

(1997) 08 MAD CK 0035
In the Madras High Court

Periyaswamy and Others

APPELLANT

Vs

Kaliammal and Others

RESPONDENT

Date of Decision : 30-08-1997

Acts Referred:

Citation : (1997) 2 MLJ 598

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

Raju, J.—Though the second appeal has been filed by the plaintiffs 1, 2 and 4 and respondents 6 to 13 the heirs of the 3rd plaintiff,

defendants 1 and 3 appear to be the appellants before the first appellate court. The suit O.S. No. 224 of 1977 was filed on the file of the District

Munsif's Court, Periyakulam for specific performance directing the defendants to receive a sum of Rs. 1,500 being the amount of reconveyance

deposited into court and execute the sale deed in favour of the plaintiffs in respect of the suit property and in default to have it done through court.

2. The relevant facts necessary for appreciating the respective contentions of the parties are not in serious controversy. On 27.2.1960, the plaintiffs

sold the suit property to one late Chinna Karuppan for a sum of Rs. 1,500 as per the terms of a registered sale deed, On the same day, the

plaintiffs and the Chinna Karuppan entered into a separate agreement to reconvey the property to the plaintiffs, if they paid a sum of Rs. 1,500 to

late Chinna Karuppan after 26.2.1970 and prior to 26.2.1975 (that is after ten years and prior to the expiry of 15 years from the date of sale) and

that if the plaintiffs failed to repay the amount, within the said period. Chinna Karuppan would be entitled to enjoy the property absolutely. The said

Chinna Karuppan died and the 1st defendant is the wife of late Chinna Karuppan and defendants 2 and 3 are his children. The claim of the

plaintiffs is that as per the terms of the agreement, on 20.1.1974 the plaintiffs offered a sum of Rs. 1,500 to the defendants and requested them to

execute a reconveyance deed, but, they did not received the money and execute the reconveyance, necessitating the plaintiffs to issue a lawyers

notice, dated 30.1.1974 which though was received by the defendants, was not replied, nor any compliance with such demand, has been made,

resulting in the filing of the suit on 19.7.1977, depositing the sum in question before court, praying for the relief as noticed earlier.

3. The defendants contested the claim and denied the claim of the plaintiffs that the amount has been tendered as pleaded by the plaintiffs and that

though notice was issued and the defendants expressed their willingness and desire to execute the deed, the plaintiffs told the defendants that they

had no money and the notice has been issued to keep the agreement alive as per the advice of the counsel and that since the agreement for

reconveyance stood canceled, by efflux of time, the defendants can enjoy the property absolutely and the suit was also barred by limitation and

the plaintiffs forfeited their right to get reconveyance.

4. On the above claims and counter claims, the suit came to be tried and oral and documentary evidence was adduced on both sides. The learned

trial Judge decreed the suit on the view that the defendants did not let in any evidence to show that the plaintiffs had no means to pay the money as

claimed and they did not get any document from the plaintiffs, expressing their inability to pay the amount. Aggrieved, defendants 1 and 3 filed A.S.

No. 13 of 1981 before the Sub Court, Periyakulam. The learned first Appellate Judge on a reappreciation of the materials on record and also after

adverting to the decisions of the Supreme Court in K. Simrathmull Vs. S. Nanjalingiah Gowder, and of this Court in Mangalampillai v. C.S.A.

Udayar AIR 1976 Mad 360 and Pattay Gounder v. Bapu Swamy (1961) 1 M.L.J. 445 differed from the findings recorded by the learned trial

Judge and held that the plaintiffs are not entitled to have the agreement of reconveyance specifically enforced beyond the stipulated period.

Consequently the learned first Appellate Judge allowed the appeal and directed the dismissal of the suit. Hence the above second appeal.

5. Mr. S. Krishnasamy, learned Counsel appearing for the appellants, while elaborating the substantial questions of law formulated in the appeal for consideration, contended that the first appellate court committed an error in coming to the conclusion that the suit was barred under Article 54 of the Schedule to the Limitation Act and that first Appellate Court also committed an error in holding that the Limitation Act will not come into operation in so far as Ex. A-1 agreement of reconveyance is concerned and the appreciation of material by the first appellate court was not in accordance with law and this resulted in miscarriage of justice. Learned Counsel placed strong reliance in support of his claim on the decision reported in *Bibi Jaibunisha v. Jagdish Pandit and Ors.* (1987) 2 L.W. 257 (S.C), as also the decisions in *Philip Jeyasingh v. Registrar of Co-operative Societies, Chidamabaranar Region, Tuticorin and 2 Ors.* 1994 W.L.R. 512 and *A.R. Antulay Vs. R.S. Nayak and Another*, for the further proposition that the latest decision of the Apex Court in *Bibi Jaibunisha v. Jagdish Pandit and Ors.* (1997) 2 L.W. 257 is binding on this Court. The respondents, though have been served, have not entered appearance through counsel to effectively contest the claim of the appellants.

6. As noticed earlier, admittedly there was a transaction of sale on 27.2.1960 and on the very date, a separate agreement for reconveyance subject to certain conditions, marked as Ex. A-1, was entered into between the parties, who were parties to the sale transaction. The right of reconveyance as per the terms of the document ought to have been enforced on or before 26.2.1975. The suit in question for specific performance came to be filed before the trial Court on 19.7.1977 indisputably three years after the notice dated 30.1.1974. As noticed earlier, the learned first appellate judge relied upon the decision of the Supreme Court reported in *K. Simrathmull Vs. S. Nanjalingiah Gowder*, and that of a Division Bench of this Court in *Mangalampillai v. C.S.A. Udayar* AIR 1976 Mad. 360 to non-suit the plaintiffs. It is worth noticing at this stage that the decision of the Supreme Court was rendered on an appeal from this Court and the Bench which rendered the judgment consisted of three judges of the Apex Court. The Division Bench of this Court, which rendered the decision in *Mangalampillai v. C.S.A. Udayar* AIR 1976 Mad. 360 had adverted not only to the decision in *K. Simrathmull Vs. S. Nanjalingiah Gowder*, but also the decision in *Shanmugam Pillai v. Annalakshmi Ammal*

AIR 1950 F.C. 38 rendered by the Federal Court to come to the conclusion that in cases where the parties contemplate to reconvey property

purchased by them and such an agreement of reconveyance is contemporaneous with the primary sale of the property and there is a stipulation in

the agreement of reconveyance that certain things have to be performed within a certain time and in accordance with certain stipulation, then such

covenants including the stipulation as to time has to be respected to the last letter and equity will interfere and extend its arm of sympathy by

varying and modifying the express stipulations, conditions and covenants of such a contract of reconveyance. It was further observed that in such

cases, equity arrays itself with common law and enforces such agreements of reconveyance in accordance with its tenor and strict conditions.

7. In *K. Simrathmull Vs. S. Nanjalingiah Gowder*, also it was held that the agreements of reconveyance, on the original vendor performing certain

conditions, have to be construed strictly and the court could not relieve the plaintiff against the forfeiture clause if the original vendor failed to act

punctually according to the terms of the contract and that the right to repurchase would be lost and could not be specifically enforced. It was also

observed that refusal to enforce the terms specifically for failure to abide by the conditions did not amount enforcing of penalty. It was also held by

the Apex Court that where under a contract of reconveyance a beneficial right is to arise upon the performance by the beneficiary of some act in a

stated manner or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right and in the absence of fraud,

accident or surprise, equity will not relieve against a breach of the terms.

8. While that be the prevailing position of law in respect of enforcement of a right of reconveyance between the parties, the Apex Court in *Bibi*

Jaibunisha v. Jagdish Pandit and Ors. (1997) 2 L.W. 257 has taken the view that in respect of an agreement of reconveyance of property sold,

time is not the essence of the contract and that it is now well settled legal position that in the matter of enforcement of agreement for sale or

agreement of reconveyance, time is not the essence of the contract unless the agreement specifically stipulates and there are special facts and

circumstances in support thereof. It is, strongly relying upon this decision, that the learned Counsel for the appellant would contend that the

decision of the learned first appellate Judge, cannot be sustained and the suit has been rightly decreed by the learned trial Judge and consequently

the first appellate Judge could not have interfered with the same.

9. On a careful consideration of the decisions referred to supra, it could be seen that the decision in Bibi Jaibunisha v. Jagdish Pandit and Ors.

(1997) 2 L.W. 257 has taken the view different from the one declared and laid down by the Supreme Court relying upon the earlier decisions of

the Privy Council and Federal Court. A Division Bench of this Court also, after referring to those decisions, has taken the same view, as noticed

earlier. The later decision in Bibi Jaibunisha v. Jagdish Pandit and Ors. (1997) 2 L.W. 257 has been rendered by two learned Judges of the Apex

Court in contrast to the earlier decision in K. Simrathmull Vs. S. Nanjalingiah Gowder, rendered by the three learned Judges of the said court.

Even on a cursory reading of the judgments, it could be seen that in the later decision different or discordant note has been struck by the learned

judges in holding that time is not the essence of the contract even in respect of an agreement of reconveyance as in the case of an agreement of

sale. The question, therefore, which looms large for consideration before me and also has been independently argued by learned Counsel for the

appellants is, as to the course to be adopted by this Court viz., either to follow the earlier decision, which has been applied by the learned first

appellate judge or to apply the later decision in Bibi Jaibunisha v. Jagdish Pandit and Ors. (1997) 2 L.W. 257 and grant relief to the plaintiffs by

setting aside the judgment of the learned first appellate Judge.

10. Apart from the fact that the learned first Appellate judge could not be said to have committed any patent error of law or perversity of approach

for having implicitly followed and applied thereto of the decision of the Supreme Court in K. Simrathmull Vs. S. Nanjalingiah Gowder, and of the

Division Bench of this Court in Mangalampillai v. C.S.A. Udayar AIR 1976 Mad. 360 as those were binding upon him and the only ruling decision

at the time when he rendered the decision, the judgment of the learned first appellate Judge may not call for interference in my hands, particularly

when the earlier decisions followed, have not been shown to have been superseded by any latter judgment of the Apex Court. So far as the latter

decision in Bibi Jaibunisha v. Jagdish Pandit and Ors. (1997) 2 L.W. 257 is

concerned, apart from the fact that it has been rendered by two learned Judges in contrast to the decision in *K. Simrathmull Vs. S. Nanjalingiah Gowder*, , which was rendered by three learned Judges, the latter decision did not even refer to or deal with the earlier binding precedent of the Apex Court itself on the subsequent Bench, which could not have in my view legitimately overruled the earlier decision.

11. In such circumstances as to what this Court has to do, has been the subject matter of consideration in *Union of India (UOI) and Another Vs.*

K.S. Subramanian, . In the said decision, Apex Court has held that the proper course for a High Court is to try to find out and follow the opinions

expressed by larger Benches of the Supreme Court in preference to those expressed by smaller Benches of the Court. That is said to be the

practice followed by the Supreme Court itself. The said practice has now crystallised also into a rule of law declared by the Supreme Court. If,

however, the High Court is of opinion that the views expressed by larger Benches of the Supreme Court are not applicable to the facts of the case,

it should say so giving cogent reasons supporting its point of view.

12. In *Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc.*, the Apex Court once again held that a pronouncement of law

by a Division Bench of the Supreme Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such

decision be binding, it is not necessary that it should be a decision rendered only by the Full Court or a Constitution Bench of the Apex Court. This

would go to show that it is not given to the High Court to mechanically follow a latter decision rendered by a smaller Bench, ignoring the earlier

decision of a larger Bench in spite of the fact that the latter smaller Bench did not even specifically refer to or deal with the earlier decision of the

larger Bench. The decision strongly relied upon by learned Counsel for the appellant, in *A.R. Antulay Vs. R.S. Nayak and Another*, also, in my

view, does not deviate from the above settled principles of law, which, as observed by the Supreme Court. In the said decision what was

observed was that the Supreme Court under its rules of Business ordinarily sits in divisions and not as a whole one and each Bench whether small

or large, exercises the powers vested in the Court and decisions rendered by the Benches irrespective of their size are considered as decisions of

the Court. It also further refers to the parties which has developed that the larger Bench is entitled to overrule the decision of a smaller Bench

notwithstanding the fact that each of the decision is that of the Court. But it was observed that the said principle would not apply in the case which

was under consideration of their Lordships by pointing out that the Bench of seven Judges is not entitled to reverse the decision of the Constitution

Bench. In my view, these observations deal with a converse situation, but cannot be said to have laid down anything contra to the propositions

noticed supra that so far as the High Court is concerned, it cannot avoid applying the decisions of a larger Bench, without giving any special reason

and, in my view, it should be all the more so when the latter decision of a smaller bench, omitted to notice or deal with the earlier decision of a

larger Bench, but yet has chosen to lay down contra position of law. Several High Courts have also taken a similar view and have also observed

that when there is conflict between two decisions of equal Benches of the Supreme Court, which cannot possibly be reconciled, Courts must

follow the judgments which appear to them to state the law more accurately and elaborately, all the more so when the latter decision of the Supreme

Court did not notice an earlier decision of the Apex Court. Vide : Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, . The decision in V.

Sheemathangam (Minor) etc., v. The State of Tamil Nadu, etc., and Ors. 1996 W.L.R. 463 of a learned single Judge of this Court is of no

assistance since there the learned single was of the view that there was no conflict at all between the two decisions, the old or earlier and the latter

one. The decision in Philip Jeyasingh v. J.T. Registrar of Co-operative Societies, Chidambaranar Region, Tuticorin and 2 Ors. 1994 W.L.R. 512

of a Full Bench of this Court is equally of no assistance and it refers to the procedure that should be followed by a single Judge of this Court in

dealing with the earlier decisions of larger Benches of the very same Court.

13. For all the reasons stated above, I am of the view that the latter decision in Bibi Jaibunisha v. Jagdish Pandit and Ors. (1997) 2 L.W. 257

cannot be applied by me in preference to the earlier decision of a larger Bench of the very same Apex Court, which has dealt with the position

more elaborately and accurately too after considering and applying the earlier Rulings of the Privy Council and also of the Federal Court. All the

more so, when the latter decision by a smaller Bench of the Apex Court has been rendered without considering the earlier decision of the Supreme Court or dealing with the matter or the principles involved elaborately or objectively.

14. For all the reasons stated above, the judgment and decree of the learned first appellate judge, dismissing the suit and also holding that the plaintiffs, on account of the default committed by them in not enforcing the agreement for reconveyance in the manner agreed to and according to the terms and conditions contained therein, including the stipulation regarding the time, which does not merely operate as period of limitation, but more as a condition precedent, for such enforcement are not entitled to the relief sought for, do not call for any interference in my hands. The second appeal, therefore, fails and shall stand dismissed. No costs.