

ANDHRA PRADESH HIGH COURT

Abdul Hakeem Khan

Vs

Abdul Mannan Khadri

(K Narasimham,C.J. Alladi Kuppuswami, J.)

02.09.1971

JUDGMENT

Alladi Kuppuswami, J.

1. The plaintiff in O. S. No. 23 of 1961. Sub-court. Nizamabad, is the appellant. He filed the suit for specific performance of an agreement dated 27-8-1950 to sell certain land, executed by the defendant in favour of the plaintiff. The plaintiff also prayed for delivery of possession of the said lands. The case of the petitioner as set out in the plaint was as follows: The plaintiff, the defendant and one Ekramuddin Ali Khan owned separate patta lands in certain villages in Bodhan August. 1944 all the three persons entered into an agreement which was duly registered. Thereby, they agreed to establish a joint farm by name. "The Graduates Farm" and to transfer their respective patta lands in the name of that farm and conduct their business 'with mutual consultation'. Ekramuddin Ali Khan would have a share of eight annas in the rupees, while the plaintiff and the defendant would each have a share of four annas in the rupee. Subsequently, Ekramuddin Ali Khan sold his eight annas share to the remaining two persons, namely the plaintiff and the defendant through a sale-deed dated 28-4-1945 and thereafter the plaintiff and the defendant became the owners of all the land of the Graduates Farm with equal shares. On 27-8-1950, the plaintiff and the defendant entered into an agreement with Bharat Krishi Co., the defendant also executed the suit agreement in favour of the plaintiff agreeing to sell all the remaining lands in favour of the plaintiff for a sum of Rs. 12,600 (OS). the plaintiff paid an advance of Rs. 8,600/- (OS) on the same day. It was also provided in the agreement that the defendant would obtain permission from the revenue authorities for the alienation of that land. The plaintiff and the defendant, as per their agreement to sell in favour of Bharat Krishi Co. executed a registered sale-deed in their favour on 26-11-1957. The defendant, however did not obtain permission from the revenue authorities to sell his lands to the plaintiff in accordance with the second agreement in favour of the plaintiff. The plaintiff, therefore, submitted an application for permission on 12th May, 1959, and he was informed that there was no necessity for any

permission as the transaction was between the two partners. Thereafter, the plaintiff asked the defendant several times to receive and accept Rs. 4,000/- the balance of consideration and execute a sale-deed. but the defendant did not comply with his request. Therefore, the plaintiff gave a registered notice on 9-11-1960. The defendant gave no reply. Hence the plaintiff filed the suit for specific performance of the agreement.

2. The defendant contended that the alleged agreement was false, forged and fabricated and denied the payment of Rs. 8,600/- (OS) as advance to the defendant. He stated that after the execution of the sale deed in favour of Bhara Krishi Co. on 26-11-1957, the plaintiff and the defendant severed their jointures by the defendant severed their jointness by taking each of them his patta lands which previously stood in his name and began to maintain them separately. The position, sine then was that each of them of his respective lands. The plaintiff finding that the defendant had fully developed his lands by investing a huge amount on it, entertained the dishonest idea of usurping the defendant's land. He managed to prepare a forged document of agreement of sale purported to be written in 1950 and filed the suit dishonestly on foot of that agreement. The defendant, further contended that the suit was barred by imitation and that it was against the provisions of the Hyderabad Tenancy and Agricultural Lands at which forbids the permanent alienation o agricultural lands, unless permission of the Collector is obtained and hence the agreement is opposed to public policy, void and unenforceable.

3, The learned Subordinate Judge framed the following issues:

- 1) Whether the suit sale agreement was made by the defendant in four of the plaintiff on 27-8-1950? if so, is it enforceable under the provision of law?
- 2) Whether the defendant obtained from the plaintiff a sum of Rs. 8,600/- under the said suit agreement in advance as earnest money?
- 3) Whether the suit is valued correctly and the court-fee paid is sufficient?
- 4) Whether the suit is within time?
- 5) To what relief the plaintiff is entitled?

4. On the first prate of issue (1) and on issue (2) he held that the defendant executed the agreement. Ex. A-1 and received Rs. 8,600/- as advance or earnest money. On the second part of issue (1) however, he took the view that as the defendant was not the sole or exclusive owner of the land agreed to be sold, as they are the property of the Graduates Farm, in which the plaintiff and the defendant, had equal interest, the title of the defendant was defective and as such Ex. A-1 could not be enforced by means of a specific performance. He observed that the remedy of the

plaintiff appears to be a to give a notice of dissolution of the partnership between the plaintiff and the defendant and for taking accounts and for division of partnership assts. As he held that a sum of Rs. 8,600/- had been paid by the plaintiff under the agreement, he gave a decree for the plaintiff for that sum together with interest at ix per cent per annum from 27-8-1950. On issue (4) regarding limitation he held that the suit was within time as it was provided under Ex. A-1 that the sale was to be effected after the sale in favor of Bharat Krishi Co. which took place on 26-11-1957, and the suit was instituted within three years from that date. In the (OS) with interest at six pr cent from 27-8-1950 and cots of the suit.

5. The defendant preferred A. B. No. 101 of 1963 to this Court and the plaintiff preferred A. S. 466/64. Both the appeals were heard together and were disposed of by a common judgment by our disposed of by a common judgment by our learned brother Sharfuddin Ahmed J. This Court considered the entire evidence and agreed with the findings of the trial Court that the agreement was true, and the plaintiff paid Rs. 8,600/- (OS) to the defendant under the sale deed. Though the defendant under the sale deed. Though the defendant had raised the plea of limitation in his grounds of appeal, it does not appear from the judgment that the question of limitation was argued in this court. This court further held that the agreement Ex. A-15 dated 15-8-1944. entered into between the plaintiff, the defendant and Ekramuddin Ali Khan constituted a partnership between the parties. Sharfuddin Ahmed, J., then referred to the contention of the plaintiff that even if it is a partnership the Court below was not justified in refusing to grant a decree for specific performance. He however, did not give any express finding as to whether the plaintiff could insist on the specific performance of the agreement in view of them fact that the plaintiff and the defendant were partners. He preferred to hold hat the plaintiff ought (not?) to be granted a relief for specific performance on account of laces on his part. Her held that the Court was justified the relief for specific performance. In the result, both the appeals were dismissed with costs.

6. The defendant has not preferred any appeal against the Judgment in A. S. No. 101 of 1963 affirming the decision of the lower Court directing the defendant to pay a sum of Rs. 8,600/-. The plaintiff however, preferred this appeal against the Judgment in A. S. 466 of 1964 confirming the decision of the trial court that the plaintiff was not entitled to specific performance of the suit agreement.

7. Shri. Y. Suryanarayana learned counsel for the appellant argued that the trial Court was in error in holding that the property belonged to the partnership consisting of the plaintiff and the defendant and that the defendant's title was defective and therefore, Ex. A-1 could not be enforced by means of specific performance. He submitted that the view of the trial Court as well as that of Sharfuddin Ahmed J., that Ex. A-15 is a partnership deed and the interest of the

defendant in the suit property was only that of a partner in a partnership asset, is incorrect. He drew our attention to the terms of Ex. A-15 and also cited several decision lessons a partnership between two persons or not. He contended that the plaintiff the defendant and Ekramuddin Ali Khan were only co-owners and when Ekramuddin Ali Khan relinquished his interest, the plaintiff and the defendant became co-owners of the properties which were pooled together and in any event, as co-owner the defendant is entitled to convey his share of the property to the plaintiff. On the other hand. Shri P. Babul Reddy, learned counsel for the respondent contended that Ex. A-15 constitutes a partnership that there was not it cannot be said that the defendant has any definite share in any particular item of partnership property and his only right was to ask for dissolution and only right was to ask for dissolution and for accounts of the dissolved partnership.

8. In our view, it is unnecessary to go into these questions.

9. In the written statement, the defendant contended that the agreement of sale relied on by the defendant (plaintiff?) was false. forged and fabricated. The other contentions raised were that (a) the suit was barred by limitation, and (b) the agreement is in violation of law, as it was against the provisions of the Hyderabad Tenancy and Agricultural Land Act which forbade permanent alienation of agricultural lands unless permission of the Collector was obtained. No contention was raised that the defendant's title was defective and therefore, he was not in a position to execute the sale-deed as per the agreement. No issue was framed as to whether the plaintiff could not claim specific performance on the ground that the defendant had no title or had a defective title as the property belonged not to the defendant, but to the partnership. The second part of issue (1) was whether the agreement is enforceable under the provisions of law. This obviously had only reference to the pleading in the paragraph 9 of the written statement that the agreement was contrary to the provisions of the Hyderabad Tenancy and agricultural Lands act and could not therefore, be enforced. This issued had no relation to (at ?) all and could have no relation in the absence of any pleading, to the question whether the agreement could not be enforced, as the defendant had no title or had defective title to the suit property. In the circumstances, the court below erred in going into the question whether Ex. A-15 constituted a partnership and whether the property belonged to the partnership or to the defendant and in denying specific performance on the ground that the property belonged to the partnership.

10. The reason for the absence of or had defective title is obvious. It is settled law that if a person executes an agreement to sell property, the vendor is not entitled to put forward, in a suit for specific performance by the purchaser the defence that the vendor had no title. It is open to the purchaser to set up a defence that the vendor had no title or has defective title in a suit for specific performance by the vendor. But the vendor cannot set up defective in his own title as a

defence in a suit for specific performance by the purchaser. In *Balushami Aiyar v. Lakshmana Aiyar*¹, it was observed:

"Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out to the agreement there is no necessity to determine the question of the vendor's title and the fact that the title which the purchaser may acquire might be defensible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract on grounds which under Hindu law would bind their interests and enable the vendor to give a good title as against them and makes them parties, it is difficult to see how the question as to the right of the contracting party to convey any interest except his own can be avoided and a decree passed, the effect of which will merely be to create a multiplicity of suits." In this case there is no question of the plaintiff attempting to bind the interest of persons not parties to the contract and making them parties, the only party in this case being the defendant. The observations of the Full Bench were followed in *Muni Samappa v. Gurunanajappa*, . In that case, in a suit on foot of an agreement to sell a house involving only the two executants, it was held that there was no necessity to determine the question of the vendor's title and the fact that the title which the purchaser may acquire might be defeasible by the sons of defendant was no ground for refusing specific performance if the purchaser was willing to take such title as the vendors had. In the same manner it is unnecessary in this suit which is filed only against the defendant who has executed the agreement and in whose name the patta of the lands stand, to go into the question whether his title is defective or whether the property belongs only to the partnership of which he is a partner.

11. We may also refer to Halsbury's Laws of England (Third Edition (.) tion clearly laid down is that a vendor cannot be permitted to except to his own title. See also Fry on Specific Performance of Contracts (Second Edition page 557) where it is stated that the Vendor cannot except to the title so as to assert his own title to be bad.

12. In *Bradley v. Muntton*², the vendor took an exception contesting in effect the validity of his own title. The Master of the Rolls said he had never before seen an exception in which a vendor assert his title was bad and that he should be sorry to sanction it, that he had no hesitation in saying, that it was wrong in substance as well as in form, and must be overruled.

13. We are therefore, of the view that the question whether the property belonged to the partnership and not to the defendant ought not to have been gone into and the trial court below was wrong in refusing specific performance to the purchaser on the ground that the vendor's title was defective.

14. We are also inclined to agree with the contention that at any rate the plaintiff is entitled to rely on Sec. 18 (a) of the Specific Relief Act of 1877 by which the parties are governed as the suit was brought in the year 1961 before the New Act of 1963 came into force. Under Section 18 (a) where a person contracts to sell or let certain property, having only an imperfect title there, the purchaser or lessee has the following rights.

(a) If the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.

(b)

Whatever may be the position at the time when Ex. A-15 was entered into between the three parties, who agreed to pool all their land, the position on the date of the agreement was that the plaintiff and the defendant were in separate possession and enjoyment of their respective lands. In paragraph 4 of the written statement the defendant himself admitted that "on 26-11-1957 the plaintiff and the defendant served their jointness from that time by taking each of them, his patta lands which previously stood in their name and began to manage them separately. And this present since then is that each of them, that is, the plaintiff and the defendant are in separate possession and enjoyment of their respective lands."

15. In Kalyanpur Lime Works Ltd. v. State of Bihar, the Supreme Court had to consider a case an agreement to grant a lease to A, it had an imperfect title, inasmuch as it could not grant a fresh lease to any one during the existence of the previous lease in favour of B. Subsequently the lease in favour of B. expired and the impediment to grant leases stood removed. It was to grant lease stood removed. It was held that Section 18 was attracted and specific performance could be enforced.

16. *In Silla Chandra v. Ramachandra Sahu*^{3R}) the Supreme Court had to consider a case where the manager of a family consisting of himself and his mother agree to sell certain property and further agreed that he and his mother would execute a sale-deed in favour of the purchaser within a period of one year. On his failing to do so the purchaser filed a suit for specific performance. The Trial Court held that the sale was not for legal necessity and therefore decreed the suit in part and directed the vendor to execute the sale deed in respect of his interest. The purchaser preferred an appeal to the High Court and during the pendency of the appeal the mother died. It was held by the Supreme Court that the purchaser had interest in the house along with his mother and on the death of the mother, the purchaser obtained title to and interest also in that portion of the house which. on a private partition, partition subsequent to the contract to sell has taken place between him and his mother and therefore under section 18 (a) he had to make good his contract out of the property he acquired subsequent to the contract to sell. They also held that the

expression "subsequently to the sale or lease" means 'subsequently to the contract to sell.' In view of these decisions of the Supreme Court we are of the view that Section 18 (a) applies to the facts of the case and the plaintiff is entitled to specific performance of the suit agreement on this ground also.

17. Sri Babulu Reddy next contended that the suit was barred by limitation. We do not think it is open to the respondent to raise this contention. The plea of limitation set up by the defendant was negatived by the first court and though specific performance was refused, a decree for Rs. 8,600/- was granted in favour of the plaintiff. The defendant preferred an appeal to this court and the decree of the lower court was affirmed. The defendant has not preferred any appeal. In the circumstances, it is not open to him to raise the question of limitation which was decided against him and which has become final. It is also to be noted that the defendant did not argue the question of limitation before Sharfuddin Ahmad I and no (.) .

18. Even on the merits, we do not think that the contention based on limitation has any substance. In the agreement of sale, Ex. A-1 it is provided that the defendant would get the case of transfer of the land in favour of the plaintiff completed at the time of the transfer of lands of the Graduates Farm in the name of Sri Seetarama Rao and others. It has already been noticed that on the same day an agreement was entered into by both the plaintiff and the defendant to sell certain other lands in favour of Bharat Krishi Co. It is that transaction that is referred to when reference is made to the transfer of the lands in favour of Sri Seetharama Rao and others. Ultimately, the sale deed in favour of Bharat Krishi Co., in pursuance of that agreement was executed on 26-11-1957. The present suit was filed on 25-11-1960 within three years after the date of the sale in favour of Bharat Krishi Co. Under Art. 113, of the Limitation Act of 1908 (by which act the present suit is governed, as the suit was brought on 25-11-1960) the suits for specific performance has to be instituted within three years from the date fixed for performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. In the case, as the date fixed for performance is after the sale-deed in favour of Bharat Krishi Co. is completed that is, 26-11-1957 the suit was properly brought within three years from that date. Sri Babul Reddy argued that under the agreement of sale in favour of Bharat Krishi Co. Ex. A-30, it was provided that the parties contemplated completing the transaction by the first week of September, 1950 and in case the vendors are, for any reason not able to complete the same on or before 10th September, 1950 the vendor shall make over possession of the lands etc. immediately thereafter and time was considered as the essence of the contract. He therefore, argued that as Ex. A-1 provided that the transfer in favour of the plaintiff should be completed at the time of the transfer of lands in favour of Bharat Krishi Co., reading the two agreements together, it will appear that the time for performance of the agreement in favour of the plaintiff would be 10th September 1950 fixed and referred to in Ex. A-30. We are not inclined to agree with this contention. It is no

doubt true that under the agreement. Ex. A-30 it was contemplated that the transaction should be completed before 10th September 1950. But Ex. A-1 does not refer to that date, but states that the transfer in favour of the plaintiff should be completed after the lands are transferred in favour of Sri Seetarama Rao and others, that is Bharat Krishi Co. This transfer was effected only the cause of action for the suit arose only on 26-11-1957 and as the suit is filed within three years from that date, the suit was rightly held to be within time by the trial court.

19. Finally it was argued that though the suit is in time, specific performance should not be granted, as there were laches and delay on the part of the plaintiff even after 1957. It was on this ground that Sharfuddin Ahmed. J. held that the plaintiff was not entitled to specific performance. It is to be noticed that the defendant did not plead in his written statement that the specific performance should not be granted as the plaintiff was guilty of laches or delay. Delay as a defence in a suit for specific performance should be specifically pleaded and if the point is not taken in the Courts below it will not be allowed to be raised for the first time in Second Appeal. (*Vide Peer Mahomed v. Mahomed Ebrahim*⁴, *Mokund Lall v. Chotay Lall*⁵. No issue was framed as to whether the plaintiff, should be denied specific performance on this ground. The trial court also did not in the absence of any issue, consider the question of delay. The only reason for the trial Court refusing specific performance was that the defendant's title to the property was defective. In the circumstances we are of the view that this court erred in holding that the plaintiff was not entitled to specific performance on the ground of laches of his part. Sharfuddin Ahmed, J. observed that the lower court was justified in using its discretion in not granting relief for specific performance. We are unable to find any reference in the judgment of the trial court to the exercise of discretion in refusing specific performance on the ground of laches on the part of the plaintiff. Hence, the question of not interfering with the discretion of the court below does not arise at all in this case. Further, we are of the view that the delay in this case is not of such a nature as would prevent the court from granting specific performance to the plaintiff. Sharfuddin Ahmed, J. observed that the suit was filed nearly ten years after the execution of the document. But as has already been noticed, the document could not be completed until the sale was effected in favour of Bharat Krishi Co., on 26-11-1957. Hence, the delay was only for a period of three years. Thus was explained by the plaintiff on the ground that he had to apply for permission for alienation under the Hyderabad Tenancy and Agricultural Lands Act and it was only on 16-5-1959 that he was informed by the Tahsildar that permission was unnecessary (.) the land were paid only in November 1959. Hence, it cannot be said that there was inordinate delay on the part of the plaintiff.

20. It was also observed by Sharfuddin Ahmed. J. that admittedly the prices of the land had gone very high during this period. We have not been shown any admission on the part of the plaintiff to this effect. There is no evidence at all as to the increase in prices of the land. Even assuming

that judicial notice could be taken of the general increase in prices of land during these years, there is no evidence regarding the extent of the increase. Further, it has been held in *Arjuna Mudaliar v. Lakshmi Ammal*⁶. that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of the delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant. From long delay alone without anything further, an abandonment of rights could not be presumed. In this case it cannot be inferred that the plaintiff had abandoned his right. As far as the changed circumstances are concerned. the only circumstance that is stated is that there has been increase in price of the land.

21. In *Sankaralinga v. Ratnaswami*, it was held that a subsequent rise in prices is not a relevant ground for refusing specific performance.

22. For all the reasons stated above we hold that the decision of Sharfuddin Ahmed. J., is liable to be set aside. The appeal is allowed and there will be the usual decree for specific performance and possession. The sale deed will be executed within one month after the receipt of records in the trial court at the plaintiff's costs on his paying the balance of the sale price. In view of this it follows that the plaintiff will not be entitled to the sum of Rs. 8600/- directed to be paid to him by the defendant. A petitioner for amendment of the plaint has been filed, which has been dismissed to day by a separate order. The parties will bear their own costs throughout.

23. Appeal allowed.

Cases Referred.

11 ILR 1921 Mad 172 (FB)

2(1852) 15 Beav 460

3 A.I.R 1964 SC 1989(1905)

4 ILR 29 Bom 234

5(1884) ILR 10 Cal 1061)

6(1948-2 Mad LJ 271) = (AIR 1949 Mad 265)