

(1999) 04 MAD CK 0017
In the Madras High Court

Parvathi Ammal

APPELLANT

Vs

M. Kuppuswamy and Another

RESPONDENT

Date of Decision : 15-04-1999

Acts Referred:

Transfer of Property Act, 1882 — Section 53(A), 53A

Citation : (1999) 3 LW 775 : (1999) 3 MLJ 633

Hon'ble Judges : V. Bakthavatsalu, J

Bench : Division Bench

Judgement

V. Bakthavatsalu, J.—The 1st defendant is the appellant. The plaintiff filed the suit for possession and injunction.

2. The case of the plaintiff is as follows:

The plaintiff and second defendant are brothers and co-owners of A Schedule property. The plaintiff's father Munuswamy permitted the first

defendant to occupy the A schedule property seven years back on the understanding that the first defendant should surrender vacant possession

whenever called upon to do so. The first defendant unauthorisedly put up a hut in the site and he was living in some portion and let out the portion

to others. On 10.3.1976, there was a fire accident, as a result of which, the huts were burnt down. The plaintiff attained majority a year back. On

21.4.1976, the first defendant began to make arrangements to put up construction on the A schedule property. The first defendant has no right to

put up construction in the property as her occupation is only permissive. Therefore, the plaintiff issued notice on 22.4.1976 calling upon the

defendants to surrender vacant possession. As there was no compliance by the first defendant, the plaintiff has filed this suit for possession,

injunction and mesne profits.

3. The case of the defendant is as follows: The property belongs to Govindammal wife of Munuswamy and by agreement dated 18.9.1967,

Govindammal and her two sons and her husband Munuswamy entered into an agreement for sale of the suit property for a sum of Rs. 7,000 and

they received advance of Rs. 3,900 and undertook to have the property released from the mortgage in favour of B.K. Nathmal Doogar and his

son, before executing the sale deed. On the strength of the above undertaking, the defendant spent, Rs. 6000 for construction of the superstructure

and has been in enjoyment of the same. The defendant has been asking Govindammal and her sons to have the property released from the

mortgage and execute the sale deed. The said Govindammal in collusion with the plaintiff and second defendant issued notice to which a reply was

sent. The plaintiff has no cause of action to file the suit in utter disregard to the agreement of sale. The defendant is in possession of the suit

property in part performance, and he has every right to construct in the manner she likes.

4. On the above pleadings, the trial court has framed six issues, on a consideration of oral and documentary evidence, the trial court dismissed the

suit without costs. The plaintiff preferred an appeal in A.S.No. 226 of 1983. The learned IX Additional Judge, City Civil Court by judgment dated

13.7.1984 allowed the appeal and consequently, the suit was decreed as prayed for with costs. The first defendant who is aggrieved upon the

judgment and decree of the appellate court has come forward with this Second Appeal.

5. The following substantial questions of law were formulated while admitting this second appeal:

(1) Whether the provisions of Section 53-A of the Transfer of Property Act are applicable to the facts in this case?

(2) Whether the suit by one co-owner without joining the other co-owners is maintainable?

6. The plaintiff and second defendant are brothers and they are sons of Munuswamy and Govindammal. There is no dispute that the suit property

belongs to plaintiff, second defendant and their mother Govindammal. Ex.A-1 is the surrender Deed executed by Govindammal in favour of

plaintiff and second defendant on 2.6.1962, The plaintiff has come forward with this suit for possession alleging that his father Munuswamy

permitted the first defendant to occupy the A schedule property under permissive occupation seven years ago on the understanding that the first

defendant should surrender vacant possession of the property whenever called upon to do so. The first defendant contended that she is in

possession of the suit property by virtue of agreement Ex.B-1 dated 18.9.1967 and that she is entitled to be in possession of the property as per

the terms of the agreement and that her possession has to be protected u/s 53(A) of the Transfer of Property Act. The 1st defendant invokes

Section 53(A) of the Act i.e., part performance to protect her possession.

7. It is seen from the pleadings that the plaintiff has totally suppressed the existence of the agreement entered into between her mother and brother

on the one hand and the first defendant on the other. The suit is filed as though the first defendant was permitted to occupy the land by

Munuswamy the father of plaintiff, But, in evidence, it is established that the first defendant is in possession of the property by virtue of the

agreement. In this context, it would be useful to refer to the agreement.

8. Ex.B-2 is the agreement dated 22.4.1967 entered into between the second defendant, Govindammal and plaintiff on the one hand and first

defendant on the other. It is recited in the above document that vacant site measuring half ground was agreed to be sold to first defendant. The

above agreement was executed for Rs. 7,000 It is recited that on the date of the agreement a sum of Rs. 100 was paid as advance. Subsequently,

under Ex.B-1 dated 18.9.1967, the second defendant and plaintiff, who was a minor then, represented by father guardian and Govindammal on

one hand and first defendant on the other entered into the agreement. It is recited in the above agreement that the plaintiff and second defendant

agreed to sell the property for Rs. 7,000. It is, further, recited that the vendors have permitted the purchaser that is the first defendant to use the

land and that a sum of Rs. 2,000 was already paid and promissory note for Rs. 1,000 was executed and that further sum of Rs. 900 was paid and

that believing the representation made by the vendor, the first defendant has put up construction spending Rs. 6,000. There is also reference to the

said fact in Ex.B-1. It is, further recited that the first defendant has let out a

portion to the tenant and is in possession of the same and that the vendors are in need additional funds to pay to the mortgagee Nathmal Doogar and Jawaharlal and that to obtain release of title, the purchasers have consented to advance, provided they enter into new agreement and allowed the purchaser to pay the. amount and get release of the site from the mortgagee and permitted the purchaser to pay the money direct to the mortgagees. It is thus, seen that on the date of the agreement a sum of Rs. 3,900 was already paid. As per the above agreement, the sale should be completed within the period of 6 months, But, certain conditions are stipulated in the above agreement. Condition No. 3 is important, As per the above condition, the vendors shall obtain a release of the property to be sold from the mortgagees Nathmull Doogar and Jawaharlal before the said date and the property shall be free from encumbrances. Condition No. 5 states that the balance of the purchase money shall be paid to the mortgagees at the time of their releasing the property to be sold. On consideration of the above terms of the agreement, and evidence the trial court has held that the first defendant is in possession of the property in part performance of the contract and that therefore, the suit is liable to be dismissed. But the appellate court did not agree with the above finding. The appellate court has held that there was no attempt by the first respondent to contact the mortgagee and that he did not pay balance of the purchase money to the mortgagees and that the period of 6 months under Clause-II of Ex.B-1 is absolute and that the limitation would start running from the expiry of the said period of 6 months and that after 3 years from that date, the first defendant would not be in a position to enforce Ex.B-1 and that therefore, the agreement become incapable of being enforced. It is, further, held by the appellate court that the first defendant was not ready and willing to complete his part of the contract. However, the appellate court has given finding that the first defendant was in possession of the site even before the execution of Ex.B-1. The appellate court has also given a finding that the plaintiff though was a minor on the date of Ex.B-1, he had ratified the agreement executed by Govindammal after he attained majority. The plaintiff has now come forward with this suit alleging that the agreement Ex.B-1 was not binding on him, since he was minor on the date of the agreement and that no sanction was obtained from the court

for alienating minor's share in the property. As the appellate court has given a clear finding that the plaintiff had ratified the agreement and that the

agreement was not repudiated in the plaint. I hold that the agreement Ex.B-1 is binding on the plaintiff.

9. The crucial question that arises for consideration in this appeal is whether the first defendant can invoke Section 53(A) of the Act to resist the

suit filed by the plaintiff. Section 53(A) of the Act reads thus:

53(A) Part performance: Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his

behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty:

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in

possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer that

the transfer has not been completed in the manner prescribed therefore, by the law for the time being in force, the transferor or any person claiming

under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the

transferee has taken or continued in possession other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part

performance thereof. In this case, the first defendant has established that there is a written agreement in the shape of Ex.B-1. Therefore, it has to

be held that the first ingredient to invoke Section 53-A of the Act has been established.

10. It is also admitted and proved that the first defendant was in possession of the property even prior to the date of Ex.B-1, The recitals in Ex.B-

1 will clearly show that the purchaser has put up construction by spending Rs. 6,000 and that he has let out portion to the tenants. It is seen that the

first defendant took possession of the property even prior to the date of Ex.B-1

and has spent Rs. 6,000 for putting up construction. Therefore, the second ingredient to attract Section 53-A has been established.

11. It is well settled that when a person invokes the Doctrine of part Performance, he must establish that he has done some act in furtherance of the contract and that he is performing of his willing to perform his part of the contract. In this case, it is admitted in Ex.B-1 that the first defendant was in possession of the property and that she has also put up construction. The first defendant has already paid Rs. 3,900 and that balance payable is Rs. 3,100 only. It is alleged in the written statement that the first defendant was asking Govindammal and plaintiff to have the property released from the mortgagee and execute the sale deed. But the appellate court has observed that the first defendant failed to prove that she was ready and willing to perform her part of the contract. The above finding of the appellate court are challenged by the appellant.

12. On the other hand, learned Counsel for the respondent contended that the first defendant has not done anything in pursuance of the agreement and that after a lapse of nearly 10 years, she has come forward with a defence claiming benefit of Section 53(A) of the Act.

13. Learned Counsel for the appellant contended that the trial court did not frame any issue on the question whether the first defendant was ready and willing to perform her part of the contract and that in fact, there is no such plea in the plaint. There is considerable force in the above connection of the appellant. As already stated, the plaintiff has suppressed the material facts in the plaint. It is for the plaintiff to allege that the agreement Ex.B-1 cannot be enforced and that the 1st defendant failed to implement the terms of the contract. Only, if the plaintiff has come forward with the suit repudiating the contract, then it is open to the defendant to raise a plea that he was ready and willing to perform his part of the contract. But, there are materials to show that in pursuance of the contract, the first defendant took possession of the property and that she also put up construction by spending Rs. 6,000. The readiness and willingness to perform part of the contract can be inferred from circumstances and conduct of parties. As already stated, the first defendant took possession of the land as vacant site and put up construction. She paid Rs. 3,900 for the agreement. The averment in the written statement that the first defendant

asked Govindammal, plaintiff and second defendant to have the property released from the mortgagee and execute sale deed is sufficient for holding that the first defendant was ready and willing to perform her part of the contract.

14. But the learned Counsel for the respondents relying upon a decision of the Supreme Court contended that the first defendant cannot claim the benefits of Section 53(A) of the Act, unless it is shown that she was ready and willing to perform his part of the contract. He relies upon a decision reported in *Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others*, , wherein it is held thus:

Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract, he will not qualify for the protection of the doctrine of part performance.

15. Another decision relied on by the respondent is reported in *Bahadur Mian Pir Bux v. Mohamed Tahar* 67 M.L.J. 865. In the above decision, the Privy Council has held thus:

The result is that, under the law applicable to the present case, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable the defendant may found upon it to have the action stayed, and suing for specific performance obtain a title which will protect him from ejectment. But, if it is no longer enforceable, part performance will not avail him to any effect.

16. The above decision will not apply to the facts of this case. The plaintiff has come forward with the suit as though the defendant was in permissive possession of the property for sometime and that he has trespassed into the property subsequently. The existence of the agreement is suppressed in the plaint. The plaintiff has not come forward with the suit alleging that the contract under Ex.B-1 became unenforceable and that the defendant failed to perform his part of the contract. In view of the above peculiar facts, the decision relied on by the respondents' counsel cannot be applied to this case.

17. As regards law of limitation, learned Counsel for the appellant contended that the appellate court has committed error in holding that the

remedy of the first defendant is barred by limitation. In this context, learned Counsel for the appellant relies upon a decision reported in

Namsimhasetty v. Padmasetty AIR 1988 Karn. 389 . The relevant portion of the judgment reads thus:

In our opinion, the first aspect to be attended to is as to whether only because of failure on the part of the transferee to bring a suit for specific

performance of the contract within the period of limitation prescribed therefore under the Limitation Act, 1963 leads to extinction of his statutory

right created by the legislature by incorporating Section 53-A in the Act. The answer to this question need not detain us too long since it is well

settled that the right and the remedy for enforcement therefore are mutually exclusive jurisprudential concepts. Remedies are availed for exercise or

enforcement of legal rights. There are authoritative judicial pronouncement to substantiate that even if a statutory remedy is lost because of

limitation or some other procedural bar, the right subsists. This legal principle has been accepted by the Privy Council in the case of AIR 1939 110

(Privy Council) .

It is also held that mere failure to sue within the time specified by the law of limitation, it would not cause the contract to become void. It is also

held that limitation bars the remedy but not the right in possession. On the analysis of the several decisions, the Full Bench of Karnataka High

Court has held that it is well settled principle that the law of limitation does not apply to defence raised u/s 53-A of the Act, since the section does

not provide for any limitation on expiry whereof the defence contemplated in this section will be lost or will extinguish.

18. The Division Bench of this Court in V.A. Padmanabhan and Others Vs. M.A. Narasimhan and Others, , has held that possession in part

performance of contract is a right falling u/s 53-A of the Act and the transferee in possession of the property in part performance of the contract

can defend his possession. There can be no dispute that the right provided u/s 53-A of the Act is a statutory right. It is no doubt thus that the

person in possession of the property under Doctrine of part performance can sue for specific performance. It is also open to the plaintiff to file suit

for specific performance, if the agreement Ex.B-1 is not binding on the plaintiff. It is open to the plaintiff to sue for partition of his half share as the

second defendant remained ex parte and did not raise any objection regarding the agreement. In the above circumstances, the finding of the

appellate court that the contract Ex.B-1 became unenforceable cannot be sustained.

19. It is admitted that there were two mortgages in respect of the property comprised in suit survey number. P. W. 1 has admitted in his evidence

that his mother, brother and others executed mortgage for Rs. 4,000 on 2.6.1962 and another mortgage for Rs. 3,000 on 26.1.1964. and that he

was also impleaded in the above suit and that the suit was decreed. The amount due under the above mortgages would be more than the amount

for which the property was agreed to be sold under Ex.B-1. The appellant filed C.M.P. during the pendency of this appeal directing the plaintiff to

receive the balance of consideration. In the affidavit filed in the said application, it is alleged that what was agreed to be sold to first defendant was

only a portion measuring 38 x 35 feet and that the total area of property was about 11/2 ground which has been mortgaged by the vendors. The

plaintiff has not filed the documents relating to the above mortgage and the mortgage suit. Further, it is specifically recited in Ex.B-1 in condition

No. 3, that the vendor shall obtain release of the property to be sold from the mortgagee before the said date and the property shall be freed from

encumbrances. Before completing the sale deed, the vendors who entered into an agreement under Ex.B-1 have to obtain release of the property

from mortgagor. The plaintiff has not come forward with a definite plea that the mortgages are still subsisting. It is not even averred as to what is

the amount due under the above mortgages. The appellate court has held that nothing prevented the first defendant from issuing notice calling upon

the vendors and the mortgagees to come forward for completing the transaction and that to get release deed, the first respondent should pay

balance of the purchase money to the mortgagee. The appellate court has given a finding without any pleadings. As already stated, the first

defendant is liable to pay only Rs. 3,100. What is the amount payable to the mortgagees is not mentioned in the plaint. As the mortgagee was

executed for the total extent of 11/2 ground, it is for the plaintiff to take steps to have the entire property released from the mortgage and only in

the above circumstances, the first defendant would be in a position to pay the balance amount. Further, it is not even alleged in the plaint that the

first defendant did not come forward to discharge the mortgage. Ex.B-1 is the contract entered into between the plaintiff and the first defendant.

Both parties are under obligation to fulfill the condition embodied in the agreement. The plaintiff or the second defendant are not shown to have

taken any steps to get the property released from the mortgagees. As already stated, without any pleadings on, this aspect, the appellate court is

not justified in giving a finding that the first defendant is not entitled to invoke the benefits of Section 53-A of the Act.

20. It is, thus, seen that the appellate court without any pleadings has rendered an erroneous finding. As the first defendant is in possession of the

property in part performance of the contract, he is entitled to be in possession and the plaintiff cannot disturb his possession. As the right arising u/s

53-A of the Act is a statutory right, the first defendant is well within his right to protect his possession. It is significant to note that the second

defendant remained ex parte. He is one of the executants of the agreement. If that is so, I fail to understand as to how the appellate court has

granted decree in respect of the entire property in favour of the plaintiff. It is no doubt true that one co-owner can sue for possession on behalf of

another co-owner against the trespasser. But, in this case, the first defendant is not a trespasser. On the other hand, he is in possession of the

property under a valid agreement. The plaintiff has not prayed in the plaint that the possession should be delivered to plaintiff and second

defendant. Even assuming that the agreement is not enforceable as against the plaintiff the remedy of the plaintiff is only to sue for partition of his

half share. But, without looking into the above vital aspect of the case, the appellate court has granted decree without pleadings.

21. Learned Counsel for the respondent contended that the contract cannot be specifically enforced against the minors. In support of the same, he

also relies upon a decision reported in Venkatakrishna Reddy v. Amarababu (1971) 1 M.L.J. 466, wherein it is held that neither the natural

guardian nor the guardian appointed under the Guardians and Wards Act has any power to sell the undivided interest of a minor coparcener of a

joint family even for necessity or for benefit. In the above decision, it is also held that a contract of sale entered into by the mother as natural

guardian on behalf of the minor children in respect of entire joint family property for necessity can be specifically enforced against the minors. The

above decision will not in any way support the case of the respondent.

22. Learned Counsel for the appellant contended that the court in Second Appeal is entitled to consider the entire evidence when the finding of the

appellate court is not based on evidence on record. In support of the same, he also relies upon a decision reported in Muthu Goundar Vs. Poosari

@ Palaniappan and 4 others, , In Kochukakkada Aboobacker (Dead) by L.Rs. and others Vs. Attah Kasim and others, , the Apex Court has

held that the High Court is entitled to reconsider the evidence by drawing inference from the admitted document). In V. Manakkan and five others

Vs. Veera Perumal, , this Court has held that the finding of the appellate court in the absence of pleadings can be interfered with in this second

appeal, As already stated, the appellate court in this case without pleadings and issues has come to the conclusion that the first defendant was not

ready and willing to perform her part of the contract, which finding is wholly unsustainable.

23. The plaintiff has admitted the possession of the first defendant, even in the notice Ex.A-4 issued on 22.4.1976. Exs.B-1 and B-2 will show that

the first defendant was in possession of the property and continued to be in possession even after the date of the agreement. Neither the plaintiff

nor the second defendant took any steps to get the property released from the mortgage. Without disclosing the material facts, the plaintiff has filed

this suit as though the first defendant is a trespasser. In the above circumstances, the trial court was justified in not granting relief to the plaintiff. As

the possession of the first defendant is entitled to protection u/s 53-A of the Act, he cannot be dis-possessed and he is entitled to be in possession

till the suit for specific performance is filed by either parties. Having allowed the defendant to enter into the property and spent huge amount for

putting up construction and having allowed the first defendant to let out the property for rent, it is not open either to the plaintiff or the second

defendant to contend that the first defendant was not ready and willing to perform her part of the contract, Thus, looked at from any angle, the

finding of the appellate court cannot be sustained. I hold that the first defendant is entitled to protect his possession u/s 53-A of the Act and as

such, the suit filed by the plaintiff has to be dismissed.

24. On substantial question of law No. 1, I hold that Section 53-A of the Act is applicable to this case. Substantial question of law No. 2 does not

arise for any consideration, since the other co-owner the second defendant is impleaded in this suit. I hold that the appellant is entitled to the benefit

of Section 53-A of the Act.

25. In the result, the second appeal is allowed. The judgment and decree of the appellate court are set aside. The judgment and decree of the trial

court are restored. No costs.