

(1999) 09 MAD CK 0091

In the Madras High Court

Case No : S.A. No. 1485 of 1987 and C.M.P. No. 13025 of 1999

Zaibunissa Bi and Mohammed Bhai (since deceased)

APPELLANT

Vs

Ram Kishore and Hemraj Pathak

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100, 148, 149

Specific Relief Act, 1963 — Section 20, 28, 28(1), 28(3), 28(4)

Transfer of Property Act, 1882 — Section 53A

Citation : (1999) 09 MAD CK 0091

Hon'ble Judges : K.P. Sivasubramaniam, J

Bench : Single Bench

Advocate : T.V. Krishnamachari, for the Appellant; J.R.K. Bhavanandam, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Sivasubramaniam, J.—This Second Appeal is directed against the judgment of the learned IX Additional Judge, City Civil Court, Madras, in A.S. No. 435 of 1984 in confirming the judgment of the learned XVI Assistant Judge, City Civil Court, Madras, in O.S. No. 8082 of 1980. The defendants in the suit are the appellants in the above Second Appeal. The suit was filed for directing the defendants to deliver possession of the two rooms on the northern side situate on the eastern row of Valley Hussain Street Old No. 24, New No. 49/3, Strahans Road, Madras-12 and for restraining the defendants by a permanent injunction interfering with in any manner with the structure of the suit property.

2. According to the plaintiffs, the first defendant's husband namely, the second defendant was once a tenant under the first plaintiffs mother and the second plaintiff wife late Kousalya Bai in respect of the two rooms on the northern side in the eastern row of the Wali Hussain Street. During the life time of the said Kousalya, the first defendant appears to have entered into an agreement for purchasing the said two rooms. After her death, in 6.7.1970, in O.S. No. 3675 of

1971 on the file of the City Civil Court, Madras, the first defendant filed a suit against the plaintiffs seeking performance of the contract of sale and for other reliefs. Subsequently, by virtue of a consent decree made between the parties, it was provided that on depositing a sum of Rs. 3,250/- on or before 31.3.1975, the plaintiffs herein shall execute a sale deed in respect of the suit property in favour of the defendants herein. The plaintiffs further contended that the first defendant failed and neglected to pay the said amount within the stipulated period and therefore, ceased to have any right to enforce the decree for specific performance of the contract of sale. The first defendant however, is continuing possession of the property unauthorisedly and her possession amounted to a trespass. She had no legal right to continue in possession. The defendants also lost their right to obtain sale as a result of not complying with the terms of the decree and the said second defendant had long ceased to be a tenant and his continuance amounted to a trespass. The plaintiffs further contended that they are entitled to recover possession of two rooms mentioned in the suit schedule which was under the possession of the defendants. Therefore, by a notice dated 21.8.1977 issued by the plaintiffs' counsel, the first defendant was required to vacate the premises. But she failed to do so. On the contrary, she has encroached upon the other portions and had put up construction unauthorisedly in collusion with the second defendant. The defendants have therefore, no right, title or interest over the property or to put up any superstructures thereon. The plaintiffs therefore, were filing the present suit for ejectment of the defendants from the suit premises and also for an injunction to restrain them from altering the structure of the property or to make any additions thereon.

3. In the written statement filed in the defendants, it was contended that they were the tenants in respect of the property under one M. Sheriff and they were paying a monthly rent of Rs. 10/- for each room for two rooms to him. The said Sheriff left for Pakistan and the defendants were in occupation of the suit premises for more than 20 years in their own rights. The first plaintiff's mother seems to have obtained a sale deed in respect of the suit premises and had become the owner of the same. The mother of the first plaintiff and the wife of the second defendant entered into an agreement of sale to sell the premises in favour of the defendants. Even in the Rent Control proceedings initiated by the plaintiffs, the plaintiffs had lost their case. Pursuant to the agreement of sale, a suit for specific performance had been filed in and by which the plaintiffs were directed to register the sale deed in favour of the defendants. There was a compromise decree where under the defendants were directed to pay a sum of Rs. 3,250/- for execution of the sale deed in favour of the defendants. Though the defendants had paid the said amount to their previous advocate on record, he had not paid, the same as a result of which the sale deed could not be executed. The defendants were not in a position to receive all the connected papers from the previous advocate and as soon as the same was received they will be filing an additional written statement. It was further stated that they spent enormous amounts towards improvement of the property. At no point of

time, the defendants had paid by way of rent to the plaintiffs which will show that the plaintiffs have no manner of right, title or interest over the suit property. The defendants would further deny that they have failed and neglected to pay a sum of Rs. 3,250/- within the stipulated period. It was only due to the mistake of the counsel on record, the defendants were made to suffer. The allegation that the defendants were in occupation of the property unauthorisedly was also denied. It was further contended that they were in possession and enjoyment of the suit property in their own rights and that the suit was barred by limitation. In the additional written statement also, the defendants had contended that they had spent considerable amount over the improvement of the premises. It was further contended that the defendants attempted several times to pay the balance amount before the expiry of the due date. But the plaintiffs had refused to receive and therefore, there was no default on their part. The consent decree in O.S. No. 3675 of 1971 provided that on depositing a sum of Rs. 3,250/- to the credit of the suit, the defendants shall execute the sale deed. Therefore, the execution of the sale deed was dependent upon depositing a sum of Rs. 3,250/-. But there was no penal clause and the consent decree did not mention anything about what was to happen in the event of failure on their part to deposit the amount. Therefore, the defendants were entitled to continue in possession of the property and to seek execution of the sale deed and the plaintiffs were entitled to collect the balance amount from the defendants. It was not stated that failure to deposit the amount within the stipulated time will result in the forfeiture of the defendants' claim over the suit property. It was further contended that they were entitled to protection u/s 53-A of the Transfer of Property Act and that the plaintiffs can claim only the balance amount from the defendants and were not entitled to seek delivery of possession of the property. It was further contended that the consent decree shall be only a contract for sale. Further, the plaintiffs owed a sum of Rs. 1,500/- to the first defendant which was due to be paid after setting of the amount due to him and therefore, the contention that Rs. 3,250/- was remaining unpaid was not correct. As per the terms of the decree the defendants should have deposited a sum of Rs. 3,250/- on or before 31.3.1975. As on 31.3.1975, a sum of Rs. 1,500/- was due to the defendants and therefore, the plaintiffs had a right to collect only the balance amount of Rs. 1,750/-. The defendants have therefore, all manner of rights to continue in possession of the property as their own and to compel the plaintiffs to register the sale of the property. It was further contended that at the instance of the well wishers, it was mutually agreed that the plaintiffs should execute the sale deed after the defendants paying the balance due to the plaintiffs.

4. On a consideration of the said pleadings and the evidence both oral and documentary, the trial Court held that there was absolutely no justification for the defendants not to have paid the sale consideration within the stipulated date and the said failure to do so was deliberate and the reasons given for the failure to pay the same by throwing the blame on their counsel was also not genuine and was not also true. It was also held that they were also not entitled to the

benefits of Section 53-A of the Transfer of Property Act, nor was the suit barred by limitation. With the result, the suit was decreed as prayed for and a sum of Rs. 2,000/- was fixed as compensation payable to the plaintiffs. On appeal, the findings of the trial Court were confirmed and the appeal filed by the defendants was dismissed by the Appellate Court. Hence, the present Second Appeal by the defendants.

5. The findings of the Courts below relating to the failure on the part of the defendants to comply with the terms of the compromise decree are pure findings of fact arrived at by both the Courts concurrently, after a detailed analysis of the evidence. Learned counsel for the appellants is unable to show as to how the said findings would be vitiated u/s 100 C.P.C. He is unable to point out any feature which could either be held as perverse or based on no evidence. In fact, a detailed analysis of the evidence justifies the pointed remarks made by the Courts below that the attempt on the part of the defendants to throw the blame on their counsel was not genuine. The said findings relating to the failure on the part of the defendants to comply with the terms of the compromise decree have to be confirmed.

6. Learned counsel for the appellants has therefore, rightly restricted his submissions to two legal issues namely, as to (1) whether the suit was not maintainable in view of Section 28(4) of the Specific Relief Act, 1963 (hereinafter referred to as "the Act") and (2) whether the defendants were entitled to invoke protection u/s 53-A of the T.P. Act.

7. The appellants have also filed C.M.P. No. 13025 of 1999 under Order 41, Rule 27 C.P.C. to admit the sale agreement dated 4.7.1970 as an additional evidence in the Second Appeal. According to the appellants, the agreement had been filed in the earlier suit in O.S. No. 3675 of 1971 as Ex.A.3 and due to oversight the agreement was not marked in the present suit. This petition is however, objected to by the respondent herein and a detailed counter affidavit has been filed by contending that the ingredients of Order 41 Rule 27 have not been strictly complied with.

8. I have considered the reasons contained in the affidavit filed in support of C.M.P. No. 13025 of 1999 and I find there can be no serious objection to entertain the said document to be taken in the evidence having regard to the fact that the existence of the said agreement has not been seriously disputed and that the same was also subject matter of an earlier suit between the same parties. Hence, C.M.P. No. 13025 of 1999 is allowed.

9. The first point for consideration is whether the present suit is barred u/s 28(4) of the Act. According to learned counsel for the appellants, the remedy of the defendants in a specific performance suit was only to proceed under the procedure contemplated u/s 28(4) of the Act. Once a decree had been granted, it is open to the vendor to seek for rescission of the contract u/s 28(1) in the event of the purchaser violating the terms of the decree, or the purchaser could seek u/

s 28(3) of the Act for extension of time for complying with the terms of the decree. Section 28(4) of the Act would be a total bar for filing a separate suit. For better appreciation of the point raised by the appellant, Section 28 of the Act is extracted below:

28. Rescission in remain circumstances of contracts for the sale or lease of immovable property the specific performance of which has been decreed (1) where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) where a contract is rescinded under sub-section (1), the Court.

(a) shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the reins and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the Court may on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely-

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court.

10. It may be incidentally stated that after filing the present petition, both parties did file petitions u/s 28(1) and Section 28(3) of the Act respectively, by the vendor for rescission of the contract and by the purchaser for extension of

time. I.A. No. 12468 of 1988 was filed before the lower Court by the vendor for rescission and the same was resisted by the purchaser. The petition was ultimately dismissed for default by order dated 2.3.1999. As a counter blast the purchaser appears to have filed an application (Number not furnished) in the year 1993 for extension of time for making deposit, which does not appear to have been numbered at all and it is represented by learned counsel for the purchaser/appellants, that the said petition for extension of time had not been pursued since I.A. No. 12468 of 1988 had been dismissed. A perusal of the affidavit filed in support of the said petition shows that even earlier another petition had been filed by the purchaser to condone the delay. But the said petition had been dismissed. Admittedly, no further appeal or revision had been filed by the purchaser.

11. In this background the effect of the provision u/s 28 of the Act has to be considered. Undoubtedly, the provisions are mandatory. But the provisions are not to be interpreted in a technical or pedantic manner, ignoring that a relief to be granted or refused under the provisions of the Specific Relief Act is discretionary, to be based on sound and reasonable grounds and guided by judicial principles (Section 20) and subject to equity, good conscience and in consideration of the conduct of the parties and as to whether parties have approached the Court with clean hands.

12. The Courts below have rightly and concurrently held that the purchasers/appellants had put forth inconsistent and improper reasons for not complying with the terms of the decree. In the original written statement filed in the present suit, they would state that they had paid the amounts to the advocate on record, but the advocate had not paid the amounts to the vendor. They would even accuse their erstwhile counsel for not having returned the case papers. In the additional written statement, they had pleaded that in spite of their repeated attempts to pay off the balance amount to the plaintiffs, the plaintiffs had refused to receive the amount. Both the reasons as mentioned above, are totally contradictory and unconscionable. Not having complied with the terms of the decree, it was pleaded by the purchaser that even otherwise they were entitled to the property in their own rights. It is under these circumstances, the trial Court has rightly pointed out that the stand taken by the purchasers and the arguments advanced before the Court on their behalf sounded as though they did not appear to realise that they were pleading before a Court of law. It is further depressing to note in the affidavit filed by the purchaser in support of their petition, praying for extension of time before the Lower Court, filed in I.A. No. 12468 of 1988, sworn to on (undated) September, 1993, the purchaser had stated that she failed to deposit the amount within the stipulated time for reasons beyond her control in spite of diligent attempts and that she is a poor old woman. Therefore, on each occasion inconsistent reasons had been given by the purchasers without any genuine attempt on their part to show the colour of the coin to the vendor. They chose to squat over the property without paying any amount. Not being satisfied with such false statements in the written statement

they have also gone to the extent of setting up independent title in themselves by pleading that they are in possession and enjoyment of the property by their own right. It is not known or shown as to what is the manner of any other right on the basis of which they claim title over the property other than the contract between the parties. This attempt is nothing, but a denial of the title of the vendor and claiming rights independent of the compromise decree. In the face of such pleadings, it is not known as to how it is open to the purchasers to plead that the present suit was barred u/s 28(4) of the Act.

13. Such as the conduct of the appellants and there cannot be a more effective example of persons approaching the Courts with unclean hands which would disentitle them to be granted with a discretionary relief. Several judgments were relied upon by learned counsel for the appellants to state that the provisions of Section 28(4) of the Act was mandatory and also that power to condone the delay in permitting the petition to comply with the terms of the contract could be exercised even at the appellate stage. He has placed reliance on several judgments in support of the said contentions.

14. In *K. Kalpana Saraswathi Vs. P.S.S. Somasundaram Chettiar*, it was held that even at the appellate stage of the appeal before the Supreme Court, time for making the deposits could be extended to enable the plaintiff to make the deposit.

15. In *Mahanth Ram Das Vs. Ganga Das*, it was held that in a peremptory Order for payment of deposit court fees within the time fixed, under Sections 148 and 149, C.P.C. the Order extending time for payment could be made.

16. Reliance is also placed on a judgment of Nagpur High Court reported in AIR 1946 Nagpur, 29 (*Gokul Prasad v. Fattelal*) in which a learned single Judge of Nagpur High Court, in a case for specific performance held that the decree was in the nature of preliminary decree and therefore, the court had the power to extend the time fixed by the decree.

17. In the judgment reported in *Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh Vs. Mangilal alias Mangtya*, the Supreme Court held that Section 28 of the Act gave right to the judgment debtor to apply for rescinding the contract and the court had power to enlarge the time to pay the amount or to perform the conditions as per the decree.

18. In *Ramankutty Vs. Avara*, the Supreme Court held that with reference to a suit dismissed by the Trial Court for specific performance, but decreed by the First Appellate Court granting one month time to the respondent to deposit the balance consideration and the respondents deposited the amount after expiry of the period, it was held that the appeal being a continuation of the suit, could exercise the power u/s 28(1) of the Act and granted extension of time.

19. In another judgment reported in *Md. Alimuddin Vs. Waizuddin* and another, the Supreme Court approved the Lower Court having exercised its discretion in

extending the time granted u/s 28(1) of the Act. In the judgment of the Madhya Pradesh High Court reported in *Kanhaiyalal Vs. Mulla Abdul Hussain* (deceased by L.R.S.) and Others, while dealing with the corresponding provision under the Act 1 of 1877, it was held that the decree granted for specific performance was in the nature of a preliminary decree and the Court continues to retain its full control over the matter to make any just and necessary orders and it can also pass a decree for rescinding the contract u/s 35 of the Act.

20. There is no quarrel over the propositions highlighted by the judgments mentioned above and the binding nature of the provisions u/s 28(4) of the Act. But the said provision cannot be read in isolation ignoring the basic qualifications prescribed u/s 20 which would entitle a purchaser to have the agreement enforced. The purchaser cannot take advantage of his own default. It must also be borne in mind that the purchaser had approached the Court at least twice to condone the delay to make the payment and the said petitions had been dismissed. In the affidavit filed by the purchaser which has been referred to earlier, it is clearly stated that she had filed E.A. No. 6014 of 1977 and C.M.P. No. 6015 of 1977 earlier for condoning the delay in payment of the decree amount and that those petitions had been dismissed. Subsequent petition filed in the year 1993 had also not been pursued. None of these orders was taken up on appeal or revision or pursued and there has to be some legal effect or consequence on the passing of such orders and the inaction on the part of the purchaser. It is also not known as to how the purchaser could have filed one more petition after his earlier petition in C.M.P. No. 6015 of 1977 had already been dismissed. The right of the purchaser to be permitted to make the deposit is neither automatic nor eternal. The legal consequences of the rejection of the petition to condone the delay in making the deposit is that the contract becomes unenforceable and in the present case the compromise decree becomes unenforceable. Hence, the bar u/s 28(4) of the Act to file a separate suit cannot also subsist. It would be a paradoxical situation to say that the purchaser cannot enforce the contract any further after the rejection of his petition u/s 28(3) of the Act for the extension of time, but at the same time, the bar u/s 28(4) of the Act would continue as against the vendor to seek possession of the property by a separate suit.

21. In fact, a reference to the judgment of a Division Bench of the Andhra Pradesh High Court reported in AIR 1978 A.P. 237 (*Sakuntala Devi v. Sakunthala*) which was relied upon by learned counsel for the appellants himself appears to be against the contention put forward by the appellants. In that case, in the suit filed for specific performance, a compromise decree was passed in terms of the compromise. It provided that on the plaintiff depositing certain amount within a particular date, the defendants should execute the sale deed for the property in question. The plaintiffs deposited the amount subsequent to the said date and filed a petition to execute the decree. According to him, the decree was in the nature of preliminary decree only and the suit was dismissed. By filing an application the Court can grant time or extend the time. This submission was

rejected by the Division Bench and it was held that in an agreement to convey the property, the time fixed by the decree for payment cannot be extended and it was further difficult in the case of a compromise decree which cannot be varied except by consent. In the said circumstances, the plaintiffs' application was held as not maintainable.

22. Even assuming that the Court has the power to extend the time, as far as the present case is concerned, the unfair attitude on the part of the purchaser is further highlighted by the stand which he took in the petition filed by the vendor u/s 28(1) of the Act for rescission of the contract. In the counter, the purchaser had chosen to state that the application was misconceived and not maintainable and a separate suit having been filed by the vendor, the vendor had waived his right u/s 28 of the Specific Relief Act. In the present Second Appeal, the stand of the petitioner is opposite. Such is the attitude of the purchaser in the present case.

23. It was further contended by learned counsel for the appellant that even in this Second Appeal, this Court can exercise its power to condone the delay and to permit the petitioner/purchaser-appellant to pay the balance amount. I am unable to uphold the submission of learned counsel. This is not a proceeding u/s 28 of the Act or in the very same suit for specific performance. Further, assuming that even otherwise this Court can exercise its discretion in this suit filed by the vendor for possession, for the reasons already stated, this is not a fit case in which the Court would exercise its discretion, having regard to the series of conduct on the part of the purchaser exposing total lack of bona fides on the part of the purchaser.

24. Hence, the objections taken by the appellants on the question of bar u/s 28(4) of the Act deserves to be rejected.

25. The only other point which is raised by the appellants that they are entitled to protection u/s 53-A of the Transfer of Property Act, is stated only to be rejected. It is not disputed that they were originally put in possession of the property only as tenants and not in pursuance of the agreement of sale. In the present agreement for sale dated 4.7.1970, the vendor's right to continue to collect the rent till the date of registration of the sale deed was given up specifically only because of the payment of advance amount of Rs. 2,000/-. Under clause IV, the vendor was to give possession of the other portion of the property which was in his possession only on the date of the registration of the sale deed.

Therefore, possession of one portion of the suit property by the purchaser which continued to be with them was given to them only in the capacity of a tenant and has nothing to do with the agreement of sale and is not a case of possession being handed over pursuant to the agreement of sale. Therefore, Section 53-A of the Transfer of Property Act cannot be invoked.

26. In the judgment reported in 93 L.W. 858, (S. Doraisami Nadar v. Nagammal),

Ramanujam, J. dealt with a case where it was pleaded by the tenant that he was entitled to be in possession as a purchaser pursuant to the agreement for sale in terms of the principle of part performance u/s 53-A of the Transfer of Property Act. The learned Judge held that by merely entering into an agreement of sale, the tenant does not acquire any right in the property. Only in the event of possession being given pursuant to the agreement of sale, such possession can be sustained on the basis of Section 53-A of the Transfer of Property Act. In the present case, as stated earlier, the terms of the sale agreement itself clearly shows that possession has nothing to do with the agreement of sale. The tenant continued to remain only in the teased out portion and the remaining portion continued in the possession of the vendor to be handed over to the purchaser only after the execution of the sale deed. Therefore, on this point also, the appeal has to fail. In the result, there are no merits in the above Second Appeal and the same is dismissed. No costs.