

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS**

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

RFA.No. 35 of 2011

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AGAINST THE JUDGMENT IN O.S.NO.69/2008 OF SUBORDINATE COURT,
MANJERI, DATED 30-10-2010
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APPELLANT(S)/1ST DEFENDANT :

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PARUTHIKKATTUPARAMBIL AYISHA, AGED 50 YEARS,
D/O.UMMER, MANAZHI NAGAR,
P.O.VALAMBUR, VALAMBUR AMSOM, DESOM,
PERINTHALMANNA TALUK, MALAPPURAM DISTRICT.**

BY ADV. SRI.P.SAMSUDIN

**RESPONDENT(S)/PLAINTIFFS AND DEFENDANTS 2 AND SUPPLEMENTAL
3RD DEFENDANT :**

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- 1. PERMBRA ABDUL NASSAR, AGED 42 YEARS,
S/O.MAMMU, PERAMBRA HOUSE, PERINTHALMANNA.P.O.,
PIN-679 322, PERINTHALMANNA TALUK, MALAPPURAM DISTRICT.**
 - 2. NECHIYIL MUHAMMED MANSOOR, AGED 26 YEARS,
S/O.ABOOBACKER, NECHIYIL HOUSE,
P.O.PERINTALMANNA-679 322, PERINTHALMANNA AMSOM,
KOKKOTH DESOM, PERINTALMANNA TALUK,
MALAPPURAM DISTRICT.**
 - 3. PUNNASSERI JAYAPRAKSH, AGED 40 YEARS,
S/O.SANKARANARAYANAN, PUNNASSERI HOUSE,
P.O.ERAVIMANGALAM-679 587, PERINTALMANNA TALUK,
MALAPPURAM DISTRICT.**
 - 4. VELATHODI SAINUL ABID @ KUNHAN, AGED 45 YEARS,
S/O.MUHAMMED, "NASREENA MANZIL"
PERINTALMANNA.P.O.-679 322, PERINTALMANNA TALUK,
MALAPPURAM DISTRICT.**

**R1 TO R3 BY ADV. SRI.K.M.SATHYANATHA MENON
R4 BY ADVS. SRI.R.MANOJ
SMT.LEKHA SANKAR**

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 22-05-2015, THE COURT ON 30-06-2015 DELIVERED THE
FOLLOWING:**

Msd.

CR

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

R.F.A. No. 35 OF 2011

Dated this the 30th day of June 2015

JUDGMENT

Sunil Thomas,J.

The first defendant, aggrieved by the judgment and decree in O.S. No. 69/2008 of the Sub Court, Manjeri, has preferred this appeal.

2. The plaint schedule property belonged to the first defendant, who by an agreement dated 14/12/2007 offered to sell it to the plaintiffs and the 2nd defendant together, for a total consideration of Rs.11,85,000/-. An advance of Rs.7,40,000/- was paid on the date of execution of the document. It was agreed that the sale would be completed within a period of five months. At the time of execution of the agreement for sale, the 2nd defendant was out of station and hence, he signed the sale

agreement subsequently, after he returned. Since he was abroad, at the time of institution of the Suit, he was arrayed as the 2nd defendant, though he also sought the relief along with the plaintiffs. While so, Rs.80,000/- was further paid to the first defendant by the plaintiffs on 14/1/2008 as part payment, thereby totaling to a sum of Rs.8,20,000/-. Thereafter, the first defendant prolonged the assignment of the property and hence on 7/4/2008 a lawyer notice was issued directing the first defendant to execute the sale deed. Though it was received, she refused to reply or to comply with the terms of the agreement. The plaintiffs and the 2nd defendant were always ready and willing to perform their part of the contract. Hence, the suit was laid seeking a decree of specific performance of the agreement for sale.

3. Pursuant to the summons, first defendant appeared and filed an affidavit dated 23/5/2008 in reply to I.A. No.673/2008, the application for attachment of the plaint schedule property. In the affidavit the first defendant undertook not to alienate the property. However, she thereafter assigned the property to the 3rd defendant by document No.3476/2008 of Perinthalmanna SRO

dated 18/6/2008. Hence, the plaintiffs filed I.A. No.968/2008 to implead the 3rd defendant assignee and I.A. No.969/2008 to amend the plaint, incorporating a prayer for setting aside the above sale deed.

4. The first defendant filed the written statement contending that she had not executed the agreement for sale dated 14/12/2007. The claim that the first defendant had agreed to assign the property for a total consideration of Rs.11,85,000/- and had received an advance of Rs.8,20,000/- and the execution of the document were denied. The alleged agreement for sale was a concocted document, misusing the blank signed papers obtained from her son by the 2nd plaintiff. According to her, in 2006 her son Muhammed Fahad had borrowed a sum of Rs.35,000/- from the 2nd plaintiff who was a money lender and, as demanded by him, had executed one blank signed paper and blank signed cheques. A car belonging to the first defendant was also given to the 2nd plaintiff as additional security. Due to financial difficulties, the amount payable escalated and in December 2007, the 2nd plaintiff threatened to sell the car. She and her son were forced to deliver blank signed stamp papers

and other documents. It was alleged that one blank signed paper was concocted into an agreement for sale and the suit was instituted. Though she had undertaken not to alienate the property, M/s. Sundaram Finance, with whom the property stood mortgaged, threatened to initiate legal proceedings for the recovery of the money due. Hence, as agreed upon with the plaintiffs, the property was sold with their consent through the intervention of mediators and the plaintiffs agreed to receive the balance consideration as agreed upon. However, after the sale, they demanded huge amount from the first defendant and subsequently initiated proceeding to set aside the sale.

5. The 2nd defendant filed written statement in terms of the plaint claim, seeking a decree as prayed by the plaintiffs.

6. The 3rd defendant filed a written statement contending that the property was purchased by him from the first defendant for valid consideration. He was aware of the claim of the plaintiffs on the strength of the agreement between the parties involved and the property was purchased by him with the knowledge and consent of the plaintiffs. The 3rd defendant was a bona fide purchaser and hence the assignment was not liable to be set

aside.

7. On the basis of the above pleadings, parties joined issue and proceeded for trial. On the side of the plaintiffs, PWs 1 to 3 were examined and Exts. A1 to A5 were marked. On the side of the defendants, first defendant was examined as DW1 and Exts.B1 to B6 and Ext.C1 were marked.

8. The court below on an evaluation of all available inputs held that, the plaintiffs had succeeded in proving the due execution of Ext.A1 agreement for sale and grounds for setting aside Ext.A5 assignment in favour of the 3rd defendant. The first defendant was directed to perform the terms of Ext.A1 agreement to receive the balance consideration and to assign the property in favour of the plaintiffs and the 2nd defendant.

9. Aggrieved by the above judgment and the decree, the first defendant has preferred this appeal.

10. Heard both sides and examined the records. The points that arise for consideration are ;

1). Whether the plaintiffs and the 2nd defendant are entitled for the specific performance of Ext.A1 agreement for sale ?

2). Whether the plaintiffs and the 2nd defendant are entitled for a decree setting aside Ext.A5 assignment

deed No.3476/08 of Perintalmanna SRO executed by the first defendant in favour of the 3rd defendant ?

11. The points 1 and 2 : The case of the first defendant is one of total denial of execution of Ext.A1 agreement for sale. Her case is that a blank signed paper got executed by the 2nd plaintiff from her and her son was converted into an alleged agreement for sale. In the nature of specific denial by the first defendant regarding the execution of Ext.A1, burden is on the plaintiffs and the 2nd defendant, to prove the due execution of Ext.A1.

12. To substantiate the plaint claim, the 2nd plaintiff was examined as PW1. He deposed that Ext.A1 was executed after due discussion and deliberation and a part payment of Rs.7,40,000/- was made. He deposed about the further payment of Rs.80,000/- on 14/1/2008 and the breach of terms of the contract by the first defendant. He also deposed regarding the assignment by the first defendant in favour of the 3rd defendant. The evidence of PW1 is in accordance with the plaint. The cross examination was mainly confined to few searching suggestions, which were reasonably answered by the plaintiffs.

13. Admittedly PW1 is a dealer of properties. The evidence of PW1 is not completely free from few doubtful circumstances. At the time of cross examination PW1 deposed that no mediator was involved in the transaction. However, this is contrary to the recitals in Ext.A1, which specifically refers to the involvement of mediator in the execution of the sale agreement. It has also come out in evidence that the 2nd defendant was not available in station during the entire transaction. PW1 had admitted that the 2nd defendant had not executed any authorization in his favour. It is strange as to how the 2nd defendant, who was nowhere in the picture during the entire transaction, at a subsequent period of time became a party to the agreement. PW1 also could not recollect as to when the 2nd defendant reached the station and signed the agreement for sale. However, these doubts pale into insignificance, since except few searching suggestive questions put in cross examination, regarding receipt of consideration and the circumstances touching upon the execution of Ext.A1 document, there was no serious challenge to the execution of Ext.A1, the question of Rs.7,40,000/- allegedly paid at the time of execution of Ext.A1, the capacity of the plaintiffs to pay the

huge amount or even to raise such an amount and the mode of payment of the above amount.

14. A huge amount of Rs.7,40,000/- was allegedly paid at the time of execution of the document. Since the plaintiffs have no case that it was paid by cheque, it has to be inferred as a cash payment. Evidently, the amount has to flow from some known source of income of the plaintiff. Strangely no reliable evidence was produced to show the payment or source of such huge amount. But, this was neither challenged nor confronted in the cross examination.

15. In a controlled and regulated economy, it is to be expected that money involved in the financial transactions flow through known channels and hence, bound to be evidenced by supporting documents. Evidently, in a case where entire transaction including the payment of consideration is disputed by specific pleadings and challenged in evidence, the burden will be heavily on the person claiming the payment of consideration, to prove it by clear, cogent and convincing evidence. This will assume more significance where huge amount is claimed to be transacted. Hence, the trial courts can legitimately expect it to

be proved by documentary evidence like bank records, Bank passbooks, account books, Income tax returns, entries in the reliable records and registers and in exceptional cases by reliable parol evidence to prove the actual source and circumstances regarding raising of the money. In the absence of any convincing and reliable supporting proof as above, courts can justifiably treat the claim of passing of consideration as not proved. Insisting for reliable and clear evidence regarding the source of consideration alleged to have been paid can be one of the safest and assured method of proving the genuineness of an agreement for sale, when the genuineness of the transaction and payment of consideration is specifically disputed. Such an insistence of strict proof regarding the source of money or the channels of flow of money, will curb enforcement of mere money lending transactions through Court masqueraded as agreements for sale of immovable property and will protect genuine, proper and real land transactions.

16. PW2 claimed to be a witness to the entire transaction. According to him, he was present in the scribe's office at the time of execution of Ext.A1. He deposed in terms of the execution

of the documents and the payment of consideration. The two named witnesses to Ext.A1 document, being the children of the first defendant herself, cannot be expected to support the case of the plaintiffs. Hence the version of PW2, which was in consonance with that of PW1, cannot be brushed aside. PW3 is the scribe herself. She stated that she was a registered document writer with 17 years experience and had office at Perinthalmanna. She prepared Ext.A1 document under the instructions of the first defendant. She asserted that the document was executed by the parties to the agreement and consideration was paid. Version of PWs1 to 3 seem to be consistent on material points.

17. The first defendant gave evidence as DW 1. Her case in the written statement was that her son had availed a loan of Rs.35,000/- from the 2nd defendant and as a security, blank cheques were obtained from the son and signed blank papers and signed cheques from her. As an additional security, a Maruthi car belonging to them and its documents were also taken. Ext.A1 is the disputed agreement for sale. It has got three pages. First one is a stamp paper purchased on 12/12/2007, in the name of the first defendant. The next two are white papers.

All the three pages are seen signed by the parties. There is one signature of the first defendant on the reverse of the first page of Ext.A1. That signature relates to a purported acknowledgment of the receipt of a further consideration of Rs.80,000/- claimed to have been received on 14/1/2008. The last page of Ext.A1 is seen signed by the son and daughter of the first defendant as witnesses to Ext.A1 transaction.

18. The oral evidence tendered by DW1 has to be analysed in the back ground of the above details. DW1 deposed that she herself has given instructions to the lawyer, though she admitted that she did not verify Ext.A1, which was available in court. In the cross examination, initially she deposed that one stamp paper and two cheques each were handed over by herself and her son. She admitted that she had signed on the reverse side of the stamp paper. In the course of cross examination, she deposed that one stamp paper signed by herself, her son and daughter was given to DW2. When cross examined further, she deviated from the above version and said that she has not given any stamp paper separately signed by herself and her son. In further cross examination, she again retracted from the above version

and deposed that the pleading to the effect that one stamp paper and two cheques were given, was incorrect. At page 3 of the cross examination she had clearly given a version contrary to the above version. Thereafter, she admitted her signature on Ext.A1 at page one and in the next answer, she retracted from that version, stating that the signature was not hers. She admitted her signature on the reverse of Ext.A1 and admitted that the name was written in her handwriting. Later, she again retracted from her version and stated that the signature on the first page of Ext.A1 was not hers. A perusal of the version given by DW1 in the cross examination reveals that she has been thoroughly inconsistent in her version contradicted herself, and went to the extent of deviating from her own written pleadings. She went on oscillating from one version to another, in the course of progress of cross examination.

19. The oral evidence tendered by DW1 and her pleadings further indicate that herself and her son were heavily indebted and had financial liabilities with the 2nd defendant, ICICI Bank and also Sundaram Finance (Pvt.) Ltd. Evaluation of the version of the plaintiffs as well as that of the defendant show the except

for the few defects in the version of PW1, the case set up by the plaintiffs appears to be more probable, by applying the yardstick of preponderance of probabilities. Hence Ext.A1 is liable to be accepted.

20. The learned counsel for the appellant (the first defendant) Mr.P.Samsudin contended that even if Ext.A1 is accepted to be proved, the acknowledgment of Rs.80,000/- seen to have been endorsed on the reverse of Ext.A1 is not legally admissible and cannot cast any liability on the appellant. It was contended by the learned counsel that though the endorsement indicates an acknowledgment of receipt of Rs.80,000/-, it was not stamped as contemplated under the provisions of the Indian Stamp Act 1899. According to the counsel, the endorsement falls within the definition of 'receipt' under Section 2(23) of the Indian Stamp Act. It was chargeable for stamp duty under item 53 of Schedule I of the Act. Non affixture of stamp was not a curable defect in the light of Section 35 (b) of the Indian Stamp Act and hence not admissible in evidence. It was further contended that in the above circumstance, the above endorsement cannot be accepted as a receipt of consideration,

has no validity in the eye of law and consequently not to be treated as evidencing payment. On the above premise, it was contended that even if specific performance was ordered, ultimately the sum of Rs.80,000/- should not form part of advance consideration paid and if alternatively, a relief of return of advance money was to be ordered, the appellant cannot be budged with the liability to return Rs.80,000/-.

21. It is pertinent to note that at the time of admitting Ext.A1 in evidence, no such objection was set up. It was not challenged and in the light of Section 36 of the Indian Stamp Act, as settled by the various judicial pronouncements, once admitted in evidence, the validity of the document cannot be challenged. It is also pertinent to note that Ext.A1 is a composite document in the form of an agreement for sale and in the light of Section 4 of the Indian Stamp Act, the plaintiffs are entitled to treat it as validly executed and admitted in evidence. Apart from that, DW1 cannot be permitted to set up such a contention after having admitted the signature on the reverse of the first page of Ext.A1. In the above circumstances, the contention set up by the learned counsel for the appellant has to fail.

22. The learned counsel further contended that the decree setting aside Ext.A5 and granting a decree of specific performance was improper and illegal. It was contended that the court was swayed by the pendente lite transfer of the property and was carried away by an assumption that it was in breach of an undertaking given in court. It was contended that Ext.A5 was set aside without considering the attending circumstances and the fact that there was no breach of undertaking given to the court. It was a bona fide transfer entered into, with the consent and approval of the plaintiffs. It was further contended that specific performance was ordered without following the mandate contained in Section 20 of the Specific Relief Act.

23. The case set up by the first defendant in the written statement regarding the transfer was that, after giving the undertaking, there was a settlement between the disputants, with the intervention of mediators. It was agreed that the property can be assigned by the first defendant and that the plaintiffs would be satisfied with the amount agreed upon in terms of Ext.A1. It was alleged that after sale, the plaintiffs retracted from their promise and set up a contention that the

sale was in breach of the undertaking given to the court, which heavily prejudiced the mind of the court. The 3rd defendant purchaser has filed a written statement in tune with the above contention of the first defendant and that the property was purchased by him with the permission and consent of the plaintiffs. However, the 3rd defendant did not enter the box to depose her case.

24. The undertaking not to alienate the property was given in the court in the form of an affidavit on 23/5/2008. The sale was effected thereafter on 18/6/2008. Except the testimony of DW1, there is no other evidence to prove the version of the defendant that property was sold pursuant to an oral agreement with the plaintiff. If the first defendant bona fide wanted to assign the property and to discharge the liability with Sundram Finance, she could have sold it to the plaintiffs and could have settled both the liabilities. She, instead of doing that, sold it to third party which itself shows the lack of bona fides. She has also no explanation as to why she did not inform the court and seek the court's permission, especially when she had the aid of a counsel. In the above circumstances, contention of the first

and third defendants' that the assignment was bona fide cannot be accepted.

25. On the above factual premise, the impact of the sale in breach of an undertaking has to be considered. It was contended by the learned counsel for the plaintiffs that the court can exercise its discretion and mould the relief under Section 20 of the Specific relief Act by setting aside the document effected in breach of an undertaking given to the court. The learned counsel for the plaintiffs contended that in a case of transfer in breach an undertaking, the assignment deed can be cancelled to restore the parties to the position ante and to enable the court to mould the relief under Section 20 of the Specific Relief Act.

26. In this regard, the learned counsel relied on the decision reported in Krishnan v. Joseph Desouza (1985 KLT 1010), wherein the court held that any action by which the process of court is attempted to be thwarted has to be viewed seriously. If an order of injunction is violated, it has to be dealt with sternly and seriously, for, otherwise, it will undermine the very basis of the Rule of Law. It was held that there was no difference whether the violation pertained to an order or to an

undertaking made before a court of law, which too will have as much effect as an interim injunction in such circumstances. This decision was followed in Cheruvanoor Nallalam Grama Panchayath v. Kathalatt Ravi(2005 KHC 1950), wherein the court reiterated that it can, under its inherent power direct the party who has gained an undue advantage by flouting the order of the Court, to restore status quo ante or to disgorge the ill gotten advantage obtained through breach of the courts order. It is pertinent to note that both the above decisions were in relation to proceedings under Order 39 Rule 2A and Section 151 of the Code of Civil Procedure. There cannot be any doubt that the parties, who flout the orders of the Court or the undertaking given to the court, cannot be permitted to escape from the obligation arising there from. The court is competent and has sufficient powers to pass appropriate orders to protect the might of law and in appropriate cases, even to restore the status quo ante. The object is twin fold; to enforce the rule of law and the supremacy of the court and in appropriate cases, to restore the status quo ante, so that the aggrieved party is not prejudiced by the breach of the above law.

27. In Delhi Development Authority v. Skipper Construction Co.(P) Ltd. And Another (1996) 4 Supreme Court Cases 622), Supreme Court referred to the provisions under Order 39 Rule 2-A and Section 151 of the Code of Civil Procedure to hold that the courts in India have the authority, duty and power to set the wrong right, in exercise of its inherent powers. It also held that the courts in India, as courts of equity have the power to reach the illegally obtained property even in the hands of relatives and associates and restore it to the victims of fraud or corruption. Though the Court was dealing under Section 16 of the Prevention of Corruption Act, it held that the Courts in India are not only courts of Law, but also courts of equity.

28. However, the crucial question arises is that whether such a power can be exercised invoking the discretionary relief under Section 20 of the Specific Relief Act. In other words, if Court finds that the pendente lite transfer is bad for breach of an undertaking, whether exercising the discretionary power conferred under Section 20 of the Specific Relief Act, grant a decree cancelling the sale pendente lite and order specific performance. The learned counsel for the first defendant

contended that the above decisions relate to exercise of powers under Order 39 Rule 2A and Section 151 CPC and such power cannot be exercised invoking Section 20 of the Specific Relief Act. It was contended that Section 20 can be exercised only in the situations contemplated under Section 20(2). It cannot be said that discretionary power conferred on courts under Section 20(1) is circumscribed by the specific cases dealt with in Section 20(2) and that those instances referred to in Section 20(2) are exhaustive. The statutory words are clear and unambiguous that Section 20 (1) confers very wide discretion on the Court to deny the relief of specific performance and to grant appropriate alternate relief. There is nothing in Section 20 (2) to show that the circumstances mentioned therein are exhaustive and the legal position is settled in Sathy v. Sayed Mohammed(1998 (2) ILR 66) at page 14 and Sardar Singh v. Krishna Devi (1994) 4 SCC 18) at para 14. For exercising the discretion under Section 20 (1), courts can take into consideration, the bona fides of plaintiff, delay in approaching court, conduct of parties and such other circumstances and mould the relief. In appropriate cases, it can even set aside a transaction effected, during the subsistence of

contract sought to be enforced. Such exercise of discretionary power under Section 20 of the Specific Relief Act cannot be confused with the object of an action under Order 39 Rule 2A of Section 151 which is to enforce the Rule of Law and may be punitive in content also. The discretionary power conferred under Section 20 is to mould the relief in the enforcement of a contract of sale and is intended to empower the court to give effect to an agreement for sale, in a changed circumstances.

29. Having held that Ext.A1 evidences an agreement for sale and that the first defendant had failed to comply with the terms of the agreement, now what remains is the relief to be granted under Section 20 of the Specific Relief Act. Section 20, as reiterated in a catena of decisions, confers on the court a discretion to mould the relief in accordance with the facts and circumstances of each case. The Hon'ble Supreme Court in Satya Jain v. Anis Ahmed Rushdie (2013 (1)KLT SN 11(C.No.10) SC) has held that the parameters for the exercise of discretion vested by Section 20 of the Specific Relief Act 1963 cannot be entrapped within any precise expression of language and the contours thereof will always depend on the facts and

circumstances of each case. Apex Court also held that the ultimate guiding test would be the principles of fairness and reasonableness as may be dictated by the peculiar facts of any given case, which features the experienced judicial mind can perceive. In K.Prakash v.B.R.Sampath Kumar (2015) 1 Supreme Court Cases 597), the Supreme Court reiterated that though the court while granting relief of specific performance exercises discretionary jurisdiction, the said discretion has to be exercised in accordance with sound and reasonable judicial principles and must not be exercised arbitrarily. It was again reiterated in Zarina Siddiqui v. A.Ramalingam (2015) 1 Supreme Court Cases 705) that the equitable remedy of specific performance depends on various factors including the conduct of the parties. The above decisions reiterate the principle that the discretion is to be exercised by the courts cautiously, taking into consideration all attending circumstances. The wording of Section 20 itself is such that it confers wide discretion on the court to mould the relief, taking into consideration various factors, but at the same time imposes an onerous responsibility on the court. The provision has been so drafted with sufficient safeguards to ensure

that the above discretion is scrupulously exercised by the court. After arriving at a conclusion regarding the enforceability of the agreement, the court has to enter the second phase of judicial process, which demands judicious exercise of discretion. Section 20, in broad words indicate the obligation on the courts to apply the mind judiciously and to enumerate cogent, valid and convincing reasons evidencing conscious exercise of discretion, which shall also be apparent on the record.

30. However, in the case at hand, the court below has not mentioned any reason as to how discretion was exercised. However, having bestowed our anxious consideration on the circumstances, including the length of time that has elapsed, the conduct of parties, the fact that the 3rd party's interest are involved, we find no reason to hold that the plaintiff is not entitled to specific performance. It is evident that the 3rd defendant had purchased the property with due notice about the pendency of the suit. The judgment has not been challenged by the 3rd defendant in appeal. In the above circumstances, we find no reason to interfere with the judgment and decree of the court below. Points answered.

The appeal is dismissed with costs to the plaintiffs.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/True copy/ PS to Judge.