IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.T.SANKARAN

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

CRP.No. 352 of 2012 ()

AGAINST THE ORDERS DATED 26.5.2012 IN I.A.NO.5314 OF 1998, I.A.NO.5486 OF 1999, I.A.NO.3834 OF 2004, I.A.NO.3835 OF 2004 & I.A.NO.3965 OF 2004 IN O.S.NO.954/1995 OF II ADDL.SUB COURT,THRISSUR

REVISION PETITIONER(S):

VINAYAN
S/O.VAZHAPPILLY VELAPPAN
PANTHALLUR DESOM
THALAPPILLY TALUK.

BY ADV. SRI.T.M.CHANDRAN

RESPONDENT :

RADHAKRISHNAN
S/O.MEENAMPARAMBIL PANJAN
KADAVALLUR VILLAGE & DESOM
THALAPPILLY TALUK, PIN-680543.

R BY ADV. SRI.T.A.RAJAGOPALAN

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 10-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T.SANKARAN, J.

C.R.P.No.352 of 2012 C

Dated this the 10th day of June, 2015

<u>O R D E R</u>

The revision petitioner entered into an agreement for sale dated 15.10.1994 with the respondent by which the petitioner agreed to purchase the residential property of the respondent at a price of ₹35,000/-. ₹25,000/- was paid as advance. The balance sale consideration of ₹10,000/- was payable by the petitioner-buyer to the respondent-seller. The petitioner filed O.S.No.954 of 1995, on the file of the court of the II Additional Sub Judge, Thrissur, against the respondent for specific performance of the agreement for sale. An ex-parte decree dated 10.2.1997 was passed in the suit.

2. Though the respondent filed an application to set

aside the ex-parte decree, that application was dismissed by the trial court.

3. The petitioner filed I.A.No.5314 of 1998 on 10.11.1998 to allow him to deposit the balance sale consideration and to direct the respondent to execute the sale deed. That application was filed under Section 151 of the Code of Civil Procedure. In fact the application should have been filed under Section 28(3) of the Specific Relief Act. That application was opposed by the respondent contending that the application was highly belated and the delay was not explained. He also raised a contention that the market value of the property has increased several times the price agreed upon. The balance sale consideration of ₹10,000/- was not deposited along with I.A.No.5314 of 1998.

4. Later, the petitioner filed I.A.No.5486 of 1999 under Section 28(1) of the Specific Relief Act and Sections 148 and 151 of the Code of Civil Procedure to extend the time for depositing the balance consideration till 26.10.1999. However, the balance consideration was not deposited, even on 26.10.1999. The court below passed an order on 28.6.2001 directing the petitioner to deposit the balance consideration within 15 days. The petitioner deposited that amount only on 21.7.2001. On the ground that the order in I.A.No.5486 of 1999 was not complied with, the court below dismissed I.A.Nos.5314 of 1998 and 5486 of 1999. That order was challenged in C.R.P.No.3064 of 2001 before the High Court. This Court set aside the order passed by the court below and permitted the petitioner to amend I.A.No.5486 of 1999 or to file a fresh interlocutory application giving reasons as to why the deposit could not be made within the time stipulated in the decree. The

court below was directed to dispose of the application taking note of the principles laid down by the Supreme Court in **V.S.Palanichamy Chettiar Firm v. C.Alagappan (1999) 4 SCC 702** and the decision of the Division Bench of this Court in **Joseph George v. Chacko Thomas (1992 (1) KLT 6)**. The respondent was also granted liberty to file an application under Section 28(1) of the Specific Relief Act to have the contract rescinded.

5. After remand, the petitioner filed I.A.No.3834 of 2004 seeking extension of time to deposit the amount till 21.7.2001. The reason stated for the delay was that the petitioner bona fide believed that it was sufficient to deposit the balance consideration when he applied for execution of the sale deed through court. It was also stated that he could not deposit the amount within 15 days as ordered by the court since he was

laid up due to fever for the period from 10.7.2001 to 27.1.2001.

6. As observed in the remand order, the respondent filed I.A.No.3965 of 2004 for rescinding the agreement, under Section 28(1) of the Specific Relief Act.

7. Before the court below, oral and documentary evidence was adduced. The court below by the common order dated 7.10.2004 allowed I.A.Nos.3834 of 2004 and 3835 of 2004 and dismissed I.A.Nos.5486 of 1999 and 3965 of 2004. That means the prayer for rescission was rejected and the time for deposit of the balance sale consideration was extended up to 21.7.2001.

8. The order dated 7.10.2004 was challenged before this Court in revision by the respondent as C.R.P.Nos.236 of

2005, 237 of 2005 and 238 of 2005. As per the common order dated 3.4.2008, those revision petitions were allowed and the case was remanded to the trial court for fresh consideration.

9. Thereafter, the trial court considered the applications afresh and passed a common order dated 26.5.2012 and dismissed all the applications filed by the petitioner and allowed the application for rescission filed by the respondent. The order dated 26.5.2012 is under challenge in this revision.

10. The agreement for sale was dated 15.10.1994. An ex-parte decree for specific performance of contract was granted in favour of the petitioner on 10.2.1997. However, he deposited the balance sale consideration only on 21.7.2001, in spite of the fact that on 4.11.1999, the petitioner filed I.A.No.5486 of 1999 under Section 28(3) of the Specific Relief

Act. The petitioner was filing applications after applications for extension of time and even at that time, he did not care to deposit the balance sale consideration of ₹10,000/-. The deposit was made after seven years of the date of the agreement.

11. In **<u>V.S.Palanichamy Chettiar Firm v. C.Alagappan and another</u> (1999) 4 SCC 702**, the Supreme Court held thus :

> "17. The agreement of sale was entered into as far back on 16.2.1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within the time granted by the Court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 year' period is prescribed for filing the suit for specific performance

of a contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of the agreement and if there was non-performance, was that on account of any obstacle put by the vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. The court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court, as a matter of course, allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court? It is not the case of the respondent decree-holders that on account of any fault on the part of the vendor judgment-debtor, the amount

> could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the respondent decree-holders as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the respondent decree-holders and no extension of time be granted to them to comply with the decree."

12. In **Joseph George v. Chacko Thomas** **(1992(1) KLT 6)**, a Division Bench of this Court held that the fact that Section 28 of the Specific Relief Act enables the court to extend

time itself would imply that, mere failure to deposit need not result in the rescission of the contract. The Specific Relief Act is not an exhaustive enactment. It does not consolidate the whole law on the subject and despite the passing of the decree in a suit for specific performance, the court retains the control and it was open to the court to entertain an application for rescission of the decree if it is shown that the plaintiff 'positively refused' to complete the contract. A decree for specific performance is a decree in favour of both the plaintiff and the defendant in the suit and naturally, the decree can be executed by the defendant as well.

13. The court below took note of the various facts and circumstances of the case and held that there was no bonafides on the part of the petitioner. It was also noticed by the court below that when the petitioner was examined as PW1, he

admitted in his cross examination that he was well aware of the fact that he was bound to deposit the balance amount within one month as per the decree. He also admitted that he was not having the amount with him at the time when he filed I.A.No.5314 of 1998. In a suit for specific performance, the plaintiff should be ready and willing to perform his part of the contract continuously. His readiness should extend till the execution of the decree. From the admission of the petitioner (as PW1), it is clear that he was not having necessary funds to deposit the balance sale consideration. The court below was justified in holding that the applications filed by the petitioner were liable to be dismissed.

14. The court below after allowing the application for rescission filed by the respondent, directed the respondent to repay the advance amount of ₹25,000/- by way of restitution.

The learned counsel for the petitioner submitted that the court below was not justified in not granting interest on ₹25,000/- to be paid to the petitioner. The learned counsel also submitted that clause (b) of sub-section (2) of Section 28 of the Specific Relief Act provides for refund of any sum paid by the vendee as earnest money or deposit in connection with the contract and even without any provision for directing payment of interest, the court would be justified in granting interest. He relied on the decision of the Supreme Court in **Thazhathe Purayil Sarabi v. Union of India** **(2009(4) KLT 370 (SC))**. In Sarabi's case, the Railway Claims Tribunal awarded compensation of ₹4,00,000/- to Sarabi, but no interest was granted. The Supreme Court considered the question whether interest could be granted in spite of the fact that the Railway Claims Tribunal Act, 1987 and the Railways Act, 1989 do not make any provision for payment of interest on any awarded amount. The

Supreme Court considered Section 3 of the Interest Act, 1978 and Section 34 of the Code of Civil Procedure and held :

> "16. It is, therefore, clear that the Court, while making a decree for payment of money is entitled to grant interest at the current rate of interest or contractual rate as it deems reasonable to be paid on the principal sum adjudged to be payable and/or awarded, from the date of claim or from the date of the order or decree for recovery of the outstanding dues. There is also hardly any room for doubt that interest may be claimed on any amount decreed or awarded for the period during which the money was due and yet remained unpaid to the claimants.
>
> 17. The Courts are consistent in their view that normally when a money decree is passed, it is most essential that interest be granted for the period during which the money was due, but could not be utilized by the person in whose favour an order of recovery of money was passed. As has been frequently explained by this Court and various High Courts, interest is essentially a compensation payable on account of denial of the right to utilise the money due, which has been, in fact, utilized by the person withholding the same.

Accordingly, payment of interest follows as a matter of course when a money decree is passed. The only question to be decided is since when is such interest payable on such a decree. Though, there are two divergent views, one indicating that interest is payable from the date when claim for the principal sum is made, namely, the date of institution of the proceedings till the recovery of the amount, the other view is that such interest is payable only when a determination is made and order is passed for recovery of the dues. However, the more consistent view has been the former and in rare cases interest has been awarded for periods even prior to the institution of proceedings for recovery of the dues, where the same is provided for by the terms of the agreement entered into between the parties or where the same is permissible by statute."

15. In **Saradamani Kandappan v. S.Rajalakshmi 2011(12) SCC 18**, the Supreme Court confirmed the grant of interest awarded on the amount paid as advance at the time of execution of the agreement for sale and held thus :

"73. The Division Bench to do broad justice and work out the equities, took note of the offer of the defendants in their written statement to refund the amount paid as advance and directed the defendants to refund the sum of ₹2,25,000/- paid to defendants 1 to 3 under the agreement and ₹1,25,000/- paid to the fourth respondent, in all, ₹3,50,000/- with interest at 9% per annum for the period when the appellant was not acting as a caretaker till the date of payment. We find no reason to interfere with the direction to refund ₹3,50,000/- with interest.

74. We however propose to make a modification in regard to the rate of interest and the period for which interest is payable. The High Court has awarded interest on the sum of ₹3,50,000/- at 9% per annum for the period in which the appellant had not acted as caretaker till the date of payment. As noticed above, the agreement of sale does not provide for forfeiture of the amounts paid as advance under any circumstances and on the other hand, specifically provides that if the plaintiff was not

satisfied with the title of the defendants, the amounts received as advance would be refunded. In fact, the respondents, in their written statement, offered to refund the amount. Therefore, the High Court ought to have granted interest from the date of cancellation of agreement (2.8.1981) to the date of payment. The High Court was not justified in restricting the interest to only for the period during which the appellant had not acted as caretaker. The liability to refund the advance has nothing to do with the appointment of the plaintiff as caretaker or the obligation of the plaintiff to return the property on cancellation of the agreement. Having regard to the facts and circumstances, we are of the view that the rate of interest shall be increased to 12% per annum instead of 9% per annum."

16. In the present case, the value of the property was fixed at ₹35,000/- on 15.10.1994, the date of the agreement for sale. ₹25,000/- was paid as advance to the respondent. The

respondent was keeping that amount with him all through out. An ex-parte decree for specific performance of agreement was passed against him. He did not execute the sale deed. The respondent filed an application to set aside the ex-parte decree and that application was dismissed. Though the petitioner failed to deposit the balance sale consideration within time, the fact remains that the respondent was keeping with him major part of the sale consideration and he was also enjoying the property sought to be sold. Justice demands that the respondent should repay the said amount of ₹25,000/- to the petitioner together with reasonable interest. In the facts and circumstances, simple interest at 7.5% per annum would be reasonable.

For the aforesaid reasons, the order passed by the court below dismissing the applications filed by the petitioner is confirmed. The order passed by the court below allowing the application for rescission filed by the respondent is also confirmed. However, the Civil Revision Petition is allowed in part and the respondent is directed to pay the sum of ₹25,000/- together with simple interest at 7.5% per annum on ₹25,000/- from 10.9.2004, the date on which I.A.No.3695 of 2004 was filed by the respondent for rescission of the contract to the date of realisation. The sum of ₹25,000/- as well as interest would be a charge on the plaint schedule property. The petitioner would be entitled to get refund of ₹10,000/- deposited by him before the court below.

K.T.SANKARAN
JUDGE

csl