

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.N. RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

RFA.No. 831 of 2010 ()

AGAINST THE JUDGMENT IN OS 319/2007 of PRINCIPAL SUB COURT, PALAKKAD
DATED 31-07-2010

APPELLANT/DEFENDANT:

ST. JOHN'S WELFARE CENTRE
[REP. BY THE MANAGING TRUSTEE, BRO LAWRENCE]
* **REP. BY THE MANAGING TRUSTEE MR. T.M. JERALD ROZARIO ROKIERAJ**
NEW NO. 1157/1 (OLD NO. 1298), TRICHY ROAD
OPPOSITE AIR INDIA, COIMBATORE TALUK & TOWN
TAMIL NADU.

***(SRI T.M. JERALD ROZARIO ROKIERAJ, THE PRESENT MANAGING TRUSTEE IS
ALLOWED TO REPRESENT THE APPELLANT IN THIS APPEAL VIDE ORDER DATED
31.1.2014 IN I.A. 186/2014)**

BY ADVS. SRI. BINOY VASUDEVAN
SRI. R. MANIKANTAN
SMT. P.G. BABITHA

RESPONDENT/PLAINTIFF:

EASTERN PROVINCE OF SISTERS OF ST. CHARLES
BY ITS PRESENT PROVINCIAL SUPERIOR
ALDRIN VILLA, ST. CHARLES PROVINCIALATE, 19
SURAPPATTU MAIN ROAD, KOLATHUR POST, CHENNAI-600099
REP. BY POWER OF ATTORNEY HOLDER REV. ST. V. AROCKIAMARY,
ST. CHARLES CONVENT, KOLAPPALUR,
ERODE DISTRICT, TAMIL NADU.

BY ADV. SRI. V.M. KURIAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 09-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN RFA.831/10

APPELLANT'S ANNEXURE:

ANNEXURE A: COPY OF RESOLUTION OF THE BOARD OF DIRECTORS OF THE
ST.JOHN'S WELFARE CENTRE DATED 1.3.13.

RESPONDENT'S ANNEXURE: NIL

TRUE COPY

P.S.TO JUDGE

dsn

P.N.RAVINDRAN & ANIL K.NARENDRAN, JJ.

R.F.A.No.831 OF 2010

DATED THIS THE 9th DAY OF JUNE, 2015

JUDGMENT

ANIL K.NARENDRAN, J.

The appellant is the defendant in O.S.No.319 of 2007 on the file of the Court of the Principal Subordinate Judge of Palakkad. The respondent herein filed the above suit for recovery of possession of the plaint schedule property on the strength of title from the appellant/defendant and its men together with compensation for use and occupation at the rate of ₹3,000/- per month from the date of suit till it is actually delivered to the respondent/plaintiff. The court below by judgment delivered on 31.7.2010 decreed the suit and directed the respondent/plaintiff to deposit the sum of ₹3,00,000/- in court within two months from the date of judgment and give notice of such deposit to the appellant/defendant. The court below further directed that, the appellant/defendant shall surrender vacant possession of the plaint schedule property to the respondent/plaintiff within three months from the date of receipt of notice regarding such deposit. Both parties were directed to suffer their respective costs. Aggrieved by the judgment and decree of the court below, the appellant/defendant is before us in this appeal.

2. We heard the arguments of the learned counsel for the appellant/defendant and also the learned counsel for the respondent/plaintiff.

3. The plaint averments in brief are as follows:- The plaintiff, which is a registered society, is the absolute owner of the plaint schedule property as per Ext.A1 registered sale deed bearing No.2694 of 1988 of SRO, Palakkad. Ever since 1988, the plaintiff was in possession and enjoyment of the said property. In the year 2001, the defendant approached the plaintiff and informed that it is interested in purchasing the plaint schedule property. Accordingly the plaintiff agreed to sell the said property to the defendant for a consolidated consideration of ₹6,00,000/- and entered into Ext.A2 sale agreement with the defendant on 27.9.2001, the original of which was kept by the plaintiff and a photocopy was given to the defendant. As per the terms of that agreement, the defendant paid the sum of ₹3,00,000/-, by way of two demand drafts for ₹1,50,000/- each, to the plaintiff towards advance sale consideration. The defendant was put in possession of the plaint schedule property on the understanding that the defendant will look after and take proper care of the entire property. It was further stipulated in Ext.A2 that, the defendant shall pay the balance sale consideration of ₹3,00,000/- on or before 27.11.2001 and in case

of failure to pay the said amount within the aforesaid period, the plaintiff will be entitled to forfeit the advance amount paid by the defendant and that the defendant shall vacate the plaint schedule property voluntarily and put the plaintiff in possession. The plaintiff has further averred that it was always ready and willing to execute the sale deed in favour of the defendant in respect of the plaint schedule property, but the defendant was not ready to pay the balance sale consideration of ₹3,00,000/- and get the sale deed executed and registered in its favour, that the plaintiff contacted the defendant over phone and also sent a letter informing its readiness to execute the sale deed after accepting the balance sale consideration, but the defendant gave a vague, evasive and bald reply and failed to pay the balance sale consideration. It was contended that thereby Ext.A2 agreement lapsed and became inoperative by efflux of time on 27.11.2004, that the plaintiff is entitled to forfeit the advance amount of ₹3,00,000/- as the defendant has failed to comply with the terms of Ext.A2 agreement, that the defendant is also liable to vacate the plaint schedule property and put the plaintiff in peaceful possession thereof. Since the defendant failed to comply with the terms of Ext.A2 agreement, the plaintiff caused Ext.A3 lawyer notice dated 3.7.2007 to be issued and it was served on the defendant on 4.7.2007. To Ext.A3

lawyer notice, the defendant sent Ext.A4 reply dated 5.7.2007 raising false and untenable contentions. According to the plaintiff, the sum of ₹6,00,000/- was fixed and agreed between the parties as the price for the whole property comprised within the four boundaries shown in the document and there is no stipulation in Ext.A2 agreement that the property shall be measured and the plaintiff has to satisfy the defendant about its actual extent. In fact the plaintiff had also not measured the property at the time of its purchase or thereafter and the extent of property was incorporated from the previous documents of the erstwhile owner. As such, it is futile for the defendant to contend that the plaint schedule property is having an extent of only 82 cents and not 1.33 acres as shown in the document. The plaintiff contended that, the statement in Ext.A4 reply that the terms of the sale agreement were concluded by way of a communication in writing between the plaintiff and the defendant and that the plaintiff failed to execute a formal agreement in this regard for other matters of transfer is false. No such thing has ever happened other than Ext.A2 agreement dated 27.9.2001 and the mediation held in August, 2004 in the presence of Vicar General of Coimbatore Diocese relates only on the reluctance of the defendant to pay the balance sale consideration of ₹3,00,000/- and to get the sale deed executed in its favour and

there was no talk for valuing the property on the basis that its extent is 82 cents. Further, the plaintiff never agreed to accept ₹70,000/- as balance sale consideration. The plaintiff never delayed execution of the sale deed stating that there is a change in the Provincial Superior. Since Ext.A2 agreement became invalid and inoperative by the operation of the law of limitation, the occupation of the plaint schedule property by the defendant is illegal and without any semblance of right and the plaintiff is entitled to realise from the defendant ₹3,000/- per month as damages for use and occupation of the plaint schedule property from 28.11.2001. However, in the plaint the plaintiff restricted the claim for such damages from the date of suit till the plaint schedule property is actually surrendered and the plaintiff is put in possession of the same. The defendant has filed O.S.No.410 of 2007 before the Court of the Additional Munsiff of Palakkad against the plaintiff seeking a decree of permanent prohibitory injunction. As the possession of the plaint schedule property by the defendant has already become invalid and inoperative under law, he is not entitled seek any such legal remedy to protect its possession of the plaint schedule property in this case. The plaintiff has already entered appearance in that suit and intends to contest the case. Therefore, the plaintiff prayed for a decree enabling it to recover the plaint schedule

property from the defendant together with compensation for use and occupation of the same and costs of the suit. In the plaint, it has been stated that, if the court is of the view that the plaintiff has to return the advance amount to the defendant, the plaintiff is willing to do so.

4. The defendant filed a written statement admitting that, the plaintiff is owner of the plaint schedule property. According to the defendant, an agreement for sale of the said property which measures 1.33 acres comprised in R.S.No.1442/1B of Puthussery amsom and desom for a sale consideration of ₹6,00,000/- was concluded between the plaintiff and the defendant through communications in writing, namely, Ext.B1 letter dated 21.7.2001, Ext.B2 letter dated 8.8.2001 and Ext.B3 letter dated 20.8.2001, and the defendant paid a sum of ₹3,00,000/- as advance sale consideration vide two demand drafts dated 26.9.2001 for ₹1,50,000/- each. According to the defendant it is incorrect to state that a sale agreement dated 27.9.2001 was executed between the plaintiff and the defendant for sale of the plaint schedule property. In fact, the defendant while making the advance payment of ₹3,00,000/- made ready a sale agreement with its signature and sent it to the plaintiff for getting it signed. But the plaintiff was very evasive in getting the sale agreement signed and returned to the defendant. The defendant made communications in this regard to the

plaintiff to return the sale agreement properly executed. The defendant does not have either the original agreement dated 27.9.2001 or a copy thereof and the plaintiff has to explain why it retained the original sale agreement with them. The defendant's possession over the plaint schedule property in part performance of the agreement is admitted in para. 2 of the plaint. The defendant is ready and willing to pay the balance sale consideration. But the plaintiff did not evince any interest in executing the sale agreement and returning it to the defendant. Nor the plaintiff sent any receipt for the advance sale consideration received from the defendant. The sale consideration of ₹6,00,000/- was fixed for the plaint schedule property considering its extent as 1.33 acres. While measuring the property it was found that an extent of 82 cents alone is available in R.S. No.1442/1B of Puthussery amsom and desom and the extent of land available in that survey number is only 82 cents. The defendant informed this fact to the plaintiff but the plaintiff was not at all responsive with this information. According to the defendant, the dispute was finally resolved between the parties in the presence of the Vicar General of Coimbatore Diocese by re-fixing the sale consideration as ₹3,70,000/- for 82 cents of land. Even thereafter, the plaintiff did not execute any sale agreement in favour of the defendant and the

defendant was told that the succeeding Provincial Superior of the plaintiff would complete the transaction. In the meanwhile, the plaintiff caused Ext.A3 lawyer notice dated 3.7.2007 to be issued, to which the defendant sent Ext.A4 reply dated 5.7.2007. The defendant filed O.S.No.410 of 2007 before the Court of the Additional Munsiff of Palakkad against the plaintiff praying for a decree of permanent prohibitory injunction and obtained a temporary injunction in I.A.No.2488 of 2007 for protecting its possession over the property on depositing the balance sale consideration of ₹70,000/-. The plaintiff filed O.S.No.319 of 2007 to counter O.S.No.410 of 2007 filed by the defendant. The defendant contended that, the sale agreement between the plaintiff and the defendant is not terminated and the period of limitation runs from the date of breach of contract or the date of termination. The defendant's possession is lawful as it was put in possession of the plaint schedule property in part performance of the agreement. The defendant is ready and willing to pay the sale consideration for the available extent of land in the plaint schedule property. As per section 53A of the Transfer of Property Act, 1882 (hereinafter referred to as 'the Act'), the possession of the defendant shall be protected and it is not subject to the legal process of recovery of possession. Therefore, the suit is liable to be dismissed.

5. On the side of the plaintiff, PW1 was examined and Exts.A1 to A5 were marked. On the side of the defendants, DWs 1 and 2 were examined and Exts.B1 to B8 were marked.

6. On the pleadings and the evidence on record, the court below held that, since the parties are not disputing the genuineness and validity of the sale agreement dated 27.9.2001 it can be concluded that a sale agreement was executed between the plaintiff and the defendant on 27.9.2001. As there is no recital in Ext.A2 agreement that the plaintiff shall convince the defendant about the actual extent of the property by taking measurements, it would indicate that the parties had no intention to vary the sale consideration in case of change in the extent of land on measurement. As the agreement relates to the property which was possessed by the defendant at the time of execution of the same, the defendant cannot now turn around and contend that the plaintiff is bound to deliver 1.33 acres of land. The court below rejected the contention of the plaintiff that the contract has become unenforceable and invalid by lapse of time. The court below held further that, the defendant has committed breach of contract and the plaintiff is not bound to assign the plaint schedule property in favour of the defendant; that the defendant is not entitled to get the benefit of section 53A of the Act, as there is necessity to

register the sale agreement in order to claim benefit under the said section, after the coming into force of the Registration and Other Related Laws (Amendment) Act, 2001; that the plaintiff is entitled to get recovery of possession of the plaint schedule property on the strength of title; that the plaintiff is not entitled to forfeit the advance sale consideration of ₹3,00,000/- as it has no case that it has suffered any loss due to the breach of contract committed by the defendant; that as the plaintiff had retained ₹3,00,000/- the defendants need not pay damages for use and occupation of the plaint schedule property; and that the plaintiff is entitled for a decree for recovery of possession of the plaint schedule property on the strength of title.

7. In the result, the court below decreed the suit directing the plaintiff to deposit ₹3,00,000/- in court within two months from the date of judgment and give notice of such deposit to the defendant. The court below further directed that the defendant shall surrender vacant possession of the plaint schedule property to the plaintiff within three months from the date of receipt of notice regarding such deposit. Both parties were directed to suffer their respective costs.

8. The learned counsel for the appellant/defendant contended that the finding of the court below that an agreement was executed between the parties on 27.9.2001 is legally unsustainable and that the

court below ought to have found that Ext.B3 letter written by the respondent/plaintiff amounts to acceptance of the counter offer made by the appellant/defendant in Ext.B2 letter and that the agreement between the parties was concluded and came into existence on 20.8.2001 and that Ext.A2 is only a formal writing of the deed of agreement. Further, as per section 55 of the Act, the seller has to give a warranty of title of the property proposed to be sold which includes the title of the entire extent of the property proposed to be sold and in such circumstances, if there was no stipulation to convince the purchaser about the measurement of the plaint schedule property, the same would have been made mention of in Exts.A2 and B3. Further, the court below went wrong in concluding that the appellant/defendant did not perform its part of contract. The question of the appellant/defendant not filing a suit for specific performance of contract is totally irrelevant for considering the question of protection available to it under section 53A of the Act.

9. Per contra, the learned counsel for the respondent/plaintiff supported the findings of the court below, which are under challenge in this appeal and contended that no interference by this court is warranted.

10. The fact that the respondent/plaintiff got right over the

plaint schedule property as per Ext.A1 registered assignment deed dated 25.5.1998 is not in dispute. The appellant/defendant has admitted in the written statement that, the respondent/plaintiff is the owner of the plaint schedule property.

11. The respondent/plaintiff would contend that, Ext.A2 sale agreement was executed between the parties on 27.9.2001 by which it had agreed to sell the plaint schedule property to the appellant/defendant for a consolidated amount of ₹6,00,000/-; that on the date of execution of Ext.A2 agreement, the appellant/defendant paid a sum of ₹3,00,000/- to the respondent/plaintiff as advance sale consideration and that the appellant/defendant was put in possession of the plaint schedule property on the understanding that it will look after and take proper care of the entire property. It is further stipulated in Ext.A2 that, the appellant/defendant shall pay the balance sale consideration of ₹3,00,000/- on or before 27.11.2001 and in case of failure to pay the said amount within the aforesaid period, the respondent/plaintiff will be entitled to forfeit the advance sale consideration and that the appellant/defendant shall vacate the plaint schedule property voluntarily and put the respondent/plaintiff in possession. Though the respondent/plaintiff was always ready and willing to execute the sale deed after receiving the balance sale

consideration of ₹3,00,000/-, the appellant/defendant was not ready to pay the balance sale consideration and get the sale deed executed. Since the appellant/defendant failed to comply with the terms of Ext.A2 agreement, the respondent/plaintiff caused Ext.A3 lawyer notice dated 3.7.2007 to be issued, to which the defendant sent Ext.A4 reply dated 5.7.2007. The respondent/plaintiff would further contend that, the price for the plaint schedule property was fixed between the parties for the whole property comprised within the four boundaries shown in the document, as a consolidated sum of ₹6,00,000/-.

12. Per contra, the appellant/defendant would contend that, an agreement for sale of the plaint schedule property which measures 1.33 acres comprised in R.S.No.1442/1B of Puthussery amsom and desom for a sale consideration of ₹6,00,000/- was concluded between the parties through Exts.B1 to B3 communications in writing and the appellant/defendant paid a sum of ₹3,00,000/- as advance sale consideration vide two demand drafts dated 26.9.2001 for ₹1,50,000/- each. According to the appellant/defendant no sale agreement was executed between the parties on 27.9.2001 for sale of plaint schedule property and that while making the advance payment of ₹3,00,000/- the appellant/defendant made ready a sale agreement with its signature and sent it to the respondent/plaintiff for getting it signed,

but the respondent/plaintiff was very evasive in getting the sale agreement signed and returned to the appellant/defendant. Further, the possession of the appellant/defendant over the plaint schedule property in part performance of the agreement is admitted in the plaint. The appellant/defendant would contend further that, the sale consideration of ₹6,00,000/- was fixed for the plaint schedule property considering its extent as 1.33 acres. But, while measuring the property it was found that an extent of 82 cents alone is available in that survey number. The dispute was finally resolved between the parties in the presence of the Vicar General of Coimbatore Diocese by re-fixing the sale consideration as ₹3,70,000/- for 82 cents of land. Even thereafter, the respondent/plaintiff did not execute any sale agreement in favour of the appellant/defendant. In the meanwhile, the respondent/plaintiff caused Ext.A3 lawyer notice to be issued to which the appellant/defendant sent Ext.A4 reply.

13. The Provincial Superior of the respondent/plaintiff examined as PW1 has deposed that Ext.A2 sale agreement dated 27.9.2001 is signed by the former Provincial Superior Sr.Jaymary, who was the then head of the society. PW1 has deposed further that she was the Assistant to the Provincial Superior at the time of execution of Ext.A2 sale agreement and that she had witnessed the execution of

the said sale agreement. PW1 has also deposed that the actual extent of the land was not ascertained by taking measurements and the total consideration to be paid by the appellant/defendant was ₹6,00,000/-. PW1 has stated in categorical terms that at the time of execution of Ext.A2 agreement the value was not fixed based on the extent of the property and that she was present at the time of the mediation talks conducted during the month of August, 2001 in the presence of Fr.Jerome. PW1 has also stated that, in the mediation respondent/plaintiff had agreed to execute the assignment deed if ₹3,00,000/- is paid by the appellant/defendant.

14. The Managing Trustee of the appellant/defendant, who was examined as DW1 has deposed that, an agreement for sale of the plaint schedule property which measures 1.33 acres comprised in R.S.No.1442/1B was concluded between the parties through communications in writing dated 21.7.2001, 8.8.2001 and 20.8.2001 (which are marked as Exts.B1 to B3) and an advance sale consideration of ₹3,00,000/- was paid on 26.9.2001. According to DW1, while paying the advance sale consideration he had made ready a sale agreement dated 27.9.2001 at Coimbatore on stamp paper and signed it and sent it through DW2 and another to Chennai for getting it signed and returned by the respondent/plaintiff, but the

respondent/plaintiff was very evasive in getting the sale agreement signed and returned to the appellant/defendant. The oral evidence of DW1 makes it abundantly clear that the sale agreement marked as Ext.A2 and the 'sale agreement dated 27.9.2001' referred to by DW1 are one and the same. DW1 has admitted the fact that Ext.A2 agreement is one prepared by the appellant/defendant, but according to him in the last part of Ext.A2 agreement the respondent/plaintiff made an insertion in handwriting, which is not binding on the appellant/defendant. During cross-examination DW1 has admitted his signature in Ext.A2 sale agreement and he has also admitted the execution of the said document. DW1 has also admitted that DW2 and one Muthukrishnan who have taken Ext.A2 to Chennai have put their signatures in Ext.A2 as witnesses. But, according to DW1 the writing with pen was not there when he put his signature in Ext.A2. Though DW1 has denied the suggestion made during cross-examination that he was supplied with a copy of Ext.A2 sale agreement, he has absolutely no valid explanation for not taking a photocopy of the same before sending it for getting the signature of the respondent/plaintiff. One of the witnesses to Ext.A2 agreement, who was examined as DW2 has deposed that, he has signed the said document as witness No.2. According to him, when he was asked to put his signature in Ext.A2,

the writings made in ink were not there.

15. A reading of Ext.B1 letter dated 21.7.2001 of the then Provincial Superior of the respondent/plaintiff addressed to DW1 would show that the appellant/defendant was carrying out charitable activities for the people of Pampuparai, utilising the plaint schedule property. In Ext.B1, the respondent/plaintiff has also made an offer to sell the plaint schedule property for a sale consideration at the rate of ₹5,00,000/- per acre. It was also made clear in Ext.B1 that, if the appellant/defendant is not able to purchase the property at this rate they may vacate the land since another party is waiting to purchase the property. Ext.B3 letter dated 20.8.2001 of the then Provincial Superior of the respondent/plaintiff addressed to DW1 would further show that the appellant/defendant had carried out certain repair works to the building situate in the plaint schedule property without the permission of the respondent/plaintiff. Ext.B3 would further show that considering the request made by DW1 in Ext.B2 letter dated 8.8.2001 the council of the respondent/plaintiff had decided to reduce the price of the plaint schedule property to a consolidated price of ₹6,00,000/-, which the appellant/defendant was required to arrange for payment by 15.9.2001, or else to vacate the premises by 30.9.2001. The evidence on record clearly and convincingly proves that there was no concluded

contract between the parties prior to the execution of Ext. A2 sale agreement. Therefore, the contention raised by the appellant/defendant that, an agreement for sale of the plaint schedule property was concluded between the parties through Exts.B1 to B3 communications in writing can only be rejected. Further, the appellant/defendant has no serious dispute as to the genuineness of Ext.A2 sale agreement. DW1 has admitted his signature in Ext.A2 sale agreement and he has also admitted the execution of the said document. He has admitted further that, DW2 and one Muthukrishnan have put their signatures in Ext.A2 as witnesses. But, according to DW1 the writing in pen, i.e., "The party should vacate the place" were not there when he put his signature in Ext.A2. Since the execution of ExtA2 sale agreement as well as its genuineness or validity are not under challenge on any valid grounds, it can be safely concluded that Ext.A2 sale agreement was executed between the parties on 27.9.2001. The finding of the court below to that effect in the impugned judgment is neither perverse nor contrary to the materials on record and is hence legally sustainable.

16. The respondent/plaintiff got right over the plaint schedule property as per Ext.A1 registered assignment deed dated 25.5.1998. The said fact is not in dispute. In Ext.A1 assignment deed as well as in

Ext.A2 sale agreement, the property (which is the plaint schedule property) is described as '1 acre and 33 cents in R.S.No.1442/1B'. As evident from Ext.A1, the said extent of 1 acre and 33 cents forms part of a larger extent of 8 acres and 30 cents held by the original vendor and the eastern boundary of the aforesaid 1 acre and 33 cents is described as 'vendor's property'. The description of the property contained in the schedule to Ext.A2 sale agreement is the exact reproduction of the description of the property contained in the schedule to Ext.A1 assignment deed. The boundaries of the property in the schedule to Exts.A1 and A2 documents are also one and the same. Similarly, the very same description and boundaries are there in the schedule to the plaint. The appellant/defendant has not taken out a commission to ascertain the actual extent of property in its possession. Further, the defendant has also no case that the respondent/plaintiff had alienated any portion of the property purchased vide Ext.A1 assignment deed. Therefore, there is no acceptable evidence to show that, the actual extent of property covered by Exts.A1 and A2 is only 82 cents.

17. The respondent/plaintiff would contend that the price for the plaint schedule property was fixed between the parties for the whole property comprised within the four boundaries shown in Ext.A2

document, at a consolidated sum of ₹6,00,000/- and that the said property was not measured at the time of its purchase by Ext.A1 assignment deed or thereafter. PW1 has deposed that the actual extent of the land was not ascertained by taking measurements and the total consideration to be paid by the appellant/defendant was ₹6,00,000/-. PW1 has stated in categorical terms that at the time of the execution of Ext.A2 agreement the value was not fixed based on the extent of the property and that she was present at the time of the mediation talks conducted during the month of August, 2001 in the presence of Fr.Jerome and in the mediation respondent/plaintiff had agreed to execute the assignment deed if the balance sale consideration of ₹3,00,000/- is paid by the appellant/defendant. As is evident from Ext.B3 communication dated 20.8.2001 the appellant/defendant was in occupation of the plaint schedule property even before the commencement of negotiations between the parties for purchasing the said property. A reading of Ext.B3 communication would further show that the offer for sale made by the respondent/plaintiff, at a consolidated price of ₹6,00,000/-, was in respect of the property covered by Ext.A1 assignment deed, a property which was already in the possession and enjoyment of the appellant/defendant. It was for that reason, it was specified in Ext.B3

communication that in case the defendant fails to arrange payment by 15.9.2001, it will have to vacate the property by 30.9.2001. There is also no recital in Ext.A2 sale agreement that the respondent/plaintiff shall convince the appellant/defendant about the actual extent of the property by taking measurements, which would clearly indicate that the parties had no intention to vary the sale consideration in case of change in the extent of land on measurement. DW1 has admitted during cross-examination that, till 2007 the appellant/defendant had not raised any written objection regarding shortage in the extent of the property. As Ext.A2 sale agreement relates to the property which was already in the possession and enjoyment of the appellant/defendant at the time of execution of the said document, the appellant/defendant cannot now turn round and contend that the respondent/plaintiff is bound to deliver 1.33 acres of land. In such circumstances, the contention raised on behalf of the appellant/defendant that, if there was no stipulation to convince the defendant about the measurement of the plaint schedule property, the same would have been made mention of in Exts.A2 and B3, since as per section 55 of the Act, the seller has to give a warranty of title of the property proposed to be sold which includes the title of the entire extent of the property proposed to be sold, can only be rejected.

18. As we have already noticed, there is no acceptable evidence to show that the actual extent of property covered by Exts.A1 and A2 is only 82 cents. The fact that Fr. Jerome, the Vicar General of Coimbatore Diocese mediated the dispute between the parties in August, 2004 is not in dispute. According to PW1, that mediation related to the refusal of the appellant/defendant to perform its part of the contract by paying the balance sale consideration of ₹3,00,000/-. On the other hand, DWs 1 and 2 would state that, it was decided in the mediation to reduce the balance sale consideration from ₹3,00,000/- to ₹70,000/- only. But, Dws 1 and 2 could not state any valid reasons for not completing the sale of the property in terms of the decision alleged to have been taken in the mediation. On 3.7.2007, the respondent/plaintiff caused Ext.A3 lawyer notice to be issued, demanding vacant possession of the plaint schedule property on the ground that the contract has become inoperative and invalid by efflux of time. Then the appellant/defendant sent Ext.A4 reply dated 5.7.2007 offering ₹70,000/- as balance sale consideration and demanding execution and registration of an assignment deed in its favour, in respect of 82 cents of land in R.S.No.1442/1B of Puthussery Village. Thereafter, the appellant/defendant filed O.S.No.410 of 2007 before the Court of the Additional Munsiff of Palakkad, seeking a

permanent prohibitory injunction restraining the respondent/plaintiff and their men from trespassing into the plaint schedule property, pending disposal of O.S.No.319 of 2007 before the Court of the Principal Subordinate Judge of Palakkad and obtained a temporary injunction on depositing the sum of ₹70,000/- before that court. A reading of Ext.A5 judgment dated 23.10.2008 in O.S.No.410 of 2007 would show that, taking note of the pendency of O.S.No.319 of 2007 before the Court of the Principal Subordinate Judge of Palakkad, the Munsiff's Court granted a decree of permanent prohibitory injunction restraining the respondent/plaintiff and their men from trespassing into the plaint schedule property, pending disposal of O.S.No.319 of 2007. It was made clear that the said decree is granted subject to the final disposal of O.S.No.319 of 2007 pending before the Court of the Principal Subordinate Judge of Palakkad.

19. Till date, the appellant/defendant has not chosen to file a suit for specific performance of Ext.A2 sale agreement. Though DW1 has denied the suggestion made during cross-examination that he was supplied with a copy of Ext.A2 sale agreement, he has absolutely no valid explanation for not taking a photocopy of the same before sending the same for getting the signature of the respondent/plaintiff. Therefore, there is considerable force in the contention raised on

behalf of the respondent/plaintiff that the appellant/defendant has withheld the copy of Ext.A2 sale agreement as its production would reveal that the handwritten clause contained in Ext.A2 was there even at the time of signing the agreement by the parties. PW1 has stated that a copy of Ext.A2 sale agreement was sent by post to DW1 after the receipt of Ext.B4 letter dated 3.10.2001. If DW1 had not received a signed copy of Ext.A2 agreement, he would have taken further action for getting a copy of the said agreement. In such circumstances, the contention of the appellant/defendant that, it was not possible for it to file a suit for specific performance of Ext.A2 contract as it was not having a copy of the same, can only be rejected. Further, the appellant/defendant never expressed its readiness and willingness to pay the balance sale consideration of ₹3,00,000/- in terms of Ext.A2 sale agreement. Though the appellant/defendant would contend that in the mediation held in August, 2004 it was decided to reduce the balance sale consideration to ₹70,000/-, there is no reliable evidence to substantiate the same. Further, DWs 1 and 2 could not state any valid reason for not completing the sale in terms of the decision alleged to have been taken in the mediation. The evidence on record clearly establishes that the appellant/defendant has not performed its part of the contract within a reasonable period. Therefore, the findings

of the court below that, the appellant/defendant has committed breach of contract and that the respondent/plaintiff is not bound to assign the plaint schedule property in favour of the appellant/defendant are neither perverse nor contrary to the materials on record and hence legally sustainable.

20. The appellant/defendant would contend that, the finding of the court below that since the Registration and Other Related Laws (Amendment) Act, 2001 came into force with effect from 24.9.2001, Ext.A2 sale agreement cannot be admitted into evidence and the appellant/defendant is not entitled for the benefit under section 53A of the Transfer of Property Act, 1882 is legally unsustainable. Further, the only stipulation in section 53A of the Act is that there must be an agreement in writing for sale and there is no requirement that the handing over of possession shall be evidenced in writing and hence giving of possession prior to 24.9.2001 is not hit by the Amendment Act of 2001.

21. Section 53A of the Transfer of property Act, which was inserted by the Transfer of Property (Amendment) Act, 1929 reads thus;

"53A. Part performance.-

Where any person contracts to transfer for consideration any

immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

22. Section 53A inserted by the Amendment Act, 1929 provides for protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee, if the proposed transferee satisfies the other conditions of section 53A. Therefore, a proposed transferee in possession by

satisfying all the conditions of section 53A of the Act can seek protection of his right under that section. However, that shield of protection is available only against the transferor, the proposed vendor, and would disentitle him from disturbing the possession of the proposed transferees who are put in possession pursuant to such an agreement. Further, it has nothing to do with the ownership of the proposed transferor who remains full owner of the said property till it is legally conveyed by a sale deed to the proposed transferee.

23. Section 49 of the Registration Act, 1908, which provides that no document required by section 17 or by any provision of the Transfer of Property Act, 1882 to be registered, shall not affect any immovable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered, was amended by the Transfer of Property (Amendment) Supplementary Act, 1929 and a proviso was inserted to permit unregistered documents being received into evidence in a suit for specific performance, or as evidence of part performance of a contract for the purpose of section 53A of the Transfer of Property Act, 1882.

24. In **Shrimant Shamrao Suryavanshi v. Pralhad**

Bhairoba Suryavanshi (2002 (3) SCC 676) the Apex Court held that, section 53A of the Transfer of Property Act is required to be interpreted in the light of the recommendations of the Special Committee's report, which are reflected in the aims and objects of the amending Act of 1929, and that there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under section 53A of the Act. Paragraphs 15, 16 and 17 of the judgment read thus;

"15. The Special Committee's report which is reflected in the aims and objects of amending Act, 1929 shows that one of the purposes of enacting Section 53A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. In that view of the matter, Section 53A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in amending Act, 1929 of the Act and specially when Section 53A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under Section 53A even if the period of limitation to bring a suit for specific performance has expired.

16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53A of the Act. The necessary conditions are:

- (1) there must be a contract to transfer for consideration any immovable property;

- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract.

17. We are, therefore, of the opinion that if the conditions enumerated above are complied with the law of limitation does not come in the way of a defendant taking plea under Section 53A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract has barred by limitation.”

25. In **Raheja Universal Limited v. NRC Limited (2012 (4) SCC 148)** the Apex Court has reiterated that, the provisions of section 53A of the Transfer of Property Act recognize the right of a transferee, where a transferor has given and the transferee has taken possession of the property or any part thereof, which does not create title of the transferee in the property in question but gives him a very limited right, that too, subject to the satisfaction of the conditions as stated in section 53A of the Act itself. Paragraph 106 of the judgment reads

thus;

"106. The provisions of Section 53A of TPA 1882 recognize a right of a transferee, where a transferor has given and the transferee has taken possession of the property or any part thereof. Even this provision does not create title of the transferee in the property in question but gives him a very limited right, that too, subject to the satisfaction of the conditions as stated in Section 53A of the Act of 1882 itself."

26. The amendments made to section 53A of the Transfer of property Act and section 49 of the Registration Act, which permitted even unregistered document being received in evidence in a suit for specific performance, or as evidence of part performance of a contract for the purpose of section 53A of the Transfer of Property Act have been withdrawn by the amendments made by the Registration and Other Related Laws (Amendment) Act, 2001, which came into force with effect from 24.9.2001. By this Amendment Act, the words "the contract, though required to be registered, has not been registered, or" occurring in section 53A have been omitted. Simultaneously, sections 17 and 49 of the Registration Act, 1908 have been amended making it clear that unless the document containing a contract to transfer for consideration any immovable property for the purpose of

section 53A is registered, it shall have no effect for the purpose of section 53A. Sub-section (1A) inserted in Section 17 of the Registration Act, 1908 by the Amendment Act of 2001 mandates that, the documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

27. Section 53A of the Transfer of Property Act, as it stood prior to its amendment by the Amendment Act of 2001 provided that, where in pursuance to part performance of a contract, the transferee has taken possession of the property and has done some act in furtherance of that contract, and that the transferee has performed or is willing to perform his part of the contract, then despite the fact that the contract was required to be registered and has not been registered, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly

provided by the terms of the contract. Meaning thereby, section 53A prior to its amendment by the Amendment Act of 2001 recognised part performance of a contract, though required to be registered, but has not been registered, and protected the right of the transferee to remain in possession. But, by the Amendment Act of 2001, which came in to force with effect from 24.9.2001, the words "the contract, though required to be registered, has not been registered, or" have been omitted from that provision. The effect of this amendment is that, after 24.9.2001, if any person takes possession or continues in possession of a property in pursuance to a contract to transfer for consideration in writing, which though required to be registered, has not been registered, the transferee has no right to remain in possession of the property under section 53A of the Act. To give effect to this principle, sub-section (1A) has been inserted in section 17 of the Registration Act, 1908 which requires such a contract to be registered for the purpose of section 53A. In the absence of such registration, the transferee cannot seek protection of his possession under section 53A, on the basis of the agreement to sell.

28. Under section 53A of the Act, a transferee seeking protection under that section has to establish first, not only an agreement in writing, which is signed by the transferor, or by some

one in his behalf, on which the claim for protection is founded (which is required to be a registered agreement with effect from 24.9.2001), in such words from which the terms necessary to construe the transfer can be ascertained, but also the other elements required on his part for attracting that section, i.e., its main part as distinguished from its proviso, viz., that he has taken possession of the property, in whole or in part, in part performance of the contract; or that if he was already in such possession, he has continued in possession in part performance of the said agreement; that he has done some act in furtherance of the contract; and further, he has either performed his part of the contract, or is willing to perform the same. It is only when these facts are established, a transferee can be said to have established his claim for protection under Section 53A of the Act. The effect of the amendments made to section 53A of the Transfer of property Act and to Sections 17 and 49 of the Registration Act are that, after 24.9.2001, if any person takes possession or continues in possession of a property in pursuance of a contract to transfer for consideration in writing, which though required to be registered, has not been registered, the transferee has no right to remain in possession of the property under section 53A of the Act. Therefore, the contention raised on behalf of the appellant/defendant that, the stipulation in section 53A of the Act is

only that there must be an agreement in writing for sale and there is no requirement that the handing over of possession shall be evidenced in writing and hence putting of possession prior to 24.9.2001 is not hit by the Amendment Act of 2001, is totally unsustainable and can only be rejected. As is evident from the materials on record, there was no concluded contract in writing between the parties prior to Ext.A2 agreement for sale dated 27.9.2001. Admittedly Ext.A2 is an agreement executed after 24.9.2001, the date on which the Amendment Act of 2001 came into force, which requires a registered contract in order to claim right under section 53A of the Act to remain in possession of the property. Sub-section (1A) inserted in section 17 of the Registration Act mandates such a contract to be registered for the purpose of section 53A. In the absence of such registration Ext.A2 sale agreement cannot be admitted into evidence and the appellant/defendant is not entitled to claim protection under section 53A of the Transfer of Property Act. The finding to that effect in the impugned judgment is neither perverse or patently illegal. The court below has rightly held that the appellant/defendant is not entitled to get the benefit of section 53A of the Act and that the respondent/plaintiff is entitled to get recovery of possession of the plaint schedule property on the strength of title.

We accordingly hold that there is no merit in the appeal. The appeal fails and it is dismissed with costs of the respondent/plaintiff.

Sd/-

P.N.RAVINDRAN, JUDGE

Sd/-

ANIL K.NARENDRA, JUDGE

dsn