

(1997) 09 MAD CK 0154

In the Madras High Court

Case No : Original Side Appeal No"s. 68 and 69 of 1997

N. Dhanalakshmi and Others

APPELLANT

Vs

S. Ekanathan, Proprietor, Eknath Real Estates

RESPONDENT

Date of Decision : 18-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 16
Specific Relief Act, 1963 — Section 22, 23, 24, 28(4)

Citation : (1997) 2 CTC 550 : (1998) 1 MLJ 132

Hon'ble Judges : Shivaraj Patil, J;N. Arumugham, J

Bench : Division Bench

Advocate : T. Viswanatha Rao, for the Appellant; R. Krishnaswami, for the Respondent

Final Decision : Dismissed

Judgement

Shivaraj Patil, J.—The defendants in C.S. No. 94 of 1994 have filed these two appeals aggrieved by the common order dated 25.2.1997 made by the learned single Judge in Application Nos. 520 and 522 of 1997.

2. Application No. 520 of 1997 was filed by the defendants to revoke the leave already granted on 6.10.1993 in Application No. 5529 of 1993 to the plaintiff to institute the suit. Application No. 522 of 1997 was filed by the defendants for deciding issue No. 1 relating to the jurisdiction as a preliminary issue before taking up the trial of other issues. The learned single judge by the common order dated 25.2.1997 dismissed both the applications.

3. The parties in these appeals, during the course of the judgment, shall be referred to as they are described in the plaint. Facts which are considered necessary and relevant for disposal of these appeals, briefly stated, are as follows: The plaintiff filed the suit C.S. No. 94 of 1994 on 6.10.1993 praying for a decree, directing the defendants to perform the agreement dated 7.10.1990, to execute and register sale deed in favour of the plaintiff in respect of the suit property. Alternatively the plaintiff prayed for a decree against the defendants to

direct them to pay the plaintiff a sum of Rs. 10 lakhs received as earnest money, with interest at 36% per annum from 7.10.1990 till realisation. The plaintiff also prayed for granting a decree for permanent injunction restraining the defendants from alienating or in any way dealing with the suit property.

4. It is admitted in paragraph 7 of the plaint that the suit properties are situated, and the defendants also reside outside the jurisdiction of this Court. The plaintiff filed Application No. 5529 of 1993 seeking leave to sue the defendants in this Court. The learned single judge granted leave to file the suit. Second defendant filed written statement on 7.7.1994 and defendants 1 and 3 adopted the same. After framing issues, the suit was posted for trial on 8.1.1997 and it was adjourned to 22.1.1997 as requested and then to 29.1.1997.

5. At that stage the defendants came forward with the two applications aforementioned, contending that they are permanent residents of Chengalpattu, outside the jurisdiction of this Court, and the properties also situate beyond the territorial jurisdiction of this Court. Since the suit is for land, this Court has no jurisdiction to try it, and on that basis they have prayed to revoke the leave, and to decide the issue relating to jurisdiction as preliminary issue.

6. The plaintiff filed counter affidavit opposing the said applications, stating that the suit is one for specific performance simpliciter, and not a suit for land, and that the defendants having raised the plea as to the jurisdiction in the written statement to try the suit, the application for revocation of leave granted, is not tenable without deciding that issue. The specific averment made in paragraph 10 of the plaint is not denied specifically in the written statement. It cannot be said that the defendants had no knowledge about the grant of leave. The defendants having entered defence upon the merits, they have acquiesced with the jurisdiction of this Court.

7. After hearing the learned counsel for the parties, and referring to various decisions, the learned single Judge, as stated above, dismissed both the applications.

8. The learned counsel for the defendants urged that having regard to the averments made in paragraph 10 of the plaint, looking to the defences of the defendants as pleaded in the written statement, and that the relief of possession in respect of the lands in question could be asked as per Sections 22 and 28(4) of the Specific Relief Act, the suit filed by the plaintiff has to be taken as a suit for land. According to him, the learned single judge was not right in dismissing the Application No. 520 of 1997 filed for revoking the leave granted, so also in dismissing Application No. 522 of 1997 filed for taking issue No. 1 as a preliminary issue, as the Court had no jurisdiction to try the suit, even having regard to the admitted facts. In support of his submissions, he relied on few decisions including those which were cited before the learned single judge. In particular he drew our attention to the Division Bench Judgment of this Court in the case of . Ram Bahadur Thakur (P) Ltd. v. A. Velliangiri and 3 Ors., 1989 2

L.W. 529, and the unreported judgment in the case of Shameem Ahmed, Partner, Waczech Leather Industry, Madras v. The Egntore Benefit Society Ltd. and Ors., (O.S.A. No. 169 of 1995 disposed of on 1.8.1995) by a Division Bench of this Court.

9. Per contra, the learned counsel for the plaintiff made submissions justifying the order of the learned single judge under appeal, both on facts and in law. He submitted that the suit filed by the plaintiff seeking Specific Performance of the contract is not one for land's, it is only to enforce an agreement against the defendants in personem; having regard to the relief sought for by the plaintiff it cannot be said that the suit is one for land. Further the applications filed by the defendants for revocation of leave granted, or to say that the Court had no jurisdiction and to dismiss the suit, were highly belated. The mere agreement to sell property by itself did not create any interest in the suit property; the relief of Specific Performance is only an equitable relief; the decisions cited by the learned counsel for the defendants have no application to the facts of the case on hand as in none of these decisions the suits did relate to Specific Performance of the contract. The learned counsel also relied on some decisions in support of his submissions.

10. We have carefully considered the submissions made by the learned counsel for the parties.

11. In the first place, we must state that in deciding the jurisdiction of the Court, the plaint averments have to be seen. Paragraph 10 of the plaint reads:-

"The entire suit transaction discussed and concluded at Madras during June, 1990 and October, 1990 and on 7th October, 1990 the agreement was entered into, executed and signed at Madras by the parties herein and therefore the suit is filed in this Honourable Court. Since defendants reside and property is situate outside the jurisdiction of this Honourable Court, leave is obtained."

12. Further the suit filed is one for Specific Performance of the agreement dated 7.10.1990 for directing the defendants to specifically perform the said agreement, to execute and register a sale deed in favour of the plaintiff in respect of the suit schedule property. Alternatively the plaintiff has prayed for direction to defendants to refund a sum of Rs. 10 lakhs received by them as earnest money with interest from 7.10.1990 till realisation, in the event the plaintiff fails to get decree for Specific Performance. The plaintiff has further prayed for a decree for permanent injunction restraining the defendants or their men from alienating, or in any way dealing with the suit property.

13. Application No. 5529 of 1993 filed by the plaintiff seeking leave to sue the defendants, was allowed on 6.10.1993. The second defendant filed the written statement on 7.7.1994 which was adopted by the defendants 1 and 3 on the same day. Issues were framed on 26.2.1996. The suit was posted for trial on 8.1.1997, and subsequently adjourned to 22.1.1997, and then to 29.1.1997. It is only at that stage the defendants filed the Application Nos. 520 and 522 of 1997

after a period of about 3 years and 3 months, from the date of suit, and almost after a period of one year after framing of the issues, that too when the suit was set for trial.

14. Looking to the relief sought for in the plaint, it is plain that principally the suit is for Specific Performance of the agreement, and alternatively for the relief of refund of money. Even the ancillary relief of permanent injunction is also for restraining the defendants from alienating or dealing with the suit property in any way. In order words the suit is not one for title or possession. The ancillary reliefs of injunction sought did not affect the title or possession. The reliefs sought for are against the defendants in personem. In this view, it is not possible to hold that the suit filed by the plaintiff is for land, even having regard to the decisions cited by the learned counsel for the defendants.

15. In none of the decisions cited on behalf of the defendants except the decision in . Ram Bahadur Thakur (P) Ltd. v. A Velliangiri and 3 Ors., 1989 2 L.W. 529, the suit for Specific Performance of an agreement came up for consideration, and in none of these decisions law is laid down to state that a suit for Specific Performance of an agreement in respect of land was a suit for land. In the case of "... Ram Bahadur Thakur (P) Ltd.," 1989 2 L.W. 529, the plaintiff prayed for a decree directing the defendants to deliver vacant possession of the suit property to the plaintiff. In that case although the suit was one for decree for Specific Performance the second prayer was for recovery of possession. The learned single judge, on the basis of the prayer made in the plaint for recovery of possession, took a view that it was a suit for land as is evident from paragraph 8 of the said judgment, which reads:-

"Thus, it is seen that all the judges who constituted the Bench in the Federal Court are unanimous on this aspect of the matter that if a relief is sought in the suit for recovery of possession, then it will be a "suit for land". In the present case, the second prayer is for recovery of possession. That is sufficient to hold that this is a "suit for land"."

16. In the above case, the leaned Judge has referred to various decisions including Messrs. Moolji Jaitha and Co. v. The Khandesh Spinning and Weaving Mills Co., Ltd., AIR 1950 F.C 83, and P.M.A. Velliappa Chettiar and Ors. v. Saha Govinda Doss and Ors., AIR 1929 Mad. 721 : 30 L.W. 169 . In the case of Moolji Jaitha and Co., considered by the Federal Court aforementioned, the first prayer in the plaint was that it may be declared that the said land belonged and are the properties of the plaintiff company and the defendants have no beneficial interest therein." In other words, the suit related to the title to the property, and any decree passed would affect the title. It was not a suit for Specific Performance of agreement.

17. In the said judgment, it is clearly stated that in order to consider whether a suit is covered by the expression "suit for land" in Clause 12 of Letters Patent, one has to consider whether it is for obtaining a decree for possession, or a

decision on title to land, or is something different, but involves the consideration of the question of title to the land indirectly. "Suit for land" covers three classes of suits, viz., (i) suit for determination of title to the land, (ii) suits of possession of land; and (iii) other suits in which the reliefs claimed if granted would directly affect title to, or possession of, the land. The words "suits for land or other immovable property" in Clause 12, besides obviously covering claims for recovery of possession or control of land, or apt to connote also suits, are primarily and substantially seeking an adjudication upon title to immovable property or a determination of any right or interest therein. The words "suit and land" means establishing title to land or any interest in the same, or for possession or control thereof, and the decree sought for must be intended *proprio vigore* to be enforceable against and binding on the land itself.

18. In the same decision, it is also stated that the nature of the suit and its purpose have to be determined by reading the plaint as a whole. The inclusion or absence of a prayer is not decisive of the nature of the suit, nor is the order in which the prayers are arrayed in the plaint. The substance or object of the suit has to be gathered from the averments made in the plaint on which the reliefs asked in the prayers are based. In the case on hand, undoubtedly, looking to the averments made in the plaint as a whole, and the relevant relief sought for, the suit is clearly, substantially, and mainly one for specific performance of the agreement. The other reliefs sought for were alternative, and ancillary having sought for the relief of Specific Performance of the agreement.

19. The Federal Court, having regard to the relief of declaration sought in respect of the suit land in that case, has held that the case was covered by Clause 12 of the Letters Patent. In the case of *P.M.A. Velliappa Chettiar and Ors. v. Saha Govinda Doss and Ors.*, AIR 1929 Mad. 721 : 30 L.W. 169 dealing with the suit filed by a purchaser for Specific Performance in respect of the land, the Full Bench of this Court has held that such a suit is not for land within the meaning of Clause 12 of Letters Patent (Madras). In the said decision the Full Bench was considering the question "Is a suit by a purchaser of lands situate outside Madras for Specific Performance of a contract to sell made in Madras by parties resident therein, a suit for land within the meaning of Clause 12 of the Letters Patent, and so not cognizable by the High Court, in its ordinary original civil jurisdiction." The last two paragraphs in the said Judgment at pages 726 and 727 read thus:-

"A suit for Specific Performance is a suit "in personem"; a suit for land is an action "in rem." They are "toto coelo" apart; they belong to different jurisdictions which are now no doubt fused. The object of C1.12, Letters Patent is to bar the ordinary Original Civil Jurisdiction of the High Court as to actions in rem, when the land is situate outside Madras; it does not bar the jurisdiction as to suite in personem. The word "for" which has occasioned all the difficulty is the same in each case, but a suit for Specific Performance is not merely in its history but in its nature distinct from a suit for land. That the present suit is concerned with the passing of title to land is a mere accident."

In my opinion, therefore, a suit for specific performance of a contract to sell land without the ordinary Original Civil Jurisdiction of the High Court, when the parties are resident in Madras and amenable to the enforcement of a decree in personem, is not a suit for land and the High Court has recognizance in its ordinary Original Civil Jurisdiction." The Full Bench Judgment of this Court aforementioned is directly on the point.

20. The learned single judge of this Court in the case of Ram Bahadur Thakur (P) Ltd., 1989 2 L.W. 529, appears to have taken the second relief for possession of the land sought in that suit, for consideration, as is evident from paragraph 8 of the judgment extracted above, and concluded that it was a suit for land. In that decisions the relief of Specific Performance was also one of the reliefs. In the light of the decision of the Federal Court and the Full Bench Judgment of this Court aforementioned, it cannot be said that a suit for Specific Performance of an agreement in respect of land can be said to be a suit for land. In this view, the decision of the learned single judge aforementioned does not help the defendants, and it should be taken as only governing to the facts of that case. In our view, it is not an authority to say that the suit for Specific Performance of an agreement relating to land is a suit for land coming within the ambit of Clause 12 of the Letters Patent.

21. In the case of Shameem Ahmed v. The Egmore Benefit Society Ltd., (O.S.A. No. 169 of 1995 disposed of by a Division Bench of this Court on 1.8.1995), the suit was one for declaration that the mortgage deed dated 1.8.1994 created by defendants 2 to 6 in favour of the first defendant on the property comprising of all the undivided share to the plaintiff firm's property and mentioned in Schedule-C was invalid and illegal, and for consequential permanent injunction. The relief sought for in the said suit was not one for Specific Performance of the agreement. Hence the said decision again does not help the defendants and we have no hesitation to hold that decision is not an authority for the proposition that the suit for Specific Performance of an agreement is a suit for land in view of the Full Bench Judgment of this Court aforementioned.

22. We are also unable to agree with the submission of the learned counsel for the defendant that the plaintiff could ask for the relief of possession in respect of the suit lands as per Sections 22 and 28(4) of the Specific Relief Act and as such the suit must be considered as one for land. Looking to the averments made in the plaint and the reliefs sought as they are, the plaintiff has not sought for the relief of possession. It is crystallised judicial view that in determining the question of jurisdiction the plaint averments alone are to be seen. What relief the plaintiff may ask or may not ask on a future date cannot be taken into consideration in deciding the jurisdiction the Court. As and when reliefs are asked on a future date, it is for the Courts to deal with them and decide the same at appropriate stage in accordance with law. Hence we have no hesitation to reiterate and hold that the suit for Specific Performance of an agreement in respect of land is not a suit for land so as to be included within the ambit of

Letters Patent, Clause 12, (Madras) in the light of what is stated above.

23. The Court had granted leave to the plaintiff to sue the defendants on 6.10.1993. The defendants filed application to revoke the leave, almost after a period of 3 years and 3 months. Issues were framed on 26.2.1996. The application was filed to decide Issue No. 1 as preliminary issue as to the jurisdiction to entertain the suit almost after a period of 11 months after the issues were framed, when the suit was set for trial. In our view the learned single judge was right in taking note of this delay as one of the grounds for holding against the defendants. This view gets support from the decision of the Apex Court in Chittaranjan Mukherji Vs. Barhoo Mahto, of the said judgment, to the extent they are relevant, read:-

"As already stated the suit was instituted on 17.2.1947 and the respondent entered appearance on 11.3.1947. So far from complaining that leave had been improperly granted to file the suit in Calcutta as he should have done at the earliest possible opportunity, and asking for all proceedings to be stayed until that question was settled, the respondent availed himself of the pending suit to have a consent order passed by the court appointing the solicitors of the parties as joint receivers to collect and hold the sum of Rs. 21,000 due from the military authorities, at Tollygune. That was because as he admitted, it was necessary to recover that sum immediately..."

(7) It is thus clear that the respondent has not only acquiesced in the steps taken by the appellant to carry forward the progress of the suit incurring considerable expenses but, in the language of Clough, J., "made use of the existence of the suit" to obtain such interlocutory reliefs as he thought would be to his own advantage, at the hands of the Court which he now claims should not try the suit. We are of opinion, in agreement with Clough, J., that the proceedings in the suit have been allowed to reach a stage where it would result in grave injustice if the Court were to hold that the "forum conveniense" was Bihar and not Calcutta and revoke the leave on that ground."

24. In Harnath Rai Binj Raj and Others Vs. Sewi Prosad Singh and Others, it is held that where a defendant feels aggrieved at the manner in which the Court exercised the discretion, which it admittedly has, that "I think that he should apply at the earliest moment and not allow what is prima facie a perfectly bonafide suit to proceed through the normal stages of litigation up to the stage of being ready for hearing and appearing in the Warning List before he makes his application." In the case on hand also the suit was set for trial. At that stage, the application to revoke the leave granted, was filed. In view of the conclusions arrived at by us on merits of the appeals, we do not think it necessary to deal with the other contention raised by the learned counsel for the respondent as to the maintainability of the appeal against the order of refusal to revoke the leave granted to the plaintiff to sue, in this case.

25. The learned single judge in the order under appeal, in the penultimate

paragraph, has stated that even the issue regarding jurisdiction can be decided along with the other issues as the suit itself, is ready for trial, and there is no need to try the issue regarding jurisdiction as a preliminary issue. In paragraph 10 of the plaint, it is averred that the entire suit transaction was discussed and concluded at Madras during June, 1990 and October, 1990. On 7th October, 1990 an agreement was entered into, executed, and signed at Madras by the parties. In paragraph 9 of the written statement the defendants have specifically denied that the suit transaction was discussed and concluded at Madras and that the agreement was executed at Madras. This being the position, in our view, the learned judge was right in stating that the issue as to jurisdiction could be decided along with other issues in the suit when the suit is ready for trial, particularly so when even the said issue may require oral evidence in the light of the pleadings of the parties. Added to this, the defendants did not file application to try issue No. 1 as a preliminary issue immediately after the issues were framed. They came forward with an application to try issue No. 1 as a preliminary issue relating to the jurisdiction only when the suit was set for trial.

26. In the result, for the reasons stated, we do not find any merit in these appeals. They are liable to be dismissed. Accordingly they stand dismissed, but with no order as to costs.