Pukhraj D. Jain & Ors vs G. Gopalakrishna on 16 April, 2004

Equivalent citations: AIR 2004 SUPREME COURT 3504, 2004 (7) SCC 251, 2004 AIR SCW 3356, 2004 AIR - KANT. H. C. R. 2006, (2005) 1 CGLJ 304, 2004 (3) SLT 592, 2004 (4) SCALE 688, 2004 (4) ACE 749, 2004 SCFBRC 277, (2004) 19 ALLINDCAS 51 (SC), 2004 (2) HRR 22, 2005 (1) ALL CJ 185, (2004) 5 JT 329 (SC), (2004) 3 ALLMR 932 (SC), (2004) 1 CLR 705 (SC), (2004) 3 CTC 308 (SC), 2004 HRR 2 22, 2004 (5) SRJ 256, (2004) 3 CIVLJ 182, (2004) 3 GUJ LH 371, (2004) 6 KANT LJ 366, (2004) 2 LANDLR 619, (2004) 3 MAD LJ 183, (2005) 1 MAD LW 745, (2004) 3 PAT LJR 255, (2004) 3 SUPREME 346, (2004) 3 RECCIVR 171, (2004) 3 ICC 747, (2004) 4 SCALE 688, (2004) 3 JLJR 146, (2004) 56 ALL LR 275, (2004) 3 ALL WC 2214, (2004) 2 WLC(SC)CVL 577, (2004) 2 CURCC 143, (2004) 2 CIVILCOURTC 630, (2004) 18 INDLD 630

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Bench: S. Rajendra Babu, G.P. Mathur

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           CASE NO.:
Appeal (civil)  2082 of 1998

PETITIONER:
Pukhraj D. Jain & Ors.

RESPONDENT:
G. Gopalakrishna

DATE OF JUDGMENT: 16/04/2004

BENCH:
S. Rajendra Babu & G.P. Mathur

JUDGMENT:
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JUDGMENT G.P. MATHUR, J.

1. This appeal by special leave has been preferred by the defendants against the judgment and order dated 17.3.1997 of High Court of Karnataka by which the Regular First Appeal preferred by the plaintiff was allowed and case was remanded to the trial court with certain directions.

2. In order to understand the controversy involved it is necessary to set out the facts which are little involved.

(i) The appellant no.6 to 10 are sons and daughters of Shri M.G. Dayal and they were owners of the suit property (residential building at Jayanagar, Bangalore). They executed an agreement to sell the suit property in favour of Dr. G. Gopalakrishna (plaintiff/respondent no.1) on 5.12.1974 for a consideration of Rs.1,42,500/- and received Rs.42,500/- by way of advance. The respondent no.1 was also put in possession of the ground floor of the property.

(ii) The respondent no.1 issued a legal notice rescinding the contract and claimed refund of the advance amount paid by him. On 7.11.1977 he filed OS No.801 of 1977 (subsequently renumbered as OS No.1891 of 1980) against the appellant nos. 6 to 10 (owners of the property) claiming the amount which had been paid by way of advance. After considerable period of time respondent no.1 moved an amendment application seeking permission to convert the suit into one for specific performance of the agreement of sale. This application was rejected by the trial court on 3.12.1984 on the ground that the suit for specific performance had become barred by limitation. The Revision Petition preferred against the said order being CRP No.702 of 1985 was dismissed by the High Court at the admission stage on 29.5.1985.

(iii) The appellant nos. 1 to 5 (Pukhraj D.Jain and his four sons) purchased the property in dispute from the original owners, namely, respondent nos. 6 to 10 on 18.4.1985 for Rs.3,60,000/- and they were put in possession of the first floor of the building.

(iv) Respondent no.1 filed an amendment application on 26.6.1985 seeking an amendment of the plaint in OS No.801 of 1977 and claiming an additional amount of Rs.125 towards the cost of the legal notice. The amendment application was allowed and the respondent no.1 was required to pay an additional court fee of Rs.12.50 in view of the enhanced claim. However, instead of paying aforesaid amount the respondent no.1 filed a memo stating that he was not in a position to pay the court fee and as such the plaint may be rejected being deficiently stamped. The trial court decreed the suit for recovery of the amount on 24.7.1985.

(v) Though the suit filed by respondent no.1 was decreed yet he preferred a revision petition being CRP No.3797 of 1985 challenging the judgment and decree passed in his favour. The High Court though observed that it was an unusual revision filed by a plaintiff yet allowed the same on 18.2.1987, set aside the judgment and decree of the trial court and rejected the plaint.

(vi) The appellants nos.1 to 5 after execution of the sale deed in their favour on 18.4.1985, filed a suit being OS no. 4631 of 1986 seeking eviction of respondent no.1 from the ground floor of the house in dispute and also for mesne profits.

(vii) On 2.4.1988 the respondent no.1 filed another suit being OS no.1629 of 1988 against appellant nos. 6 to 10 in the Court of City Civil Judge, Bangalore for specific performance of the agreement dated 5.12.1974. In this suit issue no.3 relating to the bar of limitation and issue no.4 relating to the maintainability of the suit were framed. The respondent no.1 also filed an application under section 10 CPC seeking stay of his own suit OS no. 1629 of 1988 on the ground that the issues involved were

also directly and substantially in issue in a previously instituted suit being OS no. 4631 of 1986 which had been filed by the appellants nos.1 to 5 for his eviction from the ground floor of the house and for possession.

(viii) The Addl. City Civil Judge, Bangalore dismissed OS no. 1629 of 1988 on 30.9.1995 after deciding issues no.3 and 4 wherein he held that the suit was barred by limitation and the same was not maintainable.

(ix) The respondent no.1 preferred RFA no.635 of 1996 in the High Court against the judgment and decree dated 30.9.1995 of the Addl. City Civil Judge, Bangalore. The High Court allowed the appeal and set aside the judgment and decree of the Addl. City Civil Judge and remanded the matter to the trial court to dispose of the application moved by the respondent no.1 (plaintiff) under section 10 CPC for stay of his suit. It is this judgment and order which is subject matter of challenge in the present appeal.

(x) The suit for eviction of respondent no.1 and possession (OS no. 4631 of 1986) filed by the appellant nos. 1 to 5 was decreed by the trial court on 20.12.1997. RFA no. 171 of 1998 preferred by respondent no.1 against the aforesaid judgment and decree was dismissed by the High Court on 2.7.2001. This development has taken place subsequent to the filing of special leave petition in this Court.

3. The only ground urged in the appeal preferred by respondent no.1 in the High Court was that as he had filed an application under section 10 CPC on 21.10.1993 seeking stay of his suit (OS no.1629 of 1988), it was obligatory upon the trial court to consider the said application first before deciding issues no.3 and 4. The High Court has observed that the defendants in the suit had sought time to file objection in reply to the application moved under section 10 read with section 151 of CPC seeking stay of his suit. Thereafter the suit was listed on several dates for consideration of the application but finally, after hearing the counsel for the parties, the learned Addl. City Civil Judge dismissed the suit by deciding issues no. 3 and 4 and the application under section 10 CPC was not at all considered. It was obligatory on the part of the learned Addl. City Civil Judge to have considered the application moved under section 10 CPC at the first instance before deciding issues no. 3 and 4. The High Court has held that the course adopted by the learned Addl. City Civil Judge in not deciding the application moved by the plaintiff and in proceeding to decide issues no. 3 and 4 was wholly illegal. On these findings the judgment and decree of the High Court were set aside and the case was remanded to the court of Addl. City Civil with a direction to dispose of the application under section 10 read with 151 CPC moved by the plaintiff on priority basis.

4. We have heard learned counsel for the parties and have perused the records. In our opinion, the view taken by the High Court is wholly erroneous in law and must be set aside. The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant

the relief claimed. However, mere filing of an application under section 10 CPC does not in any manner put an embargo on the power of the court to examine the merits of the matter. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the court as to how the proceedings should be conducted, it is for the court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side.

5. The facts in the present case speak for themselves. The agreement in question was executed by appellants nos.6 to 10 (original owners) in favour of G. Gopalakrishna (respondent no.1) on 5.12.1974. He himself issued a legal notice rescinding the contract and claiming refund of the advance amount paid. Thereafter on 7.11.1977 he filed a suit for recovery of the advance amount paid by him. This clearly shows that he gave up his right under the contract for execution of sale deed of the property in his favour. After considerable period of time he filed an application for amendment seeking to convert the suit into one for specific performance of agreement of sale but the said application was dismissed by the trial court on 3.12.1984 as being barred by limitation. The Revision preferred against the said order was dismissed by the High Court and therefore the finding of the trial court that the relief seeking specific performance of agreement of sale had become time barred attained finality. The suit for recovery of the amount was decreed by the trial Court on 24.7.1985 but on account of very clever device adopted by respondent no.1 of seeking additional sum of Rs.125/- towards cost of legal notice and thereafter not paying the requisite additional court fee of Rs.12.50 on the enhanced claim, the High Court in a Revision filed by him set aside the decree for refund of the amount and rejected the plaint. The suit giving rise to the present appeal was instituted by respondent no.1 on 2.4.1988 wherein he again sought specific performance of the agreement to sell dated 5..12.1974. The trial court was of the opinion that the present suit was filed after nearly 14 years. Even in the earlier suit (OS no.801 of 1977) the amendment sought by the respondent no.1 wherein he wanted to convert his suit into one for specific performance of agreement of sale had been rejected and a finding had been recorded that the relief for specific performance had already become time barred and this finding had been affirmed in Revision by the High Court. Article 54 of the Limitation Act provides a limitation of three years for instituting a suit for specific performance of a contract. This period of 3 years has to be reckoned from the date fixed for the performance, or if, no such date is fixed, when the plaintiff has notice that performance is refused. The appellant nos. 6 to 10 (original owners of the property) had opposed the application moved by respondent no.1 in the earlier suit for amendment seeking relief of specific performance of the agreement on the ground of limitation and their plea was accepted. Thus it is crystal clear that long before filing of the present suit the respondent no.1 had notice of the fact that the original owners were not prepared to execute the sale deed in his favour. The original owners (appellant nos. 6 to 10) sold the property in dispute in favour of appellants nos.1 to 5 on 18.4.1985 after the amendment application had been rejected by the trial court on the finding that the relief for specific performance had become barred by limitation. On these facts no other inference was possible and the trial court was perfectly justified

in holding that the suit (OS no.1629 of 1988) was barred by limitation.

6. Section 16(C) of the Specific Relief Act lays down that specific performance of a contract cannot be enforced in favour of a person 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 II to this sub-section provides that the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction. The requirement of this provision is that plaintiff must aver that he has always been ready and willing to perform the additional terms of the contract. Therefore not only there should be such an averment in the plaint but the surrounding circumstances must also indicate that the readiness and willingness continue from the date of the contract till the hearing of the suit. It is well settled that equitable remedy of specific performance cannot be had on the basis of pleadings which do not contain averments of readiness and willingness of the plaintiff to perform his contract in terms of Forms 47 and 48 of CPC. Here the respondent no.1 himself sent a legal notice rescinding the contract and thereafter filed OS no.801 of 1977 on 7.11.1977 claiming refund of the advance paid by him. In fact the suit for recovery of the amount was decreed by the trial court on 24.7.1985 but he himself preferred a revision against the decree wherein an order of rejection of the plaint was passed by the High Court. In such circumstances, it is absolutely apparent that the respondent no.1 was not ready and willing to perform his part of the contract and in view of the mandate of section 16 of the Specific Relief Act no decree for specific performance could be passed in his favour. The trial court, therefore, rightly held that the suit filed by respondent no.1 was not maintainable.

7. In view of these facts the decree passed by the trial court dismissing the suit was perfectly correct and the High Court committed manifest error of law in not adverting to these aspects of the matter and in accepting the contention raised on behalf of respondent no.1, which relate to a matter of procedure and not to substance, that the application moved by him under section 10 CPC seeking stay of the suit had not been considered on merits.

The appeal is accordingly allowed with costs throughout and the judgment and order of the High Court dated 17.3.1997 is set aside. The decree dismissing the suit passed by the trial court is affirmed.