

John Thomas and ors. Vs. Joseph Thomas and ors.

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Court : Kerala

Decided On : Jul-04-2000

Reported in : AIR2000Ker408

Judge : S. Sankarasubban and; G. Sivarajan, JJ.

Acts : [Limitation Act, 1963](#) - Article 54; [Specific Relief Act, 1963](#) - Sections 10 and 20; [Transfer of Property Act, 1882](#) - Sections 54 and 118; [Contract Act, 1872](#) - Sections 17 and 18

Appeal No. : A.S. No. 82 of 1992

Appellant : John Thomas and ors.

Respondent : Joseph Thomas and ors.

Advocate for Def. : S.V.S. Aiyar and; Giri V, Adv.

Advocate for Pet/Ap. : S.V. Balakrishna Iyer, Adv.

Disposition : Appeal dismissed

Judgement :

1. The above appeal is preferred by defendants 2, 3 and 5 to 8 in O. S. No. 51 of 1987 on the file of the Sub-Court, Kottayam against the judgment and decree in that case. First respondent is the plaintiff, while respondents 2 to 4 are defendants 4, 9 and 10 in the suit. The suit, O. S. No. 51 of 1987 was filed for specific

performance of an agreement and directing the first defendant to execute the sale deed in respect of 96 cents of land scheduled in the plaint and for an injunction restraining the first defendant from trespassing upon plaint schedule item No. 1 and for other reliefs. The averments in the plaint are as follows :

2. Plaintiff and the first defendant were known to each other for a long time. On 27-4-1982, they entered into an agreement for mutual exchange of properties. Plaintiff had in his possession, control and enjoyment of 12 acres of plantation in Poonjar Thekkekara Village and the first defendant had 96 cents of land at Palai within Palai Town. These properties were to be transferred by both and an agreement was made accordingly. As per the agreement, the plaintiff was to pay to the first defendant additionally an amount of Rs. 1,00,000/- as equalisation of value. According to the plaintiff, on the date of execution of the agreement, an amount of Rs. 10,000/- was paid. Further, it is stated that possession of each plot was taken by either parties. No specific date was mentioned in the agreement for execution of registered documents.

3. In September, 1982, the first defendant expressed his willingness to take the documents in respect of Poonjar Thekkekara Property in the name of his son and two daughters. As a matter of fact, the title to 12 acres was not with the plaintiff and he got possession and enjoyment of the property on the basis of an agreement dated 10-1-1982 between himself and J. J. Construction Company. As per the suggestion of the first defendant, three documents were prepared on 20-9-1982 and registered on 6-11-1982 at the Sub Registry Office, Poonjar. One document was executed in the name of Jinsymol, the daughter of the first defendant, another document was executed in the name of John Thomas, the son of the first defendant and the last document was executed in the name of Jayamma, another daughter of the first defendant. The total area covered by the above three documents was 11.08 acres and Virivu coming to a total extent of 12 acres.

4. Whenever the plaintiff met the first defendant he used to assure that he will execute the documents very soon. In April, 1986, i.e., on 5-4-1986, the plaintiff approached the first defendant to get the sale deed executed. First defendant

agreed to execute, but requested for some time because of his sickness and physical disability. On 1-12-1986 when the first defendant was free from his ailments, the plaintiff again approached him. Then the first defendant put forward some lame excuse and he wanted to protract the matter. On 23-12-1986, the plaintiff issued a notice through his advocate giving 15 days time for the execution of the documents. First defendant sent a reply raising all sorts of frivolous contentions. Before the institution of the plaint, the first defendant attempted to trespass into the plaint schedule property. It was stated that the plaintiff was ready and willing to perform his part of the contract. Hence, the suit was filed.

5. Defendants 1 to 4 filed a joint written statement. The execution of the agreement dated 27-4-1982 is admitted. It was submitted that the plaintiff was a full confident of the first defendant. The agreement was entered into at the instance of the plaintiff and on the basis of the representation made by the plaintiff. First defendant was, for a long time, bed-ridden and he was made to believe that the plaintiff had got 13 acres of well-maintained and high yielding rubber plantation in Poonjar Thekkekara village and worth Rs. 1,00,000/- per acre. It was also represented that there are about 2600 high yielding rubber trees. The plaint schedule property is situated in Palai Municipal Town and it is located in an important place. It is worth more than Rs. 10,00,000/-. First defendant believed the plaintiff without making any further enquiries. The parties did not get possession of the properties immediately after the agreement was executed. First defendant got possession of the property at Poonjar after the sale deeds were executed in favour of defendants 2 to 4. But the possession of the plaint scheduled property was never given to the plaintiff. After the sale when the first defendant entered into the property at Poonjar, it was found that the rubber plantation was of very inferior nature. The property was rocky and the soil was superficial. Trees were of inferior type. Over and above, one of the vendors had not signed. Further, on comparison of the two properties, the first defendant's property was 10 times higher in value. There was no agreement to put off the sale for a subsequent period. Plaintiff played fraud in spite of the close relationship. Feeling himself guilty, the plaintiff volunteered to take reassignment of the rubber estate. It was only after the execution of the sale deeds in favour of defendants 2 to 4 that the first defendant discovered the fraud practised on him. Immediately, he intimated the plaintiff about

this fact and expressed his unwillingness to execute the sale deed in respect of 96 cents of land belonging to him. It is for this reason that the conveyance with regard to the plaint schedule property was not executed. The statement that on 5-4-1985 the first defendant gave assurance to execute the sale deed is denied. The unwillingness and refusal were expressed long before 1-12-1986. First defendant was in possession of the plaint schedule property. The agreement dated 24-7-1982 was the result of misrepresentation. The suit is barred by limitation.

6. During the pendency of the suit, first defendant died and hence, defendants 5 to 10 were impleaded. Defendants 5, 6 and 8 did not file any written statement. Seventh defendant filed a written statement accepting the contentions of defendants 1 to 4. The Court guardian for minor defendants also filed written statement. In the written statement, they pleaded ignorance of the agreement dated 7-4-1982. On the basis of the pleading in the case, six issues were raised by the Court below. PWs 1 to 3 and DWs 1 and 2 were examined. Exts. A1 to A11, Exts. B1 to B15 and Exts. X1 to X2 (e) were marked. The Court below, after hearing both parties and after going through the documents, decreed the suit directing the defendants to execute the sale deed in respect of the plaint schedule property in favour of the plaintiff, within one month and If the defendants fail to execute the sale deed within one month, the plaintiff will be entitled to get the sale deed executed through Court and also to get recovery of possession. The receiver, who was in possession of the property was directed to put the plaintiff in possession of the plaint schedule property. 7. Shri O. Ramachandran Namblar appeared for the appellants and Shri V. Girt appeared for the plaintiff/respondent. The main contentions urged by the appellants' counsel are (1) The suit is barred by limitation. (2) There has been long delay on the part of the plaintiff in enforcing the contract. This delay has prejudiced the defendants. (3) The agreement was executed playing fraud on the first defendant. Hence, the plaintiff is not entitled to any reliefs. In so far as the documents executed by the plaintiff in favour of the defendants are concerned, Ext. B7 suffers from invalidity. All the owners of the property in Ext. B7 are not parties. Hence, the first defendant did not get title over the property mentioned therein. Plaintiff was not ready and willing to execute the sale deed. Learned counsel for the respondent supported the judgment and decree of the Court below. He submitted that the agreement has not fixed any time

limit for executing the sale deed. Hence, under Article 54 of the Limitation Act. Plaintiff has got three years time from the date on which the plaintiff refused to execute the sale deed. Plaintiff has come within three years of that date. There is no delay or laches on the part of the plaintiff. Plaintiff had already performed his part of the contract paying Rs. 1,00,000/- and by putting the defendants into possession of 12 acres of property in Poonjar Thekkekara village after executing the documents in their name. The allegation of fraud and misrepresentation is denied. Plaintiff was always ready and willing to execute the sale deeds and that there was nothing to interfere with the judgment and decree of the Court below.

8. On the above facts and circumstances, the following points arise for consideration in the appeal;

(1) Whether the suit is barred by limitation ?

(2) Was the Court below right in granting specific performance in view of the fact that there has been long delay on the part of the plaintiff to get the sale deeds executed ?

(3) Whether the agreement Ext. A1 is vitiated by fraud or misrepresentation or other vitiating elements ?

(4) Whether the defect in Ext. B4 title will stand in the way of granting decree

9. First contention raised by the learned counsel for the appellants is that the suit is barred by limitation. According to counsel, the registered agreement was executed on 27-4-1982 and the suit was filed only in 1987, i.e., on 30-1-1987. Ext. A1 is the agreement. It is as follows : Parties have decided to transfer 12 acres of property belonging to J. J. Construction Company and also 96 cents of property belonging to first defendant. To equalise the cost, an amount of Rs. 1,00,000/- is to be paid by the plaintiff to the first defendant. Out of this amount of Rs. 1,00,000/-, an amount of Rs. 10,000/- has to be paid to the first defendant on the date of the agreement. The balance amount will be paid within one month. It is further stated that the sale deeds can be executed in the name of the nominees of the respective parties. Ext. A1 agreement does not fix any period within which the

sale deeds had to be executed. Under Articles 54 of the Limitation Act, if a period is fixed under the agreement, the suit has to be filed within three years of the expiry of the period fixed in the agreement and If no period is fixed, the suit has to be filed when the plaintiff has notice of the refusal on the part of the defendant to execute the agreement. It is seen that on the basis of the agreement, the sale deeds were executed in favour of the nominees of the first defendant on 20-9-1982. Further, the entire outstanding amount was paid to the first defendant by 9-12-1982. This is revealed from Ext. B5. According to the defendants, the date of refusal should be taken as the date of Ext. B5, viz.. 9-12-1982. In the plaint, the plaintiff has stated in paragraphs 7, 8 and 9 regarding the delay. In paragraph 7 of the plaint, it is stated that the first defendant continued to repeat his assurances and readiness to execute the deed as and when demanded by the plaintiff. In April, 1986, i.e., on 5-4-1986, the plaintiff approached the first defendant to get the sale deed executed in respect of the Palai property. First defendant had assured and agreed to comply with, but pleaded that because of his sickness and the consequent physical disability, a convenient date could be fixed up later. On 1-12-1986, when the first defendant was practically free from his ailments, the plaintiff again approached the first defendant and told him that he would get the documents prepared for his signature and that he should come to put his signature. Then the first defendant put forward some lame excuses and wanted to protract the matter further. The negative attitude and behaviour of the first defendant coupled with his lame excuses made the plaintiff understood that the first defendant was unwilling to execute the deed. On 23-12-1986, the plaintiff caused a notice giving 15 days time for executing the sale deed. The said notice was served on the first defendant on 2-1-1987.

10. A reply was given by Ext. B-15 dated 14-2-1987 refusing to execute the sale deed. Even though on behalf of the first defendant, evidence was given to show that the first defendant refused to execute the sale deed earlier, no acceptable evidence has been adduced to show that there was refusal on the part of the first defendant earlier. Further, we are of the view that in the facts and circumstances of the case such a refusal could not be there, since the plaintiff had already performed his part of the contract and put the first defendant and his nominees in possession of 12 acres of property, which he agreed to sell to the defendants. No

evidence has been adduced to show that the first defendant was not satisfied with the performance of the contract by the plaintiff. Further, the case of the plaintiff was that he was put in possession of the property and this has been accepted by the Court below. In such circumstances, it was quite natural for the plaintiff to give time to the first defendant to execute the sale deeds.

11. Thus, on the facts and evidence in the case, we are of the view that refusal was made by the first defendant only when he sent reply notice to Ext. B-15 or at the earliest on 1-12-1986 as it is stated In paragraph 9 of the plaint. In paragraphs 7, 8 and 9. of the written statement, the defendants stated that by the end of December 1982 it was come to know about the fraud practised by the plaintiff and intimated him and according to them, from December, 1982 the cause of action arose. As already stated, there is no evidence to show that the first defendant expressed his unwillingness earlier.

12. Learned counsel for the plaintiff relied on the decision reported in *Mary v. Gopalan* (1987) 1 Ker LT 246 in support of his argument. That is a case where no period was fixed for performance. Question there was what was the date which was to be taken as starting point of limitation. Agreement in that case was executed on 12-11-1970. On 10-2-1972 defendants issued notice to the plaintiff informing them that in spite of repeated demands they did not come forward with the money. It was only on 22-6-1977 that the plaintiffs issued notice to the defendants requesting them to convey the property on receipt of the balance amount. Defendants refused the request. It was in that circumstances that the Court held that the suit was barred by limitation. The decision In *Craft Centre v. Koncherry Coir Factories* (1990) 2 Ker LT 837 : (AIR 1991 Ker 83) deals with acknowledgment under Section 3 of the Limitation Act. That decision only says that it is the duty of the plaintiff to convince the Court that his suit is within time. If it is out of time and the plaintiff relies on any acknowledgment or acknowledgements in order to save limitation, he must plead them or prove, if denied. The above question does not arise In this case. Plaintiff has clearly averred in the plaint that the cause of action arose only on 1-12-1986 when the first defendant refused. Plaintiff does not rely on any acknowledgment. The decision reported in *Rudrani v. Velayudhan* (1993) 2 Ker LT34 (SN) only says that when the agreement is silent

with regard to the date on which the contract is to be performed, the date of refusal known to the plaintiff is the basis for computation of the period of limitation. The decision in *Purshottam Save v. Kunverji Devji*, AIR 1954 Saurashtra 104 - was also cited before us. In paragraph 8 of the above decision, on the facts of that case, the Court came to the conclusion that the plaintiff became aware of the refusal of the contract. We have no dispute with regard to this proposition. But so far as this case is concerned, there was no evidence regarding that aspect. Even in Ext. B-15 the defendants have not stated that they refused to perform their part of the contract when they came to know that a fraud was practised on the first defendant.

13. Learned counsel for the contesting respondent placed before us the decision reported in *D.S. Thimmappa v. Siddaramkka* (1996) 8 SCC 365 : (AIR 1996 SC 1960) In the above decision, it is stated as follows: 'It is settled law that unless the deed of agreement of sale stipulated a date for performance, time is not always of the essence of the contract'.....Limitation for specific performance begins to run from the date fixed in the contract or from the date of refusal to execute the sale deed. Since time is not the essence of the contract, the respondent had offered the payment of the amount before the expiry of the date of reconveyance but the appellant had refused to reconvey the same. The cause of action arose on expiry of eighty years from the date of execution of the later sale deed.' Thus, the defendants here cannot say that the suit is barred by limitation mainly on the ground that there was some delay in demanding for specific performance after the execution of the agreement.

14. The second contention urged by the appellants is that the agreement dated 27-4-1982 is vitiated by fraud and misrepresentation, With regard to this, what is averred in paragraph 3 of the written statement is that the agreement was entered into at the instance of plaintiff and on the basis of the representation made by the first defendant. First defendant for a very long time was bedridden and he was made to believe that the plaintiff had got 13 acres of well maintained and high yielding rubber plantation in Poonjar. It was also stated that there are about 2600 high yielding rubber trees. The value of the property in Palai is more than Rs. 10 lakhs. First defendant believed the plaintiff implicitly. It is further stated that on

entering the property after X mas in 1982. the first defendant learned that the plaintiff has played fraud on the first defendant despite the confidence reposed on him. The rubber plantation offered to be exchanged was of inferior nature. It was rocky and the soil was superficial. Another contention raised was that Ext. B-3 sale deed was not properly executed. So far as evidence on this aspect is concerned, PW-1 clearly stated that the agreement was executed after previous negotiations with the first defendant. Excepting stating that the first defendant was not well, there is no evidence to show that he was not able to understand things. The two certificates, Exts. B-8 and B-9 produced are not for the relevant years. Further DW-1 the first defendant's son has stated that he had visited the property at Poonjar before the sale deed was executed. There is nothing to show that the plaintiff was able to dominate the will of the first defendant. Further, even though it has been stated that a fraud has been committed, there is no evidence regarding the alleged fraud. Plaintiff agreed only to sell 12 acres of properly and not 13 acres and he had executed sale deeds for 11 1/2 acres plus 'Virivu'. There is no evidence to show that the property at Poonjar was of Inferior quality. If as a matter of fact, the plaintiff had misrepresented or committed fraud, the first defendant would have immediately recommended for termination of the agreement. On the other hand, after getting the sale deeds executed, he also received balance money. This is evidenced by Ext. B-5 dated 9-12-1982. The evidence of DW-2 is also not of any help. Hence, we are of the view that there is no vitiating elements. Ext. A-1 is not vitiated by fraud or) misrepresentation.

15. Learned counsel for the appellants then submitted that the agreement was exeucted in 1982 and the notice was issued only in December, 1986. There is a gap of 4 years. This amounts to laches on the part of the plaintiff. Hence, this Court need not exercise discretion in favour of the plaintiff. It Is true that the decree of specific performance is a discretionary remedy. If a person, who seeks performance, is guilty of delay or laches, this Court will refuse to pass a decree for specific performance in favour of the plaintiff, even if he is entitled to the same on other respects. But the question whether a person is guilty of delay or laches depends upon the facts and circumstances of each case. It cannot be said that because there is a delay of four years, the plaintiff should not be given a decree.

16. It was observed in *Erlanger v. NewSombrero Phosphate Co.* (1878) 3 App. Cas. 1218 -- as follows:

'Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay. . . . But delay may also imply acquiescence ... It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hand about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case.'

Where a delay in payment has been acquiesced in by the vendor of immovable property and no notice terminating the contract has been given, the Court will decree specific performance - vide *Ghyasuddin Ahmed v. Mahomed Ismail*, AIR 1946 Cal 521. Notwithstanding a stipulation to the effect that time is of the essence of the contract, if surrounding circumstances are such as to excuse the failure of the plaintiff to complete the transaction, specific performance will not be refused -- vide *Nanik Lal v. Shankar Lal*, AIR 1962 Cal 103. Supreme Court in *Satyanarayana v. Yellogi Rao* (1965) 2 SCR 221 : (AIR 1965 SC 1405) held that mere delay in bringing a suit for specific performance is not sufficient to defeat the suit unless it amounts to waiver or acquiescence but unexplained inaction bars the grant of the equitable relief. What amount of delay will constitute a bar to relief by way of specific performance, where time is not of the essence of the contract, depends on the circumstances of each case.

17. So far as the facts of this case is concerned, we don't find that there has been any delay or laches on the part of the plaintiff. The agreement was executed in April, 1982. Plaintiff executed the sale deeds in favour of the nominees of the first defendant on 20-9-1982 and all the payments due to the first defendant were given by 9-12-1982. It is also seen that the first defendant was put in possession of the property comprised in Exts. B-1 to B-3. The only act that remained to be done was the execution of the sale deeds by the first defendants in favour of the

plaintiff. According to the plaintiff, the first defendant was postponing this. In the above circumstances, we don't find that there is any delay or laches on the part of the plaintiff.

18. It was next contended by the learned counsel for the appellants that what is contemplated is only an exchange of the properties under Ext. A-1 and not a sale and hence, when the first defendant executed the sale deed immediately there has been frustration of the contract. On a reading of Ext. A-1 it cannot be said to be a mere exchange. While the first party has agreed to transfer 12 acres in favour of the second party, the second party has agreed to transfer 96 cents in favour of the first party. It is further stated that the documents can be executed in favour of all the persons nominated by the parties. It contemplates sale deeds by both parties. It is not an exchange that is contemplated.

19. Another argument raised was that in Ext. B-3 one of the executants P.A. Varghese has not signed and hence, that document is Invalid and thus, the plaintiff has not performed his part of the contract. Plaintiff has stated the circumstances under which the documents were executed. It was only after the documents were written, it came to be noted that P.A. Varghese was dead. The documents were executed by two persons. There is no case, for the first defendant that he was not put in possession the property mentioned in Ext. B-3. Further, the legal representatives of the aforesaid Varghese are standing by Ext. B-3 document and they have executed power of attorney in favour of the plaintiff to convey their rights in favour of the first defendant, which is evidenced by Ext. A11. According to the first defendant, the property in Palai is worth lakhs of rupees. But In the plaint, a low value is shown and hence, it was done with a view to avoid stamp duty and income-tax. Hence, the contract should not be specifically enforced. As rightly stated by the Court below, if there is any violation of Stamp Act or the Income-tax Act, It is for the authorities under those Acts to take action. There is nothing on record to show that the value stated in the plaint is not correct.

20. Thus, on going through the facts and circumstances of the case and on going through the records in the case, we are satisfied that the plaintiff is entitled to the decree. But we modify the decree with regard to one aspect. Before directing the

defendants to execute the sale deed In favour of the plaintiff, as the power of attorney holder of Marlamma Varghese and Mrs. Lucy John mentioned in Ext. All. the plaintiff is directed to execute the sale deed with regard to their rights in the property mentioned in Ext. B-3. This shall be done within two months from today. The defendants are directed to execute the sale deed in respect of the plaint schedule property in favour of the plaintiff within one month thereafter. If the defendants fail to execute the sale deed as stipulated above, the plaintiff is entitled to get the sale deed executed through Court at his expense. Plaintiff is also entitled to get recovery of his cost of the suit. It is stated that the plaint schedule property was in the possession of the receiver and as per the direction of the lower Court, the receiver has to hand over possession of the plaint schedule property to the plaintiff. Hence, we allow the plaintiff to take possession of the property.

Appeal is dismissed. No order as to costs.

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