

Ambikadevi Vs. Easwari

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Court : Kerala

Decided On : Jun-30-2004

Reported in : AIR2004Ker349; 2005(2)CTLJ87(Ker); 2004(2)KLT1056

Judge : R. Bhaskaran, J.

Acts : [Specific Relief Act, 1963](#) - Sections 12(2) and 12(3)

Appeal No. : A.S. No. 105 of 1997

Appellant : Ambikadevi

Respondent : Easwari

Advocate for Def. : R.D. Shenoy,; S. Sachithananda Pai,; Prakash P. George

Advocate for Pet/Ap. : T.M. Mohammed Youseff, Sr. Adv.,; V.K. Sidhique and;
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Disposition : Appeal allowed

Judgement :

R. Bhaskaran, J.

1. This appeal is filed by the plaintiff in O.S.No. 267 of 1994 on the file of the II Additional Sub Court, Ernakulam. The suit was for specific performance of agreement for sale of the plaint schedule property. The suit was dismissed by the

trial court on the ground that the plaint schedule, shows an extent of 8 cents of land whereas the land actually available with defendants 1 to 3 has only 6.9 cents.

2. The case of the plaintiff is that by Ext.A1 agreement dated 7.12.1993 defendants 1 to 3 agreed for sale of approximately 8 cents of land as described in the schedule to the agreement to the plaintiff. The consideration fixed was Rs. 5500/- per cent and a sum of Rs. 5000/- was paid as advance sale consideration on the date of the agreement. It is stated that the agreement also stipulated that the property should be measured at the expense of defendants 1 to 3 to fix the boundaries and that the plaintiff should be convinced about the title and documents in respect of the plaint schedule property and to furnish encumbrance certificate for 13 years. On complying with the above conditions, the plaintiff has to prepare the sale deed and pay the balance consideration to execute the sale deed. It is also stipulated that in case the defendants fail to execute the sale deed, the plaintiff can get it executed through court. It is stated that after the execution of the agreement, defendants 1 to 3 did not measure the property nor comply with the other stipulations in the agreement within the period stipulated. The period fixed in the agreement was two months. It is stated that the plaintiff and defendants measured the property during the 1st week of March 1994 and found that the extent of the property as 8 cents. The plaint schedule property lies on the eastern side of the property of the 4th defendant. According to the plaintiff, the defendants failed to demarcate the property within the stipulated time. It is stated that the plaintiff was ready with the balance consideration to be paid within the stipulated time. On 16.3.1994 the plaintiff came to know that defendants 1 to 3 are making arrangements with defendants 4 and 5 to sell the property to defendants 4 and 5. The suit was therefore filed for specific performance of the agreement for sale. The plaintiff was always ready and willing to perform her part of the agreement. The plaintiff also prayed for a permanent prohibitory injunction restraining defendants 1 to 3 from executing any sale deed in favour of defendants 4 and 5.

3. Defendants 1 to 3 have filed a written statement. In the written statement, it is stated that on the representation of the plaintiff, the property was measured and it was found to be 6.900 cents. It is also contended that the defendants had been

willing to execute the sale deed in favour of the plaintiff in respect of 6.900 cents. The plaintiff is therefore not entitled to get a decree for specific performance of the agreement. There was a kudikidappu on the western side of the plaint schedule property and it was purchased by the kudikidappukari through the Land Tribunal. The plaintiff wanted a right of way through the kudikidappukari's property to which these defendants did not agree. In the agreement also, originally a provision was made for a right of way which was struck off by the husband of the 1st defendant before the agreement was signed.

4. The plaintiff was examined as Pw.1. She stated that as per Ext.A1 defendants 1 to 3 agreed to sell 8 cents of land at the rate of Rs. 5000/- percent. She also stated that when the property was measured, it was found to have an extent of 8.300 cents. She further stated that though originally the schedule to the agreement contained a provision for pathway from the plaint schedule property, the 1st defendant took the agreement from the plaintiff and the portion relating to the pathway was struck off from the Schedule. She also stated that the plaint schedule property is the adjacent property belonging to her husband and therefore she was interested in purchasing the property. She has also given the details of the amount with her which she had kept ready for purchasing the property. She further stated that after the sale of the property on the western side of the plaint schedule property by the 4th defendant to the 5th defendant, the western boundary of the plaint schedule property was changed by taking away one cent of property from the plaint schedule property. In cross-examination, she admitted that she was aware of the change of boundary on the western side even at the time of filing of the suit. Pw.2 is the scribe who wrote Ext.A1 agreement. His evidence is of not much importance in the case except that he had stated that there was no correction when the agreement was written by him. The Commissioner who inspected the property and submitted Ext. C1 report was examined as Cw.1. He has stated that since he found certain trees on the eastern boundary of the property of the 5th defendant cut and a new fence put up, to the east of it, he has stated in his report that there is encroachment into the plaint schedule property.

5. The 1st defendant is examined as Dw.1. She has admitted execution of Ext.A1 agreement. She stated that there is no entry to the plaint schedule property from

the southern side. She also stated that her husband struck off the portion relating to the pathway in the agreement since there was no such pathway. She also stated that she was willing to sell 6.9 cents of land which was available to the plaintiff. She also stated that after execution of the agreement she did not bother about the plaint schedule property. She was specifically asked whether she was willing to sell 6.9 cents of land to the plaintiff from the plaint schedule property and she said that she was prepared. This question would indicate that the plaintiff was even prepared to purchase 6.9 cents from the defendant.

6. Dw.2 is the 5th defendant. He has complained that the plaintiff had demolished the eastern fencing of his property and therefore he has filed a cross-objection for injunction against the plaintiff. He also stated that he was not willing to get his property measured. He was asked whether there was not a pathway on the eastern side of his property and that it was to avoid the pathway that he has put up a new fence by including the pathway and he denied it. Dw.3 was examined to show that it was the plaintiff who demolished the eastern fencing of the 5th defendant's property. In the nature of the contentions in this appeal, his evidence is not of much significance.

7. The trial court dismissed the suit on the ground that the plaint is not amended despite the contentions of the defendants that the property covered by Ext.A1 is only 6.9 cents. It is also stated that the Plaintiff does not have a case in the plaint that if the property does not measure 8 cents she is still prepared to purchase the property found on measurement. According to the learned counsel for the appellant when the defendant has no objection for assigning of 6.9 cents which according to the defendant is the only property available, nothing stood in the way of the trial court in granting a decree for that extent though the plaint schedule property was shown as having an extent of 8 cents.

8. The learned counsel for the respondents vehemently contended that the said argument of the learned counsel for the appellant cannot be accepted in view of the decision of the Supreme Court in *Surjit Kaur v. Naurata Singh* (2000) 7 SCC 379. In that case, the appellant entered into an agreement to sell her 1/2 share in 212 k 13 m of land at the rate of Rs. 30250/- per killa. The agreement for sale was

to be executed by 30.6.1981. On 30.6.1981, both the parties were present before the Registrar and filed separate applications. In the application of the 1st respondent he stated that the appellant did not give possession of the land as mentioned in the agreement. In her application, the appellant stated that she was not in a position to deliver possession as a suit has been filed by the 2nd respondent and that she was willing to execute the sale deed without handing over possession. It was thus clear that the 1st respondent did not want the document to be executed without getting possession of the property. The trial court directed refund of the amount paid as well as an amount of Rs. 8800/- as compensation. In appeal the appellant stated that he was ready to accept the offer to take the sale deed without possession and on that basis the appeal was allowed. The second appeal was dismissed by the High Court. In further appeal, the Supreme Court stated that even though an application can be made even at the stage of appeal; where a party had elected not to accept part-performance and insisted on full performance in the trial court, he cannot elect part-performance in the appellate court. The Supreme Court however, made it further clear in the following words.

' 14. It must be clarified that this Court is not saying that merely because in correspondence or orally a party has insisted on performance of the whole contract he cannot thereafter elect to , accept performance in part. A mere assertion that contract must be performed in full or even a filing of a suit for specific performance of the whole contract without averring that the plaintiff is willing to accept performance in part may not amount to electing not to accept performance in part. It is only in cases where a party has categorically refused to accept part-performance in part i.e. he has unambiguously elected not to accept part-performance that, he will be precluded from subsequently turning around and electing to accept performance in part. Whether a party has categorically elected or not will depend on the facts of each cases.'

To attract the dictum laid down in Surjit Kaur's case to (2000) 7 SCC 379), the party must have elected not to accept part performance in the trial court. It is different from saying that part performance was not insisted in the trial court. It is made clear in paragraph 14 of the same judgment. There is nothing in this case to show that the appellant had elected not to accept part performance in the trial

court though he had claimed specific performance of the agreement for the eight cents as stated in the agreement. According to her, there was an attempt to defeat her rights by changing the eastern boundary by defendants 4 and 5 on the western side of the plaint schedule property.

9. The learned counsel for the appellant relied on the decision of the Supreme Court in *Radhakrishna Narayana v. Ponthala Parvathamma* (2001) 8 SCC 173). In that case, the plaint was amended in the appellate stage and relief was granted in terms of Section 12(3) of the Specific Relief Act.

10. The facts of this case attract Section 12(2) of the specific relief Act and not. Section 12(3). Here is a case where instead of nearly 8 cents which was the subject-matter of the agreement, it is found that the vendor has only 6.900 cents in her possession. The portions which is left unperformed is only a small portion of the whole and in such case the court can direct specific performance of so much of the contract as can be performed. A close reading of Sub-section (2) and (3) of Section 12 will show Sub-section (2) is capable of liberal interpretation. It reads as follows:

'Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.'

But Sub-section (3) reads as follows:

'Where a party to a contract is unable to perform the whole of his part of it and the part which must be left unperformed either-

(a) forms a considerable part of the whole though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform if the other party-

(i) in a case falling under Clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under Clause (b), pays or has paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.'

It may be necessary to amend the plaint even at the appellate stage to attract the clauses in Sub-section (3) of Section 12. But if Section 12(2) is attracted it is not necessary to insist on amendment of plaint.

11. The learned counsel for the respondent Mr. R.D. Shenoy contended that Section 12(2) has no application since the original agreement itself was for sale of the property excluding the pathway and if only the parties understood the agreement for sale of the property including the pathway and the pathway is to be excluded, Section 12(2) can be made applicable. But in this case, since the parties had contracted for about 8 cents of land and even after excluding the pathway, it is only 6.900 cents, I am of opinion that Section 12(2) is attracted in this case. A three member bench of the Supreme Court had occasion to consider the scope of Section 12(2) of the Specific Relief Act in *Baikunthi Devi v. Mahendra Nath* (AIR 1977 SC 1514). In that case, as a result of consolidation proceedings it was found that the actual area available to be sold was found to be less by 0.06 acre and the contention was loss of identity of the subject-matter of the agreement and that it cannot be specifically enforced. This contention was rejected by the Supreme Court and it was found that Section 12(2) of the Act applies to such cases and the Court can grant relief to the lesser area.

12. The evidence of Pw.1 shows that she was always ready and willing to purchase the property and nothing is brought to my notice to hold otherwise. No

other point is argued by the learned counsel on both sides. There is no reason not to use the discretion in favour of the plaintiff as the relief of specific performance can be refused in the circumstances stated in Section 20 of the Act, though they are not exhaustive. The trial court has held that no specific performance can be granted since the property is not specific. There is no dispute that 6.900 cents of the property within the specified boundaries as described in the plaint schedule is available with defendants 1 to 3 for sale though the extent shown in Ext.A1 was about 8 cents. The rest of the property, according to plaintiff was owned by defendants 4 and 5. Since the defendants 1 to 3 had no objection in selling the available 6.900 Cents of the plaint schedule property to the plaintiff, I do not find any reason not to grant specific performance with respect to that property.

In the result the appeal is allowed and the judgment and decree of the trial court are set aside and O.S.No. 267 of 1994 on the file of the Sub Court, Ernakulam is decreed and defendants 1 to 3 are directed to execute a sale deed in respect of 6.900 cents in Sy.No. 1389/2 of Poonithura village and within the boundaries described in the plaint schedule on the plaintiff depositing, if not already deposited the entire balance sale consideration within one month from today and in case defendants 1 to 3 fail to execute the sale deed, the plaintiff will be at liberty to move the trial court to get the sale deed executed and get possession of the property at her expense. In the circumstances of the case, the parties shall bear their costs in the appeal.