

(2025) 11 KL CK 1862

In the High Court Of Kerala

Case No : Regular First Appeal No. 129 Of 2015

T.K.Vasudevan Nair S/o Late Gopalan Nair

APPELLANT

Vs

T.Vrij Mohan, S/o Late T.Balan

RESPONDENT

Date of Decision : 06-11-2025

Acts Referred:

Specific Relief Act, 1963 — Section 12(1), 12(2), 20

Citation : (2025) 11 KL CK 1862

Hon'ble Judges : Sathish Ninan, J;P. Krishna Kumar, J

Bench : Division Bench

Advocate : T.Krishnanunni, K.C.Kiran, Meena.A., Vinod Ravindranath, Biju Abraham

Final Decision : Allowed

Judgement

Sathish Ninan, J.

1. The decree for specific performance of an agreement for sale is under challenge by defendants 1 to 8.
2. Ext.A1 agreement dated 01.05.2007 was entered into between the first plaintiff and defendants 1 to 8. Under Ext.A1, an extent of 4 acres and 30 cents of property was agreed to be conveyed by defendants 1 to 8, to the plaintiff or his nominee. The period fixed for performance was six months from the date of agreement. The consideration fixed was ₹ 16,000/- per cent, for the extent to be ascertained on measurement.
3. According to the plaintiffs, as per the prior title deed the defendants 1 to 8 had title for only a lesser extent of property. So also, from the total extent of property, defendants 2 and 4 had assigned 30 cents even prior to Ext.A1 sale agreement. Alleging failure on the part of the defendants to perform the agreement, specific performance is sought for conveyance of the actual extent over which defendants 1 to 8 have title, in favour of the second defendant.

4. Defendants 1 to 8 denied the allegation that they did not have title over the entire property scheduled to the agreement. It was contended that Ext.A1 agreement was entered into with the first plaintiff alone and that there is no privity of contract with the second plaintiff. It was alleged that the first plaintiff was not ready and willing to perform Ext.A1 agreement. The financial capacity of the first plaintiff to proceed with the transaction was challenged.

5. The trial court held that defendants 1 to 8 could establish title over only 3 acres and 84.625 cents, and a decree for specific performance was granted regarding the same, directing conveyance in favour of the second defendant.

6. We have heard Sri.T.Krishnanunni, the learned Senior Counsel on behalf of the appellants-defendants 1 to 8 and Sri.B.G.Bhaskar, the learned counsel for respondents-plaintiffs.

7. The points that arise for determination in this appeal are :-

(i) Does the evidence on record prove the readiness and willingness of the first plaintiff?

(ii) Was the trial court right in having proceeded to find that defendants 1 to 8 have title over only a lesser extent of property than described in Ext.A1 agreement when admittedly the balance extent was also available at the land?

(iii) On the facts and circumstances of the case, is a decree for specific performance for a lesser extent of property, than that is actually available on the land, liable to be granted?

(iv) On the facts and circumstances of the case, is the first plaintiff entitled for a decree for specific performance?

(v) Does the exercise of discretion by the trial court granting a decree for specific performance warrant interference?

8. Defendants have a contention that there is no privity of contract with the second plaintiff and that the second plaintiff cannot seek for enforcement of Ext.A1. A reading of the plaint reveals that the second plaintiff has been impleaded only as a nominee of the first plaintiff, in whose favour the sale deed is to be executed. Ext.A1 agreement provides for conveyance in favour of nominees. All that the plaint seeks is, enforcement of Ext.A1 agreement by the first plaintiff. The readiness and willingness pleaded is that of the first plaintiff. The learned counsel for the respondents-plaintiffs nodded the understanding of the pleading accordingly.

9. Bearing the above in mind, we proceed to consider the readiness and willingness of the first plaintiff to perform Ext.A1 agreement. In a suit for specific performance, the plaintiff has to prove his readiness and willingness from the date of agreement till the date of decree.[See: Gomathinayagam Pillai And Others v. Palaniswami Nadar (AIR 1967 SC 868), N.P Thirugnanam (Dead) By Lrs. v. Dr. R. Jagan Mohan Rao and Ors (1995 (5) SCC 115), Pukhraj D. Jain And

Others v. G. Gopalakrishna (2004 (7) SCC 251), Sugani (Mst.) v. Rameshwar Das And Anothe (2006 (11) SCC 587)]. At paragraph 10 of the plaint it is pleaded that the first plaintiff was ready and willing to perform his part of the contract since the execution of the sale agreement. The relevant pleading read thus:-

"The first plaintiff was ready and willing to perform his part of the contract at all times after the execution of the sale agreement, and continues to be ready and willing to pay the price on centage basis, on determination of the actual area of the property belonging to defendants 1 to 8."

However, when it came to the evidence, in the proof affidavit filed by the first plaintiff, his readiness and willingness to perform the agreement was not specifically sworn to. What has been sworn to is at paragraph 5 of the proof affidavit and it reads thus:-

"We have been, and are ready and willing to perform our part of the sale agreement at all times in the past, present and future."

Evidently, the readiness and willingness sworn to is not that of the first plaintiff but of the plaintiffs. The above is of much significance since even in the written statement the defendants have specifically contended that the first plaintiff did not have sufficient funds to proceed with Ext.A1 agreement.

10. At paragraph 4 of the proof affidavit of PW1 it has been stated that his mother-in-law is a partner of the second plaintiff firm and that the second plaintiff is a "member" of various business concerns. Evidently, the attempt is to include the second plaintiff also into the status of the contracting party along with the first plaintiff, and to reckon the financial capacity of the second plaintiff to establish the readiness to go ahead with Ext.A1. The first plaintiff was unable to prove any source of his funds to proceed with Ext.A1 agreement. On the contrary the attempt was to show that the second plaintiff has sufficient funds. However, as noticed earlier, what is relevant is the readiness and willingness of the first plaintiff to go ahead with the transaction. There is no evidence to find that the first plaintiff had sufficient funds to go ahead with the transaction.

11. It is also important to note that while in the plaint it is the definite case that the agreement was entered into by the first plaintiff and that he was ready and willing to perform the agreement, when it came to the stage of evidence, in the proof affidavit of PW1 it was stated that the agreement for sale was entered into by the first plaintiff for and on behalf of the second plaintiff. The relevant sentence reads thus:-

"I had entered into the sale agreement for and on behalf of the second plaintiff."

Pertinently there was no such case either in the notice issued preceding the suit or in the plaint.

12. Further, in the cross examination of PW1, the plaintiff would depose that the plaintiffs had intended to jointly develop the property and that the second

plaintiff had authorised the first plaintiff accordingly. The relevant deposition reads thus:-

"?? 2 ?? joint ??????develop ? ?? ?? ?????.??? ???? ?? ????????!???????. ????? oral agreement (page 4) ?????. "

If Ext.A1 agreement was entered into for and on behalf of the second plaintiff, necessarily there must have been some document to evidence the same. If any part of the advance sale consideration paid had proceeded from the second plaintiff, the plaintiffs would have been able to produce some documents regarding the same. But PW1 in his cross examination admitted that there is no such document. He deposed,

"Advance ?????? ????????joint funds ????. ??? ??????account-?????."

Further, if the purchase was for the second plaintiff nothing prevented the second plaintiff from directly purchasing the property.

13. The period stipulated for performance of Ext.A1 agreement expired on 31.10.2007. Admittedly there is no document to show that within the period there was any demand from the part of the first plaintiff calling upon the defendants to perform the agreement and expressing his readiness and willingness to go proceed with the transaction. Going by the materials, the first demand from the part of the first plaintiff seeking performance of Ext.A1 is under Ext.A2 notice dated 10.06.2008 that is, almost eight months after the expiry of the period. In the plaint it is the case that the delay occurred due to the uncertainty in the title of the defendants in respect of a portion of the property. In the cross-examination of PW1 he deposed that the issue regarding title came to his knowledge only during legal scrutiny which was done before the issuance of the notice. Ext.A2 was sent only eight months after expiry of the period stipulated under Ext.A1. Therefore, it is evident that the reason suggested by the first plaintiff, for not expressing his readiness and willingness till the issuance of Ext.A1 notice, is not correct. As contended by the defendants, it is probable that since the first plaintiff did not have sufficient funds to proceed with the agreement, the second plaintiff was brought in to the picture after the expiry of the period of the agreement and prior to the issuance of notice.

14. In U. N. Krishnamurthy v A. M. Krishnamurthy (2023 (11) SCC 775), the Apex Court held that, though it is not necessary for the plaintiff in a suit for specific performance to have sufficient funds with him to proceed with the transaction, still, if he intends to raise the amounts from other sources, it is a matter to be specifically pleaded in the plaint. At paragraph 24 of the judgment reads thus:-

"If the plaintiff does not have sufficient funds with him to discharge his obligations in terms of a contract, which requires payment of money, the plaintiff would have to specifically plead how the funds would be available to him. To cite an example, the plaintiff may aver and prove, by adducing evidence, an

arrangement with a financier for disbursement of adequate funds for timely compliance with the terms and conditions of a contract involving payment of money.”

In the present plaint, not only that there is no averment that the first plaintiff intended to raise funds from the second plaintiff, on the contrary, the specific plea is that the first plaintiff was ready and willing to perform the agreement. We find that the first plaintiff has failed to prove his readiness and willingness to perform Ext.A1 agreement. Having failed to prove his readiness and willingness, the first plaintiff is not entitled for a decree of specific performance.

15. There is yet another reason for which a decree for specific performance is liable to be declined. Ext.A1 agreement is for the sale of 4 acres and 30 cents of property which belonged to defendants 1 to 8 under Ext.B4 Partition Deed dated 09.12.1982. However, going by its prior deed which is of the year 1961, the property has only a lesser extent of approximately 4 acres and 14.625 cents . An extent of 30 cents therefrom had already been alienated by defendants 2 and 4 even prior to the execution of Ext.A1 agreement. There is no dispute as such with regard to the said 30 cents. The Commissioner deputed in the suit identified the 4 acres and 14.625 cents, including the 30 cents that was alienated. Excluding the 30 cents sold, the extent was found to be 3 acres and 84.625 cents.

16. As is evident from the Commissioner's sketch dated 12.01.2012 [Ext.C1(e)], which was resubmitted on 04.07.2013, a strip of land on the western, northern and eastern sides of the property, shown in yellow shade therein, has been excluded from the extent of property covered under Ext.B4 Partition Deed, stating that the prior deed does not include such extent. The extent of such strip of land lying on the three sides of the remaining property, which has been marked in the sketch in yellow shade is reported to be 56 and ½ cents. In Ext.C2 it is reported,

“Property In 1982 Deed That Is Outside The Measurement In 1961 Deed. : ABCJMNQZYXWVUS (56 ½ Cents)”

In other words, the Commissioner reported that, going by the prior title deeds, the defendant does not have as much extent of property as is included in Ext.B4 Partition Deed of the year 1982. It is the extent shown in the prior title deed, that was reckoned by the commissioner. The trial court proceeded to accept the report and grant a decree for the lesser extent excluding the strip of land on the three sides.

17. Here it is to be noticed that, as reported by the Commissioner, the entire property lies as a single block. The Commissioner has noted that the property covered under Ext.B4 Partition Deed of the year 1982 has visible boundaries. The relevant statement in the report reads thus:-

“The property covered by 1982 deed has visible boundary on all sides.”

It is evident that the defendants are in possession of the extent of property

included in Ext.B4 Partition Deed. No one has a case that there is any dispute with regard to boundaries or extent of the property with any of the adjoining owners on any of its boundaries. The entire property is under the possession of the defendants and is held by them under Ext.B4 Partition Deed. There is no rival claim of title for the said extent by any person. The entire property covered under Ext.B4 Partition Deed has been specifically identified and demarcated in Ext.C1(e) plan. It includes the yellow shaded strip also. It could not be held that there is absence of title with the defendants for such extent of land. In the circumstances, there is no reason to carve out any extent from Ext.B4 Partition Deed. Further, such carving out would put the defendants in serious prejudice. They will be left with a strip of land on the three sides of the decree schedule property which cannot be put to any use, and over which, going by the decree, they have no title. A decree for specific performance could not have been passed excluding such extent of property.

18. To sever the extent and to grant a decree, the trial court relied on Section 12(2) of the Specific Relief Act. Section 12(1) and 12(2) read thus:

“12. Specific performance of part of contract.—

(1) Except as otherwise hereinafter provided in this section, the Court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.”

The inability to perform could be due to defective title or lack of title. But, on the facts noticed supra, it cannot be held that the defendants are unable to convey the property agreed to under Ext.A1. We have already found that it cannot be held that the defendants do not have title to the excluded strip of land marked in yellow shade in Ext.C1(e) plan. The lis is not one upon a rival claim of title. As was noticed above, the defendants have in their possession and enjoyment the entire property under Ext.B4 Partition Deed of 1982. The prior title deed, Ext.B3, is of the year 1961. Therein the extent of property is given in “6 feet kole measurement”. It is only probable that there would be slight differences in the actual extent. There is no case that there was any dispute with regard to the title over the property with any of the adjoining owners at any point of time. It could not be concluded that, prima facie there is lack of title with the defendants over the entire extent of property.

19. This is not a case where the defendants are unable to perform the whole of Ext.A1 agreement. There is no reason for any inability on their part to perform Ext.A1 in its entirety. May be the plaintiff has an apprehension that at some point of time in the future a rival claim of title might crop up regarding the extent which is not mentioned in the prior document. However, that is not a ground to

find that the defendants are unable to convey the entire property mentioned under Ext.A1 agreement. This is not a case where Section 12(2) of the Specific Relief Act could be applied and a decree be granted confining the extent to that mentioned in the prior deed.

20. That apart, granting of a decree for part of the contract under Section 12(2) is, in the discretion of the Court. As could be noticed, Section 12 employs the word "the Court may ... direct ... specific performance...", giving discretion to the Court to decide whether specific performance of part need to be or is liable to be granted on the facts and circumstances of the case. On the facts obtaining in this case, as noticed above, we are clear in our minds that a decree for part performance for the lesser extent, is not to be granted.

21. The plaint, as amended, seeks for specific performance of only the lesser extent, based on the Commissioner's Report. Even going by the averments in the plaint, the plaintiffs were apprehensive of the extent of property. They have expressed their readiness and willingness only to the lesser extent. Therefore, they are not entitled for a decree for specific performance in respect of the entire extent.

22. At any rate, on the entire facts as above, this is not a case where the discretion under Section 20 of the Specific Relief Act (as it existed prior to the amendment of 2018, which is applicable to the present case) be exercised to grant a decree for specific performance.

23. On the above discussions we find that, viewed in any manner, the first plaintiff is not entitled for a decree for specific performance. The decree for specific performance is liable to be set aside and we do so.

24. The plaint contains an alternate prayer for return of the advance sale consideration paid, with interest, and also for damages. The defendants having failed to prove that consequent on the breach of the agreement they have sustained any damages, they are bound to return the advance amount with interest. Coming to the rate of interest, the plaintiff has claimed interest at the rate of 12%. We are of the opinion that interest could be awarded at the rate sought, till the date of decree, and thereafter at the rate of 6% per annum.

25. With regard to the plaintiffs claim for damages, but for incorporating a prayer for damages, there is no pleading or proof regarding damages. That apart, we have already found that first plaintiff had failed to prove the readiness and willingness to go ahead with the agreement. The first plaintiff having been at fault, he is not entitled to claim damages.

In the result, this appeal is allowed. The decree and judgment of the trial court are set aside. The first plaintiff is granted a decree for realisation of ₹ 26 lakhs, with interest at the rate of 12% per annum from the date of suit (31.07.2008) till the date of decree, and thereafter at the rate of 6% from defendants 1 to 8. No costs.