

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 13TH DAY OF AUGUST 2015/22ND SRAVANA, 1937

RSA.No.293 of 2005 (B)

AGAINST THE JUDGMENT IN AS 74/1998 of SUB COURT, NEYYATTINKARA
DATED 04-09-2004

AGAINST THE JUDGMENT IN OS 634/1996 of PRINCIPAL MUNSIF COURT,
NEYYATTINKARA DATED 11-08-1998

APPELLANT/RESPONDENT IN FIRST APPEAL/DEFENDANT IN SUIT:

JAGBARUDEEN, S/O.AHAMMED KHAN, RESIDING
AT ILLAHI MANZIL, KARAMVILA, ATHIYANNOOR VILLAGE
NEYYATTINKARA TALUK, THIRUVANANTHAPURAM.

BY ADVS.SRI.V.SURESH
SRI.G.SUDHEER KARAKONAM

RESPONDENT/APPELLANT IN FIRST APPEALS/PLAINTIFF:

SHOUKATH ALI, S/O.ABDUL REHMAN,
FIDAUSE, MARUTHOOR, ATHIYANNOOR VILLAGE
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.GEORGE VARGHESE (PERUMPALLIKUTTIYIL)
SMT.SREELEKHA PUTHALATH
SRI.A.R.DILEEP

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
13-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.293 OF 2005

Dated this the 13th day of August, 2015.

J U D G M E N T

The defendant in O.S.No.634/1996 before the Principal Munsiff Court, Neyyattinkara who was successful in getting the suit dismissed but was unfortunately suffered a decree at the hands of the lower appellate court is the appellant.

2. The suit was one for specific performance of a contract. By an agreement dated 28.12.1995, the defendant agreed to sell two items of properties namely, 4 cents of garden land and 11 cents of paddy field to the plaintiff for a total consideration of Rs.30,000/-. Ext.A4 is the said agreement. It says that Rs.20,000- was paid as advance and the balance was to be paid at the time of execution of the sale deed. Three months period was fixed for execution of the document. By Ext.A5 document, the plaintiff claimed that he called upon the defendant to execute the document which the defendant did not heed to and that necessitated the suit.

3. The suit was resisted by the defendant denying the very execution of Ext.A4 document and contending that it was a concocted document. His contention was that the plaintiff is the husband of his sister and he purchased the property at the time when he was abroad and all transactions in connection with the purchase were done by the plaintiff for him. It is pointed out that the plaintiff did not hand over the sale deed either to the defendant or to his wife. It so happened that the wife of the defendant had instituted O.S.No.630/1993 when the plaintiff attempted to trespass into the suit property and tried to commit acts of waste therein. Thus the relationship became bitter between the parties and that the document in question has been taken aid of under those circumstances. In other words, there was complete denial of execution of agreement for sale. On the basis of the above contentions, he prayed for dismissal of the suit.

4. On the above pleadings, issues were raised and the parties went to trial. Evidence in the case consists of the testimony of PWs 1 to 3 and the documents marked as Exts.A1 to

A7 on the side of the plaintiff. Defendant examined himself as DW1 and had Exts.B1 to B4 marked. The trial court, for various reasons, found execution of Ext.A4 agreement to be suspicious in nature and after considering the evidence in considerable detail reached a conclusion that no reliance could be placed on Ext.A4 and thus things would be as contended by the defendant. Accordingly, the suit was dismissed.

5. Disappointed plaintiff carried the matter in appeal as A.S.No.74/1998. The lower appellate court felt that the approach made by the trial court was not proper and went on to hold that Ext.A4 agreement executed as a result of compromise between the parties is not a genuine document. The lower appellate court brushed aside various contentions which found favour of the trial court and found that since Ext.A5 notice has been received by the defendant, no reply has been furnished by him and Ext.A4 was in fact executed by him. Repelling the contentions to the contrary, the lower appellate court reversed the findings of the trial court and granted a decree for specific performance.

6. Notice was issued on the following question of law:

Has not the lower appellate court committed an error in granting a decree for specific performance without considering the matters under Section 20 of the Specific Relief Act?

7. Sri.V.Suresh, learned counsel appearing for the appellant contended that the lower appellate court was not justified in reversing the well considered and reasoned judgment of the trial court which considered all the issues in the proper perspective and had entered findings on each issue based on evidence on record. None of the contentions taken at the appellate stage is sustainable, according to the learned counsel. It is pointed out that the very recital regarding advance payment said to have been made as per Ext.A4 itself is open to serious doubt. Further, attention was drawn to the fact that the testimony of the witnesses examined from the side of the plaintiff shows that it was on the date on which the agreement was entered into that the stamp paper was purchased. But Ext.A4 would show that the stamp paper was purchased much earlier. This would belie the version given by the plaintiff. The lower appellate court treated

this vital piece of evidence lightly and dismissed the appeal holding that it might be a mistake. Reliance was placed on Rule 43 of Kerala Manufacture and Sale of Stamp Rules, 1960 and contended that the endorsement made on the stamp paper cannot be easily brushed aside nor can be a contract except under contingencies provided under Section 92 of Indian Evidence Act.

8. Learned counsel appearing for the appellant went on to contend that it is quite unusual and in fact very rare that the original document of title would be handed over to the vendee at the time of execution of agreement for sale and the production of original document of title by the vendee goes a long way in indicating that the transaction as spoken to by the defendant is more probable. The evidence of PW1 was spoken to and it was pointed out that the payment of Rs.20,000/- spoken to by PW1 is in a quite different manner than what is stated in the plaint thereby indicating that no amount had been paid at all. Learned counsel went on to contend that the assumption or presumption as the case may be made by the lower appellate court that

various cases between the parties were compromised and Ext.A4 was executed as a result of compromise cannot be countenanced. Ext.A4 is dated 28.12.1995 and even going by the evidence furnished by PW1, it is clear that the crime case between the parties was in existence till 30.05.1996. It could not therefore be said that Ext.A4 was executed as a result of compromise. Drawing attention to Ext.A7, it is pointed out that it does not contain the seal of the post office and therefore the claim made by the plaintiff that Ext.A5 notice has been served on the defendant is open to doubt. Finally it was contended that even assuming Ext.A4 is found to have been executed by the defendant, the lower appellate court should have considered whether it is just and proper to grant a decree for specific performance or in other words it should have considered the discretion envisaged under Section 20 of the Specific Relief Act and should have discussed the various circumstances which prompted the court to grant a decree for specific performance. Learned counsel went on to point out that Section 20 casts a statutory obligation on the court. Even in the absence of plea to

that effect, to address itself to the question, there would be just and proper reason to grant a decree for specific performance or some other alternative relief would be sufficient in the facts and circumstances of the case.

9. For the above proposition, learned counsel for the appellant relied on the decision in **Shamsher Singh & Ors.** vs. **Rajinder Kumar & Ors.** (AIR 2014 Supreme Court 2253). Learned counsel concluded by saying that there was no justification for the lower appellate court to interfere with the findings of the trial court and the lower appellate court has grievously erred both on facts and in law in decreeing the suit as prayed for.

10. Learned counsel appearing for the respondent in reply contended that most of the contentions now taken have been found against by the lower appellate court on appreciation of evidence and being question of facts, they are open for consideration by this Court exercising jurisdiction under Section 100 of the Code of Civil Procedure. The contention regarding execution of Ext.A4 is a passive contention and the

discrepancies in the date of stamp paper were all found against by the court below. Learned counsel pointed out that there is not much delay in filing a suit by the wife of the defendant against the plaintiff and therefore it would be clear that the relationship had become strained from then onwards. If, as a matter of fact, it was so, it is inconceivable that no action would have been taken by the defendant to get the original of the document delivered to him and his non action in this regard would have gone a long way to show that the contentions raised in this regard are false. Both the courts below have found that in all probability Ext.A4 is executed as a result of compromise between the parties agreeing to settle the disputes between them.

11. As far as the discrepancies in the date of stamp paper is concerned, learned counsel for the respondent pointed out that the witnesses examined by the plaintiff had consistently stated that it was the defendant who gave money to purchase stamp paper and it was purchased by using that money and if the defendant had a case that it was not so, it was for him to suggest those witnesses to speak about those matters. Without making

even any suggestion to these witnesses to the fact that what they have spoken to are false, the appellant may not be permitted to assail that finding before the lower appellate court. Learned counsel contended that there is no discrepancy or inconsistency or contradiction with regard to payment of advance amount as is sought to be made out by the learned counsel for the appellant. That the advance amount has been received has been uniformly stated by the witnesses and there is no ground to interfere with the findings of the lower appellate court. The issue as to whether Ext.A4 was executed as a result of compromise between the parties is a question on fact and the court below found that it is so and with the intention of being given a quietus to various disputes between the parties. Further learned counsel went on to emphasise that if there was an iota of truth involved in the contentions of the defendant, he would have replied at the earliest when he received Ext.A5 notice. He kept silent and has now taken sort of contentions without any bonafides. That alone is sufficient to show that he is not trustworthy and the contentions put forward by him are only for the purpose of

defending the suit.

12. As regards the exercise of discretion under Section 20 of the Specific Relief Act, relying on the decision in **Prakash Chandra** vs. **Narayan** ((2012) 5 SCC 403), learned counsel for the respondent contended that unless there are pleadings to that effect and some evidence in that regard, the court is not obliged to go into that question. In the case on hand, there is no whisper regarding any hardship or any loss sustained to the defendant as a result of a decree being granted and in the absence of any such plea, there is no justification for this Court to interfere with the matter. In short, the contention is that there are no grounds made out to interfere with the decree of the lower appellate court.

13. First thing that is to be noticed is that the two courts have entered into two divergent findings with regard to the transaction. While the trial court suspected the execution of Ext.A4 document, the lower appellate court had no doubt in that regard. One fact must be noticed immediately. Even though the defendant denied execution of Ext.A4, there was no attempt from

his side to show that the signature found on Ext.A4 does not belong to him except for a bare denial of execution. Of course, there is some merit in the contention raised by the learned counsel for the appellant that it is rather unusual and not in the ordinary course of things for the proposed vendee to produce original document of title of vendor claiming to have been handed over at the time of agreement. In several decisions, this Court had occasion to observe that such conduct causes suspicion. In the case on hand, the plea put forward by the defendant is that he was working abroad and he sent money to his wife for purchase of property. It may be noticed that the plaintiff is none other than the brother of his wife. His further claim is that the services of the plaintiff was utilised and the property covered by Ext.A1 was purchased. As contended by the learned counsel for the respondent, soon after the purchase it seems that there was bitterness between the parties and the wife of the defendant instituted a suit for injunction against the plaintiff. That being the position, it is contended that if what the defendant says is true, attempts should have been taken immediately for getting

the original of the document delivered to the defendant or to his wife. It cannot be said that there is no substance in the said contention.

14. One has to remember at the same time that the plaintiff is none other than the brother of the wife of the defendant. The contention raised by the learned counsel for the appellant that the document was in fact prepared by the plaintiff even after purchase in the name of the defendant is probalised by one fact that prior document of title of vendor is produced by the plaintiff. In such cases, this Court had occasion to observe that there is serious suspicion regarding transaction and in some of the cases wherein it was contended that the transaction was alone a transaction, this Court has held that production of original document of title is an indication in support of such contention. Further, there is no such contention in the case on hand. It looks rather difficult to believe that document of title and also prior document of title would have been handed over to the plaintiff at the time of execution of agreement.

15. This Court is not forgetting the fact that agreement for

sale mentions about handing over of the document of title of the vendor and also the tax receipts. It is difficult to brush aside the contention of the respondent based on the stamp paper used for drawing up the agreement. Ext.A4 document is dated 28.12.1995. But the witnesses examined including the plaintiff are consistent in their version that stamp paper was purchased on the date on which the agreement for sale was entered into between the parties. If that be so, the date that should have been found on the stamp paper is 28.12.1995. However, it is seen that the date that is bearing on the stamp paper is 08.12.1995 and that shows that the stamp paper was purchased much before what is claimed by the plaintiff. True, there are no suggestions to PW3 in this regard. But the facts speak for themselves. Learned counsel for the appellant is fully justified in referring to Section 43 of the Kerala Manufacture and Sale of Stamp Rules, 1960 and contending that prima facie the entry found on the stamp paper is different. The respondent before this Court cannot simply escape by saying that since no questions were asked by the witnesses of the plaintiff who speak about the

purchase of stamp paper on the date of the agreement, an explanation is certainly necessary in this regard. The lower appellate court was not justified in brushing aside this aspect as a rival one. Further, the question whether Ext.A4 was entered into as a result of compromise between the parties so as to settle disputes between them is also open to some doubt.

16. As already noticed, the date of Ext.A4 is 28.12.1995. The evidence of PW1 is clear to the effect that crime case between the parties was in existence till 30.05.1996. Whatever that be, the claim that Ext.A4 was entered into as a compromise of disputes between the parties cannot be easily accepted. The lower appellate court simply presumed that it might be so without any basis.

17. It is true that both the courts below have found that Ext.A5 notice has been served on the defendant even though the defendant denied the same. Even assuming that notice was served, his non reply is sufficient to come to the conclusion that the plaintiff is entitled to a decree for specific performance. As already noticed, even though the defendant denied the execution

of the document, there was no attempt from his side to show that the signature found in the document does not belong to him. At the same time, it does not appear that the agreement was entered into under the circumstances made mention of by the plaintiff. The conclusion is that even though the agreement for sale namely, Ext.A4 might have been executed by the defendant, it is more probable that it is not under the circumstances as mentioned by the plaintiff.

18. Now comes the question regarding applicability of Section 20 of Specific Relief Act. Section 20 reads as follows:

"20. Discretion as to decreeing specific performance.

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are the cases in which the court may properly exercise discretion not to decree specific performance:

(a) where the terms of the contract or the conduct of the parties at the time of

entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1: Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2: The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be

determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party”.

19. There is catena of decisions regarding the necessity of the court to consider the applicability of Section 20. Section 20 is very clear to the effect that merely because the agreement for sale is found to be a genuine document, it is not obligatory on the part of the court to pass a decree for specific performance. The court is called upon to exercise its judicial discretion and to ascertain the various facts and circumstances and to determine whether it will be just and reasonable to grant a decree for specific performance. While the discretion conferred is to be wide one, it is well settled that it has well recognised judicial principles as it is open to challenge in appeals.

20. It is no doubt true that in the decision relied on by the learned counsel for the respondent i.e. **Prakash Chandra** vs. **Narayan** ((2012) 5 SCC 403), the Apex Court had occasion to consider the question of hardship in relation to Section 20. Therein, the Apex Court observed that unless there are pleadings to that effect, the court is not obliged to consider the same. The same is the effect in the decision in **Raman** vs. **Sethumadhavan and another** (2014 KHC 2547).

21. As already noticed, Section 20 of the Specific Relief Act confers wide discretion and it can take note of any circumstances which it feels as bearing on the issue provided it is convincing and supported by materials on record. The Section itself makes mention of the factors which can be taken note of and which cannot be taken note of in exercising the discretion under Section 20. It is well settled by now that the circumstances made mention of under Section 20 is not exhaustive. There cannot be any dispute regarding the fact that a decree for specific performance is not automatic. Even if the defendant has raised false and frivolous contentions or that he even did not contest,

that will not absolve the court from exercising its statutory duty under Section 20. If any authority is required, the same is furnished by the decision in **Shamsher Singh & Ors.** vs. **Rajinder Kumar & Ors.** (AIR 2014 Supreme Court 2253). There in it was held as follows:

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22. This Court had occasion to consider a similar issue in the decision in **Omana Mathai** vs. **Joseph Easo** (2014 (1) KLT 689). Therein the issue considered was with respect to an ex parte decree. Considering the scope and ambit and also the application of exercising duty under Section 20, it was held in paragraph 7 as follows:

"7. The reasoning process in the aforequoted impugned judgment is reflected in the second paragraph thereof. The fact that the defendant remained *ex parte* is recorded. The judgment proceeds to record that the plaintiff has filed an affidavit to prove the case. The marking of documents is recorded. Ext. A1 is noted as the agreement for sale. All that the learned trial Judge has thereafter noted is that the plaintiff affirmed that

sale consideration was given. This reflects that the reasoning process discloses the consideration of the fact that the plaintiff affirmed that sale consideration was given. The judgment then proceeds to say that the learned Judge is satisfied that plaintiff is entitled for the decree prayed for. That sentence in the impugned judgment is only the recording of the satisfaction in that regard, however without stating any reasons whatsoever. This assumes importance because S.20(1) of the Act enjoins that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Therefore, the exercise of discretion is a judicial act in terms of that section and that judicial act has to be expressed by stating the reasons which would be discernible from the judgment by a court of appeal if a party were to carry an appeal against the judgment. Without the reasons being expressed by the court of first instance, a court of appeal would be totally handicapped in deciding any appeal against such a judgment and decree. The impugned one is not a consent decree, but an *ex parte* decree. The eligibility of a litigant to have his appeal considered by a court of appeal is a statutory entitlement in

terms of S.96 of the Code of Civil Procedure. That eligibility is legislatively remembered and reminded while enacting sub-section (1) of S.20 of the Act. Therefore, when a judgment which is delivered in a suit for specific performance of a contract for sale does not express the reasons, at least, its basic requirements, to exercise the discretion in a particular manner, the decree will not have legs to stand. We may also recall here that whatever is enumerated in sub-section (2) of S.20 of the Act and different circumstances mentioned in S.20 are only illustrative and not exhaustive. The circumstances of each case would be matter for consideration and the conduct of parties and respective interests under the contract would also be relevant. For support, see *Sardar Singh v. Krishna Devi (Smt) & Anr.* ((1994) 4 SCC 18)".

23. The lower appellate court has not considered this aspect at all. Normally, this Court should have remanded the matter for that purpose. But one cannot omit to note that suit is of the year 1996 and we are in 2015. Remand at this point of time will be unjustified and unreasonable.

24. In the light of the fact that this Court has come to the conclusion that Ext.A4 has in fact been executed by the defendant, in the light of other suspicious circumstances, it will

not be proper to grant a decree for specific performance and therefore a decree can be passed allowing the plaintiff in the suit to recover the advance amount of Rs.20,000/- with 6% interest from the date of suit till realisation and costs throughout.

25. In the result, this appeal is allowed. The judgment and decree of the lower appellate court are set aside and a decree is passed on the following terms:

The plaintiff is allowed to recover a sum of Rs.20,000/- with 6% interest from the date of suit till realisation from the defendant and his personal assets. He is entitled to his costs throughout.

**P.BHAVADASAN
JUDGE**

smp