

Hamsammal Vs. P.V. Thakkar

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SooperKanoon Citation : sooperkanoon.com/797733

Court : Chennai

Decided On : Sep-23-1981

Reported in : AIR1982Mad108

Judge : Ramanujam and ;Singaravelu, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 20

Appeal No. : Appeal No. 160 of 1979

Appellant : Hamsammal

Respondent : P.V. Thakkar

Advocate for Def. : M.N. Padmanabhan, Adv.

Advocate for Pet/Ap. : R. Krishnamurthi and ;K.S. Sundaram, Advs.

Judgement :

1. The defendant is the appellant. The respondent herein filed the suit for specific performance of the contract of sale D/- 20-10-1974, with the following averments: The appellant defendant is the owner of a house property situate at Oppannakara, St. Coimbatore town. On 20-10-1974, she entered into an agreement with the respondent herein, under which the former agreed to sell the property for a sum of Rs. 55,000/-. A written agreement Ex. A. 1 was duly executed between the parties incorporating all the terms and a sum of Rs. 2502/- was paid as advance. A tenant

was in possession of the said property and therefore it was agreed that the balance amount has to be paid at the time of the sale deed and a time of 90 days was fixed for that purpose. It was also agreed that vacant possession has to be delivered within that time, after evicting the tenant. On 2-11-1974, the respondent herein paid another sum of Rs. 2,500/- to the appellant. However, the appellant could not recover possession from the tenant within the stipulated time of 90 days. There were also two mortgage debts over the suit property and the respondent herein agreed to discharge the same from out of the sale price in March 1975, the respondent herein discharged the two mortgage debts amounting to Rs. 32,600/at the request of the appellant. The respondent herein called upon the appellant to execute the sale deed after receiving the balance amount. But the latter was postponing it under some pretext or other. The respondent then gave a notice to the appellant on 1-9-75 setting out all the facts and the appellant gave a reply expressing her readiness and willingness to execute the sale deed and complete the transaction. But she continued to evade and committed breach of the contract and hence, the suit for specific performance of the agreement of sale.

2. The appellant-defendant admitted the agreement, but contended that she did not quite understand the terms of the agreement, since it was written in English. Further, the property was in the possession of a tenant and it was not possible for her, she being a woman, to evict the tenant who is in possession of the property and hand over vacant possession of the property to the appellant. The appellant was always ready to receive the balance and execute the sale deed; but it was the respondent herein, who did not evince any interest in getting the sale deed. In fact, in his notice dt. 1-9-1975, the respondent has demanded only the return of all the amounts paid by him and therefore he had abandoned the claim for specific performance. Therefore, at best, he is entitled only to get back the amounts paid by him and not entitled to seek specific performance of the agreement.

3. The learned Subordinate Judge found on the facts of the case that time was not the essence of the contract between the parties, that the plaintiff was always ready and willing to perform his part of the contract and that it was only the defendant, who evaded and finally committed breach of the contract consequently, the trial court decreed the suit for specific performance of the contract and directed the

appellant to deliver only symbolic possession of the property. The defendant is aggrieved by the judgment and decree of the trial Court and has filed this appeal.

4. The following points arise for determination in this appeal :-

1. Whether the respondent herein was ready and willing to perform his part of the contract?

2. Whether the appellant committed breach of the agreement and if so, whether the respondent is entitled to specific performance of the agreement?

5. The following facts are not in dispute. The appellant agreed to sell and the respondent agreed to purchase the suit building for a sum of Rs. 55,000/- and a written agreement of sale was executed between the parties- on 20-10-1974 under Ex. A. 1. A sum of Rupees 2,502/- was paid as advance and within two weeks thereafter, a further sum of Rs. 2,500/- was paid-Vide Ex. A.2. A tenant was in possession of the property. But in spite of it, the appellant defendant agreed to evict him and put the respondent in vacant possession of the same within 90 days.' There -ere also two mortgage debts over the suit property and the plaintiff agreed to discharge the same. For some reason or other, the tenant could not be evicted within that short period and both parties treated time was not the essence o the contract. On 5-3-1975, the respondent herein at the request of the appellant, discharged the two mortgages amounting to Rs. 32,680, and obtained registered receipts for the discharge Vide Exs. A. 3 and A. 4.

6. There was a lull from the first week of March, 1975 till 1-9-1975, when the respondent herein issued a notice to the appellant under Ex. B. 1 complaining that the appellant has committed breach of the agreement of sale by her inaction and non-fulfilment of the contract. This notice effected a prompt reply from the appellant thr6ugh her lawyer under Ex. A. 5 on 8-9-1975, stating that she never agreed to deliver vacant possession of the property, since the property was in the possession of a tenant and it was beyond her power to recover possession from the tenant. She then categorically stated in the notice that her sons are not liable to join the execution of the sale deed and that she was and is always ready and willing to execute the sale deed. She further stated in her reply notice that the

respondent herein was attempting to wriggle out of the contract and called upon him to have the sale deed executed. She had also plainly admitted that the respondent herein discharged the mortgage debts on the property from out of the sale price agreed to. The respondent herein then sent a rejoinder on 12-9-1975 under Ex. A 6 that he was ready and willing to take the sale deed as per Ex. A. 1 and called upon her to do the needful. Admittedly there was no response and therefore the respondent herein filed the suit for specific performance on 2-12-1975. Thus far, there is no controversy between the parties and these facts are admitted and gathered from the evidence on record.

7. On these undisputed facts, the question that arises is, whether the respondent herein was ready and willing to perform his part of the contract and consequently whether he is entitled to the specific performance of the agreement. It is well to remember that there is an initial presumption that specific performance is the proper remedy on a contract to convey -immovable property, in other words, usually specific performance is allowed in the case of an agreement to sell immovable property; but such a presumption is not absolute and is liable to be rebutted. It is also well settled that no one can claim this equitable relief as a matter of right nor the Court would grant it as a matter of course. Section 20 of the Specific Relief Act lays down at the outset that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so such a discretion has to be exercised for valid and sound reasons guided by judicial principles. One of the grounds on which this equitable relief is sometimes denied is 'delay'. Even there, it is only where it would be practically unjust to give a remedy either because the party has by his conduct, done that which might fully be equivalent to waiver of it or had put the other party in a situation prejudicial or inequitable to his interest. These principles are laid down in *Satyanarayana v. G. Yelloji Rao*, : [1965]2SCR221 . The other principles to be remembered are, that a mere delay in the institution of a suit for specific performance of a contract to sell the property is not by itself sufficient to defeat the claim and the delay must be of such a character as to give rise to an inference of the abandonment of the right or to disclose some prejudice to the defendant - vide *Arjuna Mudaliar v. Lakshmi Ammal*, AIR 1949 Mad 265 and *Sankaralingam. v. Ratnaswami* : AIR1952 Mad389 . It is also well settled that the delay in the

institution of suit, if it is in time, will not by itself justify the dismissal of the claim for specific performance.

8. Bearing these general principles in mind, with reference to the equitable relief, let us analyse the facts of the case on hand. It is nobody's case that time was the essence of the contract, though Ex. A. I agreement of sale stipulates a period of 90 days for the execution of the sale deed. The appellant defendant herself had clearly stated in her reply notice thro' her lawyer (Para 6) that time was not the essence of the contract and that time was neither the intention nor in contemplation of the parties. Further, the parties themselves have clearly treated that time was not the essence of the contract, since the respondent herein has paid a large sum of Rs. 32,680 and discharged, the two mortgage debts on 5-3-1975, that is to say, about 4-1/2 months after the date of the agreement. Obviously the discharge of the debts by the respondent herein was not a voluntary payment, since the mortgage debts are clearly mentioned in the agreement of sale and what is more, it was also agreed that the proposed purchaser (respondent herein) shall discharge the two debts by payment to the mortgagees and take all the title deeds from them and retain them, by way of records. Above all, in the reply notice, Ex. A. 5, dt. 8-9-1975 (issued about 11 months after the agreement of sale), the appellant-defendant plainly agreed thro' her lawyer that she was willing to execute the sale deed. In fact, it is not pretended even now that time was the essence of the contract. As stated already, the suit for specific performance itself was filed in Dec. 1975 i.e., well within three years from the date of the agreement.

9. Learned counsel for the appellant relied on two circumstances to urge that the respondent herein is not entitled to a decree for specific performance. Firstly, it was pointed out that the suit property was admittedly in possession of a tenant and therefore, delivery of vacant possession was impracticable. In other words, it was argued that the appellant, a woman, was not in a position to deliver vacant possession of the property after evicting the tenant and therefore, the contract was almost, impossible of performance. This argument is pointless in view of the fact that the appellant, who is said to be a knowing woman, entered into an agreement of sale, with her eyes wide open agreeing to evict the tenant and put the purchaser (respondent) in possession. Further, the evidence is that immediately after the suit

was filed, the tenant had vacated the property. That apart the trial Court itself has not granted a decree in favour of the respondent for vacant possession; but only directed delivery of symbolic possession. The trial court agreed with the contention of the appellant-defendant that she was not in a position to deliver vacant Possession and therefore mere symbolic possession was directed in the judgment and decree. Therefore, the appellant cannot have any grievance, since she is relieved of the burden of evicting the tenant and the respondent herein is content for the present to take constructive possession of the property.

10. The only other circumstance relied on by the appellant is the notice Ex. B. 1, under which the respondent herein called upon the appellant to pay all the amounts, paid by him (Rupees 37,680) as part of the sale price and also the penalty stipulated in the contract together with interest. Much was made of this recital in Ex. B. 1 and it was strenuously argued on behalf of the appellant that this clearly amounts to waiver or abandonment of the right of agreement of sale. We have carefully considered this argument in the light of the evidence and we are satisfied that there are no merits in this plea. For one thing, this call for the refund of the amount was not unqualified and it must be read in its proper context. The notice, under Ex. B. 1 contains three pages and the major portion of this notice lists out the omissions of the appellant and clearly states that she has committed breach of the agreement, However in the fag-end of the notice, the respondent herein called upon the appellant to pay back all the amounts, which he had paid till then. There is nothing in this notice to indicate that the respondent herein had terminated the contract or abandoned his right under the agreement of sale.

11. For another, the reply notice under Ex. A. 5 by the appellant-defendant puts at rest doubts if any, in the performance of the agreement of sale. In this reply notice, the appellant thro' her lawyer, has stated as plainly as words could convey that she was always ready and willing to execute the sale deed for the consideration of Rs. 55,000 and was still ready and willing to execute the sale deed. The notice further reads - 'Your present attempt to wriggle out of the contract, is not permissible.' Finally, it is repeated, 'I am (appellant herein) still ready and willing to execute the sale deed and complete the transaction.' It is therefore absolutely clear that the appellant has kept the contract alive and stated so in unmistakable

terms and in unqualified manner. Having taken up this stand, it is not now open to the appellant to contend that the respondent herein should not be granted a decree for specific performance. It is also important to note that the respondent herein immediately sent a rejoinder under Ex. A. 6 on 12-9-75, reiterating his stand to stand by the contract and called upon her to execute the sale deed. There was no response, and after waiting for about 2-1/2 months, the respondent had come to court and there is nothing in the reply notice Ex. A. 5 to hold that the respondent herein had abandoned or waived the contract. On the other hand, Ex. A. 6 proves the contra.

12. A faint attempt was made by the learned counsel for the appellant stating that there was a delay in filing the suit and that the respondent has slept over the matter from Mar. 1975 till Sept. 1975. This delay, according to the learned counsel, amounts to abandonment. We regret we are unable to agree with this contention. There was no delay worth mentioning and it is vain to contend that the respondent, who is a Gujarati businessman and who has parted with a large sum of Rs. 37,680, out of the sale consideration of Rupees 55,000 abandoned his right for no rhyme or reason. Obviously, the parties were perhaps talking over the matter with reference to possession and with reference to the persons who had to execute the sale deed. The explanation of the respondent herein for the alleged delay is this: It is noticed, that the two mortgage deeds over the suit property were executed by the sons of the appellant also and therefore the respondent called upon the appellant to make the sons also join the execution of the sale deed. However, the appellant declined to that and stated that her sons -had nothing to do with the property and therefore they need not be added as executants. Obviously there was some delay on this aspect. The further explanation averred by the respondent herein is that he is a native of Ahmedabad in Gujarat State and that on 9-4-1975, his daughter died all of a sudden in an accident at Ahmedabad and that therefore, he had to go to his home town in Gujarat. Thus, the short delay is quite understandable. In any event, the delay if any on the part of the purchaser (respondent) has been condoned by the seller (appellant) and she had categorically stated in her reply notice Ex. A. 5 in Sept. 1975, that time was not the escape of the contract and that she was always ready and willing to execute the sale deed. The result is that there is no difficulty in confirming the findings of the

trial court that the respondent was always ready and willing to perform his part of the contract and that it was only the appellant, who evaded the same, perhaps on account of the steep rise in price of the immovable properties since the agreement of sale entered into in 1974. There is not even a single circumstance in favour of the appellant herein and she has not been prejudiced in any manner whatsoever. We therefore see no difficulty in holding that the respondent was rightly given a decree for specific performance of the contract.

13. Learned counsel for the appellant contends as a last resort that it may be made clear that the appellant is not bound to execute the sale deed in terms, of the contract of sale. In other words it was submitted that the appellant is not in a position to give vacant possession and that therefore, she cannot wholly comply with the terms of the agreement. But then, the trial court has taken this into consideration and granted only delivery of symbolic possession of the property.

14. In the result, the appeal fails and is dismissed with costs. Time for execution of the sale deed six weeks.

15. Appeal dismissed.