A.Kanthamani vs Nasreen Ahmed on 6 March, 2017

Equivalent citations: AIR 2017 SUPREME COURT 1236, 2017 (4) SCC 654, AIR 2017 SC (CIVIL) 1142, (2017) 1 GUJ LH 794, (2017) 2 JCR 148 (SC), (2017) 122 ALL LR 439, (2017) 3 CIVLJ 68, (2017) 1 CLR 811 (SC), (2017) 173 ALLINDCAS 10 (SC), (2017) 3 SCALE 331, (2017) 1 WLC(SC)CVL 532, (2017) 4 MAD LW 785, (2017) 2 CIVILCOURTC 368, (2017) 2 MAD LJ 632, (2017) 3 ANDHLD 109, (2017) 2 RECCIVR 267, (2017) 2 ICC 351, (2017) 136 REVDEC 236, (2017) 1 ALL RENTCAS 760, 2017 (3) KCCR SN 310 (SC)

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Bench: Abhay Manohar Sapre, R.K. Agrawal

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.2714 OF 2008

Mrs. A. Kanthamani ….Appellant(s)

VERSUS

Mrs. Nasreen Ahmed …Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1) This appeal is filed by the defendant against the judgment and final order dated 27.10.2006 passed by the High Court of Judicature at Madras in A.S. No. 127 of 2000 by which the High Court dismissed the appeal filed by the appellant herein with costs confirming the decree and judgment dated 30.10.1998 passed in O.S. No. 6420 of 1996 by the VIII Additional Judge, City Civil Court, Chennai, which decreed the respondent's suit for specific performance of the agreement against the appellant.

2) We herein set out the facts, in brief, to appreciate the issue involved in this appeal.

3) The appellant-defendant is the owner of the property situated at No.191, Lloyds Road, Chennai-86. She entered into an agreement for sale with the respondent-plaintiff on 05.03.1989 in respect of a part of ground floor of the said property described in Schedule 'B' to the plaint together

with 1/3rd undivided share in the property described in Schedule 'A' for a total sale consideration of Rs.3,43,200/-. On the same day, a sum of Rs.1,30,000/- was paid by the respondent as advance money to the appellant. Thereafter, the respondent paid Rs. 20,000/- towards sale consideration to the appellant on 03.04.1989, Rs. 10,000/- on 04.05.1989, Rs. 15,000 on 03.07.1989, Rs. 15,000/- on 06.07.1989 and Rs. 16,000/- on 16.08.1989. So far as the balance amount was concerned, the respondent agreed to pay the same on or before 31.12.1989 to the appellant. It was alleged that the appellant also orally agreed to sell to the respondent an additional area of 132.25 sq.ft. at the ground floor and 4 of undivided share and for that additional property, the respondent paid a sum of Rs.46,000/- as an advance money.

4) On 10.11.1989, the respondent sent a draft sale deed to the appellant for an area measuring 847.25 sq.ft. and one 1/2 undivided share. The appellant though agreed to sell the additional extent of land orally, she refused to do so and returned the draft sale deed on 04.12.1989 for approval of the respondent by treating the sum of Rs.46,000/- paid by her for additional extent as further advance for the earlier written agreement.

5) Thereafter on 15.12.1989, the appellant sent another draft sale deed for approval of the respondent by removing clauses 18 and 27 and with minor changes. Since these deleted clauses referred to clauses 17 and 24 of the agreement of sale, the respondent approved the first draft which contained these clauses.

6) On 27.12.1989, the appellant wrote a letter to the respondent insisting upon her to approve her second draft on or before 31.12.1989.

7) The respondent approved the second draft sale deed and sent it to the appellant on 28.12.1989 by speed post and also enclosed a letter from the LIC sanctioning loan of Rs.1 lakh in her favour. The respondent further informed that she is willing to bring the balance of sale consideration at the time of registration of the sale deed.

8) On 30.12.1989, the respondent sent a legal notice through her advocate calling upon the appellant to execute and register the sale deed on or before 10.01.1990 in her favour.

9) By letter dated 03.01.1990 through her advocate, the appellant refused to sell the property to the respondent and cancelled the agreement.

10) The respondent then filed a suit against the appellant on 10.01.1990 seeking specific performance of the agreement. The plaint contained aforementioned pleadings. It was alleged that the respondent was and is ready and willing to perform her part of the agreement and has, in fact, so performed. It was alleged that it was the appellant who failed to perform her part without any justification and hence committed breach of the agreement thereby entitling the respondent to claim specific performance of the agreement in relation to suit house. The appellant filed written statement.

11) Considering the plaint and written statement, the trial Court framed five issues and one additional issue which are as under:

> Whether it is true that the defendant agreed to sell the schedule property and an extent of 132.25 sq.ft. along with ½ undivided share to the plaintiff?
>
> Whether it is true that the time is the essence of the contract?
>
> Whether it is true that the plaintiff was ready to perform her part of contract in the agreement?
>
> Whether the plaintiff is entitled for the relief of specific performance?
>
> What is the relief, the plaintiff entitled for?
>
> Additional issue framed on 31.07.1998:
>
> Whether the plaintiff acted in a manner contradictory and in violation of agreement?

12) After considering the documentary evidence led in by both the parties, the Trial Court, vide judgment and decree dated 30.10.1998 in O.S. No.6420 of 1996, decreed the respondent's suit and passed the decree for specific performance of the agreement against the appellant. It was held that the time was not the essence of the contract. It was further held that the Plaintiff (Respondent) was always ready and willing to perform the agreement and, in fact, performed her part while it was the defendant (appellant) who tried to scuttle away from the agreement. It was further held that the respondent is entitled to a decree for specific performance of contract on the basis of sale agreement dated 05.03.1989 in respect of the plaint schedule property and accordingly the appellant was given two months' time to execute the sale deed and the respondent was given one month's time to deposit the balance sale consideration of Rs.1,47,200/-.

13) Aggrieved by the aforesaid judgment, the defendant filed an appeal to the High Court. By impugned judgment dated 27.10.2006, the High Court dismissed the appeal and confirmed the decree and judgment dated 30.10.1998 passed by the trial Court in O.S. No. 6420 of 1996.

14) Against the said judgment, the appellant(defendant) has filed this appeal by way of special leave petition before this Court.

15) Heard Mr. Mohan Parasaran, learned senior counsel for the appellant and Mr. R. Balasubramanian, learned senior counsel for the respondent.

16) Mr. Mohan Parasaran, learned senior counsel for the appellant while assailing the legality and correctness of the impugned judgment essentially argued three points.

17) In the first place, learned counsel submitted that since the respondent (plaintiff) did not seek a declaration that the termination of agreement is bad in law, mere suit for specific performance of the agreement was not maintainable in law and was, therefore, liable to be dismissed on this short ground. In other words, the submission was that it was obligatory upon the respondent (plaintiff) to have sought a declaration in the suit that the termination of the agreement made by the appellant (defendant) vide his notice dated 03.01.1989 is bad and along with such relief, the respondent(plaintiff) should also have claimed a relief of specific performance of the agreement to make the suit maintainable. It was urged that since such relief was not claimed by the plaintiff, the suit for specific performance of the agreement simpliciter was not maintainable.

In support of this submission, learned counsel placed reliance on the decision of this Court in I.S. Sikander (Dead) by LRs. Vs. K. Subramani & Ors., (2013) 15 SCC 27.

18) In the second place, learned counsel attacked the findings on merits. He took us to the evidence of the parties and made an attempt to point out that both the Courts below committed error in holding that the plaintiff was ready and willing to perform her part of the agreement. Learned counsel contended that from the evidence, it is clear that the plaintiff was neither ready nor willing to perform her part of the agreement and nor she had money with her to pay towards balance consideration to the defendant to get the sale deed executed in her favour in terms of the agreement. It was urged that the plaintiff did not come to the Court with clean hands inasmuch as she insisted upon the terms, which were neither agreed upon and nor they were part of the agreement.

19) In the third place, learned counsel contended that since two Courts below did not properly appreciate the evidence and that too in a case where the plaintiff had come to the Court with unclean hands, the discretionary relief of grant of specific performance of agreement ought not to have been granted to such plaintiff and instead the suit merited dismissal.

20) In reply, learned counsel for the respondent (plaintiff) while opposing the appeal contended that no case for any interference in the impugned judgment is made out. It was his submission that both the Courts below rightly held that the plaintiff was able to make out a case of breach of agreement committed by the defendant; and secondly, she had performed her part of the agreement thereby rightly held to have fulfilled the twin requirement of "readiness and willingness" as provided under Section 16 (c) of the Specific Relief Act, 1963. Learned counsel urged that since the issue relating to the maintainability of suit was neither raised in the written statement nor in the appeal before the High Court and nor even in this appeal but was raised for the first time in submission, hence the same could not be allowed to be raised for the first time in this Court. Lastly, learned counsel submitted that since the two Courts below answered all the issues on facts in favour of the plaintiff by properly appreciating the evidence, such findings being concurrent in nature, are binding on this Court. It was more so when the findings did not suffer from any perversity, much less extreme

perversity or illegality or arbitrariness, requiring any interference by this Court.

21) Having heard learned counsel for the parties and on perusal of the record of the case, we find no force in any of the submissions of the learned counsel for the appellant (defendant).

22) Before we proceed to examine the issues involved in the appeal, it is necessary to take note of some of the relevant provisions of the Acts and the decisions rendered by the Courts, which govern the controversy.

23) The filing of the suit for specific performance of an agreement/contract is governed by Section 16(c) of the Specific Relief Act, 1963 read with Article 54 of the Schedule to the Limitation Act, 1963. Form Nos. 47 and 48 of Appendix'A' to Code of Civil Procedure, 1908 prescribe the format of the plaint for such suit.

24) The Specific Relief Act, 1877 which stood repealed by the Act of 1963 did not contain provision analogues to Section 16(c). Yet in the absence of any such provision, its requirements used to be considered mandatory in the suits for specific performance by virtue of law laid down by the Privy Counsel in a celebrated case of Ardeshir H. Mama vs Flora Sasoon, AIR 1928 PC 208. It is in this Case which went to Privy Council from Indian Courts, Their Lordships laid down the following principle:

> "In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as Clough v. London and North Western Railway Co. (1871) L.R. 7 Ex. 26 and Law v. Law (1905) 1 Ch. 140 a definite election to treat the contract as at an end, no suit for specific, performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had by his election precluded himself even from making the averment just referred to proof of which was essential to the success of his suit. The effect upon an action for damages for breach of a previous suit for specific performance will be apparent after the question of the competence of the Court itself to award damages in such a suit has been touched upon."

> 25) The Act of 1963 then made the aforesaid requirement a statutory one by enacting Section 16 (c), which reads 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)-

a) 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;

b) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

26) Therefore, the plaint which seeks the relief of specific performance of the agreement/contract must contain all requirements of Section 16 (c) read with requirements contained in Form Nos. 47 and 48 of Appendix 'A' of C.P.C.

27) Article 54 of the Limitation Act provides a period of 3 year for filing a suit for specific performance of contract/agreement. A period of 3 years is required to be counted from the date fixed by the parties for the performance, or if no such date is fixed, when the plaintiff has noticed that the performance is refused. The plaint should, therefore, also have necessary pleading satisfying the requirement of Article 54.

28) The expression "readiness and willingness" has been the subject matter of interpretation in many cases even prior to its insertion in Section 16 (c) of the Specific Relief Act, 1963. While examining the question as to how and in what manner, the plaintiff is required to prove his financial readiness so as to enable him to claim specific performance of the contract/agreement, the Privy Council in a leading case which arose from the Indian Courts (Bombay) in Bank of India Limited & Ors. Vs. Jamsetji A.H. Chinoy and Chinoy and Company, AIR 1950 PC 90, approved the view taken by Chagla A.C.J., and held inter alia that " it is not necessary for the plaintiff to produce the money or vouch a concluded scheme for financing the transaction to prove his readiness and willingness."

29) The following observations of the Privy Council are apposite:

"21.....Their Lordships agree with this conclusion and the grounds on which it was based. It is true that the plaintiff 1 stated that he was buying for himself, that he had not sufficient ready money to meet the price and that no definite arrangements had been made for finding it at the time of repudiation. But in order to prove himself

ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connection that they fully concur with Chagla A.C.J. when he says:

"In my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion ' that plaintiff 1 was ready and willing to perform his part of the contract. It was not necessary for him to ' work out actual figures and satisfy the court what specific amount a bank would have advanced on the mortgage of his property and the pledge of these shares. I do not think that any jury--if the matter was left to the jury in England--would have come to the conclusion that a man, " in the position in which the plaintiff was, was not ready and willing to pay the purchase price of the shares which he had bought from defendants 1 and 2."

For the foregoing reasons, their Lordships answer question(4) in the affirmative." (Emphasis supplied)

30) This Court in Sukhbir Singh & Ors. Vs. Brij Pal Singh & Ors., AIR 1996 SC 2510=(1997) 2 SCC 200 followed the aforesaid principle with these words:

"5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub- Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till the date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law."

31) Keeping these broad principles of law in mind, which are now fairly well settled, let us examine the facts of this case.

32) At the outset, we may observe that this Court is loath to undertake the task of appreciating the evidence in an appeal filed under Article 136 of the Constitution of India. It is more so when such appeal arises out of the judgment, which has recorded concurrent findings of fact.

33) However, since in this case, leave was granted and at the time of hearing, learned counsel for the parties took us through the evidence in support of their submissions, we considered it proper to peruse the evidence with a view to find out as to whether

impugned judgment suffers from any error on facts or/and law?

34) Coming first to the submission of the learned counsel for the appellant about the maintainability of suit, in our considered view, it has no merit for more than one reason.

35) First, as rightly argued by learned counsel for the respondent, the objection regarding the maintainability of the Suit was neither raised by the defendant in the written statement nor in first appeal before the High Court and nor in grounds of appeal in this Court.

36) Second, since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court could render any finding on the plea.

37) Third, it is a well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement) then only such plea can be adjudicated by the Trial Court on its merits as a preliminary issue under Order 14 Rule 2 of the CPC. Once a finding is rendered on the plea, the same can then be examined by the first or/and second appellate Court.

38) It is only in appropriate cases, where the Court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not legally maintainable due to any legal provision; a judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit. Such is, however, not the case here.

39) Fourth, the decision relied on by the learned counsel for the appellant in the case of I.S. Sikander (supra) turns on the facts involved therein and is thus distinguishable.

40) Lastly, the suit filed by the respondent seeking specific performance of the agreement dated 05.03.1989 was maintainable for the reason that the cause of action to file the suit arose on the expiry of period mentioned in the agreement (31.12.1989) for its performance as provided in Article 54 of the Limitation Act and it was rightly filed immediately within 10 days on 10.01.1990.

41) For the aforementioned reasons, we find no merit in the first submission of learned counsel for the appellant, which is rejected.

42) Coming now to the second and third submission of learned counsel for the appellant, we are of the considered opinion that it has also no merit and hence deserve to be rejected for more than one reason.

43) First, the plaintiff had pleaded the necessary requirements of Section 16 (c) of the Specific Relief Act, 1963 read with the requirement of Forms 47, 48 and Article 54 of the Limitation Act in the

plaint; Second, the defendant did not dispute the execution of agreement with the plaintiff and, in fact, entered in correspondence with the plaintiff for incorporation of some clauses therein; Third, the plaintiff proved her readiness and willingness to perform her part of agreement and also proved her financial capacity to purchase the suit property by adducing adequate evidence; Fourth, the plaintiff had paid more than Rs.2 lacs to the defendant prior to execution of sale deed in terms of agreement dated 05.03.1989 and was, therefore, required to pay balance sum of Rs.1,47,200/- to the defendant; Fifth, on admitted facts, therefore, the plaintiff had paid more than 50% of the sale consideration to the defendant before the due date of execution of sale deed; Sixth, the plaintiff had also proved that she had the requisite financial capacity to pay the balance sale consideration to the defendant inasmuch as she had arranged the funds by obtaining loan from the LIC; Seventh, the plaintiff filed the suit immediately on expiry of the period within 10 days to show her readiness and willingness to purchase the property; and Eighth, once it was held that the defendant committed breach in avoiding to execute the agreement, whereas the plaintiff performed her part of agreement and was ready and willing to perform her part, the Trial Court was justified in exercising its discretion in favour of the plaintiff by passing a decree for specific performance of agreement against the defendant.

44) In our view, none of these findings could be assailed as being either perverse or de hors the evidence or against any provision of law and nor these findings could be assailed on the ground that no judicial man could ever reach to such conclusion.

45) We also do not find any merit in the submission of the learned counsel for the appellant when he contended that the plaintiff did not come to the Court with clean hands and hence the suit is liable to be dismissed.

46) In our view, both the Courts below rightly rejected this submission. There is no evidence to sustain the submission. On the other hand, we find that it is the defendant, who despite accepting the substantial money (more than 50%) towards sale consideration from the plaintiff, avoided executing the sale deed on one or other false pretext.

47) We also do not find any merit in the submission of the learned counsel for the appellant when he contended that since the plaintiff was insisting for execution of sale deed in relation to some more portions, which did not form part of the agreement and hence it should have been held that the plaintiff committed the breach of the agreement and not the defendant.

48) In our view, the two Courts below rightly repelled this submission by holding that the plaintiff did not claim any relief in relation to the property which was not the subject matter of agreement and confined his relief only in relation to the property which formed the subject matter of agreement dated 05.03.1989. We thus find no good ground to differ with this finding of the two Courts below. It was rightly recorded.

49) In our considered view, the two Courts below, therefore, rightly rendered the aforementioned findings in favour of the plaintiff and we find no difficulty in concurring with the findings, which in our view do not call for any interference by this Court.

50) In the light of foregoing discussion, we find no merit in the appeal. It is accordingly dismissed with cost quantified at Rs.10,000/- payable by the appellant to the respondent.

.....J. [R.K. AGRAWAL] .....J. [ABHAY MANOHAR SAPRE] New Delhi;

March 6, 2017
