

(1929) 12 MAD CK 0002
In the Madras High Court

Madiraju Jagannadha Rao

APPELLANT

Vs

Somu Laksh Munarayana and Another

RESPONDENT

Date of Decision : 18-12-1929

Acts Referred:

Specific Relief Act, 1877 — Section 27

Citation : 125 Ind. Cas. 549

Hon'ble Judges : Anantakrishna Ayyar, J

Bench : Single Bench

Judgement

Anantakrishna Ayyar, J.—Defendant No. 2 is the appellant in this second appeal. He is the adopted son of defendant. No. 1, his adoption

having taken place in 1917. Defendant No. 1, the adoptive father, executed an agreement in favour of the plaintiff to sell some Immovable property

belonging to the joint Hindu family composed of defendants Nos. 1 and 2. In Ex. A which is the agreement defendant No. 1 undertook as follows:

I shall include my adopted son Jagannath Rao also as a party to the sale-deed and execute the document of sale in your favour.

2. Defendant No. 1 having defaulted to carry out his part of the contract, the plaintiff filed the original suit of which this second appeal has arisen

for specific performance of this agreement to sell, making the father as defendant No. 1 and the adopted son as defendant No. 2 to the suit.

Defendant No. 1 set up a plea that the plaintiff himself agreed to secure the conjunction of defendant No. 2 and the plaintiff not having done so, the

suit for specific performance should fail for that reason. Defendant No. 2 pleaded that the agreement was not entered into, for necessary purposes

and that under the adoption deed, Ex. 2, dated 12th February, 1917, the adoptive father, defendant No. 1, undertook not to alienate any of the

family properties without the conjunction of defendant No. 2 also in the same. The trial Court framed six issues of which the 4th was ""whether

specific performance can be granted"" and the 5th ""whether defendant No. 2 is bound by the contract entered into by defendant No. 1."" Another

issue was raised whether the plaintiff undertook to procure the conjunction of defendant No. 2 also in the same. Both the lower Courts found

against defendant No. 1's plea that the plaintiff undertook to get the defendant No. 2 also to join in the sale-deed. The first Court granted a decree

for specific performance in so far as defendant No 1 was concerned. One reason why the suit against defendant No. 2 was dismissed is stated in

para. 14 of the first Court's judgment:

Under Ex. 2, the adoption deed, defendant No. 1 undertook not to alienate any family property. Defendant No. 2 is a major and it has not been

satisfactorily proved that defendant No. 1 is the family manager. Under these circumstances I find that defendant No. 2 is not bound by the

contract.

3. I must say at this stage that I am not able to follow the learned Munsif in the observation that, simply because defendant No 2 the adopted son is

a major, there must be some satisfactory proof that defendant No. 1, the adoptive father, is the manager. The learned District Munsif observes: ""It

has not been satisfactorily proved that defendant No. 2 is the family manager"". I cannot understand what sort of proof is necessary to constitute the

adoptive father and the only other member of the joint Hindu family besides the adopted son, a joint family manager. Under Hindu Law defendant

No. 1 is the joint family manager and unless any other member proves that owing to specific agreement or for some other reasons defendant No. 1

has ceased to be manager, it is not necessary to prove that defendant No. 1 is the joint family manager. The learned District Munsif passed a

decree against defendant No. 1 only, and dismissed the suit against the second. On plaintiff's appeal, the learned Subordinate Judge went into the

question whether the agreement entered into by defendant No. 1 to sell the properties to the plaintiff Ex. A, was binding upon the joint family. He

found that as early as 1912 there was a mortgage-debt incurred by defendant long before the adoption of defendant No. 2. He also found that the

mortgagee filed a suit and obtained a decree (Ex. C) for Rs. 2,000 and odd on

the footing of his mortgage. After a portion of the decree amount had been given up by the mortgagee-decree-holder there was a large amount of about Rs. 2,000 due under the decree of 1921. It was to pay off that decree-debt and for a fresh consideration of Rs. 200 that defendant No. 1 executed this agreement to sell the properties to the plaintiff, and he took an advance of Rs. 100 out of the Rs. 200 at the time of the agreement of sale. Of course, the lower Appellate Court held that defendant No. 1 was the manager. On these findings the lower Appellate Court modified the decree of the first Court and granted a decree for specific performance against defendant No. 1 also. This second appeal has accordingly been preferred by defendant No. 2. Two main points have been raised by the learned Advocate for the appellant. One was that in a suit for specific performance proper, in pursuance of an agreement entered into by defendant No. 1 (in whatever capacity he might have entered into that agreement), strangers ought not to have been made parties to the suit. The other was that, having regard to the recent Privy Council case reported as *Skinner v. Skinner* 119 Ind. Cas. 633 : 57 M.L.J. 765 : 6 O.W.N. 835 : 30 L.W. 451 : (1929) A.L.J. 1060 : Ind. Rul. (1929) P.C. 337 : 50 C.L.J. 487 : (1929) M.W.N. 937 : 32 Bom. L.R. 1 : 11 P.L.T. 1 : AIR 1929 P.C. 269 : 51 A. 711 : 56 I.A. 363 (P.C.), the agreement in question, Ex. A, is inadmissible in evidence and consequently the suit must fail for want of legal evidence to prove the agreement.

4. I will take up the first question first. No doubt u/s 27, Specific Relief Act, suits for specific performance of agreement to. sell Immovable property would ordinarily be maintainable only against parties to such agreement, and against certain other persons who are specifically mentioned in the several clauses of that section. It would, no doubt, have been open to defendant No. 2, the adopted son, when he was made a party to the suit, to plead that he is not a necessary or proper party to such a suit and to have his name removed from the suit, and even allow the plaintiff to obtain whatever decree he can, against defendant No. 1 either personally or in the capacity as manager, the Court might grant a decree against defendant No. 1, in which case it would have been open to defendant No. 2, if necessary, in a fresh litigation to have the questions decided as between the plaintiff on the one hand and defendant No. 2 on the other. Bat

reading defendant No. 2's written statement, it is clear that that was not the line of defence he purported to take. There he sets out various pleas on the merits which, if proved, would have had the result of having the suit dismissed as against defendant No. 2. For example, he pleaded that there was no necessity to sell and that there was no mortgage binding upon him and put forward other similar pleas. No doubt, there is the general statement that the suit against defendant No. 2 should be dismissed with costs. Under these circumstances one would like to know how the trial Court understood the pleadings in the case. No issue raised the question whether defendant No. 2 was a proper party to the suit or not.

5. I am not able to see anything in Section 27, Specific Relief Act, which would prevent a person in the position of defendant No. 2, when made a party to a suit from having the whole matter agitated and adjudicated on finally in this very same suit, if he chose to do so. Having, therefore, joined issue on the merits of the controversy and having failed, I do not think it is open to defendant No. 2 in these circumstances to raise for the first time in second appeal the point that the frame of the suit according to Section 27, Specific Relief Act, ought to have been against defendant No. 1 only.

The learned Advocate also argued that at one stage of the trial of the suit, the plaintiff would appear to have been content with taking a decree against defendant No. 1. The learned District Munsif makes an observation to that effect in the course of his judgment. That was evidently at the time when plaintiff's second witness, the plaintiff, was being examined. That offer was not accepted either by defendant No. X or defendant No. 2 with the result that the plaintiff's examination had to be completed and two other witnesses had also to be examined on the side of the plaintiff.

Plaintiffs Witness No. 4 proves the binding nature of the debts which were purported to be discharged by means of the sale to be brought about by the agreement Ex. A. There would have been absolutely no relevancy in letting in evidence of P.W. No. 4 if the parties agreed that the case should take that course at that stage as suggested here.

6. I am, therefore, of opinion that, whatever might have been the proposal made on the side of the plaintiff at one stage of the trial, the same was not accepted by the defendants, and consequently this second appeal must be disposed of on the footing that there was no such proposal at all.

Defendant No. 2 having pleaded on the merits and having let in evidence on the merits in support of his pleas and having failed with findings against

him on all questions that could possibly have arisen between the plaintiff on the one hand and defendant No. 2 on the other, I do not think it is open

to defendant No. 2 at this stage to ask me to set at large all these findings and to dismiss defendant No. 2 from the suit at this stage of the litigation.

I feel, therefore, compelled to overrule this contention of the appellant in the circumstances.

7. The second contention raised by the learned Advocate for the appellant is based upon the recent decision of the Privy Council reported as

Skinner v Skinner 119 Ind. Cas. 633 : 57 M.L.J. 765 : 6 O.W.N. 835 : 30 L.W. 451 : (1929) A.L.J. 1060 : Ind. Rul. (1929) P.C. 337 : 50

C.L.J. 487 : (1929) M.W.N. 937 : 32 Bom. L.R. 1 : 11 P.L.T. 1 : AIR 1929 P.C. 269 : 51 A. 711 : 56 I.A. 363 (P.C.). As the date of this

judgment is 16th July, 1929, and as this second appeal was filed in 1926, the learned Advocate, as is usual in such cases, took the precaution to

file an additional ground of second appeal raising a new point. The purport of the argument raised by the learned Advocate on this point is this: The

Privy Council has decided, according to his contention, that in the case of an agreement to sell Immovable property an interest in such property is

created by such agreement. Having regard to Section 17 and 49, Registration Act, such agreement requires registration and Ex. A, not being

registered, is not admissible in evidence. When the original evidence is not available for want of registration, secondary evidence could not be let in

and, therefore, the plaintiff's suit must have been dismissed in limine for want of legal evidence to prove the agreement.

8. To this it was replied by the learned Advocate for the respondents that the observations of the Privy Council should be limited to the document

they had to consider in that particular case. My attention was drawn to the terms of the document which the Privy Council had to consider. The

document is set out in extense in pages 766 and 767 (of 57 M.L.J.), of the judgment. The one party is called the vendor and the other party is

called the vendee, the words "vendor" and "vendee" occurring in several places in the document. In para. 9 these words occur:

In virtue of this sale and agreement, if the vendee considers necessary, the vendor will always be ready to execute and register a power-of-

attorney etc.

Again in para. 11:

Should the vendee not be able to get mutation of names done in his name and get full and complete possession, the vendor in such a case directs the vendee to pay the balance, etc.

9. Then there is the undertaking in para, 9 to give the vendee any other document or help the vendee may demand. Para 12 is also important,

schedule of properties sold is hereto annexed." Now when construing the words used by their Lordships in the course of their judgment it is

proper that we should have regard to the document which was the subject of dispute before them Having set out the important words occurring in

the document, I proceed to notice the several passages occurring in the judgment of the Privy Council to which my attention was drawn by the

learned Advocates on the one side or the other. At page 769 (of 57 M.L.J.) this is what the Privy Council says:

On the first question the Subordinate Judge by whom the suit was tried was of opinion that the document was a sale deed. The High Court differed

from this conclusion. The learned Judges held that the document ought to be treated as being an agreement for sale rather than a sale-deed.

The Privy Council observes:

Their Lordships have no doubt that the view taken of it by the Subordinate Judge was right,

10. That being so, it is absolutely clear that the Privy Council construed the document before them as a "sale-deed." The further discussion in my

view, is relevant only for the purpose of considering whether a provision in a sale-deed by which the vendor undertakes to execute any further

document that the vendee may ask him to execute would enable the vendee to put in evidence the sale-deed. In my view that is the purport of the

whole of the subsequent discussion in the other portions of the judgment of the Privy Council. Their Lordships observe at page 770 (of 57 M.L.J.):

If an instrument which comes u/s 17 as purporting to create or transfer an interest in Immovable property is not registered, it cannot be used in any

legal proceeding to bring about indirectly the effect it would have had if registered.

11. This observation in my view, confirms the suggestion that the document in

that particular case did create an interest in Immovable property in the transferee and it is with reference to that document that those observations were made by the Privy Council. The learned Advocate for the appellant, however, drew my attention to the passages which, he submitted, were inconsistent with the view that I have set forth above. The passages are:

They think that an agreement for the sale of Immovable property is a transaction affecting property within the meaning of the section inasmuch as, if carried it out, it will bring about a change of ownership. The intention of the Act is shown by the provisions of Section 17(2)(6) which exempts from registration and, therefore, frees from the restriction of Section 49 a document which does not itself create an interest in Immovable property but merely creates a right to obtain any document which will do so. In the face of this provision to allow a document which does itself create such an interest to be used as a foundation for a suit for specific performance appears to their Lordships to be little more than an evasion of the Act.

12. Reading the sentences as a whole, I think that what their Lordships meant there was that the document before them was a document which created an interest in Immovable property; in fact the whole interest in the property was transferred by that document of sale; and their Lordships observe that simply because there was an agreement to execute a further document if called upon, the same should not be utilized as evidencing an agreement in a suit for specific performance. I do not think that the learned Advocate for the appellant is right in his contention that every agreement for the sale of Immovable property should be treated after the decision of the Privy Council, to be an agreement affecting Immovable property within the meaning of the section. I am not able to understand the observations of their Lordships in that way. On the other hand, we have got Section 54, Transfer of Property Act, which specifically declares that ""A contract for the sale of Immovable property does not of itself create an interest in, or charge upon, such property"".

13. It may not be irrelevant at this stage to call attention to the fact that in cases where an agreement to sell Immovable property contained a recital of part payment of the price, the Privy Council had to consider the question whether in respect of the said advance a charge was created on the

property. The Privy Council held that a charge was created and that such documents require registration. The practice in India was that even in cases where there was an advance, such documents were treated as mere agreement to sell and as not creating any sort of interest in Immovable property. Having regard to the decision of the Privy Council, the Indian Legislature had to intervene and Act II of 1927 was passed to the following effect:

14. In Sub-section (2), Section 17, Registration Act, the following explanation shall be added, namely:

Explanation--A document purporting or operating to effect a contract for the sale of Immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase-money.

15. If I understand the argument of the learned Advocate for the appellant rightly, he suggests that the Privy Council decision referred only to cases where there was payment of earnest money, in which case the Privy Council held that the document came under the heading of compulsorily registrable documents, and should be registered before the same could be admitted in evidence, that the Indian Legislature restored the law as it was understood in India by Act II of 1927, but in cases where there is no earnest money or part payment made, an agreement to sell Immovable property should be taken to create not ""a charge"" (a word which would directly come under Act II of 1927) but, ""an interest"" in Immovable property which having regard to Sections 17 and 49, Registration Act, would require to be compulsorily registered before the same could be received in evidence. I do not think that the Privy Council case lays down any such propositions as the learned Advocate for the appellant asks me to assume. If that be so, the provisions of Section 54, Transfer of Property Act, and also of Act II of 1927 would surely have been considered by their Lordships. Further, in the last portion of the judgment of the Privy Council their Lordships make the following observations:

Their Lordships think that no good purpose would be served by detailed explanation of the decisions of the Indian Courts. They have the satisfaction of knowing that the principle which has been enunciated above is in

accordance with the recent decisions in most of the High Courts.

16. Their Lordships refer to three cases, one from each of the High Courts of Calcutta, Bombay and Madras. The Calcutta case quoted is Sanjib

Chandra v. Santosh Kumar 69 Ind. Cas. 877 : 26 C.W.N. 329 : AIR 1929 Cal. 436 : 49 C. 507, the Bombay case is Ramling Parvataya Samble

Vs. Bhagvant Sambhuappa, and the Madras case Satyanarayana v. Chinna Venkat Rao 100 Ind. Cas. 385 : 23 L.W. 277 : 50 M.L.J. 674 : AIR

1926 Mad. 530 : 49 M. 302. Referring to these cases one is strengthened in the view set forth above. In the case of Sanjib Chandra Sanyal v.

Santosh Kumar 69 Ind. Cas. 877 : 26 C.W.N. 329 : AIR 1929 Cal. 436 : 49 C. 507, Rankin, J., as he then was, made the following

observations:

From the terms and from the admitted circumstances I think it clear that it (the suit document) was intended to operate as a present demise to the

plaintiff for five Tears.

17. That was a case where there was not merely an agreement to lease but an actual lease which operated or was construed to operate as a

present demise. The case in Ramling Parvataya Samble Vs. Bhagvant Sambhuappa, , made the distinction between an agreement to sell which

does not convey any immediate interest in Immovable property and a document which purports to create an interest in proesenti in the property

that was the subject of the agreement The last of the cases in the case reported is Satyanarayana v. Chinna Venkata Rao 100 Ind. Cas. 385 : 23

L.W. 277 : 50 M.L.J. 674 : AIR 1926 Mad. 530 : 49 M. 302, a judgment of the late learned Chief Justice of this Court and of Reilly, J. That was

a case where the Court had to consider whether a suit for specific performance would lie at the instance of a vendee when, owing to any default on

the part of the vendor, the deed of sale in the possession of the vendee was not presented for registration in due course. The Court held that such a

deed of sale was inadmissible in evidence unless it was registered according to the provisions of the Registration Law. That was a case where an

actual deed of sale, and not an agreement to sell, was under consideration and the Court held that such a document was inadmissible in evidence.

18. I have, therefore, come to the conclusion that the Privy Council only confirmed the principle that was discussed in the Indian Courts in the

cases referred to by them; and that the observations should be taken to refer only to documents which effect a transfer in proesenti of an interest in

Immovable property. In the view I take, the document, Ex. A, was properly admissible in evidence, and I also overrule this second contention

raised by the learned Advocate for the appellant. Both the contentions failing, the second appeal is dismissed with costs.