CASE NO.:
Appeal (civil) 336 of 1997

PETITIONER:
V. PECHIMUTHU

Vs.

RESPONDENT:
GOWRAMMAL

DATE OF JUDGMENT: 01/08/2001

BENCH:
V.N. Khare & Ruma Pal

JUDGMENT:

RUMA PAL, J.

This appeal impugns an order passed by the High Court in second appeal. The High Court set aside a decree for specific performance granted to the appellant by both the Trial and the First Appellate Court. The issue is whether the High Court was justified in setting aside a concurrent finding of fact within the limits prescribed by Section 100 of the Civil Procedure Code.

Let us consider the facts.

The appellant was the owner of certain property. The property was tenanted and mortgaged. By a deed dated 2nd May 1973, the appellant sold the property to the respondent for a sum of Rs. 20,000/-. Out of this amount a sum of Rs.15,005/- was to be paid by the respondent to the mortgagee of the property to clear the appellants mortgage debt. The sale deed recorded that the balance amount of Rs.4,995/- was received by the appellant from the respondent for re-payment of advance rent made by the tenants of the property to enable the respondent to get vacant possession.

On 4th May 1973, a separate agreement was entered into between the appellant and the respondent by which the appellant agreed to sell the property back to the appellant after the 5th year from the date of the execution of the agreement and before the expiry of the 6thyear for the sum of Rs.19,900/-. (Rs.20,000 less an amount of Rs.10/- paid by the appellant to the respondent by way of an advance.) This is the agreement which is the subject matter of the litigation before us and is referred to hereafter as the agreement. Both the sale deed and the agreement were registered on 13th June 1973.

After the sale, the respondent took possession of the property and has been in possession of the property since then. It is the appellants case that after 5 years, the appellant made repeated demands in person and through mediators calling upon the respondent to execute the sale deed at the appellants expense after receiving the entire amount of Rs.19,990. The respondent refused to do so. Ultimately, the appellant sent a notice through his lawyer on the 6th February 1979 asking the

respondent to send a reply within three days from the date of the receipt of the notice specifying the date on which the respondent would execute the sale deed at the Sub Registrars Office after receiving the consideration of Rs.19,900/- and to deliver possession of the property in the same condition in which it was sold. The notice was received by the respondent on 7th February 1979. On 16th February 1979, the respondent replied refuting the demand of the appellant and claiming an amount higher than Rs.20,000/- as she had paid a further sum of Rs.1448/- to the mortgagee over and above the sum that she was liable to pay under the sale deed and had also incurred expenses of Rs.700/- in connection with the litigation with the mortgagee. According to the respondent, she had also paid a further sum of Rs.3,000/- to the respondent and that, therefore, the appellant was bound to give up his right to a re-conveyance of the property.

In March, 1979 the appellant filed a suit claiming specific performance of the agreement. While narrating the facts in the plaint, the appellant also stated that the respondent did not in fact pay the appellant the sum of Rs.4,995/- as stated in the sale deed. A sum of Rs.2,500/- had been paid by the respondent directly to the tenant of the property but the balance amount of Rs.2495/- was never paid to the appellant. The appellant also claimed that he had to pay a sum of Rs.2,000/- to the mortgagee because the respondent had defaulted in clearing the mortgagees dues in time. The appellant further stated that he was always ready and willing to perform his part of the agreement ever since the date stipulated for re-conveyance of the property, namely, 3.5.1978 and had been making repeated demands on the respondent in person and through mediators to execute the sale deed at the expense of the appellant after receiving the entire amount of Rs.19,990/-. The claim set up by the respondent in the respondents letter dated 15th February 1979 was denied and it was reiterated that the appellant was always ready and willing to perform his part of the agreement dated 4th May 1973 and that he was ready to pay the balance amount of sale consideration of Rs.19,990/- and the expenses for effecting the sale to the appellant even on the date of the filing of the suit. The appellant claimed mesne profits in respect of the respondents continued possession of the suit property after 3rd May 1978 as also credit for the amount of Rs.2,000/- alleged to have been paid by the appellant to the mortgagee and a sum of Rs.3,000/-towards the expenses which would be incurred by the appellant for repairing the suit properties. The readiness and willingness of the appellant to perform the agreement dated 4th May 1973 was again reiterated in paragraph 11 of the plaint. The appellant has ultimately prayed for a decree:-

directing the defendant to execute a sale deed in respect of the suit properties in favour of the plaintiff at the plaintiffs expense for a consideration of Rs.20,000/- after receiving the balance of sale consideration (as determined by this Honble Court) from the plaintiff within a specified date and if the defendant fails to execute the sale deed as aforesaid directing the sale deed as aforesaid to be executed by the Court on behalf of the defendant.

In her written statement, the respondent did not deny the execution of the agreement but did deny that the appellant was

entitled to any credit for any sum at all. On the other hand according to the respondent a sum of Rs.3,000/- was payable by the appellant, a claim for which a suit has been filed and decree obtained. The respondent also claimed that she had had to pay a further amount of Rs. 1448.75 to the mortgagee and had to spend Rs.3,000/- to put the suit property into a good condition, as well as make payment for incidental and legal expenses totaling Rs.700/-. It was stated that the appellant had orally agreed to give up his right of re-conveyance for Rs.30,000/- and as the respondent had paid Rs.30,648/- to or on account of the appellant, the appellant was not entitled to enforce his right of re-conveyance. The respondent disputed that the appellant was ready and willing to pay or deposit the sum of Rs.20,000/- and called upon the appellant to do so to prove his bonafides. According to the written statement, there was no question of the respondent paying any mesne profits.

On the other hand the plaintiff is bound to deposit and pay Rs.27,648/- (exclusive of pronote debt) for the re-conveyance which claim in act (fact) he must give up as per the oral agreement between the plaintiff and this defendant as already stated this written statement. (sic).

The suit was decreed in favour of the appellant on 28th July 1981. It appears that the respondent had jettisoned the case of an oral agreement at the trial. The Learned Subordinate Judge also rejected the appellants case in the plaint in so far as he had claimed credit for the various sums which he alleged that the respondent had failed to pay under the sale deed. However, it was held by the learned Subordinate Judge that the appellant was entitled to specific performance of the second agreement upon payment of a sum of Rs.23,448.75 to the respondent. The Subordinate Judge to that extent accepted the respondents claim that the respondent had, apart from the original amount of Rs.20,000/-, paid a further sum of Rs.3,448.75 to the appellant or on the appellants account which could be added to the cost of re-conveyance. By the decree the appellant was required to deposit the amount of Rs.23,448.75 on or before 7th May 1981 in order to avail of the benefit of the decree. The appellant deposited the amount of Rs.23,448.75 in the court of the Subordinate Judge within the time stipulated.

Both the appellant and the respondent preferred appeals against the decision of the Subordinate Judge. The appeals were heard analogously. Before the District Judge, it was contended by the appellant that he was liable to pay only Rs.12,495/- after taking credit for the amounts not paid by the respondent under the sale deed or expenses incurred by him. The respondent on the other hand contended that the appellant was not entitled to a decree for specific performance and that the Subordinate Judge should have held that the appellant was liable to pay a further sum of Rs.3,000/- allegedly spent by the respondent in making various improvements to the suit property. The District Judge formulated the points for consideration as follows:

(i) Whether the plaintiff is entitled to the relief of specific performance?

(ii) What is the sale consideration payable by the plaintiff for the execution of the re-conveyance deed?

The District Judge held that the parties were bound by the terms of the agreement which was a registered document and which had not been varied or altered in any manner. He noted that in terms of the agreement, the appellant had served notice upon the respondent to specify the date and time on which the respondent would come and execute the sale at the concerned Sub Registrars office, after receiving the consideration of Rs.19,990/- and deliver possession of the properties to the appellant. It was noted that in the notice the appellant had not claimed that he was liable to pay anything less than what he had contracted for under the agreement. The District Judge also held that the respondent was not entitled to anything more than the amount of consideration fixed under the agreement and that as the respondent had undertaken to discharge the mortgage debt she was not entitled to claim any excess payment that may have been made to the mortgagee. In any case, the respondent had neither made any counter claim or set off in the suit nor paid any Court fees in respect of such claim. The District Judge also rejected the case of the respondent that she had paid a sum of Rs.4495/- to the tenants of the property. In the circumstances, the District Judge directed the appellant to deposit a sum of Rs.19,990/- for specific performance of the agreement and held that the respondent was not entitled to claim any other amount from the appellant. The decree of the Subordinate Judge was accordingly affirmed with these modifications.

The respondent impugned the decision of the District Judge by way of second appeal before the High Court. The learned Single Judge formulated the following question as being a substantial question of law:

Whether on the facts and in the circumstances of the case, the decree for specific performance is sustainable?"

The learned Judge reversed the concurrent finding of the Trial Court and the first appellate Court and held on a construction of the plaint that the right of re-conveyance was a concession or a privilege granted to the original owner and that therefore not only must the terms of such agreement be strictly construed against him, but also unlike ordinary agreements for sale, time would be of the essence of the contract. It was held that such an owner claiming re-conveyance had to strictly perform the argument before the right could be enforced. Since, according to the High Court, the appellant had wanted a settlement of accounts before the performance of the agreement, the intention of the appellant was not to implement the agreement in terms thereof and as such he was not entitled to specific performance. The Learned Single Judge referred to the following decisions in support of his conclusions, (1) Shanmugam Pillai vs. Annalakshmi Ammal AIR 1950 FC 38, (2) K. Simrathmull v. Nanjalingaiah Gowder AIR 1963 SC 1182, (3) Hasam Nurani Malak V. Mohan Singh and Anr. AIR 1974 Bom. 136 (4) S. Sankaran (dead) and 4 others V. N.G. Radhakrishnan 1994 (2) L.W. 642 .

The conclusion of the High Court is unsustainable in law and contrary to the facts. The learned Judge erred in holding that it is a general principle of law that every agreement of sale by which the original owner agrees to buy back the property is a privilege or concession granted to such owner. A privilege has been defined as a particular and peculiar benefit or

advantage enjoyed by a person, and a concession as a form of privilege. An option to purchase or repurchase has been held to be such a privilege or concession. [See: Shanmugham Pillai v. Annalakshmi: AIR 1950 FC 38; K. Simarathmull v. Nanjalingaiah Gowder : AIR 1963 SC 1182.] This is because an option by its very nature is dependent entirely on the volition of the person granted the option. He may or may not exercise it. Its exercise cannot be compelled by the person granting the option. It is because of this one sidedness or unilatcrality, as it were, that the right is strictly construed and [a]n option for the renewal of a lease, or for the purchase or repurchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse (Halsburys Laws of England, 3rd Edn. Vol.3 Art. 281, p. 165).

An agreement for sale and purchase simpliciter , on the other hand, is a reciprocal arrangement imposing obligations and benefits on both parties and is enforceable at the instance of either. The interpretation of such a contract would be governed by the laws of contract relating to the performance of reciprocal promises.

Whether an agreement is an option to purchase or an ordinary agreement would depend on the interpretation of its provisions. Sometimes the option is expressly and in terms granted. In others the right may be implicit. Thus when an agreement provides that the right to obtain a sale is subject to the fulfillment of certain conditions by the purchaser, the agreement would in effect be an option to purchase, as the right to purchase would only accrue upon the voluntary performance of the conditions specified by the owner. The vendor cannot compel the performance of the conditions by the purchaser and then ask for the contract to be specifically performed.

Thus in Shanmugam Pillai V. Annalakshmi AIR 1950 FC 38, the terms of the agreement provided that the mortgagee/vendor would re-sell the land to the owners subject to the conditions (i) that the owner would pay Rs.31,500/- as the sale price as well as all expenses in connection with the re-sale (ii) that the agreement could be enforced upto 30th April 1943 and that time was of the essence of the agreement and (iii) that the owner should pay the instalments under the lease punctually failing which the agreement for re-conveyance would stand cancelled. These provisions were construed and the Court came to the conclusion that the original vendor had in fact been granted an option of re-purchase and it was not an ordinary contract for transfer of land. The Court came to this conclusion on two grounds (i) the right to purchase was subject to payment of instalments under a lease, and was a conditional right and (ii) the fixation of an outer time limit for exercise of the right gave the original owner the option to re-purchase upon payment of the sale consideration within the specified time. It was not in dispute not only that the purchaser had failed to pay the instalments, under the lease but had also allowed the time limit to lapse. It was in this context that the Court said:

It is well settled that, when a person stipulates for a right in the nature of a concession or privilege on fulfilment of certain conditions, with a proviso that in case of default the stipulation should be void, the right cannot be enforced if the conditions are not

fulfilled according to the terms of the contract.

Similarly, in K. Simrathmull V. Nanjalingiah Gowder AIR 1963 SC 1182 construed and followed Shanmugam Pillai, and the majority view that:

. where under an agreement an option to a vendor is reserved for repurchasing the property sold by him the option is in the nature of a concession or privilege and may be exercised on strict fulfilment of the conditions on the fulfilment of which it is made exercisable. (Emphasis supplied)

In the case before us, the right of the appellant to re-conveyance of the property has none of the characteristics of an option. The relevant extract of the agreement reads: (where the respondent is referred to in the first and the appellant in the second person).

On 2.5.1973 I have purchased the property described hereunder by virtue of the sale deed dated 2.5.1973 from you for a consideration of Rs.20,000/- (Rupees twenty thousand only) and I have been in possession and enjoyment of the same and whereas you must get the sale registered in your favour at your costs after the fifth year from this date onwards, i.e., 3.5.1978 and before the expiry of the sixth year, i.e. 3.5.1979 and you will have to pay the sale consideration of Rs.20,000/- (Rupees twenty thousand only) less the advance amount of Rs.10/- (Rupees ten only) received by me on this day. I will not receive any sale consideration further before 3.5.1979. Whereas I desire and agree to sell the under mentioned property to you at the cost of Rs.20,000/- to you and I hereby received a sum of Rs.10/- as an advance of sale consideration from you.

It is to be noted firstly that the appellant could not, even if he were ready and able to, buy back the property before 3.5.79 because it was made clear that the respondent would not accept any sale consideration before that date. The time limit in this case was really for the benefit of the respondent allowing five years un-interupted user of the land without threat of re-purchase by the appellant. Secondly, the clause does not provide that if the sale consideration were not paid before 3rd May 1979 the appellant would lose his right to buy the property. Time was not stated to be of the essence of the contract. Thirdly, either of the parties could enforce the contract as it stood after five years. The agreement in question therefore was an ordinary agreement for sale.

To sum up: the mere fact that an agreement for sale is described as a re-conveyance does not by itself mean that it is an option to repurchase nor does it in any way alter the substance of the deed. It merely records a historical fact that the property which is to be sold was being purchased by the

person who used to be the owner. No logical distinction can be drawn between an agreement to re-purchase and an ordinary agreement of purchase just because the vendor happens to be the original purchaser and the purchaser happens to be the original vendor. The agreement remains an agreement for sale of immovable property and must be governed by the same provisions of law.

Coming to the facts of the case, there is no dispute that the appellant sent a legal notice to the respondent offering to pay the entire amount of Rs.19,990/- to the respondent well within the period specified in the agreement. The suit was also filed before 3rd May 1979. Nothing further remained to be done by the appellant under the agreement. As far as the deposit of the balance consideration was concerned under Explanation (1) to Section 16 (c) of the Specific Relief Act, 1963 the appellant could wait for an order of the Court to do so. That is what he did. Both the Trial Court and the first appellate Court on a consideration of all the evidence therefore rightly came to the conclusion that the appellant was ready and willing to perform his obligations under the agreement and was entitled to specific performance of it.

The second error committed by High Court was in disturbing the concurrent finding of fact merely on a construction of the plaint on a point not raised by the respondent at any stage of the proceedings. It was not the respondents case either in the written statement nor before the Trial Court or the first appellate Court that the appellant was not entitled to specific performance only because he had allegedly claimed a variation in the consideration price. On the other hand it was the respondent who had all along claimed such a variation . When the appellant called upon the respondent prior to the institution of the suit to re-convey the property on payment of Rs.19,990/-, it was the respondents case that the appellant was liable to pay a larger sum to the respondent than the amount mentioned in the agreement. This stand was repeated by the respondent in her written statement and also on first appeal. The respondent had herself put in issue the amount of sale consideration payable under the agreement. Having done that, she could not turn around and contend that it was the appellant who was asking for a variation of the agreement. In fact the first appellate Court found that the claim for various credits had been raised by the appellant for the first time only after the respondent had claimed monies over and above the sale consideration of the agreement for re-conveying the property. The High Court should not in the circumstances have permitted the respondent to raise an inconsistent argument at the stage of the second appeal.

Thirdly, it is well settled

In construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of ones case for a relief. Such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. In India most of the pleas are drafted by counsel hence the aforesaid difference of

pleas which inevitably differ from one to the other. Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. (Syed Dastagir vs. T.R. Gopalakrishna Setty (1999) 6 SCC 337 at 341) [See also Motilal Jain V. Ramdasi Devi AIR 2000 SC 2408.]

In the case before us, the appellant has proved the agreement made and the parties were not at issue as to its existence. The appellant had expressed his readiness and willingness to perform the agreement by paying the consideration fixed not once but repeatedly in several paragraphs of the plaint. The High Court erred in overlooking the fact that the appellant had never said that the consideration for re-conveyance under the agreement was less than what was stated. Conceding that, the appellant had merely claimed credit for certain amounts. This could not mean that he was seeking a variation in the agreement itself.

The second reason given by the High Court for denying the appellant the relief of specific performance was under Section 20 of the Specific Relief Act, 1963. Relying upon Kommisetti Venkata Subbarayya V. Karamsetti Venkateswarlu and Others AIR 1971 A.P. 279 and Buchiraju V. Sri Ranga Satyanarayana AIR 1967 AP 69 the High Court held that the appellant had not come to the Court with clean hands since he had falsely claimed that he had not received any amount under the first deed of sale from the respondent. The appellants suit was accordingly dismissed. This again was not an issue raised by the respondent at any stage nor does any argument appear to have been advanced in this regard by the respondent before the Trial Court or the first appellate Court at all. Furthermore, the first appellate Court had not, as wrongly stated by the High Court, held that the claims of the appellant were false. The District Judge, which was the final Court of fact, expressly refused to go into the question of payment of the balance consideration by the respondent under the sale deed because he held, and in our view rightly so, that in the suit for specific performance the Court was not concerned with whether any consideration had been paid under the original sale deed executed by the appellant in favour of the respondent. The decisions noticed by the High Court in this connection were accordingly wholly inapposite.

Counsel for the respondent finally urged that specific performance should not be granted to the appellant now because the price of land had risen astronomically in the last few years and it would do injustice to the respondent to compel her to re-convey property at prices fixed in 1978.

The argument is specious. Where the Court is considering whether or not to grant a decree for specific performance for the first time, the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. [See K.S. Vidyanadam and Others V. Vairavan 1997 (3) SCC 1]. But in this case, the decree for specific performance has already been passed by the trial Court and affirmed by the first appellate Court. The only question before us is whether the High Court in second appeal

was correct in reversing the decree. Consequently the principle enunciated in K.S. Vidyanadam (supra) will not apply.

For the foregoing reasons, the appeal is allowed. We set aside the judgment of the High Court and uphold the decision of the first appellate Court but there will be no order as to costs.

J
(V.N. Khare)

...J.
(Ruma Pal)

New Delhi
August 1, 2001

Blacks Law Dictionary, 6th Edn.
ExplanationFor the purposes of clause 16 (c)

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;