

CIVIL APPELLATE

Mr. Justice C. Jayachandran

A.S. No.628 of 1997

2025 November 21

Aleyamma Iype and others . . . Appellants

v.

M/s. Kerala Spinners Ltd. and others . . . Respondents

The original owner executed two agreement for sale of his property with two different entities. The Kerala Spinners, a company with which the second agreement was executed filed a suit for specific performance of their agreement and sought for a declaration that the earlier agreement was fraudulent. The suit was decreed by the Trial Court. The individual with whom the first agreement was executed challenged the decree and filed another suit for specific performance which was dismissed and a decree for return of advance sale consideration was granted. Plaintiff took appeal to High court contending that the suit filed by the Kerala Spinners is barred by limitation. Dismissing the appeal, the Court;

Issue for consideration

- i. Whether the first agreement for sale of property overrides the subsequent agreement?
- ii. Whether delay can be a factor for consideration while granting or rejecting decree for specific performance?
- iii. Whether a decree for injunction restraining alienation is a clog for a subsequent suit for specific performance?

Specific Relief Act, 1963 (Central Act 47 of 1963)—Section 16—Maxim “*Qui prior est tempore, potior est jure*” can aid only if the person resorting to the principle has acted upon the agreement.

Held:

The maxim relied upon by the appellants is perfect, so long as the agreement prior in point of time remains enforceable. However, if the same is not acted upon on time, for which reason, its enforceability is in serious jeopardy, the maxim cannot be profitably pressed into service. (*Paragraph 23*)

Specific Relief Act, 1963 (Central Act 47 of 1963)—Section 16—Decree of injunction against alienation—Restrains only voluntary transfer and it is not a bar for decree for specific performance.

Held:

Inasmuch as the suit has been decreed, the decree binds only the defendant Sudhakaran. By any reckoning, the same will not bind M/s.Kerala Spinner Ltd. Nor would it prejudice the rights of M/s.Kerala Spinners Ltd. emanating from Ext.A1 agreement. At any rate, the same cannot cause any fetter to a court of law from passing a decree for specific performance in favour of M/s.Kerala Spinners Ltd., provided it is found entitled for the same. The decree only restrains the owner Sudhakaran from voluntarily executing a sale deed in favour of any person, other than the plaintiff therein, Iype. Based on entitlement, if a court of law directs Sudhakaran to execute a sale deed in favour of M/s.Kerala Spinners Ltd. – which entity is not bound by Ext.A5 decree - the injunction simpliciter decree cannot restrain Sudhakaran from obliging the subsequent decree. This can only be the legal impact of Ext.A5 decree, insofar as the claim of the present plaintiff M/s.Kerala Spinners Ltd. for specific performance of the contract is concerned. Besides, this Court has already frowned upon the enforceability of Ext.B3 agreement due to absence of bonafides, delay and laches. Therefore, a decree for injunction simpliciter cannot have life beyond the life of the contract sought to be enforced. A contrary interpretation will have the effect of a clog on alienability of the property forever, which the law does not contemplate and countenance. It is relevant to note that the substratum of the decree for injunction is the contract for sale and once such contract has become unenforceable in law, the injunction decree cannot govern the situation anymore. (*Paragraph 25*)

Specific Relief Act, 1963 (Central Act 47 of 1963)—Sections 16 and 20—Specific performance has to be granted unless the purchaser fails to perform his part.

Held:

The point pertains to the exercise of discretion under Section 20 of the Specific Relief Act to grant specific performance of Ext.A1 agreement, as sought for in the suit. Insofar as agreement for sale of immovable properties are concerned, it is the general rule that specific performance is liable to be granted, unless the purchaser fails to perform his part of the contract; or in cases, where the purchaser fails to comply with the requirements of Sections 16 or 20 of the Specific Relief Act. In the instant case, it may straight away be noticed that the purchaser had performed his part of the contract by paying the full consideration of 1,50,000/- 50,000/- was paid as advance sale consideration at the time of execution of Ext.A1 agreement and 1,00,000/-, by way of ten instalments paid to the 7th defendant South Indian Bank, towards the decree debt of the seller, Sudhakaran. No default, whatsoever, has been committed by the purchaser M/s.Kerala Spinners Ltd. Therefore, there exists no circumstance pointing to the default or laches on the part of the plaintiff/purchaser, so as to refuse specific performance. (*Paragraph 27*)

Specific Relief Act, 1963 (Central Act 47 of 1963)—Sections 16 and 20— Unexplained delay in seeking specific performance can be a ground to refuse specific performance.

Held:

It is well settled that unexplained delay and laches in seeking specific performance would persuade a Court of law not to exercise the discretion in favour of granting specific performance. In the instant case, the right to enforce an agreement for sale of the year 1987 is only sought to be enforced in the year 1996, that too, after the purchaser in a subsequent agreement had already sought for specific performance before a court of law. (*Paragraph 32*)

Limitation Act, 1963 (Central Act 36 of 1963)—Section 3—It is the duty of the Court to consider the question of limitation, even though there is no such defence.

Held:

The first point pertains to the question whether the subsequent suit, O.S. No.256/1996, is barred by the law of limitation. While answering this point, it has to be borne in mind that both the defendants chose to remain ex parte in that suit and there was no contest before the Court on any aspect, including limitation. However, Section 3 of the Limitation Act, 1963 which provides for bar of limitation for suits instituted after the prescribed period, specifically carves out that the Court has a duty to dismiss such suits, though limitation has not been set up as a defence. Section 3 would leave no room for any doubt that it is essentially a duty cast on a court of law to consider whether the suit instituted is barred by the law of limitation, although the same has not been set up as a defence. Therefore, this Court is of the opinion that the trial court ought to have considered that issue, even when the defendant chose to remain ex parte. (*Paragraph 29*)

List of Acts:

- (1) The Specific Relief Act, 1963.
- (2) The Limitation Act, 1963.

List of Keywords:

Specific performance, Limitation, Subsequent agreement, Discretion, Delay.

Case Law Cited:

- (1) (2009) 5 S.C.C. 562; (2) (2013) 1 S.C.C. 625 = I.L.R. 2012 (4) Ker. 464; (3) 2017 (4) K.H.C. 246 (D.B)—*Referred to*.

Appearance of Parties:

Sri. R.Azad Babu . . . for appellants

Sri. P.U.Shailajan, SC, Sri. Jomy George, Sri. R.Padmaraj, Sri.M.J.Benny, Sri. Sajeevan V.T., Sri. R.Ajith Kumar [V.K.Edom], Smt. Anjali G Kutty, Sri. Arjun S. Prakash, Sri. Anand Sasidharan and Sri. K.Prabhakaran . . for respondent.

JUDGMENT

Two suits were separately tried and disposed of, and these appeals, which stem from those suits, are considered together, since the subject matter of both the suits is more or

less the same. There were two agreements for sale in favour of two different persons. The subject matter of the second agreement is part and parcel of the subject matter of the first agreement. The first suit, O.S. No.100/1993, arose out of the second agreement and the second, O.S. No.256/1996, from the first agreement. The first suit O.S. No.100/1993 was allowed by granting specific performance sought for, which decree is under challenge in A.S. No.628/1997, the appeal first in point of time. Specific performance sought for in the second suit, O.S. No.256/1996, was refused, which decree is under challenge in A.S. No.338/1998, the appeal later in point of time. With this prelude, the facts in the chronological order may be unfurled as follows. Since there are four agreements and two suits, the parties are referred to by their names, for the sake of convenience.

2. The original owner, Sudhakaran, was the owner of a large extent of property, of which the subject property involved in both these suits were part and parcel. The South Indian Bank Ltd. obtained a decree in a suit, O.S. No.31/1985 (Ext.A8 in O.S. No.100/1993) against the said Sudhakaran for an amount of 1,41,292.40 together with interest. The decree dated 23.09.1986 was charged on 2.34 acres of land belonging to the said Sudhakaran.

3. The first agreement

On 29.11.1986, an agreement for sale was executed by and between Sudhakaran and one Iype (Ext.B1 in O.S. No.100/1993). The extent of property agreed to be sold was 1 acre, out of the above referred 2 acres and 34 cents. The sale price was agreed at the rate of 3,400 per cent, for the actual extent found on measurement. The advance paid was 25,000/- and the period fixed was 6 months. Between the same parties, a second agreement was executed on 28.05.1987 (Ext.B2 in O.S. No.100/1993). There, the extent got reduced to 74 $\frac{1}{4}$ cents and the total consideration was a definite sum of 2,52,450/-. The advance received is stated to be 27,000/- and the period fixed was before the expiry of 28.08.1987. It is stated that the purchaser Iype is put in possession of the property. Again, a third agreement was executed by and between the same parties on 29.08.1987 (Ext.B3 in O.S. No.100/1993), wherein the extent and the total consideration remained the same, as in Ext.B2. However, the advance is stated to be 33,000/-. The cardinal difference is with respect to the period fixed for execution of the document. Here, it is necessary to point out that M/s.Kerala Spinners (the purchaser in the second agreement and the plaintiff in the first suit) was occupying a building in the subject premises; and performance of Ext.B3 was fixed, as and when the said M/s.Kerala Spinners is evicted from the property.

4. The second agreement

This agreement was by and between the original owner Sudhakaran and M/s.Kerala Spinners above referred (Ext.A1 in O.S. No.100/1993). In that agreement, the extent is 50 cents and the total consideration is 1,50,000/-. Advance paid is 50,000/- and the balance amount of 1,00,000/- has to be remitted to the South Indian Bank Ltd. in 10 monthly instalments, towards the above referred decree debt of the original owner, Sudhakaran. The period stipulated for performance is upon payment of the last and tenth instalment and upon releasing the bank's charge over the property and the building. On 19.09.1988, the above said Iype (purchaser in the first series of agreements Exts.B1, B2 and B3) filed a suit for injunction, O.S. No.861/1988, and obtained an ad interim Order of injunction restraining

the defendant Sudhakaran from alienating the subject property to anybody other than the plaintiff. As per lawyer's notice (Ext.A2 in O.S No.100/1993) issued on 22.09.1988, the factum of obtaining a temporary injunction Order was communicated to M/s.Kerala Spinners. On 28.03.1992, O.S. No.861/1988 was decreed. The judgment is produced at Ext.A5 in O.S. No.100/1993. On 27.02.1993, the subject suit, O.S. No.100/1993, was filed by M/s.Kerala Spinners against the original owner, Sudhakaran; the legal heirs of the above said lype; and also the South Indian Bank Ltd, seeking specific performance of Ext.A1 agreement for sale. The plaintiff, M/s.Kerala Spinners also sought for a declaration that the agreements by and between the 1st defendant Sudhakaran and the above said lype (the predecessor in interest of defendants 2 to 6) are sham, fraudulent and collusive, and also that Ext.A5 decree in O.S. No.861/1988 is invalid and unenforceable as against the plaintiff and the plaint schedule property. The plaint proceeded relying on the recitals in Ext.A1 agreement; about the sale consideration, about the advance paid, about the stipulation for payment by way of instalments of the balance sale consideration etc. One among the covenants in Ext.A1, which has been pleaded in the plaint, is with respect to the fact that, upon effecting the payment of the last instalment towards balance sale consideration, the tenancy arrangement by and between the plaintiff M/s.Kerala Spinners and the owner Sudhakaran will stand terminated and the plaintiff, M/s.Kerala Spinners, will continue to possess the land and building as purchaser, from the date of such termination. The fact that the last and final payment of the instalment is pleaded, whereafter the plaintiff M/s.Kerala Spinners communicated with the 7th defendant/South Indian Bank seeking release of the plaint schedule property, so that the sale deed can be executed. A letter addressed to 7th defendant Bank on 30.03.1990 is specifically pleaded, to which, the 7th defendant South India Bank replied that they have given instructions to their lawyer, Sri. K.T. Mathai, to file necessary statement in the Court to release the subject property having an extent of 50 cents, together with the building, from the decree charge. As advised, the plaintiff contacted Sri. K.T.Mathai and letters were addressed to him also for release of the 50 cents of land and building. On 15.10.1990, Sri. K.T.Mathai replied to the Finance Controller of the plaintiff's Company, stating that a statement has been filed in the suit O.S. No.31/1985 before the Sub Court, Alappuzha on 01.03.1990 to release the plaint schedule property from the decretal charge. However, the Court could not pass any Order since there was no execution pending, is the pleading. Exts.B1, B2 and B3 agreements between the owner Sudhakaran and lype were claimed to be collusive and fraudulent, created only to defeat the claims of the plaintiff and the 7th defendant/Bank and other creditors. Although the original owner, Sudhakaran made a show off contesting the suit O.S. No.861/1988, the same was only an eyewash and he consciously suffered a decree. Failure on the part of lype to seek specific performance of contract, despite knowledge of refusal on the part of Sudhakaran, was also specifically pleaded. Accordingly, the plaintiff claimed a cause of action, among other dates on 01.03.1990, when the 7th defendant/Bank notified through their lawyer about the release of mortgage in favour of the plaintiff, and on 12.02.1993 when the 1st defendant refused to execute the sale deed.

5. The owner Sudhakaran, the 1st defendant in the suit, remained ex parte. Defendants 2 to 3 and 5 contested the suit by filing a written statement. The tenancy arrangement claimed was denied. According to the said defendants, the rental arrangement was only in respect of the building. Ext.A1 agreement claimed by the plaintiff was pleaded to be invalid, since it was executed much after the execution of Ext.B1 agreement on

29.11.1986. Issuance of Ext.A2 lawyer's notice is also pleaded in the written statement, to which, the plaintiff M/s.Kerala Spinners has not issued any reply. It was specifically pleaded that the 1st defendant Sudhakaran, is bound by Exts.B1, B2 and B3 agreements. The fraud and collusion alleged was denied. The said defendants sought for dismissal of the suit.

6. The evidence adduced in O.S. No.100/1993 consists of Exts.A1 to A12, supported by the oral evidence of PW1 on behalf of the plaintiff, M/s.Kerala Spinners. On the part of defendants, Exhibits B1 to B3 were marked and DW1 and DW2 were examined. On an analysis of the facts, evidence and probabilities of the case, the learned Sub Judge decreed the suit, allowing specific performance and declared that Exts.B1 to B3 agreements were fraudulent and collusive, besides declaring the decree in O.S. No.861/1988 as invalid and unenforceable against the plaintiff and the plaint schedule property.

7. **The second suit – O.S. No.256 of 1996.**

The second suit was preferred by the legal heirs of lype as plaintiffs, against the original owner Sudhakaran and M/s.Kerala Spinners, as defendants. Exts.B1, B2 and B3 agreements in O.S. No.100/1993 are marked as Exts.A1, A2 and A3 respectively, in this suit. Ext.A4 is the certified copy of the decree in O.S. No.861/1988; and Ext.A5, the judgment in that suit. On the strength of these agreements, as also, the judgment and decree in suit, O.S. No.861/1988, the plaintiffs claimed that Ext.A3 agreement dated 29.08.1987 was liable to be specifically enforced. All what is relevant to be pointed out is that both defendants remained ex parte in the second suit, O.S. No.256/1996, which fact is projected as a trump card point by the appellant in canvassing that the suit ought to have been allowed as prayed for, on that count alone. The 4th plaintiff was examined as PW1.

8. On an analysis of the facts, evidence and probabilities of the case, the same learned Sub Judge refused the relief for specific performance and granted a decree for return of the advance sale consideration, together with interest at the rate of 12% per annum, charged on the assets of the 1st defendant.

9. In this regard, it is relevant to point out that M/s.Kerala Spinners, the plaintiff in the first suit, was taken over by the Government pending this appeal and thereafter transferred its assets to the Kerala State Textile Corporation Ltd, a Government company, which has been impleaded in the appeals as the additional 6th respondent. Thus, these appeals are resisted by the additional 6th respondent.

10. Heard the learned counsel for the appellants in both these cases and the learned counsel for the respondents. Perused the records.

11. The arguments of the respective counsel will be discussed while answering the points of determination framed here below.

12. It was emphatically submitted by the learned counsel for the appellants in both the appeals that the trial court seriously erred in placing reliance upon the decree granted in O.S. No.100/1993, to refuse specific performance in the second suit, O.S. No.256/1996, especially when both suits are tried and disposed of separately and no evidence pertaining to O.S. No.100/1993 was adduced before the Court, since both the

defendants chose to remain ex parte. Therefore, this Court is of the opinion that the points for determination in both the appeals can be framed separately.

13. Points for determination in A.S. No.628/1997 (arising from O.S. No.100/1993):

- I. Whether the trial Court's finding that the suit O.S. No.100/1993 is not barred by the law of limitation is legal, proper and correct?
- II. Has the trial court considered the appellants' argument based on the maxim "*Qui prior est tempore, potior est jure*"? Is the trial court justified in law to find that Ext.A1 agreement with M/s.Kerala Spinners Limited is legal and valid and hence specifically enforceable?
- III. What is the legal impact of Ext.A5 judgment in the injunction suit referred by Sri.Iype against Sri.Sudhakaran on the suit relief for specific performance of Ext.A1 agreement in favour of M/s.Kerala Spinners Limited?
- IV. Whether the finding of the trial court that Ext.A5 judgment is obtained by fraud and collusion is legal, proper and sustainable?
- V. Whether the discretion exercised by the trial court to grant a decree for specific performance of Ext.A1 agreement is legal and proper?

14. Points for determination in A.S. No.338/1998 (Arising from O.S. No.256/1996):

- I. Whether the second suit, O.S. No.256/1996, is barred by the law of limitation? If the answer is in the affirmative, whether the money decree granted by the trial court can be interfered with, in the absence of a challenge by the defendants, especially the 1st defendant who suffered the decree in that suit? Is it fair, legal and proper to upset a decree, which has already been granted to the appellants, in an appeal preferred by the appellants?
- II. Whether the trial court erred in exercising discretion under Section 20 of the Specific Relief Act to refuse specific performance of Exts.A1 to A3 agreements?
- III. Whether the respondents' contention in the appeal that the second suit O.S. No.256/1996 is barred by Order II, Rule 2 of the Code of Civil Procedure can be found in the absence of any pleading or proof?

15. A.S. No.628 of 1997

Point No.I:

The main point pressed upon by the learned counsel for the appellant is that the first suit, O.S. No.100/1993, is barred by the law of limitation. Learned counsel would point out that as per clause (4) of Ext.A1 agreement between the original owner Sudhakaran and M/s.Kerala Spinners Limited, the sale deed has to be executed and registered immediately

after payment of the 10th instalment to the South Indian Bank. The 10th instalment was paid by M/s.Kerala Spinners Limited, to the Bank on 02.08.1989, as admitted in paragraph no.6 of the plaint (page no.6 bottom). As per Article 54 of the Limitation Act, the period prescribed for a suit for specific performance is 3 years, which reckoned from 02.08.1989 expired on 02.08.1992. Whereas the suit, O.S. No.100/1993 was filed only on 27.02.1993. Therefore, the suit is hopelessly time barred, is the argument advanced.

16. This Court cannot endorse the submissions made by the learned counsel for the appellants. Clause (4) of Ext.A1 agreement between the owner Sudhakaran and M/s.Kerala Spinners Limited is extracted here below:

“4. That the party of the first part shall see that the sale deed is executed and registered immediately after payment of the 10th instalment as stated above and he shall arrange a letter of the Bank releasing the charge over the plot and building. The entire expenses for registering the sale deed is to be met by the party of the second part.”

17. It could be seen from clause (4) above that the period of limitation will not start running with effect from the date of the 10th instalment. Instead, it will start running from the date on which the owner Sudhakaran arranges a letter of the Bank, releasing the charge over the property and building. Primarily, it may have to be observed that the above clause does not stipulate a specific time for performance of the contract. As a matter of fact, Ext.A1 agreement does not contain a definite date, within which, the contract is liable to be performed. True that clause (4) gives an indication as to when the owner Sudhakaran is duty bound to execute the sale deed. It is also true that at the first instance, such duty stems from the prospective purchaser, M/s.Kerala Spinners Limited, effecting the payment of 10th instalment to the Bank. It is relevant to note that the said criteria and the requirement to obtain a discharge from the Bank is clubbed with the term ‘and’. Meaningfully read, it can only be understood that the limitation period, so far as the purchaser is concerned, will start from the date of obtaining such release from the Bank; or in a case where the original owner fails to obtain such a release, within a reasonable time, from the date of effecting the last and 10th payment. In other words, going by Article 54, the period of limitation starts from the date, if any, fixed for performance at the first instance; and if no such date is fixed, when the plaintiff has noticed that performance is refused. In the instant case, after effecting the last and 10th payment, there were communications between the plaintiff M/s.Kerala Spinners and the South Indian Bank, who had obtained a money decree against the original owner Sudhakaran, even before the execution of any of the agreements involved in these appeals. Exts.A9, A10, A11 and A12 are communications between M/s.Kerala Spinners Limited and the South Indian Bank. Ext.A9 is a letter issued by M/s.Kerala Spinners Limited on 30.03.1990 to the Manager of South Indian Bank Ltd., which refers to several earlier correspondences and requesting to make arrangements for release of the property immediately. Ext.A10 is a letter issued by the South Indian Bank Limited in reply to Ext.A9, stating that the Bank's advocate at Alappuzha Sri. K.T.Mathai, has been instructed to file necessary statement in the Court to release the property. The said letter requires M/s.Kerala Spinners Limited to get in touch with Adv. K.T.Mathai. Ext.A10 is dated 31.03.1990. Ext.A11 is the letter issued by Sri. K.T.Mathai to M/s.Kerala Spinners Limited indicating that a statement has been filed in O.S. No.31/1985 before the

Sub Court, Alappuzha, to release the subject property from the charged decree. The letter also refers to the court's inability to pass any order, since no execution was pending. The second paragraph of the letter refers to a suit filed by one Pulikkattil (referring to the house name of Mr. Iype) on the basis of an earlier agreement in respect of the same property and also of an injunction Order passed by the Court restraining Sri. Sudhakaran from alienating the property to anybody else. Ext.A12 is dated 29.08.1990 issued by M/s. Kerala Spinners Limited to Sri. K.T. Mathai requesting to know the latest position as regards release of the property.

18. It could thus be seen that the plaintiff was not sitting idle after effecting payment of the last instalment. A question may surface as to why the plaintiff should take efforts in communicating with the South Indian Bank, when the duty to obtain a discharge from Bank is cast on the original owner, Sudhakaran. The only possible answer is that the plaintiff/purchaser is a person, who had effected payment of the entire sale consideration, and therefore, the bonafides of his anxiety cannot be doubted at all.

19. The three years period, reckoned from the date of effecting the last payment on 02.08.1989, expired on 02.08.1992. The suit was admittedly filed on 27.02.1993. The so called delay is only 6 months and 25 days. The said period of just about 6 months can be condoned as the period where the plaintiff had legitimately waited for obtaining the discharge from the original owner Sudhakaran. While adjudging the question of limitation, the cause of action pleaded in the plaint is also relevant. In paragraph no.19, the cause of action is said to have arisen on or after 01.03.1990, when the 7th defendant South Indian Bank notified the release of mortgage in favour of the plaintiff; on 28.03.1992, when the decree in an earlier injunction suit preferred by Iype, O.S. No.861/1988, is passed; and on 12.02.1993, when the 1st defendant refused to execute the sale deed. Out of the three dates referred to above, the first date is quite relevant, that is 01.03.1990. The said date is decipherable from Ext.A11 letter issued by Adv. K.T. Mathai on behalf of the South Indian Bank Ltd. to M/s. Kerala Spinners Ltd., wherein it is stated that the said lawyer filed a statement in the suit, O.S. No.31/1985 of the Sub Court, Alleppey on 01.03.1990 to release the subject property from the charged decree. It also refers to the fact that no Orders could be passed based on the statement, since no Execution Petition was pending. It is accordingly that the plaintiff gets notice that necessary application has been filed seeking to release the property from the charged decree, a condition which forms the second limb of clause (4) of Ext.A1 agreement. Since it is a letter issued by the lawyer of the 7th defendant South Indian Bank Ltd., this Court finds no reason to frown upon the date made mention of in Ext.A11 letter. If the three years period in terms of Article 54 is reckoned from that date, the suit O.S. No.100/1993 is well within the time, even if the version that the plaintiff Company met the original owner, Sudhakaran, on 12.02.1993 and that he refused to perform is not taken and believed, as such.

20. A three Judges Bench of the Hon'ble Supreme Court in **Ahmadsahab Abdul Mulla v. Bibijan and Others** [(2009) 5 S.C.C. 462] held in paragraph no.1 that there should be a crystallized date for both the limbs of Article 54 of the Schedule to the Limitation Act. In a case, where a date is fixed, the time will start running from that definite date fixed for doing a particular act. In the second part, the time starts running from the point when the plaintiff notices refusal, since there is no definite date available. In both

cases, there should be a definite date. In the instant case, the only possible definite date, which can be drawn is 01.03.1990 as referred to in Ext.A11. At any rate, the same cannot be considered as the date on which the last and 10th instalment has been paid by the plaintiff M/s.Kerala Spinners to the 7th defendant South Indian Bank, particularly so, when the second limb of clause (4) of Ext.A1 agreement speaks of the necessity to obtain a discharge certificate from the said Bank. In the circumstances, the appellants' argument that the suit is hopelessly barred by law of limitation, reckoned from the date of effecting the last and 10th payment, can only be rejected. It is so done. Point No.I answered accordingly.

21. Point No.II:

This point centers around the maxim "*Qui prior est tempore, potior est jure*" meaning "he who is earlier in time is stronger in right". This Court will first address the factual backdrop, based upon which this maxim is pressed into service by the learned counsel for the appellants. The appellants are the legal heirs of Sri.Iype. Iype executed three agreements with the original owner, Sudhakaran, in respect of a larger extent of property, inclusive of the subject property having an extent of 50 cents. The first agreement is marked as Ext.B1, which was executed on 29.11.1986. The extent is 1 acre of property out of 2.34 acres. The property was agreed to be sold at the rate of 3,400/- per cent for the actual extent found on measurement. The advance given by Sri.Iype is 25,000/- and the period fixed is six months. The second agreement Ext.B2 is dated 28.05.1987 between Iype and the owner Sudhakaran. There, the extent is 74 $\frac{1}{4}$ cents and the total consideration is stated to be 2,52,450/-. The advance received is mentioned as 27,000/-. The period fixed for performance was on or before 28.08.1987. The agreement states that Sri.Iype is put in possession of the property. The third agreement is Ext.B3 executed on 29.08.1987. The extent and total consideration are the same as stated in Ext.B2. However the advance received is stated to be 33,000/-. The substantive difference is in the time fixed for performance of the agreement. Ext.B3 specifically refers to the fact that the building in the property is occupied by M/s.Kerala Spinners as tenants and the sale deed is stipulated to be executed and registered on the date on which the tenants are evicted and the keys of the building handed over to the purchaser. It is thereafter that Ext.A1 agreement between the plaintiff and the owner Sudhakaran was executed, wherein the extent shown is 50 cents, the total sale consideration being 1,50,000/-; and the advance, 50,000/-. The balance sale consideration of 1,00,000/- is stipulated to be paid to the 7th defendant South Indian Bank in ten monthly instalments.

22. Now, the point raised is that, since Ext.B3 agreement is prior in point of time when compared to Ext.A1 agreement, the appellants, the legal heirs of Iype, have a stronger right than the plaintiff, M/s.Kerala Spinners Ltd. Therefore, the subsequent agreement cannot be enforced, is the argument.

23. Again, this Court cannot endorse the submissions made by the learned counsel for the appellants. The maxim relied upon by the appellants is perfect, so long as the agreement prior in point of time remains enforceable. However, if the same is not acted upon on time, for which reason, its enforceability is in serious jeopardy, the maxim cannot be profitably pressed into service. Having examined the above three agreements in detail and for the reasons to be stated here below, this Court is not satisfied of the bonafides and the genuineness of Exts.B1, B2 and B3 agreements. In a span of nine months, as many as

three agreements have been executed. None of the subsequent agreements refers to the earlier agreement. Ext.B2 does not refer to Ext.B1; and Ext.B3, to Exts.B1 and B2. It is argued by the learned counsel that the advance paid at the time of first agreement/Ext.B1 is 25,000/-, and that Rs.2,000/- was additionally paid at the time of execution of the second agreement/Ext.B2. However, Ext.B2 is styled as if 27,000/- is paid in a lump, without reference to the advance paid at the time of Ext.B1. The same is the situation with respect to Ext.B3, wherein the advance is stated to be 33,000/-, without reference to the earlier payments in Exts.B1 and B2. In the first two agreements, a definite period is fixed for performance, whereas in the third agreement it is stipulated to be the date on which the building is vacated and the key is handed over to the purchaser. It is important to note that lype filed a suit, O.S. No.861/1988, on 19.09.1988 against the original owner Sudhakaran. The specific allegation made in that plaint (produced as Ext.A3 in the suit, O.S. No.100/1993) is that the owner Sudhakaran is attempting to sell the property to third persons. The relevant portion of the said plaint is extracted here below:

“6. Now, the plaintiff has come to know from reliable sources that the defendant is taking hasty steps to convey or transfer the plaint schedule property to M/s.Kerala Spinners Ltd. or to some other parties.”

24. Despite this specific cause of action as alleged above - which amounts to a specific refusal to perform Ext.B3 agreement - lype remain contended by filing an injunction suit, without seeking specific performance. The suit, O.S. No.861/1988, was decreed on 28.03.1992. Until the plaintiff M/s.Kerala Spinners Ltd. filed the suit, O.S. No.100/1993 and even thereafter, the appellants (legal heirs of Sri.lype) never felt the necessity to file a suit for specific performance. The same was filed as late as on 15.06.1996, that is to say, almost three years after filing O.S. No.100/1993, the first suit. In the above referred facts and circumstances, Ext.B3 agreement and the right to specifically enforce the same cannot be pressed into service, as an agreement prior in point of time and should therefore, receive precedence over the subsequent agreement Ext.A1. In this regard, it is also relevant to note that M/s.Kerala Spinners Ltd. was never impleaded as a party in the suit O.S. No.861/1988, apart from and independent of the fact that the said lype, or for that matter his legal heirs, never chose to enforce their so called rights under Ext.B3. Further, no explanation is forthcoming as to why three successive agreements were executed between the original owner Sudhakaran and lype, within a short span of nine months. One another aspect which impinges on the genuineness of Ext.B3 agreement - in contradistinction with Ext.A1 agreement - is the consideration component in Ext.B3. It is fairly established in evidence that, at the time of execution of Ext.B3 agreement, the owner Sudhakaran was indebted to 7th defendant South Indian Bank in view of the money decree obtained by the Bank against Sudhakaran. Thus, the pressing necessity for sale is to satisfy that decree. However, the consideration stated in Ext.B3 is only 3,000/- as against the decree debt of about 1.5 lakhs. Ext.B3 does not speak as to how Sudhakaran will wipe off that liability, so as to execute a sale deed in favour of lype, conveying a valid title, free from encumbrance. *Per contra*, Ext.A1 contemplates a definite scheme enabling Sudhakaran to pay off the decree debt. This aspect also throws some suspicion on the genuineness of Ext.B3 agreement. All these will persuade this Court to reject the appellants' plea based on the maxim, “he who is earlier in time is stronger in right”. Point No.II concluded accordingly.

25. Point No.III:

This point pertains to the effect of Ext.A5 judgment in the injunction suit, O.S. No.861/1988, preferred by Iype against the original owner Sudhakaran on the relief of specific performance claimed by M/s.Kerala Spinners Ltd. in the suit, O.S. No.100/1993. Of course, the plaintiff, M/s.Kerala Spinners Ltd. has sought for a declaration that the decree in O.S. No.861/1988 is the product of fraud and collusion between Iype and the said Sudhakaran. Having perused impugned judgment and the reasons for granting a relief declaring that Ext.A5 judgment is vitiated by fraud and collusion, this Court is not fully satisfied of such reasons. That is why the present point is couched as to what is the impact of Ext.A5 judgment on the plaintiff's relief for specific performance. This Court notice that Ext.A5 is an *inter parte* judgment between the plaintiff Iype and the defendant, Sudhakaran. Inasmuch as the suit has been decreed, the decree binds only the defendant Sudhakaran. By any reckoning, the same will not bind M/s.Kerala Spinners Ltd. Nor would it prejudice the rights of M/s.Kerala Spinners Ltd. emanating from Ext.A1 agreement. At any rate, the same cannot cause any fetter to a court of law from passing a decree for specific performance in favour of M/s.Kerala Spinners Ltd., provided it is found entitled for the same. The decree only restrains the owner Sudhakaran from voluntarily executing a sale deed in favour of any person, other than the plaintiff therein, Iype. Based on entitlement t, if a court of law directs Sudhakaran to execute a sale deed in favour of M/s.Kerala Spinners Ltd. – which entity is not bound by Ext.A5 decree - the injunction simpliciter decree cannot restrain Sudhakaran from obliging the subsequent decree. This can only be the legal impact of Ext.A5 decree, insofar as the claim of the present plaintiff M/s.Kerala Spinners Ltd. for specific performance of the contract is concerned. Besides, this Court has already frowned upon the enforceability of Ext.B3 agreement due to absence of bonafides, delay and laches. Therefore, a decree for injunction simpliciter cannot have life beyond the life of the contract sought to be enforced. A contrary interpretation will have the effect of a clog on alienability of the property forever, which the law does not contemplate and countenance. It is relevant to note that the substratum of the decree for injunction is the contract for sale and once such contract has become unenforceable in law, the injunction decree cannot govern the situation anymore. Point No.III answered accordingly.

26. Point No.IV:

A meticulous consideration of this point is not required in view of this Court's finding to Point No.III. As already indicated, this Court is not fully satisfied of the reasons stated by the trial Court in holding that Ext.A5 decree is collusive and obtained by fraud. The degree of proof required to declare an agreement or a decree as one actuated by fraud and collusion are not met. Point found accordingly. However, the same will not impair the rights of M/s.Kerala Spinners Ltd to get specific performance of Ext.A1 agreement, since such right is not dependent on the relief to declare the decree for injunction as one obtained by fraud and collusion. Having explained the scope of Ext.A5 judgment while answering Point No.III, the relief of specific performance granted cannot be found fault with.

27. Point No.V:

The point pertains to the exercise of discretion under Section 20 of the Specific Relief Act to grant specific performance of Ext.A1 agreement, as sought for in the suit. Insofar as

agreement for sale of immovable properties are concerned, it is the general rule that specific performance is liable to be granted, unless the purchaser fails to perform his part of the contract; or in cases, where the purchaser fails to comply with the requirements of Sections 16 or 20 of the Specific Relief Act. In the instant case, it may straight away be noticed that the purchaser had performed his part of the contract by paying the full consideration of 1,50,000/- 50,000/- was paid as advance sale consideration at the time of execution of Ext.A1 agreement and 1,00,000/-, by way of ten instalments paid to the 7th defendant South Indian Bank, towards the decree debt of the seller, Sudhakaran. No default, whatsoever, has been committed by the purchaser M/s.Kerala Spinners Ltd. Therefore, there exists no circumstance pointing to the default or laches on the part of the plaintiff/purchaser, so as to refuse specific performance.

28. That apart, it is relevant to notice that the original owner, Sudhakaran, remained ex parte in the suit and the suit was contested only by the legal heirs of Iype, that too, on the strength of Exts.B1 to B3 agreements. This Court has already frowned upon Exts.B1 to B3 agreements and the same cannot stand in the way of enforcement of Ext.A1 agreement. The genuineness and the enforceability of the said agreements are at doubt. Thus, in the absence of a resistance by the original owner; and when the claims of defendants 4 to 6 (legal heirs of Iype) have not been sought to be enforced, as on the date of filing the first suit O.S. No.100/1993, there exists no reason why the specific relief sought for should not be granted. The exercise of the discretion contemplated in Section 20 should be sound and reasonable, guided by judicial principles; and none of the parameters contemplated under Section 20(2) of the Specific Relief Act are attracted in the instant facts. This Court is of the definite opinion that the grant of specific relief is nothing, but legal and proper. Point concluded accordingly.

29. A.S. No.338 of 1998

Point No.I:

The first point pertains to the question whether the subsequent suit, O.S. No.256/1996, is barred by the law of limitation. While answering this point, it has to be borne in mind that both the defendants chose to remain ex parte in that suit and there was no contest before the Court on any aspect, including limitation. However, Section 3 of the Limitation Act, 1963 which provides for bar of limitation for suits instituted after the prescribed period, specifically carves out that the Court has a duty to dismiss such suits, though limitation has not been set up as a defence. Section 3 would leave no room for any doubt that it is essentially a duty cast on a court of law to consider whether the suit instituted is barred by the law of limitation, although the same has not been set up as a defence. Therefore, this Court is of the opinion that the trial court ought to have considered that issue, even when the defendant chose to remain ex parte. Had the attendant facts, as admitted in the plaint, been considered by the trial court, the only possible conclusion is that the second suit is barred by the law of limitation. Ext.A3 agreement in that suit, which was specifically sought to be enforced, is dated 29.08.1987. Admittedly, the suit was filed only on 15.06.1996. On the very face of the above facts, decipherable from the plaint in O.S. No.256/1996 itself, the suit appears to be hopelessly barred by the law of limitation. The factum of filing an earlier suit for injunction, O.S. No.861/1988, is pleaded in paragraph no.12 of the plaint. The first sentence in paragraph no.12 is relevant and extracted here

below:

“12. When the plaintiff's predecessor in interest knew that the first defendant was attempting to transfer a portion of the plaint schedule property to strangers, he has instituted a suit, O.S. No.861/1988 for a perpetual injunction....”

30. It could thus be seen that the plaintiff in the subsequent suit had clear notice of refusal to perform the agreement, way back in 1988 itself. If that be so, he ought to have filed a suit for specific performance - and not for injunction - in the year 1988 itself, upon receiving definite knowledge that the original owner is attempting to sell the property to strangers, in negation of the plaintiff's right under the agreement for sale. Once the plaintiffs/purchasers (legal heirs of lype) get clear notice of refusal, it is idle for them to claim that time for institution of the suit is available till the event of vacating the tenant M/s.Kerala Spinners Ltd., and the keys handed over to the plaintiffs, as stipulated in Ext.A3. Even in the contract, where an event is stipulated for the performance of the contract, the purchaser is duty bound to act in a reasonable time, within which the stipulated act can be performed by the seller. Inordinate delay of more than ten years will certainly tell harsh upon the readiness and willingness of the purchaser. The inevitable conclusion is that the suit will be barred by the law of limitation.

31. However the issue does not end there. This Court has to proceed further to find, whether - in the absence of a challenge by the defendants in that suit as against the decree for money granted - it is proper for this Court to upset that decree, that too in an appeal preferred by the appellants/decreed holders. It is one thing to say that limitation is a question which should have been considered by the Court of original jurisdiction, albeit in the absence of a defence to that effect. However, if the trial Court has failed to exercise its jurisdiction and erroneously granted a decree, the same should have been challenged by the original owner, Sudhakaran, who suffered the decree. In the absence of such a challenge, an appellate court may not be justified in non-suiting the plaintiff, even with respect to the limited relief for return of money. The same cannot be done, since this Court is exercising a jurisdiction, the contours of which are confined to the two appeals before this Court, especially when such appeals are preferred by the appellant, who is the holder of the money decree. The point is therefore concluded accordingly.

32. Point No.II:

This point pertains to the exercise of discretion under Section 20 of the Specific Relief Act in refusing specific performance in the second suit, O.S. No.256/1996. The specific performance sought for is with respect to Exts.A1 to A3 (which were produced as Exts.B1 to B3 in the earlier suit, O.S. No.100/1993). As already indicated while answering Point No.II in A.S. No.628/1997, the plaintiffs in the subsequent suit (legal heirs of lype) were never diligent in enforcing their rights under Ext.A3/B3 agreement dated 29.08.1987. Even when they got specific information that the original owner Sudhakaran is attempting to sell the property to a third person, in derogation of the plaintiff's right under Ext.A3 agreement, neither lype, nor the plaintiffs, have chosen to seek specific performance of the agreement. lype only chose to file a suit for injunction simpliciter, restraining Sudhakaran from executing the sale deed in favour of anybody other than the said lype. Strictly speaking, the second suit, if contested by the defendants, would have been thrown out in

terms of the bar under Order II Rule 2. The plaintiffs in the second suit, or for that matter, their predecessor lype had specific information regarding the factum of an attempt by Sudhakaran to sell the property to strangers. Needless to say that a relief for specific performance should have been asked, going by that cause of action available in 1988. No leave of the Court was obtained in not seeking such a relief while filing the suit, O.S. No.861/1988. The legal position in this regard is not *res integra* and the same stands concluded in (1) **Virgo Industries (Eng.) (P) Ltd. v. Venturetech Solutions (P) Ltd.** [(2013) 1 S.C.C. 625], (2) **Sasidharan Nair v. Kunju Mohammed Unni** [2017 (4) K.H.C. 246 (D.B)]. The above expatiation of law would leave no room for any doubt as regards the non-maintainability of the second suit, in view of the bar under Order II Rule 2. However, unlike in the case of a plea of limitation, the same cannot be considered by a Court of law in the absence of a plea to that effect. In the instant case, both the defendants remained ex parte and there was no plea before the Court with respect to Order II Rule 2. If that be so, the second suit cannot be dismissed on that premise. However, this is a relevant criteria and consideration while exercising discretion under Section 20 of the Specific Relief Act. It is well settled that unexplained delay and laches in seeking specific performance would persuade a Court of law not to exercise the discretion in favour of granting specific performance. In the instant case, the right to enforce an agreement for sale of the year 1987 is only sought to be enforced in the year 1996, that too, after the purchaser in a subsequent agreement had already sought for specific performance before a court of law.

33. In such circumstances, this Court cannot find anything wrong or illegal on the part of the trial Court in not exercising the discretion under Section 20 in favour of granting specific performance to the plaintiff. The point concluded accordingly.

In the result, both these appeals fail and the same will stand dismissed. Parties will bear their respective costs. All pending Interlocutory Applications will stand closed.

Result of the Case:

Appeal Suit dismissed.

Headnote prepared by A.K.
