

K. S. Vidyanadam and Others

Vs

Vairavan

Civil Appeal No. 7467 of 1996

(S. Saghir Ahmed, B. P. Jeevan Reddy JJ)

06.02.1997

JUDGMENT

B. P. JEEVAN REDDY J.

Defendants 1 to 4 are the appellants. The respondent's suit for specific performance has been decreed in appeal by the Madras High Court. The trial court had denied specific performance but had directed refund of the earnest money paid by the plaintiff. The fourth defendant is the purchaser of the suit property from Defendants 1 to 3 after the decree of the trial court. He was impleaded as a respondent in the appeal.

2. On 15-12-1978, an agreement of sale was entered into between Defendants 1 to 3 and the plaintiff whereunder they agreed to sell and purchase the suit house for a consideration of Rs. 60,000. The relevant recitals of the agreement read as follow :

"... has been agreed to be sold by the first party in favour of the second party for the sale consideration of Rs. 60,000 (Rupees Sixty Thousand only) within a period of six months from this date and in this regard from and out of the aforesaid sale amount a portion of the same being Rs. 5000 has been obtained this day as advance amount with interest, by the first party from the second party. Further it had been stipulated that within the aforesaid period of six months the second party should purchase the stamp papers at his own expense and after adjusting the aforesaid advance amount should pay the balance amount either in person or in the presence of the Registrar and the first party should affix his signature and execute the same in favour of the second party; that further, prior to registration of the aforesaid sale deed, the first party should vacate and deliver possession in favour of the second party together with the keys and if the second party fails to complete the purchase as aforesaid the advance amount without interest and paid to the first party should not be demanded to be returned and likewise, if the second party were to be ready to complete the purchase and the first party fails to execute the aforesaid sale, the first party will be liable to pay the aforesaid advance amount of Rs. 5000 together with compensation of Rs. 5000 in all totalling Rs. 10,000 to the second party, without resorting to any litigation and with the aforesaid condition both the parties have wholeheartedly executed this sale agreement with consent"

3. On 11-7-1981, i.e., more than 2 1/2 years later, the plaintiff issued a notice through his advocate to Defendants 1 to 3 stating that he has always been ready and willing to perform his party of the contract, that he is sufficiently rich and is able to pay the amount of Rs. 50,000 as and when

required. He alleged further :

"(4) Though as per the agreement of sale, six months' time had been stated, as you know time was not agreed as the essence of the contract. In fact tenant is in occupation of the property agreed to be sold to my client. Whenever my client was approaching one or other of you, you have been stating that the tenant had not vacated and was asking for time and that as soon as the tenant vacates you would execute the sale deed. Days are passing by."

The plaintiff then stated that though as per agreement of sale, the defendants were under an obligation to deliver vacant possession but because the tenant has not so far vacated the building, the plaintiff is prepared to purchase the building with the tenant. Accordingly, the plaintiff called upon Defendants 1 to 3 execute the sale deed on an agreed date.

4. To this notice, Defendants 1 to 3 sent a reply stating that time was the essence of the contract, that the prices of the property are sharply increasing day-by-day, that the tenant is their relation who is always willing and ready to vacate the property and that it was the plaintiff who was not ready and willing to complete the transaction. Only when the plaintiff noticed that the prices in the locality have gone up three times, has he come forward with the suit notice. The defendants stated that the plaintiff never approached them for anything and that they never made any representation as alleged in the suit notice.

5. On 23-8-1981, the plaintiff instituted the suit wherein, while asking for specific performance of the agreement, he also prayed alternatively for refund of the amount paid by him with interest. The defendants contested the suit. The pleadings of the parties are in line with the respective case set up in the suit notice and in the reply notice. The trial court dismissed the suit for specific performance holding that the plaintiff was ready but not willing to refund to him with interest. The trial court rejected the plaintiff's case, supported only by oral evidence, that during the period 15-12-1978 to 11-7-1981, the plaintiff has been requesting the defendants to execute the sale deed and that the defendants have been seeking time representing that the tenant had not vacated. The trial court also found that after the suit agreement, the plaintiff has purchased two other properties, in the years 1979 and 1981, for Rs. 35,000 and Rs. 30,000 respectively and that he had no ready money to pay the balance consideration under the suit agreement. On plaintiff's appeal, a Division Bench of the High Court reversed the judgment of the trial court. The High Court accepted the plaintiff's case that he has been asking the defendants for execution of the sale deed and that the defendants had been seeking time representing that the tenant has not vacated. The High Court affirmed the finding of the trial court that time was not the essence of the contract but reversed the trial court's finding with respect to plaintiff's readiness and willingness to perform his part of the contract.

6. In this appeal, Shri J. Ramamurti, learned counsel for the defendants, took us through the oral and documentary evidence on record and submitted that the plaintiff is disentitled to specific performance on account of the delay on his part and also because he was not ready and willing to perform his part of the contract. The counsel submitted that the plaintiff has in fact come forward with a false case that though he was demanding repeatedly, the defendants had been putting off the execution of the sale deed on the ground of existence of the tenant. On the other hand, Shri Sivasubramaniam, learned counsel for the plaintiff, submitted that once it is held that time is not the essence of the contract and when the suit has been filed within the period of limitation prescribed by law, there is no reason for not decreeing specific performance. He submitted that the plaintiff is a man of means and is in a position to produce the requisite amount at any time. Mere rise in prices

during the period between the date of agreement and the date of suit is no ground for denying specific performance. The counsel submitted that the High Court has rightly exercised its discretion which should not be interfered with by this Court.

7. Section 10 of the Specific Relief Act, 1963 says that :

"Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced -

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief."

Clause (1) of the Explanation appended to the section says that "unless and until the contrary is proved, the court shall presume (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money". Sub-section (1) of Section 20 says that "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". Sub-section (2) sets out the situations in which the court may refuse specific performance. Sub-section (3) of Section 20 says that "the court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance". Section 21 sets out the circumstances in which the court may award compensation in lieu of or in addition to specific performance. Section 23 says that merely because an agreement mentions a particular sum payable by the defaulting party to the other, that shall not be a ground for refusing the specific performance.

8. Section 55 of the Contract Act is in three parts. For our purposes, it is enough to notice the first two parts, which reads :

"55. Effect of failure to perform at fixed time, in contract in which time is essential. - When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential. - If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure."

9. Article 54 of the Limitation Act prescribes three years as the period within which a suit for specific performance can be filed. The period of three years is to be calculated from the date specified in the agreement for performance or in the absence of any such stipulation, within three

years from the date the performance was refused.

10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani v. Kamal Rani* [(1993) 1 SCC 519] : (SCC p. 528, para 25)

"... it is clear that in the case of sale immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident ?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973 [It is a well-known fact that the steep rise in the price of oil following the 1973 Arab-Israeli war set in inflationary trends all over the world. Particularly affected were countries like those who import bulk of their requirement of oil]. In this case, the suit property is the house property situated in Madurai, which is one of the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? The plaintiff says that he has been calling upon Defendants 1 to 3 to get the tenant vacated and execute the sale deed and that the defendants were postponing the same representing that the tenant is not vacating the building. The defendants have denied this story. According to them, the plaintiff never moved in the matter and never called upon them to execute the sale deed. The trial court has accepted the defendants' story whereas the High Court has accepted the plaintiff's story. Let us first consider whose story is more probable and acceptable. For this purpose, we may first turn to the terms of the agreement. In the agreement of sale, there is no reference to the existence of any tenant in the building. What it says is that within the period of six months, the plaintiff should purchase the stamp paper and pay the balance consideration whereupon the defendants will execute the sale deed and that prior to the registration of the sale deed, the defendants shall vacate and deliver possession of the suit house to the plaintiff. There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11-7-1981. It is not the plaintiff's case that within six months, he purchased the stamp papers and offered to pay the balance consideration. The defendants' case is that the tenant is

their own relation, that he is ready to vacate at any point of time and that the very fact that the plaintiff has in his suit notice offered to purchase the house with the tenant itself shown that the story put forward by him is false. The tenant has been examined by the defendant as DW 2. He stated that soon after the agreement, he was searching for a house but could not secure one. Meanwhile (i.e., on the expiry of six months from the date of agreement), he stated, the defendants told him that since the plaintiff has abandoned the agreement, he need not vacate. It is equally an admitted fact that between 15-12-1978 and 11-7-1981, the plaintiff has purchased two other properties. The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2 1/2 years, the prices went up three times and that only because of the said circumstance has the plaintiff (who had earlier abandoned any idea of going forward with the purchases of the suit property) turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, we are inclined to accept the case put forward by Defendants 1 to 3. We reject the story put forward by the plaintiff that during the said period of 2 1/2 years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above finding means that from 15-12-1978 till 11-7-1981, i.e., for a period of more than 2 1/2 years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the defendants to execute the sale deed and deliver possession of the property. We are inclined to accept the defendants' case that the values of the house property in Madurai town were rising fast and this must have induced the plaintiff to wake up after 2 1/2 years and demand specific performance.

11. Shri Sivasubramaniam cited the decision of the Madras High Court in *S. V. Sankaralinga Nadar v. P. T. S. Ratnaswami Nadar* [AIR 1952 Mad 389 : (1952) 1 MLJ 44] holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality - and the reality is constant and continuous rise in the value of urban properties - fuelled by large-scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs. 5000 and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs. 5000 (as against the total consideration of Rs. 60,000) the plaintiff did nothing until he issued the suit notice 2 1/2 years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by court that time is not of the essence of the contract in the case of the immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all

stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent ? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribed certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).

12. Shri Sivasubramaniam relied upon the decision of this Court in *Mademsetty Satyanarayana v. G. Yellogi Rao* [(1965) 2 SCR 221 : AIR 1965 SC 1405], wherein it has been held :

"As Article 113 of the Limitation Act prescribed 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."

Subba Rao, J., speaking for the Bench, pointed out the distinction between India law and the English law on the subject and stated the conclusion in the following words :

"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. ... 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 contract 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."

13. In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.

14. Shri Sivasubramaniam then relied upon the decision in *Jiwan Lal (Dr) v. Brij Mohan Mehra* [(1972) 2 SCC 757 : (1973) 2 SCR 230] to show that the delay of two years is not a ground to deny specific performance. But a perusal of the judgment shows that there were good reasons for the plaintiff to wait in that case because of the pendency of an appeal against the order of requisition of the suit property. We may reiterate that the true principle is the one stated by the Constitution Bench

in Chand Rani [(1993) 1 SCC 519]. Even where time is not of the essence of the contract, the plaintiff must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property.

15. Shri Sivasubramaniam submitted that as on today, the fourth appellant alone is fighting the litigation, that he has purchased the property after the decree of the trial court which means that he has consciously purchased litigation and that, therefore, there are no equities in his favour. The counsel submitted that as between the plaintiff and the fourth defendant, equities are in favour of the plaintiff. We are not impressed. The plaintiff has paid only a sum of Rs. 5000 in December 1978 as against the consideration of Rs. 60,000. The trial court dismissed the suit for specific performance on 4-9-1982, while decreeing the refund of their earnest money. Defendant 4 purchased the suit house on 19-11-1982 for a consideration of Rs. 90,000. May be, he knew he was purchasing litigation and probably it was for that reason that he may not have paid the full amount of the value. In any event, we cannot ignore the fact that Defendants 1 to 3 are also appellants before us. We are also not prepared to say that as between plaintiff and the fourth defendant, the equities are in favour of the plaintiff alone.

16. In the above circumstances, we allow the appeal, set aside the decree of the High Court and restore the decree of the trial court inasmuch as Defendants 1 to 3 did not choose to file an appeal against the decree. There shall be no order as to costs.