
(1993) 02 MAD CK 0059
In the Madras High Court
Case No : Appeal No. 817 of 1982

Nallaya Gounder and another		APPELLANT
	Vs	
P.Ramaswami Gounder (Died) and 3 others		RESPONDENT

Date of Decision : 25-02-1993

Acts Referred:

Specific Relief Act, 1963 — Section 16(c)

Citation : (1993) 02 MAD CK 0059

Hon'ble Judges : Thangamani, J;Srinivasan, J

Bench : Division Bench

Advocate : G. Subramanian for Mr. K. Govindarajan, for the Appellant; K. Doraisami and Mrs. Muthumani Doraiswami, for the Respondent

Final Decision : Allowed

Judgement

Thangamani, J.—Appeal against the judgment and decree of learned Subordinate Judge of Salem in O.S.No. 124 of 1981 on his file. The

appellants are defendants 4 and 5 in the trial court. Respondents-Plaintiffs instituted the suit for specific performance against the appellants and

three others alleging that on 27.8.1980 defendants 1 to 3 entered into Ex. A1 sale agreement with them undertaking to sell the suit properties for

Rs. 52,500/-. They received a portion of the sale price of Rs. 20,000/- as advance and agreed to receive the balance from that date and to

execute the sale deed in favour of the plaintiffs. On 16.11.1980 which correspond to the 1st of Tamil month Karthigai, the plaintiffs were put in

possession of the properties as agreed and since then they are in actual enjoyment of them. Appellants were aware of Ex. A1 agreement as well as

handing over possession of the properties to the plaintiffs by defendants 1 to 3. Since defendants 1 to 3 were postponing the execution of the sale

deed, the plaintiffs convened panchayat thrice. The last panchayat took place at the house of Village Munsif of Konnayar on 1.1.1981 in which

defendants 1 to 3 undertook to execute the conveyance on 7.1.1981. Appellants were also present along with defendants 1 to 3 in that panchayat.

However, defendants 1 to 3 and the appellants have colluded together and created Ex. B2 sale agreement dated 5.3.1980 in favour of the

appellants on 3.1.1991 by antedating the same. Ex. B1 sale deed dated 2.1.1991 was also executed by defendants 1 to 3 in favour of the

appellants in respect of the suit properties fraudulently in order to deprive the plaintiffs of their right. The recitals as to consideration, possession are

all false and fabricated so as to get over the right of the plaintiffs under Ex. A1 agreement dated 27.8.1980. Appellants cannot derive any right, title

or interest in the suit properties by virtue of Ex. B1 sale deed. Appellants are not bona fide transferees for value without notice of the earlier

agreement for sale in favour of the plaintiffs and their possession.

2. Defendants 1 to 3 remained ex parte in the suit.

3. The appellants resisted the suit denying that Ex. A1 came into existence on 27.8.1980 and that the plaintiffs were ever in actual possession of

the properties and that there was any mediation in this connection. They pleaded that they lawfully entered into Ex. B2 agreement with defendants

1 to 3 on 5.3.1980 and in pursuance of the same, defendants 1 to 3 conveyed the suit properties in favour of them under two sale deed Ex. B1

dated 2.1.1981 and Ex. B9 dated 13.1.1981. They were also put in actual possession of the suit properties. Till then their vendors alone were in.

enjoyment of the properties and Ex. B2 agreement is not an antedated one.

4. Holding that Ex. A1 is a genuine agreement and there is nothing to suspect that it was created later on by antedating the instrument, that

appellants were aware of the existence of EX. A1 agreement, that possession was delivered to the plaintiffs as per Ex. A9 delivery receipt dated

16.11.1980, that Ex. B2 sale agreement was created by antedating the same and that the plaintiffs had come to court with clean hands, the trial

court decreed the suit with costs for specific performance.

5. The endeavour of Mr. G. Subramanian, learned senior counsel for the appellants was mainly to place before the Court the suspicious

circumstances attendant on the transactions and to demonstrate that Ex. A1 sale

agreement dated 27.8.1980 was created subsequent to the coming into existence of Ex. B2 agreement on 5.3.1980. In other words, his argument was that Ex. B2 agreement preceded Ex. A1 agreement.

The first submission in this connection relates to delivery of possession of the property. It is the evidence of the First plaintiff as P.W.1 that on 27.8.1980 defendants 1 to 3 agreed to convey the suit items to them for Rs. 52,500/- and received an advance of Rs. 20,000/- The sale deed was to be executed within a period of 5-1/2 months. He was willing to pay the balance of sale consideration and get the sale deed executed. On 16.11.1980 defendants 1 to 3 handed over possession of the properties to him as per Ex. A9 delivery receipt. Learned senior counsel for the appellants pointed out that as per the recitals in Ex. A1 the property in Survey No. 231/1 is a plot of 30 cents with a five anagram thatched shed thereon. 1st defendant Periyakaruppa Gounder and third defendant Nellammal are to enjoy this property till their lifetime and only thereafter appellants are to take possession of the same. There is no reason why contrary to the express recitals in Ex. A1. defendants 1 and 3 should have surrendered the right to reside in that house till their lifetime. None of the witnesses examined on the side of the plaintiff seeks to give any explanation on this aspect. So, in all probability plaintiffs were never given possession as indicated in Ex. A9 delivery receipt.

6. Ex. A1 agreement reads that the properties are to be handed over to the prospective purchasers on the 1st of Karthigai month. The specific averments in the plaint are to the effect that defendants 1 to 3 are closely related to defendants 4 and 5, and they are colluding with each other. It is not the evidence of the first plaintiff as P.W.1 that defendants 1 to 3 are, in any way related to or interested in him. While so, it passes one's comprehension as to the necessity or urgency for defendants 1 to 3 to undertake and later on hand over possession of the properties to the plaintiffs even before receiving sale consideration in full. Besides the version of the first plaintiff as P.W.1 that because there were standing cotton crops, the venders undertook to hand over possession on the first of Karthigai month does not inspire confidence. Had it been the real reason, certainly this would have found place in Ex. A1 sale agreement itself.

7. Ex. A9 purports to be a delivery receipt dated 16.11.1980 evidencing handing

over possession of the suit properties By defendants 1 to 3 in favour of the plaintiffs. No doubt Ex. A1 agreement recites that on the 1st of Tamil Month Karthigai the vendors are to hand over possession to the vendees. And in Ex. A3 the notice dated 6.1.1981 issued by the plaintiffs to the defendants stating that Ex. B2 agreement has been created by ante-dating. Mention is made about the plaintiffs taking possession on 16.11.1980. However, it is significant to note that this notice makes no reference to Ex. A9 delivery receipt. Even the plaint is conspicuously silent about the execution of Ex. A9 delivery receipt, even though there is an allegation that possession was handed over on 16.11.1980. Besides, a scrutiny of Ex. A9 reveals that it has been filed into Court only on 28.6.1982 during trial. Had it really been in existence on the date of document, such a vital piece of evidence would not have been filed to be disclosed in the list of documents appended to the plaint.

[Discussion of evidence omitted]

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14. We find as per the plaint averment, the plaintiffs convened panchayat thrice and the last panchayat took place at the house of the Village

Munsif of Konnayar on 1.1.81 in which it was decided and the defendants 1 to 3 agreed to convey the suit properties to the plaintiff free of all

encumbrances at their cost on 7.1.81. The panchayatdars are Sellappa Gounder, son of Periya Gounder, Sankaranpalayam (2) Kaliyanna

Gounder, Nallamapalayam (3) Ponnayaru Poon gounder, Kunpuswami gounder, Selliyanman Koil Trustee Konnaryaru and Ex. Village Munsif of

Konnayar." However, in his evidence P.W.1 gives the names of panchayatdars as Kuppanna Gounder, Konnayar Munsif, Sellappa Gounder, Pulli

Gounder and Subramanian. The discrepancy in the names of the panchayatdars mentioned in the plaint and the evidence has not been explained.

And the plaintiffs have not chosen to examine any of the panchayatdars to substantiate their allegations. Though Ex. A3 notice has been issued on

6.1.1981, subsequent to the date of the last panchayat, the said panchayat is not referred to in this notice. Ex. A1 agreement stipulates that the sale

is to be completed within 5 1/2 months from 27.8.1980. However, the plaintiffs have not given any reason for convening three Panchayats within

the date agreed to under agreement Ex. A1. While the date of the last panchayat

alone finds a place in the plaint, the dates of other panchayats are neither pleaded nor spoken to in evidence. So there could be no doubt that this plea of panchayat is also far from truth. In the circumstances, we are of the view that it is Ex. B2 agreement which preceded Ex. A1 agreement and not vice-versa as concluded by learned trial Judge.

15. Learned senior counsel for the appellants next submitted that the remedy of specific relief being an equitable one, the plaintiffs must come to Court with clean hands. In this case there is positive proof that ExA9 delivery receipt has been connected for the purpose of this case. We have also seen that the plaintiffs have put forward a false case regarding convening of panchayat. So, even if we are to take that Ex. A1 agreement has come into existence prior to Ex. A, agreement, the plaintiffs cannot maintain this action. In support of his contention he cited the decision of Ismail, J. (as he then was) in Ramaswamy Gounder Vs. K.M. Venkatachalam and Others, In that case the plaintiff denied in his evidence that he averred in the plaint that the defendants did not come to the Sub-Registrar's Office. Further, while the allegation in the plaint was to the effect that prior to a particular date he had tendered the entire balance of Rs. 14,000/- to the defendant, it was borne out from his evidence that he came into possession of part of the money only at a later date. There was also discrepancy in his evidence regarding the persons in whose names the stamp papers were purchased. Besides, his version in the witness box on the receipt of the notice was not consistent with the averment in the plaint. On the question whether the plaintiff would be entitled to the relief of specific performance, it was held that the falsity of the case put forward by the plaintiff disentitled him from obtaining the discretionary relief of specific performance of agreement. The falsity of the case directly impinged on the essential ingredients and elements necessary for claiming the relief. In *Vaiyapun v. Vtjayan* (1978 TLNJ 62) the Court found that a sum of Rs. 11,000/- was not paid as advance as contended by the plaintiff and that what was paid was only a sum of Rs. 1,000/-. The Division Bench comprising of Ismail and Nainar Sundaram, JJ. held that the plaintiff who comes to the Court with a false case in material ingredients necessary for the grant of relief of specific performance, will not be entitled to the equitable remedy and is in the discretion of the Court, which discretion has to

be exercised according to recognised principles of law and not arbitrarily. In Appeal No. 355/84 we had occasion to consider the same question.

In that case the appellant based his relief on Ex. A1 agreement after making interpolation so as to make it appear that he has a right in it. On the

ratio laid down in the decisions referred to above, this Bench took the view that that was sufficient to refuse the relief to the appellant. So, in the

present action also we have no hesitation in negating specific performance for the reason that the plaintiffs have not come forward with clean

hands in asking for the equitable relief.

16. Under S. 16(c) of the Specific Relief Act, specific performance of a contract cannot be enforced in favour of a person who fails to aver and

prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him,

other than terms, the performance of which has been prevented or waived by the defendants. Learned senior counsel for the appellants submitted

that the plaint in this case did not contain any averment to the effect that the plaintiffs made a demand for specific performance and there was a

refusal on the part of defendants 1 to 3 to comply with the said demand. It will not be sufficient if the plaintiff pleads and proves that he is ready

and willing to perform his part of the contract, but he must also plead that he made a demand on the defendant for performance of the contract and

the defendant refused to comply with the same and that the language refused to comply with the same and that the language of R.3 of O.6, of the

CPC is mandatory and any plaint in a suit for specific performance has to be strictly in conformity with Form No. 47 or 48 of Appendix A of the

CPC. Learned counsel for the appellants further pointed out that the plaint does not contain averments regarding cause of action also. He relied on

the decision in Abdul Khader Rowther Vs. P.K. Sara Bai and Others, wherein the Apex Court has laid down: "A suit for specific performance has

to conform to the requirements prescribed in Forms 47 and 48 of the First Schedule in the Civil Procedure Code. In a suit for specific

performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead

that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead

that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of

the suit the plaintiff has taken those pleas. As observed by this Court in Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another,)

that it is well settled that in a suit for specific performance plaintiff should allege that he is ready and willing to perform his part of the contract and in

the absence of such an allegation the suit is not maintainable.

17. A perusal of Form Nos. 47 and 48 shows that in a suit for specific performance there must be averments to the effect that plaintiff has applied

to the defendant specifically to perform the agreement on his part, but the defendant has not done so. The plaintiff was still ready and willing

specifically to perform the agreement on his part, of which the defendant had notice. And we find from the plaint that besides stating that they are

ready and willing to perform their part of the contract mention is made of the plaintiffs convening panchayat thrice and defendants 1 to 3 agreeing

to execute the conveyance and later on selling the properties in favour of the appellants under Ex. B1 and B.9. So in our view there is sufficient

compliance of the requirements of Forms 47 and 48 of Appendix-A of the Code of Civil Procedure.

18. In the result, the appeal is allowed and the judgment and decree of the trial court are set aside and the suit is dismissed with costs of defendants

4 and 5 (appellants) throughout.