

## Ouseph Varghese vs Joseph Aley & Ors on 18 August, 1969

PETITIONER:

OUSEPH VARGHESE

Vs.

RESPONDENT:

JOSEPH ALEY & ORS.

DATE OF JUDGMENT:

18/08/1969

BENCH:

ACT:

Specific Relief Act 1877 (1 of 1877), s. 12--Suit for specific performance of oral agreement to re-convey property sold through sale-deed--Burden of proof on plaintiff is heavy--Court will rarely grant specific performance of contract, on the basis of oral evidence only--Offer by defendant in written statement to sell part of property to plaintiff at certain price--Offer not accepted by plaintiff--Court can not pass decree in favour of plaintiff on the basis of such offer--Costs where both parties have withheld facts from Court.

HEADNOTE:

The plaintiff as original owner of the suit properties sold the same to the 1st defendant who. was husband of the 2nd defendant. According to the plaintiff apart 'from the written sale-deed there was an oral agreement between him and the 1st defendant whereunder the latter agrees to reconvey the properties sold at the same price whenever the plaintiff called upon him to do so. The suit was filed for specific performance of the said oral agreement. The 1st defendant died even before he filed his written statement. Before his death he had gifted the suit properties to his wife, the 2nd defendant. In her 'written statement the 2nd defendant denied the agreement pleaded in the point but stated that just before his death her husband had agreed to sell t6 plaintiff item No. 1 of the suit property less one acre of paddy field for a sum of Rs. 11,500 but due to his illness the sale could not be effected. She reiterated the said offer in her written statement but the plaintiff did not accept it and the suit proceeded on the basis of the agreement pleaded in the plaint. The trial court decreed the suit as prayed for. In appeal the High Court did not accept the agreement pleaded by the plaintiff but still

granted a decree directing the defendant to execute a sale deed in favour of the plaintiff in respect of item No. 1 of the plaint schedule properties less one acre of paddy field for a sum of Rs. 11,500. Both the parties appealed to this HELD.: (i) The burden of proving the oral agreement was on the plaintiff. The sale deed on the face of it evidenced an outright sale. The stipulation has it that the purchaser would not mortgage or assign the properties to anyone else during the vendor's lifetime went against the plaintiff's case inasmuch as it only gave the vendor a right to preempt. There was no satisfactory explanation why such an important thing as the agreement to re-convey was made orally and not reduced to writing. [923 G,924B]

It appeared likely in the present case that neither side had come forward with the true version. But before a court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence. Rarely a decree for specific performance is granted on the basis of an agreement supported solely by oral evidence. [925 D-E]

On the evidence adduced by him the plaintiff had failed to prove the agreement pleaded in the plaint. [925 F]

(ii) The High Court was wrong in passing the decree in respect of plaint item No. 1 on the basis of the admission of the 2nd defendant in her written statement. The plaintiff did not at any stage accept the  
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agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff in his plaint and that pleaded by the defendant in her written statement were two totally different agreements. The plaintiff did not plead at any stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. Before a decree for specific performance can be given the plaintiff has to plead and satisfy the court about his willingness to perform his part of the contract. [925 G926 B]

Pt. Prem Raj v. The D.L.F. Housing and Construction (P) Ltd. & Anr., [1968] 3 S.C.R. 648, applied.

Srinivas Ram Kumar v. Mahabir Prasad & Ors., [1951] S.C.R. 277, distinguished.

(iii) Since the parties had not laid the true version before the court and the defendant had refiled from the offer made by her in her written statement it was a case in which it was appropriate to direct the parties to bear their own costs throughout. [926 H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1782 and 1783 of 1966.

Appeals from the judgment and decree dated October 6, 1964, of the Kerala High Court in Appeal Suit No. 569 of 1963.

O.P. Malhotra and J.B. Dadachanji, for the appellant (in C.A. No. 1782 of 1966) and the respondents (in C.A. No. 1783 of 1966).

M.C. Chagla and A.G. Pudissery, for the respondents (in C.A. No. 1782 of 1966) and the appellants (in C.A. No. 1783 of 1966).

The Judgment of the Court was delivered by Hegde, J. These connected appeals by certificate arise from the decision of the High Court of Kerala in Appeal Suit No. 569 of 1963 on its file. Civil Appeal No. 1782 of 1966 is filed by the plaintiff in the suit and Civil Appeal No. 1783 of 1966 is filed by the second defendant (who shall hereinafter be referred to as the defendant), who is contesting this appeal.

The suit was for specific performance on the basis of an oral agreement alleged to have been entered into on 9.9.1121 (Malayalam Era.) between the plaintiff and the 1st defendant who died very soon after the filing of the suit. The suit was contested by the second defendant, his widow. The trial court decreed the suit as prayed for but in appeal the High Court did not accept the agreement pleaded by the plaintiff but still granted a decree directing the defendant to execute a sate deed in favour of the plaintiff in respect of item No. 1 of the plaint schedule properties less one acre of paddy field at its east for a sum of Rs. 11500/-.

Originally the plaintiff was the owner of the suit properties. He sold the same to the 1st defendant on 9.9.1121 (Malayalam Era) under Exh. P-1. According to the plaintiff at the time of the execution of P-1, there was an oral agreement between him and the 1st defendant whereunder the 1st defendant agreed to reconvey the properties sold for the very price it was sold whenever the plaintiff calls up on him to reconvey them. The suit from which these appeals arise has been rounded on the basis of the said agreement. The 1st defendant died even before he could file his written statement in the case. Before his death he had gifted the suit properties by means of a registered deed in favour of the defendant. She denied the agreement pleaded in the plaint but on the other hand she stated that just before his death her husband had agreed to sell to plaintiff item No. 1 of the suit property less one acre of paddy field for a sum of Rs. 11500 but due to the illness of her husband the sale in question could not be effected. She proceeded further and averred as follows in paragraph 10 of her written statement.

"This defendant has been asked by the 1st defendant before his death that even after his death the properties in item No. 1 (in the plaint schedule which are the subject matter of the contract) as mentioned in paragraph 7, except the nilam on the eastern part thereof, should be assigned to the plaintiff for a consideration of Rs. 11500 and accordingly this defendant is willing to give such property as mentioned above to the plaintiff."

After the defendant filed her written statement, the plaintiff did not amend his plaint and pray for any relief on the basis of the agreement pleaded by the defendant nor did he inform the court that he was ready and willing to accept the agreement pleaded by the defendant or that he was willing to perform his part of that agreement. The suit proceeded on the basis of the agreement pleaded in the plaint.

The 1st question that arises for decision is whether the agreement pleaded in the plaint is true. The burden of proving that agreement is naturally on the plaintiff. The agreement in question as mentioned earlier is said to be an oral agreement. Therefore the plaintiff's task is all the more difficult. The sale deed Exh. P. 1 proceeds on the basis that it evidences an outright sale. It does not either specifically or by implication lend support to the case put forward by the plaintiff. On the other hand it records the following condition stipulated by the vendor:

"Subject to the stipulation that during my life time the schedule properties shall not be mortgaged or assigned to anyone else without my knowledge and consent, I completely convey 'and surrender to you all my remaining rights and possession, and the properties are given to your possession on receipt of the sale consideration of Rs. 24,500."

From this clause it is clear that the plaintiff conveyed all his rights, title and interest in the suit properties to the vendee subject to the aforementioned stipulation. It is not necessary to consider whether the restriction in question is a valid one. Even if we assume that the same is valid, it does not support the plaintiff's case. On the other hand, by implication it negatives his case. At best the clause referred to above merely confers on the vendor a right to preempt. Hence by implication it negatives the plaintiff's case that there was an agreement to reconvey the suit properties. The plaintiff has not given any satisfactory explanation why the contract relating to reconveyance was not incorporated in the sale deed. To explain this important omission he has examined P.W.2, who claims to be a document writer of considerable experience. He claims that the document in question was written by one of his assistants. His evidence is to the effect that the vendor and the vendee wanted to incorporate the agreement as regards re-conveyance in Exh. P.1 itself but he advised them that it could not be done. This is a strange legal advice. This evidence is on the face of it unbelievable. There is also no satisfactory explanation why the alleged agreement was not reduced into writing.

In support of the alleged agreement reliance was tried to be placed on Exh. P-2, which is said to be a document signed by the first defendant after the present suit was filed and before his death. The High Court was unable to accept the genuineness of this document. It opined that this document must have been got up by the plaintiff with the assistance of P.W. 7, his brother. From the High Court's judgment we find that though the document contains hardly few lines, for completing the same as many as three different types of ink had been used. The original document has not been called for and therefore we have to proceed on the basis that the observations made by the High Court are correct. The very recitals in the document show that it is a suspicious document. For all these reasons we are unable to place any reliance on this document. It may be again emphasized at this stage that this document has come into existence after the institution of the present suit.

The principal witnesses who are examined in support of the oral agreement pleaded in the case are P.Ws.1, 2 and 7. We have already referred to the evidence of P.W. 2. He does not appear to us to be a reliable witness. P.W. 1 is no other than the plaintiff himself. P.W. 7 is his brother. P.W. 1 has no children and P.W. 7 is his nearest heir. Therefore it is quite clear that both P.Ws. 1 and 7 are interested witnesses. Their evidence cannot carry much weight.

The story put forward by the plaintiff in the plaint is an im probable one. It is true that the plaintiff and the 1st defendant are first cousins. It is also true that their relationship was very cordial. But if the 1st defendant could not trust the plaintiff to advance a sum of Rs. 24,000 without security as could be gathered from the plaintiff's evidence, we fail to see why the 1st defendant should have relied on the oral assurances given by the plaintiff in the matter of reconveying the property. From the averments made by the defendant in her written statement it does appear that when the 1st defendant was in his death bed being stricken by cancer, there was some talk about reconveying a portion of the suit properties to the plaintiff. It may also be as held by the trial court that the suit property was worth more than Rs. 24,000 at the time of its sale. It appears likely that neither side has come forward with the true version. But before a court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence. Rarely a decree for specific performance is granted on the basis of an agreement supported solely by oral evidence. That apart, as mentioned earlier, in this case the oral testimony adduced in support of the agreement pleaded is a highly interested one. We do not think that the trial court was justified in relying on that testimony for granting the decree prayed for. The trial court itself observed in the course of its judgment (para 12) that "there is no clear cut evidence for proving the terms of the oral contract which is alleged to have been entered into by the plaintiff and the 1st defendant". This finding alone should have been sufficient to non-suit the plaintiff. Therefore we agree with the High Court, though for reasons other than those mentioned by it that the plaintiff has failed to prove the agreement pleaded in the plaint.

This takes us to the decree passed by the High Court in respect of plaint item No. 1. This decree is purported to have been passed on the basis of the admission made by the defendant. It may be noted that the agreement pleaded by the defendant is wholly different from that pleaded by the plaintiff. They do not refer to the same transaction. The plaintiff did not at any stage accept the agreement pleaded by the defendant as true. The agreement pleaded by the plaintiff is said to have been entered into at the time of the execution of Exh. P-1 whereas the agreement put forward by the defendant is one that is said to have been arrived at just before the filing of the suit. The two are totally different agreements. The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in *Pt. Prem Raj v. The D.L.F. Housing and Construction (Private) Ltd.* and *anr.*(1) that it is

well settled that in a suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable. The High Court purported to rely on the decision of this Court in *Srinivas Ram Kumar v. Mahabir Prasad and ors.* (2) in support of the decree passed by it. We do not think that the ratio of that decision is applicable to the facts of this case. Therein the plaintiff brought a suit for specific performance of an agreement to sell a house alleging that he had paid Rs. 30,000 towards the price and had been put into possession in part performance of the contract but the defendant pleaded that the amount of Rs. 30,000 was received as a loan and the plaintiff was put into possession only to facilitate the payment of interest. This Court accepted the plea of the defendant and negated the claim of the plaintiff and refused to decree the specific performance prayed for by the plaintiff but at the same time this Court thought that on the peculiar facts of that case, it was appropriate to grant a decree in favour of the plaintiff for Rs. 30,000 which admittedly remained unpaid. As seen earlier before a decree for specific performance can be given the plaintiff has to plead and satisfy the court about his willingness to perform his part of the contract. Hence in our opinion the decision in *Srinivas Ram Kumar's* case (2) does not bear on the facts of the present case. For the reasons mentioned above we dismiss Civil Appeal No. 1782 of 1966 and allow Civil Appeal No. 1783 of 1966. In the result the suit from which these appeals arise stands dismissed.

Now coming to the question of costs, on the facts and circumstances of this case we think it is appropriate to direct the parties to bear their own costs throughout. Our reasons for doing so are these: It is proved that the suit properties were sold to the 1st defendant at a very low price. There must have been some good (1) [1968] 3 S.C.R. 648. (2) [1951] S C.R. 277.

reason for doing so but the parties have not chosen to place the true version before the Court. It is also proved that the 1st defendant before his death was willing to resell a portion of the suit properties. He had directed his wife to resell the major portion of item No. 1 of the plaint schedule to the plaintiff for a consideration of Rs. 11,500 though its price at that time is proved to be much more than Rs. 11,500. As seen earlier, the defendant was willing to sell item No. 1 in the plaint schedule to the plaintiff for Rs. 11,500. She expressed her readiness to do so in her written statement. She is evidently not willing to stand by that offer now because of the enormous rise of price of properties in recent times. Mr. M.C. Chagla, learned Counsel for the defendant told us at the time of the hearing that the property concerned in the defendant's appeal is now worth over a lac of rupees. That appears to be the reason why the defendant is backing out of the offer made by her in her written statement. All that one need say is that all is not well with defendant's ease either. G.C. Civil Appeal 1782/66 dismissed..

Civil Appeal 1783/66 allowed.