

## **P.C. Varghese vs Devaki Amma Balambika Devi & Ors on 7 October, 2005**

**Equivalent citations: AIR 2006 SUPREME COURT 145, 2005 AIR SCW 5622, 2006 (1) ALL LJ 284, 2006 (1) AIR BOM R 151, 2006 (1) AIR JHAR R 121, 2006 (1) AJHAR (NOC) 263 (KER), 2006 (1) AIR KANT HCR 74, (2006) 1 MAD LW 588, (2006) 1 DMC 189, (2006) 1 CIVILCOURTC 408, (2006) 1 HINDULR 444, (2005) 3 KER LJ 392, (2005) 4 KER LT 766, (2006) 1 MARRILJ 422, (2006) 1 CURCC 14, (2006) 2 ALLMR 111 (SC), (2006) 1 WLC(SC)CVL 404, 2006 HRR 1 242, (2005) 8 SUPREME 493, (2005) 61 ALL LR 628, (2006) 1 ALL RENTCAS 256, (2006) 1 CIVILCOURTC 321, (2006) 1 KER LJ 327, (2005) 4 KER LT 530, (2006) 2 LANDLR 13, (2006) 100 REVDEC 83, 2006 SCFBRC 197, (2005) 4 RECCIVR 469, (2006) 1 ICC 395, (2005) 35 ALLINDCAS 52 (SC), (2006) 2 CIVLJ 844, (2006) 101 CUT LT 143, (2005) 7 SCJ 767, (2005) 8 SCALE 320, (2006) 2 JCR 38 (SC), 2005 (8) SCC 486, (2006) 1 KCCR 408, 2005 BLJR 3 2425, (2005) 10 JT 278 (SC)**

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**Bench: S.B. Sinha, R.V. Raveendran**

CASE NO.:

Appeal (civil) 1984 of 2002

PETITIONER:

P.C. Varghese

RESPONDENT:

Devaki Amma Balambika Devi & Ors.

DATE OF JUDGMENT: 07/10/2005

BENCH:

S.B. Sinha & R.V. Raveendran

JUDGMENT:

**J U D G M E N T** S.B. SINHA, J :

The First Respondent herein is the wife of K.R. Narayana Pillai (Respondent No.5). Respondent Nos. 2 and 3 are daughters of the First and the Fifth Respondent herein. The Fourth Respondent was their minor daughter. 15 cents out of the land in question measuring 19 cents were obtained by Respondent Nos.1 to 3 by reason of a

partition under deed No.1598 of 1973. As Respondent No.4 was born subsequent to the execution of the said deed of partition, she became entitled to a one-fourth share in 15 cents which comes to 3.75 cents. The balance 4 cents absolutely belonged to the First Respondent on the death of one Narayana Pillai and Devaki Amma. Respondent Nos.1 to 3 and 5 agreed to sell the said property to the Appellant herein, wherefor an agreement of sale was executed on 13.09.1980 in his favour. In terms of the said agreement, a sum of Rs.5,05,000/- was fixed as total consideration; and a sum of Rs.10,000/- was received by the Respondents by way of advance. The agreement contained a condition that the Respondents would obtain requisite permission from the appropriate court for sale of the minor's share therein. Such permission was to be obtained within a period of three months which was also the period fixed for performance of the terms of the agreement. However, an extension thereof had been granted. The Appellant made several requests to the Respondents to perform their part of contract. According to him, the Respondents had deliberately been delaying the disposal of the application for obtaining the aforementioned permission. A letter was also sent to the Fifth Respondent requesting him to get the sale deed executed at least with regard to the shares of Respondent Nos.1 to 3 on receipt of proportionate amount of consideration and to execute the sale deed relating to the minor's share after such permission was obtained.

The Respondents, however, did not perform their part of contract. The Appellant deposited a sum of Rs.5,00,000/- in his name and in the names of his wife and children in fixed deposit No.28517-57-81 dated 03.08.1981 in the Federal Bank Limited. He also served a registered notice through his advocate asking the Respondents to execute the sale deed, in respect whereof a reply was sent by the Respondents stating that the sale deed can be executed only after obtaining the permission from the Court.

The Appellant filed the suit against the Respondent Nos. 1 to 5 herein, inter alia, for a decree of specific performance of contract in respect of the said agreement of sale in respect of the entire 19 cents. He also made an alternative prayer, as per para 23C praying that if specific performance could not be granted in regard to entire extent, he may be allowed to take a sale deed in respect of the share of Defendants 1 to 3 and may be allowed to recover possession of that much property from defendants through court.

It is, however, not in dispute that during the pendency of the suit, the application filed for obtaining permission for sale of minor's share was dismissed. The Appellant thereafter filed an application for amendment of plaint praying for substitution of prayer 'C'. The application for amendment was allowed and amended prayer 'C' reads as under :

"C- If for any reason this Hon'ble Court finds prayers A & B cannot be allowed as such, the plaintiff may be allowed to take a sale deed of the share of defendants 1 to 3 in the plaint schedule property, through court, in the name of his wife and children as mentioned above. And for that purpose pass a preliminary decree to divide the aforesaid 15 cents in the schedule property separating the 3/4th share of the

defendants 1 to 3 from the 1/4th share of the minor 4th defendant by metes and bounds and allowing plaintiff to recover possession of the four cents belonging to the first defendant and 3/4th share of defendants 1 to 3 in the 15 cents on payment by the plaintiff of the consideration agreed in the agreement for sale less the proportionate value of his minor's share."

The Respondents in their written-statement raised a contention that the Civil Court having refused to grant permission to sell the minor's share, performance on their part became impossible. It was further contended that the purpose for agreeing to sell the property was for meeting the marriage expenses of the Third Respondent but ad Respondent Nos 1 and 5 were able to meet the expenses therefor without selling the property, the very purpose thereof became futile.

The learned Trial Judge in view of the rival contentions of the parties framed as many as seven issues. Issue Nos. 5 and 7 read as under :

"(5) Is not a plaintiff entitled to specific performance of the agreement of sale dated 13.09.1980 ?

(7) Whether the Specific Performance of the part of the agreement is allowable ?"

The suit filed by the Appellant herein was decreed by the Trial Judge in the following terms :

"In the result, a preliminary decree for partition is passed on the following terms :

(1) The 3/4th share of the property of the defendants 1 to 3 shall be partitioned from the 15 cents of property which belongs to defendants 1 to 4 as also the 4 cents absolutely belongs to the first defendant.

(2) The plaintiff is allowed to apply for passing a Final Decree for effecting the partition of 3/4th share in the 15 cents of property.

(3) The plaintiff is also allowed to apply for issue of a Commission to effect partition of > share of defendants 1 to 3 in 15 cents of property and to ascertain the value of 1/4th share of the minor 4th defendant in the 15 cents of property.

(4) The defendants 1 to 3 are directed to execute the sale deed for their 3/4th share in 15 cents plus 4 cents when they will be allotted their shares in the final decree on receiving the sale consideration minus the value of the share of the minor 4th defendant which was ascertained in the Final Decree Proceedings within two months from the date of passing the Final Decree.

(5) The plaintiff is directed to deposit the sale consideration as per the terms of the contract deducting the proportionate value of the minor's share within two months from the date of the final decree.

(6) In case defendants 1 to 3 failed to execute the sale deed for the property allotted to them in the final decree within two months from the date of passing final decree after paying the proportionate sale consideration.

(7) The plaintiff is allowed to get the document executed for 19 cents of property as scheduled in the plaint as stated above through court and plaintiff is also entitled to get delivery of that property from the defendant in execution of this decree.

(8) In the circumstances of the case both parties are directed to suffer their respective costs."

The Original Defendant Nos.4 and 5 did not prefer any appeal against the said judgment and decree. The Respondent Nos.1 to 3 herein only preferred an appeal. A cross-appeal was also filed by the Plaintiff- Appellant.

The High Court allowed the appeal preferred by Respondent Nos.1 to 3 herein holding that the contract being an integrated one, the conditions mentioned therein as regard obtaining the necessary permission from the Civil Court relating to minor's share was an essential term for execution of the contract and since such permission had not been granted, the entire contract failed. The Appellant is, thus, before us.

As Respondent Nos. 4 and 5 were not parties to the appeal before the High Court, they were not impleaded as parties; subsequently an application for impleading them was filed. The said application was allowed. However, an application has been filed by the said added Respondents contending that they have unnecessarily been impleaded as parties.

Mr. John Mathew, the learned Senior Counsel appearing on behalf of the Appellant, would submit that having regard to the facts and circumstances of this case, the High Court committed a manifest error in misreading and misinterpreting the agreement of sale dated 13.09.1980.

Section 12 of the Specific Relief Act, the learned counsel would contend, enables the court to grant a decree in respect of a part of contract in a case where party to a contract is unable to perform the whole of his part of it. He contended that the High Court, therefore, wrongly reversed the judgment and decree of the Trial Court relying on Delsukh M. Pancholi vs. The Guarantee Life and Employment Insurance Co. Ltd. and Others [AIR 1947 PC 182] and T.V. Kochuvareed and Another vs. P. Mariappa Gounder and Others [AIR 1954 Travancore-Cochin 10], holding that the condition as regard obtaining permission from the Civil Court was a condition precedent.

Mr. Mathew would urge that the findings of the High Court cannot be sustained in view of the fact that out of 19 cents only 3.75 cents came to the share of the minor and, thus, the provision of Section 12(3) of the Specific Relief Act was clearly attracted.

Mr. V.R. Reddy, the learned Senior Counsel appearing on behalf of the Respondent Nos.1 to 3, would submit that the contract in question is a contingent one and in view of the fact that application for obtaining permission to sell the share of the minor was sought for and refused, the

entire agreement became unenforceable in law. In any event, the learned counsel would contend, the discretionary relief under Section 20 of the Specific Relief Act should not be granted in favour of the Appellant herein.

Mr. T.L.V. Iyer, the learned Senior Counsel appearing on behalf of the added Respondents, (Respondent Nos.4 and 5), would submit that Respondent Nos. 4 and 5 have unnecessarily been added in the instant case.

The property belonged to Respondents Nos.1 to 4. Respondent No.5 being the father of Respondent No.4, who was a minor at the relevant time, executed the agreement on her behalf. The said agreement was entered into by the Respondent Nos. 1 to 3 on their own behalf and by Respondent No.5 as the guardian of the minor Respondent No. 4.

In terms of the said agreement, the Respondents agreed :

- (i) to satisfy the purchaser about their title in respect of the property and also clear any encumbrance certificate, if found on verification;
- (ii) ascertain the extent of the property by measuring it and if there was any deficiency, agree for deduction of proportionate consideration;
- (iii) put up a wall separating the boundary at the entrance,
- (iv) change the names and enter new names in revenue records;
- (v) comply with all formalities which they were required to do under the law;
- (vi) obtain guardian and ward certificate, clearance certificate, permission of Town Planning Authority etc.;
- (vii) secure the amount of consideration payable to the minor in terms of the guardian and ward certificate which was to be obtained on application filed by Respondent No.5;
- (viii) receive the balance consideration and on the date specified by the Appellant, appear before the Sub-Registrar and register the deed of sale.

It was further stipulated that in the event, the Respondents failed to register the sale deed in terms of the said agreement, the Appellant would be entitled to deposit in the court the balance consideration after adjusting the amount of advance; file a suit and obtain a decree for specific performance.

We fail to understand as to how the agreement for sale can be said to be a contingent contract, as was submitted by Mr. Reddy. The agreement nowhere states that in the event the permission to sell

the minor's share is not obtained within the period specified therein, the same shall become invalid or otherwise unenforceable in law. The application for grant of permission to sell the minor's share, as noticed hereinbefore, was rejected only during the pendency of the suit.

It may be true that the agreement was to be performed within a period of three months, but it was extended. The Appellant herein not only in the suit but also even prior thereto asked the Respondents herein by a notice dated 23.03.1981 (Ex. P2) to execute a deed of sale in relation to the shares of Respondent Nos.1 to 3 herein i.e. excluding the share of the minor, stating :

" Even now I stick on to this suggestion and am prepared to purchase the remaining portion of the property minus the minor's share and is prepared to purchase the minor's share also after obtaining the permission from court.

It is further strange to see that in your letter under reference you have only invited my attention to the aforesaid suggestion of mine without specifically, unambiguously stating whether you are prepared the suggestion and if so on which date the document can be executed for the remaining share of the property after deducting the minor's share. So kindly inform me whether you accept the aforesaid suggestion and if so, on which date we can execute the document. In that case let the court take its own time to grant the permission certificate and after you obtain the said certificate from the court, I will purchase the minor's share also. Further I request you to extend the period of agreement in writing."

In reply to the said notice, the Respondent No.5 contended that as the share of the Fourth Respondent was not demarcated, the Appellant will have to wait till the required documents from the authorities are obtained. Thereafter, another legal notice was issued on 31.07.1981 asking the Respondents to execute the sale deed in his favour and his nominee failing which a legal proceeding shall be initiated for specific performance of the said agreement for sale. It is not in dispute that the Appellant was all along ready and willing to perform his part of contract.

Sub-section (3) of Section 12 of the Specific Relief Act, 1963 (for short "the Act") was enacted with a view to meet such eventualities when the whole of the contract cannot be performed, by the vendor. It reads as under :

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either--

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as

he can perform, if the other party

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant."

The said provision has been enacted for the benefit of the purchaser and, thus, cannot operate to his detriment. We may notice that under the old Specific Relief Act, the Plaintiff was not only required to relinquish his claim of specific contract as regard that part of the contract which cannot be performed but also was required to pay the entire amount of consideration; whereas in terms of Section 12(3) of the new Specific Relief Act, 1963 he is now required to pay the amount of consideration proportionately. In *Sardar Singh vs Krishna Devi (Smt.) and Another* [(1994) 4 SCC 18], it was held :

" The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice "

In *Rachakonda Narayana vs. Ponthala Parvathamma and Another* [(2001) 8 SCC 173], Khare, J., the learned Chief Justice as he then was, observed :

" Thus, the ingredients which would attract specific performance of the part of the contract, are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or has paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable to perform and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

In *Surinder Singh vs. Kapoor Singh (Dead) through LRs. and Others* [(2005) 5 SCC 1`42], (wherein Dharmadhikari, J. was a member) a three- Judge Bench of this Court on a reference made on the purported conflict in *Kartar Singh vs. Harjinder Singh* [(1990) 3 SCC 517] and *Rachakonda Narayana* (supra), opined :

"In this case, the Division Bench of the High Court passed a decree of specific performance of contract relying on or on the basis of a decision of this Court in Kartar Singh."

Strong reliance, however, has been placed by Mr. Reddy on HPA International etc. vs. Bhagwandas Fatehchand Daswani and Others etc. [(2004) 6 SCC 537]. Therein, Dharmadhikari, J. in the facts and circumstances of the case held :

"70. There was one integrated and indivisible contract by the vendor to convey full interest in the property i.e. his own life interest and the interest of the reversioners with sanction of the Court. As the Court had not granted the sanction, the contract could not be specifically enforced. The lesser relief of transfer of life interest was not claimed within a reasonable time after the vendor had intimated that the contract, as agreed for full interest, was not possible of performance. We find that neither equity nor law is in favour of the plaintiff vendee."

Therein, in the agreement not only the interest of the vendor in presenti but also the interest of the remaindermen or reversioners after his death was the subject matter of contract. The agreement was furthermore subject to the passing of the vendor's title to the property and of the vendor's right to sell the entire interest, present and future in the property by the purchaser's advocate. We may also notice that in that case one of the terms contained in the agreement for sale was :

"6. In case sanction of the Court is not accorded as aforesaid, this agreement shall forthwith stand cancelled and the vendor shall forthwith return the advance amount of rupees twenty-five thousand to the purchaser."

A perusal of the said decision clearly shows that conduct of the plaintiff therein was such which precluded him from obtaining a decree for specific performance of contract. In the aforementioned facts and circumstances of the case, it was held that recession of contract due to non- grant of sanction by the court within the stipulated period was not an act of breach of contract on the part of the vendor. The said decision has no application in the facts and circumstances of this case.

In Dalsukh M. Pancholi (supra), two questions were posed by the court : (a) was the term "subject to the court's approval" an essential term of the agreement?, and (b) if it was essential, by whose default did it fail? Therein, in the facts of the case, the Privy Council opined that the approval of the attaching court was insisted on as a necessary condition for effecting the sale, for without it the title to the property was not at all safe. Once such condition was found to be essential one, the contract was held to be a composite contract. However, in that case, the vendor therein was not in a position to convey his own interest in the property without the court's sanction and the contract. In the facts and circumstances of the case, the Defendant Nos.1 to 3 could transfer their properties having definite share in favour of the Appellant.

The decision of Travancore and Cochin High Court in T.V. Kochuvareed (supra), has also no application in the fact of the present case.



The submission of Mr. Reddy to the effect that this Court should not exercise its discretionary jurisdiction is stated to be rejected. No such contention has been raised before the High Court. Even otherwise it has not been shown, having regard to the conduct of the parties, as to why such a discretionary jurisdiction should not be exercised. An alternative plea of refund of earnest amount and damage cannot itself be a bar to claim a decree for specific performance of contract.

The Trial Court not only granted a decree for specific performance of contract but also a preliminary decree for partition.

The submission of Mr. Reddy to the effect that the learned Trial Judge committed a serious error in granting a decree for partition along with a decree for specific performance of contract need not detain us long as in view of Section 22(1)(a) of the Act a decree for partition and separate possession of the property can be granted in addition to a decree for specific performance of contract. As in this case, the Appellant herein in view of amended prayer 'C' relinquished his claim in respect of the property belonging to the minor - Respondent No. 4, he also prayed for a decree for partition and such a prayer having been allowed, no exception thereto can be taken. In any event, the said question has not been raised by the Respondents before the High Court at all. Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/ or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/ or partition is prayed for in anticipation of the grant of prayer for specific performance of contract. [See Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Others (1982) 1 SCC 525] The only person who could question the said decree for partition was Respondent No. 4. As noticed hereinbefore, a decree as against him has attained finality as she did not preferred any appeal thereagainst.

The said decree for partition, therefore, has attained finality. No decree for specific performance of contract, however, has been passed as against the Respondent Nos. 4 and 5. They are, however, otherwise bound by the decree passed by the learned Trial Judge. Therefore, they are also proper parties, though not necessary parties.

Before parting with this case, however, we may observe that the manner in which the decree has been passed by the learned Trial Court is open to question inasmuch as a relief in terms of Section 22 of the Specific Relief Act being incidental or ancillary to the main relief of specific performance of contract and, furthermore, being in addition thereto, ordinarily, a proceeding for grant of a final decree for partition should be initiated after the sale deed in terms of the decree for specific performance of contract is executed and registered and not vice-versa.

For the reasons aforementioned,, the impugned judgment cannot be sustained, which is set aside accordingly. The Appeal is allowed. No costs.