
(2006) 03 MAD CK 0044

In the Madras High Court

Case No : Appln. No. 4712 of 2003 in C.S. No. 517 of 2003

Raptakos Brett and Co. Pvt. Ltd.

APPELLANT

Vs

Modi Business Centre (Pvt.) Ltd.

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978 — Section 4, 5, 6

Citation : AIR 2006 Mad 236 : (2006) 2 LW 234 : (2006) 2 MLJ 411

Hon'ble Judges : M. Chockalingam, J

Bench : Single Bench

Advocate : K. Parasaran, Rohit Kapadia, Satish Parasaran and for M. Kemp Raj, for the Appellant; A. Somayaji and for C.A. Thiagarajan, for the Respondent

Final Decision : Dismissed

Judgement

M. Chockalingam, J.—Pending the suit for specific performance, the defendant has taken out this application for rejection of the plaint.

2. The affidavit in support of the application and the counter-affidavit are perused. The Court heard the learned Senior Counsel on either side.

3. Before going into the question whether the plaint is liable to be rejected on the grounds urged by the applicant/defendant, it would be fit and

proper to narrate the circumstances which led the plaintiff to file the instant suit for specific performance, as follows:

The defendant in the suit, is the owner of 21.71 acres of land with garden, thope, factory and sheds situated at Velacherry Road, Madras. In the

year 1995, both the parties entered into an agreement, an oral one. As per the agreement, the plaintiff should be-come entitled to 68% of the land

for a consideration of the value of the construction to be put up in the remaining 32% of the land retained by the defendant. Though it was agreed

orally and a draft agreement was prepared, the written agreement could not be entered into between the parties, since it fell within the mischief of Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. It was also agreed and accepted between the parties that it can be reduced into writing, after it comes out of the clutches of the said enactment. All along the period, the plaintiff was taking all attempts to see the property coming out of the mischief of the Act, and there were communications addressed to the Government. Finally, a Government Order was passed. Pursuant to the Government Order, the property, in question was actually outside the mischief of the Act, but not done so, which necessitated the plaintiff for filing a writ petition before this Court. By an order of this Court, the property was exempted. In February, 1999, the earlier agreement entered into in 1995, was confirmed again by communications, and the plaintiff was permitted to enter into the property to raise two sheds, wherein all the materials were stored. While the matter stood thus, the defendant unlawfully interfered with the possession of the plaintiff in respect of the two sheds and made attempts to remove the same, which necessitated the plaintiff to approach the police with a complaint. Pending the enquiry on the complaint, the defendant also gave a police complaint on 20-5-2003. While so, the plaintiff was constrained to file a Civil suit before the City Civil Court in O.S. No. 2748 of 2003 for a declaration that the two sheds which were raised by the plaintiff in the property in question belonged to the plaintiff and for a consequential permanent injunction not to interfere with the possession of the plaintiff in respect of the two sheds. On a memo filed before this Court, and on the agreement between the parties, the said suit was withdrawn and transferred to this Court. It is now pending in this Court as Tr. C.S. No. 596 of 2003. The plaintiff was constrained to file the instant suit for specific performance before this Court, since there was a denial of the very agreement itself and also the right of the plaintiff under the agreement entered into between the parties in 1995 and subsequently confirmed in 1999. When a reply notice was given by the defendant on 22-5-2003 denying the same, the plaintiff was constrained to file the instant suit. Thus, the suit is before this Court. After the filing of the suit, the defendant, who entered appearance, has brought forth this application for rejection of the plaint.

4. Advancing his arguments on behalf of the applicant/defendant, the learned senior counsel would submit that before the institution of the present suit before this Court, there was an earlier suit filed in O.S. No. 2748 of 2003 and subsequently transferred to this Court; that the plaintiff has relied upon the very same oral agreement for the purpose of cause of action in the present suit; that even a reading of the causes of action in both the suits would clearly reveal that the cause of action stated in the present suit, is exactly a replica of the cause of action mentioned in the earlier suit, and hence, it is barred under Order 2, Rule 2 of CPC that in the earlier suit, there was a declaration asked by the plaintiff in respect of the two sheds and also a permanent injunction that the defendant should not interfere with the plaintiff's possession and enjoyment of those two sheds; and that now, the plaintiff has sought for specific performance on the basis of the agreement entered into between the parties in 1995, and subsequently affirmed in 1999. The learned Senior Counsel would further submit that without the agreement entered into between the parties in 1995, the plaintiff could not have got possession of the property and raised the two sheds also; that apart from that, the breach of the agreement, even according to the plaintiff, was the cause of action for the earlier suit; that if to be so, the cause of action was very well available for filing the present suit at that time itself, since it is exactly identical; that it was also very well available at the time of the filing of the earlier suit itself; but, the plaintiff has not chosen to ask for specific performance that time; and that asking for a relief in piecemeal that time and asking for a relief of specific performance this time cannot be allowed in law. Added further the learned Senior Counsel that in the instant case, at the time when the earlier suit was filed, it was stated that the plaintiff reserved their right to file a suit for the other reliefs also; that if the cause of action was not available for filing a suit for specific performance that time, the averment that the right was reserved could not have arisen; that the same would make it clear that the cause of action for the present suit was very well available that time, and thus, the plaint is hit by Order 2, Rule 2 of CPC, and the present suit has got to be rejected on that ground. In support of his contention, the learned Senior Counsel relied on the decision of the Apex Court reported in N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead) by Proposed LRs. and Others, , where he took this Court to the relevant paragraphs

and was pointing to the position of law that while all the facts and circumstances giving rise to the causes of action necessary for filing a suit for

specific performance, were available then itself, the plaintiff in the instant case, having failed to ask that relief in the earlier suit, the present suit is hit

by Order 2, Rule 2 of CPC.

5. The learned Senior Counsel for the applicant would further submit that the plaint of the plaintiff has got to be rejected on the other ground that at

the time when the oral agreement was entered into between the parties, even as per the averments made in the plaint, the property was under the

clutches of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978, and thus, the written agreement could not be executed between the

parties; that even as per the admission, it would be quite clear that the agreement is also void ab initio, since it was under the clutches of the said

enactment that time; that according to the plaint averments, there was no second agreement; but, only the agreement of 1995 was confirmed in

1999, and under the circumstances, when the agreement was entered into in 1995, it was hit by the provisions of law; that such an agreement was

void, and even the confirmation subsequently made, would be of no avail. The learned Senior Counsel would further add that as per the averments

in the plaint, despite the Government Order, the property was not exempted by the Government which necessitated the plaintiff to file a writ

petition before this Court, and in the writ petition, the property was exempted. The learned Senior Counsel pointing to this, would submit that in the

instant case, the exemption granted by the Court in the writ petition, cannot in any way legalize the agreement, which was already void; that either

the Government Order passed, or the amendment of the Act or any order of the Court cannot make an agreement already entered into between

the parties, which is void, as one legal, and hence, the plaint has got to be rejected. In support of his contention, the learned senior counsel relied

on the decision of the Full Bench of this Court reported in 1999 (3) LW 249 P. Gopirathnam v. Feerodous Estate (Pvt.) Ltd.. Pointing to the

decision, the learned Senior Counsel would submit that once the agreement could not be entered into in view of the legal bar and when entered,

was void, the same continued to be so, and hence, no relief could be granted on the basis of such agreement.

6. Countering the above contentions, the learned Senior Counsel for the respondent/ plaintiff would submit that the application has got to be dismissed as one merited. According to the learned Senior Counsel, in the instant case, it is true that originally an agreement was entered into between the parties, an oral one, in the year 1995, and subsequently, it was confirmed in 1999. Now, it is not correct to state that the same cause of action as given in the earlier suit before the City Civil Court, is given in the instant suit before this Court. A reading of both the causes of action would make it abundantly clear that the causes of action are separate and distinct. As regards the cause of action for the earlier suit, the possession of the plaintiff in respect of the two sheds which were raised, were to be interfered with. At that time, there was no cause of action for the plaintiff to file the suit for specific performance. Only when a reply notice was given by the defendant in 2003 denying the agreement itself, there arose cause of action for the plaintiff to file the instant suit for specific performance. Apart from that, it is not a case where Order 2, Rule 2 of CPC could be applied. Citing a decision of the Supreme Court reported in Kunjan Nair Sivaraman Nair Vs. Narayanan Nair and Others, , the learned Senior Counsel would submit that in a given case like this, written statement should be filed by the defendant; that an issue whether on the same cause of action the present suit has been brought forth has got to be raised; that the parties should be given opportunity to put forth their evidence oral and documentary, and then, the Court has to decide the issue whether there are identical causes of action in both the suits or otherwise; and that at this juncture, it cannot be decided by way of filing application like this. Added further the learned Senior Counsel that on the earlier occasion, the relief of possession was not asked for; that now, the plaintiff seeks for specific performance on the different cause of action, and under the circumstances, Order 2, Rule 2 has no application to the present facts of the case.

7. So far as the second contention put forth by the defendant's side that the earlier agreement itself is void and subsequently, it cannot be legalised, and thus, it is barred under a law, and hence, it has got to be rejected, is concerned, the learned Senior Counsel would submit that at the earliest, when the agreement was entered into between the parties, there was also an agreement that the agreement could be executed subsequent to the

exemption of the property from the mischief of the Act, and thus there was a reservation between the parties as per the agreement, and under such circumstances, it cannot be stated that it was under the clutches of law; that apart from that, as understood between the parties, a writ petition was filed, and it was also allowed exempting the property, and thus, the suit for specific performance has been rightly brought forth, and hence, the contention put forth that the agreement originally was void and the instant suit cannot be filed on the strength of such agreement was to be rejected.

8. After careful consideration of the rival submissions made and scrutiny of the materials, this Court is of the considered opinion that it is a fit case where the plaint requires an order of rejection by this Court.

9. As could be seen from the averments in the plaint, both the parties entered into an oral agreement in 1995 in respect of the entire property consisting of a vast area of 21.71 acres of land in Velachery Road, and the defendant is the owner of the property. According to the plaintiff, he became entitled to 68% of the land for a consideration of the value of construction to be put up in the remaining 32% of the land retained by the defendant. Originally a suit was filed before the City Civil Court seeking for declaration in respect of the two sheds which were raised by the plaintiff in the same property. The contention put forth by the learned senior counsel for the plaintiff that the cause of action is distinct and different between that suit and the present suit cannot be countenanced. It would be apt and appropriate to reproduce the causes of action in the earlier suit and the present suit, as follows:

TRC. S. No. 596 of 2003 (O.S. No. 2748/ 2003):

The cause of action for the suit arose in 1995 and 1999 when the promotional agreement entered into at Chennai in 1995 and confirmed in 1999 and from 1995 till recently when the plaintiff had been attending to all matters relating to the promotional agreement on behalf of the defendant before Tamil Nadu Urban Land Ceiling authorities, Tamil Nadu Government, Corporation of Chennai and Chennai Metropolitan Authorities and other authorities and in February and March and April 1999 when the plaintiff and defendants agreed that the plaintiff should put up sheds in a site inside the defendants premises earmarked and when the plaintiff appointed engineers and architects and constructed sheds of 4000 sq. ft. Intended

for the storage of building materials etc. in furtherance of the promotional agreement and in 2002, 2003 when the plaintiff was taking steps towards the promotion of the promotional agreement, by negotiations with potential buyers, when the plaintiff was furnished with the original patta and copies of title deeds and when the plaintiff with the help of civil engineer and architects had the classification of zones done for the construction under the promotional agreement and recently on 14-5-2003 when the defendant started acting illegally, unlawfully and violently attempting to breach the promotional agreement, threatening the watchman the plaintiff had posted at the sheds inside the defendant's premises and threatened to remove building materials worth several lakhs stored inside the sheds, on 14-5-2003 when a police complaint was lodged before the Deputy Commissioner of Police, K. K. Nagar by the plaintiff and on 16-5-2003 when a notice was given by the plaintiff to the defendant calling upon them to desist from their illegal activities and to direct its security personnel not to disturb the peaceful possession of the plaintiff of the sheds and materials stored therein and on 18-5-2003 the defendant illegally attempted to remove the materials stored in the plaintiff's shed and when on the complaint of the plaintiff, the police intervened and warned the defendant's men not to take law into their hands and on 19-5-2003 when a complaint of theft was given by the plaintiff against the defendant to the Inspector of Police, Guindy and De-die-in diem as the defendants are bent upon perpetrating illegal, unlawful and violent activities against the plaintiff to remove all their materials from the sheds by force and also to destroy the sheds of the plaintiff. The cause of action has arisen at Chennai where the defendant company has its Factory and Office premises.

C.S. No. 517 of 2003:

The cause of action for this suit arose at Chennai, within the jurisdiction of the Hon"ble Court where the suit property is situated and where the Branch office of the defendant Company is situated. The cause of action arose in 1995, when the first development agreement was entered into orally and reflected in the development agreement of 1995 subject to the suit property being released from the mischief of Tamil Nadu Urban Land Ceiling Act and subsequently the plaintiff from 1995 till 1999 continued to be ready and willing to act as per the said agreement and from 1999

when the oral agreement of 1995 was confirmed and a draft prepared, from 1999 till May 2003 when the plaintiff has been ready and willing to act as per the terms and conditions of the agreement and actually had done acts and things in part performance of the agreement and continues to be ready and willing to discharge its obligations under the agreement. The cause of action also arose at Chennai, on 16th May 2003, when the plaintiff sent a letter to the defendant drawing the defendant's attention to the development agreement and the obligations arising under it and on 22-5-2003 when the defendant for the first time denied the agreements entered into with the plaintiff in 1995 and confirmed in 1999 and the cause of action also arose on 18-5-2003, when the defendant illegally removed the plaintiff's building materials stored in the plaintiff's sheds constructed by the plaintiff in the suit property.

10. A reading of the causes of action in both the suits would clearly refer to the agreement in question. The contention put forth by the learned Senior Counsel for the plaintiff that the first suit before the City Civil Court was filed not on the basis of an agreement of the year 1995, but only on the basis of an agreement of 1999 cannot be countenanced for the simple reason that the cause of action paragraph in the earlier suit would clearly refer to the agreement of the year 1995. Apart from that, it is an admitted position that the property belonged to the defendant. Without an agreement entered into between the parties in 1995 as averred in the plaint, the defendant would not have allowed the plaintiff to get into the property and to raise these two sheds. Even the cause of action paragraph in the earlier suit would speak of the breach of the agreement by the defendant. Even at the time of the filing of the earlier suit, the very same facts and circumstances were attendant, and the cause of action for filing a suit for specific performance though not stated in the later point, was very well available. Apart from that, it remains to be stated that the averment in the present plaint as if the cause of action for filing the instant suit arose on the denial of the agreement by the defendant, was only invented for the purpose of filing the present suit, and in short, it can even be stated as a camouflage.

11. Now, it is pertinent to point out that even at the time of the filing of the first suit, there were exchange of notices and police complaints. The

parties were before the police station, and thus, it would be quite clear that there was strained relationship between the parties at that time itself.

The act of the parties even before the filing of the suit, would clearly reveal that there was a breach of the terms in the agreement as understood

between the parties then itself. Even the first plaint seeking declaration of title in respect of two sheds, would speak about the breach of the

contract by the defendant. Not only the averments but also the conduct of the parties that time would clearly speak that there was a breach of the

agreement. It would be quite evident that the plaintiff instead of filing a suit for specific performance on the available cause of action, has filed a suit

seeking a declaratory relief in respect of the two sheds situated on the defendant's land. At this juncture, this Court is of the considered opinion

that the judgment of the Apex Court relied on by the defendant's side and reported in N.V. Srinivasa Murthy and Others Vs. Mariyamma (dead)

by Proposed LR's. and Others, , has got application to the present facts of the case. In the earlier case, there was a permanent injunction asked

for, and pending that suit, now the plaintiff has brought forth the instant suit for specific performance. In the second suit, the plaintiff claims the relief

with the same facts and the Same cause of action which were very well available that time, though not specifically stated.

12. The real test should be whether the causes of action now urged for the present suit, were available at the time of the filing of the first suit or not.

In the instant case, the causes of action for filing a suit for specific performance were very well available at the time of the first suit. Non-mentioning

of certain facts on the cause of action which was very well available, cannot be a reason to come out of the clutches of Order 2, Rule 2 of C.P.C.

That apart, the relief what has been now asked for, should have been asked that time itself, but omitted to be done. Allowing the contention put

forth by the learned Senior Counsel for the plaintiff that the defendant should be allowed to file the written statement raising such a defence plea;

that issues have to be framed; that the parties must be allowed to let in evidence on that issues; and that the Court should decide on the same

would be against the provisions under Order 2, Rule 2 of C.P.C. If allowed to be done so, it would be nothing but directing the defendant to

undergo the ordeal of trial. Apart from that, it would be against the public policy. Allowing a party to ask a relief in piecemeal, according to his

convenience, would also be against the public policy.

13. From the materials available, it is quite clear that those causes of action were very well available on the stated facts at the time of the filing of

the earlier suit. It remains to be stated that both the causes of action refer only to the agreement in question, and it is not a new agreement entered

into in 1999 as put forth by the plaintiffs side; but, it is only a confirmation of the earlier agreement, as per the plaint averments. Hence, it would be

abundantly clear that cause of action was very well available, but knowingly and deliberately omitted to be mentioned. This Court is of the view

that here is a clear case where Order 2, Rule 2 has got to be applied, and accordingly, the plaint has got to be rejected.

14. Equally so, it has got to be rejected on the second ground. According to the plaint averments, an agreement was entered into in the year 1995,

and the parties did not execute the agreement, because the property contained an extent of 21.71 acres, and it was within the mischief of Tamil

Nadu Urban Land (Ceiling and Regulation) Act, 1978 and it was so continuously, and thus, the agreement was not executed, and all those

attempts were made by the plaintiff to take the property out of the clutches of law. According to the plaintiff, in 1999, the agreement earlier entered

into in 1995, was confirmed, and pursuant to the same, he raised two sheds, and though the property was to be exempted from the same by a

G.O. by the State Government, it was not exempted so, which necessitated the parties to file a writ petition before this Court, and it was ordered

exempting the same. Now, the question, would be whether any subsequent amendment or any enactment taking the property out of the clutches of

law or an order of Court exempting the property from the clutches of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978, would

legalize an agreement which is void at the inception, to which the Court has to answer in the negative.

15. In the instant case, admittedly, the property was in excess, since the area was 21.71 acres. Even as per the averments in the plaint, it was

under the mischief of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978, and thus, at the time, when the agreement was entered into

between the parties, even at the inception, it was under the clutches of the enactment. Needless to say that if an agreement was executed between

the parties that time, it was only void. Once at the inception, an agreement though entered into was void, the subsequent agreement to make it

legalize or coming before a Court of law and getting an exemption cannot legalize the earlier agreement which is void in nature. In the instant case,

it is not the case of the plaintiff that subsequent to the repealing Act or the order of the Court, there was an agreement entered into between the

parties afresh; but, the plaintiff wants to get the relief of specific performance on the basis of the agreement originally entered into between the

parties in 1995 and subsequently confirmed in 1999. Thus, it would be abundantly clear that the plaintiff wants to get the relief only on the basis of

the agreement entered into in 1995, an oral one.

16. Needless to say that the relief of specific performance can be granted in respect of an immovable property on the basis of an oral agreement;

but, in the instant case, the oral agreement was entered into between the parties in respect of 21.71 acres, which property admittedly belonged to

the defendant, and the same property was under the clutches of the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. If an agreement

entered into between the parties at the inception is void, it can, at no stretch of imagination, be legalized by a subsequent repealing of the Act or by

an order of the Court. At this point of time, the decision of the Full Bench of this Court reported in (1999) 3 LW 249 P. Gopirathnam v.

Feerodous Estate (Pvt.) Ltd. has got application to the present facts of the case. In that case, it has been held thus:

24. From these decisions, it is clear that even if the contract by itself may not be illegal but its enforcement if violates any law that will be a ground

to hold that the agreement cannot be enforced....

25. The question whether only completed transactions are contemplated u/s 6 of the Act and therefore enforcement of agreement for sale is not a

bar is also an argument without any merit. It is true that under the Act, no person is entitled to hold more than the ceiling limits as prescribed u/s 4

of the Act. Argument is that purchaser is not holding any land on the basis of an agreement unless he gets some title. It still continues only with

vendor. Therefore, there is no prohibition in enforcement of contract. Section 6 prohibits transfer by a person holding land in excess of ceiling

limits. The matter will have to be considered taking into consideration the rights

of seller and if that person holds more land than prescribed u/s 5, such transfer shall be deemed to be null and void. The prohibition u/s 6 is for transferring the land and consequently declares that any violation of law shall be deemed to be null and void. Section 6 contemplate both proposed transfer and completed transfer. An agreement of sale is also affected by Section 6 of the Act.

17. The judgment relied on by the plaintiff's side and reported in (2003) 2 LW 314 N. Shanmugham v. Rathinam, in the opinion of the Court, has

no application to the present facts of the case, since it was made under the Urban Land (Ceiling and Regulation) Act (Central Act) (33 of 1976).

The judgment applicable to the present facts of the case is one rendered by the Full Bench of this Court, as referred to above, since it is also a

case which arose Under the Tamil Nadu Urban Land (Ceiling and Regulation) Act, 1978. Under the circumstances, an agreement which originally

stood void, can-not be made a legal one by a subsequent enactment or an order of the Court. In view of the same, the agreement originally entered

into between the parties in the year 1995 which is the basis for the suit, was void at its commencement, and hence, on the basis of such agreement,

no relief could be granted.

18. For the reasons stated above, the plaint has got to be rejected. Accordingly, it is rejected, and this application is allowed.