
(1964) 11 RAJ CK 0006
In the Rajasthan High Court
Case No : Second Appeal No. 384 of 1959

Faujmal

APPELLANT

Vs

Nathulal and Another

RESPONDENT

Date of Decision : 27-11-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 96
Specific Relief Act, 1877 — Section 12, 22

Citation : AIR 1965 Raj 115 : (1965) RLW 37

Hon'ble Judges : P.N. Shinghal, J

Bench : Single Bench

Advocate : K.S. Lodha, for the Appellant; S.K. Mal Lodha, for the Respondent

Final Decision : Allowed

Judgement

P.N. Shinghal, J.—This is an appeal by defendant Faujmal from the appellate judgment and decree of the learned Civil Judge of Uduipur dated April 6, 1959, confirming the judgment and decree of the learned Munsiff of Rajsamand dated April 28, 1958, in a suit for specific

shop to the plaintiff and pleaded that Ex. 1 was a forged document. The other defendant Ranglal pleaded that he had purchased the property for Rs. 1951/- without knowledge of any contract of sale in the plaintiff's favour. He did not admit that there was an earlier agreement for the sale of the property to the plaintiff. Some other pleas were taken in the written statement which are not material.

4. One of the important points at issue between the parties was whether Agreement Ex. 1, on which the plaintiff based his claim for specific performance, was genuine. Both the courts below reached the conclusion that the plaintiff had succeeded in proving the agreement. It was also held in those courts that the plaintiff was always ready and willing to perform his part to the contract and that it was defendant Nathulal who was guilty of a breach thereof. So also, both the courts took the view that the shop was purchased by defendant Ranglal with knowledge of the earlier contract for its sale in favour of the plaintiff. The learned Munsiff, however, did not grant a decree for specific performance on the ground that there was delay on the part of the plaintiff in applying for the sale of the property and he granted a decree only for Rs. 100/- by way of damages against defendant Ranglal. Defendant Nathulal was directed to pay the costs of the plaintiff.

The plaintiff preferred an appeal, and the defendant a cross-objection, but both of them were dismissed by the learned judge of the lower appellate court by the impugned judgment as he was also of the view that the relief of specific performance had rightly been rejected on account of the delay. In reaching that conclusion, the learned Judge took into consideration the facts that the property had already been transferred to a third person for a higher price and that it would lead to multiplicity of proceedings if a decree was passed for specific performance. It is in these circumstances that the present appeal has arisen.

5. It has been argued by Mr. K.S. Lodhi, learned counsel for the plaintiff-appellant, that an illegality has been committed by both the courts below in failing to apply or appreciate the provisions of Section 12 of the Specific Relief Act, hereafter referred to as the Act, and in denying the relief of specific performance to the plaintiff when the agreement was for sale of immovable property. It has been pointed out that the disputed sale in favour of defendant Ranglal was made on July 11, 1957 and the plaintiff instituted the suit soon after on July 25, 1957, without any delay. Further, the learned counsel has argued that delay could not, by itself, be a reason for denying the relief to the plaintiff when there was nothing to show that it amounted to waiver or abandonment of the plaintiff's claim. For this last argument, the learned counsel has placed reliance on *Abdul Majid Khan v. Balappa* AIR 1923 Nag 58; *Allah Ditta v. Jamnadas* AIR 1929 Lab 679; *Tharakam Veetil Muhammad v. Abdurahiman Kutty*, AIR 1953 Trav Co 429; *S.K. Buty v. Shriram Hari Tambe*, AIR 1964 Mag 65 and *Jiwanandan Singh v. Sia Ram Prasad Singh*, AIR 1961 Pal 347.

6. On the other hand, it has been argued by Mr. S.K.M. Lodha that the delay on

the part of the plaintiff to seek specific performance of the contract amounted to laches and that the discretion of the courts below in refusing specific performance should not be interfered with. The argument has been supported by reference to *Lekh Singh v. Dwarkanath* AIR 1929 Lab 249; *Skinner, R.H. v. Veronica Skinner* AIR 1930 Lah 1004; *Rahmath Unnissa Begum v. Shimoga Co-operative Bank, Ltd.* AIR 1951 Mys 59 ; *Purshottam Sava v. Kunvevji Devji.* AIR 1954 San 104; *Gostho Behari Sadhukhan and Another Vs. Omiyo Prosad Mullick and Others, and Ram Sworup Singh Vs. Mahabir Mahton and Another*, Further, the learned counsel has argued that it was more convenient for defendant Nathulal to have sold the suit shop to Ranglal as he had agreed to purchase both the shops which, as has been mentioned earlier, had been mortgaged in favour of the plaintiff.

7. A reading of the judgment of the trial court shows that the learned Munsiff did not consider the provisions of Section 12 of the Act although Clause (c) and the Explanation to the section were directly applicable to the facts and circumstances of the case as the suit related to the breach of a contract to transfer Immovable property, The attention of the learned Judge of the lower appellate court was invited to these provisions, but He appears to have taken the view that they were subject to the provisions of Section 22 of the Act, according to which the jurisdiction to decree specific performance was discretionary. Holding that delay was "a good consideration for refusing specific performance" and taking note of the fact that the property had already been transferred to a third person for a higher price, he took the view that the learned Munsiff had not exercised his discretion arbitrarily, and refused to interfere with it in appeal.

8. As has been mentioned, the learned Munsiff did not at all consider the provisions of Section 12 of the Act and it could not be said that the exercise of the discretion by him was sound or reasonable. It was therefore the duty of the learned Civil Judge to have corrected the discretion on appeal as required by Section 22 of the Act and he obviously went wrong in failing to do so.

9. Section 12 of the Act, excluding the portions with which we are not concerned, reads as follows:

"12. Except as otherwise provided in this chapter the specific performance of any contract may in the discretion of the Court be enforced-

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief;

Explanation--Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer Immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer moveable property can be thus relieved".

A presumption thus arises under the law that, unless and until the contrary is proved, the court shall presume that compensation in money cannot adequately

relieve a breach of a contract to transfer Immovable property. The question whether there is proof to the contrary as envisaged In the Explanation, showing that a contract to transfer Immovable property can be adequately relieved, is essentially a question of fact, which has to be proved by the party pleading it. In the instant case, however, it is admitted that no such plea was taken by the defendants and it is therefore natural that the plaintiff should not have led any evidence in regard to it. Ordinarily, therefore, the contract being one for the transfer of immovable property. ought to have been specifically enforced as there was nothing to rebut the presumption that it could not be adequately relieved by compensation in money.

10. It is true that the provisions of Section 12 are not independent of the provisions of Section 22, under which the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such a relief merely because it is lawful to do so. It has, however, to be seen whether there was any justification for refusing to exercise the discretion, in favour of the plaintiff. Section 22 enumerates cases in which the court may properly exercise its discretion not to decree specific performance, but it is not in dispute that the defendant is not entitled to the benefit of any of them. This is so because it is not the defendant's case that decree of specific performance would result in an unfair advantage to the plaintiff, or that it would involve some hardship on the defendant which he did not foresee. All the same, it is now well settled that the cases mentioned in Section 22 in which the court may exercise a discretion not to decree specific performance, are not exhaustive, and that the discretion u/s 22 will not be exercised in the plaintiff's favour if he is guilty of laches so as to justify the inference that the delay on his part was wilful and amounted to waiver or abandonment or acquiescence to forgo the claim for specific performance, or caused hardship or prejudice to the other party.

11. Ordinarily, in the absence of an agreement to the contrary, time is not of the essence of a contract for sale of immovable property and there is nothing wrong if the plaintiff exercises his right to claim specific performance within the period of limitation prescribed by the law. Where, therefore, the defendant sets up a plea of laches with the allegation that the delay amounted to waiver or abandonment or acquiescence, or that it caused any prejudice or hardship to him, it is for him to plead the circumstances justifying that assertion. It would then be for the court to go into the allegation and come to a decision. So, where the defendant has not done so, it would not be fair to draw any such inferences against the plaintiff merely because of the delay in applying for specific performance. The learned Munsiff, it appears, took into consideration the mere fact that the plaintiff instituted the suit after more than two years of the contract for sale and, holding that the delay had not been explained, he rejected the claim.

Considerations of waiver or abandonment or acquiescence on account of the delay, or questions of prejudice or hardship to the defendant, were not at all

taken into consideration by him. The learned Munsiff was therefore obviously in error. Far from correcting it, the learned Judge of the lower appellate court went to the extent of holding that in such a case "there is no necessity of proving waiver or abandonment". That court therefore perpetrated the error by refusing to grant specific performance.

12. It may be mentioned that the doctrine of laches was followed by Courts of Equity in England and the foiling observations of Sir Barnes Peacock in the case of *Lindsay Petroleum Co. v. Hurd*, (1874) 22 WR 492 may be usefully reproduced:

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct done that which might fully be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, y^t put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise, would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

While, therefore, the practical application of the doctrine of laches depends upon the nature of the claim, mere lapse of time cannot be said to operate as laches and it is the inferences which may reasonably be deducible from it which are material, for a party has obviously the right to lay his claim within the period of limitation prescribed by the law so long as adverse inferences of the nature mentioned above are not reasonably deducible from the delay. Mere delay cannot, therefore, be a ground which could disentitle the plaintiff to a claim for specific performance. There is a large catena of cases in support of this view but it would be sufficient to refer to AIR 1925 Nag 58 AIR 1929 Lah 679 AIR 1953 Trav-Co. 429 AIR 1954 Nag 65 and *Jiwanandan Singh Vs. Sia Ram Prasad Singh*, cited by Mr. K. S. Lodha.

13. Mr. S. K. M. Lodha has, however, argued that the Courts below were justified in refusing specific performance on account of the delay in bringing the action, and he has placed reliance on the cases already referred. I have gone through those cases and they appear to be clearly distinguishable. In *Lekh Singh's* case, AIR 1929 Lah 249 the agreement for sale was executed on February 15, 1918. The plaintiff had notice of the fact that after about a couple of months the vendor had mortgaged a part of the property to another person. He also knew that the rest of the property had been sold on January 13, 1920. Still he did not bring his suit until February 19, 1921. In those facts and circumstances it was held that there was inordinate and unexplained delay which, coupled with the change of

conditions was sufficient ground for refusing specific performance. That decision was, therefore, based on altogether different facts. In *Skinner's case*, AIR 1930 Lah 1004, a prayer was made before the High Court that specific performance should be refused under Sections 22 and 28 of the Act.

Although those provisions of law were not pleaded specifically in the written statement, there was a final prayer in the written statement, that specific performance should be refused as it would be unjust and entail considerable hardship on the defendant. That plea was considered sufficient for purposes of Sections 22 and 28. No such plea has, however, been taken in the present case, so that the plaintiff had no opportunity to meet the case which was later on set up merely because there was some delay in filing the suit. The case of *Rahmath Unnissa Begum*, AIR 1951 Mys 59 was also different for it was held in it that the plaintiff was rather negligent and dilatory in making payments of the instalments which had been fixed for the payment of the remaining price of the land even though the defendant was very lenient and had given numerous opportunities for payment which the plaintiff did not avail herself of. In AIR 1954 Sau 104 it had been proved that the plaintiff was aware that the defendant had applied for permission to sell the property to another person and was never earnest to secure the sale for himself.

He allowed a long period of five years to go by and this was why an inference was drawn that he had abandoned his right by his conduct. So also, in *Gostho Behari Sadhukhan and Another Vs. Omiyo Prosad Mullick and Others*, the plaintiff was found to have come to the Court with the ulterior motive of taking advantage of the money spent by a transferee over the property and specific performance was refused. It was held by their Lordships, however, that it would be too much to say that mere delay, merely because of its length, would preclude a plaintiff from obtaining specific performance. In the remaining case of *Ram Sworup Singh Vs. Mahabir Mahton and Another*, specific performance was refused because there were several special features of the case which went to show that the plaintiff's conduct was itself blameworthy, and he did not even make the subsequent transferee a party to the suit. Thus none of the cases cited by the learned counsel for the respondents can be of any avail so far as the facts and circumstances of this case are concerned and I have no doubt that mere delay, even though it does not justify any of the inferences referred to above, would justify the rejection of the claim to specific performance.

14. It appears that the learned Civil Judge refused specific performance to the plaintiff for the further reasons that the land had already been transferred to defendant Ranglal for a much higher price and a decree for specific performance was likely to lead to multiplicity of proceedings as the other defendant would, in that case, have sued for realisation of the price from the vendor. According to Mr. S. K. M. Lodha, these are good grounds and the discretion already exercised should not be interfered with. It has also been argued that defendant Ranglal having purchased both the shops, and not merely the one which was agreed to

be sold to the plaintiff, there was a further advantage to the vendor in that transaction which also deserves to be taken into consideration.

15. I am afraid, there is no force in this argument. The mere fact that the vendor has sold the property to a third party in breach of a contract for sale to the plaintiff, cannot justify the argument that such a wrongful sale should weigh against the plaintiff in his claim for specific performance. It is natural that such a sale should be affected whenever a decree is passed for specific performance but this should not be a matter of much consequence since the vendee can, in his turn, sue the vendor for realisation of the price paid by him. This is particularly so when there is nothing to show that the delay on the plaintiff's part caused any hardship or was otherwise prejudicial to the vendee. Similarly, it cannot be said that simply because the vendor secures another offer which is more convenient or valuable, he should be allowed to go back on his obligation under the earlier contract for sale.

16. For the reasons mentioned above, I am of the view that as this is a case of a breach of contract for the transfer of immovable property, a presumption property arises u/s 12 of the Act that it could not be adequately relieved by compensation in money and there is no valid reason why the discretion to decree specific performance should not be exercised in the plaintiff's favour. The two Courts below were clearly in error in taking a contrary view.

17. It may be mentioned that it was faintly argued by Mr. S. K. M. Lodha that the plaintiff had admitted that, within a few days of the execution of agreement Ex. 1, defendant Nathulal showed his disinclination to sell the property and that this admission should have been sufficient to disentitle the plaintiff from claiming specific performance. It is not necessary, however, to examine this argument because, as has already been mentioned both the Courts below have concurrently held that the plaintiff was always ready and willing, to fulfil his part of the obligation in accordance with the agreement for sale and it has not been shown how that finding could be said to be vitiated by any error of law or procedure.

18. It has, however, been argued that the other finding of fact of the two Courts below, that defendant Ranglal got the sale-deed executed in his Favour although he was aware of the existence of agreement Ex. 1 for the sale of the property to the plaintiff, is vitiated by the fact that the burden of proving such a knowledge was placed on the plaintiff, and that burden having been accepted by him without protest, it could not have been thrown upon the defendant by the Court of first appeal. The argument has been justified on the authority of Ramanlal and Another Vs. Ramgopal, Further, it has been argued that the defect could not have been rectified for the further reason that the question of burden of proof had become immaterial when both the parties had led their evidence. For these reasons, it has been argued that the finding of fact of the Courts below should be ignored and issue No. 3, which is the relevant issue, decided afresh on the basis of the evidence already on the record. The learned counsel has also argued that

the evidence on the record does not justify the conclusion that defendant Ranglal was aware of the agreement for the sale of the property to the plaintiff.

19. It is true that the burden of proving the issue should have been placed upon the defendant. The mistake, it appears, was realised by the learned Munsif as well for he has admitted in his judgment that the burden of proof should have been placed on defendant Ranglal. He, however, took the view that the defect was immaterial when the parties had led their evidence in regard to it. The question is whether the lower appellate Court committed any illegality in rectifying the defect.

20. I have gone through *Ramanlal and Another Vs. Ramgopal*, which is a judgment of a division Bench of this Court. It has no doubt been held in it that where a party accepts the burden of proof laid on him by the Court below and undertakes to discharge it but fails to do so, he cannot in appeal turn round and say that he has not been fairly treated in the matter of burden of proof. But Mr. K.S. Lodha has argued that as their Lordships reached the conclusion that the burden was rightly placed on the defendants in the circumstances of that case, their observation was really obiter dicta. Besides, the learned counsel has invited attention to a decision of their Lordships of the Privy Council in *Peddi Reddi Jogi Reddi v. Chinnabbi Reddi*, AIR 1920 PC 13 in which their Lordships corrected the burden of proof wrongly thrown upon the defendant instead of placing it as it should have been on the plaintiff and decided the case by placing the burden upon the plaintiff. The learned counsel has also placed reliance on *Mahammad Tahir v. Raghubar Dayal*, 8 All LJ 736 in which also a similar view has been taken.

21. It appears to me that if in a given case it is not the grievance of any party that the defective burden of proof has caused a prejudice in the matter of leading evidence, it would be open to the aggrieved party to contend even at the appellate stage that the burden has been wrongly thrown upon him and it would be the duty of the Court to correct the error, if necessary, and record a finding. I am fortified in this view by the decision in *Peddi Reddi Jogi Reddi's* case AIR 1929 PC 13 just referred. Besides, an error in placing the onus of proof has been held by their Lordships of the Supreme Court in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, to be a defect of procedure of sufficient gravity to justify interference even in the second appeal if it is found that the finding of fact is the result, substantially, of such a wrong approach.

With utmost respect, therefore, to the learned Judges who decided *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, it appears to me that merely because a party undertakes to discharge the burden wrongly placed upon him by the trial Court, it cannot be said that the party is precluded from saying in the appellate Court that he has not been fairly treated in the matter of burden of proof. It does not, therefore, appear to be necessary for me to follow the observation made in *Ramanlal's* case as in my humble opinion there is force in the argument of the appellant's learned counsel that it is of the nature of obiter dicta.

22. I am clearly of the opinion that there was nothing to prevent the appellant from contending in the Court of first appeal that the burden of proof had been wrongly placed on him. As has been stated the learned appellate Judge realised and rectified the mistake and proceeded to examine the finding of the trial Court on the assumption that the burden of proof was on the defendant. It is nobody's case that this, in any way, caused a prejudice to either party as, apparently, both parties were satisfied with the evidence they had already led. What the appellate Court did was, therefore, quite in order and it appears that a similar view has been taken in *Dharmdeo Singh v. Ram Prasad Sah* AIR 1918 Pat 526 as well.

23. It has, however, been argued that while reassessing the evidence which had been led by the plaintiff to prove that he went to Amet and informed defendant Ranglal of the agreement for sale in his favour, the learned Judge of the lower appellate Court committed an illegal in taking the view that the "presumption should be that the plaintiff did go there and objected to the sale in favour of the defendant No. 2". No basis has been given for such a presumption and it does not really arise. So, as the finding of the Court below has been vitiated by this error, I have reassessed the evidence for myself, but I have no reason to disagree with the finding that defendant Ranglal was aware of the fact that defendant Nathulal had agreed to sell the property to the plaintiff and even then he secured its sale in his own favour. Plaintiff Faujmal has examined himself on this aspect of the case. He has stated that one Mangilal informed him that Nathulal was getting the sale-deed registered in favour of Bhanwarlal, son-in-law of defendant Ranglal, and had gone to Amet for the purpose.

Further Faujmal has stated that he went to Amet and informed Ranglal of the agreement in his favour, as he did not find Bhanwarlal there. Ranglal has, on the other hand, stated that Faujmal was not present at the time of the registration and that he (Ranglal) had no knowledge of the agreement in question. He has examined Moolchand D. W. 2, who attested sale-deed Ex. B-1 which was executed in Ranglal's favour. Then there are the statements of defendant Nathulal and Ranglal's son-in-law Bhanwarlal D. W. 4 in which they have stated, inter alia, that they did not see Faujmal in the Amet Tehsil on the date of the registration. Nathulal D. W. 8 is the vendor and is obviously an interested person. Bhanwarlal D. W. 4 is the son-in-law of defendant Ranglal and is interested in him. Moreover, the learned Munsiff has appended a note at the foot of his statement that the witness tried to hide things, and he did not place reliance on his testimony. The testimony of Moolchand D. W. 2 does not, by itself, appear to be sufficient to lead to the conclusion that defendant Ranglal was not aware of the agreement for the sale of the property in the plaintiff's favour.

The evidence of the parties is not, therefore, sufficient for a decision one way or the other and the question of burden of proof, which, in most cases, becomes immaterial where evidence has been led by the contesting parties, regains its importance. As has been held by their Lordships of the Privy Council in *William Robins v. National Trust Co., Ltd.* AIR 1927 PC 66 and the subsequent cases of

Sime, Darby" and Co., Ltd. v. Official Assignee AIR 1928 PC 77 Yellappa Ramappa v. Tippanna AIR 1929 PC 8, Harmes v. Ilinkson AIR 1946 PC 156 AIR 1948 23 (Privy Council) and Lakshmananna v. Venkateswarlu onus as a determining factor assumes importance in cases where the evidence pro and con is so evenly balanced that it is not helpful for coming to a sure conclusion. Then the onus determines the matter. Since the onus of proving want of notice of the original contract (in the plaintiff's favour) was on defendant Ranglal, it must be concluded that he failed to discharge it, I would, therefore, uphold the finding of the trial Court and decide that the defendant had notice of the earlier contract for the sale of the property to the plaintiff.

24. For the above reasons, the appeal is allowed and the plaintiff's suit decreed for specific predominance of the contract for sale between vendor Nathulal and the plaintiff and the subsequent transferee Ranglal is directed to join in the conveyance so as to pass on the title which resides in him to the plaintiff. The defendants are allowed two months' time to execute the sale-deed in favour of the plaintiff on payment of the consideration to defendant Nathulal. If the defendant does not execute the sale-deed within that time limit, the trial Court will execute and register the sale-deed in favour of the plaintiff. The appellant will be entitled to his costs from the respondents.