

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 17TH DAY OF FEBRUARY 2017

THE HON'BLE MR.JUSTICE P.VELMURUGAN

A.No.6283 to 6285 of 2016

in
C.S. No.209 of 2008

Chevalier T.Thomas Educational Trust,
Represented by its Trustees,

1. Justice Mr.J.Kanakaraj (Retd)
2. L.Palamalai (I.A.S. (Retd))
3. Dr.Miss V.A.Vasantha
4. Mrs.Leela John
5. V.Devarajan
6. Mrs.Mary Vijayan
7. Mrs.Vivien Stuart
8. M. Dhanraj

Office at No.16, St.Marys Road,
Sembium, Chennai-11.

...Plaintiff

-Vs-

M/s.Union Carbide Employees Co-Operative
House Building Society Ltd.,
Represented by its Special Officer,
/Deputy Registrar Housing
No.1075, Tiruvottiyur High Road,
Chennai-600 019.

...Defendant

A.No.6283 to 6285 of 2016:-

M/s.Union Carbide Employees Co-Operative
House Building Society Ltd.,
Represented by its Special Officer,
/Deputy Registrar Housing
No.1075, Tiruvottiyur High Road,
Chennai-600 019.

...Applicant/Defendant

-Vs-

Chevalier T.Thomas Educational Trust,
 Represented by its Trustees,
 1. Justice Mr.J.Kanakaraj (Retd)
 2. L.Palamalai (I.A.S. (Retd))

3. Dr.Miss V.A.Vasanth
 4. Mrs.Leela John
 5. V.Devarajan
 6. Mrs.Mary Vijayan
 7. Mrs.Vivien Stuart
 8. M. Dhanraj
 Office at No.16, St.Marys Road,
 Sembium, Chennai-11.

...Respondent/Plaintiff

A.No.6283 of 2016:-

Application praying that this Hon'ble Court may be pleased to direct the respondent/Plaintiff to deliver the vacant possession of the suit schedule property and pay costs.

A.No.6284 of 2016:-

Application praying that this Hon'ble Court may be pleased to rescind the Sale Agreement dated 31.03.1999 entered between Plaintiff and the defendant with respect to the suit schedule property and pay cost.

A.No.6285 of 2016:-

Application praying that this Hon'ble Court may be pleased to direct the respondent/Plaintiff to pay the damages to a tune of Rs.1,00,000/- (Rupees One Lakhs only) for rents and profits from 1.04.1999 till the date of delivery of the vacant possession of the suit schedule property and pay costs.

These applications coming on this day before this court for hearing the court made the following order:

All the three applications are filed by the applicant/defendant and the respondents herein are the plaintiffs in the main suit. The applicant filed common affidavit in all the applications.

2. The applicant/defendant in the common affidavit averred that the suit is filed for specific performance of the sale agreement dated 31.03.1999 with respect to the schedule mentioned property. According to the applicant, the agreement was executed on 31.03.1999 for sale of the suit property for Rs.35,80,633/- and sum of Rs.5,00,000/- was paid as advance and the plaintiff was put in possession on the basis of the part performance of the agreement. On 08.09.1999, further a sum of Rs.5,00,000/- was paid. The agreement provided for further payment of 50% of the total value of the property before June 1999 and that on fulfilling the condition, the possession would be handed over to the respondents/plaintiffs. The respondents made further payment of Rs.5,00,000/- as against the payment of Rs.17,90,316 provided in the agreement. The respondents have entered into property without fulfilling the conditions in the agreement and the respondents are now holding unauthorised possession of the property till date.

3. The respondent was given time upto 1999 for payment of 50% of the price of the land and the balance amount of

Rs.7,90,317/- within one year from the date of agreement. But, the respondents failed to pay the amount and the period of agreement was not extended by the applicant at any point of time as claimed by the respondents.

4. This Court by an judgment and decree dated 14.11.2014, passed the following judgment :-

"That the plaintiff herein be and is hereby directed to deposit a sum of Rs.80,83,829 (Rupees Eighty Lakhs Eighty Three Thousand Eight Hundred and Twenty Nine only) into this Court to the Credit of the suit CS.No.209/2008 within a period of three months from this date (i.e,) on or before 14.02.2015.

(2)That on such deposit within time as mentioned in clause (i)supra the defendants herein be and is hereby directed to execute a sale deed for 6 grounds only from the property morefully set out in the schedule hereunder including the portion which is in the possession of the plaintiff herein.

(3)That in default of executing the sale as mentioned in clause (2) supra, the Assistance Registrar (OS) of this Court do execute such sale deed in favour of the

plaintiff herein and on behalf of the defendant herein.

(4) That there shall be no cost of this suit."

5. The respondents not complied with the conditions set forth in the decree for depositing the sum of Rs.80,83,829/- within the stipulated period of three months from the date of the said decree on or before 14.02.2015. On 28.03.2016, the applicant issued legal notice to the respondents to deliver vacant possession of the entire suit property in its original position by removing all the superstructure and hand over the vacant possession on 01.05.2016. The applicant claimed damages for usage and occupation for a sum of Rs.1,00,000/-p.m. from 01.04.1999 to till date. After receipt of the said notice, the respondents issued reply notice dated 04.04.2016 as false allegations.

6. The applicant has filed these three applications, A.No.6283 of 2016 is filed to direct the respondents/plaintiffs to deliver vacant possession of the suit schedule property; A.No.6284 of 2016 is filed to rescind the sale agreement dated 31.03.1999 entered into between the plaintiff and the defendant; and A.No.6285 of 2016 is filed to direct the respondents/plaintiffs to pay

the damages of Rs.1,00,000/-p.m. for rents and profit from 01.04.1999 to till date of delivery of possession of the suit schedule property.

7. The respondents/plaintiffs filed their common counter stating that an appeal has been filed against the original decree, an appeal is a continuation of the suit, a decree can be executed only after the outcome of the appeal, any proceedings pending before the appellate court and the matter is sub-judice any further proceedings pursuant to a decree is not permissible in law. In the present suit section 28 of the Specific Relief Act will not be applicable, in the written statement the applicant has not pleaded that they are entitled for the use and occupation of the suit property. The agreement stipulates condition for default of terms by the respondents, the applicants prior to the suit had only claimed interest on the balance sum to be paid by the plaintiff. The provision refers that the vendor/lessee is entitled to seek for rescind of the agreement, if the plaintiff has not paid the purchase money or any sum thereof to the defendant. The terms purchase money refers to the contractual sum mentioned in the agreement, the other money also refers in the context of the agreement if it stipulates or specifies any interest, damages, or compensation to be paid by the purchaser, the provision cannot be equated to the facts of the suit in hand. Admittedly, the agreement of sale does

not specify any sum other than the consideration money. Unfortunately, the Court had fixed the price for the property to be conveyed, the extent of the property has also been altered or varied and the court directs the plaintiff to pay the said amount. There is no default clause or payment of interest or compensation or redelivery of possession, in as much as the clauses contained in the agreement do not refer to the rights of the vendor in the default committed by the purchaser, the applicant can invoke the provision and seek for rescind of agreement or recovery of possession or payment of damages.

8. The entitlement of the parties to the proceedings has to be in conformity of the terms of the contract only. The decree for specific performance cannot be made on different terms of an agreement. Thus, the distinction to be noted in this situation referred to in Section 28 is that the amount stipulated by the Court on the basis of the agreed amount referred to in the agreement of sale and not any other amount as it has been done in this suit. Under Section 28(3) of the Specific Relief Act, it has been held that the Court may on an 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 :-

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

9. The application has been sworn by a person claiming to be the President of the Society. Admittedly, the suit has been filed against the society represented by the Special Officer/Administrator. No reason has been set out in the affidavit as to why and how the applicant is represented by the President. In law, if the application is not preferred by a proper person, the application is non est and liable to be rejected.

10. Heard the rival submissions made on both sides and perused the records.

11. The short points for determination are that (i) whether the applicant is entitled to the relief of sale agreement dated 31.03.1999 entered into between the parties is with respect to the suit property is to be rescind. (ii)Whether the applicant is entitled to get delivery of vacant possession of the suit schedule property from the respondents and (iii)Whether the applicant is entitled to get damages from the respondents to the tune of Rs.1,00,000/- towards rent and profits from 01.04.1999 till date.

12. As far as the point No.1 is concern, the counsel for the applicant would submit that the respondents have not complied with the conditions set forth in the decree

for depositing a sum of Rs.80,83,829/- within the stipulated period of three months from the date of the said decree i.e, 14.11.2014. The applicant issued legal notice to the respondents on 28.03.2016 to vacate and hand over the possession of the entire 13 grounds and 1852sq.ft in S.No.57/1, Kodungaiyur Village at Tondiarpet, Chennai in its original position, removing all the superstructure and handover the same on 01.05.2016. After receipt of the notice, the respondents sent reply notice dated 04.04.2016 by negating the demands.

13. The learned counsel for the respondents would submit that the decree is not inconsonance with the agreement and also the decree is not in accordance with law. Aggrieved with the judgment and decree passed by this Court, the respondents have preferred OSA before the Division Bench of this Court. Unfortunately, the same is not yet been numbered and it was once returned and the respondents represented the same, the appeal is in continuance of the suit, until the appeal is disposed of, the present applicant is not entitle to invoke Section 28 of the Specific Relief Act and he placed reliance on the following judgments :

(i) **(2011) 2 CTC 53 - N.V.SM.Anandvale v.**

K.T.Santhanakrishnan, this Court referred the

<https://hcservices.ecourts.gov.in/hcservices/> scope of Section 28 of the Specific Relief Act,

1963 and held that the judgment passed in a Specific Performance suit is only in the nature of preliminary decree and by passing the decree court does not lose its jurisdiction over the matter or it does not lose its jurisdiction over the matter or does become functus officio on passing the decree. If there is default on the part of the plaintiff the defendant is given the right to approach the Court under Section 28 of the Act for getting not only the preliminary decree erased but also the very root of the preliminary decree, namely the very agreement to sell.

(ii) (2007) 2 SCC 230 - **Raghunath Rai Bareja and another V. Punjab National Bank and others** held that consideration of equity cannot prevail and do not permit High Court to pass an order contrary to law.

(iii) (2013) 5 SCC 470 - **Rajasthan State Industrial Development and Investment Corporation and another V. Diamond & Gem Development Corporation Limited and another**, wherein it is held that the contract is to be interpreted giving the actual meaning to the

permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be constructed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely.

(iv) **(2014) 15 SCC 529 - Rajinder Kumar v. Kulpeep Singh and others** wherein the Hon'ble Supreme Court held that a suit for specific performance does not come to an end on passing of a decree and the Court which passed the decree retains control over the decree even after the decree has been passed and the decree is sometimes described as the preliminary decree. A decree for specific performance is a decree in favour of both the plaintiff and the defendant in the suit, the decree can be executed by the plaintiff or the defendant. The plaintiff or the defendant is also free to approach the Court for appropriate

ambiguity or supervening factors making the execution of the decree unexecutable.

Hence, the applications filed by the applicant is premature till the disposal of the OSA and these applications are liable to be deferred and prays for dismissal of the applications.

14. On careful perusal of the common affidavit filed by the applicant and the common counter filed by the respondents and after hearing the submissions made by both the counsel on record and on reading of the Section 28 of the Specific Relief Act and on perusal of the judgment and decree dated 14.11.2014. There is no quarrel with the legal proposition as laid down in the judgments referred by the learned counsel for the respondents. Considering the facts and circumstances of the applications on hands, the above referred decisions cited are not applicable to the present case on hands.

15. In this regard, it is relevant to refer, the result portion of the judgment and decree of this Court dated 14.11.2014 reads as follows :

"In the result, the suit is decreed directing the plaintiff to deposit Rs.80,83,829/- within a period of three months from the date of decree and on such deposit, the defendants are directed to

execute a sale deed for 6 grounds only from the schedule of property including the portion which is in the possession of the plaintiff, failing which, the Court shall execute such sale deed. No costs."

16. Further, it is relevant to refer Section 28 of the Specific Relief Act reads as follows :

28. Rescission in certain 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 the 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.

<https://hcservices.ecourts.gov.in/hcservices/> (2) Where a contract is rescinded under sub-section (1), the court-

(a) shall direct the purchaser or the 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 rents 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.

17. On perusal of the provisions under Section 28 of the Specific Relief Act, if there is default on the part of the plaintiff the defendant is given the right to approach the Court under Section 28 of the Act for getting not only the preliminary decree erased but also the very root of the preliminary decree, namely the very agreement to sell. Such right relating to cause of action itself once decided under Section 28 of the Act by the rescinding the very agreement.

18. As contended by the applicant, it is not in dispute that in the judgment and the decree there was a specific direction to the plaintiff to deposit the fixed sale price of Rs.90,83,829/- after deducting Rs.10,00,000/- already deposited by the respondents/plaintiffs even prior to the suit. This Court directed to deposit Rs.80,83,829/- within three months from the date of decree and on such deposit, the defendant is directed to execute a sale deed for six grounds only from the schedule of the property including the portion which is in the possession of the plaintiffs.

19. Admittedly, the conditions were not complied with by the respondents, the applicant also issued legal notice

to the respondents on 28.03.2016, after receipt of notice, the respondents sent reply denying the demands of the applicant. It clearly shows that the conditions imposed in the judgment and decree has not been complied with, even after issuing legal notice also, within the stipulated time.

20. The only contention raised by the respondents/plaintiffs is that the judgment and decree is against the proposition of law and the respondents challenged the same by way of OSA before the Division Bench of this Court. But, the OSA is not yet been numbered and it was returned once, the counsel is not able to say the stage of the appeal. Even assuming that an appeal is pending, when there is no stay, the respondents have not complied with the conditions stipulated in the decree. The applicant is entitled to file the application under Section 28 of the Specific Relief Act, seeking the relief as stated supra. The respondents have not complied with the conditions imposed in the decree, the applicant rightly invoked Section 28. As discussed above, the decree has either been set aside or stayed and even no appeal number is given, the respondents have stated that they have preferred OSA and no stay has been granted with regard to the execution of operation of the decree. Since, the appeal is not yet been numbered till date, this Court need not wait till the outcome of the appeal. The respondents

have not complied with the conditions imposed by this Court in the decree and hence, the applicant is entitled for the relief as prayed for in the application in A.No.6283 of 2016, the point No.1 is answered in favour of the applicant.

21. On perusal of the decree, the respondents have not deposited the stipulated amount, hence, the applicant has invoked Section 28 of the Specific Relief Act and the applicant is entitled for recovery of vacant possession. There is no dispute with regard to the possession, admittedly, the respondents are in possession and they are running school in the said suit property. Therefore, once the contract is rescinded the respondents are liable to vacate and handover the possession, and hence the applicant/defendant is entitled to get vacant possession. The respondents are liable to remove the superstructure and hand over the vacant possession as contemplated under Section 28 of the Specific Relief Act and the point No.2 is also answered in favour of the applicant.

22. As far as claiming damages for use and occupation is concerned, the applicant has not stated how he has arrived Rs.1,00,000/- towards compensation from 01.04.1999 to till date. For claiming compensation/damages there must be some basis. As stated, the applicant handed over the vacant possession, during the relevant period what is the

rental value for the suit property, neither the documentary nor oral evidence is available, on what basis the applicant

has arrived at conclusion that the applicant is entitled for Rs.1,00,000/-p.m. The applicant can file separate application for claiming damages in accordance with law. The applicant is at liberty to file fresh application in accordance with law and establish the same in the manner known to law, for claiming damages towards rent and profits. Hence, the point No.3 is answered accordingly.

23. In fine, the Applications in A.Nos.6283 and 6284 of 2016 are ordered as prayed for. With the above terms, the Application in A.No.6285 of 2016 is disposed of.

sd/.P.V.M.J
17/02/2017

//Certified to be true copy//

Dated at Madras this the day of 2017.

COURT OFFICER(O.S.)

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