

**John Vs. Mammooty**

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**Court :** Kerala

**Decided On :** Feb-28-1984

**Reported in :** AIR1985Ker120

**Judge :** S.K. Kader, J.

**Acts :** [Specific Relief Act, 1963](#) - Sections 21 and 24; Contract Act - Sections 73

**Appeal No. :** C.R.P. No. 2809 of 1983-A

**Appellant :** John

**Respondent :** Mammooty

**Advocate for Def. :** M.M. Abdul Azees, Adv.

**Advocate for Pet/Ap. :** P.N. Ramakrishnan Nair and; K.V. Sadananda Prabu, Adv.

**Disposition :** Revision dismissed

**Judgement :**

ORDER

**S.K. Kader, J.**

1. This revision filed by the 1st defendant in O.S. No. 170 of 1977 against an order passed in execution dismissing E.A. No. 108 of 1983 in E.P. No. 267 of 1979

raises an important question whether a decree for damages passed, in a suit where the plaintiff has abandoned the relief for specific performance of contract without making the necessary averment in the plaint initially or by amendment subsequently including the relief for damages, is null and void or non est.

2. A few facts necessary for the disposal of this revision may now be stated. The suit was instituted by the respondent herein against defendants, five in number, including the revision petitioner as the 1st defendant for specific performance of a contract for sale and in the alternative for recovery of a sum of Rs. 1,15,000/- from the defendants jointly and severally as damages for breach of contract. The respondent and the revision petitioner will hereinafter be referred to respectively as plaintiff and the 1st defendant. The 1st defendant did not appear in the suit and he was declared ex parte. The suit was contested by the other defendants. When the suit came up for trial, the plaintiff pressed only the relief against the first defendant for damages on account of breach of contract and did not press the other relief, namely the specific performance of contract. The trial court passed a decree on 19-7-1978 against the 1st defendant for recovery of a sum of Rs. 1,15,000/- as damages. The plaintiff-decree-holder filed an execution petition before the Sub Court, Calicut, and the same was transferred for execution to the Sub Court, Kottayam which issued notice in execution proceedings E.P. No. 267 of 1979 and notice was served on the 1st defendant. Thereafter, in 1979 the 1st defendant filed application for setting aside the ex parte decree passed against him. More than one application appears to have been filed in this regard by the 1st defendant and those applications were dismissed. C.M.A. No. 165 of 1980 filed before the Division Bench was also dismissed as withdrawn. It was thereafter LA. 2371 of 1982 was filed by the 1st defendant in the court below for condoning the delay in filing the application for setting aside the ex parte decree. These applications also were dismissed and a C.M.A. filed against these orders is said to be pending before this Court.

3. Although several grounds have been raised in the memorandum of revision petition, the point urged by the learned advocate for the 1st defendant in support of the revision is that the decree in question is a nullity, as there was inherent lack of jurisdiction in respect of the subject matter of the suit. It is contended that the

suit in question is essentially one for specific performance of contract and not for damages on account of breach of contract, that there is no averment in the plaint claiming damages on account of breach of contract, that the plaintiff having abandoned the relief of specific performance of contract there was nothing further to be done except to dismiss the suit, and that damages in addition to or in lieu of specific performance of contract and be granted only when the plaintiff succeeds in making out a case for granting a decree for specific performance. The argument addressed in this regard is that a decree must be supported by a judgment containing reasons, and that the court has no jurisdiction to pass a decree for damages as there was no cause of action surviving after the plaintiff abandoned his relief for specific performance. The learned advocate appearing for the 1st defendant in support of his contention placed main reliance on a Division Bench ruling of the Calcutta High Court in Gh Court in Gopi chand, AIR 1979 Cal 203 and also on the following decisions in A. H. Mama v. Flora Sassoon, AIR 1928 PC 208, Kaushalya Devi v. K. L. Bansal, AIR 1970 SC 838, Bhavan Vaja v. Solanki Hanuji, AIR 1972 SC 1371, Hira Lal v. Kali Nath, AIR 1962 SC 199, Sunder Dass v. Ram Parkash AIR 1977 SC 1201 and Lakshmi v. Bharathi 1968 Ker LT 447.

4. The only question that arises for consideration in the revision is whether the decree in the instant case is null and void or non est for lack of inherent jurisdiction. The jurisdictional error committed in this case, according to the counsel for the 1st defendant, is in respect of the subject matter of the suit.

5. It is now well settled that an executing court cannot go behind the decree nor can it question the legality or correctness of it. This is the general rule. But there is a well known exception to this Rule. When there is lack of inherent jurisdiction, it goes to the very root of jurisdiction affecting the competence of the court which tried the case and a decree passed in such circumstances will be null and void. A contention that a decree is a nullity or non est can be set up whenever and wherever it is sought to be enforced or relied upon not only in execution proceedings but even in collateral proceedings. (See Sunder Dass v. Ram Parkash, AIR 1977 SC 1201, Hira Lal v. Kali Nath, AIR 1962 SC 199, Chunchun Jha v. Ebadat Ali, AIR 1954 SC 345). In construing a decree an executing court can in appropriate cases, take into consideration the pleadings as well as the

proceedings up to the decree to find out the true effect of the decree and the meaning of the words used in the decree. The executing court has to ascertain the circumstances under which those words came to be used. In other words, the executing court should not think that its jurisdiction begins and ends with merely looking into the decree as it was finally drafted and settled. (See *Bhavan Vaja v. Solanki Hanuji*, AIR 1972 SC 1371). There is the authoritative pronouncement of the Supreme Court in *Hira Lal v. Kali Nath* AIR 1962 SC 199 that the validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other grounds, which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. Jurisdiction can be territorial or it can be with reference to the subject matter of the suit or over the parties to the suit. An objection as to local jurisdiction or territorial jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case which goes to the very root of the jurisdiction. As regards the territorial jurisdiction or local jurisdiction or pecuniary jurisdiction of a court, it can be waived. An objection as regards the place of suing or place of pecuniary jurisdiction or territorial jurisdiction has to be taken at the earliest possible opportunity as enjoined under Section 21 of the Code of Civil Procedure. In *Mathew v. Bank of Cochin Ltd.* 1982 Ker LT 274 this Court held that a court to whose jurisdiction the subject matter of the decree is transferred acquired inherent jurisdiction over the same by reason of such transfer, and if a person fails to object to execution by such court at the earliest opportunity, he should be deemed to have waived the objection. When there is no inherent lack of jurisdiction and in exercise of jurisdiction, the court commits an error, it should be the subject matter of appeal or revision or other proceedings known to law. An execution court cannot sit in appeal over the judgment of the trial court. The traditional concept of jurisdiction is the entitlement to enter upon the enquiry in question. If there was an entitlement to enter upon the enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction.

6. It is true that a court must be satisfied that the grounds for passing a decree existed and a decree must be supported by a judgment containing reasons therein. In *Kaushalya Devi v. K. L Bansal*, AIR 1970 SC 838, the Supreme Court held :

'The decree passed on the basis of an award was in contravention of Section 13(1) of Delhi and Ajmer Rent Control Act because the Court had passed the decree in terms of the award without satisfying itself that the ground of eviction existed.'

It was held in that case that the decree in so far as it directed delivery of possession of the premises to the landlord was a nullity and could not be executed. The counsel for the first defendant argued that inasmuch as the subject matter of the instant suit is only specific performance and not damages for breach of contract, the decree passed by the court is a nullity, as there was no cause of action surviving after the plaintiff abandoned his relief for specific performance.

7. The relief of specific performance is a statutory relief. This is an equitable relief granted in England by court of equity. Damages is a common law relief granted under Section 73 of the Indian Contract Act. The remedy for non-performance of a duty is two fold, namely compensatory and specific. The court awards damages for breach of contract and in the latter the court directs the party in default to do or forbear from doing the very thing which he is bound to do or forbear from doing so. The cause of action for specific performance or for damages is breach of contract or non-performance of a duty. There are two remedies open to a party where there has been a breach of contract. The party can file a suit for specific performance of the contract and in the same suit in view of the provisions in Section 21 of the Specific Relief Act he can also claim compensation or damages in addition to or in lieu of specific performance of contract. The party can also file a suit for damages on account of breach of contract under Section 73 of the Indian Contract Act. As cause of action for a suit for specific performance as well as a suit for damages is the same, namely the breach of contract, both the remedies, namely, suit for specific performance and suit for damages on account for breach of contract can be combined in one suit. In order to prevent multiplicity of suits and give complete

relief and justice to the parties all rights and obligations of the parties arising out of the same cause of action should be decided in one and the same suit. A plaintiff should not be driven to file a separate suit for damages on account of breach of contract, if that relief can be granted in a suit instituted on the basis of the same contract for specific performance. A party can select one of the two remedies. But he cannot maintain two suits in view of the bar under Section 24 of the Specific Relief Act. The circumstance that a plaintiff is not entitled to or is ineligible to the relief of specific performance is not conclusive against his right to recover damages on account of breach of contract. In other words, a plaintiff can be granted damages on account of breach of contract in a suit for specific performance, provided there is the necessary averment in the plaint either initially or by amendment subsequently praying for the relief for damages,

8. In *Calcutta Improvement Trust v. Surbarnabala Devi* (1940) 44 Cal WN 541, Ameer Ali, J. observed :

'I see no reason why the procedural dichotomy and the legal dialectics of the history of English Law & equity for which I find no fundamental juridical basis, should limit the operation of complete justice in India.'

In *Rajendra Nath's* case, the learned Judge, P. B. Mukharji, J. as he then was, after an analysis of the relevant sections in the Specific Relief Act and a due consideration of the decisions of the Privy Councils, Q.B., other English decisions and the decisions of the Indian Courts, observed :

'These seemingly different considerations in either case are only incidental and ancillary to the very nature of the relief asked. Naturally if the court is to decree specific performance the party claiming at whose instance the court is acting must himself be ready and willing to perform the contract. Equally naturally when the party is claiming only damages he need not be ready and willing to perform the contract because he is not asking for performance but only damages for the other party's breach as sufficient recompense. Election of a remedy in such case cannot and should not be said to be the cause of action. In my opinion a mental attitude or conduct in such context cannot alter the cause of action.'

The learned Judge further observed :

'The cause of action is breach of contract whether the claim is for specific performance or damages. The reliefs follow as a consequence of the breach of contract. If the party aggrieved is ready and willing to carry out his part and the party complained against commits the breach then the party aggrieved may either sue for a specific performance or for damages. It is a choice of reliefs. It has been said that it is also an election of remedy. I cannot persuade myself to the conclusion that the election is such that even subsequent to the filing of the suit which makes specific performance impossible prevent the plaintiff from converting the plaint into a suit for damages.

XX XX XX XX XX XX XX XX XX XX A claim for specific performance under the Specific Relief Act can in my judgment coexist with a claim for damages under the Indian Contract Act; claim under one Act cannot preclude claim on the other so long as the requirements of the respective Statutes are satisfied. Section 37, Specific Relief Act, shows how even in a suit for specific performance the plaintiff may claim in the alternative that the contract be rescinded. If rescission can be claimed as alternative to specific performance I can see no principle why claim for damages should be excluded.'

I am in respectful agreement with the dictum laid down in Rajendra Nath's case, AIR 1952 Cal 78.

9. In Rajendra Nath's case AIR 1952 Cal 78 the question that came up for consideration was whether an amendment of a plaint in a suit for specific performance of the contract deleting the averment of readiness and willingness to perform the contract and the claim for specific performance and to substitute a claim for damages simpliciter for breach of contract can be allowed or not. There was no pleading in that suit for damages on account of breach of contract, although there was a claim for compensation or damages in addition to or in substitution of claim for specific performance.

10. A claim for specific performance of contract, arises on account of breach of contract committed by the opposite party and a claim for damages also arises on

account of breach of contract. Therefore breach of contract is the basis for a suit for specific performance as well as a suit for damages; although in a suit for damages on account of breach of contract the plaintiff treats the contract (as) having come to an end and not subsisting. While in the other the plaintiff must treat the contract as subsisting. It is true that considerations in a suit for specific performance and suit for damages on account of breach of contract are not the same. In a suit for specific performance the plaintiff must show that he has performed his part of the contract or that he has been ready and willing to perform the contract. So also, in order to claim damages in addition to or in lieu of specific performance, the plaintiff has to show either that he has performed his part of the contract or he has been ready and willing to perform the contract. But in a suit for damages on account of breach of contract the plaintiff need not prove that he has performed the contract or he has been ready and willing to perform the contract. Notwithstanding this difference, the cause of action for a suit for specific performance and as well as a suit for damages is the same, namely breach of contract. The learned Judge in Rajendra Nath's case on an analysis of the various provisions in the Specific Relief Act and the case law on the point came to the conclusion that a plaint in a suit for specific performance can be amended and that the amendment will not alter the cause of action or the nature or character from the suit.

11. In Gopinath's case AIR 1979 Cal 203 also the suit was one for specific performance of the contract with an additional prayer for damages in lieu of specific performance. There was also an alternative prayer for a decree for refund of Rs. 305/-. During the trial when the plaintiff was examined in that suit he stated that he was not ready and willing to take the lease from the defendant and he claimed damages only. The trial Court decreed damages of Rs. 25,000/- in lieu of specific performance of the contract. It was that decree of the trial (Court) that was challenged in appeal before the Division Bench in Gopinath's case.

11A. (a) It was on the ground that the facts in Rajendra Nath's case were distinguishable from the facts in Gopinath's case that the Division Bench of the Calcutta High Court refused to grant leave to amend the plaint at the appellate stage. Referring Rajendra Nath's case, Ramendra Mohan Datta, J. observed as

follows :

'In this case no amendment has been sought for at any stage of the proceeding and, accordingly, the decision in Rajendra Nath Saha's case (supra) cannot be of any assistance to Mr. Das's client.'

While Hazra, J. observed that if.

'Had the plaintiff applied for amendment of the plaint before the trial of the suit the question might have been different.'

It may be noted that it was construing the provisions of Section 21 of the Specific Relief Act that the Division Bench in Gopinath's case AIR 1979 Cal 203 held that :

'The question of granting relief by way of damages in lieu of or in substitution of specific performance is a matter resting entirely with the Court and parties have nothing to do with it. The plaintiff cannot be allowed to abandon the case for specific performance and yet claim damages in lieu thereof.'

It may also be noted that it was a decree for damages granted in lieu of specific performance that was set aside by the Division Bench, while granting a decree, for refund of Rs. 305/- under the alternative prayer. Considerations arising in the matter of a claim for damages on account of breach of contract and a claim for damages in addition to or in substitution of specific performance are entirely different. It is this aspect that was considered in Gopinath's Case AIR 1979 Cal 203. A case of claim for damages in addition to or substitution of specific performance does not result directly or consequentially from the breach of contract. In the case of a claim for damages in lieu of specific performance, damages are granted for the performance of the contract while in the case of claim for damages on account of breach of contract the damages are granted for the non-performance of the contract. A claim for damages in addition to or substitution of specific performance is granted only in cases where the plaintiff succeeds in showing that he has performed his part of the contract or he has been ready and willing to perform the contract. In cases where, considering the facts and circumstances of the case, the court feels that the relief of specific performance

granted is not adequate and sufficient, the court in addition grants damages or compensation. Similarly in a case where the court finds that the plaintiff is eligible for the relief of specific performance but due to certain circumstances which have existed or intervened specific performance is not feasible or possible, the court grants damages or compensation in substitution of the performance.

12. The further question for consideration is whether the suit in the instant case is one where the remedy of specific performance and the remedy of damages on account of breach of contract have been combined together or whether it is a suit for specific performance alone. What is the subject matter of the suit has to be ascertained on a due construction of the plaint by reading the plaint as a whole. A certified copy of the plaint has been made available before this Court for perusal. In paragraph 13 of the plaint it has been averred that the plaintiff has sustained a loss of Rs. 1,40,000/- as a result of the breach of contract committed by the defendants and he is entitled to get the same from defendants jointly and severally. In the same paragraph the claim has been limited at Rs. 1,15,001/-. The prayer A in the plaint relates to specific performance of contract. Prayer 'B' is as follows :

'In the alternative, directing defendants jointly and severally to pay to the plaintiff and allowing the plaintiff to recover from the defendant jointly and severally a sum of Rs. 1,15,001/- with future interest as damages for breach of the contracts.'

This claim for damages is not in addition to or in substitution of the specific performance. This is an independent relief claimed. It is always open to the plaintiff to press for or not to press a particular relief. On a careful reading of the plaint as a whole, it cannot be said that the claim for the relief of specific performance alone is the subject matter of the suit and the claim for damages is not the subject matter of the suit. There are proper and necessary averments in the plaint on the basis of which the plaintiff can claim the relief of damages, independently, on account of breach of contract. On a reading of the plaint, it cannot be concluded that the entitlement to the relief of the damages does not arise on the pleadings, merely because the plaintiff did not press the relief of the specific performance. There is an alternative specific prayer for damages on account of breach of contract. There

is, therefore, no lack of any inherent jurisdiction. The decree in the instant case is not null and void or non est as alleged.

This revision therefore fails and is hereby dismissed. No costs.

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