

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

THURSDAY, THE 4TH DAY OF JUNE 2015/14TH JYAISHTA, 1937

RFA.No. 119 of 2011 ()

(AGAINST THE JUDGMENT AND DECREE IN OS 599/2008 of I ADDL.SUB COURT,
KOZHIKODE DATED 19-10-2010)
APPELLANT(S)/DEFENDANTS:

1. THODUKAYIL MAMUKOYA, S/O.AHAMMAD KOYA,
OLAVANNA AMSOM DESOM, PO OLAVANNA, KOZHIKODE TALUK,
REP.BY HIS POWER OF ATTORNEY
HOLDER THODUKAYIL SAREEFA, W/O. MAMUKOYA
OLAVANNA AMSOM DESOM, PO OLAVANNA, KOZHIKODE
TALUK(CONSTITUTED AS PER EXT.B1 POWER OF ATTORNEY)

2. THODUKAYIL SAREEFA, W/O.MAMUKOYA,
OLAVANNA AMSOM DESOM, PO OLAVANNA, KOZHIKODE TALUK.

BY ADVS.SRI.PHILIP T.VARGHESE
SRI.THOMAS T.VARGHESE
SMT.ACHU SUBHA ABRAHAM
SMT.V.T.LITHA

RESPONDENT(S)/PLAINTIFF:

KAVUNGAL KONTHANARI HANEEFA,
S/O.AHAMMED KUTTY, VALAYANAD AMSOM DESOM,
KOZHIKODE TALUK.673580

R,R1 BY ADV. SRI.V.V.SURENDRAN
R,R1 BY ADV. SRI.P.A.HARISH

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
26/05/2015, THE COURT ON 4/6/2015 DELIVERED THE FOLLOWING:

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

R.F.A. No. 119 OF 2011

Dated this the 4th day of June 2015

JUDGMENT

Sunil Thomas,J.

The defendants, who are husband and wife aggrieved by the judgment and decree dated 19/10/2010 in O.S.No.599/2008 of the Sub Court, Kozhikode, which is a suit for specific performance and permanent prohibitory injunction and consequential reliefs, have preferred this appeal.

2. The case of the plaintiff before the court below was that the defendants, who are the owners of the plaint schedule property had, by agreement dated 12/3/2008, agreed to sell the property to him for a total consideration of Rs.16,65,000/-. A period was fixed for the performance of agreement. A sum of Rs.1,00,000/- was paid on the date of agreement towards advance sale consideration. Thereafter, on the request of the

defendants, a further sum of Rs.5,00,000/- was paid on 10/4/2008 followed by another installment of Rs.1,00,000/- on 13/5/2008. In spite of the above payments, the defendants failed to perform his part of contract. Lawyer notice dated 18/9/2008 was conveying that the plaintiff was ready and willing to perform his part of the contract. This was replied by admitting the execution of the document and receipt of consideration, but denying that the defendants failed to perform their part of the contract. Consequently, the suit was laid for specific performance of the agreement for sale. Alleging that the defendants were attempting to alienate the plaint schedule property and attempting to commit acts of waste in the property, a decree of permanent prohibitory injunction was also sought for.

3. The defendants appeared and filed a joint written statement admitting the execution of the document and receipt of consideration. However, it was alleged that the plaintiff was a property dealer and that he entered into agreement to sell the property to other persons to make profit. Since a buyer could not be found out, the plaintiff had requested for more time and

paid the amount in installments towards the sale consideration to postpone the final execution of assignment. In the meanwhile, utilising the advance sale consideration, the defendants had entered into an agreement for sale of another item of property on 28/4/2005 for a total consideration of Rs. 13,23,000/-. The period stipulated in that agreement was three months and Rs.2,00,000/- was paid as advance. Since the plaintiff failed to perform his part, the agreement entered into by the defendants with the 3rd party failed and they had to loose the advance sale consideration. It was alleged that, the plaintiff was not ready and willing to perform his part of the contract, was not ready with balance consideration and hence, the burden for the breach of the agreement was entirely on the plaintiff.

4. The parties joined issue on the basis of the above pleadings and went for trial. On the side of the plaintiff, he was examined as PW1 and Exts.A1 to A3 were marked. The second defendant was examined as DW1 and a witness was examined as DW2. Exts.B1 to B7 were marked. The court below, on an evaluation of the available materials, answered all the issues raised by the court in favour of the plaintiff and granted a

decree of specific performance. The defendants were restrained by a decree of permanent prohibitory injunction against alienating the property and from committing any acts of waste in the plaint schedule property.

5. The decision of the court below is assailed in this appeal by the defendants. Heard both sides and perused the records.

6. The point that arises for consideration is whether the court below was justified in granting a decree of specific performance and permanent prohibitory injunction.

The point: Execution of Ext.A1 agreement for sale and the payment of advance consideration of Rs.7,00,000/- in installments is admitted. It is also admitted that 5 months period was agreed upon for performance. But the agreement could not proceed forward. Mutual allegations and counter allegations are raised by both sides and each alleged breach of contract by the other side. The plaintiff alleged that the defendants did not comply with the various terms of the agreement, that the outstanding debt with Kozhikode District Co-operative Bank was not discharged by the defendants, the title deed of the property which was mortgaged with the bank was

not taken back, the property was not measured, and breach of such other conditions incorporated in Ext.A1. On the other hand, the defendants contended that the plaintiff could not find out a buyer for the property and hence, he delayed performance of the contract by making few payments. According to the defendants, the plaintiff did not have the sufficient funds to pay the balance consideration and to execute the document.

7. On the basis of the above contentions, the point of dispute narrows down to the question as to who committed the breach. Both side adduced evidence regarding the alleged delay in execution of the document. PW1 gave evidence in terms of his pleadings. The first defendant, in her evidence, deposed substantially in terms of her pleadings. She admitted that there was an outstanding liability with the Kozhikode District Co-operative Bank, which was not settled. She further admitted that she had not settled the liability with the bank and had not received back the title deeds. She also admitted that she had not obtained the possession certificate and the encumbrance certificate.

8. Ext.A1 indicates that the reason for the sale of the

property was for discharging the outstanding liability with Kozhikode District Co-operative Bank. Ext.A1 specifically states that there was an obligation on the defendants to discharge, the liability, to get back the title deed, to get the property measured and to deliver all the documents including the tax receipt, encumbrance certificate, the possession certificate to the plaintiff. Only thereafter, the liability of the plaintiff to pay the balance consideration arose. In the light of this specific recital in Ext.A1, the defendants cannot contend that there was an obligation on the part of the plaintiff to pay the balance consideration and only thereafter the obligation of the defendants arose.

9. The defendants had set up a defence at the time of evidence that the plaintiff had orally undertaken to pay a sum of Rs. 10,00,000/- towards balance consideration. Due to the non payment of the above amount, the liability with the bank could not be discharged and consequently the document could not be obtained. Evidently, such an undertaking is not disclosed in Ext.A1. There is no circumstance to believe that such an oral agreement existed, not only because that such a direction is not

incorporated in Ext.A1, but also the further fact that even when subsequent payments were made and endorsements made in Ext.A1, the defendants never choose to incorporate it in the subsequent endorsement in Ext.A1. Evidently such a case was set up only at the time of trial to wriggle out of the liability.

10. The purpose indicated for entering into the agreement for sale was to discharge the existing liability with the Kozhikode District Co-operative Bank. Ext.B5 is the pass book in relation to the above bank. It is seen that as on 20/2/2006, the outstanding liability was Rs.3,84,273/-. The agreement for sale was executed on 12/3/2008 and consideration of Rs.1,00,000/- was received on that day. Thereafter, Rs.5,00,000/- was received on 10/4/2008. Ext.B5 discloses the remittance which was made to the Kozhikode District Co-operative Bank on 16/4/2008. Though, under Ext.A1, a total sum of Rs.6,00,000/- was received by the defendants, only a sum of Rs.1,37,582/- was remitted in the bank. The outstanding liability thereafter was Rs.2,46,671/-. It discloses that though considerable amount was received towards the part payment, the defendants did not remit it to discharge the outstanding liability.

11. On the other hand, it was revealed that the defendants had entered into another agreement for sale with the 3rd party by an agreement dated 20/4/2008 for a total consideration of Rs.13,23,000/-. Evidently, instead of utilizing the part payment and getting the title deed back and performing various obligations mentioned in Ext.A1, the defendants proceeded to enter into another transaction thereby burdening themselves with another liability. It was revealed in the course of cross examination that the defendants had other monetary liabilities. It was admitted that such debts were not revealed in Ext.A1. According to her, the amount received as Rs,7,00,000/- towards part consideration was utilised by her and her husband towards discharging the various other undisclosed debts as well as for entering into another contract. The plaintiff cannot be found fault for creating such financial liabilities by the defendants.

12. As mentioned above, there is no evidence to prove that the plaintiff had agreed to pay Rs. 10,00,000/- to the defendants. The court below has given a reasonable explanation that the performance of agreement with the third party, as evidenced by Ext.B2, had no material bearing on the performance of

Ext.A1 agreement with the plaintiff, since the period mentioned in Ext. B2 expired before the expiry of the period mentioned in Ext.A1. Further, there is absolutely no evidence to show that the plaintiff was even aware of such an agreement entered into by the defendants with third party.

13. An attempt was made by the defendants to salvage the position by contending that time was the essence of the contract. DW2 was examined to show that Ext.B2 agreement failed due to non performance of Ext.A1 and the defendants lost sum of Rs. 2,00,000/-. However, there is no reliable evidence to show that Rs. 2,00,000/- was appropriated by the third party towards damages. Further, Ext.A1 does not disclose that parties intended to treat, time as the essence of contract, and that the defendants had proposed to enter into further financial transaction with the third party, depending upon the performance of Ext.A1 agreement. There is also nothing to show that at any point of time the plaintiff was informed about Ext.B2 document and was called upon to perform his part of the contract.

14. The irresistible conclusion that can be drawn from the

available material is that the defendants failed to perform their part of the contract. The plaintiff, on the other hand, has proved that he was ready and willing to perform his part of contract. The court below has considered elaborately the question whether discretion under Section 20 of the Specific Relief Act should be exercised in favour of the defendants by moulding the appropriate relief. No material is available to show that there was any ground made out by the defendants for exercising equity in their favour. It is also proved that there was a reasonable apprehension in the mind of the plaintiff that the defendants may alienate the property due to financial difficulties, in which they are involved, and there is a possibility of waste being committed. Hence, plaintiff is entitled for an injunction.

15. An evaluation of the entire materials show that the court below was perfectly justified in decreeing the suit as prayed for. In the light of the above findings, there is no merit in the various grounds taken up in the appeal memorandum and the judgment and decree of the court below is unassailable. Point answered.

Hence, the appeal is dismissed with costs confirming the judgment and decree.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.