

M/S.Hotel Chandra Towers Ltd vs Henry Isidore on 13 February, 2012

Author: R.S.Ramanathan

Bench: R.S.Ramanathan

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 13.2.2012

Coram

The Hon ble Mr.Justice R.S.RAMANATHAN

Second Appeal No.610 of 2011

and

M.P.Nos.1 and 2 of 2011

M/s.Hotel Chandra Towers Ltd.,
rep by its Managing Director
Mr.K.Prabu,
NO.9, Old No.2A, Gandhi Irwin Road,
Egmore, Chennai-8.

..Appellant

vs.

1. Henry Isidore
2. Bertin @ Raju Isidore
3. Juliet Henry Isidore
4. Desire Isidore
5. J.K.Richard Isidore

..Respondents

For appellant : Mr.M.S.Krishnan, Senior Counsel
for Mr.N.Suresh

For respondent : Mr.K.Chandrasekaran

Prayer:- Second Appeal against the judgment and decree dated 23.3.2011 in A.S.No.418 of

JUDGMENT

The plaintiff is the appellant.

2. The plaintiff filed the suit for declaration of title and for permanent injunction restraining the respondents/defendants from interfering with their rights and enjoyment of the suit property.

3. The case of the plaintiff/appellant is that the plaintiff company is the owner of the building consisting of two blocks viz., new and old consisting of 45 rooms two restaurants, a bar and a conference hall in the new block and 40 rooms in the old block with leasehold right in the land in Door No.9, Old No.2A, Gandhi Irwin Road, Egmore, Chennai measuring about 7 grounds and 1952 sqft which absolutely belonged to the first defendant. The plaintiff company was originally managed by the first defendant and his son and their family members. Maurya Hotels (Madras) Private Limited represented by its Managing Director K.Prabhu agreed to purchase the Company as well as the land belonging to the first defendant. Therefore, a memorandum of understanding was entered into between the first defendant and his son on the one part and the said Maurya Hotels (Madras) Private Limited on the other part on 27.1.2005 for transfer of the company for a valuable consideration as stated therein. As per the said understanding, the plaintiff also purchased the land from the first defendant and his son under a registered sale deed dated 21.10.2005 and the document is kept pending on the file of the Sub Registrar, Periamet as according to the Registration Department, the document is undervalued. According to the plaintiff/appellant, the entry to the hotel is from Gandhi Irwin Road, Egmore and the entry starts with 11.6 feet width drive way leading from Gandhi Irwin Road to the hotel block and the length of the drive way is 38 feet and over the drive way, a small room measuring 476 sqft is available and the same is used for keeping the damaged cots, beds, etc., of the plaintiff hotel and the same is in exclusive possession of the plaintiff from the taking over of the Company and the suit is only in respect of that area viz., 476 sqft that is situate over the drive way to enter into the hotel premises. The plaintiff/appellant further submitted that on the eastern and western side over the drive way there are about 5 shops which belong to the defendants and the defendants, with the intention of taking possession of the suit property, broke open the side walls of the suit property and are also attempting to use the room for getting new passage for connecting the newly built unauthorised construction. According to the plaintiff, they are the absolute owners of the entire 7 grounds and 1952 sqft and the building constructed thereon and the defendants are only entitled to two rooms in the ground floor and five rooms in the first floor which has been specifically mentioned in the memorandum of understanding and excluding those two items of properties, the defendants have no right over the same and the building constructed above the drive way belongs absolutely to the plaintiff and they are enjoying the same and hence, the suit was filed for declaration and for injunction.

4. The defendants filed statement admitting the memorandum of understanding as well as the sale deed and contended that the suit property was the subject matter of sale and the suit property situate over and above drive way and it is part and parcel of the 5 rooms that was retained by the defendant and the plaintiff has no access to the suit property and the defendant never intended to sell the suit property to the plaintiff and the plaintiff was also aware of the same. It is further contended by the defendants that even as per the sale deed, the plaintiff has not paid the entire sale consideration and as per the sale deed, the property shall be conveyed on the realisation of the cheques issued by the plaintiff and admittedly, 11 cheques issued by the plaintiff were dishonoured

and amounts were not paid and as sale consideration was not paid, title did not pass and therefore, the plaintiff is not entitled to claim any right in respect of the property covered under sale deed and as the suit property was not conveyed under the memorandum of understanding and as per the sale deed, the plaintiff cannot claim any right over the same. It was further contended that even assuming that the suit property was agreed to be conveyed, having regard to the fact that the entire sale consideration was not paid and as per the sale deed, title will not pass unless sale consideration is paid and therefore, the plaintiff cannot claim any title to the suit property.

5. The Trial Court decreed the suit holding that the suit property was conveyed to the plaintiff as per the memorandum of understanding and as per the sale deed and the plaintiff is admittedly in possession of the property and the defendants also admitted the possession of the plaintiff and hence, the plaintiff proved title and possession to the property.

6. The lower appellate court reversed the finding holding that as per the sale deed, title will pass only on realisation of the cheques given by the plaintiff and as admittedly, the cheques were dishonoured, title will not pass and therefore, the plaintiff cannot claim any right under the sale deed in respect of any property and even assuming that the suit property forms part of the schedule property mentioned in the plaint, the plaintiff will not get any title as title did not pass for want of consideration. The lower appellate court further held that PW1 clearly admittedly in evidence that the suit property was not included in the sale deed and the two rooms are omitted to be included in the sale deed and no explanation was given in the plaint about the exclusion of those two properties in the sale deed and therefore, the plaintiffs have not purchased those two rooms, even assuming that the entire sale consideration was paid as per the sale and therefore, the plaintiff cannot claim any title and therefore, the plaintiff has no right over the suit property and allowed the appeal and dismissed the suit. Hence, the second appeal.

7. The following substantial questions of law were framed at the time of admission of the second appeal:-

"1) Whether the courts below erred in observing that the suit property and the property conveyed under Ex.A4 varies, without even considering the case of the plaintiff that suit property forms part of larger extent of the property covered under Ex.A4?

2) Whether the court below is right in dismissing the suit on the ground that the suit property being a superstructure over the land under Ex.A4 is not covered under Ex.A4, without giving legal effect to the provisions of Section 8 of the Transfer of Property act?

3) Whether the court below is right in holding that the plaintiff has not proved the possession by ignoring the material admission of the defendants in the written statement that plaintiff is in possession of the suit property?"

8. Mr.M.S.Krishnan, learned Senior Counsel appearing for the plaintiff/appellant submitted that admittedly, the suit property is situated over and above the drive way and admittedly, the drive way and the remaining land was sold by the defendants to the plaintiffs and therefore, under section 8 of the Transfer of Property Act, when an immovable property is sold, any property which is available over and above that property is also deemed to have been conveyed under that document and admittedly, the suit property is situated above the drive way and therefore, the suit property belongs to the plaintiff and the defendants have also admitted the possession of the suit property by the plaintiff/appellant and therefore, the plaintiff is entitled to the relief of declaration and injunction. In support of his contention, he relied upon the judgment reported in LAKSHMANAN v. G.AYYASAMY (2011 (2) CTC 181) wherein this court has held that the owner of property is entitled to have his right exercised upto sky and therefore, submitted that having admitted that the drive way belongs to the plaintiff/appellant, any construction over and above the drive way also belongs to the plaintiff/appellant and therefore, the plaintiff is entitled to the relief prayed for.

9. He further submitted that under sections 54 and 55 of the Transfer of Property Act, as soon as a sale deed is registered, the title passes to the buyer and as per section 54 of the Transfer of Property Act, a sale is defined as a transfer of ownership in exchange for a price paid or promised or part paid and part promised and therefore, submitted that even assuming that part of the sale consideration was not paid, it amounts to sale and therefore, the title passed to the plaintiff/appellant under the sale deed and relied upon the judgments reported in KALIAPERUMAL v. RAJAGOPAL ((2009) 4 SCC 193), BISHUNDEO NARAIN RAI v. ANMOL DEVI (AIR 1998 SC 3006) and RAJAGOPAL v. KALIAPERUMAL ((2002) 1 MLJ 335) in support of his contention.

10. He further submitted that the first defendant was the party to transfer and he was aware of the transaction between the parties and deliberately, he did not enter into witness box and the second defendant was examined as DW1 and in the absence of the first defendant, adverse inference can be drawn and had the first defendant been examined, he would have admitted the possession of the suit property by the plaintiff and therefore, the non-examination of the first defendant is fatal to the case of the defendants and adverse inference can be drawn against the defendants. He further submitted that payment of the whole sale consideration is not a sine qua non for the completion of sale and relied upon the judgment in VIDHYADHAR v. MANKIKRAO (AIR 1999 SC 1441) in support of his contention.

11. On the other hand, Mr.K.Chandrasekaran, learned counsel for the respondents submitted that the question when the title passes depends upon the intention of the parties and this is admitted by the plaintiff that when the sale consideration is not paid in full, title will not pass and admittedly, the cheques issued by the plaintiff were dishonoured and appropriate proceedings were initiated and therefore, the sale consideration was not paid as per the sale deed and the intention of the parties was also clear that without paying sale consideration, title will not pass and as the sale consideration was not paid, no title passes and that was rightly appreciated by the lower appellate court and held that the plaintiff is not entitled to the relief of declaration. He further submitted that as per the memo of understanding, the defendants are entitled to retain two rooms in the ground floor and five rooms in the first floor situated over and above the drive way and also on the eastern and western side of the drive way and admittedly, there is no access for the rooms that are available

over the drive way which is the suit property and it is admitted by the plaintiff/appellant that they have placed a ladder near the sunshade to have access to the two rooms and if really the suit property was conveyed to the plaintiff, the access to the suit property must have also been provided and therefore, having regard to the situation of the suit property and the retention of the properties by the defendants, it cannot be stated that the suit property was also conveyed to the plaintiff. He further relied upon the admission of PW1 in support of his contention. He also relied upon the judgment reported in (2009) 4 SCC 193 (cited supra), LATIF ESTATE LINE INDIA LTD. v. HADEEJA AMMAL ((2011 2 MLJ 569) and JANAK DULARI DEVI v. KAPILDEO RAI ((2011) 6 SCC 555) in support of his contention that title will pass only on payment of full consideration and it also depends upon the intention of the parties and as per the sale deed, title will pass only on realisation of the cheque amount and as the cheques were not honoured, title did not pass. He also relied upon the judgment reported in NATIONAL INSURANCE CO. LTD. v. SEEMA MALHOTRA ((2001) 3 SCC 151) and DEDDAPPA v. NATIONAL INSURANCE CO. LTD. ((2008) 2 SCC 595) in support of his contention that when cheques were issued and the cheques were not honoured, no right or title passed under the transaction. He also relied upon the judgment reported in RAJ, S. v. RAJAKANIAMMAL (1996 (II) CTC 270) in support of his contention that under section 8 of the Transfer of Property Act, when a document of sale expresses different intention and a party did not intend to transfer the immovable property, a purchaser will not get any right by invoking section 8 of the Transfer of Property Act. He also relied upon the judgment in RANGARAJAN, N. v. LAKSHMI KRISHNAN (1990-2-LW 378) for the same proposition.

12. Mr.M.S.Krishnan, learned Senior Counsel for the plaintiff/appellant submitted that though the cheques were initially dishonoured, subsequently, when the matter was pending before the Honourable Supreme Court, the plaintiff/appellant presented demand drafts for the entire balance sale consideration and that was refused to be accepted by the parties and therefore, it cannot be contended that the entire sale consideration was not paid and submitted that having regard to the subsequent event that the entire cheque amount was tendered by means of demand draft and the same was refused, it can be stated that the sale consideration was paid and therefore, the findings of the lower appellate court that the sale consideration was not paid and therefore, no title passes to the plaintiff cannot be accepted and as the entire sale consideration was offered and refused, the plaintiff/appellant became the absolute owner of the property and hence, they are entitled to the relief of declaration and injunction.

13. Considering the submissions of both the counsel and having regard to the evidence, the dispute is only in respect of constructed portion over and above the drive way. It is admitted that the memorandum of understanding was entered into between the parties for the sale of the entire property and subsequently, a sale deed was also executed in respect of the land and building. Under section 8 of the Transfer of Property Act, unless a different intention is expressed or necessarily implied, the transfer of property passes forthwith to the transferee all the interest which transferor is then capable of passing in the property and in the legal incidents thereof. It is further stated that such incidents include, where the property is the land, the easements annexed thereto, the rents and profits thereto accruing after the transfer and all things attached to the earth.

14. Under section 54 of the Transfer of Property Act, the sale is transfer of ownership in exchange for a price paid or promised or part paid or part promised. Under section 55(4)(b) of the Transfer of Property Act, where the ownership of the property is passed to the buyer, before payment of the whole of the purchase money, the seller is entitled to a charge upon the property in the hands of the buyer. Under section 55(6)(a), the buyer is entitled where the ownership of a property passes to him, to the benefit of any improvement in, or increase in value of, the property, and the rents and profits thereof. Under section 8 of the Transfer of Property Act, unless a different intention is expressed or implied, the transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof and under section 54, even though the entire sale consideration is not paid, a transfer of ownership will take place.

15. Therefore, we will have to see what was the intention of the parties when the memorandum of understanding and the sale deed were executed and whether the parties are entitled to convey the property under two documents. We will also have to see what is the effect of non payment of sale consideration as per the sale deed. In other words, whether under the sale deed, title passes to the plaintiff irrespective of the non-payment of the sale consideration or passing of title depends upon honouring of cheques mentioned in the sale deed. To answer these questions, we will have to see the memorandum of understanding and the sale deed as well as evidence.

16. The memorandum of understanding was marked as Ex.A3 and the sale deed as Ex.A4. As per the memorandum of understanding, the respondent agreed to hand over possession of the new block comprising of 45 rooms two restaurants, a bar and a conference hall with all fixed assets and the old block consisting of 40 rooms on receipt of the sale consideration towards transfer of shares. It is also admitted that the defendants are entitled to retain five guest rooms in the first floor of the existing building and two shops in the ground floor and the plaintiff also agreed to give pathway for access to the two shops in the ground floor and five guest rooms in the first floor. It is also admitted in evidence that out of the five guest rooms in the first floor retained by the defendants, three guest rooms are on the western side and two bed rooms are on the eastern side of the portion above the drive way which is the suit property. It is further admitted that the defendants filed C.S.No.401 of 2006 on the file of this court for declaration that the sale deed dated 21.10.2005 executed by them in favour of the plaintiffs is null and void on the ground that the consideration was not paid and it was contended by the parties that the title will not pass till the sale consideration is fully paid. That suit was later allowed to be withdrawn with liberty. Therefore, the defendants/respondents themselves did not proceed with the case of declaration of title to the suit property on the basis of non-payment of sale consideration and therefore, having regard to the fact that the suit filed by defendants in C.S.No.401 of 2006 was allowed to be withdrawn, there is no need to go into the question whether title passes to the plaintiff under the sale deed for non-payment of sale consideration by reason of the dishonour of the cheques.

17. The lower appellate court proceeded on the basis that title will not pass to the plaintiff as consideration was not paid and that was also the intention of the parties and therefore, the plaintiff/appellant cannot claim any title to the suit property. According to me, the finding of the lower appellate court that no title passed under the sale deed for want of payment of consideration

by reason of the dishonour of the cheque is not correct as the suit filed by the defendants/respondents in C.S.No.401 of 2006 for the same relief was allowed to be withdrawn and the issue involved in this present suit has nothing to do with that finding. Hence, the findings of the lower appellate court that under the sale deed, no title passes to the plaintiff/appellant for want of sale consideration is liable to be set aside and it is set aside.

18. The only question that arises for consideration in the second appeal and the substantial questions of law which are framed in the second appeal are only with respect to the passing of title in respect of the constructed portion over and above the drive way. As stated supra, under section 8 of the Transfer of Property Act, unless a different intention is expressed or necessarily implied under a transfer, all interests of the transferor will pass to the transferee.

19. In this case, we will have to see whether the parties have intended to transfer the interest viz., the property over and above the drive way. It is admitted by PW1 in the evidence that the suit property viz., the portion over and above the drive way was not included in the sale deed and it was omitted to be included. The lower appellate court has extracted the admission which is as follows:-

VERNACULAR (TAMIL) PORTION DELETED

20. Therefore, having regard to the specific admission by PW1, it cannot be stated that the suit property was also intended to be conveyed under the sale deed, Ex.A4 to the plaintiff. Further, having regard to the topography of the suit property, it cannot be contended that the suit property was conveyed to the plaintiff. Admittedly, above the door way there are 5 rooms and those five rooms are retained by the defendants while selling the property to the plaintiff and those five rooms are situated on either side of the constructed portion above the doorway and therefore, it can be presumed that the suit property which is the constructed portion above the doorway also forms part of the five rooms and that was retained by the defendants and those properties was not conveyed to the plaintiff under Ex.A4.

21. Further, under Ex.A3, 45 rooms two restaurants, a bar and a conference hall in the new block and 40 rooms in the old block were conveyed to the plaintiff. Admittedly, the suit property was not mentioned under Ex.A3 or Ex.A4. It is not the case of the plaintiff that in addition to the rooms in the old and new block, the plaintiff is entitled to the constructed portion over and above the drive way and it is the specific case of the plaintiff that the drive way was conveyed to the plaintiff and therefore, any property constructed over the drive way belongs to them and on that ground, they are claiming right over the property.

22. As stated supra, PW1 has admitted in clear terms that the constructed portion over the drive way was not included in the sale deed and it was omitted to be included. Therefore, as per section 8 of the Transfer of Property Act, a different intention is implied when the sale deed was executed and the parties never intended to convey the portion over and above the drive way in favour of the plaintiff and hence, it cannot be contended that any construction over the drive way becomes the part of the sale deed and therefore, the plaintiff is entitled to that portion.

23. Further, it is admitted that the plaintiff has no access to the said portion and it is the case of the plaintiff that he has put up a ladder near the sunshade and by walking over the sunshade, he got access to the two rooms. On the other hand, the two rooms which are the subject matter of the suit property are situate in between the five rooms that are retained by the defendants and it is the case of the defendants that the suit property forms part of the five rooms and the case of the defendants is more probable having regard to the situation of the property and also having regard to the fact that the plaintiff has no access to the suit property. Hence, substantial questions of law 1 and 2 are answered against the appellant and I hold that under Ex.A4, the suit property was not covered and the plaintiff/appellant cannot claim any right or title to the suit property.

24. It is the case of the plaintiff/appellant that they are in possession of the suit property and that is also admitted by the defendants and having regard to the said admission, the plaintiff is entitled to a decree of injunction and that was also proved that the property also belongs to the plaintiff under the sale deed.

25. As rightly submitted by the learned counsel for the respondents that in the written statement it was not admitted that the plaintiff is in possession of the property and it is only stated that the plaintiff is a rank trespasser of the suit property and the plaintiff unauthorisedly and illegally trespassed into the property belonging to the defendants. According to me, when the plaintiff has no title to the suit property, even assuming that they are in possession of the property, the plaintiff is not entitled to the relief of injunction. Hence, the third substantial question of law is also answered against the appellant.

26. The judgment and decree of the first appellate court is confirmed only to the extent that the plaintiff will not get title to the suit property under the sale deed and the plaintiff is not entitled to get any declaration in respect of the suit property and the plaintiff is also not entitled to decree of injunction as the plaintiff is in possession of the property by force and possession was not delivered under the document, Ex.A4.

In the result, the second appeal is dismissed. The judgment and decree of the first appellate court is confirmed subject to the finding given above. No costs. The connected miscellaneous petition in M.P.No.1 of 2011 is also dismissed. M.P.No.2 of 2011 is filed by the appellant under Order 41 Rule 27 of the Code of Civil Procedure to receive additional documents. In my opinion, those documents are not relevant for disposal of the second appeal, Hence, the application in M.P.No.2 of 2011 is dismissed.

ssk.

To

1. II Additional Judge, City Civil Court, Chennai.

2. I Assistant Judge, City Civil Court, Chennai