

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.VASHA

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

RFA.No. 668 of 2013

AGAINST THE ORDER IN OS 558/2009 of PRINCIPAL SUB COURT, PALAKKAD DATED 11-04-2013

APPELLANTS/DEFENDANTS:

1. JAYARAMAN, S/O EKKOTTIL SANKUNNI, AGED 63 YEARS
S/O EKKOTTIL SANKUNNI, RESIDING AT CHITHALI
PERUMKUNNAM, KUZHALMANNAM AMSOM, ALATHUR TALUK
PALAKKAD DISTRICT.
2. GIRISH, AGED 38 YEARS,
S/O JAYARAMAN, RESIDING AT CHITHALI, PERUMKUNNAM
KUZHALMANNAM AMSOM, ALATHUR TALUK, PALAKKAD DISTRICT.

BY ADVS.SRI.BINOY VASUDEVAN
SRI.R.MANIKANTAN
SMT.PG.BABITHA

RESPONDENT/PLAINTIFF:

HAMEED, AGED 43 YEARS,
S/O SYED MOHAMMED ROWTHER, RESIDING AT NIRAVAKKOTTIL
CHITHALI, KUZHALMANNAM AMSOM, ALATHUR TALUK
PALAKKAD DISTRICT - 678 101

R1 BY ADV. SRI.N.N.SUGUNAPALAN (SR.)
R1 BY ADV. SRI.S.M.PREM
R1 BY ADV. SRI.S.SUJIN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 23-12-2015,
ALONG WITH RFA. 26/2014 AND F.A.O.321/14, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

**R.F.A.Nos.668 of 2013, 26 of 2014
& F.A.O.321 of 2013**

Dated this the 23rd day of December, 2015

JUDGMENT

Antony Dominic, J.

The issues raised in these appeals are connected and therefore these cases were heard together and are disposed of by this common judgment.

2. R.F.A.668/13 is filed by the defendants in O.S.558/09 on the file of the Principal Sub Court, Palakkad. R.F.A.26/14 is also filed by the appellants in R.F.A.668/13, who are aggrieved by the judgment and decree dismissing O.S.522/10 filed by them against the respondent in R.F.A.668/13. F.A.O.321/13 is filed by the appellants in the aforesaid R.F.As, who are aggrieved by the order passed by the IInd Additional District Judge, Palakkad in I.A.1175/13 in A.S.83/13, which appeal was later withdrawn to this court and is numbered as RFA 26/14.

3. O.S.558/09 and O.S.522/10 are between the same parties and the subject matter being connected, these cases were disposed of by a common judgment. In so far as O.S.558/09 is concerned, the suit was filed by the respondent in the appeal seeking a decree of specific performance of

Ext.A1 agreement for sale entered into between the respondent/plaintiff and the appellants/defendants whereby plaintiff schedule item Nos.1 to 7 were agreed to be sold to the plaintiffs. By the judgment and decree under appeal, the suit was decreed and the respondent plaintiff was directed to deposit the balance sale consideration of Rs.9,28,000/- within two months and the appellants were ordered to execute a sale deed at the cost and expense of the plaintiff within one month from the date of receipt of notice of deposit. It was also ordered that in the event of the appellants failure to execute the sale deed, the plaintiff can apply to the court to execute the sale deed on behalf of the defendants.

4. O.S.522/10 was filed by the appellants in R.F.A26/14, seeking an order of injunction restraining the respondent from trespassing into the plaintiff schedule properties. By the judgment under appeal, the suit was dismissed. It is that judgment and decree which is under challenge in R.F.A.26/14. Initially, the judgment and decree in O.S.522/10 was challenged in A.S.83/13 before the District Court, Palakkad. In that

appeal, I.A.1175/13 was filed by the appellants, seeking an order of temporary injunction restraining the respondent from trespassing into the plaint schedule property. By order dated 19th October, 2013, the I.A. was dismissed. It is that order which is under challenge in F.A.O.321/13.

5. Facts, therefore, show that the main controversy that is required to be resolved is raised in R.F.A.668/13 filed against the judgment and decree in O.S.558/09. That suit, as we have mentioned, was filed on the strength of Ext.A1, agreement for sale executed on 23.7.2008, whereby plaint schedule item Nos.1 to 7 were agreed to be sold to the plaintiff. Item Nos.1 to 4 and 8 having a total extent of 281.5 cents of land are paddy fields and item Nos.5 to 7 having a total extent of 49 cents is garden lands. As per the terms of Ext.A1, item Nos.5 to 7 were agreed to be sold for Rs.11,000/- per cent and the remaining property was agreed to be sold for Rs.6,000/- per cent. The time for performance was fixed upto 28.8.2009 and Rs.5,00,000/- was paid as advance, the receipt of which is admitted. It is also seen that as per the

terms of Ext.A1, a further amount of Rs.5,00,000/- was to be paid on 10.8.2008 and that the same was paid on 18.8.2008, the receipt of which is endorsed on Ext.A1. This receipt is also undisputed. Ext.A1 contains yet another endorsement made on 12.3.2009, which show that a further amount of Rs.3,00,000/- was paid on that date. There is also an endorsement that the time for performance of the agreement is extended till 16.9.2009. Both these endorsements are admitted by the appellant/defendants. There is a further endorsement which show that the possession of the paddy fields, that are agreed to be sold, are delivered to the plaintiff. This particular endorsement in Ext.A1 is disputed before us also.

6. Ext.A2 is a notice issued by the plaintiff on 12.2.2009 demanding performance of Ext.A1 agreement. To that notice, Ext.A3 reply was given by the appellants on 16.9.2009. In that reply, appellants contended that the Sub Court, Palakkad passed an order of injunction restraining them from alienating the property and, therefore, they are unable to comply with the demand for performance. Apparently on

receipt of this notice on 19.9.2009, a second notice was issued by the plaintiff asking for the details of the suit and the order of injunction that are mentioned in Ext.A3. To that notice, appellants replied by Ext.A8 sent on 5.10.09, giving the details of the suit and the injunction order that was mentioned in Ext.A3. It was thereupon that on 8.10.09, O.S.558/09 was filed demanding specific performance of the agreement. It was this suit, which was tried along with O.S.522/10. As we have already stated, O.S.558/09 was decreed while O.S.522/10 filed by the appellant seeking injunction restraining the trespass by the plaintiffs in the O.S.558/09 was dismissed.

7. Impugning the judgment and decree in O.S.558/09, two contentions were raised by the counsel for the appellant. The first contention is that, the endorsement dated 12.3.2009 made on Annexure A1 agreement to the effect that the possession of the plaint schedule item Nos.1 to 4 and 8, the paddy fields, were delivered to the plaintiff is a material alteration made by the plaintiff rendering the agreement for sale itself void and unenforceable. Second contention raised is that, the

injunction granted by the Sub Court, in O.S.348/03, restraining alienation of the plaint schedule properties, is still in force and that, therefore, the appellants are incapable of executing the sale deed as agreed by them in Ext.A1 agreement for sale.

8. As far as the first contention that Ext.A1 was materially altered by the respondent plaintiff is concerned, as we have already stated, Ext.A1 agreement was executed between the parties on 23.7.2008. As per this agreement, 7 items of properties were agreed to be sold, of which item Nos.1 to 4 and 8 are paddy fields and 5 to 7 are garden land. The time upto 28.2.2009 was agreed for performance of the agreement and Rs.5,00,000/- was paid as advance. The agreement also provided for a further payment of Rs.5,00,000/- by 10.8.2008. It is the admitted case of the appellants that on the date of execution of the agreement, Rs.5,00,000/- was paid and the second instalment of Rs.5,00,000/-, which was payable on 10.8.2008 was also paid on 18.8.2008. The payment made on 18.8.2008 has been acknowledged by the appellant by an endorsement made on Ext.A1.

9. There is a further endorsement in the agreement made on 12.3.09. As per this endorsement, Rs.3,00,000/- was also paid by the plaintiff to the appellants. The receipt of this amount is admitted by the appellants. It is also provided that time for performance of the agreement is extended till 16.9.2009. This extension of time also is admitted by the appellants. What is disputed by the appellants is the endorsement to the extent it provides that the possession of the paddy fields agreed to be sold are delivered to the plaintiff. According to the appellants, the endorsements to the above effect that the possession of paddy fields has been delivered to the plaintiff is a unilateral insertion made by the plaintiff himself and this amounts to a material alteration of the terms of the agreement resulting in the agreement itself becoming unenforceable and void.

10. First of all, oral evidence of the parties, which has been perused by us, is already insufficient to persuade us to agree with the appellant that the disputed endorsement is a subsequent insertion made by the plaintiff. A perusal of the agreement itself would show that

the endorsement in question is made in continuation of the remaining admitted endorsements and is in the very same handwriting. Therefore, the endorsement made on 12.3.2009, was made as agreed between the parties and cannot be held to be made unilaterally as claimed. Even otherwise, we are not in agreement with the counsel for the appellant that the disputed endorsement would amount to a material alteration inviting the consequence of the agreement itself becoming unenforceable and void. The question what amounts to a material alteration has been considered by the Apex Court in its judgment in **Ram Khilona and others v. Sardar and others [AIR 2002 SC 2548]**

where inference has been made to Halsbury's Laws of England; thus:

In Halsbury's Laws of England, 4th Edition at page 552, para 1378 it is observed:

“A material alteration is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of canceling the deed.

In paragraph 1383 at page 555 it is observed:

“An alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed: and this is equally the case whether the alteration was made by a stranger or by a party to the deed. Thus the date of a deed may well be filled in after execution; for a deed takes effect from the date of execution, and is quite good though it is undated. So, also the names of the occupiers of land conveyed may be inserted in a deed after its execution, where the property assured was sufficiently ascertained without them. It appears that an alteration is not material which does not vary the legal effect of the deed in its original state, but merely expresses that which was implied by law in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable under it.”

According to us, the disputed endorsement did not bring about any change in the rights of the parties or enforcement in the agreement, in which event alone, the alteration can be said to be material, affecting

the validity of the agreement. Therefore, this contention raised before us is only to be rejected and we do so.

11. The second contention raised by the counsel for the appellants is in regard to the order of injunction passed by the Sub Court, Palakkad in O.S.347/03. O.S.347/03 is a suit filed for partition of the plaint schedule properties. To that suit, the plaintiff in O.S.558/09 is not a party. However, it is the admitted case before us that item Nos.1 to 4 in the plaint schedule herein are also the subject matter of O.S.347/03. From Ext.A7, the certified copy of I.A.2182/08 in O.S.347/03, we find that the Sub Court has passed an order of temporary injunction restraining the respondents herein, from alienating or transferring the petition schedule properties until further orders. Although in the petition under Order 39 Rule (1), the injunction sought is in respect of the property comprised in Survey No.649/3 and the building therein, the schedule to the petition comprises of two items. The first item is an immovable property having an extent of 40 cents comprised in re-survey No.643/3 (new Survey No.183/6 and

183/7 Block 16). The second item is 4 acres of paddy land comprised in Re-survey No.654/4 (old Survey No.652/7). Though there is difference between the properties included in the petition and the properties included in the schedule, still fact remains that injunction granted is with respect to the properties in the schedule to the petition. Schedule to the petition also includes the properties which are included in Ext.A1, the specific performance of which is sought in the suit.

12. Although the trial court has chosen to grant a decree of specific performance, despite the injunction order granted in O.S.374/03, according to us, the decree for specific performance ignoring the order of injunction and the pendency of the suit where partition of the properties were also sought for should not have been passed and the proper course ought to have been that the suit should have been tried along with O.S.347/03 lest there is always a possibility of conflicting decrees being passed in these suits, leading to further litigations between the parties. In order to avoid such a situation, we feel that the proper course to adopt in R.F.A.668/13 is to set aside the

judgment and decree under appeal in O.S.558/09 on the file of the Principal Sub Court, Palakkad and to direct trial of the suit along with O.S.347/03, which both sides have admitted, is pending trial of the Sub Court, Palakkad.

13. Therefore, the judgment and decree in O.S.558/09 are set aside for fresh disposal, in accordance with law.

14. In so far as R.F.A.26/14 is concerned, that appeal arises from the judgment and decree dismissing O.S.522/10 filed by the appellants. Dismissal of the suit was following the judgment and decree passed in O.S.558/09. Since we have already set aside the judgment in O.S.558/09, the judgment in O.S.522/10 rendered by the Principal Sub Court, Palakkad is also liable to be set aside and we do so.

15. As we have already stated, it is necessary that these suits shall be heard and disposed of along with O.S.347/03 pending before the Sub Court, Palakkad. Therefore, in exercise of the powers of this Court under Section 24 of the Code of Civil Procedure, 1908 it is ordered that these O.S.Nos.558/09 and 522/10 will stand transferred and posted

along with O.S.347/03, pending on the file of the Sub Court, Palakkad and the suits will be jointly tried and disposed of in accordance with law.

16. F.A.O.321/13 is filed aggrieved by the order passed by the Second Additional District Court, Palakkad. By the said order, injunction sought for by the appellants to restrain the respondent/the plaintiff in O.S.558/09 from trespassing into the plaint schedule property was declined. While admitting this appeal, this court passed order in I.A.1649/13 granting temporary injunction restraining the respondent from trespassing into the plaint schedule property in O.S.522/10. This order remains in force even now. Subsequently, by order in I.A.1581/14, the appellants herein was permitted to effect cultivation with a further direction that a report shall be filed before this court. Now, that the suits are remitted for fresh disposal, F.A.O.321/13 is disposed of directing that the aforesaid interim orders passed by this court will remain in force for a further period of two months from today and in the meanwhile, it will be open to the party concerned to make

application before the trial court for obtaining appropriate interlocutory orders in the matter and, if any, such order is passed that will supersede the existing orders of this court.

These appeals are accordingly disposed of.

SD/- **ANTONY DOMINIC
JUDGE**

jes

SD/- **P.VASHA
JUDGE**

The following corrections are made in the common judgment dated 23.12.2015 in RFA Nos.668/2013, 26/2014 and F.A.O.No.321/2013:

(a) The words and figures “item Nos.1 to 7” occurring in the 7th line of paragraph No.3 and in the 5th line of paragraph No.5 are corrected and substituted as “item Nos.1 to 8” ;

(b) The figure and words “7 items of properties” occurring in the 4th line of paragraph No.8 are corrected and substituted as “8 items of properties” ;

(c) Lower Court case No. “O.S.No.347/2003” occurring in the 3rd, 7th and 8th lines of paragraph No.11, in the 7th and 13th lines of paragraph No.12 and in the 2nd and 6th lines of paragraph No.15 are corrected and substituted as “O.S.No.374/2003”.

Vide order dated 26.2.2016 in I.A.No.432/2016 in RFA No.668/13, I.A.No.431/2016 in RFA No.26/2014 and I.A.No.290/2016 in FAO No.321/2013.

The appellants in RFA No.668/2013 will be entitled for refund of court fee paid in the appeal in terms of Section 67 of the Kerala Court Fees and Suit Valuation Act, vide order dated 29.3.2016 in I.A.No.422/2016 in R.FA.No.668/2013.

Sd/-
Registrar (Judicial)