
(1953) 03 KL CK 0005
In the High Court Of Kerala
Case No : Appeal Suit No. 2 of 1123

Mani and Others

APPELLANT

Vs

Krishnan Nayar

RESPONDENT

Date of Decision : 20-03-1953

Acts Referred:

Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1953 Ker 377

Hon'ble Judges : K.T. Koshi, C.J;M.S. Menon, J;G. Kumara Pillai, J

Bench : Full Bench

Advocate : K. Atchuta Menon and A. Krishna Menon, for the Appellant; K.K. Unni and P. Gopala Menon, for the Respondent

Judgement

Govinda Pillai, J.—The Plaintiffs are the Appellants. The plaintiff A Schedule property belonged to them. While they were about to lease out the property, the Defendant agreed to purchase it for Rs. 867-8-0. The Defendant was then not in a position to pay the consideration for the sale. The Plaintiffs were not willing to part with the property without getting at least a portion of the consideration agreed to and sufficient security for the balance. But since the agricultural operations in the property had to be started then, the parties entered into an agreement on 7th Medom 1117 regarding the conditions under which the sale was to be executed. According to this, the Defendant was to pay the Plaintiffs Rs. 500/- out of the sale consideration on or before 20th Edavom 1117 and execute a mortgage for the balance charging plaintiff A Schedule" property as well as the, properties described in the B schedule to the plaintiff.

The amount covered by the mortgage was to be paid with 6 per cent, interest within one year. If the Defendant defaulted in taking the sale deed, he was to pay the Plaintiffs Rs. 75/- as damages. If on the other hand the transaction fell through by the default of the Plaintiffs, they were to give the Defendant Rs. 75/-. The Plaintiffs had agreed, to hand over to the Defendant at the time of sale the receipts for the payment of renewal fees and "Michavaram" to the "Jenmi". The

Defendant had also put the Plaintiffs in possession, the title deeds of B schedule properties. The Defendant did not pay Rs. 500/- on 20th "Edavom" 1117. He had also not done anything for carrying out the terms of the contract.

Though the Defendant had been reminded of the agreement before 20th "Edavom" 1117, he had informed the Plaintiffs that he was not able to secure the amount and that, therefore, he would surrender possession of the property with profits and damages after harvesting the crops raised by him. The breach of the contract was therefore on account of the Defendant's default. The parties had intended that time was to be of the essence of the contract. There was no intention to extend the period mentioned in the agreement. The Plaintiffs had also not extended the period any further. In order to misappropriate the profits arising from the property, the Defendant was still retaining possession of the property without surrendering the same. Because of the rise in the price of paddy, the Defendant, with the object of securing the property, had sent a notice on 6th "Mithunam" 1119 through an Advocate.

A reply showing the true state of affaire was given to the Defendant. The mesne profits from the plaint A Schedule property would be 112 "paras" of paddy. The Plaintiffs are to get the same at this rate, from the 7th Medom 1117. The Defendant has also to pay interest on the same as also Rs. 75/- agreed to be paid as compensation for the breach of the contract. For the compensation of Rs. 75/-, the Plaintiffs were entitled to a charge on B Schedule properties as provided for in the agreement. The suit was therefore for the recovery of possession of the plaint A Schedule property with past and future mesne profits and for damages in pursuance of the agreement.

2. The Defendant contended that the suit was not maintainable, that the terms of the agreement were not correctly set out in the plaint, that he was always ready and willing to perform his part of the contract, whereas the Plaintiffs were not willing to receive the amount and execute the sale deed, that they had not given the receipt for the payment of the "Jenmi"s" dues by way of "Michavaram" and renewal fees, that they were not to get any damages or any charge oa B Schedule properties and that they were not entitled to get any amount more than the sale consideration agreed to. The Defendant had also prayed for a direction to the Plaintiffs to execute the sale deed on receipt of the sale consideration.

3. The lower Court held that time was not of the essence of the contract, that the sale deed was not executed because of the default of the Plaintiffs, that the suit as framed was not maintainable, that the Defendant was entitled to a decree for specific performance of the contract and that the Plaintiffs were to execute the sale deed in respect of plaint A schedule property as the Defendant had deposited in Court the whole purchase money. The suit was therefore dismissed and the counter claim of the Defendant decreed. The Plaintiffs were ordered to execute a sale deed in respect of the plaint A Schedule property in favour of the Defendant within on month. They were also directed to deliver to the Defendant

all the title deeds relating to the A Schedule property and also the title deeds relating to the B Schedule properties.

4. The Plaintiffs' appeal was once allowed by a Full Bench of the High Court of Judicature, Cochin. Subsequently, that judgment was reviewed and set aside and so the whole case has now come up again for decision before us.

5. Ext. A is the agreement between the parties regarding the sale of the plaintiff A Schedule property. Ext. I is the same as Ext. A embodying the same conditions. The sale deed should have been executed on or before 20th "Edavom" 1117. The contention of the Defendant that time was never intended to be of the essence of the contract was accepted by the lower Court. If time was of the essence of the contract, then the question would be as to who was responsible for the breach. In that case the party who committed the breach could not get any relief. The Plaintiffs would say that they were ready and willing to execute the sale deed on 20th "Edavom" 1117. But according to them the Defendant was not in possession of the neceo"; sary funds to take the sale deed. The Defendant would say that the Plaintiffs had not paid the Jenmi's dues before 20th "Edavom" 1117 and so they were not in a position to execute the sale deed and satisfy the Defendant, that there were no outstanding dues charged on the properties. These positions taken up by the parties have to be examined and before that it has to be considered whether from what is stated in Ext. A, it can be inferred that time is of the essence of the contract.

6. The material portions of Ext. A are as follows: (i) On or before 20th "Edavom" 1117, the Defendant was to pay Rs. 500/- to the Plaintiffs, (ii) For the balance of Rs. 367-8-0 the Defendant was to execute a hypothecation bond charging the plaintiff A and B Schedule properties and agreeing to pay 6 per cent, interest for the entire consideration for the sale deed from the date of the agreement, (iii) The amount thus secured by the hypothecation bond was to be paid within one year, (iv) The Defendant was to meet the necessary expenses for the sale and the hypothecation bond, (v) If the Defendant was not ready with the money before 20th "Edavom" 1117, he would be liable to pay compensation of Rs. 75/- and for that the Defendant and the properties, title deeds of which were handed over to the Plaintiffs on that date, would be liable. (vi) If the Plaintiffs did not accept Rs. 500/- and also the hypothecation bond to be executed by the Defendant and secure possession of the properties with profits they were to give compensation of Rs. 75/- to the Defendant. (vii) At the time of the execution of the sale deed, the Plaintiffs were to hand over the receipts for payment of "Michavaram" and renewal fees relating to A Schedule property and (viii) The Defendant, on that date was to hand over 16 documents as security for his undertaking.

7. The several provisions of Ext. A have to be examined to see whether the parties intended that time was to be of the essence of the contract. The Defendant was to pay Rs. 500/- to the Plaintiffs on or before 20-10-1117. He was also to execute a hypothecation bond for the balance agreeing to pay the

same with interest within one year of 7th "Medom" 1117. These dates would indicate that the parties wanted to settle the transaction between them within the periods mentioned therein. If time was not to be of the essence of contract, the sale deed could be executed at any time after 7-9-1117, i.e., even after one or two years. But the provision to execute a bond to pay the balance of consideration within one year of the date of the agreement would certainly indicate that the parties intended to settle all transactions within the period fixed by them.

The Defendant had agreed that in case he was not ready with the money on or before 20-10-1117 to take the sale deed, then the Plaintiffs would get compensation of Rs. 75/- and that this compensation would be charge on the Defendant's B Schedule properties from 20-10-1117. This provision is a clear indication that the sale deed should have been executed on or before 20-10-1117. If the sale deed was not to be executed before that time and if there was no obligation on the part of the Defendant to take the sale deed, then there will be no meaning for the charge declared from 20-10-1117 in favour of the Plaintiffs for the compensation agreed to be paid. If the sale deed is to be executed at any time, the question of compensation to either party could never arise. The indications mentioned above would show that the parties intended the time to be of the essence of the contract and that the sale deed should be executed on or before 20-10-1117. The view of the Court below to the contrary does not appear to be acceptable.

8. This leads us to consider as to who was responsible for the breach of the contract. Admittedly no sale deed was executed on 20-10-1117. The Plaintiffs would say that the Defendant was not in possession of necessary funds to take the sale deed and so the whole transaction fell through, whereas, according to the Defendant, the Plaintiffs were not able to execute the sale deed, because they were not able to get the necessary receipts before 20-10-1117 for payment of "Michavaram" and renewal fees due to the "Jenmi". The Defendant was the person who was to take the initiative in the matter. He was to get himself ready with the money required for the execution of the document. Ext. A would say that the Defendant was to meet all the expenses in connection with the execution of the sale deed and the hypothecation bond. If he was really ready with the money by 20-10-1117, he would not have remained quiet without taking some steps to safeguard his rights. He remained quiet till 6-11-1119 when alone he sent Ext. D notice calling upon the Plaintiffs to execute the sale deed.

There is no explanation for this unusual delay. Even in Ext. D, he had not insisted on the receipts for payment of "Jenmi's" dues. There is not even a reference to them in that notice. The Plaintiffs promptly replied Ext. D. by sending Ext. XII on 10-11-1119. This long silence on the part of the Defendant is not explained. The Defendant had deposited a sum of Rs. 500/- with a bank as security for payment of future subscriptions in a "chitty" conducted by that bank and which he had prized. His idea was to give Anr. security to the bank and draw this sum for

payment on 20-10-1117. As D.W. 3, he had admitted that after the execution of Ext. A, he attempted to draw this amount from the bank and that his attempt was unsuccessful as the bank declined to oblige him to release the security after taking other properties as security. He had admitted that his idea was to get the money from the bank and pay Rs. 500/- mentioned in Ext. A and that he was on the lookout for other money as the Bank did not oblige him with his request. He would say that he approached one Bhattathiri and- made arrangements for the money by the end of "Meenom".

This cannot be correct, for the agreement Ext. A itself was only in "Medom" 1117. No attempt was seen to have been made to correct this if it was a mistake. At any rate, he was on the lookout for money after the execution of Ext. A. This shows that he was not in possession of the necessary funds to take the sale deed. There is some indication in his evidence to show that the "Meenom" referred to was a mistake for later on he admitted that after his attempt to withdraw money from the Bank failed, he approached the Bhattathiri through his "Karia-sthan", examined in this case as D.W. 1. D.W. 1 had admitted that the Defendant had not met Bhattathiri and that the request for a loan had been made through him. There is nothing to show that any application was made to Bhattathiri for the loan or that Bhattathiri had really agreed to advance the amount. This story appears to be an invention for the purpose of this case to show that the Defendant had the necessary funds on 20th Edavom 1117.

Apart from the evidence of D.W. 1, there is nothing to show that the Defendant was in possession of the necessary funds. Defendant 1 as D.W. 3 had admitted that by the end of "Edavom" 1117, Plaintiff 2 had told him that it would not be possible to execute the sale deed and that he remained quiet thereafter to take the sale deed when it pleased the Plaintiffs to execute the same. If he had been informed in "Edavom" 1117 itself by Plaintiff 2 that no sale deed could be executed it is strange why the Defendant remained quiet till he sent Ext. D notice in "Mithunam" 1119. The Defendant would say that he was once engaged in a trade with a capital of Rs. 2000/- to 4000/-. If that be so, he would have accounts and it was easy for him to produce those accounts to show that he had more than Rs. 500/- in cash on the relevant date. He had not produced any such accounts.

The Defendant who had advanced the counter claim for specific performance of the agreement" had to prove that he was always ready with the funds and willing to take the sale deed. In this, he has miserably failed. Thus either on 20-10-1117 or thereafter till this suit was instituted or at least till 6-11-1119 when Ext. D notice was sent, the Defendant was neither willing nor ready to perform his part of the contract. He knew that by "Edavom" 1117 the Plaintiffs were not willing to execute the sale deed in his favour. In Ext. XII reply notice also they had informed him on 10-11-1119 that they were not willing to execute the sale deed. Yet he had not taken any steps to have the contract specifically performed. The Plaintiffs filed this suit on 5-4-1120. The summons of the suit

was served on the Defendant on 27-4-1120 and he had entered appearance on 21-5-1120. He filed the written statement only on 21-6-1120 after taking two adjournments and then alone he thought of depositing the amount mentioned in Ext. A in Court. Even then he had not deposited the interest on the entire amount as provided for in the agreement. The Defendant was the person who committed the breach of contract and the finding of the lower Court to the contrary is wrong.

The delay of either party in not performing the terms of the contract for sale on his part, or in not prosecuting his right through the interference of the Court by the institution of an action will constitute such laches as will disentitle him to the aid of the Court. Vide - "Rich v. Gale" 1871 24 LT 745 (A). Such delay would even amount to an abandonment on" his part of the contract. Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right will be a bar (See page 517 of Fry on Specific Performance, 6 th Edition). With reference to decided cases it is mentioned at page 519 of the same book that generally, whenever the delay is attributable to the Defendant, he will not be allowed to avail himself of it as a defence. The Defendant was at fault all through and he cannot therefore be allowed to resist the Plaintiffs' suit in ejectment. He cannot also take advantage of the provisions in Section 53A, T. P. Act. The Plaintiffs are allowed to recover possession of the property from the Defendant and their right to the same is hereby declared.

9. The Defendant was put in possession of the property from 7-9-1117 and she is liable to pay the mesne profits to the Plaintiffs. Though there is no finding entered in by the lower Court, it can be seen from Ext. A itself that the "Pattom" these properties would fetch would be 112 "Paras" of paddy a year. The Plaintiffs are allowed to get past and future "Pattom" at the above rate. The "Pattom" would be paid from 7-9-1117. Ext. A also provides for a liquidated sum of Rs. 75/- as damages for the breach of contract. It is also declared as a charge on the B Schedule properties. There is no reason why, after the several vexatious contentions raised by the Defendant, the agreed amount is not to be paid to the Plaintiffs. They are allowed to realise the same from the Defendant and the B Schedule properties. Future interest at six per cent, on the "Pattom" decreed is also allowed.

10. In the result, the decree of the lower Court is set aside and the Plaintiffs are allowed to recover possession of the plaint A Schedule property from the Defendant with mesne profits at 112 (one hundred and twelve) "Paras" of paddy a year from 7-9-1117. The past and future mesne profits will carry interest at six per cent, from this day. The Plaintiffs are also allowed to realise Rs. 75/- (seventy five) from the Defendant and the B Schedule properties. The Defendant will bear his costs and pay the costs of the Plaintiffs in both the Courts. The Defendant's memorandum of objections claiming his costs in the lower Court is dismissed with costs.