

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.A.T. No. 47 of 2018

Pramod Shroff

Vs.

Mohan Singh Chopra

For the appellant : Mr. Kushal Chatterjee,
Mr. A.K. Acharyya,
Ms. Moumita Das

Hearing concluded on : 13.01.2025

Judgment on : 21.01.2025

Sabyasachi Bhattacharyya, J.:-

1. The appeal was heard for ex parte, in view of the respondent having not contested in either court, and is accordingly taken up for passing judgment.
2. The plaintiff in a suit for specific performance of an agreement for sale has filed the present appeal against the dismissal of such suit.
3. Learned counsel for the appellant contends that the learned Trial Judge dismissed the suit on the ground that the defendant has no title in the property and as such, no decree for specific performance of an agreement for sale can be granted. However, it is argued, under Section 12 of the Specific Relief Act, 1963, where a party to a contract is unable to perform the whole of his part of the contract, the court may

direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency. Hence, the learned Trial Judge ought to have granted at least a decree of specific performance for transfer of whatever rights the defendant has in the property in favour of the plaintiff/appellant.

4. It is contended that the 75 years' lease executed by the original owner in favour of the Khimjis has still not spent its tenure. As such, at least for the residual portion of the lease period, a transfer deed could be directed to be effected in favour of the plaintiff/appellant.
5. Learned counsel next argues that after the amendment of Section 20 of the Specific Relief Act in the year 2018, the discretion of the court to grant specific performance is no longer there. If the necessary conditions for specific performance are met, the court mandatorily has to grant the relief of specific performance. In support of his contention, learned counsel cites *ChennadiJalapathi Reddy v. Baddam Pratapa Reddy (Dead) through legal representatives and Another*, reported at (2019) 14 SCC 220, where the Supreme Court directed specific performance in view of the plaintiff therein being ready and willing to perform his part of the contract.
6. Learned counsel next cites *Shivaji Yallappa Patil v. Ranajeet Appasaheb Patil and Others*, reported at (2018) 16 SCC 725, where the Supreme Court observed that for basing a claim on Section 53-A of the Transfer of Property Act, 1882, there must be a contract to transfer for consideration of any immovable property, executed in writing and signed by the transferor in such words from which the terms necessary

to construe the transfer can be ascertained. The transferee must, in partperformance of the contract, take possession of the property, and must have done some act in furtherance of the contract. Also, the transferee must have performed or be willing to perform his part of the contract.

- 7.** In the present case, it is argued, the transferee/plaintiff has fulfilled all the said conditions and is in possession of the property contemporaneously with the execution of the agreement for sale-in-question in the year 1977 and as such, is entitled to get the benefit of Section 53-A of the Transfer of Property Act. Hence, a decree of specific performance ought to have been granted in favour of the plaintiff/appellant.
- 8.** Learned counsel for the appellant next cites *B. Santoshamma and Another v. D. Sarala and Another*, reported at (2020) 19 SCC 80, where the Supreme Court considered the effect of Section 12 of the Specific Relief Act and directed specific performance of the part of the contract which could be performed.
- 9.** It is next contended that since the possession of the appellant of the property in terms of the contract and the other antecedents of part performance by the plaintiff/appellant are not in doubt in the present case, the learned Trial Judge ought to have granted a decree of specific performance, even if confined to the transferable rights available to the defendant in respect of the property. Thus, the dismissal of the suit outright in its totality is bad in law.

- 10.** Insofar as the objection as to limitation is concerned, it is argued that Clause 7 of the agreement-in-question specifically provides that a deed is to be executed in terms thereof when called upon by the purchaser (plaintiff/appellant) to do so. Since the plaintiff called upon the defendant to do so only in the year 2007, the refusal to so perform on the part of the defendant, which is the cause of action of the suit, took place in 2007, the very same year when the suit was instituted, and, hence, the suit is not barred by limitation.
- 11.** Upon hearing learned counsel for the appellant, the court arrives at the following decision:-
- 12.** The brief facts of the case are that the original owner of the property executed a 75 years' lease on August 3, 1964 in favour of the Khimjis. The Khimjis thereafter constructed a building on the said property by the name of Shalimar Apartments. During construction, the Khimjis entered into a partnership with other persons under the name and style of Goolmohar Properties to complete the construction and sell out the flats therein on ownership basis.
- 13.** On September 1, 1968, the Khimjis executed an agreement for sale in respect of the suit property, which is Flat No.61 in the Shalimar Apartments, along with a car parking space, in favour of the Balwanis, with a clause for assignment.
- 14.** Pursuant to such clause, the Balwanis transferred the property to the defendant Mohan Singh Chopra by a tripartite registered sale deed dated November 12, 1971, in which Goolmohar Properties, the Balwanis and the defendant were signatories.

- 15.** On January 21, 1977, the defendant entered into an agreement for sale with the plaintiff in respect of Flat No. 61 and the car parking space.
- 16.** The present suit was instituted in the year 2007 for specific performance of the said agreement of 1977.
- 17.** Insofar as the question of limitation is concerned, the plaintiff is justified in contending that in terms of Clause 7 of the agreement dated January 21, 1977, the vendor/defendant agreed and undertook to execute and register a formal conveyance of the said flat in favour of the purchaser/plaintiff whenever called upon to do. Since it is an undisputed position that the said right was asserted first in the year 2007 by the plaintiff, the cause of action for the suit arose with the refusal by the defendant to do so in 2007, in which year the suit was filed. Thus, the suit cannot be said to be barred by limitation, even in the absence of any justification as to why the plaintiff waited for so long to assert his claim.
- 18.** The next question which crops up for consideration is whether the court has mandatorily to grant the relief of specific performance merely because there is an agreement and the antecedent conditions envisaged therein are otherwise fulfilled.
- 19.** It is seen that the suit was filed in year 2007 and the impugned judgment was passed on October 26, 2017, whereas the substitution of Section 20 of the Specific Relief Act by way of amendment took place by virtue of the amendment of 2018, which was given effect from October 1, 2018, that is, after the passing of the impugned judgment and decree. Thus, as on the date of the impugned judgment and decree, the

said substitution had not taken place and the old Section 20 was fully applicable.

- 20.** Mere pendency of the appeal thereafter cannot give an additional cause of action or justification to the plaintiff, since the pendency of the appeal before this court can be attributed either to the delay occasioned by the plaintiff himself or the procedure of court, neither of which changes the position that the legality of the impugned judgment has to be tested on the anvil of the legal position as it stood on the date on which it was passed.
- 21.** As per Section 20, discretion is vested in the court whether or not to grant a decree for specific performance and the court is not bound to grant such relief merely because it is lawful to do so. At the same time, however, such discretion has to be exercised judiciously.
- 22.** The appellant cites *Shivaji Yallappa Patil (supra)*, where the Supreme Court postulated the *sine qua non* for basing a claim on Section 53-A of the Transfer of Property Act, 1882. However, apart from the said conditions no being exhaustive, and there being other circumstances where the court, in its discretion, can refuse to grant a relief for specific performance even if it is lawful to do so, the said conditions relate to a Section 53-A scenario and are not parameters for the grant of a decree for specific performance.
- 23.** The yardsticks for a defence under Section 53-A of the Transfer of Property Act and the conditions for grant of a decree of specific performance stand on different footings.

- 24.** Section 53-A protects the possession of a party, who, in part performance of a written agreement, has taken such possession. In the event the defendant had instituted a suit for eviction against the appellant, the said provision might have been relevant, since the defendant would arguably be estopped from asserting his rights for eviction, to which Section 53-A would provide a defence to the appellant. However, such provision is not germane in the present context.
- 25.** The appellant has also relied on *Chennadi Jalapathi Reddy (supra)* where, on the basis of an averment in the plaint that the plaintiff was ready and willing to perform his part of the contract, the Supreme Court granted specific performance. The said question is a non-issue in the present case and the above judgment is, thus, irrelevant for the present consideration.
- 26.** The next question which has been raised by the appellant is that the learned Trial Judge could have granted specific performance to the extent that the defendant has right to dispose of the subject property. However, as evident from the above adumbration of facts, as also discussed by the learned Trial Judge, the question in the present case is not one of the defendant being unable to perform a part of the contract. The absence of ownership of the property, so far as the defendant is concerned, hits at the very root of his right to transfer title in the property by way of a deed of sale, which would be the only manner in which the agreement for sale between the parties could be performed.

- 27.** In *B. Santoshamma (supra)*, the Supreme Court had directed part specific performance of an agreement to sell in a situation where a part of the subject-matter of the agreement to sell stood unassailably transferred to a third-party. There was no dearth of title of the defendant in the said case so as to prevent him from transferring such title in respect of the remaining portion of the property which had not been transferred to third parties. Thus, Section 12 of the Specific Relief Act is not attracted to the present case at all, as in the present case, the court would have to re-write the agreement between the parties and direct execution of a deed of sale, thereby giving its seal to a palpably unlawful transaction, in the teeth of the defendant's lack of ownership of the property. It is well-settled that one cannot transfer more than what one has, which principle is squarely applicable to the present case.
- 28.** The instant case is not one where the defendant is capable of performing a part of the contract whereas he is incapable of performing the rest. Here, in view of his dearth of title in the property, the defendant could not pass title in respect of any part of the property. Thus, no part of the agreement for sale could have been performed by the defendant at all.
- 29.** As such, it would be beyond the jurisdiction of the court to create a new agreement and direct execution of a deed of lease by the defendant in favour of the plaintiff for the residual period of the original 75 years' lease.

- 30.** Thus, the argument of the appellant on Section 12 of the Specific Relief Act falls flat.
- 31.** In the present case, there arises no question of the vendor being able to perform a part of the contract. It is either the whole of the contract which has to be performed or none of it. In the absence of any saleable title in the property having vested in the vendor at any point of time, since the original owner himself had granted only a 75 years' lease, which has been percolating through several hands to the present defendant, no decree of specific performance can be passed by directing the defendant to execute a sale deed. As the agreement-in-question between the parties is one for sale, the same cannot be converted to an agreement for grant of lease by the court and a lease deed be directed to be executed.
- 32.** At best, the plaintiff might have claimed an alternative relief of damages. However, such claim would also have its own attending doubts, as the plaintiff entered into the agreement of sale with his eyes wide open and has enjoyed possession of the suit property for three long decades since the year 1977 before even seeking the execution of a sale deed from the defendant only in the year 2007. In any event, such discussion would be merely academic as the plaintiff, despite being able to seek such alternative relief in the suit, has not done so.
- 33.** In the light of the above discussions, we find that the impugned judgment and decree dismissing the plaintiff/appellant's suit for specific performance on the ground of lack of title of the

defendant/respondent is absolutely justified and there is no reason or scope to interfere with the same in appeal.

- 34.** Accordingly, F.A.T No.47 of 2018 is dismissed on contest, thereby affirming the judgment and decree dated October 26, 2017 passed by the learned Judge, Sixth Bench, City Civil Court at Calcutta in Title Suit No.3500 of 2007 whereby the plaintiff/appellant's suit for specific performance was dismissed.
- 35.** There will be no order as to costs.
- 36.** A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)