

(1925) 10 MAD CK 0080
In the Madras High Court

Meenakshisundaram Pillai

APPELLANT

Vs

Chandrakasa Naicker and Others

RESPONDENT

Date of Decision : 28-10-1925

Acts Referred:

Citation : AIR 1927 Mad 550

Hon'ble Judges : Curgenvan, J

Bench : Division Bench

Judgement

Curgenvan, J.—The plaintiff, who is now the petitioner, sued three persons in the following circumstances. In a previous suit a decree had been obtained against the undivided brother of the 2nd and 3rd defendants and in execution of that decree a house supposed to belong to the judgment-debtor was purchased by the 1st defendant. The latter sold this house to the plaintiff for Rs. 1,500 but the plaintiff was obstructed from obtaining possession by the 2nd and 3rd defendants, claiming each 1/3 share. He therefore sued the three defendants to obtain delivery of the house together with mesne profits and in the alternative, if delivery were not decreed, to recover the purchase money from the 1st defendant. When the suit came on for trial, the 2nd and 3rd defendants were ex parte and the plaintiff compromised with the 1st defendant, with the result that a decree was passed against all the defendants for possession and for a sum of Rs. 405 as mesne profits, this part of the decree being executable first against the 2nd and 3rd defendants and only on a failure to recover from them against the 1st defendant. The 1st defendant was also to pay off the amount of a mortgage decree on the property, and this, it is said, he subsequently did. It will be observed that the claim for return of the purchase money was given up. After this decree was passed, the 2nd defendant, who had been ex parte applied to the District Munsif to have it set aside as regards himself. The District Munsif dismissed that application, but in appeal it was allowed by the Subordinate Judge. It is against this order that the present revision petition is preferred. If it is to be set aside at all, the petitioner asks that it should be set aside not only as against one, but as against all the defendants. There is an affidavit sworn to by

the vakil who represented the petitioner that this request was made to the Subordinate Judge and I think I must accept this as true, although there is a counter-affidavit by the defendant to the contrary. The Subordinate Judge having failed to consider and decide whether or not the request is to be granted, I think that, if due cause is shown, there will be ground for interference in revision.

2. Under the proviso to Rule 13, Order 9, Civil P. C., where a decree is of such a nature that it cannot be set aside as against the applying defendant only, it may be set aside as against all or any of the defendants also. It appears to me that the decree in this case is of this indivisible character, because it is for the possession of a house, which itself is indivisible; so that if the share of one of the defendants is excluded, delivery will, in effect, be impossible. I think, therefore, that the case will be a fit one for acting under the proviso if the circumstances that as between the plaintiff and the 1st defendant the decree was by compromise is not a bar to such a course. There is indeed nothing in the Code which requires that a compromise decree should receive special treatment in this respect; but it is true that on general principles the parties cannot ordinarily be allowed to resile from the contract which forms the basis of such a decree. An exception to this principle would, I think, be permissible in cases where an action would lie to avoid the contract upon any ground (recognized by the Contract Act. Under Section 56 of that Act a contract which becomes impossible, becomes void. It was a part of the contract, between the plaintiff and the 1st defendant, that the former should obtain possession of the house, and it was a necessary condition of so obtaining possession that the decree obtained against the other two defendants should remain in force. If the decree against either were set aside, the circumstances in which the contract was made would have ceased to exist. I have been referred to an English case, *Krell v. Henry* [1903] 2 K. B. 740 which was a decision arising out of some analogous circumstances. The plaintiff hired a flat from the defendant for the purpose of witnessing the coronation procession of King Edward VII, but the procession was postponed owing to the King's illness. The contract contained no express reference to the purpose for which the flat was taken, but it appeared from extrinsic evidence that the object was as stated. Vaughan Williams, L. J., who delivered the leading judgment observed:

I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both the contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such a case, if the contract becomes impossible of performance by reason of the nonexistence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract, thus limited, and further:

In each case one must ask oneself, first, What, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract.

3. It appears to me that in the circumstances of the present case these questions may be answered in the affirmative. It was a foundation of the contract, (under which the 1st defendant escaped liability for refunding the purchase money) that the plaintiff was to get possession of the house. The execution of this plan would be frustrated if either or both of the other defendants obtained a reversal of the decree. I answer the third point, whether such a reversal could reasonably have been foreseen, with more hesitation; but I think on the whole that the need of providing for the contingency which actually arose might quite easily have been overlooked in the circumstances.

4. I consider accordingly that the plaintiff would cease to be bound by the contract underlying the decree if that decree is to be set aside against either or both of the other defendants. The fact that it is a compromise decree is, therefore, in my view, no bar to the application, of the proviso to Rule 13, Of Order 9. The case appears to me to be a fit one for the application of this proviso and on condition that plaintiff repays to the 1st defendant such sum if any that the latter has paid in O. S. No. 51 of 1924, District Munsif's Court, Valangiman, in discharge of the mortgage referred to in the compromise, I, accordingly, allow the petition and set aside the ex-parte decree as against all the defendants.

5. In the circumstances of the case I make no order as to costs.