

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 8TH DAY OF APRIL 2015/18TH CHAITHRA, 1937

RFA.No. 126 of 2005 (A)

AGAINST THE JUDGMENT AND DECREE IN OS 289/1992 of PRINCIPAL SUB
COURT, NORTH PARAVUR, DATED 30-10-2004.

APPELLANTS/PLAINTIFFS:-

1. KAVUKUTTY
KUNNUPURATH VEETIL, MARIYAMANGALAM KARA
THIRUVANIYOOR VILLAGE, KUNNATHUNADU TALUK
ERNAKULAM DISTRICT. (DIED)

2. CHANDRAN, S/O. VELAYUDHAN,
KUNNUPURATH VEETIL, MARIYAMANGALAM KARA
THIRUVANIYOOR VILLAGE, KUNNATHUNADU TALUK
ERNAKULAM DISTRICT.

BY ADV. SRI.S.JAMES VINCENT

RESPONDENTS/RESPONDENTS:-

1. BABY
THRIKKANARVATTOM DESOM, KANAYANNUR TALUK, ERNAKULAM.

2. NARAYANAI, W/O. VELAYUDHAN,
MADAVANA, KAKKATTUKARA, KANAYANNUR TALUK
ERNAKULAM.

3. SUKESHAN, S/O. NARAYANAN,
THADATHIL, THIRUVANKULAM, KANAYANNUR TALUK
ERNAKULAM.

ADDL.4. ITHAMMA, KUNNUPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.5. KARTHAYAYANI, KUNNUPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.6. SARASU, KUNNUPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.7. VALSALA, KUNNUPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.8. KOMALA, KUNNUPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

(.....2)

ADDL. 9. PRABHAKARAN, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.10. MURALEEDHARAN, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.11. RAGHUVARAN, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.12. VIJAYAN, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.13. JAYAMMA, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.14. JAYAN, KUNNUMPURATH HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.
(DIED).

ADDL.15. CHEERU, W/O.KUNJAN, NEDUNTHURUTHIL HOUSE,
MAMALA P.O., KAKKAD KARA, ERNAKULAM DIST.

ADDL.16. C.P.UDAYABHANU, AGED 49,
S/O.C.K.PADMANABHAN, "BHARATHAM",
THRIIPPUNITHURA.

ADDL.17. C.P.PRATHAPAN, AGED 47,
S/O.C.K.PADMANABHAN, "SWATHY KRISHNA",
HILL PALACE P.O.

ADDL.18. C.P.AJAYAGHOSH, AGED 45,
S/O.C.K.PADMANABHAN, CHULLUTHARAYIL HOUSE,
MAMALA P.O., THIRUVANKULAM.

(ADDITIONAL RESPONDENTS 4 TO 15 ARE IMPEADED AS THE LEGAL
HEIRS OF DECEASED FIRST APPELLANT VIDE ORDER DATED 26.10.2007
IN I.A.NO.3541 OF 2006)

(ADDITIONAL RESPONDENTS 16 TO 18 ARE IMPEADED AS PER ORDER
DATED 13.10.2008 IN I.A.NO.1529 OF 2008)

(THE SECOND APPELLANT IS EXEMPTED FROM SUBSTITUTING THE LEGAL
HEIRS OF THE DECEASED R14 AS PER ORDER IN I.A.NO.2389 OF 2012
DATED 8.11.2012)

R1 & R2 BY ADV. SRI.K.C.CHARLES
R3 BY ADV. SRI.SOJO J.KALLIDUKIL
R4,12-15 BY ADV. SRI.BEPIN VIJAYAN
ADDL.R16-18 BY ADV. SRI.P.N.RAMAKRISHNAN NAIR
ADDL.R16-18 BY ADV. SRI.P.VISWANATHAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
01-04-2015, THE COURT ON 08-04-2015 DELIVERED THE FOLLOWING:

Kvs/-

C.R.

P.B.SURESH KUMAR, J.

R.F.A.No.126 of 2005.

Dated this the 8th day of April, 2015.

J U D G M E N T

The plaintiffs in O.S.No.289 of 1992 on the file of the Court of the Principal Subordinate Judge, North Parur are the appellants in this appeal.

2. O.S.No.289 of 1992 is a suit instituted for setting aside the sale deed executed by the first plaintiff in favour of defendants 1 and 2 on 5.12.1990 in respect of the plaint schedule property and for consequential injunction. The plaint schedule property and the building therein belong to the first plaintiff. The second plaintiff is the adopted son of the first plaintiff. According to the plaintiffs, they are residing in the building in the plaint schedule property and that after the death of the husband of the first plaintiff, she was mentally depressed and was not having a steady and disposable state of mind. It is also their case that when the second plaintiff came to know

that the defendants have obtained some documents from the first plaintiff by misrepresenting facts and exercising undue influence, he had to publish a notice in the Mathrubhumi daily dated 29th October, 1990 that in view of the state of mind of the first plaintiff, documents, if any, executed by the first plaintiff will not bind him and the plaint schedule property. According to the plaintiffs, despite such a public notice, on 5.12.1990, defendants 1 and 2 got executed from the first plaintiff the sale deed sought to be set aside. The case of the plaintiffs in the suit is that the document obtained by defendants 1 and 2 from the first plaintiff is vitiated for want of steady and disposable state of mind for the first plaintiff to execute a document of that nature, want of consideration, undue influence, fraud etc.

3. The defendants contested the suit contending *inter alia* that they obtained the sale deed referred to in the suit paying adequate consideration and with the best of intentions and that the said document is not vitiated in any manner whatsoever. According to them, they have paid to the first plaintiff a sum of Rs.60,000/- by way of sale consideration for

the property.

4. The evidence in the suit consists of oral testimonies of Pws.1 to 5 and Exts.A1 to A10 documents on the side of the plaintiffs and the oral testimonies of DWs.1 to 3 and Exts.B1 to B8 documents on the side of the defendants. Besides Court Exhibits, Exts.XI and C1 were also marked. Among the documents produced, Ext.A4 was the sale deed sought to be set aside.

5. The trial court found that the plaintiffs have not established that the first plaintiff was incapable of understanding things properly or was suffering from unsoundness of mind on the date of execution of Ext.A4 sale deed. The trial court also found that the document sought to be set aside was not vitiated by fraud or misrepresentation as contended by the plaintiffs. But, it was held by the trial court that the evidence tendered by defendants 1 and 2 do not establish that the defendants were having sufficient funds with them and that they had paid any consideration to the first plaintiff for the property covered by Ext.A4 sale deed. Despite

the said finding, the trial court dismissed the suit.

6. The plaintiffs challenged the decision of the trial court in A.S.No.54 of 1995 before this Court. This Court, on a reappraisal of the materials on record, confirmed the findings of the trial court that the first plaintiff was having a steady and disposable state of mind at the time of execution of Ext.A4 sale deed and that Ext.A4 sale deed was not vitiated on any grounds. As regards the case of the plaintiffs that Ext.A4 sale deed was not supported by any consideration, this Court took the view that payment of consideration was a fact to be proved by defendants 1 and 2 and that they have not established the said fact by adducing evidence. This Court also found that defendants 1 and 2 have failed to establish that the first plaintiff was in need of money and that she had executed the sale deed for meeting her necessities. In the light of the said findings, this Court set aside the decision of the trial court and remitted the suit for considering the issue as to whether the decree sought can be granted on that ground, after affording the parties yet another opportunity to adduce evidence.

7. Pursuant to the decision in A.S.No.54 of 1995, when the suit was posted for further evidence before the trial court, defendants 1 and 2 examined another witness on their side as Dw4. Thereafter, the matter was considered again by the trial court and as per the decree and judgment impugned in this appeal, the suit was dismissed holding that Ext.A4 sale deed was supported by consideration. The plaintiffs are aggrieved by the said decision of the trial court and hence this appeal.

8. Heard the learned counsel for the appellants and the learned counsel for the respondents.

9. The issue that arises for consideration is whether the evidence on record would establish that Ext.A4 sale deed was supported by consideration and if not, a decree could be passed as claimed by the plaintiffs. It is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has actually been paid. As noticed above, at the first instance itself, on an elaborate consideration of the entire evidence on record, the trial court found that

defendants 1 and 2 have not established that Ext.A4 sale deed was supported by consideration. The relevant portion of the judgment reads thus:

"It is true that the evidence tendered on the defence side is not sufficient to establish that defendants were having sufficient funds with them and that they had paid the consideration as stated in the sale deed to the first plaintiff during the date of execution of Ext.A4 sale deed and the properties were handed over to them on the basis of the sale deed. So also, there is no evidence to establish that the first plaintiff was in need of funds and that she had executed the sale deed for meeting her necessities."

The said finding was confirmed by this Court in A.S.No.54 of 1995 after hearing both sides. Thereafter, the matter was remitted to the trial court for considering the issue as to whether a decree could be passed in favour of the plaintiffs on that ground. Of course, the parties were given liberty to adduce further evidence. As such, defendants 1 and 2 cannot be heard to contend that the materials on record as available at the time of disposal of A.S.No.54 of 1995 were sufficient to hold that Ext.A4 sale deed was supported by consideration. As observed by this Court, it is for defendants 1 and 2 to establish

that Ext.A4 sale deed was supported by consideration. As pointed out earlier, the additional evidence let in by defendants 1 and 2 after the remand is only the oral evidence of DW4. DW4 is none other than the brother of the first defendant. True, DW4 has stated in the proof affidavit filed by him that he had seen the first defendant paying Rs.65,000/- to the first plaintiff before the execution of Ext.A4 sale deed at the office of the Sub Registrar. In cross examination, at the first instance, DW4 has stated that the sale consideration of the property was paid by the first defendant to the first plaintiff at the office of the Sub Registrar after the registration of the document. He has also stated that the consideration was paid by about 12 O'clock. Later, DW4 has stated that no amount was paid at the office of the Sub Registrar. The learned counsel for the appellants has brought to my notice the time of presentation of Ext.A4 sale deed, as endorsed therein. It is seen that Ext.A4 sale deed was presented for registration only by 2.10 p.m. on the relevant day. If what is recorded in Ext.A4 is accepted as genuine, the evidence tendered by DW4 cannot

be believed. Even otherwise, as noticed above, the evidence tendered by DW4 is not consistent. It is, therefore, to be held that the defendants 1 and 2 have not established that Ext.A4 sale deed is supported by consideration.

10. The next aspect to be considered is whether the plaintiffs are entitled to the decree sought by them for the inability of defendants to establish that Ext.A4 is not supported by consideration. Section 54 of the Transfer of Property Act defines sale as a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The definition indicates that in order to constitute a sale, there must be a transfer of all rights in the property by the seller to the buyer. The vendor cannot retain any part of his interest or right in the property or else it would not be a sale. The price constitutes an essential ingredient of the transaction of sale. The words 'price paid or promised' indicate that actual payment of the price is not a sine qua non for the completion of the sale, if the parties intend to transfer the property. Even if the document is executed and registered without payment of the price, the sale

would be complete. In such cases, if consideration is not paid, the remedy of the vendor would be to institute a suit for recovery of the sale price. Normally, the ownership and title to the property will pass to the purchaser on registration of the sale deed. The same, however, is not an invariable rule. The real test is the intention of the parties. In order to constitute a sale, the parties must intend to transfer the ownership of the property and to pay the price either in *praesenti* or *in futuro*. Though registration is *prima facie* proof of an intention to transfer the property, it is not proof of operative transfer. In case of disputes, the intention is to be gathered from the recitals in the sale deed, conduct of parties and the evidence on record. [See **Vidhyadhar v. Mankikrao** (AIR 1999 SC 1441) & **Kaliaperumal v. Rajagopal** (AIR 2009 SC 2122)].

11. I have found that Ext.A4 sale deed was not supported by consideration. That apart, the materials on record would indicate that possession of the property has not been handed over to defendants 1 and 2 pursuant to Ext.A4 sale deed. It is conceded that a suit as O.S.No.248 of 2006 has been

filed by defendants 1 and 2 to recover possession of the property from the first plaintiff based on Ext.A4 sale deed. The plaint in O.S.No.248 of 2006 is part of the records. The specific pleadings of defendants 1 and 2 in the said suit is that after the purchase of the property, the first plaintiff was permitted to reside in the building in the plaint schedule property. However, in the written statement filed in the suit, such a case was not advanced. It is also seen from the order passed by this Court in this appeal on I.A.No.4278 of 2008 that this Court had appointed the first plaintiff as receiver of the plaint schedule property on an application for temporary injunction filed by the plaintiffs. In the counter affidavit filed by the contesting defendants in the said interlocutory application, defendants 1 and 2 undertook that they will not dispossess the plaintiff from the plaint schedule property otherwise than by due process of law. In other words, defendants 1 and 2 cannot be heard to contend that they have obtained possession of the property pursuant to Ext.A4 sale deed. If really the intention of the parties was that the title to the property should pass to

defendants 1 and 2 on the execution of the sale deed and its registration, the possession of the suit properties would have been delivered to defendants 1 and 2. In Ext.A6 notice sent by the plaintiffs to the defendants, it is stated that the first plaintiff is an uneducated lady. The said document is produced along with the plaint and hence the same is part of the pleadings of the plaintiffs. In the written statement, the said statement in Ext.A6 is not denied. The law in India protects persons who transfer their property to their disadvantage when they do not have the means to understand fully the nature and effect of what they do. In **A.Venkappa Bhatta v. Gangamma** (AIR 1988 Kerala 133), a Division Bench of this Court, following the decision of the Privy Council in **Kwamin Bassayin v. Bendentu II** (AIR 1937 Privy Council 274) held that it is upto the party relying on a document executed by an illiterate person that it was executed in the full knowledge of what it was. The materials on record are, therefore, not sufficient to hold that the parties to Ext.A4 document intended to transfer the title to the property. Ext.A4 sale deed, in the

circumstances, is liable to be set aside.

In the result, the appeal is allowed, the impugned judgment and decree of the trial court are set aside and the suit O.S.No.289 of 1992 on the file of the Principal Sub Court, North Paravur is decreed, setting aside sale deed No.4320 of 1990 of Puthencruz Sub Registry. The defendants are restrained by a decree of permanent prohibitory injunction from trespassing into the plaint schedule property and interfering with the possession of the plaintiffs over the plaint schedule property. There will be no order as to costs.

Sd/-P.B.SURESH KUMAR, JUDGE.

Kvs

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PA TO JUDGE.