Parakunnan Veetill Joseph'S Son Mathew vs Nedumbara Kuruvila'S Son And Ors. on 14 September, 1987

Equivalent citations: AIR1987SC2328, JT1987(3)SC643, 1988(1)KLT7(SC), 1987(2)SCALE588, 1987SUPP(1)SCC340, 1987(2)UJ449(SC), AIR 1987 SUPREME COURT 2328, 1987 SCC (SUPP) 340, 1987 4 JT 643, (1987) 3 JT 643 (SC), 1987 RAJLR 567, (1988) 1 KER LT 7, 1987 2 UJ (SC) 449, (1987) 13 ALL LR 676

Bench: K. Jagannatha Shetty Shetty, O. Chinnappa Reddy

JUDGMENT

1. This appeal, by Special Leave concerns the validity for a decree for specific performance granted by the High Court of Kerala in A.S. No. 525/1971.

2. 'Kadalat Estate', which was the subject matter of a suit out of which the appeal arises was originally owned by Fakhir Mohammed Sait. By agreement Ex. A1 dated June 8, 1962 Sait agreed to sell the estate to Kasi Chettiar for Rs. 24,500/-. Chettiar paid Rs. 5,500/- as advance on the date of agreement and undertook to pay the balance upon executing the sale deed. The sale deed was to be executed within two months from the date of agreement. The deed, however, was not executed and the matter was dragged on by correspondence between the parties. On December 22, 1963 Sait died leaving behind his wife Sulekha Bai and some minor children. In the neighbouring estate there was a lady Doctor P.W. 2. Mathew is her brother. Kuruvila is her husband. Varghese is her father-in-law. The first three appeared to have contacted Sulekha Bai and also took some steps to purchase the estate. Chettiar was not unaware of their efforts and transactions which we will presently refer.

3. On December 31, 1963 Sulekha Bai and her children executed a registered lease deed Ex. B43 in respect of 57.83 acres of the estate in favour of Mathew. The total extent of the estate is about 462 acres. On the next date there was an agreement Ex. B44 again in favour of Mathew for sale of the entire estate. The price agreed thereunder was Rs. 24,500/-out of which Rs. 1,500/-was paid in advance. There are conflicting versions from Mathew and Kuruvila in regard to these two transactions. Kuruvila was contending that the agreement Ex. B43 and Ex. B44 were benami in nature, intended for his benefit and it was for him to purchase the estate. But Mathew has denied that version. He was asserting that those transactions were not benami and pursuant thereto, he alone was entitled to purchase the estate. The fact remains that on November 22, 1965, Sulekha Bai and her children sold the estate to Mathew and executed the sale deed Ex. B8 in his name. They received the full consideration from Mathew alone. It was the case of Kuruvila that he was defrauded by his brother in-law. He appeared to have approached his father for solution. The result was on February 22, 1966 Chettiar assigned his rights under Ex. A1 to Varghese for Rs. 10,000/-. The deed of assignment is Ex. A24. Varghese paid Rs. 7,500/- in cash and cheques, to Chettiar with a promissory note for balance of Rs. 2,500/-. The assignment deed refers to the sale deed obtained

by Mathew. It states that the legal representatives of Sait have sold the estate to Mathew who was fully aware of the agreement for sale Ex. A1. It further states that Mathew contacted Chettiar for the purpose of ascertaining the nature of the agreement and other details regarding the estate.

4.On March 29, 1966 Varghese armed with the deed of assignment Ex A24 alongwith Chettiar instituted O.S. No. 41 of 1966 for specific performance of the agreement Ex. A1. The suit was instituted against Mathew and legal representatives of Sait. The alternate relief claimed in the suit was for refund of the advance of Rs. 5,500/- paid under Ex. A1 with interest thereon and damages for breach of the agreement. That is not all. On October 18, 1967 Kuruvila instituted O.S. No. 119/67 against Mathew, Varghese and Chettiar for declaration that he alone was entitled for all the claims and rights over the Kadalat Estate, as per Ex B43, Ex. B44 and Ex. B8, and Mathew did not have any claim or right. He has impeached Ex. B43, Ex. 44 as benami and Ex. B8 as fraudulent. In this suit, Kuruvila also disclosed perhaps, unwittingly the purpose of suit O.S. No. 41/1966 filed by his father. He stated:

> It was thought that then atleast there would be dawn of wisdom to the 1st defendant and he may adopt the proper course. Accordingly father and 3rd defendant joined together and the 1st defendant and others were made as parties and O.S. 41 of 1966 was filed in this Court for getting compulsory sale deed executed with regard to the said Kadalat estate.

5. The case put forward by Kuruvila in O.S. No. 119/67 was outright rejected by the trial court. The Court held that the amounts under Ex. B43, Ex. B44 were paid by Mathew and not by Kuruvila or his wife. Mathew was put in possession of the estate upon the execution of Ex. B43 and Ex. B44. The parties never had any intention to treat the transaction under Ex. B43 and Ex. B44 as Benami. The sale deed Ex. B8 was not vitiated by fraud or misrepresentation. It was not taken behind the back of Kuruvila. With these and other findings the Court dismissed O.S. No. 119/67. In the other suit, the Court said that Chettiar was willing to complete the sale as per Ex. A1 even after the death of Suit. After Sait's death the minority of his Children and the Execution of Ex B43 and Ex. B44 by Sulekha Bai to Mathew had created obstacles in the way of completing the sale. The assignment deed Ex. A24 was valid and the rights under Ex. A1 were assignable in law. The Court then observed that Mathew was originally a harmless photographer at a distant place. The estate was thrust upon him by his sister P.W 2 and her husband. Mathew was put in possession by Virtue of Ex B43, Ex B44 and Ex B8. Since then, he effected improvements with heavy investment. Considering these and other circumstances particularly the conduct of parties, the Court concluded that it would be just and fair to all parties concerned if Varghese was given refund of Rs. 5.500/- paid by Chettiar under Ex. A1. Accordingly, the Court while denying relief of specific performance decreed the suit only for refund of that advance money; in addition to damages in a sum of Rs. 5,625/-.

6. Against the judgment of the trial court, the parties appealed to the High Court of Kerala. The High Court found fault with the conclusions reached by the trial court. At one stage of the judgment the High Court seems to have agreed with the contention of Kuruvila that Ex. B43 and Ex. B44 were benami and Mathew was only a name lender, but in regard to sale deed Ex B8 the High Court said that it was not fraudulent and Kuruvila had no right thereunder. Accordingly the High Court

confirmed the dismissal of O.S. No. 119/1967.

7. In O.S. No. 41/66 the High Court was of opinion that the trial court exercised discretion arbitrarily in refusing specific performance. The High Court held that Mathew obtained the sale deed Ex. B8 with knowledge of the existence of Ex. A1 and the fact that he expended money for effecting improvements is no ground to deny specific performance of Ex. A1. The High Court accordingly, directed Mathew to convey the suit property and transfer possession thereof to Varghese on the latter depositing in Court a sum of Rs. 19,000/-.

8. There is no appeal to this Court against the judgment of the High Court affirming the dismissal of OS. No. 119/67. That judgment has become final. The appeal before us is only by Mathew against the decree for specific performance granted in O.S. No. 41 of 1966.

9. Mr. S. Padmanabhan learned Counsel for the appellant urged that the events indicate that Chettiar had waived his rights under Ex. A1 and Varghese as an assignee could not get a better right. He also urged that in view of the stand taken by Varghese in O.S. No. 119 of 1967, there cannot be a decree for specific performance. Mr. G. Vishwanath Iyer, learned Counsel for the respondent while supporting the judgment of the High Court referred to us the various aspects of the matter.

10. It seems to us that contentions of Mr. Padmanabhan deserve to be accepted. The High Court appears to have missed the crux of the matter. It is not in dispute that Kuruvila, his wife and brother-in-law were moving hand in hand to purchase the estate. They knew that Chettiar had obtained an agreement for sale Ex. A1 from Sait. They never wanted to bye pass that transaction. They in fact wanted to close that transaction. Varghese also appeared to have joined in this bargain. It was apparently with the knowledge of all persons, Ex. B43 and Ex. B44 came to be executed. This much would be clear from the pleadings in O.S. No 119/67. This is what Kuruvila as plaintiff stated in para 6 of the plaint:

> The decision taken for executing the lease deed was on the ground that it would be a source of strength for closing the transaction with the 3rd defendant. The plaintiff told the wife and sister of Sait that if the Karar and lease deed were executed in the name of the plaintiff; it would create difficulty in closing the transaction with the 3rd defendant and it would be easy if they are executed in the name of another. He said that the lease deed and Karar may be executed in the name of the 1st defendant who is the brother-in-law of the plaintiff and was having close and friendly relationship with him.

11. Varghese while admitting all these allegations has gone a step further in his written statement where he said:

> The lease deed and agreement were executed after the death of Sait and they were executed as a support to close the transaction with the 3rd defendant. It was with the intention of purchasing the properties as per the agreement with the 3rd defendant, the said lease deed and the agreement with the plaintiff in the name of 1st defendant

were got executed.

Then he said:

> This defendant did not oppose the contentions made in the plaint. He also admits them. This defendant has no objection in deciding O.S. No. 41 of 1966 as per the decision of this case.

12. What do these averments mean? They are suggestive of the fact that Ex. B43 and Ex. B44 were executed with a view to close the transaction with Chettiar. Those deeds in the name of Mathew would serve as a source of strength for closing the transaction with Chettiar. Those averments also impliedly suggest that Ex. B43 and Ex. B44 were not obtained to defraud Chettiar from his legitimate rights, if any, under Ex. A1. In this context, the case of Varghese put forward in his written statement appears to assume importance. He has stated that the lease deed and agreement [Ex. B43 and Ex. B44] were executed with the intention of purchasing the property as per the agreement with Chettiar. This is very significant and ought not to be overlooked. It evidently indicates that the lease deed Ex. B43 and the agreement for sale Ex. B44 were obtained from the owners of the estate after taking Chettiar into confidence. We have no doubt about the implied consent of Chettiar for executing those documents and the parties settling his rights under Ex. A1. To put it in other words, Chettiar must have waived his rights to purchase the estate for himself. It is, in our view, plainly to be inferred. There is no escape from this logical assumption, particularly in the absence of evidence of Varghese and Kuruvila. Both of them have kept themselves away from the Court.

13. In Satyanarayana v. Yellogi Rao 1965 (2) SCR 222 (at 230), this Court observed:

> But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for it abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "Waiver" in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action : It is an agreement to release or not to assert a right" : see Dawson's Bunk Ltd. v. Nippon Mankwa Kabushiki Kaisha. It is not possible or desirable to lay down the circumstances under which a Court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.

14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff The

High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for sale Ex A1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance.

15. In the result, we allow the appeal, reverse the judgment of the High Court and restore that of the trial court.

16. In the circumstances of the case, the parties to bear their own costs.