

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN

MONDAY, THE 19TH DAY OF OCTOBER 2015/27TH ASWINA, 1937

CRP.No. 236 of 2014 ()

REVISION PETITIONER:

**LAILA KASSIM,
W/O. M.A. KASSIM, THAIPARAMBIL HOUSE,
KOLLAMPATTADA KARA, KUMILY VILLAGE, PEERMEDU TALUK,
IDUKKI DISTRICT.**

BY ADV. SRI.V.A.AJAI KUMAR

RESPONDENT/PETITIONER:

**V.K. KUNJUMOL,
W/O. SHAMSUDHEEN, VELLIYAMPALLI HOUSE
ROSAPOOKANDAM KARA, KUMILY VILLAGE, PEERMADU TALUK
IDUKKI DISTRICT. PIN-685 509.**

R1 BY ADV. SRI.GEORGEKUTTY MATHEW

**THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 19-10-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

vpv

"C.R."

P.N.RAVINDRAN, J.

C.R.P.No.236 of 2014

Dated this the 19th day of October, 2015

ORDER

The petitioner is the defendant in O.S.No.142 of 2011 on the file of the Court of the Subordinate Judge of Kattappana, a suit instituted by the respondent/plaintiff for specific performance of Ext.A1 agreement dated 6.5.2011 to sell six cents of land with the building therein. The suit was decreed exparte by judgment delivered on 11.01.2013. By that decree, the defendant was directed to execute a sale deed after accepting the balance sale consideration within one month from the date of the decree. It was stipulated that in the event of default on the part of the defendant to execute the sale deed, the plaintiff will be entitled to get the sale deed executed within one month of the default by depositing the balance sale consideration in court. The total agreed sale consideration according to the plaintiff was Rs.3,00,000/- and out of the said amount, the sum of Rs.1,85,000/- was paid to the defendant on the date of the agreement. Going by the averments in the plaint, the balance sale consideration payable to the defendant is Rs.1,15,000/-.

2. Three months after the exparte decree for specific performance was passed, to be exact on 12.4.2013, the plaintiff filed E.P.No.15 of 2013 in the Court of the Subordinate Judge of Kattappana praying that a conveyance in respect of the decree schedule property may be executed through court and the decree schedule property may be delivered over to him. Along with the said application, he filed E.A.No.64 of 2013 wherein he prayed for condoning the delay in depositing the balance sale consideration and for permission to adjust the amount awarded by way of costs namely the sum of Rs.41,760/- and to permit him to deposit the sum of Rs.73,240/-. The plaintiff had in the affidavit filed in support of the application averred that under the decree she is bound to deposit the sum of Rs.1,15,000/- towards the balance sale consideration, that under the decree she is entitled to realise the sum of Rs.41,760/- by ways of costs and therefore, she may be permitted to adjust it towards the balance sale consideration. The court below allowed the said application by order passed on 12.4.2013 itself without notice to the defendant. The said order is under challenge in this civil revision petition filed under section 115 of the Code of Civil Procedure.

3. Heard Sri.V.A.Ajaikumar, learned counsel appearing for the petitioner. Perused the records. The short question that arises for consideration in this civil revision petition is whether the decree holder

in a suit for specific performance is entitled to set off or adjust the amount awarded by way of costs by the trial court or the appellate court against the balance sale consideration payable by him/her in terms of the decree granting specific performance. The decretal portion of the judgment in O.S.No.142 of 2011 reads as follows:

"In the above circumstances, the transaction between the plaintiff and defendant had established with the affidavit sworn by the plaintiff and the document produced therein. The suit is decreed with costs on the following terms.

- 1. The defendant is directed to execute the sale deed as per Ext.A1 sale agreement, accepting the balance sale consideration within one month of the date of decree.*
- 2. In default of execution of the sale deed in favour of the plaintiff, she is entitled to get the sale deed executed within one month of the said default, by depositing the balance sale consideration before the court."*

4. The decree passed in the suit reads as follows:

"DECREE

That, suit is decreed with costs on the following terms.

- 1. The defendant is directed to execute the sale deed as per Ext.A1 sale agreement, accepting the balance sale consideration within one month of the date of decree.*
- 2. In default of execution of the sale deed in favour of the plaintiff, she is entitled to get the sale deed executed within one month of the said default, by depositing the balance sale consideration before the court."*

5. The relief sought in E.A.No.64 of 2013 in E.P.No.15 of 2013 in O.S.No.142 of 2011 is as follows:

"ഇതോടൊന്നിച്ച് ബോധിപ്പിക്കുന്ന സത്യവാങ്മൂലത്തിൽ വിവരിക്കുന്ന കാരണങ്ങളാൽ ബഹു. കോടതിയുടെ ദയവുണ്ടായി ടി നമ്പറിൽ പണം ഒടുക്കുവാനുള്ള കാലതാമസം മാപ്പാക്കി കോസ്റ്റ് കഴിച്ചുള്ള തീർത്ഥ സംഖ്യ സ്വീകരിക്കുവാൻ അനുവദിച്ച് വേണ്ട ഉത്തരവാകണമെന്ന് അപേക്ഷിക്കുന്നു."

Such a relief is sought on the averment that under the decree passed by the trial court, the plaintiff is entitled to realise the sum of Rs.41,760/- by way of costs and if that amount is adjusted towards the balance sale consideration or set off against the balance sale consideration, the plaintiff is liable to pay only the sum of Rs.73,240/-. By the impugned order, the court below allowed the application without notice to the defendant. The impugned order reads as follows:

"Heard. Allowed deposit ₹ 73,240/-."

6. Apart from the fact that the order is cryptic and does not give any reason and has been passed without notice to the defendant, the order in my opinion amounts to a variation of the decree. The decree in the instant case directs the plaintiff to deposit the balance sale consideration of Rs.1,15,000/-. The order in E.A.No.64 of 2013 thus amounts to a variation of the decree by the execution court. An amendment of the decree can be permitted only by the court which passed the decree and not by the execution court. Such an amendment can be permitted only after notice to the defendant. A similar issue arose for consideration before a Division Bench of the High Court of Calcutta in **Sunity Chandra Bose v. Nil Ratan Sinha**

(AIR 1985 Calcutta 282). In the plaint in that case there was a prayer for deduction of arrears of tax due to the Corporation of Calcutta, arrears of rent payable to the landlord and other dues to make the property free from all encumbrances, damages and costs. In the conditional decree which was passed, deduction was allowed in respect of the arrears of taxes due to the Corporation of Calcutta and arrears of rent, from the balance purchase money. Though there was no direction in the conditional decree for deduction of the costs of the suit from the balance sale consideration, the plaintiff first tried to have the costs of the suit deducted from the balance of the consideration by filing a petition. While that petition, which was filed on 27.6.1978, was pending awaiting return of the notice issued to the defendant, he filed another petition on 16.8.1978 for having the costs of the suit deducted from the balance of purchase money and it was allowed on the very same day without hearing the defendant. The Division Bench of the Calcutta High Court held that deposit of the sum of Rs.25,901.57 towards balance sale consideration after deducting the costs of the suit amounts to modification of the decree and that the order passed by the court on 16.8.1978 allowing the plaintiff to deposit the balance sale consideration after deducting the costs of the suit, cannot be justified as the plaintiff has asked the court to make a different judgment regarding the balance of purchase money to be deposited by

him. The Calcutta High Court also held that as the decree was a conditional decree it should not have been amended without notice to the defendant. The Division Bench also held that the costs of the suit could have been recovered by filing an execution petition under Order XXI Rule 32 of the Code of Civil Procedure and that by not depositing the amount representing the costs of the suit, the plaintiff has obtained an unfair advantage over the defendant.

7. The principles laid down by the Division Bench of the Calcutta High Court in the aforesaid decision in my opinion squarely apply to the case on hand. The court below has by the impugned order permitted the plaintiff to set off or adjust the sum of Rs.41,760/- awarded by the trial court as costs, from the balance sale consideration payable by him. On the terms of the judgment/decreed passed in the suit, the plaintiff was bound to deposit the sum of Rs.1,15,000/- towards balance sale consideration. The decree does not permit him to pay the amount in installments or to deduct the costs awarded by the trial court. The court below could not have in my opinion granted the relief prayed for in E.A.No.64 of 2013. Though the court which passed the decree has the power under section 28(1) of the Specific Relief Act, 1963 to enlarge the time for deposit of the balance sale consideration, the execution court could not have allowed the plaintiff to set off or adjust the sum of Rs.41,760/- from the

balance sale consideration payable by him. On the terms of the decree and judgment passed in the instant case, the plaintiff was bound to deposit the entire sale consideration and apply for the execution and registration of a sale deed in his favour and for delivery of the property. He could not have in my opinion set off or adjusted the sum of Rs.41,760/- awarded to him by way of costs by the trial court from the balance sale consideration payable by him. His remedy to realise the costs awarded by the trial court lies under Order XXI Rule 32 of the Code of Civil Procedure. The impugned order cannot therefore in my opinion be sustained.

For the reasons stated above, I allow this civil revision petition, set aside the order passed by the Court of the Subordinate Judge of Kattappana on 12.4.2013 in E.A.No.64 of 2013 in E.P.No.15 of 2013 in O.S.No.142 of 2011 and dismiss E.A.No.64 of 2013. The court below shall dispose of E.P.No.15 of 2013 in O.S.No.142 of 2011 having regard to the observations and findings herein. No costs.

Sd/-

**P.N.RAVINDRAN
JUDGE**

/true copy/

P.A. to Judge