

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 12TH DAY OF JUNE 2015/22ND JYAISHTA, 1937

RFA.No. 725 of 2012&C.O.79/2012

(AGAINST THE JUDGMENT IN OS 243/2007 of II ADDL.SUB COURT,THRISSUR
DATED 09-04-2012)

APPELLANT(S)/ PLAINTIFF:

POONTHATH JAMALUDHEEN,AGED 56,
S/O HYDROSHKUTTY, PALAYOOR DESOM, GURVAYOOR AMSOM,
CHAVAKAD P.O, CHAVAKAD TALUK, THRISSUR DISTRICT

BY ADV. SRI.PRAVEEN K. JOY

RESPONDENT(S)/DEFENDANTS:

1. BALACHANDRAN, AGED 65 YEARS,
S/O KALIPURAYATH LEELAVATHI AMMA, KUPRAVALLY DESOM,
PUNNAYOORKULAM AMSOM, CHAVAKAD TALUK.

2. RAMACHANDRAN,, AGED 53 YEARS
S/O KALIPURATH LEELAVATHI AMMA, KUPRAVALLY DESOM
PUNNAYOORKULAM AMSOM, CHAVAKAD TALUK

3. JAYACHANDRAN,, AGED 52 YEARS
S/O KALIPURAYATH LEELAVATHI AMMA, KUPRAVALLY DESOM
PUNNAYOORKULAM AMSOM, CHAVAKAD TALUK

R2 BY ADV. SMT.K.NANDINI

R2 BY ADV. SRI.BINU BOSE

RR1 BY ADV. SRI.R.SREEHARI

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 4-06-
2015, ALONG WITH CO. 79/2012, THE COURT ON 12/6/2015 DELIVERED THE
FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

R.F.A. No. 725 of 2012 & C.O.NO. 79 of 2012

Dated this the 12th day of June, 2015

JUDGMENT

Sunil Thomas, J.

The plaintiff, in a suit for specific performance of a contract for sale of an immovable property and in the alternative for recovery of advance money with damages, aggrieved by the judgment and decree dated 9/4/2012, of the Sub court, Thrissur has preferred this appeal.

2. According to the plaintiff, he had entered into an agreement for sale dated 25/3/2004 with defendants, inter alia, for a total consideration of Rs. 20,26,215/-. A period of 11 months was fixed for the performance of the contract and an advance of Rs. Two Lakhs was paid on the date of the agreement. After the expiry of the above period, a further sum of Rs. Five Lakhs was paid on 4/3/2005 and the period of agreement was thereafter extended to 1/9/2005. There was no access to the property agreed to be sold and hence, the plaintiff had purchased an item of property lying in front of the

plaint schedule property. Thereafter, he entered into agreements with the third parties for sale of the property to them. Thereafter, the plaintiff made a request to the defendants for the completion of the terms of the agreement, which was delayed by the defendants under one pretext or other. However, the defendants issued a notice to the plaintiff rescinding the contract and forfeiting the advance paid. On receiving the notice, the plaintiff approached the defendants, whereupon they entered into an oral agreement by which the defendants undertook not to initiate any legal action and agreed to pursue the agreement. They undertook to extend the period till 30/12/2006. Since the above condition was not complied with, the plaintiff instituted the civil suit seeking appropriate relief including one for specific performance of the agreement for sale and in the alternative, return of the advance money with damages and interest.

3. The defendants appeared and the first defendant filed a separate written statement admitting the execution of the agreement of sale and the receipt of Rs. Two Lakhs as consideration. However, the payment of Rs. Five Lakhs on 4/3/2005 was denied by him. According to him, he had neither

received the above money nor demanded from the plaintiff. He was also not aware of whether the plaintiff had purchased an item of property for road access. He had not agreed for extending the period of agreement, and was not aware of the alleged oral agreement. The period of agreement was lapsed and since the default was committed by the plaintiff, he was not entitled to return of advance money of Rs.Two Lakhs. The amount has been forfeited by the plaintiff.

4. Defendants 2 and 3 filed a separate written statement contending that they were still in possession of the plaint schedule property. The execution of the document, the receipt of Rs. Two Lakhs and the subsequent extension on payment of Rs. Five Lakhs were admitted. The claim that the plaintiff has been ready and willing to perform his part of the contract was incorrect. The alleged default by defendants was also incorrect. The agreement was extended till 1/9/2005 on the request of the plaintiff. He had not issued any notice expressing his willingness to purchase the property. Since he failed to purchase the property on payment of the balance consideration, the agreement has worked itself out and the defendants have

forfeited the amount. This was conveyed to him by notice dated 26/9/2005. The allegation that on 26/9/2005 the plaintiff approached the defendants and the defendants agreed to extend the period of contract was incorrect. A reply notice was sent to the notice issued by the plaintiff. The allegation regarding the entering into contract with the third parties was false. He has also not suffered any damages.

5. On the basis of the above pleadings, the Court below formulated issues for consideration and the parties went for trial. On the side of the plaintiff, PWs 1 to 5 were examined, Exts.A1 to A15 were marked. On the side of the defendants, the first defendant was examined as DW1 and the second defendant as DW2. Exts.B1 to B7 were marked on their side. The commission report and draft sketch were marked as Exts.C1 and C1(a).

6. The court below, on an appreciation of the entire evidence, concluded that the defence set up by the first defendant that he has not agreed for a subsequent extension of the agreement for sale and the claim that he has not received Rs. Five Lakhs towards the part payment was not substantiated. The court below further held that the plaintiff had failed to prove

his readiness and willingness to perform the agreement for sale and consequently, the relief for specific performance was declined. Hence, the court below held that, the plaintiff was not entitled for damages. However, the court held that he was entitled for return of Rs. Seven Lakhs paid as part consideration with interest at the rate of 6% from 2/9/2005 till realisation.

7. Aggrieved by the above judgment and decree refusing to grant decree for specific performance, the plaintiff has preferred this appeal. Challenging that part of the decree to the extent of casting liability on the first defendant to the extent of Rs Five Lakhs alleged to have been paid on 4/3/2005, the first defendant has preferred this Cross Objection.

8. Heard both sides and examined the records. The point that arises for consideration is whether the judgment and decree of the Court below is liable to be sustained.

9. The point. The crux of the defence of the defendants was that Ext.A1 agreement for sale which was admitted by them failed since the plaintiff was not ready and willing to perform his part of the contract. The first defendant had a further contention that the extension of time on 4/3/2005 and the

receipt of further advance of Rs. Five Lakhs was not known to him and was not under his authority.

10. Ext.A1 is seen signed by all the three defendants. The first defendant in his evidence deposed that no amount was received by him on 4/3/2005 and that he had not authorized for extension of time. According to him, it was done without his knowledge, consent and authority. The second defendant, as DW2, admitted that the above extension was done by him and the first defendant had not authorized for such an extension. Evidently, regarding the above defence, there is no dispute between DW1 and DW2. However, the court below in its evaluation of evidence did not accept this version. According to the court below, it could not be assumed that the extension was made by DW2 without the authority and, being a co-owner of the property, the extension by one of the co-owners has to be presumed as one authorized by the other co-owners.

11. However, the above finding of the court below does not appear to be correct. Ext.A1 is admittedly executed by all the three co-owners. Hence, it is quite natural to expect all of them to jointly extend the period. However, one co-owner can do so,

provided he is specifically authorized by the other co-owners. In the case at hand, DW2, alone signed the endorsement dated 4/3/2005 and he himself had admitted that it was extended without the authorization of first defendant. In the light of specific admission of DW2 and all attending circumstance, the conclusion that can be arrived was to hold that the extension on 4/3/2005 was not with the authority of the first defendant and he cannot be burdened with liability of having received Rs.Five Lakhs. The reasoning given by the court below at para 12 of the judgment to arrive at a contra conclusion largely borders surmises.

12. Specific case of the plaintiff was that he was put in possession of the plaint schedule property pursuant to the agreement for sale. This was denied by the defendants. The plaintiff as PW1 had deposed that he was put in possession of the property, that he had carried out improvements and after developing the land entered into agreements for sale with third parties . He relied on the version of PW2 and the remaining witnesses as well as Ext.C1 commission report to substantiate the above contention. In Ext.C1 commission report, there are

specific findings that at the time of inspection, it was found that the plaintiff was carrying maintenance operations. This was proved through PW5 also.

13. A perusal of Ext.A1 shows that there is no specific recital that the plaintiff was put in possession of the property. However, clause 4 of the agreement authorized the plaintiff to reclaim the land, to lay road, to develop the land and to enter into agreement for sale of plots. This clause, coupled with the oral testimony of PWs 1 to 5 and the commission report, clearly lead to a conclusion that the plaintiff was put in possession of the property.

14. Another contention of the plaintiff was that he had purchased an adjoining plot for a total consideration of Rs.40,000/- for the purpose of laying a road to Ext.A1 property. This contention was specifically denied by defendants 2 and 3 in their written statements, though the first defendant feigned ignorance. To prove that the plaintiff had purchased the property for laying a road to the property covered by Ext.A1, he relied on Exts.A7 and A8 assignment deeds. It relates to purchase of property by the plaintiff on 23/2/2004 for a total

consideration of Rs.40,000/-. The court below did not accept it on the ground that Exts.A7 and A8 were anterior in time to that of Ext.A1. According to the court below, there was no pleading that the property was purchased in anticipation of an agreement for sale with respect to the property covered by Ext.A1.

15. It is true that there is no such pleading. However, there is no dispute that it is an adjoining land and it appears to be the portion which was seen as a road by the advocate commissioner and recorded in Ext.C1 and C1(a). The defendants had no contra contention also. In the light of the above, it could not be assumed as to why the plaintiff, without any purpose, purchased such a small plot especially when there are indications that it lay as a way to Ext.A1 property.

16. The plaintiff had a further contention that pursuant to Ext.A1, he had developed the land and had entered into agreements with the third parties for the sale of the plots. To substantiate it, he relied on Ext.A9 to A11 agreements with third parties. The court below refused to rely on it and to grant relief. However, oral testimony of witnesses and the documentary evidence coupled with clause 4 of Ext.A1 a

reasonable conclusion can be arrived at that pursuant to Ext.B1, the plaintiff had developed the land and entered into agreement with the third parties for the sale of the plot.

17. With the above materials on record, the learned counsel for the plaintiff vehemently contended that it show his readiness and willingness to proceed with the contract and to take Ext.A1 to its logical conclusion. There cannot be any dispute that the plaintiff, to succeed, has to prove that his readiness and willingness continued till the end. It is admitted fact that pursuant to execution of Ext.A1, there was an extension on 4/3/2005 and a sum of Rs. Five Lakhs was paid to DW2. Regarding this, there are divergent versions. According to the plaintiff, it was extended on the request of the defendants. DW2 in his evidence as well as in the written statement had contended that the extension was at the instance of the plaintiff, who had pleaded that he could not raise sufficient fund. However, even thereafter the agreement did not proceed forward, which is the crux of the dispute. It is on record that while so on 26/9/2005, Ext.B2 notice was sent at the instance of the defendants stating that since the plaintiff was not ready and willing to perform his

part of the contract, the defendants are rescinding the contract and the amount of Rs. Seven Lakhs paid as advance stood forfeited. This was not replied.

18. However, according to the plaintiff, thereafter he approached the defendants and after mediation and negotiation, an oral agreement was entered into by which the defendants agreed to revoke the stand taken in Ext.B2 and to proceed forward with the agreement. To substantiate this oral agreement, there is only oral testimony of PW1. The court below has correctly held that in terms of Ext.A1, the only obligation that remained to be done by the plaintiff to complete the sale transaction was to pay the balance consideration and to execute the document. However, according to the defendants, the plaintiff was not ready with the balance consideration. This appears to be more probable for several reasons. The oral agreement allegedly entered into by the plaintiff pursuant to Ext.P2 is not substantiated by the reliable and cogent evidence. There cannot be any doubt that when the agreement for sale is reduced into writing and when Ext.B2 lawyer notice is sent, an oral agreement to overcome Ext.B2 is highly improbable.

19. After Ext.B2,the plaintiff remained silent till Ext.A2 letter dated 8/1/2007 and Ext.A3 notice dated 24/2/2007 were issued by him. He alleged that the defendants had committed the breach. There is no evidence of despatch of Ext.A2. Ext.A3 was replied by Ext.A5 dated 12/3/2007 wherein the defendants placed the entire burden on the plaintiff. There is absolutely no evidence to show that during the long period in between Exts.B2 and A3, the plaintiff was ready with the balance consideration and that he had ever approached the defendants offering his willingness to perform his part of the contract. Hence, the only conclusion that can be drawn from the above is that there is substance in the contention of the defendants that the plaintiff was not ready and willing to perform his part of the contract. Hence, the plaintiff failed to prove that his readiness and willingness continued till the institution of the suit. The conclusion arrived at by the court below in this regard appears to be correct.

20. In the light of the above findings, the court below has correctly concluded that the plaintiff was not entitled for specific performance of the agreement for sale. Since he was

not ready and willing to perform his part of the contract and in the absence of anything to show that he had suffered special loss, the court below correctly held that the plaintiff was not entitled for damages. The court below proceeded to hold that the plaintiff was entitled for return of advance money with future interest alone. However, the defendants were holding the amount even after Ext.B2, whereby they expressed the intention to rescind the contract. Hence reasonable interest is liable to be granted for the above from the date of Ext.B2.

21. Appreciation of the above facts lead to the conclusion that the judgment and decree of the court below, to the extent of directing the refund of the advance money with interest, is liable to be sustained. However, the decree to the extent of refusing to grant interest for the period prior to decree and the liability cast on the first defendant in relation to the entire Seven Lakhs rupees, is liable to be modified. Point answered.

22. In the light of the above finding, the judgment and decree of the court below is modified as follows.

1). All the defendants are jointly and severely liable to return to the plaintiff a sum of Rs. Two Lakhs with 6% interest

from 26/9/2005 till realization with a charge on the plaint schedule property limited to the extent of their shares.

2). The defendants 2 and 3 are jointly and severely liable to return to the plaintiff a further sum of Rs. Five Lakhs with 6% interest from 26/9/2005 till realization with a charge on the whole property to the extent of the shares of the defendants 2 and 3.

The appeal is partly allowed as above. Accordingly, the Cross Objection is also allowed. No costs.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/True copy/ PS to Judge.

