

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 11TH DAY OF MARCH 2015/20TH PHALGUNA, 1936

RFA.No. 696 of 2011 (D)

AGAINST THE JUDGMENT IN OS 682/2005 of PRL.SUB COURT,TRIVANDRUM
DATED 30-06-2011

APPELLANT/PLAINTIFF:

GIRIJA VALLABHAN NAIR
S/O.DAMODARAN NAIR, AGED 55 YEARS, PADMAVILASOM
CHOOZHATTUKOTTA, VILAVOORKAL VILLAGE.

BY ADV. SRI.B.KRISHNA MANI

RESPONDENTS/DEFENDANTS:

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1. S.S.BEENA, W/O.MR.GOPAKUMAR
GOURI MANDIRAM NJALIKONAM, SASTHAMKOVIL LANE
ARAMADA PO, THIRUMALA, THIRUVANANTHAPURAM.
 2. GOPAKUMAR, S/O.PARAMESWARAN NAIR
GOURI MANDIRAM, NJALIKONAM, SASTHAMKOVIL LANE
ARAMADA PO, THIRUMALA, THIRUVANANTHAPURAM.

R1 BY ADV.SRI.R.S.KALKURA
SRI.M.S.KALESH
SMT.A.V.PRIYA
SRI.HARISH GOPINATH
SRI.V.VINAY MENON
SRI.GENS GEORGE
SRI.KOSHY P.THOMAS

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 11-03-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

R.F.A. No.696 of 2011

Dated this the 11th day of March, 2015

J U D G M E N T

P.N.Ravindran, J.

The appellant is the plaintiff in O.S.No.682 of 2005 on the file of the Court of the Principal Subordinate Judge of Thiruvananthapuram. The respondents are the defendants therein. The suit instituted by the appellant for specific performance of Ext.A3 agreement was dismissed after trial by judgment delivered on 30.6.2011. The appellant has aggrieved thereby, filed this appeal. The brief facts of the case are as follows:-

2. The appellant had in the plaint averred that the first defendant had entered into Ext.A3 agreement with him on 5.6.2005 agreeing to sell the plaint schedule property for a total sale consideration of Rs.2,50,000/-, that on the date of execution of the agreement he had paid the sum of Rs.10,000/ as advance and that in the agreement it was stipulated that the first defendant will execute the sale deed and deliver possession of the property on or before 5.9.2005 after receiving the balance sale consideration. He had also averred that though he was always ready and willing to perform his part of contract and he had on several occasions approached the first defendant to get the sale deed executed, the first defendant delayed

the execution of the sale deed under one pretext or the other, that on 31.8.2005 he caused Ext.A4 notice to be issued calling upon the first defendant to be present in the Sub Registrar's Office, Malayinkeezh at 10.30 AM on 5.9.2005 to execute the sale deed after accepting the balance sale consideration, that the first defendant received the notice and was present in Sub Registrar's Office, but she was not willing to execute the sale deed and stated that the property is mortgaged with the bank and she is not in a position to execute the sale deed. In the plaint dated 23.12.2005 there is however no reference to Ext.A5 reply notice dated 22.9.2005 stated to have been sent on the first defendant's instructions in reply to Ext.A4 lawyer notice. The appellant had in the plaint prayed for the following reliefs:

(A) To execute the sale deed and to deliver possession of plaint schedule property to the plaintiff through the Honourable Court.

(B) To permit the plaintiff to deposit the balance of sale consideration before this Honourable Court.

(C) To allow 12% interest on advance amount from the date of filing this suit and to deduct the same from the balance sale consideration and also allow 12% interest for the balance sale consideration from the date of deposit of the same.

(D) To allow the cost of this suit from the defendant and her assets.

(E) In case if it is found that the sale is not able to be done through the Honourable Court, to permit the plaintiff to recover the amount paid through advance with 18% interest per annum and other damages from the defendants and their assets.

(F) To allow such other reliefs which the plaintiff may seek from time to time and this Honourable Court deem fit and necessary in the interest of justice.

3. Upon receipt of summons, the first defendant entered appearance and filed a written statement dated 23.6.2009. In paragraph 3 thereof she contended that she is not the absolute owner of the plaint schedule property and that it belongs to her husband who purchased it from her as per Ext.A7 sale deed dated 15.5.2002. In the succeeding paragraphs she contended that she had no intention to sell the plaint schedule property because she had no right to do so, that the plaintiff is her close relative, that in order to close a loan availed by her husband, she had approached the plaintiff, that the plaintiff was ready to advance the money but he demanded that she should sign some blank papers and should also get the signature of her husband as a witness, that as she was in dire need of money to close the loan she agreed to do so, that she signed on two stamp papers and two blank papers on 25.5.2005 and on that day, the plaintiff advanced her the sum of Rs.1,00,000/-. The first defendant had also averred that though she thereafter returned the amount to the plaintiff and requested the plaintiff to give back the stamp papers and the blank papers signed by her, the stamp paper dated 25.5.2005 was returned to her. She has also averred that though the stamp paper dated 25.5.2005 was returned by the plaintiff, when she requested for the other stamp paper and blank signed papers, the plaintiff demanded Rs.10,000/- as interest, but as she did not have the said amount with

her, she requested for time, that the plaintiff was adamant and stated that he will return the other stamp paper and the plain papers only after he receives the sum of Rs.10,000/- as interest. She contended that the agreement on which the suit is instituted was written on the stamp paper which was cancelled. She also averred in paragraph 9 thereof that the plaintiff who is her close relative is fully aware of the fact that the plaint schedule property stands in the name of her husband. In paragraph 10 she reiterated her contention that she had returned the sum of Rs.1,00,000/- borrowed by her on 25.5.2005 and in the stamp paper which the plaintiff had retained he had fraudulently executed Ext.A3 agreement for sale dated 5.6.2005. She contended that the statement in the disputed agreement that the defendant had received the sum of Rs.10,000/- as advance itself would reveal the fraud committed by the plaintiff. In paragraph 11 she reiterated the earlier contention that the plaintiff did not return the second stamp paper for the reason that she was not willing to pay the sum of Rs.10,000/- as demanded by the plaintiff.

4. After the first defendant filed the written statement, the first defendant's husband was impleaded as the second defendant. The plaint was amended and paragraph 17(a) was incorporated in the plaint. In the amended plaint it was contended that the first defendant had in collusion with the second defendant executed a sale deed on

15.5.2002 with respect to the plaint schedule property, that the sale has not taken effect and that the first defendant continues to be the absolute owner of the plaint schedule property. It is also contended that the second defendant has signed as a witness to the sale agreement. In the court below the plaintiff was examined as PW1, the scribe of Ext.A3 agreement was examined as PW2 and a near relation of his as PW3. On the side of the defendants, the first defendant examined herself as DW1. The second defendant did not enter appearance and file written statement and therefore, he was set ex-parte. The court below considered the rival contentions and held that execution of Ext.A3 agreement is suspect. The court below also held that as the second defendant is the owner of the property and he has not entered into an agreement with the plaintiff, agreeing to sell plaint schedule property to him, specific performance cannot be decreed. The suit was accordingly dismissed. Hence this appeal.

5. We heard Sri.B.Krishna Mani, learned counsel appearing for the appellant and Sri.R.S.Kalkura, learned counsel appearing for the first respondent. Though the second respondent has been served, he has not entered appearance. The learned counsel appearing for the appellant contended that as the second defendant is an attesting witness to Ext.A3 agreement, the court below erred in holding that he cannot be imputed with the knowledge of the contents of Ext.A3 and

therefore, the finding entered by the court below that no relief can be granted in the instant suit cannot be sustained. The learned counsel contended, referring to Ext.A5 reply notice stated to have been sent by the first defendant in reply to Ext.A4 notice, that the case set out therein is contrary to the case set out in the written statement and therefore, for that reason alone the impugned judgment is liable to be set aside. Referring to the contentions in Ext.A5, the appellant contended that the first defendant had in the said notice admitted having entered into Ext.A3 agreement and the only defence which she had set up in the reply notice was that though she was prepared to abide by the terms of the agreement, the plaintiff was at fault and that the plaintiff has violated the terms of the agreement. The learned counsel contended that the first defendant had no case in Ext.A5 reply notice that the property belonged to her husband, the second defendant, and therefore, the court below erred in non suiting the plaintiff. Per contra, Sri.R.S.Kalkura, learned counsel appearing for the first defendant contended that there is no reference whatsoever in the plaint to Ext.A5 reply notice dated 22.9.2005 stated to have been sent by the first defendant, that the plaintiff has not proved that Ext.A5 reply notice was sent on the instructions of the first defendant, that the plaintiff has not disputed the execution of Ext.B1 agreement and that the evidence in the case on hand, more particularly the testimony

tendered by the scribe of Ext.A3 agreement discloses that the agreement was prepared on the instructions of the plaintiff and not on the instructions of the defendants and therefore, the court below was perfectly right in holding that Ext.A3 agreement is suspect. The learned counsel for the first respondent contended that the real transaction between the parties was a loan transaction, that though the loan amount was fully repaid, the plaintiff misused the blank signed stamp paper and the signed blank papers which were given by the first defendant when the loan was availed, to fabricate Ext.A3 agreement and therefore, the finding entered by the court below does not merit interference.

6. We have considered the submissions made at the Bar by the learned counsel on either side. We have also gone through the pleadings and the materials on record. The plaintiff has in the plaint admitted the fact that copies of the title deeds namely Ext.A1 and A2 which stood in the name of the first defendant were handed over to him on the date of execution of Ext.A3 agreement. He has also admitted having executed Ext.B1 agreement. The fact that the property belongs to the second defendant is not in dispute. Though the second defendant is an attesting witness to Ext.A3 agreement, it is evident from the testimony tendered by PW2, the scribe of Ext.A3 agreement that it was prepared on the instructions of the plaintiff. As

rightly noticed by the court below, in such circumstances, the second defendant to whom the property belongs cannot be imputed with the knowledge of the contents of Ext.A3. This fact coupled with the fact that the parties had entered into Ext.B1 agreement on 25.5.2005 which was admittedly cancelled discloses that the case set out by the first defendant in her written statement appears to be more probable. There is also no explanation forthcoming from the plaintiff as to the reason why the case set out in Ext.A5 reply notice was not referred to in the plaint, notwithstanding the fact that the reply notice was produced along with the plaint. The appellant has also not proved that Ext.A5 reply notice was sent on the instructions of the first defendant. In such circumstances, as Ext.A3 agreement was prepared on the instructions of the plaintiff and the defendants had no role to play in the preparation of Ext.A3 agreement, the court below was in our opinion perfectly right in coming to the conclusion that the plaintiff has failed to prove the due execution of Ext.A3 agreement. In any case as the first defendant who has executed Ext.A3 agreement is not the owner of the plaint schedule property and the plaintiff has failed to prove that Ext.A7 sale deed in favour of the second defendant was not intended to be acted upon, we are of the opinion that a decree for specific performance could not have been granted. Though the learned counsel appearing for the appellant contended that a decree

for realisation of the sum of Rs.10,000/- paid as advance on the date of execution of Ext.A3 agreement ought to have been passed, as the very execution of Ext.A3 is shrouded in mystery, we find no reason to interfere with the impugned judgment.

The appeal fails and is accordingly dismissed. The parties shall bear their respective costs.

**P.N.RAVINDRAN,
(JUDGE)**

**ANIL K.NARENDRA,
(JUDGE)**

vps