Madras High Court
K.M. Jaina Beevi And Ors. vs M.K. Govindaswami on 4 March, 1965
Equivalent citations: AIR 1967 Mad 369
Author: Veeraswami
Bench: Veeraswami, K Kutti
JUDGMENT Veeraswami, J.

(1) Appeal 26 of 1964: This appeal by the defendants turns on enforceability against the third defendant, a Muslim, minor, of an agreement which he had entered into on 12-2-1961 with the respondent to lease out premises No. 34 General Patters Road, Madras after reconstruction and put him back in possession thereof. The premises were purchased in the name of the minor in 1954. The respondent continued to be a tenant of a major portion of the premises even after the purchase. In November 1960, on behalf of the minor a notice to quit the premises was served on the respondent on the ground that the existing structure had to be pulled down and a new building raised with ground and first floors and that a plan of the proposed construction had already been sanctioned by the Corporation. The respondent replied on 22-11-1960 stating that there had been an oral discussion on the matter between him and the minor's father, the second defendant, and that it was agreed that the respondent might temporarily vacate the portion of the building under his occupation for the purpose of reconstruction and that when the reconstruction was over, he should be allowed to occupy the ground floor portion corresponding to the then existing plinth area of the reconstructed building. But, as the respondent did not vacate, a partition was taken out before the Rent Controller, Madras, under the provisions of the Madras Buildings (Lease and Rent Control) Act 1960, for his eviction. Pending this petition there would appear to have been negotiations between the second defendant and the respondent which eventually fructified into the suit agreement. In view of it, the respondent submitted to an eviction order and surrendered possession on 18-4-1962. The agreement was between the respondent and the minor, then 13 years of age, represented by his motherland guardian, the first defendant. The agreement was, however, executed by the second defendant in his capacity as the power of attorney agent of the first defendant. The actual agreement was that the minor would allow the respondent to occupy the whole of the ground floor as soon as the same was built up and provide for payment of a specified monthly rent and an advance.

On 1-8-1962, the respondent gave a suit notice complaining of failure to abide by the terms of the contract and calling upon the defendants to complete the construction and put him in possession of the stipulated portion therein. This was later on followed by the respondent by the present suit for a decree directing the defendants to specifically perform the contract of lease as rectified by completing the construction of the ground floor of the premises in accordance with the plan, originally sanctioned by the Corporation and handing over possession of the same to him. The reference in the prayer to rectification relates to the respondent's case that in point of fact there had been an agreement to lease out the property not on a monthly tenancy, but for a period of ten years. But, this was, by a mutual mistake or fraud, omitted from the agreement drawn up and executed. On this basis, the respondent also wanted a decree for rectification of the agreement by interesting therein a provision to that effect providing for the terms of the lease to be ten years. The suit was resisted by the defendants contending inter alia that the property exclusively belonged to the minor and the contract entered into by him or on his behalf was not enforceable specifically against him,

that since the building was still not completed, the suit was premature and that there was no understanding that the lease should be fore a period of ten years. They also maintained that the respondent's prayer for an injunction against them from leasing out the property to third parties should not be granted.

(2) The suit was tried by the First Assistant City Civil Judge, Madras. He framed as many as six issues and recorded his finding that there was no fraud or mutual mistake as alleged by the respondent and so no rectification of the agreement could be ordered, that since, in his view, the contract was, for a monthly tenancy in respect of the minor's property, it was not a contract entered into by the minor, but on his behalf by his guardian and that there was, therefore, no impediment to the prayer for specific performance being granted. He accordingly decreed the suit for specific performance of the agreement to lease. But the decree drawn up was in terms of the prayer in the plaint, namely, that the defendants should perform the contract of lease by completing the construction and putting him in possession of the premise in question.

(3) Mr. K. Rajah Aiyer for the appellants submits that the contract being one entered into by a Muslim minor represented only by his personal law, and is unenforceable against him and that in any case, as the construction had not been completed, no specific performance could be granted, because the court in such a case could not effectively supervise and compel a party to build. Learned counsel also urges that where a contract to build does not specify with particularity the specifications of the proposed construction, specific performance should be denied on grounds of vagueness. Lastly, his submission is that before the completion of the building the suit is premature. He also adds that courts will not grant specific performance, where the party who asks for it, can be compensated adequately for breach of contract. On the view we take on his first contention it may not be necessary to deal with the rest of his points. Nevertheless, we shall briefly dispose of them first.

(4) Section 21 of the Specific Relief Act 1877 speaks of a contract which cannot be specifically enforced, and of them is one of such a nature that the court cannot enforce specific performance of its material terms. The section itself gives an illustration to this type of contract, namely, "A contracting with B to execute certain works which the court cannot superintend". This limitation in relation to the court's power to direct specific performance appears to be in conformity with the prevailing English view in 1877 as seen from Ryan v. Mutual Tontine West minister Chambers Association, 1893-1 Ch. 116. By Carpenters Estate Ltd. v. Davies, 1940-1 Ch. 160 the English courts on the Chancery side would appear to have modified its view and recognised exceptions to the normal rule that a court will not enforce specific performance of a contract to build. One of the reasons behind the policy of the rule is what is to be found in the illustration which we referred to for Section 21(b). In the second case of the Chancery court in 1940, specific performance was granted to carry out certain works. That, of course, was a peculiar case on facts. A vendor had sold certain land to purchaser for building development retaining other land adjoining it. As part of the terms of the sale, the vendor covenanted to make certain roads and lay certain mains, sewers and rains on the land retained. The covenant having been broken. the purchasers brought an action for specific performance. While granting specific performance, the court gave its reasons:

"that in the present case there should be an order for specific performance as that consisted the only adequate remedy and the work to be done was sufficiently clearly defined".

The Court would appear to have been weighed by the fact that the defendant was actually in possession of the land on which the works had to be carried our. The counter part in India of Section 21 in the old Act is Section 14 in the Specific Relief Act 1963, and it is clear from its provisions that they have been modeled more or less on the views of the Chancery in 1940-1 Ch. 160 and analogous cases. Sub-S.(3) of S. 14 provides by sub-clause (c) that specific performance of contractor for construction of any building or execution of any other work on land can be enforced subject to certain conditions mentioned in the proviso to it namely (1) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work; (2) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (3) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land relying on the provisions in the old Act and on which the building is to be constructed or other work is to be executed Mr. Rajah Aiyer, relying on the provisions in old Act and Kashinath v. Agra Municipality, AIR 1939 A;; 375 has pressed that quite apart from the validity of the suit agreement, no specific performance of an agreement to construct a building could be granted not only because the court cannot conveniently supervise the execution, but also the agreement itself does not contain specific details relating to the proposed construction. But, we are total by learned counsel for the respondent, and this is not seriously contested by Mr. Rajah Aiyer, that by the time the suit was instituted, the building has been since completed and all that remained to be done was plastering, and that too, on orders of the court pending the appeal, had been since completed. Whether it was so completed by the one or other of the parties need not detain us. In view of the completion of the building, the arguments of Mr. Rajah Aiyer, become academic, for, the court's power is a matter of procedure and it can take note of subsequent events pending the appeal and give relief in the light of them. Further, if the building had been almost completed even before the suit was instituted, the argument for the defendants on this part of their cases loses its force. In any case, under the provisions of the new Act, the court's under the provisions of the news Act, the court's power is wider. We are not, therefore, persuaded that the court below was in error in appreciating powers to enforce specific performance of a contract to build on land. Mr. Rajah Aiyer faintly addressed an argument that damages could have been an adequate remedy to the respondent and that in such a case, therefore, enforcement of the contract to build would not be proper. But, this point does not appeal to have been argued before the court below; nor any evidence directed on it. It is, therefore, not possible for us to entertain this point and express our opinion in respect of it.

(5) That takes us to the enforceability of the argument. We have already mentioned how the agreement was between the respondent on the one hand and the minor on the other represented by his mother, a de facto guardian, and was executed actually by the minor's father as the power of attorney agent of his mother. By reference to the evidence, Mr. V. Thiagarajan for the respondent, argued that inasmuch as it was the second defendant, the father of the minor, that actually bargained for, and entered into the agreement, regard being had to the substance, it must be treated substantially as an agreement entered into between the respondent and the minor represented by

his father, his legal guardian. We shall assume the factual basis of this argument, for, in the nature of thins, it was quite probable that the first defendant being apparently a gosha woman, the second defendant, the father of the minor, deal with the respondent, negotiated and brought about the agreement. But it does not follow from it that the agreement, as reduced to writing, was one between the respondent and the minor represented by his father. The argument is expressly to the contrary. It says that the minor was represent by his mother and not by his father. Even when the second defendant executed the agreement, he styled himself not as the guardian of the third defendant, but as acting in virtue of the power given to him by the first defendant. It is obvious, therefore, that whatever part the second defendant played in bringing into existence the agreement, it was not in his capacity as the guardian of the minor but as the power of attorney agent of the first defendant, the mother of the minor, a de facto guardian.

(6) The question, therefore, is whether an agreement between a person sui juirs with a Muslim minor relating to immovable property can be specifically enforced against such a minor. On that, the law which governs the matter is not in doubt. The Mohammedan law does not recognize the mother of a Muslim minor as his legal guardian in respect of his immovable property. His legal guardian are only his father which his paternal grandfather pr great grandfather or their respective executors. The Privy Council in Imambandi v. Mutsaddi, ILR 45 Cal 878: (AIR 1918 PC 11) held as early as 1918 that the mother of a Muslim minor had no right to deal with his immovable property, and if she did, the transaction would be void. Ameer Ali J. who delivered the judgment for the Privy Council observed:

"... in the absence of the father under the Sunni law, the guardianship vests in his executor. If the father dies, without appointing an executor (wasi) and his father is alive, the guardianship of his minor children devolves on their grandfather Should be also he dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the sovereign"

The Learned Judge proceeded :----

"She (mother) may incur the responsibilities, but can impose no obligation on the infant".

He went on further to observe that this rule however, was subject to certain exceptions provided for the protection of a minor child who had no de jure guardian. But in this case, we are not concerned with this aspect of guardianship and the power it carries for exercise in case of imperative necessity for incurring liabilities on behalf of the minor without which the child's life may run the risk of destruction. The Privy Council Summed up its view as follows.

"For the foregoing considerations, their Lordships are of the opinion that under the Mohammedan law, a person who has charge of the person or property of a minor without being his legal guardian and who may there fore, be conveniently called a "de facto guardian" has no power to convey to another any right of interest in immovable property which the transfer can enforce against the infant; nor can such transfer, if let into possession of the property under such unauthorised transfer,

resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title."

(7) This view of the Privy Council was followed and applied by the Supreme Court in Md. Amin v. Vakil Ahmad, , after pointing out that the test of benefit resulting from the transaction to the minor was negatived by Ameer Ali J. A Division Bench of the Patna High Court in Md. Zafir v. Amiruddin, held that a contract entered into by a Muslim minor relating to immovable property represented by him de facto guardian was void and not merely avoidable, which is also our view Mir Sarwarjan v. Fakhruddin Md. Chowdhry, (1912) ILR 39 Cal 232 (PC) was a case of a minor asking for performance of a contract relating to immovable property. But the prayer was refused on ground of lack of mutuality. When the contract itself is void, obviously the question of mutuality relating to enforceability of an agreement does not arise, which is but a reason for the result.

(8) In view of the settled law that a Muslim minor represented by his de facto guardian cannot validly enter into a contract relating to or affecting his immovable property and that if he did, the contract will be void and unenforceable by either of the parties to the contract, we hold that the suit agreement is void and cannot be enforced against the third defendant. The court below though that because the agreement was a lease executed by the third defendant represented by his de factor guardian, there was no impediment in law to grant specific performance. Obviously, this view is erroneous. We can find no difference between a lease and a sale from the standpoint of transfer of interest in the immovable property. On that point, we agree with Govinda Karup v. Beekhu, AIR 1931 Mad 147. Whether an agreement entered into by a Muslim minor by his de facto guardian relating to his immovable property is a sale or a mortgage or a lease, it suffers from the same defect or want of due capacity and the rule rendering such a transaction void applies with as much force to a lease of immovable property as to a regular conveyance by a sale or a transfer of interest as in a mortgage.

(9) This appeal is allowed, and the suit of the respondent is dismissed. The appellant will be entitled to costs throughout.

A. S. 758 of 1963. This appeal is by the respondent in the other appeal and relates to the question of rectification. On the view we have taken on the validity of the agreement, this appeal is dismissed but without costs.

(10) Order accordingly.