

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On:16.12.2016

Pronounced On:21.12.2016

Coram

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1755 of 1997

Smt.P.Cecili

..Appellant/Plaintiff

/vs/

1.Smt.Devathal

2.N.Shanmugham(Senior) alias

Sadaiyappan, S/o late K.nachi

(Aria Section), Kamala Mills Ltd.,

Uppilipalayam P.O., Coimbatore 641 015.

3.N.Shanmugham (Junior),

S/o late K.Nachi,

(Spinning Section),

Kamala Mills Ltd.,

Uppilipalayam P.O.,

Coimbatore 641 015.

4.Smt.Nagammal

5.Lakshmi

6.The N.G.R.Industrial Mill Workers

Co-operative House Construction Society Ltd.,

Coimbatore K.1704,

rep.by its President,

70, V.O.c.Road, N.G.R. Nagar,

Varadarajapuram, Coimbatore-15.

7.The Deputy Registrar of the

Co-operative Housing Society,

A.T.C.Colony, V.O.C. Park,

Coimbatore 641 018.

Respondents /Defendants

2 to 6, 1 & 7

Second Appeal filed under Section 100 of the Civil Procedure Code against the decree and judgment of the learned Principal District Judge, Coimbatore daed 18.07.1996 passed in A.S.No.120 of 1995 setting aside the decree and judgment of the learned Principal District Munsif, Coimbatore dated 24.04.1995 passed in O.S.No.907 of 1991.

For Appellant :Mr.A.S.Vijayaraghavan
For Respondents:Mr.J.Hariharan for
Mr.V.Nicholas for R1 to R5
R6 and R7-dismissed on 16.4.2007

JUDGMENT

The plaintiff is the appellant herein. The suit is for specific performance and mandatory injunction to transfer 17 shares of the first defendant's Society held in the name of one K.Nachi to the name of the plaintiff. The trial Court has allowed the suit as prayed for. On appeal, the first appellate Court has reversed the trial Court's finding and dismissed the appeal.

2. The brief facts leading to this Second Appeal is as under:-

The first defendant-Housing Society with the financial assistance of the Government constructed 112 houses for its members and allotted to them on lease-cum-sale agreement for a period of 25 years. One Mr.K.Nachi, the husband of the second defendant, who was holding 17 shares in the Society was allotted house bearing No.10, in the year 1963. After the month of March 1976, the said K.Nachi was not able to pay the monthly installments. Hence, on 23.06.1977, he entered into an agreement of sale with the plaintiff Smt.Cecili a non-member of the society. As per the sale agreement-Ex A-1, the sale consideration for the suit property was fixed at Rs.14,000/- and advance of Rs.3,000/- was paid on the date of agreement. It was agreed to pay Rs.7,000/- on or before 25.08.1977 and the balance amount to be paid at the time of registration. Accordingly, on 23.06.1977 the plaintiff paid Rs.7,000/- and got the possession of the property as per the terms. Later, a further sum of Rs.2,000/-, Rs.200/-, Rs.100/- and Rs.200/- were paid by the plaintiff towards the sale consideration and a document Ex.A-4 was obtained from K.Nachi to that effect on 31.01.1982. Since sale deed could be executed only after completion of the lease period of 25 years, the parties were waiting for it to complete. By the time, K.Nachi died on 10.06.1984 leaving behind his wife the 2nd defendant and his four children defendants 3 to 6.

3. On 21.7.1984 the plaintiff caused notice to the defendants which was promptly replied denying the plaintiff's claim. On 11.02.1988 the 25 years period was completed. The plaintiff approached the first defendant Society to execute the sale deed in her favour based on the sale agreements Ex.A-1 and Ex.A-4 executed by K.Nachi. Since the Housing Society did not

consider her request, the plaintiff has filed the suit, which is now the subject matter of the appeal.

4. The first defendant contested the suit on the ground that under Section 156 of the TamilNadu Co-operative Societies Act, 1961, the decision of the Society officials cannot be called in question by a Civil Court. The by-laws of the first defendant's Society prohibits alienation of the house allotted to a member, without the knowledge and prior permission of the Society. While so, the alleged sale agreement by the plaintiff with the late K.Nachi is not binding on them being in violation of the terms and condition of the allotment.

5. The other defendants 2 to 6 in their written statement contented that, though the house was allotted in the name of K.Nachi, the monthly installments were paid only by the family members of K.Nachi. Therefore, K.Nachi has no right to alienate the suit property. There was no sale agreement entered between the plaintiff and K.Nachi as alleged. Ex A-4 is a forged document. The possession of the property was not delivered to the plaintiff as per the terms of the alleged agreement Ex.A-1. The plaintiff was inducted into the property only as a tenant under K.Nachi. For arrears of rent for the period July' 1984, notice was issued to the plaintiff. Aggrieved by that, the plaintiff has filed the present suit in O.S.No.907 of 1991. Already Rent Control Proceedings in R.C.O.P.No.69/1981 is pending against the plaintiff. The suit has no merit for consideration and the same is liable to be dismissed.

6. The trial Court has framed the following issues:-

"1) Whether the plaintiff is entitled for the relief sought based on the agreement entered with K.Nachi ?

2) Whether the plaintiff is entitled for the prayer of mandatory injunction against the first defendant's Society to transfer 17 shares, each value at Rs.25/- to the plaintiff?

3) What other relief the plaintiff is entitled for?"

7. 5 witnesses and 28 documents on behalf of the plaintiff and 3 witnesses and 2 exhibits were marked on behalf of the defendants. The trial Court has after appreciating those evidences, allowed the suit.

8. In the appeal preferred by defendants 2 to 6, the first appellate Court has accepted additional documents on behalf of the appellants/defendants Ex.B-3 to B-6 and marked it, by consent. After re-appreciating the evidence, the first appellate Court has allowed the appeal, thereby dismissed the

suit.

9. Aggrieved by the reversal of the judgment, the plaintiff is before this Court as appellant. This Court before admitting the second appeal has cause notice to the respondents to hear him on admission.

10. The learned counsel appearing for the appellant submitted that, only the Civil Court is competent to grant relief of specific performance. Section 90 of the Tamil Nadu Co-operative Societies Act, 1961 has no scope to redress such grievance. Unfortunately, the first appellate Court, without any basis has reversed the finding of the trial Court. At the time of instituting the suit, the plaintiff was not a member of the Society. Therefore, Section 90 or 156 of the Tamil Nadu Co-operative Societies Act, 1983 is not applicable to the facts of the present case, since the plaintiff is claiming right of share, based on the agreement with K.Nachi.

11. Per contra, the learned counsel representing for the respondents submitted that, when the by-law of the Society prohibits alienation without permission of the society, so the alleged sale agreement is unenforceable and void abinitio. Such an agreement cannot be enforced through Court of law. Further, even according to the plaintiff/appellant, the plaintiff issued notice on 21.07.1984, which was replied by the defendants denying the alleged agreement and also specifically averred that his occupation in the premises is only a permissive occupation as tenant. In spite of denying the factum of agreement and refusal to execute the sale agreement as early as 29.08.1984, a re-joinder to the reply notice was sent from the plaintiff's counsel belatedly on 25.03.1985 and only on 11.04.1991 the suit was filed. Even assuming there was an enforceable agreement, the time limit for its performance has lapsed long back and the suit for specific performance is barred by limitation.

12. After hearing both sides, the following Substantial Question of Law is formulated for consideration :-

1) Whether the lower appellate Court erred in applying Section 90 or 156 of the Tamil Nadu Co-operative Societies Act, 1983 to de-suit the plaintiff?

2) Whether Ex.A-1 is an unenforceable agreement in view of the society by-laws ?

3) Whether the suit is barred by limitation and if so, whether the Court at second appeal stage adjudicate the issue of limitation in the absence of defence set up in

the pleadings?

13. Ex.B-3 is the by-laws of the Society. The relevant by-laws are as follows for determination of the Question of Law:

"By-law No.37(A)(7) would disclose that "No member of the society shall alienate any house site bought from the Society or house constructed with the loan taken from the Society except to a person who is a member of the Society or to one whom the Board of Directors is willing to admit as a member. The approval of the Registrar shall be obtained before such alienation if permitted by the Board of Directors"

By-law No.39(A)(vi) that "No member shall assign, subject or part with the possession of the property or any part thereof without the previous permission of the Board of Directors".

By-law No.49 that "If any dispute touching the business of the Society arises (a) among members, past members and persons claiming through members and deceased members; or (b) between a member, past member or person claiming through a member, past member or deceased member and the Society, its committee or any officers, agent or servant of the society; the Registrar may on receipt of such reference decide the dispute for himself or transfer it for disposal to any person who has been invested by the State Government with powers in that behalf or refer it for disposal to arbitrator or arbitrators."

14. On a reading of the above by-laws, it is clear that transfer of the house allotted to members is restricted subject to certain conditions, but not totally prohibited. Ex.B-6-membership entrance register reveals that the plaintiff was admitted as a member of the first defendant Society on 31.12.1990. Therefore, alienation of the house allotted to one member to another member is permissible under the by-law. Though the sale agreement was entered by the plaintiff, when she was not a member, the infirmity at the time of inception has been rectified, after she was admitted as member of the Society. Further, P.W.5 the Secretary of the Society admits both in the chief examination as well as in his cross examination that the Society cannot by a resolution transfer the property in favour of the plaintiff. They can do so either on the proceedings of the Additional Registrar of Co-operative Societies or on the direction of a Court decree. Therefore, the agreement is not per se unenforceable as contented by the learned counsel for the respondents. The agreement Ex.A-1 and letter Ex.A-4 disclose the

consensus ad-idem between the buyer and the seller. Both were aware of the restrictions on alienation. Having received part sale consideration and being a party to the document by affixing the thumb impression, the second defendant is esstoped from questioning the validity of the sale agreement. Further, the defendants admit that the plaintiff is in possession of the suit property since 1977. Their specific case is that the plaintiff was put in possession as tenant for a rent of Rs. 200/-. Though they have pleaded that they have initiated rent control proceedings against the plaintiff for default in payment of rent, no document has been produced to substantiate it. In the absence of evidence, negative inference ought to be taken.

15. Sections 90 and 156 of the Tamil Nadu Co-operative Societies Act, 1983 read as follows:

Section 90-Disputes-(1)if any dispute touching the constitution of the board or the management or the business of a registered society(other than a dispute regarding disciplinary action taken by the competent authority constituted under sub-section (3) of Section 75 or the Registrar or the Society or its board against a paid servant of the Society)arises-

(a)among members, past members and persons claiming through members, past members and deceased members; or

(b)between a member, past member or person claiming through a member, past member or deceased member and the society, its board or any officer, agent or servant of the society, or

(c)between the society or its board and any past board, any officer, agent or servant or any past officer, past agent or past servant, or the nominee, heirs or legal representatives of any deceased officer, deceased agent, or deceased servant of the society, or

(d)between the society and any other registered society, such dispute shall be referred to the Registrar for decision.

"Section 156-Bar of jurisdiction of Civil Court-Not withstanding anything contained in any other law for time being in force, no order or award passed, decision or action taken or direction issued under this Act by an arbitrator, a liquidator, the Registrar or an officer authorised or empowered by him, the Tribunal or the Government or any officer subordinate to them, shall be liable to be

called in question in any court and no injunction shall be granted by any court in respect of anything which is done or intended to be done by or under this Act."

16. The relief sought is specific performance of a contract entered between two individuals. On the date of presenting the suit, the plaintiff was a member and the defendants 2 to 6 were claiming right through K.Nachi whose membership dates back to 1960. However, the parties have failed to bring to the notice of the Courts below that the plaintiff was admitted into membership of the first defendant Society on 31.12.1990 prior to suit and the prayer for mandatory injunction is infructuous. Only in the first appeal, the membership detail has been produced and marked as Ex.B-6 by consent. Section 90 of the Tamil Nadu Co-operative Societies Act, 1983 provides for the procedure regarding settlement of disputes among the members. Section 156 of the Tamil Nadu Co-operative Societies Act, 1983 bars the civil Court jurisdiction on actions of the Registrars, Arbitrators or Liquidators or any officers authorised exercised under the Act.

17. From the evidence let in by both the parties, it is seen that the defendant 2 to 6 have caused notice Ex.B-1 to the President of the first defendant Society on 16.06.1988 not to transfer the property in favour of the plaintiff. In turn, the plaintiff has issued Ex.A-14-notice dated 11.7.1988 to the Society to adjudicate the dispute regarding transfer of the demise property in her favour. The Society has not acted upon these notices. Under these circumstances, the plaintiff has no other alternate, except to approach the Civil Court which has jurisdiction to redress her grievance.

18. In the judgment of the Hon'ble Supreme Court in DHULABHAI AND OTHERS v. THE STATE OF MADHYA PRADESH AND ANOTHER dated 5th April, 1968, the Hon'ble Supreme Court, while considering the scope and ambit of Section 9 of Code of Civil Procedure, has observed as under:-

"Section. 9 of the Code of Civil Procedure. How Section 9 operates is perhaps best illustrated by referring to the categories of cases, mentioned by Willes, J. in Wolverhampton New Waterworks co. v. Hawkesford(1)-They are :

"One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the

statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides, no particular form of remedy : there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it..... The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class."

Undoubtly, the grievance of the plaintiff touches upon her civil rights and the provisions of Co-operative Societies Act either Section 90 or Section 156 does not provide for complete redressal of grievance before the tribunal or by any other mode of redressal mechanism. In fact, the evidence indicates that the plaintiff attempted to get redress by approaching the 7th defendant, but it ended in vain. Therefore, the plaintiff had approached the Civil Court under common law to enforce the sale agreement executed by K.Nachi. The plaintiff has elected the common law remedy, by necessary implication in view of the failure on the part of the 7th defendant to act on the Ex.B14.

19. The learned counsel for the respondents submitted that, though the defendants did not raise the plea of limitation, being a mixed question of law and fact, it can be adjudicated even in the absence of pleading. In support of this proposition he relied upon judgment of this Court in [Ranganathan -vs- Narayanan reported in 2015 (3) CTC 1] in which para 8,9 and 10 read as follows:-

"8. The first and foremost contention of the learned counsel for the appellant is in respect of the first Substantial Question of Law. According to him, in the absence of the plea of limitation raised either in the written statement before the trial Court or in the appeal memorandum before the lower appellate Court, the lower appellate Court ought not to have raised the question of limitation itself to answer the same.

9. In my considered opinion, this argument overlooks the statutory provision contained in Section 3 of the Limitation Act (hereinafter referred to as, 'the Act'). Section 3(1) of the Act reads as follows:

"3. Bar of limitation-(1) subject to the provisions contained in Sections 4 to 24

(inclusive), every suit institute, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence". Thus, a plain reading of the above would make it undoubtedly clear that it is the duty of the Court to verify as to whether the suit has been filed within the period of limitation irrespective of the fact as to whether the limitation has been set up as a defence or not and if it is found that the suit has not been filed within the period of limitation, the only option left open for the Court is to simply dismiss the suit on the sole ground that the suit is barred by limitation.

10. Order 7, rule 11 of C.P.C., also says that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. Here, the suit is barred by the Limitation Act. Therefore, in this case, de hors the fact that no plea of limitation was taken by the defendant, the trial Court ought to have rejected the plaint as barred by limitation or to have dismissed the suit as barred by limitation. The trial Court failed to do so. But, the lower appellate Court rightly went into the question and held that the suit is barred by limitation. In this finding, I do not find any illegality. Thus, the first Substantial Question of Law is answered in favour of the defendant."

20. Going by the above citations, in the light of Section 3 of the limitation Act, if the defendants could establish that the suit for specific performance is barred by limitation, de hors the fact that no plea of limitation was taken by the defendants, it can be entertained even in the second appeal.

21. In this case, it is an admitted fact that sale deed can be executed only on expiry of 25 years and after payment of entire installments. Therefore, the cause of action arises only on expiry of 25 years from the date of allotment order. The pass book Ex A-7 issued in the name of K.Nachi reveals that the allotment was made on 11.02.1963 and the payment of monthly instalments has begun thereafter. The documentary evidence as well as ocular evidence goes to show that the cause of action to seek specific performance commences from 11.02.1988. The plaintiff has caused Ex A-13 notice dated 12.05.1988 to the defendants 2 to 6 calling upon them to receive the balance sale consideration and arrange for the execution of sale deed by the Society in favour of the

plaintiff. Since the defendants 2 to 6 have failed to respond positively, the plaintiff has issued notice Ex A-14 dated 11.07.1988 to the seventh defendant Society requesting them to hold enquiry and give appropriate directions to the first defendant Society to execute the transfer deed. Therefore, from these documents, it is undisputable clear that the right to seek transfer of property accrues only after the expiry of 25 years from the date of allotment and that date is 11.02.1988. Under Article 54 of the Limitation Act, 1963 the period of limitation has to be computed from the date on which, the plaintiff has noticed that performance refused.

22. Peculiar to the fact of this case, the sale deed has to be executed by the first defendant Society and not by the defendants 2 to 6. Till date, the Society has not transferred the property either to K.Nachi or to his legal heirs or to the plaintiff. After the right to seek transfer of property accrued, the plaintiff has caused notice to perform the contract vide Ex A-13 and Ex A-14. Therefore, the date of refusal of performance of the contract has to be reckoned from the date of notices to the defendants and not earlier to that. Since the right and obligation to perform commences after 11.02.1988 and only thereafter, any refusal to perform becomes meaningful. The date of refusal could be at the earliest on 11.05.1988 only. Therefore, on facts since the suit has been filed on 11.04.1991 within three years from the commencement of limitation, the question of law raised on this score is held to be unsustainable. Hence, the Substantial Questions of Law formulated are held in favour of the appellant.

23. In the result, the Second Appeal is allowed. The judgment and decree of the first appellate Court in A.S.No.120 of 1995 is set aside and the judgment and decree of the trial Court in O.S.No. 907 of 1991 is confirmed. No order as to costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

The Principal District Munsif, Coimbatore.

The Principal District Judge, Coimbatore.

+1 cc to Mr.A.S.Vijayaraghavan Advocate sr 74876

+1 cc to Mr.V.Nicholas Advocate sr 74578

S.A.No.1755 of 1997

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