

E. Bhagwan Das Vs. Dilip Kumar and Others

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Court : Andhra Pradesh

Decided On : Mar-12-1998

Reported in : 1998(2)ALD816; 1998(2)ALT803

Judge : P. Ramakrishnam Raju and ;B. Sudershan Reddy, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 10, 20, 21, 22 and 23; [Indian Contract Act, 1872](#) - Sections 73; [Limitation Act, 1963](#) - Article 113

Appeal No. : L.P.A. No. 133 of 1988

Appellant : E. Bhagwan Das

Respondent : Dilip Kumar and Others

Advocate for Def. : Mr. Mirza Munavvar Ali Baig, Adv.

Advocate for Pet/Ap. : Mr. V. Venkataramana, Adv.

Judgement :

ORDER

P. Ramakrishnam Raju, J.

1. Defendants are appellants. One Dr.E.N. Das, along with his two sons, who are Appellants 1 and 2 herein entered into an agreement for sale with the plaintiff- first respondent herein, on 4-7-1973, for sale of site admeasuring 1,718 sq. yards,

together with building bearing Municipal No.20-E-2 situate at St John's Road, Secunderabad for a sum of Rs.1.00 lakh. Plaintiff paid a sum of Rs. 10,000/- by way of advance. As per the terms of the agreement, defendants have to execute and register sale deed on or before 4-1-1974 after receiving the balance of sale consideration- It is made clear in the agreement that the defendants have executed a registered sale deed in favour of the fourth defendant on 22-4-1958, who has agreed to reconvey the said property within certain period on compliance of certain conditions, and that she has no objection to convey the property in favour of purchaser, provided the vendors first comply with the conditions for reconveyance of the property. Of course, the agreement contains several usual terms that in case of default by the purchaser he shall forego a sum of Rs.5,000/- out of the earnest money of Rs. 10,000/- and refund the balance of Rs.5,000/-. If on the other hand the default is on the part of the vendors, they should pay a sum of Rs.5,000/- as damages in addition to refund of earnest money of Rs.10,000/-.

2. While so, as the defendants did not take steps to complete the transaction, the plaintiff issued registered notice under Ex.A3 dated 10-12-1973 requesting the defendants to complete formalities or return the advance sum of Rs. 10,000/- together with damages of Rs.5,000/- as stipulated. Defendants replied to the said notice on 24-1-1974 under Ex.A5, stating that Kamala Bai Modi (fourth defendant) raised certain objections, which are being verified; therefore, they sought extension of time by two months for completing the formalities. The plaintiff again issued Ex.A6 notice dated 30-3-1974 stating that in spite of extension of time, defendants have not completed the formalities. It is further stated that in case of failure, they will be held responsible for refund of Rs.15,000/- as stipulated, and also for reduction of price by 10 per cent. The plaintiff again issued another notice under Ex. A8 dated 23-7-1974 stating that he is ready with the balance of Rs.80,000/- and asked the defendants to complete the formalities, or else, they will be responsible for refund of Rs. 15,000/- and reduction of price by 10 per cent. As there was no response, plaintiff issued notice under Ex. A9 dated 10-9-1974 calling upon the defendants to write to fourth defendant to join execution of registered sale deed, or else, they will be responsible for Rs. 15,000/- and reduction of price by 10 per cent as agreed to orally. Evidently, the said notice was followed by another notice dated 14-10-1974 (Ex.A10) almost on the same tenor

and tone as Ex. A9, however adding that though they agreed to repay Rs. 15,000/- , plaintiff is insisting on payment of Rs. 18,000/-. It is denied that they ever agreed for reduction of price by 10 per cent. Therefore, they called upon the plaintiff to receive Rs. 15,000/- within three days from the date of receipt of notice, or else they would not be liable to pay any amount. By way of reply to this notice, plaintiff sent Ex.A13 notice dated 11-12-1973 stating that it is false to state that he has no interest to purchase the property. The claim that the plaintiff is demanding a further sum of Rs.3,000/- is false; but as the defendants have got better offer they are dodging. Practically this is the last notice that was exchanged between the parties. Dissatisfied with the conduct of the defendants, plaintiff filed the suit for specific performance of agreement for sale.

3. Originally, the plaintiff did not ask for alternate relief, but later he amended the plaint by including alternate relief for refund of earnest money, together with interest.

4. As Dr. E.N. Das died, his legal representatives Defendants 4 to 7 were brought on record, pending the suit.

5. In the written statement filed by Defendants 1 to 3, although admitted execution of agreement for sale, stated that the property nominally stood in the name of Defendant No.4 who had executed an agreement of reconveyance in their favour and that the husband of fourth defendant is giving them trouble, and in fact, when they received first notice from the plaintiff, second defendant met the plaintiff and told him that he would return the earnest money along with liquidated damages; that fourth defendant's husband who is a close friend of the plaintiff, prevented the plaintiff from receiving the money, and the suit was also engineered by him. In fact defendants were ready to perform their part of the contract, but the transaction could not be completed due to the attitude of the fourth defendant's husband. As demanded by the plaintiff, defendants sent a cheque for Rs. 15,000/- drawn on Prudential Co-operative Urban Bank Limited, Secunderabad and the said cheque was returned by the plaintiff.

6. The other defendants adopted the written statement filed by Defendants 1 to 3.

7. The lower Court framed necessary issues.

8. Plaintiff examined three witnesses, including himself as PW1. PW2 is one of the attestors of the agreement; and PW3 is the husband of DW4. DW1 is the second defendant. Plaintiff marked Exs.A1 to A16, while defendants marked Exs.B1 and B2. The trial Court found that execution of agreement for sale is true. However as the fourth defendant is not co-operating in reconveying the property, the defendants could not proceed with the execution and registration of sale deed in favour of the plaintiff. Realising this, plaintiff also started claiming damages only instead of the relief of specific performance.

Having regard to these circumstances, and also considering the evidence, the lower Court came to the conclusion that the plaintiff is not entitled to the main relief of specific performance, but he is entitled to the relief of refund of earnest money together with liquidated damages and interest till payment. On appeal, the learned single Judge reversed the decree. Hence this Letters Patent Appeal.

9. It is well-settled that in a contract of immoveable property time is not essence of the contract unless it is stipulated so by express terms or by necessary implication. It is equally well-settled that fixation of the period within which the contract has to be performed does not make the stipulation as to time essence of the contract. Specific performance by no means an absolute right, but one which rests entirely on the judicial discretion exercised with reference to facts of each case. Generally liquidated damages are fixed in the contract more for securing performance. Section 10(a) of the Specific Relief Act indicates that when there exists no standard for ascertaining actual damages in case of non-performance of the act agreed to be done, specific performance should be enforced. Of course an explanation added to that section says that in case of breach of contract to transfer immoveable property, it cannot be adequately relieved by compensation. Section 20 deals with discretion of the Court, which says that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion of the Court is not arbitrary, but it should be fair and reasonable, guided by judicial principles and capable of correction by a Court of appeal. According to Section 21 in determining

the amount of any compensation in a suit for specific performance, the Court shall be guided by the principles specified in Section 73 of the [Indian Contract Act, 1872](#). Section 73 of the Contract Act deals with compensation for loss or damage caused by breach of contract. Section 23 of [Specific Relief Act, 1963](#) deals with power of the Court to grant specific relief including refund of earnest money. Accordingly, when a contract is broken, the party who suffers for such breach, is entitled to receive compensation for any loss or damage which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract, to be likely to result from the breach of it. Explanation to Section 73 envisages that in estimating the loss or damage arising from a breach of contract, the means which existed for remedying the inconvenience caused by the non-performance of the Contract must be taken note of. Further, Court has got power to order refund of earnest money and other reliefs under Section 22 of the Specific Relief Act; while Section 23 says that liquidation of damages is not a bar for specific performance. In view of the above provisions and legal principles, it has to be seen whether the plaintiff is entitled to specific performance of the contract or not?

10. From the notices that were issued by the plaintiff referred above, plaintiff never asserted that he would seek specific performance of contract in the Court. No doubt he was asking for specific performance of contract; and in default, he claimed refund of earnest money together with damages at Rs.5,000/-. The thrust appears to be for refund of earnest money together with damages. The reason for this type of notice is that the defendants are not in a position to convey title immediately to the plaintiff. The fourth defendant obtained a sale deed, of course with a promise to reconvey on compliance of certain conditions. The fourth defendant did not reconvey as expected. It is not the case of the plaintiff that the fourth defendant was always ready, but at the same time, Defendants 1 to 3 themselves were dodging the issue. In the notice (Ex.A3) dated 10-12-1973 it is stated that the defendants should complete the transaction before the due date or else they have to pay back the earnest money together with damages of Rs.5,000/- as agreed to in the agreement. Of course, by way of reply under Ex.A5 dated 24-1-1974 the defendants stated that the fourth defendant has raised certain objections and the matter is being verified, therefore, they have sought extension of

time by two months. So far everything seems to be normal with both parties. However, in the notice issued by the plaintiff under Ex.A6, he states that defendants have not completed the formalities in spite of extension of time, and so, they will be responsible for refund of Rs. 15,000/- and also reduction of price by 10 percent. This reduction of price by 10 per cent was introduced for the first time in Ex.A6 which is followed by Ex.A8. Under Ex.A8 dated 2-7-1974 plaintiff says that he is ready with Rs.80,000/- instead of the balance amount of Rs.90,000/- and requested the defendants to complete the formalities, or else, they will be responsible for refund of Rs, 15,000/- and reduction of price by 10 per cent. This reduction of price by 10 per cent is continuously mentioned as if it is agreed between the parties, in all the correspondence thereafter- In Ex.A9 dated 10-9-1974 which followed Ex.A8, plaintiff states that defendants are called upon to write to fourth defendant to join, execution and registration of the sale deed or else they will be responsible for refund of 15,000/- rupees, as well as reduction of sale price by 10 per cent which is orally agreed. For the first time this oral agreement bringing about certain change in the terms of the agreement has been pleaded by the plaintiff in Ex.A9. Of course, to this notice, there is no reply by the defendants. Ex.A9 notice is immediately followed up by Ex, A10 dated 14-10-1974, of course, on the same lines, but adding one more dimension stating that they are showing the property to third parties for sale, which was replied by the defendants under Ex.A12. In this reply, it is stated that the plaintiff is not interested in purchase. They set up oral agreement reached between the parties to refund Rs.13,000/-only, but however, they later agreed to pay Rs.15,000/-, but the plaintiff is insisting on payment of Rs, 18,000/-, therefore, they asked the plaintiff to receive Rs.15,000/- within three days. Of course, for Ex.A12 a reply was given by the plaintiff under Ex. A13 on 11-2-1974 denying that they have no interest to purchase the land, also denying that they demanded Rs.3,000/- more, but attributed these false claims to them since defendants are getting better offer. Of course, the correspondence stopped there. At this stage, it is relevant to mention that from this it is clear that the stress is more on the refund of earnest money together with liquidated damages at Rs.5,000/- rather than the main relief. In none of the notices, it is stated that he is going to file a suit for specific performance. Be that as it may.

11. It is also pertinent to notice at this juncture another important circumstance which perhaps is the reason why the plaintiff was not insisting seriously for execution of the sale deed, i.e., the property stands in the name of the fourth defendant. Fourth defendant had agreed to reconvey, but the fact remains that she has not reconveyed by then. Therefore, the trial Court observed that the tenor of the correspondence should be given due importance to show that the plaintiff at one stage has given impression to the defendants that he wants refund of earnest money together with compensation, and at any rate from Ex.A8 notice dated 23-7-1974 atleast there appears a readable intention on the part of the plaintiff to claim back Rs.15,000/-. Plaintiff knows that no useful purpose would be served by insisting upon execution of the sale deed at that time even before the defendants get title from the fourth defendant. It is also not the case of the plaintiff that the defendants wantonly or purposefully failed to take action against the fourth defendant or that they are dodging for nothing. In none of the notices such an apprehension was expressed. Even by notice dated 10-12-1973 (Ex A3), the defendants were not in a position to execute the sale deed. Although Ex.A3 notice was given reminding the defendant about the last date of performance viz., 4-1-1974 foundation for claim of refund of money was also laid in that notice. Till the last notice (Ex.A14) dated 17-12-1974 the defendants were not in a position to execute the sale deed. Therefore, in the absence of any allegation that the defendants have failed to take appropriate action against the fourth defendant, it is not possible to hold that Defendants 1 to 3 have committed breach of the agreement.

12. Coming to the case of the plaintiff, no doubt, he has been insisting upon the performance of their part of the contract. He too introduced certain new theories in the agreement. No doubt, he was asking for refund of the earnest money together with liquidated damages which he is entitled to since the due date has elapsed, but he started saying that he is entitled for reduction of sale price by 10 per cent for which there is no proof On 23-7-1974 under Ex. A8, he merely indicated that Defendants 1 to 3 will be responsible for reduction of price by 10 per cent. After two months, under Ex.A9 notice dated 10-9-1974, he stated that reduction of price was orally agreed to. There is absolutely no proof of any such oral agreement Therefore, rightly the defendants have denied the same in their reply notice, under

Ex.A12. We are of the opinion that the plaintiff also has not come with clean hands. Another circumstance which has to be noticed at this juncture is that although last notice directing the plaintiff to receive Rs.15,000/- within three days was issued prior to somewhere in or around 11-12-1974 as the notice does not contain any date, for which Ex.A13 dated 11-12-1974 is the reply, we take it that it was issued prior to 11-12-1974, the plaintiff waited till 1-9-1975 to file the suit. Here again we may say unhesitatingly that on the date of filing of the suit defendants are not in a position to convey the property under a registered deed. Defendants had to file O.S.No.7 of 1975 against the fourth defendant seeking reconveyance in their favour. Of course, the suit ended in compromise later. The fact remains that on the date of filing of the suit, Defendants 1 to 3 were not in a position to convey the property to the plaintiff. The plaintiff also has not explained properly for waiting nine months even after Ex.A14 notice was given. Under Ex.A14, defendants have made it clear that the fourth defendant has not transferred, therefore, they could not execute the sale deed. Taking totality of these circumstances, we are of the view that on the date of filing of the suit, defendants had no title, and therefore, they are not in a position to convey title. Secondly, the plaintiff was always insisting upon refund of the earnest money together with liquidated damages more than performance. There is also no explanation for the delay in filing the suit. No doubt the trial Court has taken the view that having regard to the totality of the circumstances instead of granting the main relief, alternate relief of damages by directing refund of earnest money together with liquidated damages and interest would meet the ends of justice. After all the plaintiff has paid a sum of Rs.10,000/- for a transaction involving Rs. 1.00 lakhs keeping Rs.90,000/- with him. Further, defendants also have at or about the time of filing the suit, may be a few days before or after filing of the suit, sent a cheque for Rs.15,000/- which was of course returned by the plaintiff. As such, whether the decree passed by the trial Court is just or not has to be considered. Where the trial Court exercised its discretion, appellate Court would not interfere unless it is established that the discretion has been exercised by it perversely, arbitrarily or against judicial principles.

13. Sri V. Venkataramana, learned Counsel appearing for the appellants submits that in this case though there is no waiver, as observed by the trial Court, still there

are laches on the part of the plaintiff which debarred him from seeking the main relief of specific performance. Learned Counsel cited a decision reported in *Satyanarayana v. Yelloji Rao*, : [1965]2SCR221 , wherein their Lordships approved the principle laid down by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd* (1874) 5 CP 221 at pages 239-240 which is as follows:

'Where it would be practically unjust to give a remedy; either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay, are most material.'

The Supreme Court noticing that old Section 22 which corresponds to new Section 20 that the Court is not bound to grant relief of specific performance merely because it is lawful to do so, and also noticing the period of limitation of three years as prescribed under Article 113 of the Limitation Act, observed that both the provisions must be read harmoniously and so read there is some discretionary field unoccupied by the illustrations mentioned under Section 22. The three Judge Bench further observed thus:

'Adverse situation may arise which may induce a Court not to exercise the discretion in favour of the plaintiff It ay better be left undefined except to state what the section says viz., discretion of the Court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal.'

The Supreme Court in another case reported in *Kanshi Ram v. Om Prakash Jawal*, : AIR 1996 SC2150 refused to grant the main relief of specific performance in view of the circumstances. An extent of 100 Sq.yards situated in Dayanand Colony, Rajpat Nagar, New Delhi was agreed to be sold on 7-4-1969 for Rs. 16,000/- and a sum of Rs.2,500/- was paid as earnest money. The suit was laid on 13-7-1970 for specific performance. The lower Court decreed the suit, and on appeal, the Supreme Court observing that it is true that the rise in prices of the property during the pendency of the suit may not be the sole consideration for

refusing to decree the suit for specific performance, but granting decree for specific performance of a contract of immoveable property is not automatic. When the Court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fair play to both the parties. Considered from this perspective, in view of the fact that the respondent himself had claimed alternative relief of damages, the Court felt that the Courts would have been well justified in granting alternative decree for damages, instead of ordering specific performance which would be unrealistic and unfair. Under these circumstances, the apex Court held that the decree for specific performance is inequitable and unjust to the appellant. Accordingly they allowed the appeal granting a sum of Rs. 10,000/- by way of damages to the plaintiff in lieu of specific performance.

14. In *K.S. Vidyanadam and others v. V. Vairavan*, : AIR 1997 SC1751 , the Apex Court did not agree with the proposition laid down in *S. V. Sankaraninga Nadar v. P.T.S. Ratnaswamy Nadar*, : AIR1952 Mad389 , that mere rise in price is no ground for denying specific performance. It is observed thus:

'With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the Court by law. We cannot be oblivious to the reality and the reality is constant and continuous rise in the values of urban properties - fuelled by large-scale migration of people from rural areas to urban centres and by inflation.'

The Court notified that the plaintiff paid only a sum of Rs.5,000/- in December, 1978 as against the consideration of Rs.60,000/-. In those circumstances, the apex Court set aside the decree and judgment for specific performance and restored the trial Court decree for refund of earnest money.

15. In another case reported in *Kallathil Sreedharan and another v. Komath Pandiyala Prasanna and another*, : (1996)6SCC218 the apex Court found that granting alternate relief of damages is just and proper instead of granting the main relief of specific performance, taking into consideration the totality of the circumstances of the case.

16. Sri Mirza Munawwar Ali Baig, learned Counsel appearing for respondent-plaintiff submits that time is essence of contract and in this case as parties have expressly agreed that time should be the essence of the contract, and therefore, defendants have failed to secure performance having agreed to under the agreement. He cited *Gomathinayagam Pillai v. Palaniswami Nadar*, : [1967]1SCR227 , *Govind Prasad v. Hari Dutt Shastri and Anr.*, : [1977]2SCR877 , *P. Lazarus v. Johson Edward*, AIR 1976 AP 23, *M/s. Gujarat Bottling Co. Ltd. v. Coca Cola Company*, AIR 1975 SC 2372 to show that time is essence of the contract. There is no quarrel for this proposition. Though time is not essence in a contract for immoveable property, still the parties can stipulate time as essence of the contract as was done in this case. He further submits that stipulation for payment of damages is not an alternate choice given to the plaintiff under the contract, but it is purely intended to secure the performance. He cited *B. Pattabhiram Reddy v. N. Srinivasulu Reddy*, 1984 LS 129 in support of his contention. He further submits that the plaintiff, no doubt has sought for alternate relief of damages by amending the plaint, but he did not waive or give up the main relief, and therefore, he is entitled to the main relief only. Even in the notices issued by him, if he was asking for damages, it was because he was rather compelled under the circumstances to seek damages at that time. Therefore, this attitude cannot be seriously taken note of, nor understood the plaintiff to have given up the main relief He cited *Jagdish Singh v. Natthu Singh*, : AIR 1992 SC1604 . In the said case after the contract was entered into, the land which is the subject-matter of the contract, was acquired and in those circumstances, the Supreme Court felt that specific performance of the contract has become impossible and at the same time the plaintiff is entitled to the compensation, and accordingly decreed the suit for compensation, equivalent to the amount the land acquisition officer awarded for the suit land together with solatium and interest. This decision has no relevancy to the facts of the case on hand.

17. Apart from the circumstances narrated above, in this case, some important events have taken place which cannot be lost sight of. During the pendency of the appeal, the appellants and the respondent-plaintiff have agreed for payment of a sum of Rs.8,50,000/- by way of compensation in lieu of specific performance. In fact it is admitted by the respondent-plaintiff himself who filed an affidavit into

Court on 16-10-1995 stating that out of the agreed amount of Rs.8,50,000/- a sum of Rs.5,00,000/- was paid to him. Of course, he is not denying the agreement, but what all he contends is that because of the breach committed by the appellants in paying balance he rescinded the said compromise entered into on 5-4-1990. The fact remains that the plaintiff has received Rs.5.00 lakhs and as per the agreement the balance of Rs.3,50,000/- which is due to him is not paid, and it is not the case of the parties that any further amounts were paid later. Of course, plaintiff states in his affidavit that respondents have received some amounts by way of collecting rents from the building for all these years at the rate of Rs.500/- per month. It is also now brought on record that defendants have constructed super-structures in a part of the site and they are residing. These circumstances viz., later agreement, or payment of substantial amount of Rs.5.00 lakhs are not before the learned single Judge at the time of disposal of the appeal, as these events have taken place subsequently.

18. Having regard to the totality of the circumstances, and having regard to the judgments cited above, the fact that the rise of prices of property in urban areas cannot be over-looked and also the fact that the plaintiff was insisting on alternate relief of damages from the beginning; having regard to the fact that defendants were not in a position to execute the document in time although time is the essence of the contract and having regard to the fact that plaintiff had not come forward with sufficient explanation for delay in filing the suit after last notice (Ex.A14) and as the plaintiff has altered the terms of the contract by stating that there is oral agreement to reduce the price by 10 per cent even though there is no proof for such an agreement, and since the plaintiff has not come with clean hands and having regard to the fact of concluding subsequent agreement entered voluntarily by the parties and a substantial amount of Rs.5.00 lakhs having been paid as part payment, we are of the view that grant of damages would meet the ends of justice in lieu of granting the main relief of specific performance, and accordingly, we direct the appellants to pay the balance of Rs.3,50,000/- as per the subsequent agreement with interest at 18 percent from the date of the said agreement till payment. Time for payment in six weeks.

