

Thakamma Mathew

Vs

M. Azamathulla Khan and Others

Civil Appeal No. 6076 of 1990

(M.N. Venkatachaliah, S.Mohan, Dr. A.S. Anand JJ)

15.12.1992

JUDGEMENT

S. C. AGRAWAL, J.:-

1. This appeal is directed against the judgment dated July 18, 1990 of the High Court of Karnataka in Regular First Appeal No. 154 of 1985. It arises out of O.S. 9213 of 1980 filed by the appellant against M. Azmathulla Khan (hereinafter referred to as the 'defendant') for cancellation of an agreement to sell dated November 12, 1974 and for recovery of possession of the premises bearing No. 102, Wheeler Road, Gooxe Town, Bangalore, the said property was purchased by the appellant from one D. Ponnurangam under a registered sale deed dated June 29, 1972, by the agreement dated November 12, 1974, the appellant agreed to sell the said property to the defendant for a sum of Rs.90,000/-. The defendant paid a sum of Rs. 3,000/- as advance on the date of execution of the said agreement and paid a further sum of Rupees 15,000/- on November 25, 1974. Under the agreement the last date for finalisation of the transaction was January 11, 1975. It appears that Smt. Mohanambal, one of the sisters of Pounnurangam, had not joined in execution of the sale deed dated June 29, 1972 in favour of the appellant. In the agreement dated November 12, 1974, it was provided that the said Smt. Mohanambal had disclaimed any interest in the property and that the appellant would make available a declaration to that effect before the finalisation of the sale transaction and would also give necessary indemnity bond of either herself or of her husband giving security for indemnifying the possible damages or loss to the defendant to the extent of Rs. 5,000/- and the interest thereon from the date of the sale deed at 12% per annum in case the said Smt. Mohanambal or anybody through her puts him to such loss or damage or deprives him out of the property to the extent of her share. The case of the appellant is that about a fortnight after the execution of the said agreement dated November 12, 1974, the defendant obtained possession of the property above mentioned on the ground that it was needed temporarily in connection with a marriage. On January 7, 1975, the defendant gave a notice to the appellant to which the appellant sent a reply dated January 9, 1975.

2. The transaction of sale was not finalised within the period of two months prescribed in the agreement. On March 10, 1975, the appellant sent a notice that since the sale had not been completed within the period prescribed, the agreement had been cancelled and the advance of Rs. 18,000/- had been forfeited. By the said notice the defendant was called upon to deliver possession of the suit premises and pending delivery of possession to pay damages for use and occupation at the rate of Rs. 500/- per month. Thereafter on March 18, 1975, the appellant filed the suit giving rise to this appeal for a declaration that agreement dated November 12, 1975 stands cancelled and for recovery of possession of the suit premises and for Rs. 1,870/- towards damages. In the said suit, the case of the appellant was that the time was essence of the contract and since the defendant had

failed to perform his part of the contract, the agreement had been cancelled and the advance amount of Rs. 18,000/- had been forfeited. The said suit was resisted by the defendant who pleaded that he was ready to perform his part of the contract and the appellant had defaulted. The defendant also pleaded that he has obtained possession of the property in part performance of the contract and the appellant was not entitled to claim possession or damages. He claimed that he had spent nearly Rs. 20,000/- on improvements in suit premises. The defendant also pleaded that he was ready and willing to take a regular sale deed provided appellant complied with the terms of the agreement as regards Smt. Mohanambal's share in the suit property.

3. The trial Court, i.e., tenth Additional City Civil Judge, Mayo Hall, Bangalore, by his judgment dated September 12, 1984, decreed that the agreement dated November 12, 1974 is cancelled and the appellant was directed to refund Rs. 18,000/- received by her as advance against the agreement to the defendant with the interest of 6% per annum. The defendant was directed to hand over back possession of the property and pay a sum of Rs. 215/- by way of past damage and future damage at the rate of Rs. 65/- per month. The trial Court was of the view that having regard to the fact that the agreement was in respect of sale of immovable property time was not the essence of the contract. It was further found that there was ample evidence to show that the appellant was prepared to receive the balance of sale consideration less Rs. 5,000/- as provided in the agreement for sale for indemnifying the share of Smt. Mohanambal and that the appellant had also established that she had deposited a sum of Rs. 6,000/- in the State Bank of Mysore Branch, Cook Town, towards the indemnity and in these circumstances, there was no justification for the defendant to insist on the appellant, as a condition precedent, to obtain a declaration from Smt. Mohanambal and in addition offer security in the form of indemnity bond in a sum of Rs. 5,000/-. It was further held that defendant had, by his conduct, made it impossible for the appellant to complete the transaction. As regards the defence of part performance set up by the defendant, the trial Court found that there was no document evidencing payment of Rs. 15,000/- or the circumstances under which the possession was delivered and that there was no reliable evidence on the side of the defendant to show that he came into possession in performance of the agreement to sell and therefore, Section 53 A of the Transfer of Property Act could not be invoked by the defendant in defence of the suit. The trial Court held that the appellant was ready to perform her part of the contract while the defendant was not and in the circumstances, the appellant was perfectly justified in terminating the contract by issuing the notice dated February 10, 1975 and she was entitled for cancellation of the agreement for sale and for recovery of possession for suit premises. The trial Court rejected the case of the defendant with regard to improvements which he claimed to have carried out in the property. The trial Court considered the question whether specific performance of the agreement for sale could be granted although the defendant had not sought for specific performance and after taking into consideration the facts and circumstances, it held that there was no justification for granting specific performance of the agreement or to allow the continuance of the present state of affairs to the detriment of the appellant. At the same time, it was held that the appellant was not entitled to forfeit the amount of Rs. 18,000/- received by her. In view of the findings aforesaid, the trial Court passed the decree as mentioned above.

4. The defendant filed an appeal against the said decree of the trial Court in the High Court. The appellant also filed a cross appeal against the decree of the trial Court. During the pendency of the said appeal, the defendant died and respondents were brought on record as his legal representatives. The appeal of the respondents was disposed of by the High Court by its judgment dated July 18, 1980. The High Court affirmed the finding recorded by the trial Court that time was not the essence of the contract. The High Court was, however, of the view that the requirements of S. 31 of the Specific Relief Act for passing a decree for cancellation of an instrument were not satisfied in the

present case in as much as the agreement to sell is neither void nor voidable as the appellant had not pleaded mistake, illegality, fraud, coercion, undue influence or misrepresentation and as there was no legal infirmity in the deed which made it unenforceable, the suit was not maintainable under Section 31 of the Specific Relief Act and that the only right of the appellant was to file a suit for recovery of the balance of the consideration payable to her under the agreement to sell. The High Court was further of the view that on January 9, 1975, the appellant had replied in stating that she was ready and willing to execute the said deed and at no point of time there was refusal so as to make the time for suit for specific performance to run and since defendant was admittedly in the possession of the house and enjoying the same and was in possession of the documents regarding his predecessor's title except that here was no valid conveyance, in other respects the terms of contract had been substantially acted upon, the defendant could not be treated as trespasser as his possession was lawful and was traceable to agreement of sale. According to the High Court, there was no legal impediment for specific performance and if the appellant had not filed the suit, the defendant would have resorted to file a suit. The High Court, further, found that so long as the agreement stands, the appellant could not seek possession and the suit was liable to be dismissed. Taking into consideration the fact that the matter was pending since 1975 and that the parties should not be driven to second round of litigation and keeping in view the fact that appellant was entitled to claim unpaid purchase money and defendant being in possession was entitled to ask for registered sale deed executed by the appellant, which were only legal formalities, the High Court, in exercise of their discretion under Order 7, Rule 7, C.P.C. to mould the reliefs as they are just and equitable, made the following order : -

(1) Appeal is allowed, suit is dismissed.

(2) The defendant shall pay or deposit sum of Rs. 72,000/- the unpaid balance of consideration with 15% interest per annum from 15-11-1974, till the date of payment of deposit in the Court below on or before 31 st December, 1990.

(3) If the deposit is so made in the Court, the Court shall issue notice to the plaintiff fixing a date for executing the sale deed. The defendant shall produce the necessary stamp paper and meet the expenses of registration.

(4) On receipt of notice, as aforesaid, the plaintiff shall execute the sale deed, after receiving the entire amount as directed above, if within two months, after service of notice, the plaintiff fails to execute the sale deed, the same shall be executed by the Court."

5. The High Court did not, however, consider the cross appeal of the appellant.

6. Feeling aggrieved by the said judgment of the High Court, the appellant has filed this appeal.

7. During the course of hearing of this appeal, it was pointed out by the learned Counsel for the appellant that in view of the appreciation in the prices of real estate in Bangalore, the present market value of the suit premises is around Rs. 30 lacs. The learned Counsel also stated that the appellant is willing to offer to the respondents a sum of Rs. 10 lacs if they agree to settle the matter and deliver vacant possession of the suit premises or in the alternative the appellant is willing to withdraw all her claims to the suit premises if she is paid a sum of Rs. 15 lacs by the respondents. The respondents were, however, not willing to accept either of these proposals.

8. The learned Counsel for the appellant has submitted that the High Court has virtually passed a decree for specific performance of the agreement to sell in favour of the defendant in the suit filed by the appellant and that such a relief could not be granted under Order 7, Rule 7, C.P.C. Moreover, a decree for specific performance could not be passed in the present case since the period of limitation prescribed for filing a suit for specific performance had long expired and the conditions which are required to be fulfilled by a person seeking a decree for specific performance of the contract under Section 16 of the Specific Relief Act were not satisfied in the present case. It has also been urged by the learned Counsel for the appellant that the High Court has erred in proceeding on the basis that the principle of part performance would be attracted and a decree for possession could not be passed in favour of the appellant against the respondent. It has also been urged that the High Court had disposed of the appeal of the respondent and dismissed the suit of the appellant without considering the cross appeal filed by the appellant.

We find considerable force in the aforesaid contentions of the learned Counsel. In order that decree for specific performance of a contract may be passed it is necessary to consider whether Such a relief can be granted in view of Section 16 of the Specific Relief Act, 1963. In other words the person seeking such a decree has to satisfy that S. 16 of the Specific Relief Act does not bar the grant of such a relief and the person against whom the decree is passed can show that the relief of specific performance cannot be granted in view of the provisions of S. 16 of the Specific Relief Act. Clause (c) of S. 16 postulates that the person seeking specific performance of the contract must file a suit wherein he must aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him. Moreover, in view of Article 54 of the Limitation Act, 1963, a suit for specific performance of contract has to be filed within three years of the date fixed for the performance or if no such date is fixed where plaintiff has notice that performance is refused. In the present case, the appellant by his notice dated February 10, 1975 had clearly indicated that he had cancelled the agreement and had forfeited the advance amount of Rs. 16,000/- deposited by the defendant. By the said notice, It was clearly indicated that the appellant was no longer willing to perform the agreement to sell dated November 12, 1974. In the circumstances, it was incumbent upon the defendant to have filed a suit for specific performance of the contract within a period of three years from the date of the said notice dated February 10, 1975 and if such a suit had been filed by the defendant, it would have been open to the appellant to show that it was barred by the provision contained in Section 16 of the Specific Relief Act. The defendant did not choose to adopt that course and remained content with defending the suit filed by the appellant for cancellation of the agreement to sell dated November 12, 1974 and for recovery of the possession of the property. Even if It is found that the appellant was not entitled to succeed in the said suit and the said suit is liable to be dismissed, it would not entitle the defendant to obtain a decree for specific performance of the contract in those proceedings. The High Court, with due respect, was not right in invoking its discretionary power under Order 7, Rule 7; C.P.C. to grant such a relief to the defendant. The said power conferred on the Court does not enable it to override the statutory limitations contained in S. 16 of the Specific Relief Act, 1963 and S. 54 of the Limitation Act, 1963 which preclude the grant of the relief of specific performance of a contract except within the period prescribed by the section.

9. The decree passed by the High Court whereby the defendant has been directed to pay or deposit a sum of Rs. 72,000.- as balance consideration with 15% interest from November 15, 1974 till the date of payment of deposit in the Court and directing the appellant to execute the sale deed after receiving the entire amount as directed, cannot, therefore, be upheld and must be set aside.

10. The next question which arises for consideration is whether a decree for possession of the

property can be passed in favour of the appellant. The defence that was put forward by the defendant to the said claim of the appellant was on the basis of the doctrine of part performance as contained in Section 53A of the Transfer of Property Act. The defendant had pleaded that he had obtained possession of the suit property in part performance of the contract. The case of the appellant, on the other hand, was that a fortnight after the execution of the agreement dated November 12, 1974, the defendant sought for temporary accommodation for eight days and on that request, the possession of the property was delivered to him. In order that the doctrine of part performance as contained in Section 53-A of the Transfer of Property Act may be invoked, it is necessary that the act of part performance must be such as not only to be referable to the contract of which part performance is alleged but to be referable to no other title. (See: Fry on Specific Performance, Sixth Ed., at p. 276, Ranchhoddas Chhaganlal v. Devaji Supdu Dorik, (1977) 2 SCR 621 at 624 : (AIR 1977 SC 1517 at p. 1520). In the instant case, it was for the defendant to establish his claim that he obtained possession of the suit property by way of part performance of the contract as contained in the agreement to sell dated November 12, 1974. The trial Court after considering the said evidence adduced by the defendant as well as the evidence of the appellant that the defendant sought for temporary accommodation for eight days and therefore, possession was delivered, has found -

"It is clear from the above decisions that defendant must have come into possession in pursuance of the agreement to sell. In other words, that there must be direct nexus between the agreement and getting into possession. As already observed, I find no reliable evidence on the side of the defendant on this aspect of the case. What is stated by the plaintiff is that the defendant sought for temporary accommodation for eight days and therefore possession was delivered. While according to the defendant, it was pursuant to Ex. P.7 D.W. 3 Anthony has no idea as to the circumstances under which defendant was put in possession. Admittedly, he was not present at the time of payment of Rs. 15,000/-. Therefore, having regard to the conduct of the defendant subsequent to Ex. P.7, I am unable to hold that defendant was put in possession in pursuance of the suit agreement. That being so, Sec. 53-A cannot be invoked by the defendant in defence of the suit."

11. The High Court, on the other hand, has found :

"In the instant case, there is no dispute that the plaintiff received Rs. 15,000/- on 15-11-1974 and on that date he put the defendant in possession of the house and entrusted him all the documents pertaining to the house. Those acts, in turn, were traceable to the agreement of sale dated 12-11-1974."

12. In arriving at the said finding, the High Court has not even referred to the evidence of the appellant that the possession of the suit property was delivered to the defendant for the reason that he had sought for temporary accommodation for eight days. The High Court has also given no reasons for disagreeing with the finding recorded by the trial Court that the defendant could not be held to have been put in possession in part performance of the suit agreement. It would thus appear that the High Court has reversed the finding recorded by the trial Court that the defendant was not entitled to invoke the protection of Section 53-A of the Transfer of Property Act without considering the evidence on record. The said finding of the High Court cannot, therefore, be upheld and the matter has to be remitted to the High Court for reconsideration.

13. The matter requires to be remitted to the High Court for reconsideration also for the reason that

the cross appeal filed by the appellant against the decree of the trial Court has not been considered by the High Court. It is necessary that both the appeals arising from the judgment and decree of the trial Court are heard and disposed of together.

14. We may also advert to the fact that the defendant obtained possession of the suit premises in November, 1974. By then he had paid a fraction of the sale consideration and since then the defendant and, after his death, the respondents have been enjoying the premises. Since the appellant has been deprived of the use of the property without having been paid the full amount of the sale consideration for the past 18 years, we consider it appropriate in the interest of justice that suitable provision be made for the appellant by way of interim measures during the pendency of this litigation. It is, therefore, directed that the appellant be paid @ Rs. 500/- per month for the period from December 1, 1974 till the date of disposal of this appeal. This amount shall be paid by the respondents to the appellant, or may be deposited in the High Court, within a period of two months and if so deposited the appellant would be entitled to withdraw the same. For the subsequent period while the appeal, thus remitted, is pending in the High Court, the amount payable to the appellant may be fixed by the High Court keeping in view the facts and circumstances. The decree of the trial Court under appeal before the High Court will be stayed only upon fulfilment of the conditions as to payment of sum of Rs. 500/- per month from December 1, 1974, till the date of this judgment and continuing to pay such sums as the High Court may direct during the pendency of the appeal. The amount thus paid by the respondents to the appellant shall be taken into account by the High Court while passing the final order in the appeal.

15. The appeal is, therefore, allowed. The judgment and decree dated July 18, 1990 of the High Court of Karnataka in Regular First Appeal No. 154 of 1985 is set aside. The matter is remitted to the High Court for reconsideration on merits in accordance with law. Since the suit out of which the appeal arises was filed in 1975, it is expedient in the interest of justice that appeal on remission is heard and disposed of expeditiously. The High Court is therefore requested to take up the appeal for hearing at an early date and if possible dispose of the same within a period of six months. The appellant would be entitled to her costs in this appeal. Appeal allowed.

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