

ALLAHABAD HIGH COURT

Someshwar Dayal

Vs.

Widow of Lalman Shah

Appln. No. 10 of 1951. , from order of Munsif Kheri

(B. Mukerji and Randhir Singh, JJ.)

28.11.1950. 31.10.1957

JUDGMENT

B. Mukerji, J.

1. This is an application in revision by the defendants against an order of a learned Munsif of Kheri dated the 28th of November 1950 extending the time granted to the opposite-party for making the deposit of a sum of money which represented the sale consideration in respect of a decree that was made by that court for specific performance of a contract of sale.
2. This revision in the first instance came up before a learned single Judge who referred it to a Bench for decision because a question of some importance arose namely, whether the court below had the power to extend the period for making the deposit after the court had fixed the period for the deposit in the order by which it disposed of the suit for specific performance.
3. On the 16th of November 1944 a decree for specific performance was made in favor of one Lalman Sah as against Kashi Prasad and one Kunj Behari. The plaintiff Lalman Sah sued to enforce a contract of sale which had been entered into between him and Kashi Prasad. Kunj Behari was no party to this contract nor was he in the first instance a party to the suit. Kunj Behari Lal, however, applied to be made a party to the suit as he claimed title to the property and he was thereafter added as a party.
4. The trial court decreed the suit in the following terms:

"The suit for specific performance of the contract to sell the house in suit is decreed against the defendants. Plaintiff is allowed one month's time to deposit the sum of Rs. 275/-. On this sum being deposited, defendant 1 shall execute the sale-deed three months from today failing which the plaintiff shall be entitled to have the sale deed executed through Court. The costs of execution and registration of the sale deed shall be borne by

the plaintiff. The plaintiff's costs of the suit shall be paid by defendant 2 who is responsible for all this litigation."

5. An appeal was preferred against the decision of the learned Munsif by Kunj Behari who was defendant No. 2 - neither Lalman Sah nor Kashi Prasad defendant No. 1 appear to have challenged the decision of the Court below by appeal. The appeal was decided on 23rd of February 1945. The appeal was dismissed and the decision of the trial Court was affirmed. On 23rd of March 1945 Lalman Sah, the plaintiff, deposited a sum of Rs. 275/- which he was directed to deposit for getting specific performance of the sale. Defendant Kashi Prasad, however, had not executed a sale deed in favor of Lalman Sah after the decree which had been made for specific performance of the contract against him so that Lalman Sah after he made his deposit of the sale consideration made an application in the execution department for having a sale deed executed through the mediation of the Court by Kashi Prasad. Kashi Prasad took objection to the execution of the sale deed and one of the grounds that he took was that he was no more bound to execute a sale deed nor could the Court force him to execute the deed because the plaintiff Lalman Sah had not made the deposit of the sale consideration within the time fixed by the trial Court, namely, within one month from 16th of November 1944. The contention of Lalman Sah was that there having been an appeal against the decision of the trial Court the decision of that Court was in jeopardy and therefore, he was not bound to deposit the amount till the decree of the trial Court had not been finally affirmed in appeal. It may be pointed out that Lalman Sah's deposit was within one month of the date of the decision of the appeal. The executing Court came to the conclusion that Kashi Prasad could not be forced to execute the sale deed and therefore the application for execution was dismissed. The matter came up to this Court ultimately and on 16th of March 1950, the late Mr. Justice Kidwai, held that on the terms of the decree as it then stood the deposit of the sale consideration by Lalman Sah must be held to have been made beyond time and therefore the Court below was right in not executing a sale deed. While this matter was being argued it was apparently submitted by counsel that time for making the deposit could be extended by the Court below and therefore the executing Court could also extend the time. Reliance was placed on the provisions of Section 148 of the Code of Civil Procedure . While dealing with this submission of the learned counsel the late Mr. Justice Kidwai observed that the executing Court had no power to extend the time fixed by the trial Court under the provisions of Section 148, Cr. P. C. But nevertheless, he did express the view that since there was no proper application before the trial Court for the extension of time he refrained from expressing any opinion as to whether or not time could be extended by the trial Court.

6. It appears that the plaintiff Lalman Sah thereafter made an application for extension of time to make the deposit. This application was made on 20th of July 1950. The learned Munsif heard the parties in respect of this application, and came to the conclusion that he had the power to extend the time and accordingly he extended the time upto the date on which the deposit actually was made by Lalman Sah. The learned Munsif also came to the conclusion that Lalman Sah was justified in the belief that since there was an appeal against the decision of the trial Court in this

matter the entire decision was in jeopardy and that he would be within his rights if he deposited the sale consideration within one month of the decision of the appeal.

7. In revision it was contended on behalf of the applicants that the learned Munsif had no power to extend the time for the deposit under the provisions of Section 148 of the Code of Civil Procedure under which Lalman Sah's application purported to be. Section 148 of the Code is in these words :

"148. Where any period is fixed or granted to the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

The application that was made for extension could not in the circumstances of the case strictly fall within the ambit of this section, for the time which the learned Munsif had fixed in his order dated 16th of November 1944 was not in accordance with anything prescribed by the Code. The Code does not prescribe any particular form for the drawing up of a decree for specific performance as it does in the case of some other decrees nor does the Code indicate the contents of such a decree as it does in the case of a decree in a pre-emption suit as provided for by Order 20, Rule 14 of the Code. All that a decree for specific performance can properly contain is an adjudication to the effect that the plaintiff was entitled to the enforcement of the contract which the defendant had entered into with him for the sale of a certain property for a certain specified sum. The power of the Court to fix a period for the deposit of the sale consideration was not provided for specifically, either in the Civil Procedure Code or in the Specific Relief Act. Indeed, S 35 of the Specific Relief Act indicates a contrary intention, for Section 35 indicates that in the event of a party to the decree being in default another party could either file a suit for the rescission of the contract on which specific performance had been granted or he could even apply to that Court which could then rescind the decree. It is no doubt true that in this country usually when Courts pass a decree for specific performance, they fix a time during which the plaintiff is enjoined to pay the consideration and thereby get a proper sale in respect of a property. But this is more for purposes of convenience rather than in compliance with any provision of law.

8. In *Abdul Shaker Sahib v. Abdul Rahiman Sahib*¹, Chief Justice Schwabe and Wallace, J., held that the proper form for a decree for specific performance was not to make the relief granted to the plaintiff conditional upon his paying the sum within a specified time. The practice which prevailed in the Chancery Division in England was the proper practice to follow in respect of decrees for specific performance of contract of sale. In Abdul Shaker Sahib's case, the question did arise as to whether or not a Court which had made a decree for specific performance and had by that decree fixed a time for the plaintiff to deposit the sale consideration could subsequent to that decree extend the time. The learned Judges held that the Court had the power to extend the time. The view taken by the Madras High Court in this case was that the decree which is made in

a specific performance suit is, in the first instance, a decree in the nature of a preliminary decree, and that the decree only attains a final form after the plaintiff has made the deposit of the sale consideration and has thereafter obtained actual sale of the property. It was observed by Chief Justice Schwabe that till the date of the final completion of the matter the Court had seized over the case and that as such the Court could extend the time which it may have fixed earlier for the payment of the sale consideration. Wallace J. put the matter slightly differently. He expressed¹ AIR 1923 Mad 284

the view that a decree for specific performance of a contract was nothing more than a contract which had been affirmed by a Court by its decree and that that decree did not lose the essential character of a contract. The time which that decree fixed for payment of the sale consideration was like the time fixed for doing an act in any contract and unless it could be held that time was of the essence of the contract it could be extended and that the contract could not fail because the time fixed for the performance of the contract had elapsed. Wallace, J. in his judgment in considering this matter said thus :

"Regarding the decree from this point of view, as a contract, it is clear in this case, as in most others of the same kind, that time is not of the essence of the contract, and that, until the contract is rescinded by formal order or decree, such time for performance, not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are."

As we have already said Section 35 of the Specific Relief Act gives clear indication of the fact that a decree for Specific performance unless it is rescinded for non-performance of any other conditions laid there under, does not automatically cease to exist. The words which give this indication are these :

"Any person interested in a contract (in writing) may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely .

(a)

(b)

(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums which the Court has ordered him to pay.....

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require." The afore-mentioned case was followed in the Madras High Court again in *Rama Bhatlu v. Annayya Bhatlu*²,

9. The same view was taken by the Calcutta High Court in *Abdul Rahim v. Tamijaddin*³ Here the decree fixed the time for making the payment but did not as in the case before us, say that on

failure to pay the amount within the time the suit would stand automatically dismissed. The learned single Judge who decided Abdul Rahim Molla's case, took the view that the contract which was held valid and binding within the parties still subsists as no provision had been made in the decree to the effect that in the event of the decree-holder failing to deposit the balance of the consideration money within the time allowed by the Court the contract would be rescinded.

² AIR 1926 Mad 144

³ AIR 1933 Cal 580

10. In *Gokul Prasad v. Fattelal*³, Niyogi, J. held that a decree in a suit for specific performance of a contract for sale fixing time for payment of purchase-money is in the nature of a preliminary decree and therefore the Court has the power to extend the time fixed by it by that decree. In our view it is not necessary for us to agree in its entirety with the dictum of Niyogi, J. in the afore-quoted decision, for we are of opinion that there may be difficulty in terming the decree made in a suit for specific performance where a Court fixes a time for payment of the sale consideration as a preliminary decree since preliminary decree has been defined by the Code of Civil Procedure and since further, the decree made in a suit for specific performance may not strictly fall within the terms of that definition. But nevertheless, we are of the opinion that the decree which is made in a suit for specific performance is not a final decree of the character that completely debars the Court from extending the period fixed by it, for, in our opinion, the decree in such a suit partakes of the nature of a contract and unless it is rescinded or performed it subsists and therefore the right of the Court to make the extension of time for payment also subsists.

11. It was contended on behalf of the applicants that the time in this case had been fixed by the decree and therefore the Court could not vary the time as a court had no power to vary the terms of a decree except in accordance with the procedure provided for under review etc. A decree has been defined in Section 2(2) of the Code of Civil Procedure in these words:

" 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.....".

The fixation of the time was no part of the controversy between the parties nor did it determine any of the rights of the parties conclusively. Therefore, it could not justly form part of the decree as contemplated by the Code. Order 20, Rule 3 only prohibits a Court from afterwards altering or adding to a decree or a judgment except as provided by Section 152 or on review. We are of the opinion that since the fixation of the time by the Court did not in this particular case at any rate partake of the nature of a decree, the Court's power to extend time was in no manner affected by the provisions of Order 20, Rule 3 of the Code of Civil Procedure, We may here point out that the position in a pre-emption suit is slightly different, for as we have already pointed out earlier, in a pre-emption suit a decree has to be made in accordance with the provisions of Order 20,

Rule 14 of the Code of Civil Procedure which enjoins on the Court to fix a date for payment. Reliance was placed on *Dori Lal v. Mt. Jamaga*⁴, wherein a learned single Judge held that a Court had no power to extend the time fixed by it for the deposit of money in a suit for specific performance. We regret we are unable to follow the rule of law laid down in this case because in this decision the effect of Section 35 of the Specific Relief Act had not been considered at all. Reliance was further placed on the decision of *Jagjit Singh v. Sankatha Singh*⁵, where three learned Judges of this Court held that time fixed under the U. P. Agriculturists' Relief Act for payment of the mortgage-money could not be extended by the Court

³ AIR 1946 Nag 29 ⁵ AIR 1950 All 675 (FB)

⁴ AIR 1923 Oudh 16

subsequently. The Bench held that Section 148 of the Code of Civil Procedure did not apply to such proceedings nor did the provisions of O. 34 apply. This decision to our mind was not at all relevant to the question which fell for our determination.

12. The fact that an earlier execution application of the decree-holder in this case was dismissed would, in our opinion, have no effect on the determination of the question now before us : this question was, as we have already pointed out, specifically left open by the learned single Judge when the execution matter came up to this Court.

The position that obtained then was that the right of the executing Court to extend time was in controversy and not the right of the original Court that made the decree.

The decision of that execution matter cannot therefore in any manner affect the right of the trial Court, to extend the time if the trial Court's right was not otherwise taken away, which, according to our view, was not so taken away. The merits of the matter undoubtedly were such as would have led us not to exercise our revisional jurisdiction to interfere with the order of the Court below but we have gone into the matter because the question that arose for determination was an important one. We therefore dismiss this application in revision but in the circumstances of the case direct the parties to bear their own costs.

Revision dismissed.