

(1981) 02 MAD CK 0021
In the Madras High Court

T. Thangamuthu		APPELLANT
	Vs	
A. Gowrishanker		RESPONDENT

Date of Decision : 16-02-1981

Acts Referred:

Contract Act, 1872 — Section 39
Provincial Small Cause Courts Act, 1887 — Section 15(1)
Specific Relief Act, 1963 — Section 27

Citation : (1983) 2 MLJ 215

Hon'ble Judges : V. Balasubrahmanyam, J

Bench : Division Bench

Judgement

V. Balasubrahmanyam, J.—This is a small cause revision. The plaintiff in this case filed a suit for recovery of Rs. 500 from the defendant. The

claim related to the refund of advance paid by the plaintiff to the defendant under a written agreement for the purchase of a house-site in a layout.

Under the terms of the agreement, the defendant undertook to obtain the sanction of the concerned municipal authorities for the lay-out. The

plaintiff pleaded that while he was always ready and willing to pay the balance of the price for the house-site, the defendant had failed and

neglected even to obtain the sanction for the lay-out. The suit was accordingly laid for the refund of the advance since, according to the plaintiff, the

defendant had committed breach of the agreement.

2. The defendant resisted the suit. He raised in the forefront, an objection to the maintainability of the suit. He contended that the suit, as laid, was

for specific performance of a contract and hence barred under Entry 15 of the Schedule to the Provincial Small Causes Courts Act, 1887. Trying

this issue as a preliminary issue, the Court held that the plaintiff's suit was not a

suit for specific performance of the agreement for sale, as

contended for by the defendant. This finding is questioned by the defendant in this revision.

3. Section 15(1) of the Provincial Small Cause Courts Act read with Entry 15 of the Schedule to the Act bars from the cognisance of a Small

Cause Court in the mofussil any suit for specific performance or for rescission of a contract.

4. A contract can be said to be concluded only when there is mutuality and consensus between the parties. Likewise there cannot be rescission of

a contract unless it is preceded by breach of contract by the other party. It is a settled principle of contract law that where a party commits a

breach of contract, the other party has a choice of two things to do : he can either ignore the breach and perform his part of the contract; or he can

react to the breach by rescinding the contract. Rescission of contract has accordingly been described by an English writer, very pithily, as

acceptance of a repudiation". Rescission following the repudiation of the contract by the other party, thus puts an end to the contract. Both

parties, in such cases, go back on the contract, using their reverse gears, as it were.

5. Our contract law recognise the right of a party to file a regular suit, even for rescission of contract. But the condition precedent for rescission

either by suit or otherwise is the preceding breach committed by the other party. Section 39 of our Contract Act lays down that when a party to a

contract has refused to perform his promise in its entirety, the promisee may put an end to the contract unless he has signified, by words or

conduct, his acquiescence in its continuance. Section 27 of the Specific Relief Act, 1963, enacts that any person interested may sue for rescission

of a contract, where it is voidable for terminable by him.

6. Mr. Subramaniam, learned Counsel who argued this revision for the defendant, conceded that the suit in the present case is not a suit based on

an earlier act of rescission by the plaintiff. He however, maintained that the suit is one for specific performance of the agreement of sale, and as

such, it is barred under the other limb of Entry 15 of the Second Schedule to the Provincial Small Causes Courts Act. He relied on the averments

in the plaint to make good this contention. He referred, particularly, to the

following averment in the plaint, which, according to him showed that the plaintiff was all the while affirming the agreement and was seeking his remedy only within its four corners:

The plaintiff is having ready cash with him from the inception of the agreement till this moment with a view to pay the balance of the sale price and

to have the sale deed executed by the defendant through the owners.

The contention of Mr. Subramanian, seems to me to be quite tenable. The plaint averments are clearly in affirmance of the terms of the agreement,

and not in repudiation of any of those terms.

7. On behalf of the plaintiff, however, Miss. Bahkula, appearing as amicus curiae, urged that although the plaintiff did not actually rescind the

agreement, yet by the mere act of filing the suit for return of the advance he must be treated as having elected to put an end to the agreement. On

this basis she urged that the suit cannot be regarded as one for specific performance.

8. It may now be regarded as well-settled that were a purchaser under a contract of sale sues for return of the purchase price, the action in the

nature of a suit for specific performance of the contract. In *Narageri Veerasalingam v. Seethapalli Sathiaraj* (1909) 19 M.L.J. 220, the suit filed

was for recovery of Rs. 60. which the defendant had agreed to, but did not, pay the plaintiff under a contract for the conveyance of land. The suit

was held by a Bench of this Court as a suit for specific performance. The suit was somewhat of an unusual character, for the seller was prepared

to convey the property, but the purchaser had defaulted. The principle laid down in this decision was followed in later cases of this Court, notably

N.M.S.S. Subramanian Chettiar Vs. S.M.A.M. Arunachalam Chettiar and Others, , Miss. Bahkula, however, placed reliance on *Sundara Thevan*

v. Ananthan Kaladi (1924)20 L.W. 656 : AIR 1924 903 a decision of Reilly, J., in this Court, and also a decision of Venkatesam, J., of the

Andhra Pradesh High Court in *Gothi Seeharatnamma v. Kadiyala Narasimha Murthy* (1968) 2 A.W.R. 84, In the earlier Madras case, the plaintiff

agreed to purchase certain lands from the defendant for Rs. 85. The plaintiff paid Rs, 85. but, the defendant failed to convey the land and

eventually refused to do so taking up the stand that there was no contract under which he was bound to make the payment which the plaintiff

demanded of him. The plaintiff then sued the defendant for recovery of the amount in the Small Causes Court. Relying on Entry 15 of the Second

Schedule to the Provincial Small Cause Courts Act, 1877, the defendant objected to the maintainability of the suit. This objection was negatived

by the Small Causes Court. On revision to this Court, Reilly, J., upheld that decision. The learned Judge referred to the fact that while the plaintiff

pleaded the contract of sale and demanded the return of the purchase-money, the defendant for his part, denied the alleged contract altogether. In

these circumstances, according to the learned Judge, the institution of the suit must itself be regarded as putting an end to the contract. On this view

of the plaintiff's suit, the learned Judge held that it was not a suit for specific performance of the contract. The learned Judge's line of reasoning is

brought out in the following passage:

Defendants denied the alleged contract altogether. Plaintiff by his suit declared his election to put an end to the contract.

On this basis, the learned Judge proceeded to hold that the suit was cognizable by the Court of Small Causes.

This decision by Reilly, J., is head-noted in the AIR as follows:

Suit by vendee for recovery of purchase-money on the failure of a contract by vendee to convey land is of small cause nature.

9. It seems to me that the head-note has gone further than the decision reported. The whole point of the ruling of Reilly, J., is that although the basis

of the claim sprang from a contract for purchase of land, there was a breach committed by the defendant and when the plaintiff instituted the suit,

by that conduct he must be deemed to have elected to put an end to the contract. The learned Judge only purported to decide the question

whether the plaintiff in that case had elected to rescind the contract. He did not lay down any broad proposition of law, or even a working rule of

presumption, to the effect that in all such cases the suit of the plaintiff must itself be regarded as a suit not under the contract but de hors the

contract.

10 Apparently on the basis of the AIR head note Venkatesam, J., observed in a subsequent Andhra case that Reilly, J.'s decision was authority for

the position that where a plaintiff-vendee alleges the vendor committed breach of the contract to sell, the vendee not only has a remedy to sue for

specific performance, but could also rescind the contract and sue for recovery of the purchase money paid by him and the suit for refund of

purchase price would lie on the small cause side.

11. With respect, Venkatesam, J,"s observation not only puts the legal position unduly broadly, but also involves a misinterpretation or an undue

extension of the principle, if it can be so called, of Reilly. J."s judgment. To accept the doctrine laid down in the Andhra case would render the

earlier Bench decision in such cases as Narageri Veere Salingam v. Seethapalli (1909) 19 M.L.J. 220 as wrongly, decided and also go against the

fundamental doctrine of contract law relating to rescission and specific performance. The only principle which we can safely derive from Reilly, J"s

judgment is that it is a matter for consideration in every case whether the suit by a purchaser under an agreement of sale for refund of purchase

money would itself amount to a rescission of the contract following the defendant"s earlier breach, For if we study any given plaint carefully enough,

there can conceivably be indications therein to show that the plaintiff does not purport to rescind the contract, but only to sue in affirmance of it.

12. In the very first paragraph of this judgment, I have summed up the salient pleadings which the plaintiff had averred in the body of his plaint. I

have also quoted passages from the plaint. From the plain-, tiff"s own pleadings we know that the plaintiff"s attitude really was as regards the suit

agreement of sale, even while he was instituting the suit. The pleadings show a reiteration by the plaintiff of his abiding faith in. the suit agreement

and his willingness and. readiness to do all things necessary on his. part to complete the agreement by payings the balance of sale price, and the

like. With such pleadings as these in the plaint, the institution of the sait is clearly in affirmation, of the suit contract, and not in repudiation of it. The

contend otherwise, as Miss. Bakhula did, and urge that the very act of filing the suit amounted to a rescission by the plaintiff of the suit agreement is

altogether to ignore the meaningful act of instituting, the suit.

13 I am, therefore satisfied that the decision of the Court below was erroneous on the issue as to jurisdiction. I accordingly, set aside the order of

the Court below The matter is remitted with a direction that the Court below should return the plaint for proper presentation.

14. The revision is allowed on the above terms. But there will be no order as to

costs.

15. At the end of the day, I think it necessary to place on record my appreciation of the help rendered by Miss. Bahkula as amicus curiae.