

Krishnan Vs. Krishnan

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Court : Kerala

Decided On : Jun-26-2003

Reported in : AIR2004Ker155; 2003(3)KLT166

Judge : K.S. Radhakrishnan and Pius C. Kuriakose, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 12(2) and 12(4)

Appeal No. : A.F.A No. 28 of 1993

Appellant : Krishnan

Respondent : Krishnan

Advocate for Def. : P.N. Krishnankutty Achan, Sr. Adv. and; T. Sethumadhavan, Adv.

Advocate for Pet/Ap. : V. Chitambaresh, Adv.

Judgement :

K.S. Radhakrishnan, J.

1. Defendant is the appellant. Suit was instituted for specific performance of an agreement for sale of A1 dated 12.10.1982. The agreement was executed by the defendant along with his brother Pulendran and Govindan. Plaintiff's schedule house and compound is having an extent of 20 cents. Total sale consideration was Rs.

1,45,200/-. An advance amount of Rs. 20,000/- was paid on the date of the execution of the agreement. Defendant and his two brothers had also undertaken to evict the tenants residing in the property. It was agreed that the transaction be completed by 30th August 1983. While so, Pulendran surrendered his one-third share over the plaint schedule property in favour of Govindan. Govindan then executed assignment deed in respect of his 2/3rd share on 26.8.1986 to the plaintiff. Afterwards by instalments plaintiff had paid to the defendant and his two brothers a sum of Rs. 1,05,000/- thereby making a total payment of Rs. 1,25,000/-. However, the defendant was not prepared to perform his part of the contract. Hence the suit was instituted seeking a decree for specific performance of the agreement by defendant after receiving Rs. 6,667/- his share of the balance consideration.

2. Suit was resisted by the defendant. Receipt of the further sum of Rs. 1,05,000/- was denied by him. He contended that he had subscribed his signature in some of the papers taken to him by his brother Govindan and those papers might have been utilised for preparing the agreement and the receipt. Trial Court after considering the oral and documentary evidence came to the conclusion that A1 is genuine document, but denied the relief for the reason that the defendant had not received any consideration on the date of the agreement or thereafter and the agreement is not enforceable against one of the co-owners. Aggrieved by the same plaintiff approached this Court and filed A.S.207/87. A learned single Judge of this Court allowed the appeal and directed the defendant to execute the sale deed in favour of the plaintiff in respect of his one-third share over the plaint schedule property on receiving Rs. 6,667/- being his share of the balance consideration and put the plaintiff in full possession of the property. Defendant is aggrieved by the said judgment and has preferred this appeal.

3. The following substantial questions of law are raised by the defendant.

i. When no part of the contract is left unperformed and the contract with the defendant does not stand on a separate footing with that of his brothers, was it correct in law to apply Sub-sections (2) to (4) of Section 12 of the Specific Relief Act? Can Ext.A1 agreement be construed as two different contracts for

conveyance of the property in parcels?

ii. When Exl.A1 agreement provided only for a joint conveyance, has not the terms of the agreement been violated by a release by one brother of the defendant and a subsequent sale by the other brother? Was it therefore correct in law to grant a decree for specific performance of Ext.A1 agreement for sale as it stands?

iii. When Ext.A 12 receipt is not duly proved and the payment of the amount thereunder not supported by the production of the account maintained by the plaintiff, was it correct to hold that the share of the sale consideration has been paid over to the defendant? Does the finding of the trial Court based on oral evidence call for any interference in appeal?

The main legal question which arises for consideration is whether the agreement can be enforced against the defendant who is only one of the executants of the agreement. This question centres round the interpretation of Section 12 of Specific Relief Act. Section 12 lays down the general rule that courts do not enforce the partial performance of a contract. As observed by Romilly M.R. in *Merchants Trading Co. v. Banner* (19 W.R.707) the Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all. The locus classicus of the law relating to partial performance is the following passage in Viscount Haldane's judgment in *Rutherford v. Acton Adams* ((1915) AC 866).

In exercising its jurisdiction over specific performance a Court of equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not by misrepresentation or otherwise disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court hold his to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase-money.

The law relating to specific performance of part of a contract was earlier dealt with in Sections 14 to 17 of the Specific Relief Act, 1877. The same has been reproduced with some modification in Section 12 of the Specific Relief Act, 1963. The general rule in Sub-section

(1) of Section 12 is that the Court shall not direct the specific performance of a part of a contract except as otherwise provided in that section. The exceptions are provided in Sub-sections

(2) to (4). They constitute a complete code as far as enforcement of a part of a contract is concerned and the reliefs can be claimed or granted only within the terms thereof. Sub-section

(2) relaxes the general rule in favour of both parties. 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. That sub-section enables even a party in default to claim specific performance provided the part left unperformed is small in value and admits of compensation. On the other hand, if the part left unperformed forms a considerable part of the whole it is Sub-section

(3) that is applicable. Under this sub-section a decree for specific performance of a part of the agreement will be granted on reduction from the consideration for the part which is left unperformed provided the following conditions are fulfilled, (i) The part which is left unperformed forms a considerable part of the whole though admitting of compensation in money, (ii) the part left unperformed does not admit of compensation in money, and (iii) the party who is not in default relinquished all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant. In a case where the part which is left unperformed forms a considerable part of the whole though admitting of compensation in money the party is entitled to obtain a decree on payment of proportionate consideration, viz. the agreed consideration for the whole reduced

by the proportionate consideration for the part which must be left unperformed. Counsel on either side cited several decisions which were taken note of by the learned single Judge. Reference was made to the following decisions. Abdul Aziz v. Abdul Sammad (AIR 1937 Mad. 596), Lakshmikantayya v. Nagayya (AIR 1955 Andhra 188), Balakrishnan v. Kunjikirishnan (1981 KLT 463), Narayana Surve v. Pappu Ammal (1983

(1) ILR

599) and also unreported decision in A.S.391 of 1982. Reference was also made to the decision of the Apex Court in Kartar Singh v. Harjinder Singh (AIR 1990 SC 854).

4. What emerges from the discussion is that if the contract is one and indivisible it can be enforced only in its entirety. But a part of the contract is also enforceable if it comes within one or other of the exceptions provided in Sub-sections (2) to (4) of Section 12. Whatever may be the position under the old Specific Relief Act, the position under the present Act is that the plaintiff in a suit for specific performance can get relief in respect of a share of the property on paying the proportionate consideration provided therein. That is possible at the instance of either party if the part which is left unperformed bears only a small portion to the whole in value and admits of compensation in money. The Court may in such a case direct specific performance of so much of the contract as can be performed and award compensation in money for the deficiency. When the part of the contract unable to be performed forms a considerable part of the whole only the person who is not in default is entitled to obtain a decree and that too if the part left unperformed admits of compensation in money and pays or has paid the proportionate consideration for the part which was left unperformed. So also the case where the part left unperformed does not admit of compensation in money but in that case he has to pay the whole of the consideration without any abatement. Over and above, the person who seeks specific performance shall relinquish all his claims to the performance of the remaining part of the contract and all rights to compensation.

5. We may also indicate the question whether a contract is divisible or not has to be determined on the facts and circumstances of each case. When a divisible part

of such a contract is enforced what is being enforced is an entire and complete contract as far as that divisible part is concerned. Before granting relief under this section the party who claims specific performance has to establish that the part taken by itself stands on a separate and independent footing from the other part of the contract and that it can and ought to be specifically performed. In other words; the above mentioned sub-section deals with a case where part of the contract can be severed from the remaining part. All the same the Court is not expected to substitute a new bargain and enforcing a new contract on the parties. An agreement for specific performance could also be enforced against one of the co-owners who had jointly contracted to convey a property. If any of them is unable to convey his portion there is no legal bar in getting specific performance of the remaining portion against the other co-owners. Further, each of the co-owners is entitled to possession and enjoyment of the whole property along with others. Further Section 44 of the Transfer of Property Act says that the transferee acquires as to such share or interest the transferor's right to joint possession or other common or part enjoyment of the property. The transferee can also enforce partition of his rights but subject to the conditions and liabilities affecting at the date of the transfer in a case where several co-owners had contracted to convey a joint property belonging to them the contract can be enforced against one of them if the others are unable to convey their shares. From the facts we obtain we find that it was the inaction on the part of the defendant, one of the co-owners that the sale deed could not be executed. Two of his brothers relinquished their rights in favour of the plaintiff. That being the position decree for specific performance can be granted on paying proportionate amount to the defendant. Plaintiff had contracted to purchase the entire 20 cents. If a portion of the 20 cents could not be obtained the very purpose of the agreement could be defeated. It was the defendant along with two brothers had entered into the agreement. Agreement is not disputed.

6. Under the above mentioned circumstance we are in full agreement with the learned single Judge that plaintiff is entitled to get a decree for specific performance on the balance payment of Rs. 6,667/- being his share of the balance consideration. We find no reason to take a different view from that of the learned single Judge.

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