
(2000) 03 MAD CK 0018
In the Madras High Court
Case No : Appeal No. 707 of 1994

Mrs. Leela Raghavan and 2 others

APPELLANT

Vs

Zacheria and 8 others

RESPONDENT

Date of Decision : 08-03-2000

Acts Referred:

Specific Relief Act, 1963 — Section 12
Transfer of Property Act, 1882 — Section 44

Citation : (2000) 03 MAD CK 0018

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : C. Rajan, for the Appellant; P.T. Asha, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Subramani, J.—Defendants 1, 2 and 11 in O.S.58 of 1991 on the file of Sub Court, Mahe are the appellants. The material facts

necessary for the disposal of this appeal could be summarised thus:

Plaint scheduled property originally belonged to one Kumaran as per Kuzhikkanapattam (lease) dated 11.4.1937. On the basis of that document,

Kumaran put up constructions. While so, as per Ex.A1 dated 29.5.1967, he executed a settlement in the nature of gift in favour of four of his

children (1) Leela Raghavan, (2) Ramachandran, (3) Jayaraman and (4) Sivaraman Kumaran had other children also and they are Hayna

Gangadaran and K.K. Vijayan. At the time of his death, Kumaran had also left his widow Rohini.

2. On 29.11.1987, Leela, Ramachandran, Jayaraman, Widow of Sivaraman representing herself and her minor children, executing Ex.A2

agreement for sale in favour of plaintiff. Leela and Ramachandran are defendants

1 and 2 in the suit. After execution of the agreement, Jayaraman also died and his legal representatives are defendants 3 to 6.

Widow and children of Sivaraman are defendants 7, 8 and 9 of whom, defendants 8 and 9 were minors on the date of suit. As stated earlier,

widow of Kumaran was alive at the time of settlement, Ex.A1. But before Ex.A2 agreement for sale was executed, Sivaraman, one of the sons

died and his 1/4th right in the property devolved on his mother and defendants 7 to 9. In the agreement for sale, the executants did not say anything

about the right of Rohini as one of the legal heirs of Sivaraman. Rohini also died and the share which she inherited from her son devolved on the

children of Sivaraman. They are defendants 1 and 2 and defendants 10 and 11 are also children of Jayaraman and Sivaraman.

3. As per the agreement for sale, executants agreed that the occupant of the building will have to be evicted and since defendants 8 and 9 were

minors, permission has to be obtained from Court for alienating their share. One year period is also provided to complete the transaction. Total

consideration agreed was Rs. 5,67,500/- out of which Rs. 25,000/- was paid as advance.

4. It is the case of plaintiff that 7th defendant, who is the guardian of defendants 8 and 9 did not take any steps for getting permission from the

Court. It is also alleged that the occupant of the building is not a tenant though that was the representation made. In fact, occupant was 11th

defendant in the suit, who is also one of the co-owners and legal heirs of Rohini. Even after expiry of one year when no steps were taken to

execute the sale deed, Plaintiff issued a registered notice on 11.11.1988 evidenced by Ex.A3 asking defendants to execute sale deed in terms of

the contract. A reply was sent by first defendant admitting the agreement but pleading inability to execute the sale deed. After notice, suit was laid

in October 1991.

5. Plaintiff has alleged that since 7th defendant has not taken Court permission as against defendants 8 and 9, plaintiff is not claiming any right. It is

also alleged that even before agreement for sale, Rohini was dead and her legal heirs apart from executants are defendants 10 and 11 from whom

plaintiff has not taken any agreement. So, as against them also agreement cannot be enforced. Plaintiff wanted to enforce the agreement as against

defendants 1 to 7 i.e., 81/96 share on payment of proportionate sale consideration, i.e. Rs. 4,78,828/-. Plaintiff alleged that he was all along willing and ready to take the document and continues to be ready to take the document in terms of the agreement.

6. In the written statement filed by the first defendant, she admitted that there is agreement for sale. But according to her, 11th defendant is residing in the building along with his son and he being co-owner, he could not be evicted merely because of agreement for sale executed by her along with others. It is her further case that even though they attempted to get 11th defendant evicted, he was not prepared to vacate the building nor he was prepared to sell the property. According to first defendant, 11th defendant has refused to vacate on the ground that sale consideration do not represent the actual market value of the property. It is further averred by first defendant that the agreement was taken by plaintiff with two specific conditions. One is that the occupants should be evicted and the house should be given possession to plaintiff within a period of one year and the same become impossible and secondly, 7th defendant was not in a position to obtain Court permission to assign the shares of her minor children. Since these conditions could not be complied with, plaintiff was informed about the impossibility to perform the contract and they expressed their willingness to return the advance paid by plaintiff. It is also alleged that even though agreement is dated 29.11.1987 and plaintiff also filed the suit only in October 1991, will show that plaintiff himself was not serious in getting specific performance of the Contract. It is the case of first defendant that she could not execute sale deed due to circumstances beyond her control. She prayed for dismissal of the suit.

7. Second defendant also filed separate written statement taking similar contentions.

8. 11th defendant also filed separate written statement wherein he said that he is not party to the agreement and therefore as against him, no relief could be granted and he has been unnecessarily impleaded in the suit. According to him, even if some of the co-owners agreed to sell the property that by itself will not be a ground to grant specific performance. According to him, if specific performance is granted that will cause great inconvenience and loss to the co-owners. He also alleged that in a suit for specific performance, relief of partition cannot be had.

9. Before further proceeding with the case, it may also be stated that after institution of the suit and before parties went on trial, defendants 7 to 10

executed a sale deed in favour of plaintiff in terms of the agreement and the same is marked as Ex.A5 in the suit. By that time the document is

executed, except 9th defendant, all the others have become majors. In the suit, they have also filed written statement admitting that they have

executed Ex.A5 sale deed. It may also be stated that along with defendants 7 to 10, defendants 3 and 4 also joined in execution of Ex.A5.

Defendants 3 and 4 have also filed written statement admitting the execution of sale deed in favour of plaintiff.

10. On the above pleadings, parties went on trial. None of the defendants adduced evidence either oral or documentary. Plaintiff got himself

examined as PW1 and through him, Exs.A1 to A5 were marked.

11. After appreciating evidence, trial Court held that only because of misrepresentation by defendants, Plaintiff is not in a position to take sale deed

for entire property. Trial Court held that the fact that Rohini is one of the legal heirs was not represented to plaintiff and her death before Ex.A.2.

For that reason, plaintiff is not in a position to take Sale Deed from defendants 10 and 11. Trial Court also found that with the conduct of 7th

defendant in not getting Court permission for selling properties of minor children of Sivaraman. But lower Court did not find it necessary to enter a

conclusive finding since under Ex.A5, right of Sivaraman is also conveyed to plaintiff. Trial Court further held that plaintiff was ready and willing to

take the sale deed.

12. Regarding claim for partition trial Court held that when plaintiff is entitled to take sale deed from all the sharers except defendants 8 to 11,

plaintiff is also entitled to partition and defendants were directed to execute sale deed on receipt of proportionate sale consideration. It is against

the said Judgment, defendants 1, 2 and 11 have preferred this appeal.

13. Even though 11th defendant has joined as one of the appellants, after disposal of the suit, he has also executed sale deed in regard to his 1/96

share as per sale deed dated 19.4.1994. Certified copy of sale deed was produced by learned counsel for respondent before this Court and the

same is also not challenged by learned counsel for appellants.

14. Learned counsel for appellants challenged the decree and Judgment of Lower

Court in granting decree for specific performance on the ground

that the claim now put forward is not in accordance with agreement for sale, but in variation. Learned counsel submitted that if plaintiff wants only a

share by sale, Section 12 of the Specific Relief Act will have to be complied with and when there is no averments in terms of Section 12, decree

granted by lower Court is liable to be interfered with. Further argument of learned counsel is that even though agreement for sale is in November,

1987, suit was filed only in October 1991. Counsel submitted that even though suit is not barred by limitation, there is laches on the part of plaintiff

and that will be a ground to exercise discretion against plaintiff.

15. The points that arise for consideration in this appeal are,

1. Whether plaintiff is entitled to get sale deed executed in so far as the share of defendants 1 and 2 alone?

2. Whether there is any delay or laches on the part of plaintiff disentitling him to get decree for specific performance?

16. Point No. 1. Defendants 1 and 2 alone are contesting appellants. Both these appellants admit that they have executed agreement for sale along

with others agreeing to convey entire Schedule property to plaintiff. According to them, they could not execute sale deed due to reasons beyond

their control i.e., they could not evict 11th defendant and 7th defendant has not taken permission from the District Court.

17. It is not their case that as against their share they could not execute sale deed. In so far as the shares of defendants 1 and 2 are concerned,

there is concluded contract and there is no scope for applicability of Section 12 of Specific Relief Act. As against defendants 1 and 2, plaintiffs can

enforce whole contract

18. Similar question came for consideration before the Honourable Supreme Court in the decision reported in Kartar Singh Vs. Harjinder Singh

and others, The facts in that case are also similar. In that case, a brother and sister owned some properties, each entitling to half share. As between

them, there is no partition by metes and bounds, Brother executed an agreement for sale not only for his share but also that of his sister and he

undertook to take up the responsibility of getting sale deed executed by her sister also. Sister did not agree to execute sale deed. Suit was filed for

specific performance of agreement for sale by appellant before the Supreme

Court. The argument was that u/s 12 of the Specific Relief Act, the agreement will have to be performed in full or not at all and provisions of sub-sections (2), (3), and (4) of Section 12 could not be applied in that case. The suit was dismissed. The matter was taken up before the Honourable Supreme Court. Their Lordships held in that case that there is no scope of applicability of Section 12 in that case. In paragraphs 4 to 6 of the Judgment, their Lordships held thus,

4.....It was never disputed that the respondent and his sister had each half share in the suit properties. Hence a mere failure to mention in the agreement that they had such share in the property would not entitled one to come to the conclusion that they did not have that share. When the property is owned jointly, unless it is shown to the contrary, it has to be held that each of the joint owners owns a majority of the property. In the present case, there is neither a pleading nor a contention that the respondent and his sister did not own the property in equal shares. Secondly, the agreement of sale clearly mentions that respondent was entering into the agreement both on behalf of himself and his sister, and that he was, under the agreement selling the whole of his share and also the whole of the share of his sister in the property. Further in the agreement itself he had stated that he was responsible to get the sale deed executed by his sister and that he would persuade her to do so. This being the case, the properties agreed to be sold were clearly distinguishable by the shares of the respective vendors. In the circumstances when the absent vendor, for some reason or the other, refused to accept the agreement, there is no reason why the agreement should not be enforced against the Vendor who had signed it and whose property is identifiable by his specific share.

5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts viz., for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the

appellant and the respondents sister and the only valid contract was with respondent in respect of his share in the property.

6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty, whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated.....

19. In *Sardar Singh Vs. Smt. Krishna Devi and another*, , also their Lordships considered the scope of Section 12 of Specific Relief Act and modified the decree granted by the trial Court and gave a decree in respect of the share of the executant who was entitled to half share in the entire property (see para 17 of the Judgment).

20. In *Manzoor Ahmed Margray Vs. Gulam Hassan Aram and Others*, a case coming under Jammu & Kashmir Specific Relief Act, in para 16 of the Judgment, it is held thus,

As stated above, Section 15 of the J & K Act makes it abundantly clear that where a party to a contract is unable to perform the whole of his part of it, the Court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform. Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd and 2/3rd share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of Defendant 1) admittedly, no decree is passed by the High Court.

Dealing with the similar contention where agreement was for sale of property belonging to a brother and sister each having a half share, the Court in *Kartar Singh Vs. Harjinder Singh and others*,) held that when the absentee vendor, for some reason or the other refused to accept the

agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by

specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific

performance of a part of a contract. Such type of case would be the case of specific performance of the whole of the contract so far as the

contracting party is concerned. Further, whenever a share in the property is sold the vendee has the right to apply for the partition of the property

and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties.

21. In 1993 (1) K.L.T.384 (Krishnan v. Krishnan), Kerala High Court had occasion to consider a similar question and the decision of Supreme

Court in Kartar Singh's case was followed. In paragraphs 15 to 20 of the judgment it is held thus,

15. The position therefore is that if the contract is one and indivisible it can be enforced only in its entirety. But a part of the contract is also

enforceable if it comes within one or other of the exceptions provided in sub-sections (2) and (4) of S.12. Whatever may be the position under the

old Specific Relief Act, the position under the present Act is that the plaintiff in a suit for specific performance can get relief in respect of a share of

the property on paying the proportionate consideration provided therein. That is possible at the instance of either party if the party which is left

unperformed bears only a small portion to the whole in value and admits of compensation in money. The Court may in such a case direct specific

performance of so much of the contract as can be performed and award compensation in money for the deficiency. When the part of the contract

unable to be performed forms a considerable part of the whole only the person who is not in default is entitled to obtain a decree and that too if the

part left unperformed admits of compensation for the part which was left unperformed. Similar is the case where the part left unperformed does not

admit of compensation in money but in that case he has to pay the whole of the consideration without any abatement. The further condition is that

the person who seeks specific performance shall relinquish all his claims to the performance of the remaining part of the contract and all rights to

compensation.

16. Sub-Section (4) of S.12 provides a third exception to the rule that part of a contract is not specifically enforceable. That sub-section reads:

When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from

another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former

part.

17. This is permissible on the principle that the contract though appearing to be composite one is actually divisible. When a divisible part of such a contract is thus enforced what is being enforced an entire and complete contract as far as that divisible part is concerned. The question whether a contract is divisible or not has to be determined on the facts and circumstances of each case. Before granting relief under this section the party who claims specific performance has to establish that the part taken by itself stands on a separate and independent footing from the other part of the contract and that it can and ought to be specifically performed. That can be done only if the other part in respect of which no relief is claimed cannot or ought not to be performed. In other words the subsection deals with a case where part of the contract can be severed from the remaining part. This sub-section therefore applies only if the contract is divisible. If not the Court would be substituting a new bargain and enforcing a new contract on the parties which is sought to be prevented by the prohibition contained in sub-section (1) of S.12.

18. The law being what has been stated above there cannot be any difficulty in enforcing a contract against one of the co-sharers who had jointly contracted to convey a property. If any of them is unable to convey his portion there is no legal bar in getting specific performance of the remaining portion against the other co-sharers. Each of the co-sharers is entitled to possession and enjoyment of the whole property along with others. He has an equal right to the possession of every part and parcel of the property. It may be that their interests are unequal but still they have got unity of possession and each of the co-sharers can transfer his share and the transferee becomes a co-sharers along with others. S.44 of the Transfer of Property Act says that the transferee acquires as to such share or interest the transferor's right to joint possession or other common or part enjoyment of the property. The transferee can also enforce partition of his rights but subject to the conditions and liabilities affecting at the date of the transfer. Thus in a case where several co-sharers had contracted to convey a joint property belonging to them the contract can be enforced against one of them if the others are unable to convey their shares.

19. A more or less identical question was considered by the Supreme Court in Kartar Singh Vs. Harjinder Singh and others, Respondent in that

case and his sister owned some properties. He entered into an agreement with appellant for sale of the property and he undertook to get the sale deed registered. His sister having refused to sell her share, he was not able to perform the contract. In a suit filed for specific performance of the agreement the trial Court granted a decree. On appeal the High Court set aside the judgment and decree relying on the provisions contained in S.12 of the Specific Relief Act. On further appeal to the Supreme Court it was held that this is not a case which is covered by S.12 of the Act. The present is not a case of the performance of a part of the contract but the whole of the contract so far as the contracting party, viz. the respondent is concerned. It is observed that the agreement was to sell the whole of the property- The two contracts, viz., for sale of his share and of his sister's share were separate and severable from each other though they were incorporated in one agreement. The Supreme Court held that there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.

20. The principle enunciated by the Supreme Court applies to the facts of the present case also. The agreement to sell was entered into by the respondent and his two brothers. What was sought to be enforced is only the agreement as against the respondent, the rights of the other two brothers having been purchased by the appellant. Respondent refused to perform his part and even denied the execution of the document and receipt of consideration. It was under such circumstances, that appellant obtained the assignment of 2/3rd share from one of the brothers, viz. Govindan who had obtained release of the share of the third brother. The enforcement in the suit is therefore regarding the 1/3rd share belonging to the respondent which as observed by the Supreme Court is the whole of the contract as far as respondent is concerned. Under the agreement respondent had contracted to sell his entire share over the property along with his brothers. What is sought to be enforced is only an agreement regarding that share. Applying the principle of the decision in Kartar Singh's Case (supra) it is held that the enforcement claimed is not that of a part of a contract but the whole of the contract as far as respondent is concerned. That part is severable from the remaining part viz. the contract in

respect of the other two brothers. The part which is sought to be specifically enforced thus stands on a separate and independent footing from the

other part which ought not be specifically performed, an assignment having been executed in respect of that part of respondents brother Govindan.

The case therefore comes under the exceptions provided in S.12 of the Specific Relief Act....

21. In view of the above decisions, the argument of the learned counsel that in view of Section 12 of the Specific Relief Act plaintiff is not entitled

to get decree of specific performance of contract is therefore rejected.

22. Point No. 2: The only other point argued by learned counsel for appellants was that there was a delay on the part of plaintiff in filing suit.

23. In para 4 of the written statement filed by the first defendant, it is stated thus,

The very fact that the agreement was entered on 29.11.87 and the suit is filed only in 1991 will make it clear that the plaintiff was not serious

about the specific performance in the matter. Now he wants specific performance of the portion of the property because the value of the property

has gone up as anything.

Similar is the contention taken by second defendant also.

24. The law is well settled that delay by itself is not a ground to refuse specific performance, unless it is a case of waiver. Similar question came for

consideration in the decision reported in Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others, u/s 22 of Old Specific Relief Act, 1827. In

that case their Lordships considered the difference between English Law and Indian Law and in para 11 their Lordships concluded thus,

The result of the aforesaid discussion of the case law may be briefly stated thus: While in England mere delay or laches may be a ground for

refusing to give a relief of specific performance. In India mere delay without such conduct on the part of the plaintiff as would cause prejudice to

the defendant does not empower a Court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a

pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part

of the Court would arise. We have used the expression ""waiver"" in its legally accepted sense, namely, ""waiver is contractual, and may constitute a

cause of action; it is an agreement to release or not to assert a right": See AIR 1935 79 (Privy Council) . It is not possible or desirable to lay down

the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the

conduct or neglect of the plaintiff is directly responsible in including the defendant to change his position to his prejudice or such as to bring about a

situation when it would be inequitable to give him such a relief.

In the earlier portion of the Judgment in para 7, their Lordships also held that in England, there is no period of limitation for instituting a suit for

specific performance and therefore mere delay, the time lag depending upon circumstances, may itself be sufficient to refuse the relief. Their

Lordships further held, in India, mere delay cannot be a ground for refusing the relief for the statute prescribes the period of limitation. If the suit is

in time, delay is sanctioned by law; if it is beyond time; the suit will be dismissed as barred by time; in either case, no question of equity arises.

25. From the above decision it is clear that unless it is a case of waiver, delay if any cannot be a ground to dismiss the suit.

26. The above decision was also followed in the decision reported in Parakunnan Veetill Joseph's Vs. Nedumbara Kuruvila's and Ors,

27. In Smt. T.K. Santha and Others Vs. Smt. A.G. Rathnam and Others, also similar view was taken after following the decision in

Satyanarayana's case (cited supra).

28. On the basis of above law, let us consider whether there is delay and whether the same bars plaintiff from getting relief from the Court. As per

Ex.A2, defendants themselves have taken period of one year to comply with the conditions. It must be noted that it is not an act to be performed

by plaintiff but only by defendant. If there is delay on the part of defendant in performing their part, that cannot be a reason to hold that there is

laches on the part of the plaintiff. It was defendant who did not take steps either to take possession from 11th defendant nor did they take steps to

get permission from District Court. It is not the case of defendants that plaintiff was not willing and ready to take sale deed or that because of his

acts or representations there is delay for them to take necessary action. Suit notice was issued after expiry of one year and reply was also sent by

first defendant pleading inability. Only thereafter plaintiff can come to Court with

a suit for specific performance. It is true that suit was filed only in 1991. In the defence, they have not taken any plea that because of so called delay any prejudice has been caused to them or there is change of circumstances which should make granting of relief of specific performance iniquitable in any way. In fact, in this case, no evidence was adduced by defendants and they did not even care to enter box. Under these circumstances, I do not think that learned counsel for appellant can be heard to say that because of delay, the discretion in favour of plaintiff should not be exercised.

29. Learned counsel for appellant also relied on the decision reported in G. Chelliah Nadar (died) and Others Vs. Periasami Nadar and Others, .

Wherein a Division Bench of this Court held that if there is unexplained delay on the part of plaintiff, discretion should not be exercised in his

favour. The facts therein are entirely different. Their Lordships held that false allegation itself is sufficient to refuse specific performance. In that

case, agreement itself was interpolated and evidence also show that plaintiff was never ready to take sale deed in terras thereof. Along with those

allegations, there is also inordinate delay. All these circumstances were taken together to hold that plaintiff was not entitled to specific performance.

I do not think that the above decision will have application to the facts of this case. In the result, I do not find any ground to interfere in the

Judgment and decree of Court below. The appeal is dismissed with costs.