

(2011) 01 MAD CK 0126
In the Madras High Court
Case No : A.S. No. 379 of 2000

M. Inayadulla

APPELLANT

Vs

P. Palanisamy and P. Priyadharshini @ Nithya Devi, rep. by
Court Guardian Advocate Selvi N. Kalaiselvi

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 41 Rule 22, Order 8 Rule 1,
Order 8 Rule 10, Order 8 Rule 9
Specific Relief Act, 1963 — Section 16, 20

Citation : (2011) 01 MAD CK 0126

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : V. Kuberan, for Ganesh and Ganesh, for the Appellant; S.
Parthasarathy, S.C. for V.P. Sengottuvel, for R1 and K. Surendranath, for R-2, for
the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard.

2. This appeal suit is filed u/s 96 of the Code of Civil Procedure, challenging the judgment and decree in O.S. No. 43 of 1994 dated 09.12.1998

on the file of the Additional Sub Court, Erode.

3. The Appellant is the plaintiff. He filed two suits before the Trial Court O.S. No. 43 of 1994 was filed for specific performance for executing a

sale deed in accordance with the agreement dated 05.11.1992, failing which, the Court itself must execute the sale deed. He filed the second

suiting O.S. No. 117 of 1995 for a permanent injunction, restraining the defendant or their men or agents from in any manner causing interference

with his peaceful possession and enjoyment of the suit properties.

4. Pending the suit, on behalf of the second defendant, the Court appointed a guardian since the second defendant was a minor. Both suits were tried together and dismissed by a common judgment dated 09.12.1998. However, the present appeal is filed only against the judgment and decreeing O.S. No. 43 of 1994.

5. The case of the Appellant/plaintiff was that the suit properties are situated in Then mugam Vellode Village, Perundurai Taluk. It absolutely

belonged to the defendants(Respondents) as per the registered Partition Deed dated 26.03.1990. The defendants wanted to sell the suit properties

due to family necessity and they made their intention to sell the properties and as the Appellant was interested in purchasing the property, he

negotiated with the defendants and the sale price was arrived at Rs. 3,25,000/-. On 05.11.1992, the Appellant and the Respondents had entered

into an agreement for sale of the suit properties free from encumbrance and the agreed price was Rs. 3,25,000/-. The Appellant/plaintiff had paid

Rs. 3,00,000/- towards the sale price and advance as well as part performance of the sale transaction to the defendants. The agreement for sale

was executed by both sides on that day and the original registered Partition Deed dated 26.03.1990 was also given to the Appellant. At the time

of agreement, no time limit was stipulated and it was not an essential part of the contract. As per the agreement for sale, the Appellant had to pay

the balance of Rs. 25,000/- within six months from the date of agreement that was on or before 05.05.1993. It was also stated that the Appellant

was put in possession of the suit property from the date of agreement and he was in possession and enjoyment of the property. The Appellant was

always ready and willing to perform his part of the contract and the Respondents were directed to perform their part of the contract on receipt of

the balance sale price. But the Respondents were evading their obligation. The first Respondent was also instigating certain anti-social elements

who came to the plaintiff on 06.02.1993 and attempted to trespass into the suit properties. Therefore, the Appellant filed the suit in O.S. No. 257

of 1993 on the file of the District Munsif Court, Erode to safeguard his possession. Even after filing of the suit, the Respondents failed to comply

with the agreement. Therefore, a legal notice was sent on 17.05.1993 calling upon the Respondent to fix a day, time and place for receiving the

balance of Rs. 25,000/-and to execute the sale deed. Even after the receipt of the acknowledgment, there was no reply from the Respondents.

The suit was filed by presenting the plaint dated 30.10.1993.

6. On notice from the Court, the first Respondent had filed a written statement dated 09.01.1996. The stand of the first Respondent/defendant was

one of denial. The Respondent also denied for having agreed to sell the properties at the sale price of Rs. 3,25,000/-. The fact of entering into an

agreement on 05.11.1992 was also denied. The fact of handing over the original registered Partition deed dated 29.03.1990 was also denied. It

was claimed that the Appellant had manufactured certain records so as to file the suit. It was also stated that the first Respondent along with one

Thangaraj and O. Karuppannan were doing business in the name and style of "Indian Medicals"" at Erode. The said Karuppannan is the brother-in-

law of one Veterinary Doctor S. Palanisamy. A dispute arose between the Respondent, Thangaraj and Karuppannan. The said Karuppannan was

acting as benamidar to Dr. S. Palanisamy. The properties of Karuppannan were given as security with the Indian Overseas Bank, Periyar Nagar

Banch, Erode. As per the settlement arrived at between the partners, it was agreed to release the security of Karuppannan and the same was to be

substituted with the properties of the first Respondent. Therefore, the first Respondent gave his properties as a security with Indian Overseas Bank

in the month of February 1991. The properties were hypothecated with the Bank by deposit of title deeds. The first Respondent had cleared the

loan on 10.11.1992 and when the first Respondent asked the bank authorities to return his document, it was handed over to him by way of

creating a mortgage by deposits of title deeds. The Manager of the Bank was evading to return the documents and when the first Respondent on

22.12.1992 sent a telegram to the Bank Manager of Indian Overseas Bank, he did not send any reply. Therefore, he filed a complaint with the

District Consumer Redressal Forum in C.P.O.P. No. 13 of 1993 and the same was pending. Therefore, it was probable that the original Partition

Deed was handed over to the Appellant without any authority. It was also claimed that the Appellant was not entitled to file a suit for bare

injunction on the basis of an alleged agreement of sale. The Appellant also filed a memo in O.S. No. 257 of 1993 stating that the matter was

settled out of court without the knowledge of the Respondents.

7. The Additional Sub-Court, Erode heard both the suits together and framed two issues. Before the Sub-Court, on behalf of the Appellant, 5

documents were filed and marked as Exs.A1 to A5. On the side of the plaintiff, he had examined himself as P.W.1 and one Jeganathan was

examined as P.W.2. The defendants neither filed any document nor examined any witness on their side.

8. The Trial Court found that in Ex.A1 Sale agreement, it was stated that the balance amount has to be paid within 6 months namely on or before

05.05.1993 and in case of default, the Appellant will lose the advance of Rs. 3,00,000/-. But it was claimed by the Appellant that even though it

was stated that the balance amount has to be paid within 6 months, time was not considered to be essence of the contract. Immediately, after the

date of expiry in the sale agreement, the suit was filed. The Trial Court found that the Appellant did not show any proof that he was ready and

willing to pay the amount and except his own interested testimony, no other evidence was let in. There was no proof that on or before 06.05.1995,

he made any efforts to pay the amount and get the sale deed executed. The Trial Court also found that Ex.A3 legal notice dated 17.05.1993 was

sent by the plaintiff to the defendant for executing the sale deed, but from the date when the agreement expired till 16.05.1993, the Appellant did

not take any steps and no proof regarding the same was forthcoming. Though it was claimed that since the first Respondent was sending antisocial

elements to threaten the Appellant, the suit in O.S. No. 117 of 1995 was filed as early as on 10.02.1993, the Appellant did not deposit the

balance amount before the Court to show his bona fide in ready and willing to perform his part of the contract. It was only on 31.10.1998 the

amount was deposited before the Trial Court. Therefore, there was no proof to show that he was always ready and willing to perform his part of

the contract before the Court. The Trial Court found that the balance Rs. 25,000/- was not paid within 6 months and only after 4 years later, the

amount was deposited in the Court and it cannot be said that he was always ready and willing to perform his part of the contract. Since the

Appellant did not claim any alternative relief for refund of the amount given to the Respondents, the Trial Court did not pass any order in respect of

the refund of the amount of Rs.3,00,000/-. In view of the above facts, the Trial Court dismissed the suit presented by the Appellant.

9. Attacking the said judgment and decree, the plaintiff/Appellant contended that the time was not an essence of the contract. A perusal of Ex.A1

clearly shows that it had stipulated time limit of six months to pay the balance amount due. It was also stated that in case the Respondents are

unwilling to execute the sale deed, the balance amount can be deposited before the Court and with the permission of the Court, the sale deed can

be executed by the Court.

10. The Appellant in his deposition before the Trial Court as P.W.1 deposed that the suit properties were in possession and enjoyment of the

Appellant. The contentions raised by the Appellant that time was not essence of the contract cannot be admitted when a special clause has been

introduced in the sale agreement Ex.A1 and to prove his bona fides, no amount was deposited immediately on presenting the plaint before the Trial

Court and took 4 years to deposit the amount. The entire issue is a finding of fact recorded by the Trial Court and it does not call for any

interference.

11. Mr. V. Kuberan, learned Counsel for the Appellant contended that the Appellant having been paid a substantial amount of Rs. 3,00,000/-and

possession was also handed over must not be denied the relief. On the basis of the materials placed before the Trial Court, he contended that his

part of the obligation has been fulfilled by sending a legal notice in Ex.A3 and it is the Respondents who have failed to discharge their obligation.

12. The learned Counsel placed reliance upon the judgment of the Supreme Court in Ramakrishna Pillai and Another Vs. Muhammed Kunju and

Others, for the proposition that since the defendants never raised the plea of readiness and willingness, the Court cannot reject the plaint and the

assertion of the plaintiff that he was ready and willing ought to have been accepted.

13. Thereafter, he placed reliance upon the judgment of the Supreme Court in Aniglase Yohannan Vs. Ramlatha and Others, for contending that

the ingredients of Section 16(c) read with Explanation (ii) of the Specific Relief Act has been complied with. He placed reliance upon the following

passage found in paragraph 12, which is as follows:

12. The basic principle behind Section 16(c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract

must manifest that his conduct has been blemish less throughout entitling him to the specific relief. The provision imposes a personal bar. The Court

is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get

the relief on perusal of the plaint he should not be denied the relief.

14. The learned Counsel further referred to the decision of the Supreme Court in Balraj Taneja and Another Vs. Sunil Madan and Another, and

contended that if the second defendant has not filed any written statement, it is open to the Court to pronounce the judgment against the defendant

and that was not done in this case. For this purpose, he placed reliance upon the following passage found in paragraph 14.

14. This rule, namely Rule 10, was also amended by the CPC (Amendment) Act, 1976 (Act 104 of 1976). Prior to its amendment, it was held in

a number of decisions that the rule can be invoked only in those situations where the court has required the defendant to file the written statement in

terms of Rule 9 of Order 8. A few other High Courts had taken the view that this rule would be applicable even to those cases where a written

statement was required to be filed under Order 8 Rule 1 CPC . The conflict of decisions has been set at rest by providing specifically under this

rule that where a party from whom a written statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time

permitted or fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit as it thinks fit. Rule 10 thus

governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In

both the situations, if the written statement has not been filed by the defendant, it will be open to the court to pronounce judgment against him or

make such order in relation to the suit as it thinks fit. It is to be noticed that if the written statement is not filed, the court is required to pronounce

judgment against the defendant. The words ""against him"" are to be found in Rule 10 of Order 8 which obviously means that the judgment will be

pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or ""make such order in

relation to the suit as it thinks fit". These words are of immense significance, inasmuch as they give a discretion to the court not to pronounce

judgment against the defendant and instead pass such order as it may think fit in relation to the suit.

It is not clear as to how the said decision is of any assistance to the Appellant.

15. The learned Counsel also relied upon the judgment of this Court in R. Rajaram and Anr. v. T.R. Maheswaran (2010) 2 MLJ 253 for

contending that since agreement itself provides for the plaintiff to move the Court for getting the sale deed executed and when the plaintiff has come

to the Court with clean hands, the Court is bound to examine whether the purchaser should be given equitable relief of specific performance and

the amount of Rs. 25,000/- was retained not as part of the agreement. It was only to enable the parties to move the Court for execution of the

agreement.

16. He also placed reliance upon the judgment of the Supreme Court in Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors, for

contending that the Court should see that the litigation should not be used as an instrument of oppression to have unfair advantage. For this

purpose, he relied upon the following passage found in paragraph 14, which is as follows:

14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should

meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do

so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument

of oppression to have an unfair advantage to the plaintiff....

17. Per contra, Mr. S. Parthasarathy, learned Senior Counsel leading Mr. V.P. Sengottuvel, counsel for the first Respondent submitted that though

the Appellant had filed two suits and a common judgment and decree was passed by the Trial Court on 09.12.1998, the present appeal is only

directed against O.S. No. 43 of 1994 and the judgment and decree passed in respect of the suit for permanent injunction in O.S. No. 117 of 1995

has become final. In this context, he relied upon a judgment of the Division Bench in K. Viswanathan v. R. Appavoo Chettiar 2010 (3) CTC 79.

In paragraph 6, it was observed as follows:

6. Factual details of the dispute between the parties may not be of relevance any longer in view of the fact that five Suits were tried together and

disposed of by common judgment, but the parties have chosen to come up with the Appeals against the judgment in one Suit only. Therefore, the

present Appeals, in our view, may be barred by res-judicata.

Therefore, the appeal is clearly barred by res judicata.

18. The learned Senior Counsel also referred to another judgment of the Division Bench of this Court in M/s. Bafna Developers v. D.K. Natarajan

and Ors. 2010 (4) L.W. 129. This is for the proposition if two suits are filed based upon same facts and obligations and based upon the same

agreement, then the second suit is barred under Order 2 Rule 2 CPC In paragraphs 33 and 35, it was observed as follows:

33. The learned Senior Counsel for the defendants submitted that both the earlier suits referred to the same set of facts and obligations and also

proceeds on the footing of clauses in Ex.A.2 agreement and therefore the present suit is barred under Order 2 Rule 2 CPC The learned Senior

Counsel would further contend that as pre Order 41, Rule 22 C.P.C while supporting the decree, it is open to the Respondents/defendants to

challenge the findings on any specific issue, which were registered against them. Order 41 Rule 22 is a special provision, whereby the Respondent,

without filing any cross objection, can support the decree and also urge that any issue found against him is erroneous in addition to his right to

support the decree on any other point.

35. As we have discussed earlier, the earlier two suits are founded on the same cause of action i.e., the agreement of sale and on the same cause

of action that the defendants not coming forward to perform their obligations and breach of contract. In N.V. Srinivasa Murthy and Others Vs.

Mariyamma (dead) by Proposed LR's. and Others, , the Appellants/Plaintiffs therein sought for permanent injunction against the defendants from

interfering with their possession of suit property in the earlier suit. In the earlier suit, the Appellants/Plaintiffs neither claimed relief of declaration that

original sale deed on basis of which Respondents have acquired title to the suit property was a loan transaction nor claimed specific performance of

said agreement for reconveyance in the earlier suit. They have only claimed

permanent in junction restraining the defendants from interfering with their possession of suit property. On such facts, in the said case, the Supreme Court held that the subsequent suit for specific performance of the agreement for re-conveyance is clearly barred by limitation.

19. In this case, there is no explanation on the part of the Appellant as to why the judgment and decree relating to O.S. No. 117 of 1995 was not appealed against. In this regard, the stand taken by the learned Senior Counsel for the Respondents is well founded.

20. Further, the Trial Court had rightly rejected the contention that time was not the essence of the contract and found that time limit has been stipulated in the agreement. Even after filing of the suit, the Appellant had not deposited the amount before the Court immediately, but extending the date and it was deposited only after four years.

21. In the light of the above, this Court is not inclined to accept the contentions raised by the Appellant. Hence, the Appeal Suit stands dismissed.

However, there will be no order as to costs.