(1997) 10 MAD CK 0007

In the Madras High Court

Lakshmi Ammal (died) and Others APPELLANT

Vs

J. Victor and Others RESPONDENT

Date of Decision : 18-10-1997

Acts Referred:

Citation : (1998) 3 LW 189 : (1998) 1 MLJ 740

Hon'ble Judges : P. Sathasivam, J

Bench : Division Bench

Judgement

P. Sathasivam, J.—Defendants 1 to 7 in O.S. No. 7368 of 1978 on the file of IV Additional Judge, City Civil Court, Madras are the

appellants in the above appeal. The first respondent herein filed the said suit for specific performance.

2. The case of the plaintiff is briefly stated here under.

The plaintiff and one Narayanaswami Pillai entered into an agreement of sale dated 21.7.1973 under which Narayanaswami Pillai agreed to sell the

suit property for a sale consideration of Rs. 37,000 free from all encumbrances According to the terms of the agreement, Narayanaswami Pillai

should discharge a subsisting mortgage in respect of this property, pay the arrears of taxe6, obtain an encumbrance certificate and convey the

property free from all encumbrances. Subsequently on 11.10.1975 Narayanaswami Pillai received a sum of Rs. 13,500 representing that he would

discharge the two mortgages in respect of the property and another in respect of another property of Narayanaswami Pillai due to the same

mortgagee. Including the advance of Rs. 1,100 paid on the date of the agreement and the subsequent payments made by the plaintiff,

Narayanaswami Pillai had received a total sum of Rs. 17,851 towards the sale consideration. However, Narayanaswami Pillai did not redeem the mortgages. He took a hostile attitude. But possession of the property was delivered in part performance of the agreement of sale. Before completing the execution of the sale deed Narayanaswami Pillai died on 9.11.1977. The first defendant/first appellant is the wife and defendants 2 and 3/appellants 2 and 3 are the sons and defendants 4 to 7/appellants 4 to 7 are the daughters of Narayanaswami Pillai. 8th defendant/2nd respondent is the legal representative of the mortgagee. The plaintiff issued a notice even during the life time of Narayanaswami Pillai asking him to execute the sale deed. But Narayanaswami Pillai sent a reply refusing to execute the sale deed and rescinding the contract. After the death of Narayanaswami Pillai, the plaintiff issued a notice to the defendants 1 to 7 calling upon them to execute the sale deed. The said demand made by the notice dated 2.6.1978 was not complied with by the defendants 1 to 7. The plaintiff has been ever ready and willing to perform his part of the contract and as such he has come forward with the above suit for specific performance directing the defendants 1 to 7 to execute a registered sale deed after discharge of the subsisting mortgage.

3. Defendants 1 to 7 filed a written statement and contended that Narayanaswami Pillai had himself sent a reply notice dated 9.8.1977 terminating the contract. The defendants admit the receipt of the total sum of Rs. 17,851. The plaintiff had agreed to discharge a mortgage from and out of the balance of sale price within a period of six months, but he did not discharge the mortgage. So it is the plaintiff who committed breach of the contract. After the death of Narayanaswami Pillai, the plaintiff had made forcible entry into the property. The possession of the property was not given to the plaintiff in part performance of the agreement to sale. The defendants 1 to 3 had filed O.S. No. 4457 of 1978 in the City Civil Court for permanent injunction. The present suit has been filed only after the other suit was filed by defendants 1 to 3. The 8th defendant filed a written statement and contended that there are two mortgages subsisting over this property, the one for Rs. 3,000 and the other for Rs. 4,000. The 8th defendant has filed O.S. No. 8366 of 1977 for recovery of a sum of Rs. 14,465 due on the mortgages.

4. The plaintiff himself was examined as P.W. 4 and one Ratnam was examined

as P.W. 2 apart from marking Exs. A-1 to A-35 in order to prove

his case. On the other hand, third defendant was examined as D.W. I and Exs. B-1 to B-9 were marked on the side of the defendants. In the light

of the above pleadings and oral and documentary evidence, after framing necessary issued, the learned 4th Additional Judge, City Civil Court, after

holding that the agreement dated 21.7.1975 was not legally concealed by Narayanaswami Pillai, the plaintiff did not agree to discharge the

mortgage over the property, the plaintiff had always been ready and willing to perform his part of contract and the breach was committed only by

Narayanaswami Pillai, decreed the suit for specific performance in favour of the plaintiff.

5. Aggrieved against the decree for specific performance, the unsuccessful defendants 1 to 7 filed the above appeal.

6. I have heard Mr. T. Thirumaran, learned Counsel for the appellants, Mr. R. Rathinadurai, learned Counsel for first respondent and Mr. V.

Subramaniam, learned Counsel for 2nd respondent.

7. Mr. T. Thirumaran, learned Counsel for the appellants raised the following contentions:

(1)Ex. A-1 dated 21.7.1975 is not a valid agreement, since the plaintiff has no signed the same. As per Section 15(a) of the Specific Relief Act,

parties to the agreement alone can enforce the agreement, since the plaintiff is not a party to the said agreement, the suit filed on the basis of Ex. A-

1 cannot be maintained.

(2) Even if the agreement is unilateral since Narayanaswami Pillai has right to cancel the said agreement, he has rightly cancelled it.

(3) There is no evidence to show that the plaintiff was all along ready and willing in order to perform his part.

(4) There is no specific finding regarding the discharge of the mortgage in terms of Ex. A-1.

(5) The plaintiff has also failed to prove regarding possession as well as delay in filing the suit.

(6) Inasmuch as the trial court has failed to frame issues, the entire discussion and ultimate decree in favour of the plaintiff are liable to be set aside.

8. On the other hand, Mr. Rathinadurai, learned Counsel for the first respondent/ plaintiff submitted that,

(1) the plea that the suit based on Ex. A-1 is not maintainable as per Section 15(a) of the Specific Relief Act has not been raised in the written

statement, nor any issue was framed. He also contended that even in the memorandum of appeal, no ground is taken as contended by the learned

Counsel for the appellants. Hence, such belated objection cannot be entertained at this stage.

(2) In view of the specific averment admitting the executing of Ex. A-1 in O.S. No. 4457 of 1978 and in the absence of any denial in the written

statement in the present suit, even in the absence of signature of the plaintiff in Ex. A-1, the suit as framed on the basis of Ex. A-1 is maintainable.

(3) The plaintiff has established regarding his readiness means in order to perform his part.

(4) The plaintiff has established that he is in possession of the suit property and the same has been established by evidence.

(5) Inasmuch as the court below has granted decree on the basis of the acceptable, oral and documentary evidence, produced by the plaintiff,

absolutely there is no merit in the appeal and the same is liable to be dismissed. I have carefully considered the rival submissions.

9. At the outset I shall consider the objection regarding the maintainability of the suit as contended by the learned Counsel for the appellants. As

requested, I have perused Ex. A-1 dated 21.7.1975 agreement entered into between the plaintiff and Narayanaswami Pillai. It is true in the said

agreement only Narayanaswami Pillai has signed. The plaintiff''s signature is not found in Ex. A-1. As per Section 15(a) of the Specific Relief Act,

the party to the contract alone is entitled to file a suit. Relying on this provision, Mr. T. Thirumaran, learned Counsel for the appellants, vehemently

contended that the suit filed by the plaintiff on the basis of Ex. A-1 cannot be maintained. In this regard, he also brought to my notice the relevant

averment in the plaint. It is mentioned in para 10 of the plaint that the cause of action for the suit arose at Madras and on 21.7.1975 where and

when the agreement of sale was executed and subsequently on all the dates of demand to execute the sale deed and non compliance thereof,..,"".

There is no dispute that the suit has been laid on the basis of Ex. A-1 dated 21.7.1975. I have already observed that the plaintiff has not signed in

Ex. A-1. At this stage, he also submitted that though the said objection has not been raised in the written statement or during the pendency of the suit as well as in the memorandum of grounds of appeal, in view of the fact that the said question being pure question of law, it can be raised at any

stage including at the time of argument. In support of his contention, he has relied on the following decision:

(1) Kandamath Cine Enterprises (Pvt.) Ltd. Vs. John Philipose, .

(2) Vasantkumar Radhakisan Vora Vs. The Board of Trustees of the Port of Bombay, .

(3) K.P.M. Basheer Vs. State of Karnataka and another, . (4) Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others, .

As requested by the learned Counsel for the appellants, I have carefully gone through the above decisions.

Absolutely there is no dispute that if it is a question of law, the same can be raised even at the appellants stage. Since there is no dispute with

regard to the above legal position, there is no need to refer the relevant passages from the above referred decisions. However, the learned Counsel

for the first respondent submitted that even prior to the present suit, namely, O.S. No. 7368 of 1978 the defendants 1 to 3 had filed O.S. No.

4457 of 1978 before the City Civil Court against the plaintiff herein for permanent injunction. The plaint in the said suit has been marked as Ex. A-

35 in the present suit. In the said suit, defendants 1 to 3 herein/plaintiffs in that suit made the following averment in para 3 of the plaint:

The plaintiffs (in O.S. No. 4457 of 1978) respectfully state that the defendant and late Narayanaswami Pillai entered into agreement of sale dated

21.7.1975 in respect of house No. 4, New Street, Nungambakkam, Madras... "" Again in para 7 i.e., cause of action it is mentioned as follows:

The cause of action arose at Madras when the defendant entered into an agreement with the deceased Narayanaswami Pillai and when the

defendant broke open the lock and subsequently within the jurisdiction of this Hon''ble Court. "" The above averments made by defendants 1 to

3/appellants 1 to 3 herein clearly show that the plaintiff herein and one Narayanaswami Pillai had entered into an agreement on 21.7.1975 (Ex. A-

1). Further, even in the present plaint in para 4 it is specifically pleaded that by an agreement of sale dated 21.7.1975, the said Narayanaswami

Pillai contracted to sell the above said property to the plaintiff for a price of Rs. 37,000 free of all encumbrances. "" For this specific averment in the written statement in para 4 it is merely stated that ""the agreement of sale dated 21.7.1975 was cancelled, as clearly stated in the reply notice of late

Narayanaswami Pillai dated 9.8.1977. "" It is not the case of the defendants that the said Narayanaswami Pillai has not executed any agreement. In

view of the above factual position. particularly in the light of the specific averment in the plaint in O.S. No. 4457 of 1978 which is exhibited as A-

35 and in the absence of any denial in the written statement filed in the present suit, I am unable to accept the contention that the present suit filed

on the basis of Ex. A-1 is not maintainable. Inasmuch as the other party to the agreement, namely, Narayanaswami Pillai who has agreed to sell the

suit property to the plaintiff for a price of Rs. 37,000 has signed is sufficient to enforce the same by way of filing suit for specific performance. In

this regard the following statement found at page 248 in the Book, namely ""A. Treatise on the Specific Performance of Contracts"" by The Rt. Hon.

Sir Edward Fry G.C.B., (Sometime one of the Lords Justice of Appeal) is relevant which is extracted hereunder:

515. The statute requiring that the agreement, or the memorandum or note thereof, shall be signed by the party to be charged therewith, or his

agent, and not requiring that it shall be signed by both parties to the contract, it has been held, both in courts of Equity and also in Common Law

Courts, that a signature by the party against whom the contract is sought to be enforced is sufficient.

The above observation of the learned Author squarely supports the contention of the respondents herein. In such circumstance, I do not find any

infirmity in the present suit filed by the plaintiff on the basis of Ex. A-1.

10. Now coming to the merits of the case, it is contended by the learned Counsel for the appellants that at any point of time, the plaintiff was ready

and willing, he had no means to perform his part and has also not discharged the mortgage. The above said argument has been vehemently

opposed by the learned Counsel for the respondents. As per the agreement Ex. A-1, an advance of Rs. 1,001 had been paid. Admittedly no

period during which the sale deed has to be completed is mentioned in Ex. A-1. On the other hand, it is mentioned that Narayanaswami Pillai

should received the sum of Rs. 13,000 from the plaintiff on or before 25.8.1975 and discharge the mortgages over the suit property. Ex. A-2 receipt shows that only on 11.10.1975 a sum of Rs. 13,500 was received by Narayanaswami Pillai. The said receipt is attested by first defendant.

Even though the said receipt does not mention that the money was being received for the purpose of discharge of mortgages in view of the fact that

as per the agreement, a sum of Rs. 13,000 was agreed to be paid by the plaintiff and the actual amount paid under this receipt is a sum of Rs.

13,500. The fact that the amount paid is of the order of Rs. 13,000 will only go to show that the amount was actually received for discharge of the

mortgages as agreed in the agreement. Apart from this, it is seen from the reverse of the receipt Ex. A-2 which is marked as Ex. A-22, dated

25.10.1975 that Narayanaswami Pillai had received another sum of Rs. 2,000 on 25.10.1975 and also received another sum of Rs. 1,000 on

23.10.1975, Rs. 100 on 15.11.1975 and Rs. 250 on 25.11.1975. The said payments are not disputed in the written statement. In such

circumstances, it is rightly contended that the plaintiff had paid a total sum of Rs. 17,851 and the balance payable under the agreement was only

about Rs. 19,149. No doubt, only after 1 1/2 years under Ex. A-10 the plaintiff through his counsel sent a notice to Narayanaswami calling upon

him to execute a sale deed for which the said Narayanaswami sent a reply under Ex. A-11. Hence, it is clear that the plaintiff had already provided

nearly 50 per cent of the sale consideration within four months after the execution of the agreement. The plaintiff had paid the above said amount

which includes a sum of Rs. 13,000 agreed to be received by Narayanaswami Pillai for the specific performance of discharge of the mortgages.

So, it is clear that the plaintiff had performed his part of contract under Ex. A-1 by paying the amounts. The evidence before the court is also

makes the position clear that the said Narayanaswami did not take any initiative for executing the sale deed or calling upon the plaintiff to take the

sale deed by paying the consideration. The above circumstances will go to show that the plaintiff had been always ready and willing to perform his

part of the contract. As already stated, he had paid nearly 50 per cent of the consideration.

11. Now I shall consider the question regarding means of the plaintiff. A perusal of the oral evidence of P.W. 1 clearly shows that he is the owner

of a printing press in the name and style of J.V. Press and its value is Rs. 85,000. According to him, he is doing the printing works for the Tamil

Nadu Text Book Society, Sports Company, and various undertakings both Central and State. The total turn over is Rs. 1 lakh to Rs. 1 1/2 lakhs.

The following evidence of P.W. I is very relevant in this regard and the same is extracted hereunder:

As rightly observed by the court below, the cumulative effect of all the above facts mentioned by the plaintiff will only go to prove that besides

advancing 50 per cent of the sale price of the suit property, the plaintiff had been engaging himself in doing lucrative business in that he could raise

over draft from the State Bank of India. He has chosen to purchase property in the name of his wife for Rs. 25,000 and he was in a position to

pledge 28 sovereigns of jewels for the purpose of putting up the construction. On the other hand, D.W. I, has merely stated that he is not aware of

the income of the plaintiff and his investment in the business. D.W. I in his cross-examination has, stated thus:

In such circumstances I am satisfied that the plaintiff had suffices means to take the sale deed. 12. Coming to the possession of the property it is

stated that Narayanaswami Pillai evicted the tenants of the property and kept the house under lock and key so that he could deliver vacant

possession of the property at the time of the registration of the sale deed. It is the evidence of P.W. 1 and P.W. 2 that in order to complete the

transaction, they have gone to the house of Narayanaswami Pillai to press him to execute the sale deed. According to them, this happened in the

first week of October, 1977. Both P.W. I and P.W. 2 deposed that Narayanaswami Pillai told them that he would not defraud the plaintiff having

received so much amount out of the sale consideration, that he was sick and had been undergoing treatment and he would executed the sale deed

after discharge from the hospital and if they had any doubt about the bona fide of Narayanaswami Pillai, he was prepared to deliver possession of

the property and in so saying he handed over the key of the house also. In this regard, the relevant evidence of P.W. 1 is extracted hereunder. In

chief-examination he has deposed thus:

Likewise, P.W. 2 who is the at store of Ex. A-1 has also deposed thus:

Even in the cross-examination, he has deposed as follows:

Even in the plaint in para 6 it is specifically pleaded "".... In such circumstances in part performance of the said contract of sale dated 21.7.1975 possession of the schedule mentioned property was also delivered to the plaintiff. But before a sale deed could be executed the said

Narayanaswami Pillai died on 9.11.1977. "" It is also stated in para 7 of the plaint thus:

... While matters stood so the defendants interfered with the possession of the plaintiff and eventually the plaintiff gave a complaint to the police.

Thereafter, the defendants 1 to 3 filed a suit in O.S. No. 4457 of 1978 on the file of this Honourable Court seeking the relief of injunction alleging

falsely that the plaintiff has broken open the lock of the schedule mentioned property after the death of Narayanaswami Pillai. They also filed an

application for adinterim injunction and no order of injunction was granted. The suit is pending.

For this there is no specific denial or details furnished in the written statement except the mere denial in paragraphs 7 and 8 of the statement. In the

light of the averments made in the plaint and written statement mentioned above, the various averments in Ex. A-35 plaint copy in O.S. No. 4457

of 1978 coupled with the oral evidence of P. Ws. l and 2 clearly support the case of the plaintiff with regard to the deliver of possession of the

property. All the above discussions clearly show that the plaintiff has established his case with regard to readiness and willingness, means to

perform his part as well as possession of the property in part performance of the agreement to sale in view of the fact that he had already parted

with 50 per cent of the sale consideration. I am satisfied with the conclusion arrived at by the court below in this regard.

13. Finally an argument was made by the. learned Counsel for the appellants that the court below committed an error in not framing issues; hence

the entire discussion and conclusion of the learned Judge cannot be sustained. No doubt, in the judgment, there is a omission to mention the issues

framed by the learned Judge. Even though in para 4 he has stated that, ""on the above pleadings the following issues were framed"", the necessary

issues had not been mentioned after para 4 as stated by the learned Judge. In view of the contention of the learned Counsel for the appellants, I

have perused the records of the court below and it is seen that on 2.2.1980, the learned Judge has framed the following four issues:

(1) Was the agreement dated 21.7.1975 entered into between the plaintiff and Narayanaswami Pillai for sale to the plaintiff of the suit property

cancelled?

(2) Has the plaintiff agreed to discharge the mortgages dated 20.12.1962 and 18.7.1964 in favour of S.V. Iyer and Mangalam?

(3) If so, what is the effect of such nondischarge?

(4) To what relief?

After framing the above mentioned issues, the learned Judge directed the parties to filel document within two weeks and posted the suit for trial on

15.4.1980. Even though there is an omission in the body of the judgment, in view of the fact that the learned Judge has framed necessary issues on

2.2.1980 as referred above, I am unable to accept the last argument of the learned Counsel for the appellants. It is true that the learned Judge

could have verified while pronouncing the order and had taken sufficient care at the time of pronouncement of judgment, this mistake could have

been avoided. I have already observed with regard to the fact that the plaintiff has established his case on the basis of the oral and documentary

evidence.

14. Under these circumstances, I do not find any merit in any one of the contentions raised by the learned Counsel for the appellants and I am in

agreement with the conclusion arrived at by the court below. Accordingly, the appeal fails and the same is dismissed with costs. During discourse

of hearing, it is brought to my notice that as per the decree, the plaintiff had deposited the balance of sale consideration and 8th respondent herein

was also permitted to withdraw the said amount as per the decree obtained by him. In such a circumstance, the appellants/defendants 1 to 7 are

directed to execute the sale deed within a period of two months from today, failing which it is open to the plaintiff to get the same executed through

court.

