

SUPREME COURT OF INDIA

Shamsu Suhara Beevi

Vs.

G. Alex

C.A.No. 3729 of 2000

(Ashok Bhan and S. H. Kapadia JJ.)

20.08.2004

JUDGMENT

ASHOK BHAN, J.

The defendant/appellant (hereinafter referred to as 'the appellant') entered into an agreement of sale with the plaintiff/ respondents (hereinafter referred to as 'the respondents') on 20.10.1994 for the sale of land measuring 15.125 cents owned by her at the rate of Rs. 3,15,000/- per cent for a total consideration of Rs. 44,66,385/-. The agreement was to be executed within a period of 3 months from the date of the execution of the agreement of sale. A sum of Rs. 10 lakhs was paid by the respondents as advance / earnest money towards the sale consideration. As the appellant failed to execute the sale deed the respondents on 26.4.1995 filed a suit being O.S. No. 458 of 1995 in the Court of III Additional Sub-Judge, Ernakulam for specific performance of the agreement dated 20.10.1994. Appellant filed the written statement. The suit was decreed on 24.7.1997 in the following terms:

"1. That the defendants shall cause the plaint schedule property be sold in terms of Ext. A4 sale agreement dated 20.10.1994 within three months from the plaintiffs depositing the balance sale consideration with the court after causing the property to be measured and satisfying the plaintiff about the measurements and complying the requirements under the Indian Income Tax rules and Act obtaining necessary sanction and permission and certificate from the authorities under the Income Tax Act. It is made clear that it shall not be the duty of the plaintiff to inform the defendant about the deposit of the balance sale consideration with the court and it is for the defendant to make enquiries with the office and ascertain as to whether the balance sale consideration was deposited by

the plaintiffs with the court.

2. The plaintiff shall deposit the balance sale consideration with the court within three months from the date of this decree. The balance sale consideration shall be paid for the entire area shown in the plaint and if in any case it is found by measuring the property that the actual extent is short of the area shown in the plaint the plaintiff shall get back the amount paid in excess by them by taking into consideration of the difference if any found in the measurements.

* 3. If defendant fails to cause the registration of the sale deed as aforesaid within the time mentioned above the plaintiffs are at their liberty to move the court in execution for causing the sale deed executed and then it shall be the duty of the defendant to obtain necessary permission and sanction and certificate from the Income Tax authorities for the purpose of the sale in compliance with the requirements of the Indian Income Tax Act and rules and shall take steps to get the property measured and the actual extent ascertained.

4. The defendant shall pay the cost of the plaintiffs in the suit." *

This judgment became final as the appellant did not contest the case by filing further appeal.

2. Respondents in terms of the decree deposited the sum of Rs. 34,66,385/- in the Court as balance of the sale consideration on 23.10.1997 within the period of 3 months. The Court directed that the amount deposited be kept in a nationalised Bank and accordingly the amount was deposited in the Indian Bank, Mattancherry Branch. Respondents moved IA. No. 5187 of 1997 for permission to measure the suit property to ascertain the exact extent of land and a direction to the appellant to obtain 'no objection certificate' from the Department of Income Tax so that sale deed could be executed. On 17.2.1998 respondents moved another application, IA No. 851 of 1998, under Section 28(3) of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') claiming interest @ 12% on Rs. 44,66,385/- (sale consideration) from the date of deposit of the amount till the registration of the sale deed and delivery of possession of the suit property. The sale deed was executed and registered by the appellant on 17.8.1999. It was found that clearance from the Department of Income Tax was not required. Soon after the registration of the sale deed the respondents took possession of the property.

3. The trial Court disposed of IA Nos. 5187 of 1997 and 851 of 1981 by a common order dated 15.10.1999. Both the I.As. were allowed. The actual extent of land held by the appellant worked out to be 14.179 cent instead of 15.125 cents mentioned in the agreement of sale. It was held that the respondents were entitled to recover the sum of Rs. 12,77,870/- by way of compensation which included the costs awarded in the suit, excess amount deposited and interest by way of compensation on the sale consideration . Respondents were permitted to recover the amount of Rs. 12,77,780/- from the amount lying deposited in the Bank. The break up of the sum of Rs. 12,77,780/- under various heads for payment to the respondents was worked out as under:-

1.

Costs decreed to the plaintiffs

Rs. 3,09,093.00

2.

Survey Expenses

Rs. 2,650.00

3.

Excess amount deposited by The plaintiff

Rs. 16,065.00

4.

Interest on excess amount of Rs. 16,065/- from 23.10.1997 To 17.8.1999 at 15%

Rs. 4,371.00

5.

Interest on Rs. 44,50,320/- from 23.10.97 date of deposit till 1.8.1999 at 12% towards compensation

Rs. 9,45,691.00

Rs. 12,77,870.00

4. Appellant being aggrieved with the order passed by the Trial Court preferred CRP No. 2267 of 1999 in the High Court.

5. The learned Single Judge before whom revision petition came up for hearing agree with the contention raised by the appellant that Section 28 of the Act invoked by the respondents would not be applicable to the facts of the case as Section 28 applies to cases where rescission of the contract takes place with regard to contract for sale or lease of immovable property. Before us as well it was not argued that Section 28 of the Act would be applicable in the facts of the present case. However, learned Single Judge invoking Section 21 of the Act held that the respondents would be entitled to get compensation. Learned Single Judge placed reliance upon the judgment of the Single Judge of that High Court in Purushothaman vs. Thulasi, 1995 (1) KLT 40. It was observed that in Purushothaman (supra) case as well the plaintiff had not amended his plaint. Order of the Trial Court was modified as to the rate of interest payable. The interest of 15% granted on the excess amount of Rs. 16,065/- from 23.10.1997 to 17.8.1999 by the Trial Court was reduced to 12% and the interest of 12% on Rs. 44,50,320/- from 23.10.1997 till 1.8.1999 as compensation was reduced to 6%. The Court below was directed to disburse the sum lying deposited with the Indian Bank to the parties in accordance with the judgment rendered by the High Court. Aggrieved against the judgment of the High Court the present appeal has been filed by the appellant.

6. Counsel for the appellant strenuously contended that the High Court has misunderstood the scope of Section 21 of the Act. According to him, compensation for breach of agreement of sale either in addition to or in substitution of the performance of the agreement cannot be granted unless the plaintiff claims such compensation in his plaint. Since the respondents had failed to claim the compensation either in the original plaint or by amending the plaint at a subsequent stage during the pendency of the said proceedings as provided under section 21(5) the respondents were not entitled to any compensation for breach of agreement of sale even if there was such a breach. It was further

contended that the learned Single Judge committed a factual error in observing that in Purushothaman (supra) the plaint had not been amended in terms of Section 21(5) of the Act. According to him, in Purushothaman (supra) the plaint had been amended to claim of the relief of compensation. That the sum of Rs. 3,09,093/- towards the cost in the suit could not be included while working the amount of compensation under sub-section (5) of Section 21. Such costs could be recovered by the Respondents by filing an execution application for recovery of the cost and the same could not be recovered as a part of compensation payable in addition or in substitution of the relief of specific performance. Counsel appearing for the respondents controverted the submission made by the counsel for the appellant and supported the findings recorded by the High Court.

7. Section 21 of the Act reads:

"21. Power to award compensation in certain cases (1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the Court, decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under the section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint the Court shall, at any stage of the proceeding, allow him to amend the plaint, on such terms as may be just, for including a claim for such compensation.

Explanation: The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section." *

8. This Section corresponds to Section 19 of the Specific Relief Act, 1877. Sub-section (1) re-enacts the law as contained in clause (1) of the repealed Section 19 with suitable variations. The words 'any person suing' have been substituted by the words 'in a suit'. The word 'claim' has been substituted for the words 'ask for' and the word 'plaintiff' has been inserted before the words 'performance of a contract'. Sub-clause (2) reproduces verbatim the language of clause 2 of the repealed Section 19 with the alteration that the word 'such' has been prefixed before the word 'compensation'. Sub-section (3) corresponds to Clause (3) of the Section 19 of the repealed Act. There is no modification in this sub-section. Clause (4) of section 19 of repealed Act has been substituted by the new sub-section (4) of Section 21. It provides the mode and 'manner of determining the amount of compensation under this Section. It lays down the principle which would govern the determination of the award of compensation and provides that the Court shall be guided by the principles specified in Section 73 of the Contract Act, 1872 while determining the amount of compensation. Sub-section (5) of this Section is new. It provides that the compensation under this Section shall not be awarded

unless the plaintiff has claimed it in the plaint. An important rider has been attached to this sub-clause which is to the effect that the Court shall, at any stage of the proceedings, permit the amendment of the plaint to enable the plaintiff to include his claim for compensation on such terms, as the Court may deem fit. Explanation to this sub-section re-enacts the language of the old explanation without any change. Illustrations under Section 19 have been deleted.

9. Reasons for recommending the changes have been given by the Law Commission of India in its Ninth Report on the Specific Relief Act, 1877. Since in the present case, we are considering whether the compensation could be awarded in a suit for specific performance without making a claim of compensation either in the original plaint or by amending the plaint during the course of the proceedings, we would refer to the suggestions made by the Law Commission for the enactment of such-clause (5) only.

10. Sub-sections (1) and (5) of Section 21 seem to resolve certain divergence of opinion in the High Courts on some aspects of jurisdiction to the award of compensation. The Law Commission in its 9th Law Commission Report dated 19th July, 1958 (pages 18 and 19) observed that there has been a difference of judicial opinion as to whether the Court has the power to award compensation in a suit for Specific Performance, where the plaintiff has not specifically prayed for it in the plaint. The Lahore High Court has taken the view in *A.P. Pratinidhi Sabha vs. Lahori* 1924 (5) Lah. 509, that the Court has the power to award damages whether in substitution for or in addition to specific performance even though the plaintiff has not specifically claimed it in the plaint. The Madras High Court took a contrary view in *Somasundram vs. Chidambaram*, 1951 AIR(Mad) 282 and held that the Court cannot award damages in addition to specific performance in the absence of a specific claim for damages and a proper pleading stating why the relief of specific performance would be insufficient to satisfy the justice of the case and the amount which should be awarded. The Law Commission recommended that the view expressed by the High Court of Madras appeared to be based on the principle that there should be a proper pleading in every case. While it is proper that the Court should have full discretion to award damages in any case it thinks fit, one cannot, on the other hand, overlook the question of unfairness and hardship to the defendant, if a decree is passed against him, without a proper pleading. The Commission accordingly recommended that in no case should compensation be decreed unless it is claimed by a proper pleading. However, it should be open to the plaintiff to have an amendment, at any stage of the proceeding, in order to introduce a prayer for compensation, whether in lieu of or in addition to specific performance. Legislature accepted the suggestions made by the Law Commission of India and accepted the view expressed by the High Court of Madras to the effect that the Court cannot award compensation in addition to specific performance in the absence of a specific claim for damages and a proper pleading stating why the relief of specific performance would be insufficient to satisfy the justice of the case and the plaintiff would not be entitled to compensation.

11. It is admitted position before us that in the original plaint the respondents did not claim compensation for the breach of agreement of sale either in addition to or in substitution of the performance of the agreement. Further the respondents did not amend their plaint and ask for compensation either in addition to or in substitution of the performance of the agreement of sale. Sub-section (5) of Section 21 emphatically provides that no compensation shall be awarded under section 21(5) of unless the relief for compensation has been claimed either in the plaint or included later on by amending the plaint at any stage of the proceedings. The need to file an execution petition did not arise as the appellant executed the sale deed on 17.8.1999. We have perused the application filed by the respondents. It is a simple application filed under Section 28(3) of the Act seeking permission to ascertain the extent of plaint schedule property by measuring the same with

the help of Village Officer or by deputing an Advocate Commissioner and directing defendant / appellant to obtain 'no objection certificate' from the Department of Income Tax, in addition the respondents prayed that they be permitted to recover interest @12% towards loss of income on the sale amount of Rs. 45,66,385/- from 23.10.1997, i.e. the date of deposit till delivery of the possession of the property. Permission seeking to amend the plaint to include the relief of compensation for breach of the contract in addition to the specific performance has not been made. The relief was claimed under Section 28 and not under Section 21 of the Act. The High Court came to the conclusion that Section 28 would not be applicable to the facts of the case but granted the relief under section 21 of the Act. In our view, the High Court has clearly erred in granting the compensation under Section 21 in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance. Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law.

12. We have perused the judgment in Purushothaman (supra) carefully. The High Court in the impugned judgment has committed a factual error in observing that in that case plaint had not been amended. The plaint had in fact been amended and the relief of mesne profit claimed from the date of deposit of the balance consideration in addition to the relief of specific performance of the agreement. A factual error has crept in the impugned judgment of the High Court. The learned Single Judge has thus erred in placing reliance upon the judgment in Purushothaman (supra).

13. The learned Single Judge has also erred in including the amount of cost which have been awarded in the main suit towards the amount of compensation. Of course, the plaintiff/ respondents are entitled to recover the amount of cost which has been decreed in the main suit but the same cannot form part of compensation by way of additional relief to the specific performance of the agreement of sale.

14. For the reasons stated above, the judgments of the High Court as well as the Trial Court are set aside. Application filed by the respondents under Section 28(3) is dismissed. The appellants would be entitled to withdraw the amount deposited except the excess amount of Rs. 16,065/- deposited by the plaintiff/ Respondents towards the sale consideration of suit land from the Indian Bank along with accrued interest, if not already withdrawn. In case the respondents have withdrawn the deposited amount from the Indian Bank in pursuance to the direction issued by the Trial Court then they are directed to redeposit the amount or pay the same to the appellant along with interest @ 6% after deducting a sum of Rs. 16,065/- within a period of 3 months from the date of withdrawal till its re-deposit. Failure to deposit the amount within a period of 3 months as directed above, would attract interest @ 12% from the date of withdrawal till its redeposit/re-payment. This, however, would not debar the respondents from recovering the costs awarded in the suit in accordance with law.

15. Appeal is allowed and disposed of in terms of the above directions.