

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 8TH DAY OF JULY 2015/17TH ASHADHA, 1937

RSA.No.1003 of 2007 (C)

AGAINST THE JUDGMENT IN AS 285/2006 of ADDL.DISTRICT COURT,
NORTH PARAVUR DATED 13-09-2007

AGAINST THE JUDGMENT IN OS 478/2003 of MUNSIFF COURT,ALUVA DATED
31.10.2005

APPELLANT/APPELLANT/DEFENDANT:

MARY, AGED 43 YEARS
D/O. AUTTOKKARAN VEETIL VAREETH, NEELESWARAM KARA,
KALADY VILLAGE, ALUVA TALUK.

BY ADV. SRI.MILLU DANDAPANI

RESPONDENT/RESPONDENT/PLAINTIFF:

BASHY, AGED 42 YEARS, S/O. CHERUPULLY VELAYUDHAN,
NEELESWARM KARA, KALADY VILLAGE, ALUVA TALUK.

BY ADVS. SRI.K.M.JAMALUDHEEN
SMT.LATHA PRABHAKARAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
08-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.1003 OF 2007

Dated this the 8th day of July, 2015.

J U D G M E N T

Defendant in a suit for specific performance is the appellant. She entered into Ext.A1 agreement dated 31.03.2003 with the plaintiff agreeing to sell about 10 cents of land for a total consideration of Rs.85,000/-. On the date of execution of Ext.A1, Rs.5,000/- was received as advance. The transaction was to be completed within a period of eight months from the date of agreement. The plaintiff alleged that apart from Rs.5,000/- received as advance on the date of agreement, other payments were received on various dates which are seen endorsed on the reverse side of Ext.A1. Accordingly, it is alleged that on 31.03.2003, a sum of Rs.6,000/- was received towards sale consideration, and Rs.4,000/-, Rs.10,000/- and Rs.25,000/- were also received on 07.04.2003, 09.05.2003 and 15.10.2003 respectively, and the balance amount to be paid was only Rs.35,000/-. The allegation in the plaint was that in spite of repeated demands made by the plaintiff to execute sale deed in

his favour, the defendant was not willing to do so and that necessitated the suit.

2. The defendant resisted the suit. She admitted that Ext.A1 agreement was entered into by her with the plaintiff. The main contention taken was that since she had asked the plaintiff to pay a sum of Rs.25,000/- to one E.V. Varghese, she bonafide believed that the said amount would be paid by the plaintiff and believing so, she made an endorsement on the reverse side of Ext.A1 showing receipt of Rs.25,000/-. That amount, according to the defendant, was not paid at all. It is further contended that she was forced to enter into an agreement and she was defrauded by the plaintiff. Various other allegations are made by the defendant which are not relevant for the present purpose. Suffice to say that the defendant tried to support the non execution of the document.

3. On the basis of the above pleadings, issues were raised by the trial court. Evidence consists of the testimony of PW1 and the documents marked as Ext.A1 to A6 on the side of the plaintiff. The defendant examined DW1. Exts.C1 and C1(a) are

the commission report and plan.

4. Both the courts below, on analysis of the evidence, came to the conclusion that the claim made by the defendant that Rs.25,000/- has not in fact been paid cannot be accepted in view of the endorsement made on the reverse side of Ext.A1 and found that balance amount due is only Rs.35,000/-. Holding do, a decree of specific performance was granted by the trial court which was confirmed in appeal.

5. At the time of admission of this appeal, the following substantial question of law was framed by this Court:

Whether courts below were justified in granting a decree for specific performance without considering the question whether the discretion could be exercised in favour of the plaintiff as provided under Section 20 of Specific Relief Act?

The question of law framed by this Court would clearly indicate that this Court was not persuaded to accept the challenge on facts regarding payment of Rs.25,000/- on 15.10.2003.

6. Learned counsel appearing for the appellant contended that the amount directed to be paid to E.V. Varghese was not paid and therefore the plaintiff has committed breach of contract.

It is contended that the burden was on the plaintiff to show that the amount had been paid to E.V. Varghese and that has not been done. It is also contended that the endorsement on 15.10.2003 was made by the defendant under the bonafide belief that amount would be paid to E.V. Varghese. In fact, according to the learned counsel for the appellant, the plaintiff has defrauded the defendant and the plaintiff is not entitled to any relief. It is further contended that at any rate the court below ought to have considered the question of discretion available under Section 20 of Specific Relief Act and the judgment passed without considering the scope and ambit of the applicability of Section 20 to the facts of the case cannot be justified. On that sole ground, according to the learned counsel, the judgment and decree are liable to be interfered with.

7. Learned counsel appearing for the respondent, on the other hand, contended that both the courts below have concurrently found that the plaintiff has paid Rs.25,000/- and the balance amount due was only Rs.35,000/-. It is contended that after having admitted the endorsement on the reverse side of

Ext.A1, the defendant cannot be heard to say that he had not received Rs.25,000/- on 15.10.2003. It was pointed out by the learned counsel that the plaintiff has no case that he has ever paid any amount to E.V.Varghese. The case put forward by the defendant was that the endorsement on 15.10.2003 of having received Rs.25,000/- on that day was made under the bonafide belief that amount would be paid to E.V. Varghese. This contention raised by the defendant was found to be non acceptable by both the courts below. That conclusion is essentially based on appreciation of evidence and is a question on fact. Learned counsel went on to point out that in the nature of the circumstances if the court below felt that it is only proper to grant a decree for specific performance there was nothing wrong about the decree. Accordingly, it is contended that there are no grounds made out to interfere with the judgment and decree of the courts below.

8. Probably, learned counsel for the respondent is justified in his submission that the finding that Rs.50,000/- has in fact been received by the defendant is not open to challenge. It was

contended before this Court that by a bonafide omission, the defendant did not examine E.V. Varghese and she may be given a chance to examine him. One fails to understand the logic behind the said contention. The plaintiff has categorically stated in his evidence and also in the plaint that even though Rs.25,000/- was directed to be paid to E.V. Varghese, he did not pay any amount to E.V. Varghese but that amount was received by the defendant herself on 15.10.2003. In cross examination, defendant, when he examined as DW1, has admitted all the endorsements found on the reverse side of Ext.A1. Both the courts below have analysed the materials on record and found that the word 'ഇപ്പോഴത്തെ' found on the reverse side of Ext.A1 means currently received. It would appear from the endorsement on the reverse side that Rs.25,000/- was received by the defendant. Since the plaintiff has no case that he has paid any amount to E.V. Varghese, his non examination will be of no consequence at all. If the defendant had a case that he had not received Rs.25,000/-, it is for her to establish the same. Her explanation was that that endorsement was made under the bonafide belief

that Rs.25,000/- which was directed to be paid as per Ext.A2 would later be paid to E.V. Varghese. Unfortunately for the defendant, the endorsement does not appear to be so. Payments found on the reverse side, admitted to have been made by the defendant herself, courts below were fully justified in coming to the conclusion that an amount of Rs.50,000/- had been paid. That finding does not call for any interference.

9. The matter does not end there. It is trite by now that even assuming that the plaintiff has established that he always ready and willing to perform his part of contract and there is no latches on his part, still it lies within the discretion of the court to grant relief of specific performance or not. This discretion vested with the court under Section 20 of Specific Relief Act is to be judicially exercised. It has to be exercised in terms of judicial norms. There is authority to hold that the decision rendered without considering the discretion to be exercised under Section 20 is considered to be bad in law and non-est. This Court had occasion to consider an identical issue in the decision in **Omana Mathai** vs. **Joseph Easo** (2014 (1) KLT 689). In fact the only

question that was considered in the said decision was regarding the applicability and necessity to consider Section 20 of Specific Relief Act in a case of this nature. After elaborately advertng to the facts of the case, coming to the question of applicability of Section 20, it was held 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)".

10. A reading of the above decision shows that it is mandatory for the court to consider the applicability of Section 20 in the case of specific performance and to give reasons as to why decree for specific performance is being granted. In the decision in **Lakshmi Amma** vs. **Rajan** (2014 (3) KLT 666) while considering the question of discretion to be exercised under Section 20, this Court had occasion to observe as follows:

"22. Coming to the question of exercise of discretion under S.20 of the Specific Relief Act, true in the decision in *Omana Mathai v. Joseph Easo* (2014 (1) KLT 689), this Court has gone to the extent of saying that it is a mandatory provision and it is obligatory on the part of the courts to consider the applicability of S.20 of the Act. A decision rendered without advertting to the applicability of S.20 of the Act, according to this Court, is *non-est*".

11. A reading of the above decisions would show that if there was no consideration of the question of applicability of

discretion to be exercised under Section 20 at all and an automatic decree for specific performance has been granted, that is non-est in law. Going by the principles laid down in the above decisions, the judgment and decree are clearly unsustainable in law. True, both the trial court as well as the lower appellate court have not considered this issue. But it is purely an issue to be decided on appreciation of evidence and it is not necessary that further evidence in the matter makes to be adduced.

12. In the light of the facts and circumstances of the case, it is felt that consideration of the matter to the extent stated above at the hands of lower appellate court would be sufficient.

13. In the light of the fact that question of applicability of discretion to be exercised under Section 20 is not considered, this Court has no option but to set aside the judgment and decree of the lower appellate court and remand the matter to the lower appellate court for consideration of question of discretion under Section 20.

14. It is only to avoid further long litigation that the matter is being remanded to the lower appellate court. Strictly

speaking, the matter should have been gone to the trial court. But since no additional facts are required in the circumstances of the case, it is felt that consideration of issue at the hands of the lower appellate court would be sufficient.

For the above reasons, this appeal is allowed and the judgment and decree of the lower appellate court are set aside and the lower appellate court shall consider whether it is just and proper to grant a decree for specific performance. Parties shall appear before the lower appellate court on 03.08.2015. The lower appellate court may make every endeavour to dispose of the appeal as expeditiously as possible, at any rate, within a period of three months from the date of appearance of parties.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A. to Judge.