

# **V.S. Palanichamy Chettiar Firm vs C. Alagappan & Another on 3 February, 1999**

**Author: D.P. Wadhwa**

**Bench: S.Saghir Ahmad, D.P.Wadhwa**

PETITIONER:

V.S. PALANICHAMY CHETTIAR FIRM

Vs.

RESPONDENT:

C. ALAGAPPAN & ANOTHER

DATE OF JUDGMENT: 03/02/1999

BENCH:

S.Saghir Ahmad, D.P.Wadhwa

JUDGMENT:

D.P. WADHWA, J.

Leave granted.

These are judgment- debtors two appeals against common judgment dated December 24, 1997 of the Madras High Court, passed in revision of the order of the executing court dismissing execution applications filed by the respondent decree-holders. The decrees are for specific performance of two agreements of sale of certain immovable properties.

The appellant, as owner of the property being two plots of land, each measuring 60 x 40, entered into two separate but similar agreements of sale dated February 16, 1980 with the respondent decree-holders. Since the judgment-debtor failed to perform his part of the agreements, decree-holders filed suits for specific performance of the contract of sale in the court of the District Munsif, Pudukottai. The suits were decreed in favour of the respondents with a direction to them to deposit the balance amount of consideration and with further direction to the appellant to execute the sale-deeds. The suits were decreed on January 31, 1983 and the balance consideration amount was to be deposited on or before March 31, 1983. Against the judgment and order decreeing the suits the appellant filed appeals in the High Court which were dismissed on February 28, 1985. High Court while dismissing the appeals of the judgment-debtor did not grant any extension of time to the respondents for deposit of the balance amount of consideration.

The respondent decree- holders filed applications for execution of the decrees of specific performance of contract after five years of the decrees by the trial court and three years after dismissal of the appeals by the High Court. One of the contentions raised by the appellant judgment-debtor was that the respondent decree-holders had failed to deposit the balance amount of consideration in terms of the decrees. In one case the balance consideration amount was deposited much after the period granted in the decree and in the other case no amount of the balance consideration was at all deposited.

The executing court by order dated September 2, 1984 dismissed the execution applications of the respondent decree- holders holding that they did not pay the amount of balance consideration within the time stipulated under the decrees.

Against this order two revisions were filed in the High Court by the respondent decree-holders. It was not disputed that there was delay in complying with the terms of the decrees which were conditional. In the course of proceedings before the High Court respondent decree-holders filed separate applications seeking extension of time granted under the decrees by the trial court to deposit the amount. When the appellant judgment- debtor objected to the filing of the application on the ground that these could not be maintained in the High Court and no such application was filed in the trial court, the High Court remitted the matter to the executing court with a direction to treat the applications as interlocutory applications in the execution proceedings and to dispose them of in accordance with law. At the same time High Court also said that in view of the decision of this Court in *Sardar Mohar Singh through Power of Attorney Holder, Manjit Singh vs. Mangilal alias Mangtya* (1997 (2) M.L.J. 88 (SC) : 1997 (9) SCC 217), the Lower Court has got power to extend the time.

Aggrieved the appellant judgment-debtor filed these appeals.

Under Section 16 of the Specific Relief Act, 1963 (for short the Act) there are certain grounds which bar the relief of specific performance of the contract. This Section, insofar it is relevant, is as under :-

16. Personal bars to relief.- Specific performance of a contract cannot be enforced in favour of a person --

(a) .....

(b) .....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.- For the purposes of clause (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;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

Under Section 28 of the Act after a decree for specific performance of contract for the sale of immovable property has been made and the purchaser decree-holder does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money which the court has ordered him to pay, the vendor judgment-debtor may apply in the same suit in which decree is made, to have the contract rescinded. Section 28 of the Act is as under

:-

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed. - - (1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court --

(a) shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely --

(a) the execution of a proper conveyance or lease by the vendor or lessor;

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

In the present case no such application has been filed by the respondent decree-holders before the trial court seeking extension of time to deposit the balance amount under the decrees. The applications which have been filed in the High Court have been transmitted to the executing court with a direction to the executing court to dispose them of by restoring the execution applications which had been dismissed.

It was submitted by Mr. K.K. Mani, learned counsel for the respondent decree- holders that this Court should not interfere in the order of the High Court inasmuch as matter has only been remanded to the executing court to dispose of the applications for extension of time to deposit the balance amount of consideration in terms of the decree in accordance with law. Reliance was placed on the decision of this Court in *Sardar Mohan Singhs case* (1997 (9) SCC

217). There cannot be any dispute with the proposition of law laid in that judgment which states :-

From the language of sub-section (1) of Section 28, it could be seen that the court does not lose its jurisdiction after the grant of the decree for specific performance nor it becomes functus officio. The very fact that Section 28 itself gives power to grant order of rescission of the decree would indicate that till the sale deed is executed in execution of the decree, the trial court retains its power and jurisdiction to deal with the decree of specific performance. It would also be clear that the court has power to enlarge the time in favour of the judgment-debtor to pay the amount or to perform the conditions mentioned in the decree for specific performance, in spite of an application for rescission of the decree having been filed by the judgment- debtor and rejected. In other words, the court has the discretion to extend time for compliance of the conditional decree as mentioned in the decree for specific performance.

Again, while considering the provisions of Section 28 of the Act as applicable to the facts of the case before it this Court in *K. Kalpana Saraswathi vs. P.S.S. Somasundaram Chettiar* [AIR 1980 SC 512] said :

It is perfectly open to the court in control of a suit for specific performance to extend the time for deposit, and this court may do so even now to enable the plaintiff to get the advantage of the agreement to sell in her favour. The disentitling circumstances relied upon by the defendant-respondent are off-set by the false pleas raised in the course of the suit by him and rightly negatived. Nor are we convinced that the application for consideration and extension of time cannot be read, as in substance it

is, as a petition for more time to deposit. Even so, specific performance is an equitable relief and he who seeks equity can be put on terms to ensure that equity is done to the opposite party even while granting the relief. The final end of law is justice, and so the means to it too should be informed by equity. That is why he who seeks equity shall do equity.

In *K.S. Vidyanadam & Ors. vs. Vairavan* (1997 (3) SCC 1) this Court referred to the circumstances to be considered in exercising the discretionary power of the Court to decree specific performance of agreement for the sale of immovable property. The Court was of the view that in spite of the fact that suit was filed within the period of limitation as prescribed in Article 54 of the Limitation Act, 1963, the Court can nevertheless see that even where time is not the essence of the contract, the plaintiff must perform his part of the contract in reasonable time and by looking at all the relevant circumstances including the express terms of contract and nature of the property. The case before the Supreme Court was an appeal by the defendants-vendors who had suffered decree of specific performance of agreement for sale of their immovable property located in Madurai in the State of Tamil Nadu. The Court noticed that in case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades. The Court then held as under :

In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2½ years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices - according to the defendants, three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.

The Court relied upon the decision of the Constitution Bench in *Chand Rani vs. Kamal Rani* [(1993) 1 SCC 519].

In *N.P. Thirugnanam (Dead) By LRS. vs. Dr. R. Jagan Mohan Rao & Ors.* [(1995) 5 SCC 115] this Court observed with reference to Sections 16[c] and 20 of the Act that the continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance and that this circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The Court is not bound to grant the relief which is discretionary merely because there was a valid agreement of sale. It is equitable remedy and is in the discretion of the Court which discretion, however, has to be exercised according to the settled principles of

law and not arbitrarily.

In *Ramankutty Guptan vs. Avara* [(1994) 2 SCC 642] the appellant was the judgment-debtor in a suit for specific performance agreement for sale of immovable property. The question before the Court was whether application under Section 28 of the Act was maintainable on the execution side in a decree passed in the same suit by the appellate court. Plaintiff-respondents suit for specific performance though dismissed by the trial court was decreed by the appellate court which granted one month time to deposit the balance amount of consideration. The judgment-debtor filed second appeal in the High Court against the decree which was dismissed. The decree-holder deposited the amount after the time fixed by the appellate Court but before the second appeal was dismissed. Decree- holder applied for execution of the decree. The judgment-debtor filed an application in these very proceedings under Section 28 of the Act for rescission of the contract which had resulted in passing of the decree on the ground that the balance consideration was not deposited within one month of the decree by the trial Court. the Executing Court dismissed the application on the ground that deposit had been made within the time while holding that the application was not maintainable on the execution side. The High Court on revision also held that the application was not maintainable in the executing court. This led the judgment-debtor to come to this Court. This Court observed that when the decree specifies the time for performance of the conditions of the decree, on its failure to deposit the money, Section 28(1) itself gives power to the court to extend the time on such terms as the court may allow to pay the purchase money or other sum which the court has ordered him to pay. The Court held, after noticing the conflict of decisions by the Bombay High Court and the Andhra Pradesh High Court, that when the court which passed the decree and the executing court is the same, application under Section 28 can be filed in the executing court. However, where decree is transferred for execution to a transferee executing then certainly the transferee court is not the original court and the executing court is not the same court within the meaning of Section 28 of the Act. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under Section 28 is maintainable in the same court. Then dealing with the contention of the judgment-debtor that deposit was not within the time allowed by the appellate Court, the Court said :

The question then is whether it is a fit case for our interference. It is seen that the decree for specific performance became final. While the second appeal was pending, the balance consideration was deposited and no steps have been taken to bring it to the notice of the High Court that the respondent had committed default in compliance of the appellate decree depositing within the given time the balance consideration. Moreover, the respondent has been in possession of the land for a long time. The execution is on midway. Under these circumstances, the command of Article 136 of the Constitution is to draw the curtain and allow the application to lie in quietus where it was laid and dismiss the appeal.

In view of the decision of this Court in Ramankutty Guptans case (supra) when the trial court and the executing court are same, executing court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-holder can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of decree. One of the grounds on which the trial court dismissed the execution application was that the decree holder did not pay the balance of consideration as per the sale agreement and also did not pay within the time stipulated by the court in the decree. High Court could have certainly gone into this question when applications for extension of time was filed before it. However, on the objection by the judgment-debtor, it chose to send back the matter to the executing court for decision on these applications, which was perhaps, in the circumstances, was not correct procedure to adopt. But then, at the same time, the High Court put shackles on the discretion of the executing court by observing that vendor might have felt that after the appeal filed by the vendor judgment-holder against the decree for specific performance was disposed of they can even then deposit the amount or at the time of seeking the execution of the sale deed.

The agreement of sale was entered into as far back on February 16, 1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within time granted by the court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years period is prescribed for filing the suit for specific performance of contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of agreement and if there was non-performance was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. Court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court as a matter of course allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court? It is not the case of the respondent- decree holder that on account of any fault on the part of the vendor- judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the decree-holder- respondents as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the

record. Equity demands that discretion be not exercised in favour of the decree holder-respondents and no extension of time be granted to them to comply with the decree.

These appeals are, therefore, allowed with costs. Judgment of the High Court is set aside and that of the executing court confirmed.