(2008) 03 KL CK 0015

In the High Court Of Kerala

Case No : C.R.P. 1168 of 2005

Illickal Joseh and Others — APPELLANT

Vs

Cholappurath Vrindadevi and Others — RESPONDENT

Date of Decision : 06-03-2008

Acts Referred:

Limitation Act, 1963 — Article 54, 62
Specific Relief Act, 1963 — Section 22(1)
Transfer of Property Act, 1882 — Section 55, 55(6)

Citation : AIR 2009 Ker 2 : (2008) 1 KLJ 725

Hon'ble Judges : Harun-ul-Rashid, J

Bench : Single Bench

Advocate : S. Sreekumar and P.K. Soyuz, for the Appellant; M. Gopikrishnan Nambiar, for the Respondent

Judgement

Harun-ul-Rashid, J.—The defendants in O.S. No. 46 of 1999 except defendants 3, 5, 6, 8 and 17 on the file of the Sub Court, Vadakara are the revision petitioners. The suit was filed by respondents 1 to 4 as plaintiffs for realisation of money.

2. The plaint schedule properties, 21 items, having an extent of 29 acres belonged to the defendants and they had agreed to sell the properties to the predecessor of the plaintiffs, late Sahadevan, for a consideration of Rs. 46,00,000/-. The terms and conditions agreed between the parties had been reduced into a written agreement for sale executed on 11-1-1994 and an amount of Rs. 9,00,000/- was given as advance towards sale consideration on the date of agreement itself. Subsequent payments were also made and altogether an amount of Rs. 17,50,000/- was given towards sale consideration. As per the agreement, the sale deed is to be executed on or before 30-6-1994 after measuring the properties and verifying the extent of the same. One of the terms of the agreement was that the defendants had to satisfy late Sahadevan the title of the properties by showing the original documents and also that the properties are free from encumbrance. The predecessor of the plaintiffs died on 29-9-1995. According to the plaintiffs, completion of the transaction was delayed by the

defendants deliberately under one pretext or other during the lifetime of late Sahadevan and that after his death, though they persuaded the defendants to execute the sale deed, there was no positive response. It is contended by the plaintiffs that since the defendants failed to perform their part of the contract, they were constrained to rescind the contract and, therefore, entitled to get back the amount paid towards purchase price.

3. In the written statement filed by the defendants, execution of the agreement and receipt of Rs. 17,50,000/- from the predecessor of the plaintiffs are admitted. According to the defendants, the plaintiffs and deceased Sahadevan are responsible for not carrying out the terms of the contract and that the defendants were in fact ready and willing to hand over the original title deeds and other documents and to execute the sale deed as agreed. The defendants contended that the transaction was postponed as the plaintiffs were not ready with the balance sale consideration.

4. The trial Court framed five issues, two of which are (i) whether the suit is barred by limitation and (ii) who among the parties to the sale agreement committed breach of contract. The suit was listed for trial and at that time, the defendants insisted for a preliminary hearing on issue No. (i). The Court below took the stand that the disputed fact as to who had committed default in the performance of the agreement is a complex issue which requires proof by oral and documentary evidence on both sides. The trial Court is of the view that for the purpose of deciding the suit filed u/s 55(6)(b) of the Transfer of Property Act, 1882, the question of applicability of the relevant Article under the Limitation Act can be decided only after the evidence is taken. By taking such a view, according to me rightly, the trial Court refused to decide the question of limitation as a preliminary issue. The revision petitioners/defendants had insisted for a preliminary hearing of the above issue in spite of the factual and legal position stated above. Since the trial Court did not consider this question as a preliminary issue, the revision petitioners approached this Court by filing W.P. (C) No. 21346 of 2005 for a direction to the Court below to hear the question of limitation as a preliminary issue and this Court directed the trial Court to decide the preliminary issue regarding limitation in accordance with law.

5. The trial Court in order to adjudicate the question of limitation had elaborately narrated the respective contentions of the parties and rightly observed that the question as to who committed default in performing their part of the agreement calls for detailed enquiry on the basis of the evidence to be adduced by both sides. The trial Court also observed that from the materials available at this stage, the Court was not in a position to arrive at a conclusion as to who had defaulted in performing their part of the agreement. In paragraphs 11 and 12 of the judgment, the Court below discussed the remedies provided under the Specific Relief Act, 1963 to a person who has entered into an agreement for sale of the property who is complaining about non-performance on the part of the other side. The Court below also noticed that Section 22(1)(b) of the Specific

Relief Act provides for the remedy of refund of the advance amount. The Court below also considered Section 55(a) of the Transfer of Property Act wherein remedy for return of advance amount is contemplated. After examining the question, the Court below held that if an agreement could not be performed due to the fault of the buyer, the relevant Article applicable for the filing of the suit is Article 54 of the Limitation Act, 1963 and that the materials available before the Court do not lead to the conclusive finding that non-performance of the contract was due to the fault of the plaintiffs or their predecessor-in-interest. The Court below had raised a specific issue as to who was at fault for the non-performance of the contract which can be adjudicated only after examining the evidence adduced by the parties. The question as to whether the plaintiffs have improperly declined to accept delivery of the property or not is a question to be decided after taking evidence. The issues regarding the question of limitation and as to who among the parties to the sale agreement committed breach of contract are interlinked and, therefore, can only be decided after conclusion of the trial. For the purpose of taking a decision as to whether the plaintiffs are entitled to a decree u/s 55(6)(b) of the Transfer of Property Act, the trial Court rightly concluded that the question of limitation largely depends on the question whether the plaintiffs have improperly declined to accept delivery of the property or not.

6. On a plain reading of Section 55(6)(b) of the Transfer of Property Act, it is clear that in the absence of a contract to the contrary, the buyer will have a charge on the seller''s interest in the property which is the subject-matter of the sale agreement in so far as the purchase money and interest on such amount are concerned, unless the buyer has improperly declined to accept delivery. The charge is available against the seller and all persons claiming under him. The buyer''s charge under the section is a statutory charge and differs from a contractual charge which a buyer may be entitled to claim under a separate contract. Charge on the property u/s 55(6)(b) of the Transfer of Property Act is enforceable not only against the seller, but against all persons claiming under him. Article 62 of the Limitation Act, provides a period of 12 years, "to enforce payment of money secured by a mortgage or otherwise charged upon immovable property" from the date when money becomes due.

7. It is clear from Article 62 of the Limitation Act that the period of limitation for enforcement of the statutory charge created u/s 55(6)(b) of the Transfer of Property Act is 12 years from the date on which it become due and not three years. The Supreme Court in the decision in Delhi Development Authority v. Skipper Construction Co. (P) Ltd. reported in AIR 2000 SC 573 held that the period of limitation for enforcement of a statutory charge created u/s 55(6)(b) of the Transfer of Property Act is 12 years from the date when the money becomes due. The buyer''s charge u/s 55(6)(b) of the Transfer of Property Act would extend and enure to the purchase money or earnest money paid before the title passes and property has been delivered by the seller to the purchaser, on the seller''s interest in the property unless the purchaser has improperly declined to

accept delivery of the property or when he properly declines to accept delivery including for the interest on purchase money and costs awarded to the purchaser, in a suit to compel specific performance of the contract or to obtain a decree for its rescission.''

8. After discussing the entire materials and the factual and legal position, I am of the view that in the light of the contentions of the parties and in view of Section 55(6)(b) of the Transfer of Property Act, the proper course is to have left the question of limitation undecided at this stage. I have noticed the fact that the question was decided as per the direction issued by this Court in the Writ Petition, only because of the insistence on the part of the defendants. The defendants filed the Writ Petition seeking such a direction and pursuant to the direction of this Court, the trial Court decided the issue. The trial Court having taken a decision against the defendants, they have approached this Court in revision challenging the said decision. The conduct on the part of the defendants is highly deprecable and it appears that attempts are being made to protract the trial and disposal of the suit in the special context in which the question was re-opened at the instance of the same persons who had insisted for a decision on the question of limitation. After inviting a decision against them, in this revision they contended that the trial Court should have considered the issue only at the final stage. This conduct shows that the defendants intend to protract the proceedings of the case to the extent possible. Therefore, they are liable to pay heavy costs.

9. In the above circumstances, by invoking the revisional jurisdiction I set aside the finding on the issue of limitation on condition that the revision petitioners pay Rs. 25,000/- as costs within one month from today. The trial Court shall decide the issue regarding limitation afresh along with other issues. The trial Court shall give top priority to this case and decide the same as expeditiously as possible, at any rate within six months from today.

10. The Civil Revision Petition is disposed of as above.

