
(1986) 12 KL CK 0009
In the High Court Of Kerala
Case No : S. A. No. 482 of 1981

Moksha Mary and another

APPELLANT

Vs

Gopalan and Others

RESPONDENT

Date of Decision : 03-12-1986

Acts Referred:

Contract Act, 1872 — Section 52

Citation : (1987) KLJ 63

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : T.P.K. Nambiar, P.G. Rajagopalan and P. Devakikutty, for the Appellant; C.R. Natarajan and C.M. Devan, for the Respondent

Final Decision : Dismissed

Judgement

S. Padmanabhan J

1. Plaintiffs are the appellants. First plaintiff and her children including 2nd plaintiff are the owners of the plaint schedule property. Plaintiffs mortgaged the property to the 1st defendant. One of the sons of the 1st plaintiff who did not join the mortgage deed assigned his 1/6th right over the property to the 2nd defendant in 1967. Thereafter as per Ext. A1 dated 12-11-1970 plaintiffs and defendants 1 and 2 entered into an agreement whereby defendants 1 and 2 agreed to reconvey the mortgage right and 1/6 right over the equity of redemption in favour of the plaintiffs for Rs. 1,750/-, Rs. 900/- was paid as advance on the date of Ext. A1 itself. The further provision is that when the plaintiffs raise the balance amount of Rs. 850/- and make a demand defendants should convey their rights. On 10-2-1972 defendants 1 and 2 issued Ext. B2 notice to the plaintiffs informing them that inspite of repeated demands they did not come forward with money to take the document and therefore defendants 1 and 2 are not any further willing to convey the property. Without sending a reply plaintiffs waited without doing anything for more than 5 years. On 22-6-1977 they issued Ext. A2 notice to the defendants requesting them to convey the

property on receipt of the balance amount. Defendants refused and therefore the suit was filed in 1978 for specific performance of Ext. A1. Defendants contended that plaintiffs were not ready and willing to perform their part of the contract and further the suit is barred by limitation. The trial court held that under the provisions of Ext. A1 cause of action will arise only after demand is made by the plaintiffs and therefore intimation of refusal evidenced by Ext. B2 before demand was made by the plaintiffs will not be sufficient. For that reason it was held that the suit is not barred by limitation. A decree was given as prayed for. The appellate Court disagreed with the trial court and found that the suit is barred by limitation. The appeal was allowed and the suit was dismissed.

2. The only question to be decided is whether the claim is barred by limitation or not. Agreement was on 12-11-1970. Both the courts below found that by Ext. B2 notice dated 10-2-1972 defendants informed the plaintiffs that performance is refused on the ground that plaintiffs did not come forward ready with money to take the sale deed in spite of repeated demands by the defendants. Therefore undoubtedly 10-2-1972 is the date on which the plaintiff's had notice that performance is refused. They did not respond to Ext. B2 and waited till 22-6-1977. Ext. A2 notice was issued on that day informing defendants 1 and 2 that they are ready with funds Defendants were asked to execute the document. There is no dispute regarding the fact that Article 54 of the Limitation Act is the relevant article that is applicable. Period of limitation is three years and it starts from the date fixed for performance of the contract, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

3. The provision in Ext. A1 is that when the plaintiffs raise the fund and make a demand defendants should convey their rights. No time is fixed in Ext. A1 for the plaintiffs to raise the funds and make the demand. Therefore the case of the plaintiffs is that they can take their own time to raise the fund and make a demand and the cause of action will arise only when demand is so made by them. It is their further case that the question of refusal of performance giving rise to the starting point of limitation under Article 54 of the Limitation Act will arise only after demand is so made and not before. In other words the contention is that notice of refusal on the basis of Ext. B2 which was not in answer to any demand made by the plaintiffs for performance of the contract will have no bearing in fixing starting point of limitation. To put it otherwise, the case of the plaintiffs is that by a unilateral act of refusal and intimation without being asked for by the plaintiffs, defendants cannot say that there was cause of action and starting point of the period of limitation. On the other hand the contention of the defendants is that Ext. A1 is an agreement in which no time is fixed for performance and therefore starting point must be when the plaintiff had notice that performance is refused. Since both the courts below found that plaintiffs had notice on 10-2-1972 that performance is refused it was argued that limitation has started from that date. So also it was pointed out that even if cause of action will arise only after the plaintiffs made the demand, such demand, after performing their part of the contract, must be within reasonable time, since no

time is fixed for that purpose in Ext. A1. It is said that the plaintiffs cannot wait indefinitely for any length of time according to their choice to postpone the starting point of limitation. These are the aspects to be considered.

4. The counsel for the appellants relied on the decision in *Narayana v. Muthiah* (AIR 1924 Madras 680) wherein there is a stray sentence "The words "on demand" in Ext C show, in a case like this, the cause of action arises only after request". That may be correct on the facts and circumstances of that case. B.B. Mitra on Limitation, 17th Edn, at page 451 it is stated that when a cause of action arises for a party under a contract only when, as contemplated by the parties, the obligor is in a position to perform his promise effectively. It was also stated therein that under the second clause of the third column of Article 54 of the Limitation Act, specific demand by the plaintiff is necessary to make the date of refusal the starting point and in the absence of a date fixed for performance of the contract, time does not continue to run until there has been a demand, and refusal. It was held in *Lakshminarayana v. Singaravelu* (AIR 1963 Madras 24) that a cause of action arises for a party under a contract only when, as contemplated by the parties, the obligor is in a position to perform his promise, effectively. Till that date no cause of action arises for the other party to compel him to file a suit for specific performance of the contract. It is also true that Article 54 of the Limitation Act has to be construed liberally. It was argued on behalf of the appellants on the basis of S. 52 of the Contract Act that reciprocal promises are to be performed in the order where it is so expressly fixed by the contract. In this case it is said that the order is that the plaintiffs should raise money and make the demand and thereafter the defendants should execute the sale deed. Therefore it was argued that the question of performance or refusal of performance by the defendants will arise only after the plaintiffs performed their part and make the demand.

5. In *Narayana's* case (AIR 1924 Madras 680), the question did not directly come up for consideration. Further in all cases it cannot be laid down as a rule of uniform application that wherever a specific demand by the plaintiff is necessary, cause of action will arise only when a refusal is made and intimated on the plaintiff making the demand. If that be so the plaintiff could in all cases postpone the starting point of limitation to suit his own convenience and keep the defendants in suspense for any length of time as he chooses *Lakshminarayana's* case (AIR 1963 Madras 24) was one in which there were circumstances beyond the control of the party. The property was sold in court auction and performance was possible only after the court sale was set aside. As to when the court sale will be set aside and whether the court sale will be set aside at all were matters beyond the control of the parties. So far as the present case is concerned, there was no such contingency at all. Here both sides were capable of performing their part of the contract without any difficulty. Only thing is that due diligence and earnest desire to fulfil the respective parts was necessary. In such cases when no time is fixed for making the demand, it must be held to be within reasonable time. So far as the present case is concerned plaintiffs were only to raise Rs.

850/- and demand the defendants to execute the document. Time was given only for that purpose. Periods of limitation are not fixed without any purpose. Rights and liabilities cannot be kept under suspense indefinitely. That may even retard the progress of society. Under the guise of raising money and making the demand plaintiffs cannot be allowed to take their own time. It is only common knowledge that even prices of properties may go up according to the passage of time. To say that plaintiffs could wait for a number of years to raise the funds and make the demand and the question of refusal giving rise to the starting point of limitation will arise only thereafter does not appear to be correct. If such an argument is accepted the plaintiffs could by their own inaction postpone the starting point of limitation for any number of years and thereby stagnate transactions regarding the plaintiff's scheduled property indefinitely. The Limitation Act never contemplated such a choice of starting of limitation to anybody. I do not think that even the parties intended unlimited choice of time to the plaintiffs to raise funds and make the demand. In cases where time was granted only to raise funds and make a demand without fixing any time limit, what is to be gathered is that the parties bargained only for a reasonable time.

6. In the present case defendants waited for more than one year from the date of agreement. Thereafter they demanded the plaintiffs to raise funds and take the document. When they felt that the plaintiffs are not coming round they issued Ext. B2 notice informing that in the absence of favourable reaction they are not any more prepared to execute the document. In my opinion this is sufficient refusal and it is intimation within the meaning of Article 54 of the Limitation Act so that period of limitation will start to run. Even after receiving Ext. B2 notice the plaintiffs kept quiet for more than five years. Ext. A2 notice was issued by them only on 22-6-1977. Long before that in 1975 itself the period of limitation expired. Evidently the suit is barred by limitation as found by the appellate court. There cannot be any dispute regarding the fact that this is a case in which no specific time is fixed for performance of the contract. In such cases especially when the offer and the demand did not come from the plaintiffs within a reasonable time it was within the competence of the defendants to enquire with the plaintiffs whether they are ready to perform their part of the contract. When as a result of such enquiry the defendants came to know that the plaintiffs were not earnest in proceeding with the agreement, they were perfectly justified in informing the plaintiffs that they are not any more willing to go ahead with the agreement. Such an intimation on the part of the defendants must definitely give rise to cause of action under Art. 54 of the Limitation Act. Law does not allow the plaintiffs to have the period of limitation started to suit their whims and fancies.

7. *Shrikrishna v. Balaji* (AIR 1976 Bombay 342) is a case in which the contract was on 15-10-1957. The suit was filed on 22-5-1964. Under the agreement in that case the sale was to be executed after the attachment which the creditors had effected was raised. The lower appellate court held that the date of raising the attachment not being clear from the document, it could not be found out as to what could be the date fixed for performance of the contract. The High Court

agreed with the opinion expressed by the appellate court and said:

The starting point of limitation, as already noted was the date fixed for performance of the contract, or, if no such date is fixed, the date on which the plaintiff has notice that performance is refused. In the absence any indication when the attachment would be raised and what would be the date for the performance of the agreement, which was after the attachment was raised, it had to be treated as a case in which no date was fixed for the performance of the contract. To such a case, the starting point of limitation is when the plaintiff has notice that performance is refused. In the instant case, it was when defendant No. 1 sold house No 384 to defendant No. 2 on 6th February, 1963, under the registered sale deed Ext. A96 that the plaintiff could be posted with the knowledge that defendants were refusing performance of the contract. The suit was filed on 22nd May, 1964, that is, well within three years from 6th February, 1963, and would be within limitation.

In *Manick Lal v. K.P. Chowdhury* (AIR 1976 Calcutta 115) which was a case under Art. 113 of the old Limitation Act it was held;

According to Article 113, the limitation for specific performance of contract starts when the plaintiff has notice that performance is refused. The word "Notice" means intimation, information, cognizance, or observance. "Notice" implies knowledge and this knowledge comes from direct perception or from inference reasonably arising out of several facts and circumstances.

On that basis it was held that whether a party got notice of refusal or not depends upon the substantive evidence to that effect or inference from the surrounding facts and circumstances. So far as this case is concerned, there was categoric refusal and both the courts found that the refusal was made known to the plaintiffs as early as 10-2-1972. The suit was filed only in 1978 and it is hopelessly barred by limitation. Then it was argued on behalf of the appellant that the appellate court ought to have atleast allowed them to redeem the mortgage. It is true that the right to redeem the mortgage was not barred by limitation. But the respondents contended that without specific performance being granted no decree for redemption could be given. Further it was pointed out that the plaintiffs are entitled only to a fractional share of the equity of redemption and in the absence of prayers for partition or redemption no decree could be given. Specific performance cannot be a condition precedent to granting a decree for redemption. So far as the equity of redemption is concerned, specific performance relates to only 1/6th of the right that belongs to the 2nd defendant. Admittedly the plaintiffs are part owners of the equity of redemption. As part owners of the equity of redemption they could be given a decree either for partition and redemption of their share or for redemption of the entire property. Mortgagee is the 1st defendant and he has not acquired any right over the equity of redemption. Integrity of the mortgage is not broken. When a larger relief is prayed for and the plaintiffs are found only to a smaller relief, nothing prevents that smaller relief being allowed. But none of those questions arise in

this case. The suit is only for specific performance of Ext. A1 and not one for redemption. Even the mortgage deed has not been produced. What is the mortgage amount is also not known. First defendant had no opportunity to raise contentious as if it is a suit for redemption. Therefore no question of granting a decree for redemption arises in this case.

The second appeal fails and it is hereby dismissed. In the circumstances of the case, parties are directed to suffer costs.