

CASE NO.:
Appeal (civil) 1396-1397 of 2002

PETITIONER:
Ramakrishna Pillai & Anr.

RESPONDENT:
Muhammed Kunju & Ors.

DATE OF JUDGMENT: 20/02/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. Challenge in these appeals is to the judgment of a Division Bench of the Kerala High Court.

2. Background facts need to be noted in some detail. Two suits were filed for specific performance of agreement to sell the suit properties. Appellant No.1 is the plaintiff in OS No. 11 of 1997 which was filed in the Sub Court Mavelikara on 23.2.1987. Appellant No. 2 is the plaintiff in OS No. 17 of 1987 which was filed on 28.2.1987. The three defendants were common to both the suits. Defendant no.1 is defendant No.2's brother's son and defendant No. 3 is the wife of defendant No. 2. Defendant No. 3 obtained the property mentioned in the two suits under an exchange of properties between her and her husband i.e. defendant no.2. She mortgaged the properties to the Kerala Financial Corporation Limited. Sometime in 1970 defendant No.3 executed a Power of Attorney in favour of her husband-defendant No.2 authorising him to deal with the property. On 17.5.1974 defendant No.2 sold portions of the property to defendant No.1 acting on the power conferred by the power of attorney vide Exhs. A 8 and A 18. Subsequently on 12.8.1974, defendant No.3 cancelled the power of attorney. In 1979 the defendant No.1 executed a power of attorney authorising defendant No. 2 to deal with the property. On the basis of such power of Attorney he entered into an agreement with appellant No. 2 on 6.8.1979 to sell 3.5 cents of the property and the structures for a price of Rs.32,000/-. An advance of Rs.10,000/- was paid. Appellant No. 2 was then the tenant of the possession of the structure and had paid Rs.7,000/- as security. It was agreed that the amount shall be adjusted against part payment of the price fixed and appellant No. 2 was to pay Rs.15,000/- as the balance consideration. The agreement indicated that possession was delivered to appellant No.2.

On 20.8.1979 defendant No.2 as power of attorney holder entered into an agreement to sell 7.5 cents of property with structures to appellant No. 1 for consideration of Rs. 43,500/-, out of which Rs.27,000/- was paid as advance. Appellant No. 1 was already in possession of the structure as tenant. The terms of the agreement i.e. Exh.A1 are similar to those as Exh.

A14. Since defendant no.3 did not discharge the dues to the Financial Corporation, recovery proceedings were started and the rent payable by the appellant was attached. It appears thereafter there was a dissension amongst the defendants and Defendant No.3 filed a suit (OS No. 42 of 1982) challenging the sales made by Defendant No. 2 to defendant No. 1. The appellants were not parties to the said suit. Defendant No. 1 took the stand that the sales in favour of defendant No. 2 as power of attorney holder was valid and defendant No. 3 was not entitled to the relief prayed. Thereafter the dispute was settled recognizing the rights of defendant No.3. She undertook to honour all commitments made by defendant no. 2 in respect of the property. In 1986 appellants called upon the defendants to execute the sale deed in their favour. A reply was given on 13.11.1986 refusing to execute the sale deeds. Two suits were filed, as noted above, for specific performance. There were clear averments to the effect that the appellants were and are always ready and willing to perform their part of the agreement. The defendants 1 and 3 contested the proceedings. It was their stand that the agreements sued on, namely Exhs. A 1 and A19 are not valid and binding on the defendant. A plea of limitation was also taken. But there was no denial to the plea regarding readiness and willingness. There was specific reference to the earlier disputes between the defendants. The trial court by judgment and decree dated 19.3.1992 dismissed the suit as barred by limitation after holding on merits that the agreements are valid and binding the defendant. The plaintiffs filed separate appeals in the High Court. Defendant No.3 also filed separate memo of cross-objections challenging the trial court's finding on the valid and binding nature of the agreements. By the impugned judgment dated 9.7.2001, the High Court affirmed the trial court's finding that the agreement are valid and binding, and also held that the suits were not barred by limitation. However the High Court dismissed the suit on the ground that there was no plea raised regarding readiness and willingness and exercise of discretion. However, the High Court granted a decree for refund of the amount paid as advance covered by the agreement, but that no credit was to be given for further payments of Rs.3,800/- and 4,460/- by the plaintiffs.

3. Learned counsel for the appellants submitted that the High Court fell into grave errors by holding that the plea of readiness and willingness was not raised by the plaintiffs. In this connection, reference is made to averments in the plaint as noted in the judgment of the trial court. Reference was also made to the issues framed and the written statements filed by the defendants. It was pointed out that in the written statements there was no plea taken by the defendants that plaintiff was not ready and willing to fulfil their part of the obligation. It was, therefore, submitted that the High Court non suited the plaintiffs on a ground which was not raised by the defendants and which was not considered by the trial court. It was also pointed out that factually the High Court was wrong in holding that no plea in that regard was taken.

4. Learned counsel for the respondent on the other hand submitted, that while considering a case of this nature, the parameters of Section 20 have to be kept in view. It is pointed out that suits were not filed within a reasonable time and the subsequent events by considerable effect. It was submitted that the High Court has rightly held that there was no material to show that at all relevant points of time the plaintiff was ready and willing to fulfill their part of the obligation. Reference was placed on several decisions of this Court in

support of the stand e.g. K.S. Vidyadnam and others v. Vairavan (1997(3) SCC 1), K. Narendra v. Riviera Apartments (P) Ltd. (1999(5) SCC 77), V. Pechimuthu v. Gowrammal (2001(7) SCC 617), Manjunath Anandappa v. Tammanasa and Others (2003(10) SCC 390) and Pukhraj D. Jain & Ors. v. G. Gopala Krishna (2004 (7) SCC 251). There can be no quarrel with the position in law urged by learned counsel for the respondent about the parameters to be considered while dealing with a suit for specific performance. But the High Court's judgment is clearly vulnerable. Firstly, there was no dispute ever raised by the defendants about the readiness and willingness of the plaintiffs to fulfill their obligations. The High Court was clearly in error in holding that no plea regarding readiness and willingness was raised. As noted above, the trial court in its judgment has referred to various portions of the averments in the plaint where the plaintiffs had categorically stated that they were and are always willing to fulfill their part of the obligations. The High Court also failed to notice that there was no plea either in the written statement or in the cross objections filed in the appeal before the High Court that the plaintiffs were not ready and willing to fulfill their part of the obligation.

5. The conclusions of the High Court are to the following effect:

"Then the question is whether the respective plaintiffs have pleaded and proved that they were always ready and willing to perform their part of the contracts. Even though time did not start to run on the expiry of two months from the dates of the agreements, certainly, the plaintiffs were aware that the defendants had to discharge their obligation and get a release of the mortgage in two months of the dates of the agreements. Until the sending of the notices preceding the suits, there is nothing to show that the plaintiffs at any time called upon the defendants to perform their part of the contract."

6. The conclusions are clearly contrary to the pleadings of the plaintiffs. It was categorically stated in the plaint in both the suits that the plaintiffs are always ready and willing to fulfill their part of the obligations and that defendants were evading the execution for one reason or the other.

7. Above being the position, the appeals deserve to be allowed, which we direct. The respondents shall execute the sale deed after receiving the balance of the consideration within a period of three months. If that is not done it shall be open to the appellants to move the trial court for necessary steps in that regard.

8. The appeals are allowed without any order as to costs.