decree of specific performance in his favour, he does not get a right to possession. He cannot, therefore, at the interlocutory stage, dispossess somebody who is in possession prior to the filing of the suit.".....

No doubt, I am aware that in CHOCKALINGAM PILLAI v. PICHAPPA CHETTIAR, a Division Bench of the Madras High Court has stated hereunder:

"So far as Sch.A properties are concerned, Mr. T.R. Ramachandrier has also argued that the lower Court has exercised its discretion improperly in appointing a Receiver in respect of properties of which the plaintiff, in the first instance at least, is only asking for specific performance of sale and not for possession. Subsequently however the plaintiff was allowed to amend his plaint and put forward a prayer for possession of these properties also. A Civil Revision Petition has been filed here against this amendment of the plaint and we deal with this now. Various rulings of this Court have been quoted to us, as- also Form 47, Sch.1, Civil P.C., which set out that it is open to the Court in a suit for specific performance of sale, also to give a decree for possession. We are not therefore prepared to say that the lower Court exercised its discretion wrongly in permitting the amendment of the plaint and allowing the plaintiff to add a prayer

for possession of Sch.A properties. That being so, the plaintiff's prayer for possession will stand, and in these circumstances we do not think we can say the lower Court exercised its discretion wrongly when it appointed a Receiver in respect of these

2. Purshottam Visindas Raheja Vs. Life Insurance Corporation of India and Others, properties, a decree for possession of which the plaintiff would be entitled to if he succeeds."

But it was a case where in the first instance, the Receiver was not a party and secondly apparently the fact disclosed that the plaintiffs would have got a decree for possession as well. Hence, in view of the statutory provisions and other circumstances noticed above, it can be said that as a matter of right, the plaintiffs in a suit for specific performance cannot seek to dispossess the defendants by appointment of a receiver and unless the circumstances made mention of in T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, referred to above, exist, the Court may not exercise its power under Order 40 Rule 1 C.P.C.

17. As far as the present case is concerned, in addition to what is stated above, I wish to refer to one more aspect which would show that the appointment of the plaintiffs as the Receiver cannot at all be permitted. The plaintiffs are Timber Merchants. Pending the suit the plaintiffs had filed in the trial Court I.A.No. X u/s 151 of C.P.C. for permission to cut and remove the trees in the plaint schedule property. This I.A. was dismissed by the trial Court. Now by the order under challenge, the Court has permitted the plaintiffs to cut the trees and the permission is granted to do so in the following manner:

"(d) If for the purpose of plantation of trees and for protection of agricultural crops such as areca, cardamom, coffee, etc., the over shaded trees are required to be cut and removed, the receivers shall cut and remove the trees either only with the permission of the forest department or by virtue of the deemed permission granted by the Hon"ble High Court of Karnataka in W.P.No. 1312/90."

Admittedly, the property is a vast hilly area. No one knows as to what trees would be cut by the plaintiffs under the camouflage of the above permission. It is the admitted case of both sides that the tree growth in the property valued around Rs. 2 crores. If by virtue of the order, the plaintiffs gain entry and carry on the tree cutting activities, then the Court has no means to police the same. There will also be no independent means to assess the quantity of trees cut and removed by the plaintiffs. If the cut trees are stacked in the same timber yard as that of the plaintiffs, then it gets "blended" in such a form that no one can trace it out as well. I am informed that there is no well demarcated

boundary for the property. In these nebulous state of affairs if the tree growth is depleted and ultimately the plaintiffs do not prosecute the suit, then whatever wealth that the defendants would have had would be completely lost. The parties

should not be placed in such a situation as a result of the order passed by the Court. For all these reason as well, the plaintiffs cannot be appointed as the Receivers of the properties.

18. Hence, I set aside the order passed by the trial Court in I.A.No. II. At the same time, I order that the defendants be restrained by an order of injunction from disposing of, alienating or encumbering any portion of the plaint schedule property or inducting any third parties into the property till the disposal of the suit.

19. As regards M.F.A (FR) No. 2393/94, I have heard the Counsel for the appellants and the respondents. They have submitted that they have no fresh arguments to be addressed on the merits of the case in addition to what they have stated regarding connected Appeals. It is also agreed that the delay in filing the Appeal may be condoned. Accordingly, the delay in filing the Appeal is condoned. In the light of the discussion in the preceding paragraphs and for the reasons stated therein, the above Appeal shall stand allowed and the order in I.A.No. I is set aside.

20. In the result, the Appeals are allowed. The parties shall bear their respective costs.