
(1996) 03 MAD CK 0001

In the Madras High Court

Case No : S.A. No. 504 of 1983 and C.M.P. No. 12615 of 1983

Pitchan Ambalam

APPELLANT

Vs

Kasi Pitchan Ambalam and Others

RESPONDENT

Date of Decision : 01-03-1996

Acts Referred:

Specific Relief Act, 1963 — Section 12, 12(3)(iii), 14, 15, 15

Citation : (1996) 03 MAD CK 0001

Hon'ble Judges : Raju, J

Bench : Single Bench

Advocate : E. Padmanabhan and G. Ethirajulu, for the Appellant; B.S. Gnanadesikan, for the Respondent

Final Decision : Dismissed

Judgement

Raju, J

1. The above Second Appeal has been filed by the second defendant in O.S. No. 2071 of 1979 on the file of the Dist. Munsif s Court, Dindigul,

who was successful before the trial Court, but failed before the lower appellate court, against the judgment and decree of the learned Subordinate

Judge. Dindigul, dt. 18.10.1982 in A.S. No. 136/1981 reversing the judgment and decree of the learned trial Judge, dt. 30.9.1981 in O.S. No.

2071/1979. The first respondent/plaintiff filed O.S. No. 2071/1979 for specific performance and for directing defendants 3 to 7, the legal

representatives of the first defendant to execute the sale deed in favour of the plaintiff as per the terms and conditions of the sale agreement dt.

18.4.1979 and if the defendants 3 to 7 fail to do so, to execute the same through Court and also for a decree for permanent injunction, restraining

the defendants, their men and agents from in any manner interfering with the

plaintiffs alleged possession and enjoyment of the suit properties. The case of the plaintiff is that the first defendant has entered into an agreement of sale to sell the three suit items or properties under Ex. A3 dt. 18.4.1979, that pursuant to the sale agreement the possession of the properties was also entrusted to the plaintiff on receipt of a sum of Rs. 1.500/- towards the advance out of the total consideration of Rs. 3,500/-. that the sale deed has to be executed within one year after receiving the balance of consideration and that the first defendant was evading to execute the sale deed in spite of demands made and a registered notice dt. 28.5.1979 marked Ex. A1 sent which the first defendant also acknowledged on 30.5.1979 and in spite of all these, the first defendant, colluding with the second defendant, has sold the property to the second defendant and has started giving trouble to disturb the possession of the plaintiff, of the property. The first defendant died during the pendency of the suit and the second defendant filed the written statement contending that the alleged agreement of sale is a sham and nominal one, that the agreement having been not registered it is a void document and no rights flow to the plaintiff under the same and the same cannot be enforced and that the second defendant has purchased the properties for valid consideration and he being a bona fide purchaser for value without notice of the alleged agreement, his rights under the sale deed dt. 9.6.1979 marked as Ex. B1 cannot be disturbed, that the second defendant alone has been in possession and enjoyment of the properties and prior to him, the first defendant was in possession and that, therefore, the suit is liable to be dismissed. On the above conflicting claims and contentions of parties, the suit was tried and both sides adduced oral and documentary evidence. The learned trial Judge by his judgment and decree dt. 30.9.1981 dismissed the suit. The learned trial Judge was of the view that the sale agreement Ex. A1 is a true document, and not a sham and nominal one without consideration as claimed by the second defendant, that the same was void for want of registration and cannot be enforced, that the plaintiff was never put in possession of the properties and that it is the second defendant who was in possession and the second defendant is a bona fide purchaser for value without notice of the agreement of sale in favour of the plaintiff. The trial court also held that since the plaintiff had an alternative remedy, the relief

of specific performance need not be granted.

2. Aggrieved, the plaintiff pursued the matter before the Sub-Court, Dindigul. The learned first Appellate Judge, by his judgment and decree dt.

18.10.1982 reversed the judgment and decree of the learned trial judge and decreed the suit on allowing the appeal. In coming to the said

conclusion, the first Appellate Court has chosen to come to a different conclusion on some of the issues and held that the document Ex. A1 cannot

be said to be void and unenforceable and that the second defendant is not a bona fide purchaser without notice. In other respects, the first

appellate Judge, almost concurred with the findings of the learned trial Judge by holding that the agreement Ex. A1 is a true and real document, that

the plaintiff has not been put into possession of the properties as claimed and inasmuch as the plaintiff has confined his relief in respect of items 1

and 2 alone, there is no impediment in granting the decree for specific performance of the agreement of sale in question. The first Appellate Judge

in dealing with the issue as to whether the plaintiff is entitled to recover any compensation and if so, what amount, has held that in the absence of

any evidence with regard to the quantum of compensation on account of the inability of the first defendant to convey the third item of property

which had been already sold even earlier to the agreement of sale in favour of the plaintiff to a third party, it is for the plaintiff to file a separate suit

against defendants 2 to 7 for recovery of the compensation. Aggrieved against the same, the second defendant has come before this court.

3. Mr. E. Padmanabhan, learned counsel appearing for the second defendant/appellant contended that the learned first Appellate Judge could not

have granted the relief of specific performance in derogation of the provisions contained in S. 12 of the Specific Relief Act, 1963 and the first

appellate Court also misdirected itself in surmising that the second defendant had notice of the earlier agreement of sale marked as Ex. A3. The

learned counsel took me at length through the judgments of both the courts below and particularly the findings recorded by the first Appellate

Court deviating from the findings of the learned trial Judge to demonstrate his stand that the view taken by the learned first Appellate Judge is

unsustainable in law.

4. I have carefully considered the submissions of the learned counsel for the

appellant The learned first appellate Judge, in my view, commit the a serious error of law in not only disturbing the finding on the issue relating as to whether the second defendant was a bona fide purchaser for value without notice of the suit agreement of sale, but also on the issue relating to the entitlement of the plaintiff to partial enforcement of the agreement of sale by grant of relief of specific performance of a portion of the agreement. In support of his claim, the learned counsel invited my attention to the provisions contained under S. 12 of the Specific Relief Act and also the decision reported in ILR (1965) 1 Mad 464 = L.W. 672 (A.L. Parthasarathy Mudaliar vs. Venkata Kondia Chettiar)

5. The decision reported in ILR (1965) I Madras 464 = 77 L.W. 672 (supra) is that of a Division Bench of this Court wherein the question that was considered was as to whether the contract was divisible or indivisible and under what circumstances there could be a partial enforcement of an agreement of sale in the context of Ss. 14 and 15 of the Specific Relief Act, 1877. As could be seen from the reported judgment, one L was the original owner of Items 1 and 2 of the plaint schedule properties, that he purchased item 1 in his name and 2 in the name of his wife R, so that he had two sons the first defendant and the husband of the second defendant, that his wife died in the year 1947 and he died in the year 1955 and the claim in the plaint was that the defendants in the suit entered into an oral agreement to convey the two items for Rs. 5,750/- and subsequently an agreement of sale was executed by both the defendants and a sum of Rs. 1,000/- was paid as advance and according to the terms of the agreement, the sale had to be completed within three months, failing which the defendants had to pay to the plaintiff a sum of Rs. 5,000/- as and for damages to the plaintiff Since the plaintiff was ready and willing to purchase the properties, but the defendants evaded performance on their part, the suit for specific performance came to be filed. The learned trial Judge, after considering the oral and documentary evidence, came to the conclusion that the agreement relied on by the plaintiff in that case was true, valid and binding on the defendants and having regard to the provisions contained in S. 14, the plaintiff was entitled to specific performance of the contract only in respect of item 1 of the property. On further appeal before this Court, a learned single Judge held that the agreement is valid and

binding on the defendants and having regard to S. 15 of the Specific

Relief Act, the defendants are bound to execute a conveyance in respect of item 1 of the plaint schedule on receipt of a portion of the sale

consideration proportionate to the value of item 1. On further appeal under Letters Patent, before a Division Bench, the learned judges of the

Division Bench reviewed the case-law on the subject as hereunder :-

The abovesaid principles are embodied in Ss. 14 to 17 of the Specific Relief Act with a view to provide remedies for partial specific performance

of the contract with compensation. S. 14 is applied to a case where a party to a contract is unable to perform the whole or part of it on account of

some incurable defect in title or deficiency in quantity of the subject-matter or of some legal impediment, when the Court may it the suit of either

party direct the performance of so much of the contract as can be performed and award compensation in money for the deficiency by proportion

the abatement of the purchase money. But two conditions are necessary before S. 14 can be applied, namely, the part which must be left

unprofaned bears only a small proportion to the whole in value, that is so small that it is inconsiderable, such as small mistake or inaccuracy, and it

may be compensated in money by allowing an abatement of the purchase money by calculating the difference between what was contracted to be

done and what can actually be done or sold. In other words, where a substantial part of the contract is capable of performance, then equity will

enforce specific performance of that part. But in the instant case, the section cannot be applied as the extent of item 2 is 1 acre 41 cents out of the

total extent of 4 acres 26 cents. Item 2 cannot be considered to be a small or immaterial portion in relation to the whole property agreed to be

conveyed, which would enable the plaintiff to get a decree for specific performance subject to the payment of compensation to the plaintiff by

equating the amount of compensation to the price of item 2. S. 14 cannot, therefore, apply to the present case.

Before considering whether S. 15 would be applicable to the facts of this case, we may deal with the question whether the plaintiff can obtain relief

under S. 16 of the Specific Relief Act. S. 16 applies where a contract consists of several parts which are separate and independent of one another

and some of which can and ought to be performed, such part or parts as can and

ought to be performed may alone be specifically enforced. Such a contract though nominally one is actually divisible and when the court enforces what is apparently a part, it really enforces an entire and complete contract. In the instant case, there are two separate items of properties mentioned in the agreement and the question for consideration is even though the defendants have no title in respect of the second item, can they not be directed to execute a conveyance in respect of the first item, thereby decreeing in favour of the plaintiff specific performance of the entire contract. The question whether the contract is divisible or indivisible is one depending upon the nature and terms of each individual contract. To make S. 16 applicable it has to be shown (i) that the contract can be split up into parts, (ii) that there is a part of the contract which taken by itself can and ought to be specifically performed, and (iii) that the said part stands on a separate and independent footing from the other part of the same contract. Before a Court can exercise the power given in the section it must have before it some material tending to establish these propositions. This section cannot be applied on a mere surmise that if opportunity were given for further enquiry, such material might be forthcoming and possibly might be found to be sufficient. In the instant case, the defendants entered into an agreement to sell both the items of property for a consolidated sum of Rs. 5,750/-. This is a contract for sale of property in one lot which will generally be considered as indivisible, as the conveyance of item 2 does not stand on a separate and independent footing from the conveyance of item 1. We agree with Ramakrishnan, J., that S. 16 of the Specific Relief Act cannot be applied to the present case.

After observing thus, the Division Bench held that since S. 15 of the Specific Relief Act was applicable to the case before the Division Bench and if the purchaser relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him, he can sue for specific performance and obtain partial enforcement of the agreement.

6. So far as the case on hand is concerned, it could be seen that the plaintiff had claimed specific performance of the entire agreement under Ex. 3 in respect of all the three items of properties, that after the written statement was filed, the plaintiff filed a reply statement on coining to know of the

fact that the first defendant had sold item No. 3 of the suit property to one Rama Ambalam, son of Chinnan Ambalam long prior to the suit

agreement of sale stating that it is impossible for the plaintiff to enforce the first defendant to execute the sale deed in respect of item No. 3 of the

suit property and under those circumstances, the plaintiff has to give up the said claim and reserve his right to take appropriate legal action against

the first defendant. Even that apart, as noticed earlier the learned first Appellate Judge also has formulated an issue on this very question in

paragraph 15 of his judgment as hereunder :-

15. Point No. 9:- The first defendant entered into an agreement of sale of the suit properties with plaintiff. But the third item had been sold to

second defendant's brother Raman Ambalam prior to the agreement of sale Ex. A3. The first defendant is liable to pay compensation for the third

item.

The plaintiff has not stated what is the compensation for the third item. There is no evidence with regard to the quantum of compensation. The first

defendant is bound to pay the compensation for the third item. So the plaintiff is directed to file a separate suit against the defendants 3 to 7 for

recovery of compensation. I, therefore, find this point accordingly.

This would go to show that the provisions of S. 12(3) (iii) cannot be said to have been satisfied and the requirements therein complied with and on

the other hand, pursuit of the claim for compensation for the deficiency and getting an adjudication on the issue would disentitle the plaintiff from

getting a partial performance of the agreement of sale under Ex. A3. The conclusions of the learned first Appellate Judge to the contra that specific

performance can be granted in respect of suit items 1 and 2 cannot be, therefore, sustained in law.

7. As for the other contentions based on the claim of the appellant being a bona fide purchaser for value without notice of the agreement of sale in

favour of the plaintiff, it could be seen that the learned trial Judge has adverted to all the relevant evidence on record and placing particular reliance

upon the fact that Ex. A1 notice dt. 28.5.1979 was issued by the plaintiffs counsel only to the first defendant and that there was no material on

record in the shape of any oral or documentary evidence to show that the second defendant knew the agreement of sale in favour of the plaintiff or

could be imputed with notice or knowledge of the said agreement to come to the conclusion that the second defendant was not a bona fide

purchaser for a value without notice of the agreement of sale in favour of the plaintiff. Per contra, the learned first Appellate Judge has chosen to

place reliance merely on the fact that the counterpart of the sale agreement Ex. A3 has been marked on the defendants' side as Ex. B3 and this

production and making on the defendants' side of the said document would go to show that the second defendant was aware of or at any rate

could be imputed with the knowledge of the agreement of sale This approach, consideration and conclusion, to say the least, is not only perverse,

but not warranted at all in the absence of any specific material to prove the point of time when the second defendant could have come into

possession of the said document or to show that the 2nd defendant came to know of it or into possession of it prior to the sale in his favour Apart

from the absence of any such evidence whatsoever on this aspect, the fact remains that at the time of trial, the first defendant was not alive and that

the trial has been effectively conducted for the defendants mainly by the second defendant who was the only person interested so defending the suit

claim and merely because at the time of trial after the death of the first defendant, this document came to be marked at time when the second

defendant alone has been effectively contesting the case that by itself is no justification to surmise a conclusion, that the second defendant came into

possession of the document or was aware of the existence of Ex. A3, the counterpart of which was Ex. B3 even prior to or at the time of entering

into the transaction of sale with the first defendant, for purchasing the property The said finding of the first Appellate Court that the second

defendant was not a bona fide purchaser for value without notice of the agreement of sale in favour of the plaintiff, apart from being one based on

mere surmise is not based upon any eligible acceptable or relevant material or evidence and consequently is vitiated on account of perversity of

approach in readily assuming without formal or legal proof a fact situation which was not only a vital but relevant one for the adjudication of the suit

claim.

8. The learned first Appellate Judge in my view, has failed to take into account, also as pointed out by the learned counsel for the appellant, certain

other vital issues before interfering will the discretion exercised by the learned trial Judge in granting specific relief and decreeing the suit by taking a different view at the first appellate stage. Apart from the fact that the suit contract itself provided for the alternative relief in case of default of execution of the sale deed, the plaintiff has come before the court with unclean hands, pleading a false case in respect of a vital matter concerning the very agreement of sale by making a claim that he had been put into possession of the properties also pursuant to the sale agreement. This plea has been not only found to be false and rejected by the trial court, but also confirmed by the lower Appellate Court, and the learned first Appellate Judge ought not to have exercised his discretion in favour of such a person claiming specific performance and granting the discretionary relief by disturbing the decision of the learned trial Judge to refuse the relief of Specific Performance.

9. For all the reasons stated above, judgment and decree of the first appellate Court is hereby set aside and that the suit shall stand dismissed. The judgment and decree of the learned trial Judge shall stand restored. The Second Appeal, therefore, shall stand allowed. No costs. In view of the final orders passed in the Second Appeal, no order is necessary in the connected C.M.P.