A. Abdul Rashid Khan (Dead) And Ors. vs P.A.K.A. Shahul Hamid And Ors. on 3 May, 2000

Equivalent citations: 2000(6)ALT5(SC), JT2000(7)SC483, (2000)3MLJ147(SC), (2000)10SCC636, 2001 AIR SCW 2361, 2000 (10) SCC 636, (2000) 4 CURCC 115, (2001) 1 LANDLR 315, (2001) 3 PUN LR 324, (2000) WLC(SC)CVL 622, (2001) 2 BLJ 822, (2002) 1 ALL RENTCAS 108, (2000) 3 MAD LJ 147, 2001 SCFBRC 291, (2001) 3 ALLMR 770 (SC), (2000) 6 SUPREME 575, (2001) 2 UC 206, (2000) 6 ANDH LT 5, (2000) 3 ALL WC 2476, (2000) 7 JT 483 (SC)

Author: A.P. Misra

Bench: N. Santosh Hegde, A.P. Misra

ORDER

A.P. Misra, J.

1. The following questions are raised in this appeal:

> 1. Whether on the facts and circum stances of this case the High Court is right in decreeing the suit for specific performance to the extent of the share of the Appellants?
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> 2. Whether the purported agreement of sale is one for the sale of the entire suit property and not for the sale of individual shares. Hence, whether the High Court is right in decreeing the suit only in respect of the shares of Appellants Nos. 1 to 9?
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> 3. Whether in a suit for specific performance where alternative plea of partition is also raised, was the High Court to decree the suit for partition?

2. In order to appreciate the controversy, we are herewith giving short gist of facts.

3. The suit property is a tiled house in Erode Town, which originally belong to one Aziz Khan. On his death, his heirs under the Muslim Law, viz., Appellant Nos. 1 to 9 who are brothers and Respondent Nos. 2 and 3 who are sisters inherited the said property. According to Appellants, after negotiation for the sale of the said property with Respondent No. 1, agreement of sale was purported to be executed between the Appellants and Respondent Nos. 2 and 3 on the one hand and Respondent No. 1 on the other hand. Some dispute is raised with reference to two documents viz., Exhibit A-1 which is said to be the original sale agreement produced by the Plaintiff-Respondent from his

possession and the other is Exhibit B-1 produced by the, Appellants. Both these documents according to the Appellant are original. The distinguishing difference between the two documents is that Exhibit A-1 is purported to be signed by Respondent No. 1 while Exhibit B-1 is not signed by Respondent No. 1. It is not in dispute that the aforesaid two sisters, viz., Respondent Nos. 2 and 3 did not sign either of the two agreements. This agreement of sale is dated 8th November, 1978. In spite of the said agreement, when sale deed was not executed, the plaintiff-Respondent No. 1 issued notice dated 29th November, 1979 for the execution of the sale deed. The notice states that though the Appellants assured and undertook to get the signatures of Respondent Nos. 2 and 3 but they did not do so. In any case in the alternative the Appellants are bound and thus they should execute the sale deed to the extent of their share in the property. The Appellants denied these allegations of the notice. Thereafter, Respondent No. 1 filed the present suit for specific performance of the aforesaid sale agreement dated 8th November, 1978 and for the partition and separate possession of their 5/6th share in the said property. A written statement was filed by the Appellant No. 1 which was adopted by the other Appellant Nos. 2 to 9. They denied that they gave any assurance or promise to obtain the signatures of their sisters. They fulfilled all their obligations and it is the plaintiff who did not and was never willing and ready to perform his part of the obligations and that this suit is filed only to avoid the forfeiture of his advance money. Initially rupees five thousand was paid by the plaintiff as per the agreement of sale. A plea was raised in the additional written statement that the sale could only be one indivisible sale in respect of the entire property for which all their heirs, viz., defendant Nos. 1 to 11 (Appellant Nos. 1 to 9 and Respondent Nos. 2 and 3 herein) must join. Admittedly the sisters have not joined in this agreement of sale. The Appellant's case is that it was the plaintiff who undertook to obtain the signatures of their sisters which he could not, hence the suit must fail.

4. The trial court dismissed the suit by holding that the agreement dated 8th November, 1978 was indivisible and could only be executed if all the defendants joined and that the Plaintiff was also not ready and willing to perform his part of the contract. The Plaintiff-Respondent preferred an appeal before the High Court. The High Court held that the Plaintiff had not pleaded and proved that Respondent Nos. 2 and 3 agreed to sell the said property, hence it cannot be held that the said agreement was by all the Defendants. As Respondent Nos. 2 and 3 admittedly did not join the contract they cannot be held bound by the said agreement. However, it further held that Defendant Nos. 1 to 9 agreed and entered into the said agreement with the plaintiff hence bound by it. It further held that the said agreement was not contingent upon signing by Respondent Nos. 2 and 3. The case pleaded in the additional written statement was a new case and an after thought. In other words High Court held, it couldn't be said that it was an indivisible contract. So, a valid and enforceable contract exists only between the Plaintiff and the Appellants. The trial court erroneously disentitled the Plaintiff for the relief of specific performance on account of laches. Thus the suit of Respondent No.1 for specific performance was decreed as against the Appellant. It also decreed the suit in respect of the alternative relief, viz., for the partition of the suit property into six equal shares by metes and bounds, and delivery of separate possession to the plaintiff of its five such shares.

5. At the outset, we may consider the case of the Appellants, as contained in the additional written statement that it was understood between the parties that plaintiff would obtain the signatures of Respondent Nos. 2 and 3 and that the sale deed would be executed as one composite sale deed of the

entire property. On the contrary, the case of the Respondent No. 1 is that Appellants undertook to get the signatures of their sisters. They are all plea and contentions, which are not born out of the agreement and sale. These are pleas by both the parties beyond the said written agreement. The law in this regard is well settled, in view of Section 92 of Indian Evidence Act, where any contract which is required by law to be reduced in writing, then no oral evidence or understanding to the contrary or what is apart from the said contract would be admissible in law. It is not in dispute in the present case, the agreement of sale was reduced in writing which was for an immovable property. Hence, these pleas, both of the Appellants and Respondent No. 1, as aforesaid being beyond the written agreement of sale cannot be taken into consideration.

6. So far the contention for the Appellant that there are two original agreements of sale, viz., Exhibit A-1 and Exhibit B-1 and the one in the possession of the Appellants, Exhibit B-1 being not signed by Respondent No. 1, shows there was no concluded contract and hence signature of Respondent No. 1 in Exhibit A-1 was also not there and it was only later, signed which was not there on the alleged date and time of the agreement of sale. After giving our consideration we have no hesitation that the trial court wrongly accepted this case of the Appellant and the High Court rightly rejected the same. We find in the original written submission itself there is admission by the Appellant. Relevant portion is reproduced below :

> ...defendants were always ready and willing to execute the documents ...Due to the plaintiff's default the agreement has come to an end in the month of September, 1979.

7. This statement that the defendants were always ready and willing to execute the documents admits the existence of a valid agreement of sale. Further averment that the agreement came to an end in the month of September, 1979 also confirms the admission by the defendant-Appellants that the said agreement continued and was valid till September, 1979. In other words, admits an existence of an agreement, which continued till 1979. Thus submission of the Appellants has no merit.

8. The next submission for the Appellant is that the trial court was right in holding that Respondent No. 1 was not ready and willing and did not perform his obligation, hence suit for specific performance should not have been decreed by the High Court. The reason for the trial court holding so was that Respondent No. 1 had slept over the matter and was lethargic for more than 4 to 5 months and it is only after the hike in prices he had chosen to sent the notice on 30th November, 1979. Hence, these laches indicates that the plaintiff was not ready and willing to perform his part of the obligation. On the other hand, submission for the. Respondent No. 1 is that there was no delay on the part of the plaintiff, if it all, it was on account of Appellants themselves. He referred the agreement of sale as to when the obligation of plaintiff arises to execute the sale deed. Learned Counsel referred to the agreement under which the sale deed was to be executed within 60 days from the date of the document of title, the High Court order is given by the Appellants to the plaintiff and that not having done would not constitute any latches or failure on the part of the plaintiff. We have perused the agreement of sale. The relevant portion of the same is quoted below :

> ...individual Nos. 1 to 11 agreed to obtain the copy of the judgment of the High Court by which all of them acquired the right and decree copy under all the documents relating to the property mentioned hereunder and after giving all the copies and from that day within the stipulated period of 60 days, individual No. 12 (Respondent No. 1) among as shall finalise the sale at his costs....

9. The aforesaid quotation clearly indicates that the obligation to get the sale deed executed was to be within sixty days after the documents referred to therein are tendered to the plaintiff by the defend ant which in the present case has yet not been done. Hence, the trial court fell in error in calculating period of 60 days from the date of agreement itself to hold laches.

In our considered opinion, the obligation to execute the document arises only after the documents are tendered by the plaintiff to the defendant. Hence, the findings of the trial court on this count can not be sustained and the High Court is right in setting aside this finding of the trial court.

10. The next submission for the Appellant was that as the plaintiff's case was found to be false, no relief for specific performance should be granted since such a relief is only a discretionary relief. Submission is, the case set up by the plaintiff that the Appellants undertook to get the signatures of their sisters on the agreement of sale having been found to be false, this discretionary relief should not be granted. Firstly, we find that there is no such finding that plaintiff spoke falsehood. The reliance of the Appellant is to the following part of the High Court judgment where it held: ...even assuming that it has not been proved, is not a very material allegation which is found to be false.

11. Learned Counsel has perhaps missed the preceding line of the said sentence where the similar submission made on behalf of the Appellants was rejected by the High Court. The submission made before the High Court was that the plain tiff's allegation that defendant Nos. 1 to 9 assured and undertook to get defendant Nos. 10 and 11 to sign the agreement on the sale deed is false. But the High Court in the next sentence reads :

> But, this contention has no merits.

12. It seems the Appellants seeks to place reliance of that portion which has been quoted herein before, where the High Court proceeds by saying even assuming it to be so. This apart, this part of the case falls away from the written agreement of sale, as we have held would be inadmissible under Section 92 of the Indian Evidence Act. There is difference between 'not proved' and 'false'. Merely not able to prove cannot be in all cases categorised as false. Thus we find that even this submission for the Appellants has no merits.

13. Next, submission is made on behalf of Respondent Nos. 2 and 3 viz., the sisters that no suit for specific performance should have been decreed without they joining as part of the property is only a small house about which partition is not possible and hence, grant or decree of partition in the alternative is not sustain able. A submission has also been made that there exists Right of Pre-emption, to the sisters and thus first offer should have been given to the sisters to purchase this property, hence the suit for specific performance must fail on this score. He re lied on the following

decisions :

1. 21 Indian Cases (Calcutta) 528.

2. Abdul Rahman's case reported in AIR 1999 Gauhati, 101 and

3.

14. We have perused these decisions. None of them applies to the facts and circumstances of this case. So far the Right of Pre-emption that has not been raised in any of the courts below by any party and cannot be permitted to be raised in this appeal for the first time. In fact, there is no pleading or evidence in this regard. On the other hand, learned Counsel for the Respondent No.1 has placed reliance on Manzoor Ahmed Magray v. Ghulam Hassan Aram and Ors. . This was also a suit for specific performance of a contract of an agreement of sale of an orchard. The court held that there is no bar for passing the decree for specific performance with regard to 1/3 or 2/3 share owned by the contracting parties for which he can execute the sale deed.

15. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court which requires no interference.

16. So far the other part of the High Court's order by which it decreed the alternative relief of Respondent No.1 for partition of the suit property in six equal share by metes and bounds and delivering separate possession over these such shares, on the face of it is erroneous and cannot be sustained, in a suit for specific performance. The vendee on the date of filing this suit has yet not become the owner of this property, as he merely seeks right in the said property though the decree of specific performance. When the sale deed itself has yet to be executed, whose right in the property has yet not matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposit the balance consideration and the sale deed is actually executed. This apart how could be any partition in the property, without other co-sharer joining, who are not part of the disputed agreement. No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing this alternative prayer of partition in this suit.

17. Learned Counsel for Respondent No.1 fairly states he is not able to support this part of the High Court's order. However, he prays that plaintiffs right in future date for partition be not in jeopardy because of these findings.

18. For the aforesaid reasons the appeal is partly allowed, to the extent the High Court's order for the partition of the suit property and delivery of possession to the plaintiff is set aside but the other part of the High court's order decreeing the suit for the specific performance for the execution of the sale deed as against by the Appellants, to the extent of their 5/6th share is upheld. We make it clear that setting aside of the High Court's order to the extent of partitioning of the specified share is only on account of such claim being made pre-mature. This in no way would prejudice the right of Respondent No.1 (plaintiff) in future, if he becomes co-sharer of this property.

19. The appeal is accordingly partly al lowed. Costs on the parties.