

(2011) 03 KL CK 0066

In the High Court Of Kerala

Case No : Writ Petition (C) No. 836 of 2010 (O)

Kappothoora Chandran, Kappithoora Haridasan and
Kappithoora Ajitha

APPELLANT

Vs

N. Musthafa Haji

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, 148, 151
Specific Relief Act, 1963 — Section 28, 28(1), 28(3)

Citation : (2011) 4 RCR(Civil) 267 : (2011) 4 RCR(Civil) 267

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

Bench : Single Bench

Advocate : C. Khalid, for the Appellant; C.P. Peethambaran, for the Respondent

Final Decision : Dismissed

Judgement

Harun-UI-Rashid, J.—The petitioners are the defendants in O.S.No.39 of 2008 on the file of the Sub Court, Thalassery. They are also the respondents in I.A.Nos.2467 & 2468 of 2009. The writ petition is filed seeking to set aside Ext.P4 common order dated 5.12.2009 in the above said I.As and to pass an order dismissing the said I.As as illegal and arbitrary.

2. I.A.No.2467/2009 is an application filed u/s 28(3)(a) of the Specific Relief Act to direct the defendants in the suit (petitioners herein) to execute the sale deed in respect of plaint A, B and C schedule properties. I.A.No.2468/2009 is filed u/s 151 of the CPC to permit the plaintiff to deposit the balance sale consideration before the court.

3. The short facts leading to the filing of the aforesaid two writ petitions are as follows:

Suit was filed for specific performance of the agreement dated 2.4.2007 directing the defendants to execute sale deeds in respect of plaint A, B and C schedule property. During trial, the matter was settled between the parties. They filed a

compromise petition on 11.11.2008 praying to pass a decree in terms of the compromise. The court decreed the suit as per the terms of compromise.

4. Copy of the compromise petition filed by the parties under Order XXIII Rule 3 is marked as Ext.P3. As per the terms of the compromise petition the petitioner in the I.A (plaintiff) agreed to purchase the plaint schedule properties for a different centage value than what is mentioned in the sale agreements. As per the sale agreement dated 2.4.2007 the defendants agreed to sell plaint schedule properties to the plaintiff at the rate of Rs.16,000/- per cent. As per the terms of the compromise the centage value is fixed separately for plaint A, B and C schedule properties. Parties agreed the value of plaint A schedule property at Rs.21,000/- per cent, plaint B schedule property at Rs.20,000/- per cent and Rs.21,000/- per cent for plaint C schedule property. Clause 2, 3 & 4 in Ext.P3 deals with the value of the property. Clause (5) deals with the period within which the balance consideration shall be paid and the execution of the sale deeds. The period agreed was on or before 3= months. In clause (6) parties further agreed that if the plaintiff is unable to get the sale deeds executed within 3= months, the plaintiff shall have the right to receive back the advance amount paid without interest. In clause ((7) the parties further stipulate that if the defendants commit breach in executing the sale deeds within the agreed dates, the plaintiff has got every right to get the execution of the sale deed in his favour by payment of the consideration originally agreed in the sale agreements (Rs.16,0000/- per cent) and that the defendants are bound to execute the sale deeds at the same rate. The court passed a decree in terms of the compromise. Thus all the terms agreed between the parties which are recited in Ext.P3 form part of the decree.

5. As I said earlier, clause (5) in Ext.P3 compromise petition fixed 3= months for execution of the sale deeds in favour of the plaintiff. The said 3= months period expired on 26.2.2009. Plaintiff had not chosen to pay the agreed sale consideration on before 26.2.2009. The sale consideration payable less advance amount is rupees 13 and odd lakhs.

6. After the expiry of the date, i.e., on 27.2.2009, the plaintiff paid Rs.2,45,000/- to the third respondent in the I.A. The petitioner has also purchased stamp paper worth Rs.34,300/-for the purpose of registration. The petitioner filed the above said I.As for the reliefs I have mentioned in the preceding paragraphs.

7. In the counter affidavit filed by the petitioners who are the respondents in the I.As, it is inter alia contended that the time fixed for execution of the sale deed as per the terms of compromise has expired, that they are not liable to execute the sale deed in favour of the petitioner, that they have entered into an agreement for sale in respect of the property with one Babu, that the total stamp value for preparation of the sale deed is Rs.1,25,825/- and that the purchase of stamp paper by the petitioner for Rs.34,500/- is not sufficient and adequate to show that the petitioner was ready with the sufficient stamp papers. The respondents in the I.A admitted that Rs.2,45,000/- was paid by the plaintiff to

the third respondent. It is also contended that they have granted further time to the plaintiff and fixed 25.4.2009 as the date for registration of the sale deeds. But, the plaintiff did not turn up on or before 25.4.2009 with the balance sale consideration. In the said factual matrix the petitioners who are the respondents in the I.As prayed for dismissal of the petitions.

8. I have already narrated in detail the terms of compromise entered into between the parties during the pendency of the suit and the decree passed by the court which is in terms of the compromise petition. The decree was passed on 11.11.2008. As per the terms of the decree the last date fixed for registration of the sale deed was on 26.2.2009. The court below allowed the petitions following the settled decision that the court can extend the time for payment fixed in the decree. The court also relied on the decision of the Calcutta High Court reported in *Mangalaghosh v. Rabindranath Hazra* AIR 1987 Cul 307. Finding that the plaintiff paid an amount of Rs.2,45,000/- on 27.2.2009 towards balance sale consideration for the sale of plaint C schedule property, towards the balance sale consideration the parties extended time for execution of the sale deed to 25.4.2009 and that the plaintiff purchased a portion of the stamp paper, the court allowed the petitions by Ext.P4 order.

9. Ext.P3 is the petition filed stating the terms of compromise. A decree was passed in terms of the compromise. As per the decree the petitioner/plaintiff shall have to pay the balance consideration of 13 and odd lakhs of rupees on or before 26.2.2009. It is not disputed that the plaintiff did not pay the balance consideration as per the terms of the decree. It is true that the court has got power to extend the time fixed for execution of the sale deed. It is also true that even after the expiry of the period the court can extend the period for execution of the sale deed. Section 28(1) of the Specific Relief Act postulates that the court does not lose its jurisdiction after the grant of the decree for specific performance. Section 28 also gives the power to grant order of rescission of the agreement which itself indicates that till the sale deed is executed, the trial court retains its power and jurisdiction to deal with the decree of specific performance. No doubt, therefore, the court has power to enlarge the time in favour of the judgment debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance. The principles of law as stated above are stated in *Kumar Dharendra Mullick v. Tivoli Park Apartments (P) Ltd.* 2005(1) KLT SN 21. This Court in *Chitambar v. Viswambaram* 2000 (2) KLT 128 held that the power to extend the time is inbuilt in Section 28 itself, and therefore the court has got power to extend time for execution of the sale deed. The learned counsel for the plaintiff/respondent also relied on the decisions of the Apex Court in *Smt. Periyakkal and Others Vs. Smt. Dakshyani*, and *Mangala Ghosh Vs. Rabindra Nath Hazra*, . The Apex Court in *Periyakkal's* case (supra) referring to Section 148 of the CPC held that "time for deposit stipulated by the parties became the time allowed by the court and this gives the court the jurisdiction to extend time in appropriate cases. Of course, time would not be extended ordinarily, nor for the mere asking. It would be granted in rare cases to prevent

manifest injustice. The court would not rewrite a contract between the parties but the court would relieve against a forfeiture clause; and where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed". The Apex Court in the decision reported in *Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh Vs. Mangilal alias Mangtya*, referring to subsection (1) of Section 28 held that "the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with the decree of specific performance". The Apex Court in *Kumar Dharendra Mullick's case* (supra) also followed the same principles. The Calcutta High Court in the decision cited supra held as follows:

The court can extend the time for deposit of the purchase-money or balance of the purchase- money, I hold that upon an application made by a party the Court can extend the time stipulated in the compromise petition upon which the consent decree has been passed in a suit for specific performance of contract, even without any consent of the other party, as in such a case the time so stipulated is not the essence of the contract and is a penal clause and such time becomes part of the Court's order and the Court is empowered to relieve the party concerned of the rigours of such penal clause in appropriate cases.

10. The power to extend the time originally fixed in the decree depends on the facts and circumstances of each case. Of course, time would not be extended ordinarily, it would be granted in rare cases of manifest injustice. By granting further time the court would not re-write a contract between the parties. In appropriate cases, where the contract of the parties has merged in the order of the court, the court's freedom to act to further the ends of justice would surely not stand curtailed. The relief extended in the two decisions reported in *Smt. Periyakkal and Others Vs. Smt. Dakshyani*, and *Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh Vs. Mangilal alias Mangtya*, are on the basis of the peculiar facts of case, apart from fixing the time limit in the decree there is another important clause namely clause No.(6). Clause No.6 recites that if the plaintiff failed to carryout the terms of payment of balance consideration within the 3= months agreed period, the plaintiff have the right to demand the advance amount paid by him from the defendants. Going by the said clause the time for payment of the amount within the agreed time is important and if the payment is not made within the said period the only right reserved by the plaintiff is to receive back the advance amount already paid as per the original agreement. This is not a case where a decree was passed in favour of the plaintiff decreeing the suit for specific performance and fixing the date for execution of the sale deed. This is a case where the parties agreed certain terms and a decree was passed in terms of the agreement. The right of the plaintiff to ask for execution of the sale deed within 3= months is one of the rights conferred. If the balance consideration is not paid within the time the recitals

would go to show that the defendants are freed from executing the sale deed after the said date. As per the agreement, the plaintiff's right after expiry date, is to receive back the advance amount. In these circumstances, the learned Sub Judge committed an error of law by directing the defendants to execute the assignment deed in respect of the plaint schedule properties. The offer to pay the balance amount due to the defendants long after the agreement period cannot be entertained. More over, the plaintiff has not chosen to apply to the court for extension of time before the expiry of the period fixed for execution of the sale deeds. Failure on the part of the plaintiff to pay balance sale consideration due to the petitioners 1 & 2 and the portion of the balance consideration due to the petitioner No.3 resulted in the rescission of the compromise as per clause (6) of the Ext.P3 compromise petition. Partial payment of Rs.2,45,000/- or purchase of stamp paper worth Rs.34,500/- are not acts which would go to show that the plaintiff has complied with the terms of the decree or terms of agreement between the parties. The said act does not amount to fulfillment of the terms of the agreement embodied in the compromise petition. Compromise entered into by the plaintiff and defendants have to be performed within the fixed date. A portion of the payment due to the third petitioner alone cannot be considered as performance of the obligation. In the facts and circumstances stated in detail, this Court is of the view that the extension of time granted for the execution of the sale deeds is unsustainable on facts and law. Therefore, Ext.P4 common order is set aside. I.A.Nos.2467 & 2468 of 2009 in O.S.No.39/2008 on the file of the Sub Court, Thalassery are dismissed.

11. The writ petition is allowed.

W.P.(C).No.25260/2010

12. The connected writ petition 25260/2010 is filed by the very same plaintiff for a direction to the respondents 1 & 2 (Thahsildar and Village Officer) not to transfer the registry of the property covered by Exts.P1 to P3 and P5 to P8 in favour of the third respondent. In the light of the decision taken in W.P.(C). No.836/2010, the prayer in 25260/2010 does not survive. Hence the writ petition is dismissed.