
(2003) 07 MAD CK 0002

In the Madras High Court

Case No : Application No. 2295 of 2003 in C.S. No. 644 of 2002

Mrs. P. Syamala, Proprietrix, Prajwal Associate and Another	APPELLANT
Vs	
R. Gopinathan and Others	RESPONDENT

Date of Decision : 31-07-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 38 Rule 5

Contract Act, 1872 — Section 10

Transfer of Property Act, 1882 — Section 53A, 54, 55

Citation : (2004) 1 CTC 117

Hon'ble Judges : A.K. Rajan, J

Bench : Single Bench

Advocate : R. Thiagarajan, for the Appellant; N.V. Srinivasan, for Respondent Nos. 1 to 5 and Habibullah Basha, for S.A. Rajan, for the Respondent

Judgement

A.K. Rajan, J.—The suit has been filed by the plaintiffs for a decree for specific performance of the agreement dated 9.5.2001 by executing

sale deed with respect to the suit property and for declaring that the plaintiffs have an equitable charge over the schedule mentioned property on

the payment made by him and for a permanent injunction restraining the defendants or their men from alienating the property or demolishing the

property or structures either by way of sale, mortgage, joint development, lease or otherwise.

2. In the plaint it is stated that a total sum of Rs. 70 lakhs was paid by four cheques on 9.5.2001; the first defendant gave the Xerox copies of the

documents stating that the originals were with the Egmore Benefit Society, the mortgage. Since the defendants did not pay any amount to the

Egmore Benefit Society towards the mortgage, they wanted to enter into a written agreement for the joint development agreement and it was

agreed between the parties for the payment to be made periodically from 10th August 2001 to 30th December, 2001. The first defendant

informed the plaintiffs that he would get the documents from the Egmore Benefit Society. Since the first defendant did not take any steps to

discharge the mortgage and get the documents, the plaintiffs wanted to recall the money. The first defendant promised that he would refund the

money with interest and other damages. But in the meanwhile, he entered into another agreement with the 7th defendant. Therefore, this suit has

been filed.

3. In the above suit, O.A.No. 640 of 2002 was filed for an order of interim injunction restraining the defendants-1 to 7 or their men ""from

alienating or encumbering or dealing with the suit property"". O.A.No. 641 of 2002 was filed for an order of interim injunction restraining the

defendants-1 to 7 or their men ""from demolishing the existing building or putting up any new construction over the suit mentioned property"".

4. A learned Single Judge of this Court heard these two applications but dismissed both the applications holding,

No doubt, the plaintiffs have parted with the sum of Rs. 70 lakhs on 9.5.2001. They have failed to discharge the mortgage of Rs. 50 lakhs with

Egmore Benefit Society Limited. Having waited for nearly one year and after due communication on 11.12.2001 and after receiving the letter

dated 12.4.2002 from the plaintiffs, defendants 1 to 6 had entered into an agreement with the 7th defendant to sell the property. The aforesaid

facts cumulative put together would lead to the irresistible conclusion that the contract was not a concluded one between the parties and the

plaintiffs have failed to perform their part of the contract at the earliest point of time and defendants-1 to 6 cannot wait indefinitely and they cannot

be at the mercy of the plaintiffs. When the properties were already mortgaged with Egmore Benefit Society Limited with an extent of Rs. 50 lakhs,

which prompted defendants-1 to 6 to sell away the property and the plaintiffs having failed to clear the mortgage at the earliest point of time,

naturally the interest will accrue and ultimately the property itself will be in danger.

After coming to know about the sale in favour of the 7th defendant and taking possession of the property and after demolition of the building only,

the plaintiffs have come to this Court. Hence, I am of the view that the plaintiffs have no prima facie case and the balance of convenience is not in

their favour and the points are answered accordingly.

For the reasons stated above, both the applications fail and accordingly dismissed".

5. Aggrieved by this order, the plaintiffs filed O.S.A.Nos. 422 and 423 of 2002. A Division Bench of this Court set aside the order of the learned

Single Judge; the Division Bench found that admittedly the respondents-1 to 6 received a sum of Rs. 70 lakhs by way of advance from the plaintiffs

and also Rs. 1.5 crores by way of sale consideration from the 7th defendant and directed the defendants to deposit a sum of Rs. 70 lakhs; the first

defendant pleaded before the Court that he has no cash to deposit. The Division Bench held further that even assuming that the applicants may not

be entitled for the relief of specific performance, the plaintiffs prima facie entitled for the refund of the advance amount, if not fully, atleast a part, if

the respondents-1 to 6 are able to establish the damages or loss. Therefore, the Division Bench found that the applicants/plaintiffs are entitled for

the refund of Rs. 70 lakhs plus interest thereon. If at all, there are any loss to the respondents-1 to 6 because of the failure on the part of the

appellants to discharge the mortgage, it will only be the accrued interest on the mortgage amount and the appellants can be made liable to that

extent and not more. But the respondents-1 to 6 did not plead any loss sustained by them. The Division Bench further held that the respondents-1

to 6 pleaded that the sale consideration agreed with the appellants being 2.2 crores, there is no reason for the respondents-1 to 6 to agree to sell

the property of a larger extent to the 7th respondent for Rs. 1.45 crores. The Division Bench observed further,

The offer made by Mr. S.A. Rajan, the counsel for the 7th respondent that his client would withdraw from the picture, if the appellants pay Rs. 1

crore, throws some doubt with regard to the genuineness of the transaction between the respondents. If really the 7th respondent had parted with

Rs. 1.45 crores, as pleaded by him or Rs. 1.50 crores, as pleaded by the first respondent, definitely the 7th respondent cannot forgo Rs. 45 lakhs

or Rs. 50 lakhs, as the case may be, by receiving Rs. 1 crore from the appellants;

It has further held that in view of the, fact that no sale deed has been, executed

in favour of the 7th respondent and as such the 7th respondent cannot claim any title over the property, at the most by virtue of the power of attorney, the 7th respondent can claim a right for promoting the site, but he cannot claim ownership. Ultimately, the Division Bench ordered as follows: Accordingly, we modify the order of the learned Judge by directing the respondents to deposit a sum of Rs. 70 lakhs within two weeks from today as a condition to confirm the order of the learned Judge, failing which the appeals shall stand allowed and thereby the applications in O.A.640 and 641 of 2002 shall allowed and there will be an order of injunction in both the applications; as prayed for.

6. Against this order of the Division Bench, the 7th defendant filed petitions for Special Leave to Appeal (Civil) Nos. 24812 and 24813 of 2002 in the Supreme Court. The defendants-1 to 6 also filed Petitions for Special Leave to Appeal (Civi-1) Nos.5310 and 5311 of 2003. The Supreme Court passed the following Order:
SLP(C) Nos.24812-24813 of 2002
Leave granted.

There will be a stay of the impugned order qua the petitioner. It being clarified that it will only be respondent Nos. 3 to 8 who will have to deposit Rs. 70 lacs as per the impugned order. It is clarified that that portion of the impugned order which provides for consequences of non-deposit by respondent 3 to 8 shall also remain stayed. It is further clarified that in case of non-deposit, respondent 1 and 2 will be at liberty to take such action as is available to them in law.

S.L.P.(C) Nos.5310-5311 of 2003

We see no reason to interfere.

The Special Leave Petitions are dismissed.

7. The plaintiffs now have filed the present application O.A. 2295 of 2003 for an order of attachment before judgment of the suit property. It is stated in the affidavit that the respondents-1 to 6 did not deposit Rs. 70 lakhs received by them. They deliberately failed to comply with the order of the Division Bench which was confirmed by the Supreme Court. Hence, the present application has been filed for attachment before judgment of the immovable property of the defendants-1 to 6/respondents-1 to 6. The

defendants confessed in the course of proceedings that they are not owning any other immovable property other than the suit property; unless an order of attachment before judgment is granted pending disposal of the suit, the applicants' interest would not be adequately safeguarded.

8. Respondents-1 to 6 have not filed any counter.

9. The 7th respondent has filed a counter stating that this respondent admittedly has not received any amount from the plaintiffs; it has no

knowledge of the agreement between the plaintiffs and the defendants-1 to 6 before it parted with the entire consideration of Rs. 1.45 crores.

Hence it is an innocent purchaser for valuable consideration. The admitted case of the plaintiffs is that this respondent has paid the entire sale

consideration and has taken possession of the property as well as documents relating to the property and also obtained power instrument to deal

with the property, in any manner. This respondent demolished the building and is developing the property into multi-residential unit to sell the

residential flats. Applications, O.A.Nos.640 and 641 of 2002, for interim injunction restraining the defendants-1 to 7 from demolishing the existing

building or putting up new construction, were dismissed after hearing elaborate arguments and the order of the Division Bench reversing the order

of the dismissal was stayed by the Supreme Court. The Supreme Court has further held that the defendants-1 to 6 alone are liable to deposit the

amount of Rs. 70 lakhs and if they do not deposit, the plaintiffs should have recourse only against, them. Therefore, the plaintiffs cannot seek any

action against the suit property. This Court passed an order of status quo without notice to the respondents. Therefore, there is no impediment for

the 7th respondent to deal with the matter, in any manner. The applicants are trying to nullify the orders of the Supreme Court. The action taken by

the applicants amounts to contempt of the order of the Supreme Court and also abuse of order of the Supreme Court. This respondent reliably

understands that the defendants-1 to 6 are possessed of immovable properties of appreciable value in the nature of agricultural lands, commercial

properties and residential properties in Chittur District of Andhra Pradesh. The defendants-1 to 6 may be directed to disclose these, assets at the

first instance and thereafter, they may be directed to furnish the necessary securities in respect, of their other properties as suit properties cannot in

any event be attached, in view of the finding of the Supreme Court. Even if a decree for money is passed, that cannot be against this respondent.

For the suit property, this respondent had paid the entire sale consideration and took possession, and is developing and hence that cannot be attached.

10. In the reply affidavit, the petitioner has stated that in the absence of any counter-affidavit from defendants-1 to 6 and in view of the failure on

the part of defendants-1 to 6 to deposit the money as directed by the Supreme Court, the petitioners are well within their right to file the present

application for attachment before judgment of the immovable properties of the defendants-1 to 6. The failure to deposit the money as per the

directions of the Supreme Court manifestly prove that the defendants-1 to 6 have no respect for law and for the orders of the Court, including the

Supreme Court; The 7th respondent is only an Agreement-holder; no sale deed has been executed in his favour; even if any sale deed is executed,

it will not bind the applicants. Unless an order of attachment before judgment is passed, it is not possible for the applicants to retrieve the amount

of Rs. 70 lakhs paid by them.

11. Mr. R.Thiagarajan, learned counsel appearing for the plaintiffs submitted that admittedly, the applicants/plaintiffs have paid Rs. 70 lakhs as part

payment for the sale consideration based upon the oral agreement. The case of the defendants-1 to 6 is that the contract has been cancelled or

rescinded. When the contract has been rescinded, the defendants are liable to refund the money received by way of advance or part consideration.

When that money, is not refunded, the plaintiffs have a charge over the property. Admittedly, the defendants-1 to 6 have not executed any sale

deed either in the name of the 7th defendant or in favour of any other person. Admittedly, there is only an agreement for sale; that has not

transferred the title in the property in favour of the 7th respondent. Since no sale deed has been executed and registered in accordance with the

Registration Act, title remains with the owner. According to Section 54 of the Transfer of Property Act, a holder of agreement to purchase the

property does not get any title in that property. He referred to the judgment of the Supreme Court in Sardar Govindrao Mahadik and Another Vs.

Devi Sahai and Others, , where it has been held as follows:

The sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be

satisfied. It is a sort of a guarantee against decree becoming in-fructuous for want of property available from which the plaintiff can satisfy the decree.

The learned counsel further submitted that inasmuch as the suit property is the property of the defendants-1 to 6, the 7th defendant cannot have

any say in this matter. The counsel also submitted that ""attachment"" creates a lien over the property, whereas ""injunction"" not to alienate, restrains

only the alienation of the property; order of attachment is only against the owners of the property, whereas the injunction can be with respect to

third parties as well; the agreement holder can never be equated to that of the owner; therefore, the applicants are entitled to the order of

attachment, as prayed for.

12. Learned counsel for the defendants-1 to 6 submitted that there is no agreement at all with the plaintiffs. They entered into agreement with the

respondent No. 7. But, he further stated that the applicants entered into an agreement to purchase the property and they were told about the

mortgage with Egmore Benefit Society. The applicants paid Rs. 70 lakhs as earnest money on 9.5.2001; the earnest money is only a guarantee for

fulfilling a contract, failure of which will result, in deprivation of the earnest money. Since the applicants herein failed to fulfill their contract, they are

deprived of their money and the entire amount of Rs. 70 lakhs has, been forfeited. Learned counsel also submitted that 6th respondent wrote a

letter on 11.12.2001 to the plaintiffs that the amount was forfeited. Presently, there is no subsisting contract between the plaintiffs and the

defendants-1 to 6. Further, the property has already been sold to 7th defendant. Therefore, R.1 to R.6 are not obliged to pay any amount and that

they are not bound to pay that amount of Rs. 70 lakhs. Therefore, no order of attachment can be passed.

13. The learned senior counsel Mr. Habibullah Basha appearing for the 7th respondent submitted that the prayer in the earlier O.A.No.640 of

2002 was, for order of injunction which amounts to prayer, for attachment and the prayer in O.A.641 of 2002 was for not to alienate or encumber

the suit property. Both these prayers were only amount to attachment of the

properties; but those prayers were rejected by the learned Single Judge. Though that, was modified/reversed by the Division Bench, on appeal, the Supreme Court has stayed the order of the Division Bench.

Therefore, the injunction order passed by the Division Bench from demolishing or constructing or alienating or developing the property has been stayed. Hence, respondent No. 7 cannot be prevented from alienating the property. The plaintiff can proceed with respect to any other property other than the suit property against the defendants-1 to 6. In any way, the rights of the 7th defendant cannot be thwarted. Now the plaintiffs want to go behind, the Supreme Court orders. Before seeking an order for attachment before judgment, the plaintiffs must seek for an order to furnish security which they have not done. Therefore, no order of attachment before judgment can be passed.

14. The learned senior counsel further submitted that u/s 53-A of the Transfer of Property Act, there is no charge at all and Section 53-A of the

Transfer of property Act is not applicable to the present case. Any order of attachment would amount to contempt of Court.

15. Learned counsel for the applicants replied that the alleged letter, of cancellation of the agreement dated 11.12.2001 has not been received by

the petitioner. It was not sent by registered post. There is no proof for having sent it to the applicants. Further, the respondents-1 to 6 are residents

of Chennai and the entire transaction is at Chennai. The letter is alleged to have been posted from Chittur; that itself shows that the letter was not

sent- With respect to possession of valuable properties by respondents-1 to 6, other than the suit properties, the contention of the respondent No.

7 will not amount to an affidavit by respondent Nos.1 to 6. The plaintiffs are the unsecured creditors. Respondent No. 7 is not the owner of the

property. If at all, only respondent Nos. 1 to 6 can resist this application. Respondent No. 7 has no right to resist this application.

16. According to Section 54 of the Transfer of Property Act, sale is the transfer of ownership in exchange for a price paid or promised or part-

paid and part-promised. Such a transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, can be

made only by a registered instrument. A contract "for" the sale of immovable property is a contract that a sale of such property shall take place on

terms settled between the parties. It does not, of itself, create any interest in or charge on such property. Therefore, an immovable property can be

said to be sold only when a registered sale deed is executed. Unless and until a deed of sale is executed and registered, there is no sale of the

immovable property.

17. Admittedly, no sale deed has been executed by the defendants-1 to 6 as on date, in favour of the 7th defendant. Therefore, the suit property

has not been sold by the defendants-1 to 6. Hence 7th defendant is not the owner of the suit property; it is only the holder of an "agreement for sale".

18. Agreement for sale and the power of attorney deed have been executed by defendants 3, 4, 5 and 6, i.e., by G.Bhupesh, Miss G.Mona, M/s.

Niruba and Company and M/s. R.G.P. Builders. Agreement for sale is in favour of the 7th defendant M/s. Jamals, a partnership firm. But the

power of attorney Power is in favour of S.C.M. Jamaludeen and his son J.C. Shameem Kasim. Of course, both of them are described as partners

of the 7th defendant firm. But it is not given in favour of the firm (the power of attorney is only, in favour of the two individuals). By this registered

power of attorney, the respondents-1 to 6 appoint and retain" the two individuals S.C.MJamaldeen and J.C.Shameem Cassim, "as true and lawful

POWER OF ATTORNEY" of defendants-1 to 6. The power of attorneys were permitted "to take possession and to continue to be in possession

of the property" on behalf of the defendants/respondents-1 to 6. Further, under this deed of Power of Attorney, the power has been given to take

various steps, specified therein on behalf of the defendants-1 to 6 and defendants-1 to 6 agreed to ratify all the acts done by the power of attorney

on their behalf. Under this deed of Power of Attorney, defendants-1 to 6/ respondents-1 to 6 permitted the two named individuals,

S.C.MJamaldeen and J.C.Shameem Cassim to take possession of the property on behalf of the, respondents-1 to 6. Therefore, the possession of

the property by S.C.M. Jamaldeen and J.C.Shameem Cassim is only on behalf of the respondents-1 to 6. That is, the suit property is in the

mediate" possession of the defendants. Therefore, the possession of the suit property is only with the defendants 1 to 6.

19. This power of attorney was executed on 22nd August, 2002. There is also an

affidavit dated 26.8.2002 signed by G.Bhupesh, G.Mona, M/s.

Niruba and Company and R.G.P. Builders; this is an unregistered document, signed by G.Bhupesh, G.Moha, Gopinathan, Padmini Gopinathan,

only in their individual capacity. No one has signed on behalf of M/s.Niruba and Company or R.G.P. Builders. Therefore, this affidavit has been

signed, only by the four named individuals and not by the firms. But, the firms are joint owners of the property. In this affidavit also, the following

recitals are found:

We have today executed registered and handed over a power instrument in the names of two of the partners of the firm M/s. JAMALS, the

purchaser. They are Mr. S.C.M. Jamaldeen and Mr. J.C.Shameem Cassim and they are authorised to act jointly and severally, as our attorneys.

By the power instrument, we have empowered our attorneys to take possession of the property to obtain all plans and sanctions to develop the

property and to sell the entire property by one sale deed.....

It also contains another recitals,

..as we have delivered physical possession of the property....

That is, these two persons, S.C.M. Jamaldeen and Mr. J.C.Shameem Cassim are only the attorneys of the executants of the affidavit. This affidavit

has not been executed by respondents-1 to 6. It was only executed by the four named individuals, defendants 1 to 4, whereas the power of

attorney has been executed by dendants-1 to 6. Further, the power of attorney is a registered document, but the affidavit is an unregistered

document. Therefore, the recitals in the affidavit cannot be taken into account as against the registered deed of power of attorney. Therefore, the

possession of the suit property is only with the defendants-1 to 6.

20. Even in the agreement dated, 8.7,2002, the vendors D.1 to D.6 agreed to deliver vacant possession of the property to the purchaser D.7 at

the time of, their receiving the balance sale consideration. In the affidavit dated 26.8.2002, it is mentioned that the entire sale consideration has

been received by them, but from the letters given by Vijaya Bank, a sum of Rs. 20 lakhs was credited only on 20.9.2002 though the cheque were

said to have been issued on 22.8.2002. If really the cheques were issued on 22.8.2002, there is no reason for the delay of one month in crediting

the amount. Therefore, the particulars given in the affidavit cannot be accepted as reflecting the entire truth, especially in the circumstances of this

case. Therefore, even as per the agreement, unless the full amount was paid, the vendor did not agree to hand over possession of the suit property.

This suit has been filed by the plaintiffs on 20.9.2002; only three days after a sum of Rs. 20 lakhs has been credited to the accounts of the defendants-1 to 6.

21. Admittedly, the defendants-1 to 6 have entered into an oral agreement, as early as 9.5.2001. A total sum of Rs. 70 lakhs was paid by way of

four cheques and admittedly that amount has been encashed and received by defendants-1 to 6. Oral agreement for sale is also a valid agreement.

Merely because the agreement of 7th defendant has been registered, it does not and cannot get a better or superior right than that of the plaintiffs.

Therefore, as between the plaintiffs and the 7th defendant, the plaintiffs are the holders of earlier agreement for sale.

22. This suit has been filed for specific performance of the contract. In a suit for specific performance, it is always possible for the Court either to

grant a relief of specific performance or in the alternative to pass a decree for return of the amount received by the vendor, of course after

compensating any loss, if any, sustained by the vendors. The defendants-1 to 6 did not file any counter to this application. But the counsel for the

defendants-1 to 6 is categorical that his clients have forfeited the entire amount of Rs. 70 lakhs for breach of contract. They have taken a definite

stand that they are not willing to repay the amount of Rs. 70 lakhs, because according to them, the plaintiffs are not entitled to get back Rs. 70

lakhs paid. But the Division Bench of this Court has directed the respondents-1 to 6 to deposit the amount of Rs. 70 lakhs into this Court. The

Supreme Court has also dismissed the SLP filed by defendants-1 to 6. Therefore, there is a direction by the Court to R.1 to R.6 to deposit Rs. 70

lakhs to the credit of the suit. The Division Bench has directed to deposit Rs. 70 lakhs within two weeks from 16.12.2002, that is, on or before 1st

January, 2003; the amount of Rs. 70 lakhs should have been deposited by the defendants-1 to 6 into this Court. But the defendants-1 to 6 by not

depositing the amount into this Court, have disobeyed the orders of the Court. According to the learned senior counsel appearing for the 7th

respondent, only when the order to furnish security has not been complied with, the order of attachment can be passed. In the absence of an

application to furnish security, no order of attachment before judgment can be passed. This argument of the learned senior counsel is not

acceptable. Inasmuch as there is already an order by the Division Bench of this Court which was also confirmed by the Supreme Court directing

the defendants-1 to 6 to deposit the amount of Rs. 70 lakhs into this Court, there is no need for another application to furnish security. Under

Order 38, Rule 5 of C.P.C., when the defendants failed to comply with the orders of the Court to deposit the money, there is no further need for

this Court to direct the defendants-1 to 6 to furnish security. Therefore, the argument of the counsel for the 7th defendant that no attachment can

be ordered, in the absence of any prayer for furnishing security is not acceptable.

23. Admittedly, the respondents-1 to 6 have entered into an agreement for sale with 7th defendant and have also received a sum of Rs. 140 lakhs.

Therefore, the plaintiffs have satisfied this Court the conditions prescribed under Order 38, Rule 5(1)(a), C.P.C. In a suit for specific performance,

this Court can always grant an alternative decree for the return of the amount received. The plaintiffs have stated in the affidavit that there is no

property possessed by defendants-1 to 6 except the suit property. But, the 7th defendant has stated in its counter that the defendants-1 to 6 are in

possession of large number of immovable properties in Chithur; but not given any details. Further, this Court cannot take the statement of the 7th

defendant as true when the defendants-1 to 6 have not stated so by filing a counter. The averments made by the plaintiffs/applicants against the

defendants-1 to 6 can be denied only by defendants-1 to 6/respondents-1 to 6, but they have not denied that.

24. In the circumstances, this Court is of the view that there is no other property owned by the defendants 1 to 6. If ultimately, a decree is passed

for the return of the amount of Rs. 70 lakhs, it may only be a paper decree. In the circumstances, in order to safeguard the interest of the plaintiffs,

an order of attachment before the judgment of immovable properties has to be passed, as per Rule 5 of Order 38, C.P.C., since the plaintiffs have

satisfied all the conditions specified therein.

25. Learned counsel appearing for the 7th defendant submitted, that the suit

property cannot be attached since the Supreme Court has rejected the petition filed by the plaintiffs/petitioners. According to the learned counsel, the Supreme Court has rejected the claim for attachment of the suit properly.

26. In this case, since the matter has already been taken to the Supreme Court and the Supreme Court has also passed an order, it is necessary to understand what is the order of the Supreme Court. If the Supreme Court has already decided this issue, this Court cannot pass any order. If the Supreme Court has left the question open, then this Court can exercise the power under Order 38, Rule 5, C.P.C.

27. The Supreme Court has passed an order that there will be a stay of the Division's order ""qua the petitioner"". That is, the order passed by the Division bench has been stayed in so far as it relates to the 7th defendant. The consequence of non-payment by the defendants-1 to 6 has also been stayed qua 7th defendant. The Supreme Court has clarified that the plaintiffs-1 and 2 herein ""will be at liberty to take any action as is available to them in law.

28. The Division Bench modified the order of the Single Judge whereby the Division Bench directed the defendants-1 to 7 to deposit the sum of

Rs. 70 lakhs failing which the order of the Single Judge would be set aside. The order of the Single Judge in Application. Nos. 640 and 641 of

2002 was to dismiss the prayers for an injunction restraining the respondents-1 to 7 therein from alienating or dealing with the property and also

from demolishing the existing building or putting up a new construction. The Division Bench held that Single Judge's order of dismissal of the

prayers would be valid, only if the defendants-1 to 7 deposited Rs. 70 lakhs into the Court. This conditional order has been stayed by the

Supreme Court, in so far as the defendants-7 is concerned. That is, the Supreme Court has stayed, the order of injunction restraining the

defendants-7 from demolishing and putting up construction and also encumbering.

29. The Supreme Court has also categorically stated that the plaintiffs will be at liberty to take such action as is available to them in law. The

plaintiffs have filed the present application for attachment of the property before judgment. It is permissible under law to attach a property before

judgment when the plaintiffs have satisfied the conditions specified under Order 38, Rule 5, C.P.C. The case of the 7th defendant is that, it has

become the owner of the property. That is according to defendant No. 7, defendants-1 to 6 are not the owners of the suit property; but, defendant

No. 7 is not the owner of the property. Admittedly, no registered sale deed has been executed by defendants-1 to 6 in favour of defendant No. 7.

The 7th defendant is having only a registered agreement for sale. As per Section 54 of the Transfer of Property Act, an agreement for sale does

not transfer any right in the property. Therefore, title of the suit property is only with defendant Nos. 1 to 6.

30. The counsel for the plaintiffs submitted that the plaintiffs have a charge over the suit property for the amount they have already paid, as per

Section 40 of the Act. The learned counsel for the 7th defendant submitted that since the 7th defendant has performed part of the terms of

contract, he is entitled to protection u/s 53-A of the Transfer of Property Act. When there is part performance of a contract, (payment of sale

price and transfer of possession), no person who claim through the vendor can prevent the 7th defendant from doing any act. But, the plaintiffs are

not the persons claiming under the defendants-1 to 6; the claim is similar to that of the 7th defendant. Though agreement for sale by itself does not

create any charge over the property, any amount paid as part sale consideration creates a charge for that amount over that property. Therefore,

the plaintiffs have a charge in the suit property for Rs. 70 lakhs paid by them as part sale consideration.

31. A Division Bench of this Court has held in the case in I.T.O., Madras v. K.A.Govindaswamy AIR 1978 Mad. 186 as follows:

The principle u/s 55(6)(b) of the Transfer of Property Act is indeed a converse of the seller's charges for the unpaid purchase price contemplated

u/s 55(4)(b) of the Transfer of Property Act.

.....

This statutory charge is the outcome of the rule of justice, equity and good conscience, though there is no question of ownership involved while

asserting the change as above, as such ownership would still be in the seller. Yet in order to adjust the equity of the parties to the contract which

are contained in Section 55(6) of the Transfer of Property Act, the buyer is

privileged to claim a statutory charge u/s 55(6)(b) of the Transfer of Property Act. There is even authority for the proposition that this statutory charge can be enforced even in Court sales.

We have already observed that this statutory privilege resulting in a charge in favour of the intending buyer is based on the well-known principle of justice, equity and conscience. This is because that once the buyer has paid the whole or part of the property in question, the vendor becomes a trustee for him and to the extent to which the buyer has paid the purchase money the buyer acquires a lien over the property, "as if upon the payment of a part of the purchase money the vendor has executed a mortgage to him of the property to that extent.....

32. Therefore, the plaintiffs are having a charge over the suit property for the sum of Rs.70 lakhs which is tantamount to a mortgage executed by the defendants 1 to 6. The finding of the Division Bench that title of the suit property was not divested to 7th defendant has not been set aside or stayed by the Supreme Court.

33. In the circumstances, it is worthwhile to quote the decision of the Supreme Court in Delhi Development Authority Vs. Skipper Construction

Company (P) Ltd. and another, , Where the Supreme Court has held as follows:

..... in India, the Courts are not only Courts of law, but also Courts of equity.

Therefore, this Court cannot ignore the rights of the plaintiffs and reject their claim. The defendants-1 to 6 have already failed to comply with the

order of the Division Bench as confirmed by the Supreme Court to deposit the amount. Therefore, the plaintiffs are entitled for an order of

attachment before judgment, as prayed for. The Supreme Court has not considered the question of attachment of the suit property. The order of

attachment before judgment is not contrary to the order of Supreme Court in the Special Leave Petition, attachment before judgment of the

property of the defendants-1 to 6 is a remedy available to the plaintiffs, in law. The Supreme Court has permitted such action. The

plaintiffs/applicants are also entitled to a charge over the suit property for a sum of Rs. 70 lakhs (Rupees seventy lakhs only) together with interest.

Hence, the plaintiffs/applicants are entitled to the relief prayed for.

In the result, the application is ordered, as prayed for