G. Gopala Chettiar vs N. Giriappa Gowder on 19 January, 1971

Equivalent citations: AIR1972MAD36, (1971)2MLJ481, AIR 1972 MADRAS 36, ILR (1971) 3 MAD 524, (1971) 2 MADLJ481, 1984 MADLW 464

JUDGMENT

Venkataraman, J.

1. The appeal has been filed by the plaintiff before the learned Subordinate Judge and the cross-objections have been filed by the defendant. The suit arises out of an agreement for sale of the plaintiff's land situate in Mysore State for a sum of Rs. 71,000/-. Under Ex. B-1, dated 19-10-1960, the defendant paid a sum of Rupees 10,000/- and on 26-10-1960, the parties entered into a formal agreement Ex. A-1, Clauses 3, 4 and 5 are as follows:

> "3. The vendor has received Rupees 10,000..... The remaining sale amount of Rs. 61,000 be paid to the vendor by the purchaser within 90 days from this date.
>
> 4. The sale deed be executed in the name of the purchaser herein described above or in any other name fixed by the purchaser, by the vendor.
>
> 5. The purchase shall be completed with 90 days from this day of 26th October, 1960."

The plaintiff was residing at Pollachi. The defendant was a resident of Ootacamund. Clause 10 of the agreement provided as follows-

> "10. The vendor gives possession of the properties to the purchaser at the time of registration."

The registration had to be done at Arkulgud in Mysore State.

2. On 27-10-1960, under Ex. B-2, the defendant paid a further sum of Rs. 5,000. We may trace the subsequent correspondent briefly. Under Ex-B-13, dated 25-1-1961, the defendant sent to the plaintiff a draft sale deed. The plaintiff acknowledged it under Ex. B-14, dated 26-1-1961. Under Ex. B-15, dated 31-1-1961, the plaintiff modified the draft sent by the defendant and sent his own draft, that has been marked as Ex. B-25.

3. The defendant did not approve of it and sent a draft, Ex. B-26, making some modifications to Ex. B-25, with his covering letter, Ex. B-16, dated 6-2-1961. The points of difference which arose between the parties as a result of this and the subsequent correspondence may be formulated thus:

1. The defendant insisted that the sale deed should be executed not merely in favour of himself but also 30 other persons. It may be mentioned that the property is over 1190 acres, mostly of forest lands, and the defendant felt that it would not be wise or convenient for him to buy such property in his own name exclusively. But the plaintiff was not willing to execute the sale deed in favour of any body besides the defendant.

2. The defendant wanted the plaintiff to sell the land free from all encumbrances, but the plaintiff was prepared only to give an assurance that he himself had not created any encumbrances after his purchase of the property from the Mysore Maharaja in 1959. he was not prepared to give any assurance that there had been no encumbrances on the property prior to his purchase in 1959.

3. As a result of the differences on the above two points, the defendant said that he did not think it safe to pay the balance of the purchase money to the plaintiff at Pollachi, but insisted on paying the balance of the purchase price only at Arkulgud at the time of the execution of the deed and the registration thereof. He was however willing to oblige the plaintiff by giving a draft on a bank at Pollachi for a sum of Rs. 56,000. The plaintiff for his part insisted that the payment should be made to him at Pollachi. But he was willing, upon payment, to execute the sale deed immediately at Pollachi and send his agent with a power of attorney for registration of the document at Arkulgud.

4. As a result of these differences, the plaintiff put an end to the contract under Ex. B-21, dated 10-3-1961. The defendant for his part retained his right to claim for specific performance and damages.

5. Thereafter, on 5-7-1961, the plaintiff filed the suit O.S. 154 of 1961 out of which this appeal and cross-objections arise, for recovery of a sum of Rs. 10,000/- with interest. He claimed that he had sustained damages to the extend of Rs. 25,000/- out of that, he had appropriated Rs. 15,000/- paid under Ex. B-1 and Ex. B-2 and claimed the balance. The defendant, in his written statement, stated that he was not in breach of the agreement and that it was the plaintiff who had committed breach of the agreement, and the defendant counter-claimed for recovery of (1) Rs. 15,000/- which he had paid under Ex. B-1 and B-2 and (2) further damages of Rs. 10,000/-.

6. The learned Subordinate Judge, who tried the suit, found that both parties were at fault and that consequently neither was entitled to claim damages from the other, and that the just thing for him to do was to order the plaintiff to repay Rs. 15,000/- which he had received, and he accordingly gave a decree for Rs. 15,000 and dismissed the suit and the counter-claim in other respects. Hence this appeal by the plaintiff and the memorandum of cross-objections by the defendant. The plaintiff has confined his appeal to the sum of Rs. 15,000/- directed to be returned to the defendant. In his Memorandum of cross-objections, the defendant has claimed Rs.

5,000/- as damages, and another sum of Rs. 4,126-50 towards costs which the defendant, according to him, was entitled to in the trial court.

7. The three points for determination before us also are those formulated above. The first point is whether the defendant was entitled to insist on the sale deed being executed in favour of himself and 30 other persons. The learned Subordinate Judge has held that the defendant was so entitled and we are in entire agreement with him. Ex. B-1 itself says: "The registration and document will be made in the name of Mr. N. Giriappa Gowder or his nominees". Similarly, clause 4 of Ex. A-1 states "The sale deed be executed in the name of the purchaser herein described above or in any other names fixed by the purchaser, by the vendor." The defendant, as DW. 3, deposed that in October, 1960 he informed the plaintiff's agent, Radhakrishna Chettiar, that it was too large an extent to be purchased by him and that it had to be purchased by ten or twenty persons, and that subsequently on Deepavali day, when he was in Ootacamund, Radhakrishna Chettiar phoned him up from Pollachi to have a talk with the plaintiff about the purchase of the lands. Thus, the evidence of the defendant is that even prior to Ex. B-1, it had been agreed that the sale deed should be in the name of the defendant and his nominees, and having regard to the terms of Exs. B-1 and A-1, we accept this evidence. Even apart from this evidence, we hold as a matter of construction of Exs. A-1 and B-1 that the defendant was entitled to insist on the sale being taken in the name of the defendant and his nominees.

A point has been made by the appellant's learned counsel, Mr. T.R. Srinivasan, that the wording of Ex. B-1 is "In the name of Mr. N. Giriappa Gowder or his nominees" and not "in the name of Mr. N. Giriappa and his nominees", and the wording is also similar in Ex. A-1. We think there is no substance in this contention. This argument proceeds on a concession that the defendant could insist on the plaintiff, executing sale deeds in favour of several nominees of the defendant, and if so, as pointed out by the lower court, there can be no objection to the defendant being one of the vendees. The learned counsel for the appellant has naturally been unable to produce any case to support his extreme contention. On the other hand, the law in England as well as in India seems to contemplate the vendee being able to get sale deeds in the name of himself and his nominee (see Halsbury's Laws of England, Volume 34, Simond's Edn. III Edn. pages 338 and 345, Rahimtullah v. Official Assignee, Bombay AIR 1935 Bom 340 and Himantharaju v. Corporation of the City of Bangalore, AIR 1954 Mys 145. These authorities show that where a purchaser has not entered into a co-venant with the vendor, there can be no objection to the purchaser insisting on the sale to be made to him and his nominees. There is no such obligation cast on the purchaser in Exs. B-1 & A-1 and it was a case of an outright sale, all the covenants being on the side of the vendor. Hence, we have no hesitation in holding that the plaintiff was in breach by declining to execute the sale deed in favour of 30 other nominees and the defendant.

8. Point 2: The next point to be considered is whether the covenant of title given by the plaintiff was sufficient. Ex. B-25, the draft sent by the plaintiff, reads as follows on the question of covenant:

> "The vendor doth hereby covenant with the purchaser that he, the vendor, had good right and full power to grant and convey the premises in manner aforesaid and that the said premises are free from all encumbrances, claims and demands occasioned or created by the vendor."

In Ex. B-16, dated 6-2-1961, the defendant took objection to this as follows:

> "The purchaser is also entitled to a conveyance from his vendor free from all encumbrances and not only free from encumbrances created or occasioned by the vendor."

In Ex. B-17, dated 10-2-1961, the plaintiff replied as follows:

> "With regard to the next para, it may be pointed out that the agreement for sale does not provide for a conveyance free of all encumbrances. My client can, in the context of facts, covenant only as regards encumbrances created by himself. For the rest, your client would surely, in terms of the agreement, have got the encumbrance certificates and satisfied himself. Considering the nature, extent and character of the property and the antecedent title thereto, you will appreciate my client's stand, in this regard. He therefore insists that the words 'created or occasioned by the vendor' wherever they had been deleted must be restored."

The learned Subordinate Judge has held that the covenant given by the plaintiff was sufficient. His reasoning is as follows:

> "I must state here that the draft sale deed under Ex. B-25 is only in consonance with C1.7 of the agreement of sale under Ex. A-1 wherein it was agreed between the parties that the vendor should give assurance that he is the absolute owner of the property and that he has perfect and valid title and right to convey the property. It is clear that the parties have expressly stipulated as to the warranty of good title and in pursuance of the agreement, the plaintiff was willing to give assurance that he is the absolute owner of the property and that he has perfect and valid title. When the parties have stipulated regarding the warranty of title, that should be given by the plaintiff, I do not think that it is open to the defendant to contend that the plaintiff should give warranty of title not only as against his own acts but against those of his predecessors-in-title."

9. We do not agree with the learned Subordinate Judge on this point. The learned Judge has overlooked the provisions of clause 55 (1)(g) of the Transfer of Property Act, which enacts:

> "In the absence of a contract to the contrary, the seller is bound..... (g) to pay all public charges and rent accrued due in respect of the property upto the date of the sale, the interest on all encumbrances on such property due, on such date, and, except where the property is sold subject to encumbrances, to discharge all

incumbrances on the property then existing."

Under the latter half of clause (g), it is clear that the property was not sold subject to any encumbrances and hence the plaintiff was bound to discharge all encumbrances on the property then existing, and he was bound to give an assurance to that effect. C1, 7 of Ex. A-1, which reads "The Vendor gives an assurance that he is the absolute owner of the property and that he has perfect and valid title and right to convey the property," cannot be construed as a contract to the contrary. Sri. T.R. Srinivasan, learned counsel for the appellant, does not adopt the line of reasoning taken by the learned Subordinate Judge. For his part,, Mr.T.R. Srinivasan agrees that the plaintiff is bound to discharge any encumbrance which may have been created on the property even by his predecessors-in-title. But he would say that as a matter of fact, there were no such encumbrances and that the defendant knew about it and that the covenant which the plaintiff was prepared to give in the draft of Ex. B-25, as extracted above would, for all practical purposes, be sufficient. We are unable to agree with the submission that the covenant which the plaintiff was prepared to give in Ex. B-25 was sufficient compliance with the provision of law we have quoted above. We say this because, firstly, in Ex. B-25, the plaintiff qualifies the words "encumbrances, claims and demands" by the words "occasioned or created by the vendor", and secondly, he explicitly says in Ex. B-17 which we have extracted above, that he cannot answer for any encumbrances created by his predecessors-in-title. We, therefore hold on this part of the case, that there was breach of agreement on the part of the plaintiff.

10. The third point is whether the defendant was right in insisting that he would pay the balance of the purchase money only at Arkulgud at the time of the registration. Here the learned Subordinate Judge finds in favour of the defendant. But we may say at once that we are not prepared to agree with his reasoning. Sri Gopalaswami Aiyangar contended as a preliminary point that in paragraph 6 of the plaint, the plaintiff did not specifically urge that the defendant committed breach of the contract by insisting on paying the balance of the purchase money at Arkulgud. But we find that this point figured in the forefront in the correspondence between the parties and also at the time of the trial and was discussed in paragraph 10 of the judgment of the learned Subordinate Judge. Hence, we are not inclined to accept the technical submission of the learned counsel, Sri Gopalaswami Aiyangar, that this point is not open to the plaintiff. On the other hand, we think that the objection taken by the plaintiff to the stand of the defendant on this point is substantial and we hold that the defendant committed breach of the agreement.

11. It may be noted at the outset that Ex. A.1 does not contain any provision that the balance of the purchase money would be paid at Arkulgud at the time of registration. Hence the defendant cannot insist as a matter of right that he was entitled to make the payment at Arkulgud at the time of registration. Sri Gopalaswami Iyengar would however urge that under Section 54 of the Transfer of Property Act, title would pass to the defendant only if the document was also registered and that mere execution in the sense of signing the sale deed in the presence of two witnesses would not suffice. But there is a well-marked distinction in law between execution and registration. Apart from the fact that Section 54 of the Transfer of Property Act itself speaks of a registered instrument and also of execution in Section 55, in separate terms, the difference in the concepts of execution and registration is clearly brought out in Section 23 of the Registration Act, which allows a period of four

months from the date of the execution of the document for registration, and Section 47 says that on such registration, the deed will date back in its effect to the time of execution. Further Ex. A.1 itself recognises the difference between execution and registration, because in clauses 3 and 4, it contemplates that the balance of Rs. 61,000 had to be paid within 90 days from the date of Ex. A.1 and the purchase shall be completed within 90 days from the date, namely, 26th October 1960. On the other hand, clause 10 of Ex. A.1 says that the vendor should give possession of the properties to the purchaser at the time of registration. Thus the agreement itself contemplates the difference between execution and registration. Further, if we remember that the parties had four months time to register the document after the execution, it is not reasonable to construe clause 5 of Ex. A. 1 as meaning that the registration also should be completed within the period of 90 days. Suppose, for instance, the defendant had offered the balance of Rs. 61,000 in cash to the plaintiff at Pollachi on the 90th day at 4-30 p.m. but there was no time to register the document on the same day at Arkulgud in Mysore State, there can be no doubt that the defendant's payment would have been quite proper within the terms of Ex. A.1 and the plaintiff could not have refused to accept the payment of the money on the ground that the registration could not be completed within the period of 90 days. In the context, therefore, clause 5 of Ex. A. 1 could only mean, that the execution had to be completed within 90 days. It may be recalled that under clause 3, the defendant had a period of 90 days to pay the balance of the purchase money and since the same period of 90 days is fixed for completion of the purchase in clause 5, it could only mean that the payment and the execution should also take place with 90 days and clause 5 cannot possibly have reference to the registration.

12. Section 55(1)(d) of the Transfer of Property Act says that the seller is bound on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place. As a matter of grammer, the word 'it' in the latter portion of the clause refers to the conveyance and therefore the words "at a proper time and place" would refer only to the buyer tendering the conveyance to the seller for execution at a proper time and place. In other words, there is no explicit mention of the words "proper time and place" in respect of the first portion of Section 55(1)(D), namely, of payment or tender of the amount due in respect of the price. Normally, we would be justified in holding that since the payment or tender of the amount due has to be made to the seller, it has to be made at the seller's place. But there may be circumstances where the defendant may be justified in not paying the amount to the seller at his place. It is sufficient to say that in this case there are no such circumstances. In Ex. B 16, the defendant says:

> "Having regard to the stiff and somewhat distrustful attitude so far adopted by your client towards our client and especially as to the registration of the conveyance has to be effected at Arkulgud and possession of the lands, bulls, carts, implements and zinc sheets has to be given on the spot far from Pollachi, our client does not feel that it would be safe for him to depart from the normal procedure of the payment of the balance of the purchase money at the time and place of execution and registration of the conveyance and delivery of possession of the properties agreed to be sold."

We are not at all satisfied that the normal place of payment of the purchase money is at the place of registration. If that was the intention of the parties, we should expect them to have stated that the

balance of the purchase money was payable at the time and place of the registration. The reasons given in this passage by the defendant for not paying the amount at Pollachi and insisting on payment at Arkulgud at the time of the registration do not appear to us to be sound. It is true that we have found that the plaintiff was at fault in not agreeing to execution of the sale deed in favour of 30 persons besides the defendant, and in not being prepared to sell the properties free from all encumbrances. But that would not by itself justify the defendant refusing to pay the balance of the purchase money at Pollachi. In our view, the obligations of the plaintiff and the defendant were mutual. So far as the defendant's obligations were concerned, he was liable to pay or tender the balance of the purchase money to the plaintiff at Pollachi. It may be noted that both in Ex. B-15 and in Ex. B-17, the plaintiff reiterated his willingness to execute the sale deed at Pollachi immediately on payment of the balance of the purchase money and to send his agent with a special power of attorney for effecting registration at Arkulgud, On the facts of this case, we hold that the plaintiff was not in breach on this point and that, on the contrary, the defendant was in breach.

13. It follows from the above discussion that both the parties were at fault and hence neither party is entitled to claim damages from the other. But, under Sections 64 and 65 of the Contract Act, as explained by their Lordships of the Privy Council in Muralidhar Chaterjee v. International Film Co. Ltd., 1943-2 Mad LJ 369 = (AIR 1943 PC 34) the defendant is entitled to the return of the sum of Rs. 15,000, as directed by the trial court. We also think that under the provisions of S. 34, Civil P.C., it is just and reasonable to direct the plaintiff to pay interest on the sum of Rs. 15,000 from the date of the trial court's decree till the date on which he deposited the amount, at six per cent. per annum. Further than this we are not prepared to give any relief to either party; in other words, each party will bear its own costs both in the lower court and here.

14. In the result, the appeal is dismissed and the cross-objections are allowed to the limited extend indicated above.

15. Appeal dismissed;