

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 1937

RFA.No. 279 of 2011 (D)

**AGAINST THE ORDER/JUDGMENT IN OS 412/2008 of II ADDL.SUB
COURT,ERNAKULAM DATED 09-02-2011**

APPELLANT/PLAINTIFF:

**M.M.HASSAN,S/O.MEETHAN, MUDILUMPALLIYIL,
KULAYATTIKKARA, AMBALLOOR VILLAGE, ERNAKULAM.**

**BY ADVS.SRI.K.I.MAYANKUTTY MATHER
SMT.RUKHIYABI MOHD KUNHI
SRI.P.P.RAMACHANDRAN**

RESPONDENT(S)/DEFENDANTS:

- 1. SANJAY SUBHA RAO NIGAM, S/O.SUBHA RAO,
SANJAY NIWAS, 444 A, MULAMTHURUTHI VILLAGE,
ERNAKULAM-682 314.**
- 2. RINU, W/O.SANJAY SUBHA RAO NIGAM,
SANJAY NIWAS, 444 A, MULAMTHURUTHI VILLAGE,
ERNAKULAM-682 314.**

R,COVEATOR BY ADV. SRI.K.R.VINOD

**THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
26-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

DG

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

R.F.A.No.279 of 2011

Dated this the 26th day of May, 2015

J U D G M E N T

Thottathil B.Radhakrishnan, J.

1. Heard. The plaintiff is in appeal. The appeal arises from a suit for specific performance of an alleged contract of sale. The defendant disputed the execution of the document. The disputed document was sent to an expert for opinion. The expert's opinion was to the effect that the document was one executed by the defendant. The defendant had filed objections and application to set aside the report. The trial court dismissed the defendant's application to set aside the report, but, thereafter held that the report of the expert cannot carry much evidentiary weight beyond that of expert opinion and hence proceeded to decide the suit otherwise. The appreciation of evidence revolved around the consideration of the testimony of PW1 to PW4 and DW1, the defendant. The material documentary evidence on record included the notices, reply notices etc. as were evidenced by Exts.A1 to A16. There was no documentary evidence on the side of the defendants.

2.Examining the materials on record, we see that there is material difference from what is available as a photocopy of Ext.A1 as produced along with the plaint by stitching it on to the paper book of the plaint and what is ultimately marked as Ext.A1. We have given our anxious consideration to the space available as blank in that photocopy vis-a-vis the signatures available at such spaces in the original of Ext.A1. We may immediately note that the plea taken in the written statement is that after obtaining the notice from court, the defendant perused the documents in court and found that his signature shown in the documents is a concocted one. However, the document stitched into the paper book of the plaint, does not appear to show any signature as that of the defendant. We dissuade ourselves from saying anything more on this issue since we see that I.A.No.8976 of 2010 was a petition filed by the plaintiff before the court below invoking Sections 340 and 195 of the Cr.PC.

3.On the totality of the facts and circumstances, we are of the view that the material evidence on record is not only insufficient to sustain the impugned decree but also indicates

that there was no fair trial inasmuch as the court below did not bestow due attention to the complaint made by the plaintiff even as regards interpolation of the documents in the custody of the Court. Better consideration of I.A.No.8976 of 2010 was called for on the facts and circumstances of the case.

4. The dismissal of the defendant's application to set aside the expert opinion would have been a sufficient indication to the plaintiff that the court below may rely on the said expert opinion. Sticto senso, the trial court may be justified in saying that the expert's opinion could not have been relied upon without corroborating testimony of the expert who could have also been subjected to cross examination in court. That not having been done, we think that the course of justice stands deflected by the procedure of the court below. On the totality of the facts and circumstances noted above, we are of the view that this is a fit case which should go for re-trial, including for consideration of I.A.No.8976 of 2010. We, therefore, are inclined to make an order of remand, leaving open all issues and leaving the parties with liberty to adduce further evidence as may be advised.

5. We may also refer to I.A.No.873 of 2015 filed by the appellant before this Court seeking leave to summon the expert. We close that petition without prejudice to the plaintiff/appellant seeking similar relief before the court below following the order of remand.

6. In the result, the impugned dismissal of the suit and the judgment rendered are set aside and the suit is remitted for further trial in the light of what is indicated above, leaving the parties with liberty to adduce further evidence. The appellant, having regard to the nature and reasons for the order of remand, is entitled to refund of the entire court fee paid on this appeal. Refund ordered so.

The parties are directed to mark appearance before the court below on 29.7.2015.

Sd/-
(THOTTATHIL B.RADHAKRISHNAN, JUDGE)

Sd/-
(SUNIL THOMAS, JUDGE)

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P.A TO JUDGE

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