

Madamsetty Satyanarayana

Vs

G. Yellogi Rao and Two Others

Civil Appeal No. 669 of 1964

(K. Subha Rao, Raghuvar Dayal, N. Rajgopala Ayyangar JJ)

24.11.1964

JUDGMENT

SUBHA RAO, J. -

This appeal by certificate raises the question whether the High Court went wrong, in the circumstances of the case, to give a decree for specific performance of an agreement to sell in favour of the plaintiff.

The facts may be briefly stated : On August 23, 1954, at 10 a.m. defendants 1 and 2, through their Auction Agent, defendant 3, advertised and put their plots Nos. 1 to 4 situated in Narayanguda opposite to Deepak Mahal Theatre to public auction. In regard to plots Nos. 2 and 3 the plaintiff offered the highest bid of Rs. 12,000/-. He wanted to purchase the plots for the purpose of starting his business. When the plaintiff tendered one-fourth of the sale price as earnest money in accordance with the terms of the auction, the defendants unlawfully refused to accept it. On August 30, 1954, the plaintiff gave notice to the 3rd defendant and sent copies thereof to the other defendants calling upon them to obtain from him the one-fourth amount of the sale price as earnest money within 24 hours and pass a receipt therefor and accept the balance of the auction price within a period of one week thereafter in accordance with the conditions of the auction sale and to execute a sale deed duly registered in his favour. Defendants 1 and 2 did not give any reply to the said notice. The plaintiff filed the suit in the Court of the 4th Additional Judge, City Civil Court, Hyderabad, on April 18, 1955, for directing the defendants, inter alia, to execute the sale deed in his favour. Defendants 2 and 3 in their written-statement admitted that there was an auction sale and that plaintiff was the highest bidder; but the 1st defendant, on the other hand, denied that there was any final bid or that it was accepted. He further stated that he gave up the idea of selling the plots and that after obtaining the necessary permission from the Municipality he began to build shops on the said plots. The City Civil Judge held that the suit plots were knocked down at the auction in favour of the plaintiff and that the 1st defendant refused to take the earnest money. He further held that though the plaintiff gave notice as early as August 30, 1954, to the defendants, he did not take any steps to enforce his contract and that though he knew of the construction a couple of months before he filed the suit he kept quiet and allowed the 1st defendant to complete his construction and, therefore, it was not a fit case where he could, in exercise of his discretion, give a decree for specific performance; instead he awarded to the plaintiff a sum of Rs. 500/- towards damages. On appeal, a Division Bench of the Andhra Pradesh High Court, on a consideration of the evidence, came to the conclusion that the delay in filing the suit was due to the illness of the plaintiff's wife and also on account of the demolition of one of his houses by the Municipal Corporation, that he came to know for the first time on April 13, 1955, that the 1st defendant was raising a structure on the suit plots and that without any loss of time within a few days thereafter he filed the suit. The High Court also found

that the 1st defendant did not act bona fide inasmuch as he chose to rush headlong in raising the structure evidently to defeat the claims of the plaintiff. On those findings, the High Court held that the Trial Court went wrong on principle in exercising its discretion in favour of the defendants and in refusing to grant a decree for specific performance in favour of the plaintiff. In the result, the High Court set aside the decree of the Trial Court and gave a decree for specific performance in favour of the plaintiff on his depositing a sum of Rs. 12,000/- together with stamp papers and registration charges within a month from the date of the decree. It may also be mentioned that the learned counsel for the plaintiff made an offer that his client was willing to pay a sum of Rs. 14,750/- towards the cost of the building put up by defendants 1 and 2 on the suit plots and the Court recorded the same. But, the High Court left it to the said defendants either to give vacant possession of the plots or with the structure thereon accepting money for it, as they chose. The 1st defendant has preferred this appeal by certificate to this Court making the plaintiff the 1st respondent, and defendants 2 and 3, respondents 2 and 3.

Mr. Lakshmaiah, learned counsel for the appellant, argued : (1) The appellant repudiated the contract on the next day of the auction itself by refusing to take money from the 1st respondent; the 1st respondent did not accept the repudiation, but elected to keep the contract alive by asking the appellant to receive from him one-fourth of the amount as earnest money at any time within 24 hours thereof and to obtain from him the entire balance within one week thereafter; by so doing, he not only unilaterally varied the terms of the contract but committed a breach thereof in not paying the amount; having himself committed a breach of the contract, he could not specifically enforce it. (2) Time is the essence of the contract, as the object of purchase by the 1st respondent was to start a business; therefore, the 1st respondent should have pursued his remedy with promptitude and diligence. It was not enough to assert his right by issuing a notice, but he should have taken steps to enforce it; his inaction and indifference for 7 1/2 months without making any attempt to enforce his right would disentitle him to the discretionary relief of specific performance. (3) The reasons for the delay, namely, that the 1st respondent's wife was ill or that one of his houses was demolished by the Municipal Corporation, were obviously untenable excuses, for both the reasons existed even before the auction was held.

Mr. A. Viswanatha Sastri, learned counsel for the 1st respondent, on the other hand, contended as follows : (1) Mere delay in filing a suit for specific performance could not possibly be a ground for exercising a discretion against a plaintiff, as the Limitation Act prescribed a period of 3 years for filing such a suit. (2) Under the Indian law relief of specific performance could be refused only if the plaintiff abandons or waives his right under the contract; and in the present case the appellant had not established either abandonment or waiver by the 1st respondent of his right under the contract, for indeed as soon as he saw that the appellant had laid foundations for putting up structures on the plots, he rushed without any delay to the court and filed the suit. (3) In the circumstances of the instant case there is no scope for holding that the appellant could have had any reasonable belief that the 1st respondent had waived or abandoned his right, for it was the positive case of the appellant that there was no concluded sale at all.

We cannot allow the learned counsel for the appellant to raise before us the first question, namely, that the 1st respondent did not accept the repudiation but kept the contract alive and committed a breach thereof, with the result that he disqualified himself to file the suit for specific relief, for the said plea was not raised in the pleadings, no issue was raised in respect thereof and no arguments were addressed either in the Trial Court or in the High Court. As the question is a mixed question of fact and law, we cannot permit the appellant to raise it for the first time before us.

At the outset we shall construe the relevant sections of the Specific Relief Act and the Limitation Act unhampered by judicial decisions.

Specific Relief Act : Section 22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance :-

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or mis-representation on the plaintiff's part.

Illustrations

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II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations

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The following is a case in which the Court may properly exercise a discretion to decree specific performance :-

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustrations

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The First Schedule to the Limitation Act

#-----Description of suit Period of Time from  
which Limitation period begins to run-----Art.  
113. For specific Three years The date fixed for the performance performance, or, if of a contract.  
no such date is fixed, when the plaintiff has noticed that performance is refused.-----  
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Under section 22 of the Specific Relief Act, relief of specific performance is discretionary but not arbitrary : discretion must be exercised in accordance with sound and reasonable judicial principles. The cases providing for a guide to courts to exercise discretion one way or other are only illustrative; they are not intended to be exhaustive. As Art. 113 of the Limitation Act prescribes a period of 3 years from the date fixed thereunder for specific performance of a contract, it follows that mere delay without more extending up to the said period cannot possibly be a reason for a court

to exercise its discretion against giving a relief of specific performance. Nor can the scope of the discretion, after excluding the cases mentioned in section 22 of the Specific Relief Act, be confined to waiver, abandonment or estoppel. If one of these three circumstances is established, no question of discretion arises, for either there will be no subsisting right or there will be a bar against its assertion. So, there must be some discretionary field unoccupied by the three cases, otherwise the substantive section becomes otiose. It is really difficult to define that field. Diverse situations may arise which may induce a court not to exercise the discretion in favour of the plaintiff. It may better be left undefined except to state what the section says, namely, discretion of the court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a court of appeal.

Mr. Lakshmaiah cited a long catena of English decisions to define the scope of a court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems - English and Indian - qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay - the time lag depending upon circumstances - may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said 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.

With this background let us look at the English textbooks and decisions relied upon by the learned counsel for the appellant. In Halsbury's Laws of England, Vol. 36, at p. 324, it is stated :

"Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance. The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract. A much shorter period of delay, however, suffices if it is delay in declaring an option or exercising any other unilateral right; and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance."

In "Fry on Specific Performance", 6th Edn., at p. 517, it is said :

"Where one party to the contract has given notice to the other that he will perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be bar : so that in one case two years' delay in filing a bill after such notice, in another case one year's delay, and in a third (where the contract was for a lease of collieries) five months' delay was held to exclude the intervention of the Court."

Learned Counsel cited many English decisions in support of his argument that there shall be promptitude and diligence in enforcing a claim for specific performance after a repudiation of the contract by the other party and that mere continual claim without any active steps will not keep alive the right which would otherwise be defeated by laches : see *Clegg v. Edmondson* ([1857] 114 R.R. 336.), *Eads v. Williams* ([1854] 43 E. R. Chan. 671.), *Labmann v. McArthur* ([1868] L.R. 3 Ch.

A.C. 496.), *Watson v. Reid* ([1830] 39 E. R. Chan. 91.), and *Emile Erlanger v. The New Sombrero Phosphate Company* ([1878] L.R. 3 A.C. 1218.). But as stated earlier, the English principles based upon mere delay can have no application in India where the statute prescribes the time for enforcing the claim for specific performance. But another class of cases which dealt with the doctrine of laches have some bearing in the Indian context. In the *Lindsay Petroleum Company v. Prosper Armstrong Hurd, Abram Farewell, and John Kemp* ([1874] L.R. 5 P.C.A. 221, 239-240.) Sir Barnes Peacock defined the doctrine thus :

"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

This passage indicates that either waiver or conduct equivalent to waiver along with delay may be a ground for refusing to give a decree for specific performance. In *Caesar Lamare v. Thomas Dixon* ([1873] 6 H.L.C. 414, 423.), Lord Chelmsford said :

"The conduct of the party applying for relief is always an important element for consideration."

The House of Lords in *Emile Erlanger v. The New Sombrero Phosphate Company* ([1878] L.R. 3 A.C. 1218.) approved the passage in *The Lindsay Petroleum Company v. Prosper Armstrong Hurd, Abram Farewell, and John Kemp* ([1874] L.R. 5 P.C.A. 221.) which we have extracted earlier.

It is clear for these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preclude him from obtaining a decree for specific performance.

Now we shall consider some of the Indian decisions cited at the Bar. A Division Bench of the Allahabad High Court held in *Nawab Begum v. A. H. Creet* ([1905] I.L.R. 27 All. 678.) that great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claimed the benefit was of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. But it will be seen from the facts of that case that, apart from the delay the conduct of the plaintiff was such that it induced the other party to change his position to his detriment. A Division Bench of the Patna High Court in *Rameshwar Prasad Sahi v. M. Anandi Devi* ([1960] I.L.R. 39 Pat. 79.) held on the facts of that case that the delay in bringing the suit for specific performance was always fatal to a suit, and that it amounted to an abandonment of the contract and waiver of his rights to sue for specific performance. If the learned Judges meant to lay down that mere delay would amount to abandonment of a right, we find it difficult to agree with them. The decision of the Calcutta High Court in *Gostho Behari v. Omiyo Prasad* ([A.I.R. 1969 Cal. 361.) recognized that mere delay was sufficient to deny the relief of specific performance, but pointed out that though it was not necessary to establish that the plaintiff had abandoned his right, the Court may, in view of the conduct of the plaintiff coupled with his delay that had propositioned the defendant, refuse to give the equitable relief. In *Chamarti Suryaprakasrayudu v. Arardhi Lakshminarasimha* ([1914] 26 M.L.J. 518, 521, 523.), a Division Bench of the Madras High Court rightly pointed out that delay by itself was not a ground for refusing to give a decree in a suit for

specific performance. Sadasiva Aiyar, J., observed :

"I think that it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part."

Seshagiri Aiyar, J., said much to the same effect, thus :

"There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance. ....  
Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the legislature has not intended that mere laches should be one of the grounds for refusing specific performance."

We do not think, though the observations of Sadasiva Aiyar, J., are rather wide, that the learned Judges intended to lay down that unless there is a waiver or abandonment by the plaintiff of his rights to sue for specific performance, he should be nonsuited, for if that was the law, as we have pointed out earlier, the substantive part of section 22 of the Specific Relief Act would become nugatory. A Division Bench of the Calcutta High Court in *Jadu Nath Gupta v. Chandra Bhushan* (A.I.R. 1932 Cal. 493.) again emphasized the fact that the English doctrine of delay and laches showing negligence in seeking relief in a Court of equity cannot be imported into the Indian law in view of Art. 113 of the Limitation Act. But it pointed out that where the conduct of the plaintiff was such that it did not amount to abandonment but showed waiver or acquiescence especially when inaction on his part induced the defendant to change his position, the plaintiff ought not to be allowed any relief. This case brings out not only the distinction between English and Indian law but also that waiver or abandonment of a right is not a pre-condition for refusing relief of specific performance.

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 precondition 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 *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha* ([1935] L.R. 62 I.A. 100, 108.). 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 inducing 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.

Bearing these principles in mind let us now look at the facts of the case. Both the lower Courts found that the appellant repudiated the contract even on the next day of the auction, i.e., August 24, 1954. The 1st respondent issued a notice to the appellant on August 30, 1954, asking him to obtain from him one-fourth of the auction price as earnest money at any time within 24 hours and the balance within a period of one week thereafter and execute a sale deed in his favour. The appellant

did not reply to this notice. The 1st respondent in his evidence says that he could not take effective steps to enforce the contract for a period of 7 months as his wife was ill and as the Hyderabad Municipal Corporation had demolished one of his houses. The High Court accepted the explanation given by the 1st respondent for the delay in his taking steps in enforcing the contract. In the affidavit filed by the 1st respondent in the Trial Court on October 18, 1955, he stated that his house had been demolished by the Municipal Corporation before a year and a half and his wife was also seriously ill for the "last two years" and that, therefore, he was worried. From this statement it is argued that both the circumstances which are said to have been the reasons for the delay were in existence even before the auction and, therefore, the High Court went wrong in accepting the explanation of the 1st respondent for the delay. It is true that the 1st respondent's wife was ill even before the auction, but she continued to be ill even after the auction and there is clear evidence that she was being treated in a hospital. This continual illness of the 1st respondent's wife must have unnerved him and when the High Court accepted his evidence we cannot say that it went wrong. It is also true that the notice by the Municipal Corporation to demolish the house was given two months prior to the auction, but there is nothing on the record to show when the house was actually demolished. Some time must have elapsed between the notice and the actual demolition. The only evidence in regard to the demolition of the house is that of the 1st respondent; and it is not suggested in the cross-examination that the demolition of the house was before the auction. On the uncontradicted evidence of the 1st respondent, we must hold, agreeing with the High Court, that the 1st respondent was in a worried state of mind because of the said two circumstances which might have been responsible, to some extent, for his not taking immediate active and effective steps to enforce his right. The most important circumstance in the case is, when did the 1st respondent come to know of the commencement of the building operations by the appellant on the suit site ? The 1st respondent says in his evidence that 7 or 8 months after the auction he passed by the suit site and saw foundations had been dug therein and a few days thereafter he filed the suit. The appellant, on the other hand, says in his evidence that he started the construction after the disputed auction and that it was completed in 5 or 6 months. Though he says in the cross-examination that he applied to the Municipality for permission to build, he did not produce either a copy of that application or the sanction issued to him by the Municipality. He is not even prepared to deny that he got the sanction only in March 1955. The Trial Court surmised without any evidence that at the time the 1st respondent saw the foundations the stage of the construction indicated that the building operations must have commenced two months earlier. The High Court rightly pointed out that it was a pure surmise and accepted the evidence of the 1st respondent that a few days after he saw the foundations being dug in the suit site he filed the suit. But all these are beside the point, for it is not the case of the appellant that because of the 1st respondent's conduct he was induced to put up the building at a heavy cost : his case throughout was that there was no contract at all. If so, there was no question of his being induced to act to his detriment because of the conduct of the 1st respondent. Therefore, except for some delay, there are no circumstances within the meaning of the aforesaid decisions which should induce a Court to refuse in its discretion to give a relief of specific performance. The High Court rightly held that it was a fit case where the plaintiff should have been given a relief of specific performance.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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