

(2009) 08 MAD CK 0204

Madras High Court

Case No: C.R.P. (N.P.D) No. 2543 of 2008 and M.P. No. 1 of 2008

Govindasamy and Others

APPELLANT

Vs

Sellamuthu and Others

RESPONDENT

Date of Decision: Aug. 20, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 148, 151, 152
- Contract Act, 1872 - Section 46
- Specific Relief Act, 1963 - Section 22, 28, 28(1)
- Transfer of Property Act, 1882 - Section 55

Hon'ble Judges: M. Venugopal, J

Bench: Single Bench

Advocate: N. Manoharan, for the Appellant; T. Murugamanickam, for RR 6 to 9 and D. Shivakumaran, for RR 1 to 5, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

M. Venugopal, J.

The petitioners/petitioners No. 2,3,5 to 17/legal representatives of the decree holders/plaintiffs have filed this civil revision petition as against the order dated 17.04.2008 in R.E.A No. 39 of 2007 in R.E.P No. 38 of 2002 in (O.S. No. 893 of 1981 on the file of District Munsif Court Tiruchengode) passed by the Learned District Munsif Court, Sankari.

2. The trial Court while passing orders in R.E.A No. 39 of 2007 in R.E.P No. 38 of 2007 on 17.04.2008 has inter-alia opined that as an Executing Court how it is permitted to have beyond the terms of the decree and in this regard no explanation or an argument has been advanced on the side of petitioners and as such the application cannot be entertained for passing orders and resultantly dismissed the application without costs.

3. According to the learned Counsel for the revision petitioners/legal representatives of the decree holder/plaintiffs the order of the Executing Court in dismissing the R.E.A 39 of 2007 is against law, evidence and probabilities of the case and the decree for specific reforms passed by the trial Court in O.S. No. 893 of 1981 dated 24.08.1981 has reached finality in view of the judgment in second Appeal No. 1653 of 1982 dated 24.11.1995 and that the respondents No. 3 to 11/judgment debtor 3 to 11/Defendant No. 3 to 5 and legal representatives of defendant No. 1 and 2 have not raised the purported defect in the decree either in A.S. No. 210 of 1981 decree dated 12.03.1982 or in the second Appeal No. 1653 of 1982 decree dated 24.11.1995 and therefore they are estopped from challenging the extension of time on the ground of constructive resjudicata and that Section 151 and 152 of CPC empowers a Court of Law to correct its own error in a judgment or decree arising out of any accidental slip or omission and the latin maxim; Actus Curiae Neminum Non-Gravabit i.e., no one should suffer by an act of Court will squarely apply to the facts of the case and added further a protracted litigation has dragged on for nearly 27 years and the mere omission to include a clause in the decree to deposit the balance sale consideration of Rs. 3000/- is not fatal so as to deprive the decree holders in enjoying the fruits of the decree and a mere inclusion to clause in a decree or permitting the decree holders to pay the balance sale consideration by an Executing Court cannot mean that it acts beyond the scope and ambit of decree passed and inasmuch as the respondents are aware of the none inclusion of the clause in regard to the deposit of sale consideration of Rs. 3,000/- but they have not challenged the same either in the first appeal or in the second appeal and these aspects have not been appreciated by the Executing Court in an appropriate perspective which has culminated in miscarriage of justice and therefore prays for allowing the civil revision petition in the interest of justice.

4. In response, the stand of the respondent is that the petitioners/decreed holders have not been granted the right to deposit the sale price within a fixed time and hence they have no right to come forward with an application to deposit the same and as a matter of fact the petitioners/decreed holders should have approached the trial Court, Appellate Court, Second Appellate Court praying for necessary orders being passed in this regard and when the same has not been resorted to the petitioners cannot raise a plea praying the Court to pass an order in their favour to deposit the balance sale price of Rs. 3,000/- and moreover an Executing Court cannot go behind the tenor of decree and as such the order of the Executing Court passed in R.E.A No. 39 of 2007 dated 17.04.2008 is just and proper in the eye of law.

5. The learned Counsel for the revision petitioners in support of the contentions that a Court of Law has power to extend time to deposit the balance sale consideration relies on the decision of Hon"ble Supreme Court [Chanda \(dead\) through LRs. Vs. Rattni and Another](#), wherein it is held that;

suit for specific performance does not come to an end on passing of decree and Court while passing decree retains control over decree even after passing of decree and the decree for specific performance is described as preliminary decree and that the Court has got power to extend time to deposit the balance sale consideration, though decree directed that said payment should be made by certain date failing which suit shall stand dismissed and the power of Court to cancel or annul decree is discretionary and Court has got power u/s 28 of Specific Relief Act, 1963 to grant complete relief to both parties in terms of decree.

6. He also cites the decision of Hon"ble Supreme Court [Kumar Dhirendra Mullick and Others Vs. Tivoli Park Apartments \(P\) Ltd.](#), wherein it is held that

when Court passes a decree for specific performance, the contract between the parties is not extinguished and the Court does not lose its jurisdiction, nor does it becomes functus officio and the decree for specific performance in the nature of preliminary decree and the suit is deemed to be pending even after a grant of such decree and hence the Court retains control over the entire matter even after decree and Section 28 of Specific Relief Act, 1963 itself indicates the same and therefore the Court has power to enlarge time infavour of decree holder to pay the amount or to perform conditions mentioned in decree for specific performance etc.

7. The learned Counsel for the petitioners brings it to the notice of this Court the decision of K. Kannappan v. C.S. Selvaraj (deceased) and 11 Ors. 2007-4-L.W. 180 at page 181, wherein it is held that;

It is well settled that in a suit for specific performance of the contract, the Court retains jurisdiction to extend time.

8. On the side of the petitioners reliance is placed on the decision of Hon"ble Supreme Court Sardar Mohar Singh through power of attorney holder, [Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh Vs. Mangilal alias Mangtya](#), at page 218 wherein it is held that;

It is clear from Section 28(1) of the Specific Relief Act, 1963 that the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with the decree of specific performance. The Court has power to enlarge the time in favour of the judgment debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of an application for rescission of the decree having been filed by the judgment debtor and rejected. The court has the discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance etc.

9. Added further the learned Counsel for the revision petitioners relies on the decision of this Court in Ponnaiyan alias Periya Gounder v. Rangasamy Gounder wherein it is held as follows;

In the present case, the decree is not one of declaration merely. But it is one which contains a mandatory injunction. In the plaint, the plaintiff has given the measurements of the channel and also the location of the channel as one starting from the common well. The necessary details are found in paragraphs 4,5 and 8 of the plaint. A rough plan is also attached to the plaint. The rough plan shows that the channel begins from the common well on the western side and proceeds west, then north, then east, then south and again east to the lands of the plaintiff. A Commissioner was appointed to inspect the property and he has also inspected the property and filed a report and plan. The executing court is, therefore, right in taking into account the details given in the plaint the rough plan and the Commissioner's plan which are attached to the decree and issuing suitable instructions for implementing the decree. There is no error whatever in the order of the court below.

10. He also seeks in aid of the decision in [Shambhu Nath Vs. District Judge and Others](#), at page 184 wherein it is among other things held thus;

...the second appeal was dismissed on merit by this Court and in a suit for specific performance of contract while a decree is being passed in favour of the plaintiffs the duty cost upon the court itself to give such direction as to make compliance for payment or deposit of the sale consideration either in the court or to the vendor, which this Court appears to have ignored while dismissing the appeal itself vide annexure No. 11. In fact, both trial court and the first appellate court have decreed the suit and the second appeal was dismissed. The decree was confirmed and remained intact. The interim order, if any, passed by this Court in second appeal, has lost any relevance in the face of final judgment rendered in the case. Therefore, if this Court has not passed the direction towards the deposit of remainder sale consideration, it is not the respondents who are to blame. The plaintiffs respondents moved the executing court which in pursuance of the existing decree has given permission vide impugned order dated 21.02.2004 to make the deposit of the remainder sale consideration in pursuance to which the deposit has been made. I do not find any illegality in the said order of the executing court dated 21.02.2004 likewise there is absolutely no infirmity in the revisional order passed in the revision preferred against the order of the executing court.

11. Furthermore on the side of revision petitioners the decision N.K. Jinnah v. K.P. Krishnan (2006) 2 M.L.J. 350 at page 353 and 354 wherein it is inter-alia held as follows;

The only amendment to be made in the plaint was to add a relief for possession necessitated because of the provisions of Section 22, which is only an enabling

provision. There has been a protracted litigation and it has dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree holders to file a separate suit for possession. The objection of the petitioner is hyper-technical. The executing court has every jurisdiction to allow the amendment. The only difficulty is that instead of granting a relief of possession the High Court should have allowed an amendment in the plaint. The mere omission of the High Court to allow an amendment in the plaint is not so fatal as to deprive the decree-holders of the benefits of the decree when Section 55 of Transfer of Property Act authorises the transferee to get possession in pursuance of a sale deed. This is an additional reason why this Court should not interfere with the eminently just order of the High Court. The High Court had amended the decree passed by the first appellate Court and passed a decree for possession not only against the transferors but also against their transferee, i.e., the petitioner. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections. In the circumstances narrated above, we do not find any fault with the order passed by the High Court. In this case too, possession is admittedly with the petitioner who is bound to deliver possession upon execution of the sale deed. For the above reasons, the impugned order is not interfered with. This civil revision petition is dismissed. No costs. Consequently connected C.M.P. is also dismissed.

12. Also the decision of Hon"ble Supreme Court Niyamat Ali Molla v. Sonargon HSG Coop. Society Ltd. and Ors. 2007 SAR (Civil) 929 at page 937 wherein it is observed as follows;

It is not a case where the defendants could be said to have been misled. It is now well settled that the pleadings of the parties are to be read in their entirety. They are to be construed liberally and not in a pedantic manner. It is also not a case where by reason of an amendment, one property is being substituted by the other. If the Court has the requisite power to make an amendment of the decree, the same would not mean that it had gone beyond the decree of passing any decree. The statements contained in the body of the plaint have sufficiently described the suit lands. Only because some blanks in the schedule of the property have been left, the same, by itself, may not be a ground to deprive the respondents from the fruit of the decree. If the appellant herein did not file any written statement, he did so at its own peril. Admittedly, he examined himself as a witness in the case. He, therefore, was aware of the issue raised in the suit. It is stated that an Advocate-Commissioner has also been appointed. We, therefore, are of the opinion that only because the JL numbers in the schedule was missing, the same by itself would not be a ground to interfere with the impugned order.

13. It is to be noted that the procedure is a hand made of justice and therefore it ought to be molded to secure the ends of justice. Indeed, the technicalities may not

stand in the way to subserve the ends of justice. After all, the final end of law is justice and so the means to it too must be informed by equity in the considered opinion of this Court.

14. Admittedly, The Specific Relief Act, 1963 is not an exhaustive enactment and as per specific relief law, a Court of Law which passes a decree for specific performance retains control over decree even if the decree has been passed. The settled legal position is that a Court of Law does not cease to have any jurisdiction after passing of the decree.

15. In fact, as per Section 28(1) of Specific Relief Act, 1963, the conduct of parties including the over all assessment of the facts and circumstances of the case are to be looked into by a Court of Law.

16. At this stage, this Court in the interest of justice recalls the observation of Hon"ble Supreme Court in the decision [Ramankutty Guptan Vs. Avara](#), at page 1700 wherein it is held as follows:

Where the question is whether application u/s 28(1) for rescission of contract, specific performance of which had been decreed should be on the original side or execution side and section indicates that it should be "in the same suit". It would obviously mean in the suit itself and not in the execution proceedings. It is equally settled law that after passing the decree for specific performance, the Court does not cease to have any jurisdiction. The Court retains control over the decree even after the decree has been passed. It is open to the Court to exercise the power u/s 28(1) of the Act either for extension of time or for rescinding the contract as claimed for. Therefore, where the execution application has been filed in the same Court in which the original suit was filed, namely, the Court of first instance, instead of treating the application for rescission on the execution side, it should have as well been numbered as an interlocutory application on the original side and disposed of according to law. The High Court, therefore, is not right in dismissing the application treating it to be on execution side, instead of transferring it on the original side for dealing with it according to law.

17. Continuing further this Court cites the decision [V.S. Palanichamy Chettiar Firm Vs. C. Alagappan and Another](#), wherein it is laid down as follows;

When the trial Court and the executing Court are same, executing Court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-holder can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of decree.

18. In the decision [Maruti Vishnu Kshirsagar Vs. Bapu Keshav Jadhav](#), it is among other things held that;

The time to deposit mentioned in decree is always an incidental direction towards granting specific performance and a date fixed will not result into defendant's getting right of having the plaintiff's suit dismissed and time can be extended from time to time by the trial Court and application for extension cannot be made u/s 148 of CPC and the application cannot be made to Appellate Court or Executing Court executing the appellate decree and it is not a matter of execution of decree and further that an executing Court and the trial Court being the same, the application for contention must be held to have been held to the trial Court as separate application, the suit not having been disposed of.

19. In [Chigurupati Subbanna Vs. The District Labour Officer](#), it is held that;

Every Court and every officer exercising quasi-judicial functions has an inherent power to grant an adjournment.

20. Generally speaking, specific performance is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief, in short, he who seeks equity shall do equity.

21. It is not out of place for this Court to point out the decision of Hon"ble Supreme Court *Hungerford Investment Trust Ltd. v. Haridas Mundhra and Ors.* : AIR 1972 Supreme Court 1826 at page 1827 wherein it is held that, "as the Court passing a decree retains control over the decree even after the decree has been passed it can entertain the application for recession of the decree etc." Moreover, in the aforesaid decision at para 25 it is held as follows;

...if a contract does not specify the time for performance, the law will imply that the parties intended that the obligation under the contract should be performed within a reasonable time. Section 46 of the Contract Act provides that where, by a contract a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time and the question "what is reasonable time" is, in each particular case, a question of fact. We have already indicated that the contract between the parties was not extinguished by the passing of the decree, that it subsisted notwithstanding the decree. It was an implied term of the contract and, therefore, of the decree passed thereon that the parties would perform the contract within a reasonable time. To put it in other words, as the contract subsisted despite the decree and as the decree did not abrogate or modify any of the express or implied terms of the contract, it must be presumed that the parties to the decree had the obligation to complete the contract within a reasonable time.

22. Apart from the above, it is relevant to make a mention that an inherent power cannot be exercised in conflict with general or Special Law. Section 151 of CPC will not apply when there is an express provision of law applicable to the case as opined by this Court. Moreover, the label or nomen clature of an application or petition may not matter, even it is possible to grant the relief in some other provision and an

applicant ought not to be denied due relief to which he is entitled to, as the case may be.

23. Interestingly, the decree passed in O.S. No. 893 of 1981 dated 24.08.1981 on the file of Learned District Munsif Tiruchengode "directs the defendant's to specifically perform the suit agreement and execute a sale deed in favour of the plaintiff's of the suit properties could be delivered to him, and in default of doing so, the plaintiff is at liberty to execute the sale deed in his favour through Court etc."

24. But in A.S. No. 210 of 1981 on the file of Learned District Judge Selam, a decree has been passed on 12.03.1982 conforming the judgment of the trial Court passed in O.S. No. 893 of 1981 and resultantly the appeal has been dismissed. However, in second appeal 1652 of 1992 a decree has been passed by this Court on 24.11.1995 whereby the first Appellate Courts decree has been confirmed and consequently the second appeal has been dismissed.

25. On a careful consideration of the respective contentions, this Court is of the considered view that the trial Court which has passed the decree in O.S. No. 893 of 1981 retains control over the decree even after such decree has been passed and therefore, to sterilise the decree and to prevent an aberration of justice this Court on Equity and as a matter of prudence directs the petitioners to approach the trial Court by means of filing an interlocutory application on the original side and on such application being filed, and counter filed if any filed thereto, the trial Court is directed to dispose of the same in the manner known to law after providing due opportunity to necessary parties in the case and in any event to dispose of the said application within two months from the date of receipt of the copy of this order and to report compliance to this Court without fail. Consequently, the view taken by the Executing Court in R.E.A No. 39 of 2007 dated 17.04.2008, that it cannot go behind the tenor of the decree passed in O.S. No. 893 of 1981 is not correct perse in the eye of law and the same is hereby set aside in furtherance of substantial cause of justice. With these observations this civil revision petition is disposed of. Consequently connected M.P. No. 1 of 2008 is also closed.