

Ouseph and anr. Vs. Devassy

Ouseph and anr. Vs. Devassy

SooperKanoon Citation : sooperkanoon.com/730251

Court : Kerala

Decided On : Oct-27-2000

Reported in : AIR2001Ker104

Judge : M.R. Hariharan Nair, J.

Acts : [Specific Relief Act, 1963](#) - Sections 28

Appeal No. : C.R.P. No. 386 of 1998

Appellant : Ouseph and anr.

Respondent : Devassy

Advocate for Def. : K.N. Narayana Pillai and; Dinesh R. Shenoy, Advs.

Advocate for Pet/Ap. : S.K. Brahmanandan,; S.B. Premachandra Prabhu and;
G.S. P

Disposition : Revision dismissed

Judgement :

ORDER

M.R. Hariharan Nair, J.

1. The revision petitioners are the defendants in a suit for specific performance. The first petitioner and the respondent are brothers. The former had obtained a

loan of Rs. 734/- from the latter. While so, on 22-6-1982 an agreement was entered into between them whereby the revision petitioners, who are man and wife agreed to sell 26.5 cents of land to the respondent for consideration at the rate of Rs. 325/- per cent. Out of the total sale consideration of Rs. 8,612.56 so due, Rs. 734/- was adjusted towards the loan amount. The total consideration paid and received on the date of agreement was Rs. 7,400/- and with regard to the balance, provision was made in the agreement. The respondent was also put in possession. In due course, the respondent moved for specific performance and the suit was decreed in his favour on 31-3-1987. It was directed that the plaintiff should pay a sum of Rs. 1,212.50 on receipt of which the defendants should execute the sale deed before 30-6-1987. Alleging that the defendants have failed to execute the conveyance on receipt of the money offered by the plaintiff, Execution Petition was filed on 6-8-1986 and in the absence of any objection to the Execution Petition, the execution of document was allowed as prayed for.

2. During the pendency of the E.P. the plaintiff deposited the balance amount due to the defendants on 11 -2-1997. On the next day i.e., 12-2-1997 the defendants filed I. A. No. 494/97 on the trial side invoking Section 28 of the Specific Relief Act and seeking rescission of the agreement to sell. The application was resisted and during the pendency of this application plaintiff filed I.A. No. 1959/ 97 also on the trial side seeking condonation of the delay involved in the deposit of the balance sale consideration. The Court below considered the two petitions together and passed the impugned order dismissing the defendants application I. A. No. 494/97 and condoning the delay in the deposit as prayed for in I.A. No. 1959/97.

3. The learned counsel for the revision petitioners submitted that the Court below has not approached the question from the proper perspective and that in the absence of any plausible explanation on the part of the plaintiff in not making the deposit of the balance sale consideration within reasonable time, the Court below should have upheld rescission of the contract as prayed for in I. A. 494/97. Case law was also relied on in this regard. As regards the contention of the plaintiff, deposed to by him when he went to the box, that in the year 1987 he had issued a notice calling upon the defendants to receive the balance sale consideration at the Sub-Registrar's office and also waited for the defendants there, on that day though

in vain, it was argued that there is no documentary evidence adduced in support of the said plea.

4. On behalf of the respondent herein it was contended that here is a case where the lion's share out of the total sale consideration was received by the vendors on the date of agreement itself and the plaintiff was also given possession of the property on the date of agreement and that the consequence of allowing I.A. No. 494/97 would be upsetting the long possession held by the plaintiff for the past 18 years. It is also argued that the defendants did not take any step for getting the balance of sale consideration through any petition and even failed to seek rescission at any time until the plaintiff moved for execution of the sale deed through Court on deposit of the entire balance sale consideration. According to him, there are no grounds for allowing rescission in the circumstances.

5. I have considered the submissions as above. Section 28 of the Specific Relief Act relied on by the revision petitioners reads as follows :

'28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed. -- (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under Sub-section (1), the Court -

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor; and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or the lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in Sub-section (1), the Court may, on application made in the same suit, award the purchaser or lessee such further reliefs as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely :--

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the Court.'

6. Here is a case where the decree was silent as to the date by which the plaintiff should deposit the balance of sale consideration. It was argued by the learned counsel for the revision petitioner that in such circumstances, the deposit has to be made within a reasonable time.

7. The Hon'ble Supreme Court has found in the decision in H.I. Trust v. Haridas Mundhra, AIR 1972 SC 1826 that for the purpose of Section 28 the contract between the parties does not get extinguished by the passing of the decree; it subsists even thereafter and that if a contract does not specify the time for performance, the law will imply that the parties intended that the obligation under the contract should be performed within a reasonable time. Even extending the

said finding with regard to the deposit for the period after the decree where the decree is silent with regard to the relevant date, the reasonableness of the delay has to be considered based on the surrounding circumstances.

8. The learned counsel for the revision petitioners relied on a decision in *Kanhaiyalal v. Abdul Hussain* AIR 1985 Madh. Pra. 24 where even nine month's delay was found unjustified. However, whether it is 9 months or longer period what is crucial on the point is the circumstances in which the delay occurred. *K. Kalpana Saraswathi v. P.S.S.S. Chettiar* AIR 1980 SC 512 took the view that even at the stage of appeal before the Supreme Court, the time to make deposit could be extended to enable the plaintiff to get the advantage of the agreement to sell. In *Joseph George v. Chacko Thomas* (1992) 1 Ker. LT 6 a Bench of this Court also had occasion to consider the question of delay and its impact on an application under Section 28 of the Specific Relief Act. It was found that the fact that Section 28 enable the Court to extend time itself would imply that mere failure to deposit need not result in the rescission of the contract. The Specific Relief Act, it was held. Is not an exhaustive enactment and it does not consolidate the whole law on the subject and despite the passing of the decree in a suit for specific performance, the Court retains the control and it is open to the Court to entertain an application for rescission of the decree if it is shown that the plaintiff 'positively refused' to complete the contract. It was further held that the wilful refusal by the plaintiff to make the deposit would be a relevant circumstances to rescind the contract under Section 28 of the Act. In the context of Section 28 of the Act and also Order XXI Rule 32 C.P.C., it would not be possible to hold that a decree passed for specific performance can be effaced for the mere failure to deposit amount in time. This is particularly so since under Section 28 of the Act and under Section 148 of the C.P.C. the Court can extend the time for deposit.

9. In the present case there are certain circumstances which are in favour of the decree-holder; the first of them being, that on the date of agreement itself the plaintiff was given possession and such possession has continued for 18 years by now. The motion for rescinding the contract actually comes 15 years after the execution of the contract and 10 years after the passing of the relevant decree. It is very important that before the defendant's petition was filed, the decree holder

had already deposited the entire balance sale consideration before court, though the difference between two events is only one day. It is also important that in the instant case out of the total sale consideration of Rs. 8,612.56 the lion's share, namely, Rs. 7,400/- was paid on the date of agreement itself and the defendants have had the benefit of utilisation of this fund during all these years. It is also seen that the defendants have failed to adduce evidence in support of their contention when the matter was posted for-evidence in the trial Court. On the other hand, the decree holder went to the box and deposed about circumstances. It is true that documentary evidence is not forthcoming to show that the plaintiff had actually issued a notice in the year 1987 calling upon the defendants to come to the Sub-Registry and to receive the balance amount. But then it is also to be remembered that the defendants have not chosen to go to the box and deny the said averment.

10. In the circumstances, I am of the view that the Impugned order allowing the condonation of delay in the matter of deposit of the balance amount and dismissing the application filed under Section 28 of the Specific Relief Act does not suffer from any irregularity or Impropriety justifying interference in exercise of the revisional power of this Court.

The C.R.P. is without merit it is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com