

(1999) 07 KL CK 0011
In the High Court Of Kerala
Case No : S.A. No. 183 of 1990E

Kochuthampi Rawther Hassankutty

APPELLANT

Vs

Peerumuhammed Puthumaliyar Rawther and Others

RESPONDENT

Date of Decision : 27-07-1999

Acts Referred:

Specific Relief Act, 1963 — Section 16

Citation : AIR 2000 Ker 17 : (2000) 3 CivCC 138 : (1999) 3 ILR (Ker) 821 : (2000) 2 RCR(Civil) 660

Hon'ble Judges : K.A. Abdul Gafoor, J

Bench : Single Bench

Advocate : S. Venkitasubramania Ayyar, V. Giri, M. Mohammed Navaz and T.P. Sajan, for the Appellant; P.C. Joseph Pazheparambil and T.H. Abdul Azeez, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Abdul Gafoor, J.—Defendant No. 3 in a suit for specific performance is the appellant in this case. He is an assignee from the 1st defendant who entered into an agreement with the plaintiff. The suit was decreed and confirmed in appeal by the lower appellate Court. Exhibit A10 is the agreement for sale dated 3-10-1978.

2. Can an agreement without mutuality be enforced? Can a decree for specific performance be granted in the absence of averment regarding readiness and willingness of the plaintiff in terms of Section 16(c) of the Specific Relief Act? Can a decree for specific performance be granted, when there is much disparity in price due to lapse of time? These are the substantial questions of law formulated in this appeal. Can an agreement for sale be enforced when there is mistake of fact regarding the identity of a property agreed to be sold, is also argued as a question of law. Therefore, these are the substantial questions of law arising in this case.

3. The description of the property in Ext. A 10 is 20 cents of land lying east west on the southern side of 55 cents of property touching the eastern side and

stretching north south of a larger extent of 92 cents. The property covered by Ext. A10 was of course not described with side measurements. Though Ext. A10 agreement was disputed by the plaintiff both the scribe as well as the two witnesses examined as P.Ws. 2, 3 and 5 have proved the execution. In the light of this weighty evidence, the defendant No. 3 or the defendant No. 1 cannot deny execution of Ext. A10 agreement. It is contended by defendant No. 1 that he was not the owner of the whole of the property agreed to be conveyed as per Ext. A10. That property is owned by some other as well. Therefore, there is mistake regarding identity of the subject-matter of the agreement which itself is a mistake as to a matter of fact essential to the agreement. Therefore, the agreement is void. It is not in dispute that defendant No. 1. the executant of Ext. A10 agreement is a party to Ext. A1 partition deed and he and his wife got 8 cents each in terms of Ext. A1 and that as per Ext. A2 sale deed his wife has transferred the rights over her 8 cent to defendant No. 1. Exhibits A3 to A8 are certain other sale deeds in favour of defendant No. 1 transferring the shares of other sharers. These documents altogether cover an extent of 60 cents. Out of that as per Ext. A9.5 cents of property purchased as per Ext. A5 had been sold by the defendant No. 1. Thus altogether the 1st defendant was having 55 cents of land. This 55 cents of land is part of a larger extent of 92 cents which was partitioned in terms of Ext. A1. It is out of this 55 cents, 20 cents had been agreed to be sold in Ext. A10, by defendant No. 1 to the plaintiff. The ownership over the 55 cents is not disputed by the defendant and as seen from Ext. C3 plan this 55 cent is marked as HBCLDEJKI. the entire 92 cents is almost in L shape and out of this the aforesaid 55 cents is touching the eastern boundary and also stretching the northern as well as southern boundary on one limb of the L portion. Therefore, that 55 cents, substantially satisfy the description made mention of in paragraph 4 of the plaint and Ext. A10 agreement. The 20 cents described within that 55 cents is also touching southern boundary and stretching east west. Therefore, the description of the 20 cents in Ext. A10 agreement also is satisfied more or less in conformity with the agreement. Both the parties did not, while entering into the agreement have any description of the property with the side measurement but only with reference to the sides of the said 55 cents forming part of a larger extent of 92 cents. In such circumstances. It cannot be said that there was any mistake as to a matter of fact essential to the agreement so as to invalidate the contract in terms of Section 20 of the Contract Act.

4. It is true that Ext. A10 is not signed by both the parties. But Ext. A10 contains an unequivocal undertaking by the 1st defendant to sell the property to the plaintiff, after accepting advance from the plaintiff. It is an agreement on the part of the defendant No. 1 in favour of the plaintiff upon due consideration. The plaintiff has accepted that agreement. Thus all the essentials of a valid contract had been satisfied. So even if the plaintiff had not subscribed his signature to Ext. A10, it cannot be contended, that there was no mutuality as the receipt of the consideration or payment and receipt of the advance amount had been satisfied by the defendant No. 1 in Ext. A10 itself. So there was mutuality and

consensus so far as the parties described in Ext. A10 is concerned. So, Ext. A10 Is not a memorandum of offer alone as contended by the appellant. Because of the passage of consideration and its acceptance and also the acceptance of the offer itself is a true concluded contract so that it can be enforced.

5. It is a statutory requirement in terms of Section 16(c) of the Specific Relief Act that a plaintiff seeking specific performance of the agreement shall aver and prove that he has performed his part of the contract and he is willing to performs or he is ready and willing to perform his part of the contract. In the absence of such pleading and proof of such pleading, the plaintiff will not be entitled to get a decree. It is contended that the plaint does not contain any averment with regard to the readiness and willingness of the plaintiff to perform his part of the contract. Therefore, the plaintiff is not entitled to get a decree. In the absence of such pleading the Courts below were wrong in granting a decree for specific performance. It may be true that the defendant had not pleaded that there was no such pleading In terms of Section 16(c) in the plaint. But such weakness in the defendants' case shall not be taken as an advantage to the plaintiff in a specific performance suit. To fortify this contention the counsel relied on the decision reported in Punjab Urban Planning and Dev. Authority Vs. M/s. Shiv Saraswati Iron and Steel Re-Rolling Mills, It is contended that the appellant-3rd defendant, though, an assignee from the 1st defendant can agitate this contention in spite of the decision in Union of India (UOI) and Others Vs. G. Vasudevan Pillay and Others, because 3rd defendant-appellant had taken the assignment subsequent to the institution of the suit. Therefore, whatever rights had been crystallised to defendant No. 1 will be available to the 3rd defendant. It is further contended placing reliance on Section 146 and Order XXII. Rule 10. CPC as well as the decision reported in Mamu v. Kunhamina Umma. 1971 KLT 296 that an assignee can raise all the contentions that are available to the assignor and an assignee cannot be defeated because of such assignment.

6. As against this, it is contended by the counsel for the plaintiff that he had issued a notice showing his readiness to the performance of the contract and he had made specific averments in paragraph 8 of the plaint that in terms of the agreement Ext. A10 he had Issued a notice to the defendant No. 1 to execute the document in his favour after receiving the balance consideration of Rs. 6.000/-. It is contended relying on Jayalakshmi v. Anil Kumar (1996) 1 KLT 727 : (1996 AIHC 4353) that,

"The readiness and willingness of the appellant to perform her part of the contract crystalline, in view of the deposit of the balance sale consideration made by her. The deposit of the balance sale consideration in Court ipso facto establishes the readiness and willingness of the appellant from the date of deposit till the passing of the decree in the suit".

7. A reading of paragraph 8 of the plaint will clearly show that the plaintiff had averred his readiness and willingness to perform his part of the contract because he had referred to the notice where he had demanded to the defendant No. 1 to

execute the document receiving the balance consideration from him. Receipt of the balance consideration means the payment of balance consideration by the defendant No. 1, the performance of his part of the contract. That notice is not disputed by the defendants. Therefore, there is clear averment in the plaint with regard to the readiness and willingness of the plaintiff and his readiness is proved by deposit of the balance consideration in the Court. Therefore, the contention raised with reference to Section 16(c) of the Specific Relief Act, cannot be sustained.

8. It is contended further that as the decree of the specific performance is a decree granted in equity, taking into account the lapse of time and exorbitant rise in price of land, at this distance of time such a decree cannot be granted. That will result in inequity rather than granting equity in favour of the plaintiff, the appellant contends. The price agreed to in Ext. A10 dated 3-10-78 is only Rs. 500/- per cent whereas the present price of land has no comparison to the said agreed price. In this regard, the decision in *Kanshi Ram Vs. Om Prakash Jawal and others*, is relied on. The Court held,

"It is true that the rise in prices of the property during the pendency of the suit may not be the sole consideration for refusing to decree the suit for specific performance. But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretions to be exercised on sound principles. When the Court gets into equity Jurisdiction it would be guided by justice, equity, good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the respondent himself had claimed alternative relief for damages, we think that the Courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair".

In this case, there is no plea for alternative relief, Exhibit A10 was executed on 3-10-1978 and the suit was filed on 10-10-79. There is no delay in filing the suit. The suit was decreed on 4-3-1986 itself. Thereafter, it was at the instance of the appellant that the matter is being prolonged. For this the plaintiff shall not be penalised. In this regard it would be profitable to refer to the decision of the Supreme Court in *S.V.R. Mudaliar (Dead) by Lrs. and Others Vs. Rajabu F. Buhari (Mrs) (Dead) by Lrs. and Others*, the Supreme Court held that,

"In so far as the delay in the disposal of the case and the rise in prices during Interregnum, Shri Parasaran urges that the delay not having been occasioned by any act of the plaintiff, he may not be punished for the same on the principle of "*actus curiae neminem gravabit*" an act of the Court shall prejudice no man. As regards the rise in prices, the submission is that it should not weigh with the Court in refusing the relief if otherwise due, as opined in *S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar*, which decision was cited with approval in *Mir Abdul Hakeem Khan v. Abdul Mannan Khadri*. We are in agreement with this view because of the normal trend of rise in prices of properties situate especially in metropolitan city like Madras, where the property in question is situate. If merely

because the prices have risen during the pendency of litigation, we were to deny the relief of specific performance if otherwise due, this relief could hardly be granted in any case, because by the time the litigation comes to an end a sufficiently long period is likely to elapse in most of the cases. This factor therefore, should not normally weigh against the suitor in exercise of discretion by a Court in a case of the present nature".

In such circumstances, as the plaintiff had approached the Court immediately after the refusal to perform Ext. AID agreement and as the suit had been decreed on 4-3-86, it cannot be said that the lapse of time is because of the fault of the plaintiff. Therefore, the plaintiff cannot be denied of the decree or the fruits of the decree, when he is in every other respect entitled to succeed.

Thus, the questions of law raised in this appeal are answered against the appellant resulting in dismissal of the appeal, anyhow with no order as to costs.