

SUPREME COURT OF INDIA

Rachakonda Narayana

Vs.

Ponthala Parvathamma

C.A.No.9166 of 1996

(V.N. Khare and Shivaraj V.Patil JJ.)

23.08.2001

JUDGMENT

V.N. Khare, J.

1. This is a plaintiffs appeal. On 12th of December, 1975 defendant No.1 executed an agreement to sell two plots of land plot A comprising 2 acres patta land and plot B comprising Ac.1.30 Cents Sivaijama land for a sum of Rs. 17,900/- in favour of the plaintiff. Under the agreement to sell, a sum of Rs. 2,900/- was paid to defendant No.1 as earnest money. Subsequently, one Bhima Naik issued a registered notice to the appellant stating therein that he is the owner of the land comprising in plot B measuring Ac.1.30 Cents and that the defendant No. 1 has no right to sell the same to the appellant herein. The appellant sent notice to defendant No. 1 for executing the sale deed. However, the defendant evaded to perform his part of the contract. It is under such circumstances, on 15.3.76, the appellant herein brought a suit for specific performance being OS 19/76 in the court of Subordinate Judge, Madanapalle. The plaintiffs case was that the appellant always was and is ready and willing to perform his part of the contract. Since the title of defendant No. 1 was found to be defective as one Bhima Naik set up title on Sivaijama land, hence the plaintiff prayed for specific performance of agreement to sell of two acres of patta land only after proportionate deduction of the price for the land or in the alternative, substitute the patta land for the price agreed upon between the parties. Defendant No.1 contested the suit by filing a written statement. The defendant took the plea that the plaintiff cannot seek to enforce a new contract and that the plaintiff under the pretext of notice having received by him from Bhima Naik, did not come forward to perform his part of the contract and his plea for proportionate deduction of the price or in the alternative, substitute the property is untenable and the suit is liable to be dismissed. The trial court held that the plaintiff is not entitled to seek enforcement of new contract either by way of substitution of the patta land or for proportionate deduction of the agreed price of the land. The trial court further found that the title set up by Bhima Naik in respect of one item of the land did not entitle the plaintiff to vary the contract. With the aforesaid finding, the plaintiffs suit was dismissed.

2. The plaintiff thereafter filed an appeal before the first appellate court. Before the first appellate court for the first time it was stated by defendant No. 1 that he has no title in respect of plot B land and the same belonged to his wife and she has refused to assign the said land in his favour. Under such circumstances, the plaintiff moved an application for amendment of the plaint to the effect that the plaintiff is ready and willing to purchase Ac. 2 acres of land in plot A by paying the entire sale consideration of Rs. 17,900/- and further he is relinquishing his claim in respect of the land contained in plot B and that he would not claim any compensation. The said amendment was allowed by the appellate court. The first appellate court having found that defendant No. 1 has no title in respect of land comprising in plot B, and the plaintiff is ready and willing to pay up the whole of the agreed consideration amount, after relinquishing his claim in respect of plot B land and the compensation, the plaintiff is entitled to decree for specific performance. In that view of the matter, the appeal was allowed and the suit was decreed in respect of land comprised in plot A measuring two acres of patta land.

3. Aggrieved, the defendant preferred a second appeal before the High Court. The High Court was of the view that since the plaintiff did not come with the suit claiming the benefit of sub-section (3) of Section 12 of the Specific Relief Act, 1963 (hereinafter referred to as the Act), and claimed performance of only part of the whole agreement, and therefore he was not ready and willing to perform his part of the whole contract and thus not entitled for decree for specific performance of the agreement to sell. Consequently, the second appeal was allowed and the suit stood dismissed. It is against the said judgment of the High Court, the plaintiff has preferred this appeal by way of special leave petition.

4. Learned counsel for the appellant urged that the relief under sub-section (3) of Section 12 of the Act can be claimed even at the appellate stage and the High Court committed serious mistake of law in holding that such relief ought to have been claimed when the suit was filed. Learned counsel appearing for the respondents contended that in view of Section 16 (c) of the Act, the plaintiff is to aver and establish that he has performed or has been ready and willing to perform the essential terms of the contract. The averment has to come in the plaint itself. An amendment to the pleading at a later point of time to bring in the statement is to be refused after the parties have gone into evidence.

5. On the arguments of the parties, the question that arises for consideration is whether the relief under sub-section (3) of Section 12 of the Act can be claimed at the appellate stage by amendment in the plaint. We would first examine whether the plaintiff was entitled to relinquish a portion of his claim under the agreement at the appellate stage and seek performance of remaining part of the contract in conformity with Section 12 (3) of the Act when the plaintiff for the first time came to know that defendant no.1 has no title in respect of Sivajama land.

6. Pomercy on Specific Performance stated thus:

“When the vendors title proves to be defective in some particulars, or his estate is different from that which he agreed to convey, or is subject to encumbrances or

outstanding rights to third persons, or the subject-matter generally the land is deficient in quantity, quality or value, it is plain that the contract cannot be specifically performed, according to its exact terms, at the suit of either party. In such a case there are only three possible alternatives for a court of equity to pursue, either to refuse this remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give and to pay the full price as agreed; or to decree the conveyance of the vendors actual interest and allow to the vendee pecuniary compensation or abatement from the price, proportional to the amount and value of the defect in title or deficiency in the subject matter.

Sub-section (3) of Section 12 of the *Specific Relief Act, 1963* runs as under:

“12(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either (a) forms a considerable part of the whole, though admitting of compensation in money; or (b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.”

7. A perusal of sub-section (3) of Section 12 shows that the first part of the said provisions mandates refusal of specific performance of a contract on certain conditions. However, latter part of the provisions permits a Court to direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party pays or has paid the agreed consideration for the whole of the contract and relinquishes all claims to the performance of the remaining part of the contract and all the rights to compensation for the loss sustained by him. If a suit is laid by the other party, the court may direct the defaulting party to perform that part of the contract which is performable on satisfying two preconditions, i.e., (i) the plaintiff pays or has already paid the whole of the consideration amount under the agreement and that (ii) plaintiff relinquishes all claims to the performance of other part of the contract which defaulting party is incapable to perform and all rights to compensation for loss sustained by him. Thus, the ingredients which would attract specific performance of the part of the contract, are : (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent and (ii) the other party to an agreement must, in a suit for such specific performance, either pays or has

paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of other part of contract which defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or latches or any other disability on the part of other party.

8. Now, the question is whether relief under Section 12(3) of the Act is required to be pleaded in the plaint when the suit is laid or it can also be taken at the appellate stage. The view taken by the High Court is the readiness and willingness to perform the terms of the contract by the plaintiff based on latter part of sub-section (3) of Section 12 must be pleaded in the plaint itself when the suit is laid and in its absence the relief being discretionary cannot be granted by amendment of the plaint at the appellate stage. In *Kalyanpur Lime Works Ltd. vs. State of Bihar* and another 1954 SCR 958, identical question came up for consideration before the Supreme Court. In the said case, the apex court held that relief based on Sections 13, 14, 15 and 17 of the *Specific Relief Act, 1877* can be granted at any stage of the litigation. In *A.L. Parthasarathi Mudaliar vs. Venkata Kondiah Chettiar*¹, it is held that it is open to plaintiff to relinquish the part of the performance of the contract after paying the entire consideration of the contracted amount at the appellate stage of the proceedings if the defaulting party is not capable to perform the whole of the contract.

We are in agreement with the statement of law expressed in the aforesaid decisions. In the present case what we find is that it was for the first time at the appellate stage, the defendant no.1 stated that he had no title in respect of Plot B Sivaijama land which belonged to his first wife and his wife has refused to assign the said plot of land in his favour. It is on account of the said statement the plaintiff filed an application for amendment of the plaint relinquishing his claim in respect of B plot of land as well as compensation for the loss he sustained for non-performance of part of the contract while agreeing to pay the entire contracted amount. An appeal is a continuation of the suit. When an appellate Court hears an appeal, the whole matter is at large. The appellate Court can go into any question relating to rights of the parties which a trial Court was entitled to dispose of provided the plaintiff possesses that right on the date of filing of the suit. Defendant no.1 prior to filing of appeal by the plaintiff never informed the plaintiff that his wife has refused to assign B plot of land in his favour and he having no title over the said plot of land is incapable to perform the whole part of the contract. Under such circumstances it was open to the plaintiff to move for amendment of the plaint pleading therein the ingredients for part performance of the contract as provided under sub-section (3) of Section 12 of the Act. It is not disputed that the plaintiff had deposited the entire contracted amount in the trial Court. He further relinquished his claim in respect of B plot of land as well as claim for compensation. Under such circumstances the first appellate Court was justified in allowing the amendment of the plaint and thereafter decreeing the suit of the plaintiff. We, therefore, find that view taken by the High Court in holding that the plea taken by the plaintiff at the appellate stage having been not taken at the time of filing of suit, the suit would fail, is erroneous. For the aforesaid reasons appeal deserves to be allowed.

We, accordingly, set aside the judgment under appeal. The appeal is allowed. There shall be no order as to costs.

¹AIR 1965 Madras 188