

(1993) 08 MAD CK 0021
In the Madras High Court

J.K. Abdul Jabbar Rowther

APPELLANT

Vs

V.J. Mani Raj and Others

RESPONDENT

Date of Decision : 05-08-1993

Acts Referred:

Citation : (1993) 2 LW 198 : (1994) 1 MLJ 205

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The plaintiff, whose suit for specific performance has been dismissed, is the appellant herein. The case set out in the plaint is

as follows: The properties described in the plaint schedule belonged originally to the first defendant. They were rented out to five persons. The first

defendant was himself occupying one portion and running a printing press. As he wanted to augment his income and for that purpose demolish the

superstructure and put up a new construction, he approached the plaintiff and the latter agreed that he would finance him provided a lease of the

suit properties is granted to the plaintiff. The first defendant agreed to that course and as the building was in a dilapidated stage, he agreed to

vacate the tenants and also vacate the portion occupied by him, demolish the entire building and put up new construction and lease out the entire

property to the plaintiff. On 19.2.1988, an agreement was entered into between the plaintiff and the first defendant, which is marked as Ex. A-1.

Under the agreement, the first defendant agreed to evict the tenants within three months and also vacate the portion in his occupation within the

said time. He agreed to demolish the existing building and reconstruct a new building. A sum of Rs. 50,000 was paid by the plaintiff to the first

defendant for the purpose of evicting the tenants and demolishing the existing building. He agreed to receive further amounts from the plaintiff for the expenses to be incurred for demolishing the building and raising a new construction. He agreed to let out the new building to the plaintiff for a rent of Rs. 2,000 per mensem. It was also agreed that the rent of Rs. 2,000 would be adjusted towards the total amount paid by the plaintiff for a period of five years and thereafter, the first defendant would pay interest for the balance amount payable to the plaintiff at the rate of 24% per annum. The lease would be for a period of ten years after reconstruction and a lease deed would be executed and registered after the reconstruction was over. The plaintiff was informed that a plan had been submitted to the Municipality for approval in March, 1988 for demolition and reconstruction. On 26.4.1988 the plaintiff paid a further sum of Rs. 50,000 towards expenses for demolition and reconstruction by cash and the same was acknowledged in a pocket note book marked as Ex. A-3 in the hand-writing of the first defendant himself. Thus, a total sum of Rs. 1,00,000 had been received by the first defendant. The Municipality sanctioned the plan on 2.5.1988. The first defendant evicted the tenants and vacated the portion in his occupation. Only one tenant continued in occupation. The building was almost demolished excepting the portion in the occupation of the aforesaid tenant, who was running a radio repairing shop. At that stage, the first defendant changed his attitude and the plaintiff became apprehensive of the conduct of the first defendant. The plaintiff learnt that defendants 2 to 6 obtained a conveyance of the property from the first defendant and got it registered. Defendants 2 to 6 are not bonafide purchasers as they have been the family auditors for the first defendant for a long period and the latter was always acting on their advice. Even before entering into the lease agreement, the first defendant should have secured the advice of defendants 2 to 6 and from stage to stage, they were advising him. Defendants 2 to 6 are fully aware of the agreement in favour of the plaintiff and in any event, the plaintiff is entitled to enforce his rights under the contract as against all the defendants. The plaintiff had been ready and willing throughout to perform his part of the contract. The plaintiff reserves his right to claim damages from the defendants by separate proceeding. The suit is filed for specific performance of the agreement of lease dated 19.2.1988. The prayer in the plaint is to direct the

first defendant to execute the lease deed free of all encumbrances and get the lease deed registered. It is also prayed that the defendants shall be directed to deliver possession of the suit property as contemplated under the agreement of lease. A permanent injunction restraining the defendants from encumbering the plaint schedule property is also prayed for by the plaintiff. In the Schedule to the plaint, the property was described as that existed prior, to the agreement Ex. A-1. A building is also described as measuring 32 feet east to west and 57 feet north to south bearing Door Nos.13/1,14,14/1 and 14/2 with a well.

2. The first defendant filed a written statement. According to him, he never agreed to lease out the entire property to the plaintiff as alleged in the plaint and the agreement set out in the plaint is not enforceable in law. He denied the receipt of Rs. 50,000 in cash on 20.4.1988. He also denied the averment that defendants 2 to 6 were his auditors. It is stated that he consulted his advocate A. Venugopal who is the family lawyer and that he used to act only on the advice of the said lawyer. It is also contended that the alleged agreement is void for uncertainty and not enforceable. It is also pleaded that the suit is not maintainable inasmuch as the alleged agreement itself relates only to the execution of the lease after the completion of the construction of a new building.

3. Defendants 2 to 6 filed a separate written statement. They have also raised the plea that the agreement is not enforceable for various reasons, set out in the written statement. It is also contended that they have paid a valuable consideration of Rs. 2,41,000 and purchased the property under a registered agreement dated 11.5.1988 (Ex. B-1). It is stated that after their purchase, they got the tenants vacated and started demolition of the building with a view to put up new construction.

4. In the additional written statement filed by the first defendant a plea is raised that the suit is premature and not maintainable in law. In the additional written statement filed by the other defendants, after an amendment of the plaint, it is stated that the defendants had admittedly no knowledge of the suit agreement Ex. A-1 and had purchased the properties for valid and good consideration and what was in existence at the time of the suit was only a vacant site and the suit building was not in existence.

5. The trial Court initially framed four issues. The first issue is whether the

plaintiff is entitled to get a lease of the suit property as per the document dated 19.2.1988 as claimed in. the plaint. The second issue is whether the plaintiff is entitled to get a permanent injunction. The third issue is whether the suit is maintainable in law and the fourth issue is what are the reliefs to which the plaintiff is entitled. After the conclusion of the trial, the learned Subordinate Judge, at the time of delivering the judgment reframed the issues. He framed six issues. The first issue is whether the plaintiff is entitled to get a lease free of encumbrance as per the document dated 19.2.1988. The second issue is whether the plaintiff is entitled to get delivery of possession of the suit property. The third issue is whether defendants 2 to 6 have purchased the property for proper consideration without knowledge of the plaintiffs agreement. The fourth issue is whether the plaintiff is entitled to permanent injunction. The fifth issue is whether the suit is premature. The 6th issue is to what relief the plaintiff is entitled.

6. The trial court answered issues 1,2 and 4 in the negative and issues 3 and 5 in the affirmative. Consequently, it held that the plaintiff was not entitled to any relief under issue No. 6. In short, the trial court held that the agreement under which the plaintiff claims is not enforceable in law, the suit is premature, the plaintiff is not entitled to get the reliefs prayed for in the suit and defendants 2 to 6 are bonafide purchasers for value without" notice of the plaint agreement.

7. In this appeal, it is vehemently contended by the learned senior counsel for the appellant that the trial court has recast the issues without any notice" to the parties which has considerably prejudiced them. It is also argued that issue No. 5 has been framed without any plea to that effect in the pleadings. We would straightaway point out that this contention is without merit inasmuch as a specific plea is raised in the additional written statement of the first defendant that the suit is premature. Hence, the trial court is justified in framing that issue. We also find that the issues originally framed do not cover the entire dispute between the parties as adumbrated in the pleadings. The court is always entitled to recast the issues before judgment and it is not necessary to the court to issue notice to the parties when it finds that proper issues have not been framed. Particularly in this case, we find that the parties have let in evidence on all the issues as framed by the trial court at the time of judgment and no prejudice has been

caused to any of the parties. Order 14, Rule 5 of the CPC empowers the court to amend the, issues or frame additional issues at any time before

passing a decree for the purpose of determining the matters in controversy between the parties. On the facts of the case, we find the issues as

framed by the learned trial Judge at the time of the judgment are properly framed and they cover the entire controversy between the parties as set

out in the pleadings and as brought out in the evidence.

8. We have already referred to the fact that the plaintiff has prayed in the plaint for a direction to the first defendant to execute a lease deed with

reference to the suit property and also deliver possession of the suit property as contemplated under the agreement of lease dated 19.2.1988. We

have also referred to the circumstance that the schedule to the plaint describes the property as it existed prior to the agreement. It also refers to the

building has been demolished and at the time of filing of the suit, there was no building and the site was vacant. The prayer in the suit cannot be

granted because the property as described; in the schedule did not exist at the time of the filing of the suit. Secondly, the agreement put forward by

the plaintiff under Ex. A-1 is that a lease deed would be executed in favour of the plaintiff after the construction of a new building and possession of

such building would be handed over to the plaintiff after the execution and registration of such lease deed. But the prayer in the plaint relates only to

the property which existed previously and not the property which is to come into existence in future.

9. Ex. A-1 refers to the payment of a sum of Rs. 50,000 by the plaintiff to the first defendant on the date of the agreement for the purpose of

evicting the tenants and demolishing building. In paragraph 3 of the plaint that is reiterated. The document also provides that further amount would

be paid by the plaintiff for further expenses in that regard. But, no time limit has been prescribed for demolition of the building even though a time

limit of three months has been specified for the purpose of evicting the tenants and vacating the building by the first defendant. In the last paragraph

of the agreement it is stated that the sum of Rs. 50,000 received on the date would be kept as rental advance at the time when the lease is executed

and it would be refunded to the plaintiff when he vacates the shop. There is no mention about the amounts which the plaintiff has agreed to pay

thereafter for the purpose of expenditure in connection with evicting the tenants and demolishing building. On the other hand, P.W. 1 has

categorically stated in his evidence that the sum of Rs. 50,000 is not paid as rental advance. There is no evidence on record to prove as to how the

other amounts apart from the initial payment of Rs. 50,000 should be returned to the plaintiff and on what terms those amounts are to be advanced

to the first defendant. In that, aspect of the matter, the agreement is vague.

10. It is also provided in Ex. A-1 that after a period of five years, the first defendant should pay interest on the balance amount at 24% per annum.

It is brought out in the evidence of the plaintiff that the total expenditure for demolition and reconstruction would be about Rs. 20,00,000 and the

interest for such amount at the rate of 24% after a period of five years would come to Rs 37,000 per month. The agreed rent for a total period of

ten years is only Rs. 2,000 per mensem as per the agreement. If the first defendant is to pay a sum of Rs. 37,000 per month by way of interest and

deduct only Rs. 2,000 for rent, there is no knowing how the debt would be discharged by the first defendant. There is no provision in the

agreement as to how the first defendant should discharge the entire debt. According to the plaint, the agreement to lease out relates to the entire

building as reconstructed. If that is so, the first defendant will have no property with him to be let out to others so as to get an income from the

property. That means that the entire amount advanced by the plaintiff would also continue to be a permanent loan around the neck of the first

defendant, which he will never be able to discharge. He will always be a permanent debtor throughout his life. If that is the effect of Ex. A-1, it is

wholly unconscionable and such an agreement cannot be enforced in law. A court cannot grant specific performance of an agreement which

contains unconscionable terms, which give an unfair advantage to the party who seeks specific performance. Vide: *Vejanla Poothi Rajuv. v. B.*

Raju, (1969) 2 S.C.W.R. 200. Section 20(2) of the Specific Relief Act provides that the court (may properly exercise discretion not to decree

specific performance where the terms of the contract on the conduct of the parties are such that the contract, though not voidable, gives the

plaintiff an unfair advantage over the defendant. The same Sub-section provides that if the performance of the contract would involve hardship on

the defendant which he did not foresee at the time of the contract, the court would not enforce such a contract.

11. While it is the case of the plaintiff that under the agreement the first defendant agreed to give a lease of the entire building as constructed, P.

W.3 says that the agreement was to grant a lease of the ground floor only of the new building. In fact the plaintiff as P.W.I, did not say so in his

evidence. But, P.W.3 has obviously given that version in order to earn the sympathy of the court and to show that the contract between the parties

is reasonable. The terms of Ex. A-1 do not show that the agreement to lease the new building was restricted to a portion thereof or the ground

floor only.

12. The agreement Ex. A-1 does not contain any detail whatever of the proposed building. The measurements of the building proposed to be

constructed are not set out. No plan is attached to the agreement. It cannot be known by a reading of Ex. A-1 as to what sort of building is to be

constructed by the first defendant with the aid of the money lent by the plaintiff. Reliance is placed by the plaintiff on Section 14(3)(c) of the Specific

Relief Act. The Sub-section reads thus:

Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land; Provided that

the following conditions are fulfilled, namely:

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the

building or work;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-

performance of the contract is not an adequate relief; and

(iii) the defendant has, in pursuance of the contract, obtained, possession of the whole or any part of the land on which the building is to be

constructed or other work is to be executed.

13. Even as the proviso shows, the terms of the agreement must be sufficient to enable the court to precisely determine the exact nature of the

building. Seeing the lacuna in this case, P.W. 1 put forward a new version in his evidence that the agreement was to construct a building in

accordance with the plan Ex. A-4. He admits that there is no such recital in Ex. A-1. The following passage in his deposition would reveal the truth.

The admissions made in the above passage clearly show that the case put forward for the first time in the evidence is false. It is to be noted that

P.W. 1 has admitted that there was no plan at the time of Ex. A-1. Learned Counsel for the appellant wants to contend that the admission of P.

W.I would only mean that no plan was attached to Ex. A-1 we are unable to accept this contention. The same statement is made by P. W. 1 again

in the course of cross-examination in the following passage:

The categorical statement made by him that the first defendant filed the plan in the Municipality only after Ex. A-1 shows that there was no plan at

the time of Ex. A-1 and at any rate, the plan was not the subject matter of negotiation between the plaintiff and the defendant. The agreement Ex.

A-1 if at all, was entered irrespective of any plan and in particular Ex. A-4.

14. The above features show that the terms of Ex. A-1 are vague and if they are enforced as interpreted by the plaintiff, they would work out

unreasonable hardship on the first defendant and they are really unconscionable. In the circumstances, Ex. A-1 is not enforceable at the instance of

the plaintiff as prayed for by him.

15. The next question is whether defendants 2 to 6 are bona fide purchasers without knowledge of Ex. A-1. There is not much dispute as to the

fact that defendants 2 to 6 have purchased the property for valuable consideration of Rs. 2,41,000. The evidence of the first defendant and the

third defendant as D.Ws. 1 and 2 proves that they paid a sum of Rs. 2,41,000 for purchasing the property. The contest really centres round the

alleged knowledge of defendants 2 to 6. In the plaint, it is stated that defendants 2 to 6 are the auditors of the first defendant and they were

consulted before the suit agreement was entered. It is also alleged that they were fully aware of the suit agreement. D.W. I has deposed that

defendants 2 to 6 are not his auditors, and that he has no auditor at all. In another place, he has stated that his family is paying Income Tax and

there is an auditor for his family and his name is P.N.B. Manian, whose sons are defendants 2 to 6. It is further stated by him that Manian is dead

and defendants 2 to 6 are auditors. Learned Counsel for the appellant contends

that the later statement of D.W. 1 contradicts the earlier statement

that he had no auditor at all and also proves that defendants 2 to 6 are his auditors. We are unable to accept any such contention and give such an

interpretation to the statement of D. W. 1. He has only stated in the earlier portion that he has no personal auditor and in the later portion he has

stated that his family had an auditor and he is no more. He has not stated that defendants 2 to 6 are his auditors. He has merely stated that

defendants 2 to 6 are carrying on the profession of auditors. D.W. 2 has deposed that his father's clients are the clients of defendants 2 to 6.

Learned Counsel for the appellant submits that this would constitute an admission on the part of D.W. 2 that the first defendant is also their client.

We are unable to accept this contention. No such inference can be drawn from that general statement. It is further stated by D.W. 2 that at the

time of purchase he enquired the first defendant as to who was his auditor and got a reply from him and that he was not liable to pay income tax.

The necessity for such an enquiry is stated to be that for a transaction of the value of over Rs. 50,000 Income Tax clearance should be obtained.

In that connection, the third defendant made an enquiry and learnt that the first defendant had no auditor.

16. On the other hand, the evidence adduced on the side of the plaintiff itself shows that defendants 2 to 6 are not the auditors of the first

defendant. The version given in the plaint (that defendants 2 to 6 are the first defendant's auditors is falsified by the deposition of the plaintiff. Even

in his chief examination the plaintiff has said that Ex. A-1 and the copy thereof were read by the first defendant's advocate. That shows that the

person who was consulted by the first defendant the time of Ex. A-1 was his advocate and not a fii auditor. It is also stated by P.W. 1 that he does

now now defendants 2 to 6 personally. He is not, therefore, competent to say that defendants 2 to 6 are the auditors of the first defendant. He also

stated that he does not know where they reside and where they are carrying on their profession and who are their clients. There is nothing on

record to show that defendants 2 to 6 were the auditors of the first defendant.

17. The evidence of P. W. 1 itself shows that nobody else apart from himself, the first defendant, the attestor and the scribe of the document knew

about Ex. A-1. In the cross-examination he has stated that at the time of writing

Ex. A-1 himself, the first defendant and P.Ws.2 and 3 were alone present and nobody else know about the agreement. He has also stated that till he filed the suit, nobody else knew about the agreement. As regards defendants 2 to 6, the first defendant has expressly admitted that they were not aware of the agreement. He has admitted that it is correct to say that defendants 2 to 6 were not aware of the agreement and they purchased the property for proper price. He has also stated earlier that he does not know whether defendants 2 to 6 were aware of Ex. A-1. He has also stated categorically that defendants 2 to 6 do not know about Ex.

A-1. A reading of the admissions clearly shows that defendants 2 to 6 were never aware of the agreement Ex. A-1.

18. Reliance is placed by learned Counsel for the appellant on the evidence of P. Ws.2 and 3 according to whom, defendants 2 to 6 were informed about Ex. A-1. A perusal of the depositions of P.Ws.2 and 3 shows that there are number of contradictions in their versions and they are not speaking the truth. We have already referred to the circumstance that P. W.3 goes one step further than P.W. 1 and deposes that under Ex.

A-1, the ground floor of the new building was alone agreed to be let out. Both P.Ws.2 and 3 are very much interested in the plaintiff and they are giving evidence only to oblige him. We do not believe their evidence.

19. It is submitted by learned Counsel for the appellant that admissions can always be explained by parties and in the present case, the statements made by P.W. 1 are either inadvertently made or there is a wrong recording by the trial court. If it is a case of wrong recording, the plaintiff should have taken steps in the trial court itself to get the deposition corrected. His counsel could have read the deposition and informed the learned Judge of the mistake and get it corrected. No such step was taken. If it is a case of inadvertent admission, the plaintiffs counsel should have put appropriate questions in the re-examination and got an explanation from the plaintiff. There is no explanation whatever by the plaintiff in the present case of the admission and we cannot, therefore, accept the contention that the admissions of P.W. 1 have been explained in the present case. The proposition of law that admissions can be explained by the party concerned, cannot be disputed. In Nagubai Ammal and Others Vs. B. Shama Rao and Others, , it is held that an admission is not conclusive as to the truth of

the matters stated therein and it is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It is also held that it can be shown to be erroneous or

untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel. In

MM.Chetti v. CCoonwraswamy Naidu and Sons AIR 19⁰ Mad. 212, it is held that the law by no means regards admissions as conclusive proof

of the matters admitted and the court should examine any given admission inside out to see if it suggests any clear inference on the fact in issue

against the party making it. The proposition cannot apply in the present case.

20. In Janaki Ammal Vs. G. Perumalswami Nadar and Others, , Varadacharier, J. held that a Judge when asked to consider the weight of an

admission by a party cannot ignore it on some guess of his own without plea or explanation by the party making the admission. As pointed out

already, there is no explanation on the part of the plaintiff with regard to the admissions made by him.

21. Recently a Division Bench of this Court has considered the evidentiary value of admissions in R. Anandavalli Vs. Alagammal and Others, and

held that admission is the best form of evidence and the plaintiff can certainly rely on it. It was also pointed out that in that case, no attempt

whatever was made by the defendants to show that the said admission was wrong, and when the defendants had not given any explanation, the

court cannot on some presumption think that the admission may not be true. The Bench relied on the judgment in Panyam Thirumalappa Vs.

Alasyam Ramappa and Others, , as well as the judgment of the Supreme Court in Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak

Gosavi and Others, .

22. Learned Counsel for the appellant contends that the burden is on the transferees viz. defendants 2 to 6 to prove that they are bona fide

purchasers for value without notice. We have already referred to the various circumstances and facts of this case to show that defendants 2 to 6

are purchasers in good faith for value without knowledge of Ex. A-1. Hence, there is no necessity to consider in detail the following judgments

relied on by learned Counsel in support of the said proposition.

AIR 1934 68 (Privy Council) , AIR 1946 97 (Privy Council) , Veeramalai Vanniar

(Died) and Others Vs. Thadikara Vanniar and Others, and

Babu Lal Vs. Hazari Lal Kishori Lal and Others, . The proposition does not apply in the present case. Consequently, we hold that defendants 2 to

6 are bonafide purchasers for value without notice of the suit agreement.

23. The only other questuion that remains to be considered is whether the plaintiff should be permitted to reserve the claim for damages. As

noticed already, in the plaint, in paragraph 5 the plaintiff has reserved his right to claim damages from the defendants by separate proceedings.

There is no mention in the plaint about the amount of Rs. 1,00,000 said to have been paid by the plaintiff to the first defendant. There is no prayer

in the plaint for refund of the said amount. The plaintiff filed I.A. No. 635 of 1988 under Order 2, Rule 2 of the CPC for leave to file a separate

suit for refund of Rs. 1,00,000 and for damages against the defendants. A certified copy of the order in the said application has been produced

before us by learned Counsel for the appellant. It is seen that the learned Subordinate Judge after dismissing the suit by his judgment dated

26.11.1990 passed an order on the same day in the application dismissing the same on the ground that the suit has been dismissed. The order of

the learned Subordinate Judge in the application is undoubtedly erroneous. The plaintiff has prayed for reservation of the relief under Order 2, Rule

2 of the CPC for taking separate proceeding with regard to the same. That application had been filed long before the suit was taken up for trial.

The court should have considered that application earlier and disposed of the same in accordance with law. If the court had decided against the

plaintiff, he would have either challenged the order in the higher forum or amended the plaint or included the relief in this suit alternatively.

24. After hearing counsel on both sides on that question, we are of the view that leave ought to have been granted to the plaintiff for reserving the

prayer for the refund of the sum of Rs. 1,00,000 alleged to have been paid by him to the first defendant and for damages, since the plaintiff has

expressly reserved the same in the original plaint itself. Hence, we grant the leave prayed for by the plaintiff in I.A. No. 635 of 1988. The plaintiff is

given liberty to file a fresh suit for the reliefs which he has reserved in the present proceedings. However, in such a suit, the defendants are entitled

to raise all the pleas available to them in law including the plea of limitation. The

grant of this liberty to file a separate suit will not mean that the plaintiff will be entitled to get such reliefs in the fresh suit which might be instituted by him as against the defendant.

25. In the result, C.M.P.No.9176 of 1993 is allowed. A.S.No.1354 of 1990 is dismissed with costs of respondents 2 to 6.