

Vasantha Viswanathan & Ors vs V.K. Elayalwar & Ors on 24 August, 2001

Equivalent citations: AIR 2001 SUPREME COURT 3367, 2001 (8) SCC 133, 2001 AIR SCW 3304, 2001 (3) ARBI LR 110, 2001 (5) SCALE 483, (2001) 6 JT 622 (SC), 2001 (6) JT 622, 2001 (8) SRJ 512, 2002 (1) ALL CJ 642, (2001) 4 CIVLJ 551, (2002) 2 CIVILCOURTC 265, (2001) 3 ARBILR 110, (2001) 6 ANDHLD 107, (2001) 6 SUPREME 442, (2001) 4 RECCIVR 469, (2001) 5 SCALE 483, (2001) WLC(SC)CVL 750, (2001) 2 UC 464, (2001) 45 ALL LR 206, (2001) 4 ALL WC 2789, (2001) 3 BLJ 2289, (2002) 1 CURLJ(CCR) 500

Author: B.N.Agrawal

Bench: V.N. Khare, B.N. Agrawal

CASE NO.:

Appeal (civil) 599-600 of 1997

PETITIONER:

VASANTHA VISWANATHAN & ORS.

Vs.

RESPONDENT:

V.K. ELAYALWAR & ORS.

DATE OF JUDGMENT: 24/08/2001

BENCH:

V.N. Khare & B.N. Agrawal

JUDGMENT:

B.N.AGRAWAL,J.

In these appeals by special leave judgment rendered by a Division Bench of Madras High Court has been impugned whereby the judgment and decree of the trial court dismissing plaintiffs suit have been set aside and suit has been decreed. While Civil Appeal No. 599 of 1997 has been preferred against the main judgment whereby the High Court has decreed the suit, Civil Appeal No. 600 of 1997 against that portion of the impugned judgment whereby the prayer, made on behalf of the

defendants for taking, joint application filed by the plaintiff and defendant no. 1 before Regional Transport Authority for permission to transfer 5 buses along with permits in favour of defendant no. 1, by way of additional evidence at the appellate stage, has been refused.

The plaintiff-respondent filed a suit bearing Title Suit No. 261 of 1982 in the Court of Subordinate Judge at Salem for appointment of a Commissioner for fixing price of 5 buses and their routes fully described in Schedule 'B to the plaint and thereafter decree the suit for the amount so ascertained against defendant nos. 1 and 4 to 7. Further prayer was made for rendition of accounts in respect of profits derived by the aforesaid defendants from plying of the aforesaid vehicles from 17.8.1979 till the date of final decree and thereafter decree the suit for the said amount together with interest at the rate of 12% per annum.

Case of the plaintiff is that he was running the business of stage carriage transport and owned 18 or 19 buses in the year 1970 and as there were talks of legislation imposing a ceiling on number of stage carriage permits owned by an individual in the year 1970, the plaintiff entered into an agreement with the Ist defendant on 11.12.1970 under Exhibit A-1 for sale of 5 buses covered by the route permits. Pursuant to the said agreement, a joint application was made by the plaintiff and the Ist defendant in April 1971 before the concerned Regional Transport Authority for transfer of permits of 5 buses which was rejected on 5.7.1971 on the ground that Tamil Nadu Ordinance No. VI of 1971 was issued by the State Government fixing a ceiling limit of 10 permits to an individual operator and directing surrender of excess permits which came into force w.e.f. 18.6.1971. The Ist defendant thereafter preferred an appeal before the State Transport Appellate Tribunal against the aforesaid order of rejection whereas the plaintiff filed a writ petition in the Madras High Court challenging validity of the aforesaid Ordinance and during the pendency of the writ petition the proceeding before the Tribunal was stayed. During the pendency of the writ application and the aforesaid appeal, the Ist defendant sent a letter dated 31.1.1972 (Ex. A-2) to the plaintiff in which, after referring to the pendency of the aforesaid cases, it was stated that the Ist defendant would pay price of the buses covered by the permits as may be ascertained after the passing of an order of transfer of permits and take delivery of the vehicles after such payment. In the said letter it was also stated that no amount of sale price had been paid by the Ist defendant to the plaintiff till then. Subsequently the writ application was allowed and the provisions fixing a ceiling of 10 permits in the Ordinance which was by then replaced by an Act were struck down as constitutionally invalid. After the said judgment, the Tribunal allowed the appeal filed by the Ist defendant and directed the concerned Regional Transport Authority to transfer the permits in favour of the Ist defendant whereupon the same were transferred on 21.4.1979 and till then the buses were in possession of the plaintiff.

According to the plaintiff, Ist defendant filed a suit bearing Title Suit No. 1769 of 1979 in the Court of District Munsif, Salem, for permanent injunction restraining the plaintiff from interfering with his possession and enjoyment of the aforesaid 5 buses stating therein that the Ist defendant became owner of the vehicles on 11.12.1970 under the agreement, Exh. A-1, referred to above, permits were transferred in his favour on 21.4.1979 and the plaintiff employed anti- social elements to prevent the Ist defendant from plying the buses which necessitated filing of the suit. In the said suit, prayer for temporary injunction was made and an ex-parte order of injunction was passed. According to the plaintiff, the Ist defendant made use of the said order and took forcible possession of the buses from

the plaintiff with the help of police. The plaintiff appeared in the said suit and also filed an application for injunction restraining the Ist defendant from alienating the buses and the route permits. On the said application for injunction, the Ist defendant gave an undertaking that he would not alienate the vehicles and the permits in favour of anybody which undertaking was duly recorded by the District Munsif. As the Ist defendant took forcible possession of the vehicles and did not pay the price, the same necessitated filing of the present suit.

The Ist defendant filed a written statement contesting the claim of the plaintiff. According to him, he was the relative of the plaintiff and he and his father joined services of plaintiff's father in or about the year 1949 and he was treated more or less as a member of the family. There was no stipulation for payment of any salary and he was being paid money as and when required with a view to give him a good status in life. Keeping this in mind, the plaintiff, after death of his father, executed some sale deeds in favour of the Ist defendant in relation to certain lands and also sold five buses along with their permits to him under the agreement, Exhibit A-1. The consideration for the aforesaid agreement, Exhibit A-1, was that the Ist defendant should discharge the debts against the plaintiff which were duly discharged before 21.4.1979 when the permits were transferred. The ownership of the vehicles along with permits passed on to the Ist defendant upon the execution of the document, Exhibit A-1, though the delivery of the vehicles was postponed till the transfer of permits and after the same were transferred, the plaintiff delivered physical possession of the five buses to the Ist defendant. The Ist defendant denied execution of letter dated 31.1.1972, Exhibit A-2, stating that the plaintiff had with him his signatures on blank papers, one of which was used for fabricating the letter, Exhibit A-2. Original Suit No. 1769 of 1979 filed by the Ist defendant, referred to above, was withdrawn on 8.8.1983 and thereafter on the next day, i.e., on 9.8.1983 the Ist defendant and defendant nos. 4 to 6 filed a joint application before the Regional Transport Authority for transfer of 4 permits in favour of defendant nos. 4 to 6 stating therein that as the Ist defendant found it difficult to maintain the vehicles, he decided to transfer the same in favour of defendant nos. 4 to 6. On the same day, another application was filed by the Ist defendant and one T. Sundararajan for transfer of the 5th permit making similar statements and the said T. Sundararajan had later transferred the permit in favour of defendant no. 7. The applications for transfer of all the five permits were granted on 10.8.1983. In the written statement it was mentioned that sale of the permits by the plaintiff under Exhibit A-1 was opposed to public policy.

After the filing of the written statement, on prayer being made on behalf of the plaintiff, the two concerned Regional Transport Authorities were impleaded as defendant nos. 2 and 3 and transferees from Ist defendant as defendant nos. 4 to 7, who filed two written statements one by defendant nos. 4 to 6 and another by defendant no. 7 - and contested the suit taking defence similar to the Ist defendant. Their further claim was that they were bona fide purchasers for value and had no notice of the contract, Exhibits A-1 and A-2, between the plaintiff and the Ist defendant.

Both the parties in support of their respective cases led evidence. The trial court dismissed the suit after recording findings, inter alia, that the documents, Exhibits A-1 and A-2, were genuine, the agreement, Exhibit A-1, was against public policy as the same was executed to circumvent the provisions of an enactment which was going to be passed fixing a ceiling of permits for an individual which was later promulgated as Tamil Nadu Ordinance No. VI of 1971 and defendant nos. 4 to 7

were bona fide purchasers for value without notice.

Thereafter plaintiff preferred an appeal before the High Court in which on behalf of the defendants an application was filed to take on record the joint application dated 5.4.1971 filed by the plaintiff and defendant no. 1 before the Regional Transport Authority for transfer of the 5 buses along with their permits in favour of the Ist defendant by way of an additional evidence. The High Court, after rejecting the prayer for accepting the additional evidence, by the impugned judgment has allowed the appeal, set aside the judgment and decree passed by the trial court and decreed the suit in its entirety after recording findings, inter alia, that the document, Exhibit A-2, was genuine, the Ist defendant had taken forcible possession of the vehicles in question, the plaintiff continued to be owner of the vehicles as property therein did not pass on to the Ist defendant and consequently upon defendant nos. 4 to 7 as the price of buses covered by the permits was neither ascertained nor paid by the Ist defendant to the plaintiff, the agreement between the plaintiff and the Ist defendant for transfer of the vehicle covered by the permits was not illegal, defendant nos. 4 to 7 were not bona fide purchasers and had knowledge of the agreement entered into between the plaintiff and the Ist defendant. Against the aforesaid judgment, the present appeals by special leave have been filed by defendant nos. 4 to 7.

Shri Sudhir Chandra, learned Senior Counsel appearing on behalf of the appellants, in support of the appeal has raised various points. He submitted that the finding of the High Court that the Ist defendant took forceful possession of the vehicles in question is vitiated as all the circumstances have not been taken into consideration while recording the said finding. Shri K. Parasaran, learned Senior Counsel appearing on behalf of the plaintiff- Respondent, on the other hand, submitted that the High Court has recorded the aforesaid finding after taking into consideration all the relevant materials. We have been taken through the judgment and we find that it is not possible to interfere with the finding as the High Court has taken into consideration the entire evidence adduced on behalf of the parties and the circumstances before recording the said finding. Shri Sudhir Chandra made an attempt in vain for reappraisal of evidence by this Court on the said question, but since we have already held that the said finding has been arrived at by the High Court after taking into consideration all the relevant materials, it is not possible to accede to the prayer.

Shri Sudhir Chandra further submitted that the plaintiff was at the highest entitled to price of the vehicles in question and was not entitled to recover profits earned by the Ist defendant and later on by defendant nos. 4 to 7 from plying of the vehicles as property in the vehicles in question passed on to the Ist defendant on the day when the order for transfer of registration was passed by the Regional Transport Authority in view of the provisions of Section 31 of the Motor Vehicles Act, 1939 and Section 19 of the Sale of Goods Act, 1930, which lays down that if there is a contract for sale of a specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, has no application. Section 31 of the Motor Vehicles Act, 1939 lays down that where the ownership of any motor vehicle registered under Motor Vehicles Act is transferred, the transferor and transferee both are required to report the fact of transfer to the Registering Authority so that particulars of transfer of ownership may be entered in the certificate of registration. The transfer is not effected under Section 31 of the Motor Vehicles Act, 1939, but the same simply prescribes procedure for entering the factum of transfer in the

registration certificate, which is an act posterior to the transfer. The transfer of vehicles in question would be governed by the provisions of Section 19 of the Sale of Goods Act according to which property in the vehicle would pass to defendant no. 1 at such time as the parties to the contract intend it to be transferred. Thus the passing of property in the goods would be dependent upon the intention of the parties as evidenced from the contract. From the contract, Exhibits A-1 and A- 2, it would appear that the parties intended that after the registration formalities were completed, price of the vehicles covered by the permits would be ascertained and thereafter the same would be paid by the Ist defendant, entitling him to take possession of the vehicles. Thus the parties intended that property in the vehicles shall pass only after possession of the vehicles was delivered to the Ist defendant after completion of all the aforesaid formalities. In the present case, after registration formalities were completed, the value of the vehicles covered by the permits was not ascertained, much less paid, rather, on the other hand, possession was forcibly taken by the Ist defendant. Therefore, property in the vehicles did not pass to the Ist defendant as required under Section 19 of the Sale of Goods Act. As the Ist defendant had illegally taken possession of the vehicles which he was not entitled to ply, it has been rightly held by the High Court that the plaintiff would be entitled to profits earned by the Ist defendant and defendant nos. 4 to 7 from plying of the vehicles.

Mr. Sudhir Chandra also submitted that plaintiff is not entitled to profits derived by the Ist defendant and defendant nos. 4 to 7 from plying of the buses also on the ground as granting such a relief would amount to permitting the plaintiff to ply the buses on the permits which are not in his own name and that such a permit would be treated to be benami as Section 48A, as inserted by the Motor Vehicles (Tamil Nadu Second Amendment) Act (Act XVI of 1971), in Motor Vehicles Act, 1939, which came into force on the 18th June, 1971, which lays down that a Regional Transport Authority shall refuse to grant or renew a stage carriage permit if it appears to such authority that the application for such permit is benami. The question of benami was not pleaded by any of the defendants in the written statement and neither any issue framed nor raised before the trial court or before the High Court. Therefore, it is not possible to allow the defendants to raise the same, for the first time, before this Court, especially when it is not a pure question of law.

Shri Sudhir Chandra next submitted that the plaintiff was carrying on business of sale of permits which amounted to trafficking in permits and the same is prohibited by rule 199 of Tamil Nadu Motor Vehicles Rules, and as such the agreement in question for sale of 5 permits at a price to be ascertained was unlawful within the meaning of Section 23 of the Indian Contract Act, 1872 and accordingly it would be void in view of the provisions of Section 24 of the Indian Contract Act, 1872. In the written statement filed by the Ist defendant as well as the other defendants it has been simply stated that sale of permit was illegal and opposed to public policy. In the pleadings there is no whisper that the plaintiff was carrying on business of sale of permits. No issue was framed on this question in the trial court and no evidence was led by the defendants. The only question that was raised was that the agreement to sell permits was illegal as the plaintiff wanted to circumvent the provisions of law which were likely to be introduced soon fixing a ceiling of permit on individual. This question was raised for the first time before the High Court, which has recorded a finding, as stated above, that the agreement was not invalid. The question whether the plaintiff was trafficking in permits is not a pure question of law, but is a mixed question of fact and law both and for deciding the question of law, facts have to be first established by evidence. As in the present case,

there was neither any pleading on this question nor any issue framed or evidence led, it is not possible to allow the defendants to raise the same.

The further submission of Shri Chandra is that in any view of the matter, the High Court was not justified in passing a decree against defendant nos. 4 to 7 as there was no privity of contract between them and the plaintiff. The High Court has recorded a categorical finding that these defendants were not bona fide purchasers and had notice of the agreement between the plaintiff and the Ist defendant which finding has not been assailed before this Court. Learned Senior Counsel appearing on behalf of both the parties are in agreement that the High Court was not justified in holding that the present case would be governed by Section 52 of the Transfer of Property Act as the same applies to immovable property alone and not to movable. Section 58 of the Sale of Goods Act expressly lays down that subject to the provisions of Chapter II of the Specific Relief Act, 1877, in a suit for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. It further lays down that decree may be unconditional, or upon such terms and conditions as to damages, payment of price, or otherwise, as the court may deem just and the application of the plaintiff may be made at any time before the decree. Section 19(b) of the Specific Relief Act, 1877, which occurs in Chapter II, applies to moveables by virtue of the provisions of Section 58 of the Sale of Goods Act referred to above. Under Section 19(b) a specific performance of a contract can be enforced not only against either party thereto but against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of original contract. Further, Section 91 of the Indian Trusts Act, 1882 lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which a specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. Defendant nos. 4 to 7 had notice of the contract between the plaintiff and the Ist defendant and they were not bona fide purchasers, therefore, in view of the provisions referred to above, we are of the view that the High Court was quite justified in passing a decree against them as well.

Shri Chandra then submitted that the High Court was not justified in rejecting the prayer for additional evidence. The document sought to be brought on record by additional evidence, was the joint application filed on behalf of the plaintiff and the Ist defendant before the Regional Transport Authority. High Court has refused the prayer on the ground that the said document was not put to the plaintiff when he was deposing as a witness in the suit. Further ground for refusal of the prayer by the High Court was that the copy produced was not a certified copy as there was neither any seal of the court nor certificate of endorsement and on the face of the document it was copy of a true copy issued by the Regional Transport Officer. Shri Chandra could not point out any infirmity in the judgment of the High Court refusing the prayer for additional evidence on the aforesaid grounds.

The last submission of Shri Chandra is that in any view of the matter the High Court was not justified in awarding 12% interest per annum. In the documents, Exhibits A-1 and A-2, there is nothing to show that in case of failure by the Ist defendant to pay the price, the plaintiff would be entitled to any interest. In view of the said fact and in the facts and circumstances of the case, we are

of the view that the High Court was not justified in awarding interest.

In the result, the appeals are dismissed with modification in the impugned judgment to this extent only that the plaintiff shall not be entitled to any interest. In the circumstances of the case, there shall be no order as to costs.

.J. [V.N. KHARE] J. [B.N. AGRAWAL] AUGUST 24, 2001.