

## **BOMBAY HIGH COURT**

Maruti Vishnu Kshirsagar

Vs.

Bapu Keshav Jadhav

A.F.A.D. No. 1177 of 1966

(K.K. Desai, J.)

12.07.1966. 17.12.1969

### **JUDGMENT**

#### **K.K. Desai, J.**

1. In this second appeal by the original decree-holder from the judgment of the Assistant Judge, Satara, dated July 12, 1966, the contention of the decree-holder is that the Assistant Judge was wrong in setting aside the order of the executing Court condoning delay on the part of the decree-holder in depositing the purchase price by 9 days and that the Darkhast No. 124 of 1965 (which was for carrying out the sale of the property in suit by the judgment-debtor to the decree-holder) should proceed.

2. The facts leading to the above Darkhast No. 123 of 1965 are that in Suit No. 70 of 1960 decree for specific performance of agreement for sale of the suit property was passed in favor of the decree-holder on August 27, 1964. The trial Court had directed the decree-holder to deposit in Court Rs. 700/- within 3 months of the decree and that thereafter the defendant should execute the sale deed of the two properties in suit in favor of, Section 148 - Contract - Decree - AGREEMENT TO SELL - TRIAL COURT - Appellate Court - Decree for specific performance of agreement to sell in favor of plaintiff - Plaintiff asked to deposit Sale amount within a month - Execution of decree - Deposit made some days later after executing Court had condoned delay - Held that time to deposit mentioned in decree is always an incidental direction towards granting specific performance - Date fixed would not result into defendant's getting right of having plaintiff's suit dismissed - Time could be extended from time to time by trial Court - Application for extension could not be made under Section 148, Civil Procedure Code - Application cannot be made to appellate Court or executing Court executing the appellate decree - It is not a matter of execution of decree - Held further that the executing Court and the trial Court being the same, the application for condonation must be held to have been made to trial Court as separate application, the suit not having been disposed of.

AIR 1923 Madras 284 and AIR 1923 Bombay 211 and AIR 1946 Nagpur 29, Rel. on.  
[Paras 12, 13]

--> Cases Referred :

Abdul Shaker v. Abdul Rahiman, AIR 1923 Madras 284.

Gokul Prasad v. Fattelal, ILR 1945 Nag 924 : AIR 1946 Nagpur 29.

Kurpal v. Shamrao, 25 Bom LR 234 .

Venkata Rami Reddy v. Adhinarayana Reddy, AIR 1960 Andhra Pradesh 271.

## JUDGMENT

In this second appeal by the original decree-holder from the judgment of the Assistant Judge, Satara, dated July 12, 1966, the contention of the decree-holder is that the Assistant Judge was wrong in setting aside the order of the executing Court condoning delay on the part of the decree-holder in depositing the purchase price by 9 days and that the Darkhast No. 124 of 1965 (which was for carrying out the sale of the property in suit by the judgment-debtor to the decree-holder) should proceed.

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3. The decree-holder failed to deposit the sum of Rs. 700/- in the trial Court on September 13, 1965. He deposited that amount in Court on September 21, 1965, and by the above Darkhast 123 of 1965 stated that he had deposited the sum of Rs. 700/- on September 21 in pursuance of the decree of the appellate Court. He had been unwell and was, therefore, compelled to delay deposit of the above sum for 8/9 days and that delay should be condoned. He prayed that after such condonation of delay the decree for specific performance granted by the appellate Court should be carried out in the manner mentioned in column 10 of his application.

4. By the order dated March 10, 1966, the executing Court negated the contention made by the

defendant that the period of one month mentioned in the decree of the appellate Court was an essential and important condition of the decree for specific performance. It negated the contention that the decree-holder was bound to deposit the sum of Rs. 700 in Court in accordance with the original decree passed by the trial Court. It negated the contention that the decree-holder was not entitled to specific performance and the Darkhast was not maintainable, because the sum of Rs. 700 was not deposited on September 13, 1965. It accordingly condoned the delay in payment as prayed.

5. In Civil Appeal No. 157 of 1966, the learned Assistant Judge accepted the contention made on behalf of the defendant that the executing Court had no power to extend the time fixed for payment of Rs. 700. In that connection, he observed that the provisions of Section 148 of the Code of Civil Procedure were not applicable to the decree that was made in favor of the decree-holder. He observed that the time for payment of the amount in a suit for specific performance is granted not under the Code but by way of convenience. He also referred to several decisions of different Courts in connection with the true nature of a decree passed in a suit for specific performance. He rightly observed that "the time is granted in a decree for specific performance not under the Code of Civil Procedure and therefore, the provisions of Section 148 are not applicable". He negated the contention made on behalf of the defendant that since the appellate Court had fixed the time for deposit of Rs. 700/-, the executing Court had no jurisdiction to extend the time. In that connection, he relied upon the observations of the High Court of Andhra Pradesh in the case of *Venkata Rami Reddy v. Adhinarayana Reddy*<sup>1</sup>. He, however, held against the decree-holder on the question of his being unwell and held that the executing Court was wrong in granting the application for condonation of delay. He accordingly allowed the appeal and set aside the orders passed by the executing Court and dismissed the Darkhast.

5-A. In this appeal, the main contention that is made on behalf of the decree-holder is that on a true construction of the decree for specific performance that was passed by the appellate Court and of which execution was sought in the above Darkhast, the time of one month mentioned in the decree for deposit of Rupees 700/- was an ancillary direction towards granting to the plaintiff specific performance of the agreement for sale made by the defendant in his favor. The date fixed by the decree was not a condition for granting specific performance to the plaintiff. In connection with mutual obligation of the parties to perform the agreement for sale, the decree made the above incidental direction that the price should be deposited within one month. This direction was not an executable direction enforceable at the instance of the defendant. This was an enabling direction so that the plaintiff could towards enforcing as against the defendant the part of the decree which directed the defendant to execute a sale deed to proceed further and get the relief claimed in the suit. The decree did not provide that in default of the plaintiff paying the sum of Rs. 700/- within one month fixed by the decree, his suit for specific performance should stand dismissed. The contention was that this direction was only a preliminary direction and the time fixed was such as could from time to time be extended at the instance of the plaintiff if circumstances made it necessary so that the plaintiff could get the ultimate relief that he claimed

in the suit. On the basis of the above contention, the submission was that in the matter of the suit further applications were liable to be entertained by the trial Court. The Darkhast in its first part claims condonation of delay which is an application for extension of time. That application must be treated as having been made to the trial Court in the suit matter and not in the matter of any application, (Darkhast) for execution. The submission was that the trial Court was always entitled to give directions for extension of time for payment of Rs. 700/-. As the plaintiff was entitled to claim the reliefs claimed in the darkhast only upon the sum of Rs. 700/- being accepted by the Court, the darkhast must be held to be only for the relief of execution of a sale deed. The first part of the relief claimed in the darkhast was liable to be treated as an application made in the suit to the trial Court.

6. Each of these submissions is denied on behalf of the judgment-debtor defendant by Mr.

<sup>1</sup> AIR 1960 And Prad 271

Jahagirdar. He has submitted that it is well settled that provisions of a decree passed by appellate Court can never be altered or varied except by the appellate Court itself. The trial Court would have no jurisdiction to vary and alter decree passed by an appellate Court. The submission was that the application for condonation of delay was entirely misconceived. That application was for amendment of the decree and alternation of the date mentioned therein for payment of Rs. 700/-. The application was, therefore, to a Court without jurisdiction and liable to be dismissed.

7. The further submission was that the time of one month mentioned in the decree was not provided under any of the provisions of the Code of Civil Procedure. It was, therefore, clear that time could not be extended under Section 148 of the Code of Civil Procedure . There was no provision in law under which the time of one month mentioned in the decree could be altered and the application was, therefore, also misconceived.

8. The application for extension of time could never be made to an executing Court. Such an application must be made to the trial Court and for that reason also it was misconceived.

9. The last submission was that the true construction of the decree on which the plaintiff relied was that on default by the plaintiff of a payment of Rs. 700/- within the time of one month fixed by the decree the plaintiff was not entitled to any relief in the suit. In fact, his suit became useless and his decree was, therefore, also not enforceable for completion of sale of the suit property in his favor.

10. In connection with these rival submissions, it may at once be stated that the question of the true nature of the decree for specific performance arose before several Courts and in some of the decisions in that connection reference was made to the provisions in Section 35 of the Specific Relief Act, 1877, Clause (c) whereof provided for a right in the defendant in a suit for specific performance to apply for rescission of the contract after the decree was passed in the following words :-

"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 last paragraph of that section it was provided :-

"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. ...."

11. Having regard to the above provisions and what has been often noticed by the Courts granting decrees for specific performance, particularly on the Original Side, it is quite clear that the declaration in a decree that the plaintiff is entitled to specific performance of the agreement for Sale or lease mentioned in the plaint must in the nature of things be not sufficient to completely dispose of the suit for specific performance in all respects. After such a declaration is made in favor of the plaintiff by a decree, questions like the failure of the defendant to deliver to the plaintiff's Solicitors documents of title for investigation of title, the failure of the defendant's Solicitors to answer requisitions on title submitted to him, the failure of the Solicitors of the parties in agreeing as to correctness of certain provisions and/or covenants in the draft deeds of conveyance and leases prepared by them for ultimate execution on behalf of the vendors and/or lessors, the necessity of determining outgoings to be borne by the plaintiff and the credit to which the plaintiff would be entitled in connection with the rents to be appropriated by the seller and/or lessor and such several matters of details will always arise for further consideration. In connection with these matters, from time to time, different kinds of applications will have to be entertained and decided by trial Court. Now, it is true that these serious questions do not crop up in mofussil Courts. That, however, does not make any difference to the matter of the true construction and the true nature of decrees for specific performance which are passed on the Original Side of this Court and/or in mofussil Courts. One of the items which arises for consideration in these suits for specific performance is the item of the liability of the plaintiff to pay the price in exchange of his getting the sale deed and/or lease in his favor completely executed on behalf of the defendant. Apparently, the stage for exchange of price against the duly executed sale deed is the very last stage with which the trial Court would have to deal in suits for specific performance of agreements of sale. The date fixed for payment of price by depositing the same in Court would, therefore, be always an incidental direction towards getting to the plaintiff in the main claim and relief of the specific performance for which he instituted the suit. Ordinarily, the date for deposit of price should be fixed in accordance with the request and convenience of the plaintiff in such a suit. Mere failure to carry out the direction for depositing the amount of price as ascertained on the date fixed would not result into the defendant getting the right of having the plaintiff's suit dismissed. The scheme of the Section 35 of the Specific Relief Act goes to show that even after the plaintiff makes a default in carrying out directions for depositing the price in the trial Court, the contract for sale continues to be binding between the

parties and the defendant in the suit would have to enforce his rights under Section 35 and apply for rescission of the contract if he wants to escape from the liabilities under the contract. This scheme of Section 35 has been better clarified in Section 28 of the Specific Relief Act, 1963. The relevant parts of Section 28 provide :-

"28(1) Where in any suit a decree for specific performance of a contract for the sale ..... has been made and the purchaser ..... does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor ..... may apply in the same suit in which the decree is made, to have the contract rescinded .....

(3) If the purchaser..... pays the purchase money ..... which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser ..... such relief as he may be entitled to, including .....

(a) The execution of a proper conveyance .....

(b) The delivery of possession. ....

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor,.....".

12. Now, the scheme in the above section is in accordance with the practice which has prevailed in the English Courts in connection with the reliefs to be granted in a suit for specific performance from time to time on different applications made to the trial Court. The scheme in Section 28 was applicable to the plaintiff's suit, because the 1963 Act came into force as from March 1, 1964. The decree in the suit was passed on, August 27, 1964, and the decree of the appellate Court was passed on August 13, 1965. The provisions in this Section 28 go to show that the trial Court would have jurisdiction to extend the time for payment of purchase price even if it had fixed a date for the same in the first instance in the decree originally passed. It further goes to show that the provision in any decree whether passed by a trial Court or an appellate Court in a suit for specific performance when it mentions a date for payment of purchase price, the date is merely an incidental direction in favor of the plaintiff. The date is not such as cannot be extended at a subsequent stage by the trial Court. Having regard to the scheme of Section 28 and having regard to the true nature of a decree for specific performance of an agreement for sale as discussed above, it is quite clear that the direction in the decree of the appellate Court dated August 13, 1965, that the plaintiff should deposit Rs. 700/- within one month from the date of the decree (i.e. on September 13, 1965) was merely an incidental direction liable from time to time to be altered and varied by the trial Court as the convenience of the plaintiff demanded. Such extension should be granted until the Court was in a position to make a finding that because of the default made by the plaintiff in making deposit, his suit was liable to be dismissed on the ground that the plaintiff was guilty of breach of contract. The result of the above discussion is that the application for extension of time that was made on behalf of the plaintiff could not be considered and was not made under Section 148 of the Code of Civil Procedure . That the trial

Court had jurisdiction to grant and extend time is quite clear. That the application need not have been made to the appellate Court which passed the decree is also clear. This is more so as further incidental direction granting extension of time would not be varying the provisions of the decree on any matters of importance. The decree was not required to be amended. The extension of time does not result into amendment of the decree passed by the appellate Court. The result of the above finding is that the contention that the trial Court could not consider application for extension of time because of the delay in the execution of the decree passed by the appellate Court cannot be accepted:

13. Now, it is true that application for extension of time should be made to the trial Court and not to an executing Court. It is, however, not correct to hold that because the application for extension of time was mentioned in column 10 of the darkhast, that extension of time was a matter of execution of the decree. The extension had nothing to do with execution and did not give any relief by way of execution of the decree passed. This matter was a separate matter and could have been dealt with by a separate application made to the trial Court in the suit matter. The suit matter could not be considered as finalised and completed because until the price was deposited in the trial Court it was impossible that the decree-holder should get the relief of execution and completion of a deed of conveyance in respect of the suit property in favor of the plaintiff. The contents of the darkhast application in its first part which relates to application for extension of time should have been separated by the trial Court as a separate matter to be dealt with as if brought before it by a separate application before the trial Court. That the trial Court did not look into the matter in the above manner does not make any difference. The executing Court and the trial Court being the same and the suit having not been completely disposed of, the application for condonation of delay must be held to have been considered as a separate application made to the trial Court. The contentions made on behalf of the judgment-debtor defendant accordingly fail.

14. In connection with the findings made above, reference may be made to the decision of the High Court of Madras in the case of *Abdul Shaker v. Abdul Rahiman*<sup>2</sup>, Now, this case has been a leading authority and has been followed in several subsequent decisions by different High Courts. In this case, the Court came to consider the true nature of a decree passed in a suit for specific performance. In that connection, the learned Chief Justice referred to the forms of judgments in such suits and in that connection referred to the treatise of Seton on judgments and in the result held that that the decree for specific performance was in its nature a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders, therein, including in appropriate cases the extension of time. In arriving at the above finding Mr. Justice Wallace particularly referred to the scheme of Section 35 which I have already referred to above.

15. This section came to be discussed in the case of *Kurpal v. Shamrao*<sup>3</sup>, It is not necessary to refer to the observations made by this Court in the judgment in that report.

16. In the case of *Gokul Prasad v. Fattelal*<sup>4</sup>, the High Court of Nagpur referred to the above decision of the High Court of Madras and the scheme of Section 35 and made a definite observation that:-

"It is open to the lower Court to extend time for payment fixed in a decree for specific performance. That decree is in the nature of a preliminary decree which rests on the contract between the parties until it is rescinded by a formal order. The delay in payment of specific performance of a contract in which time is not the essence of the contract cannot entail the penalty of rescission unless there has been such persistent delay as to justify the rescission....."

17. Having regard to the findings made above, this appeal succeeds. The appeal is allowed. The order of the lower appellate Court is set aside and the order made by the trial Court on March 10, 1966, is restored. There will be no order as to costs.

Appeal allowed.

<sup>2</sup> AIR 1923 Mad 284

<sup>4</sup> ILR 1945 Nag 924 : AIR 1946 Nag 29

<sup>3</sup>25 Bom LR 234