

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V. ASHA

WEDNESDAY, THE 21ST DAY OF OCTOBER 2015/29TH ASWINA, 1937

RFA.No. 722 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN OS 146/2009 of I ADDL. SUB COURT, THRISSUR
DATED 20-03-2013

APPELLANT(S)/RESPONDENTS 1 AND 2:

1. JAYAPRAKASH, AGED 69 YEARS
S/O VAZHAPPULLY CHATHUNNY, PALLIPURAM DESOM
VALAPPAD VILLAGE, CHAVAKKAD TALUK, THRISSUR DISTRICT.
2. SILOMONI, AGED 63 YEARS
W/O JAYAPRAKASH, S/O VAZHAPPULLY CHATHUNNY
PALLIPURAM DESOM, VALAPPAD VILLAGE, CHAVAKKAD TALUK
THRISSUR DISTRICT.

BY ADVS. SRI. RENJITH THAMPAN (SR.)
SMT. P.R. REENA

RESPONDENT(S)/PLAINTIFFS & 3RD RESPONDENT:

1. NANDINI, AGED 76 YEARS
W/O PADMANABHAN, VETTUVANTHRA HOUSE, NATTIKA VILLAGE
CHAVAKKAD TALUK, THRISSUR DISTRICT PIN 680566
2. RENUKA,, AGED 51 YEARS
D/O DECEASED PADMANABHAN, W/O GOPINATHAN, KORATTIL
EDATHIRITY, KODUNGALLUR TALUK
THRISSUR DISTRICT PIN 680122
3. RETHI,, AGED 48 YEARS
D/O DECEASED PADMANABHAN, W/O PREMAN, KOLAT HOUSE
CHAZHUR, THRISSUR TALUK PIN 680571
4. SUNIL, AGED 47 YEARS,
S/O DECEASED VATTUVANTHARA PADMANABHAN, NATTIKA
CHAVAKKAD TALUK, PRESENT ADDRESS V.P SUNIL
P.B NO 40590, QUATAR, DOHA

R1-R4 BY ADV. SRI. K.S. BHARATHAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
16.10.2015, THE COURT ON 21.10.2015 DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

R.F.A.No.722 of 2013

Dated this the 21st day of October, 2015

JUDGMENT

Antony Dominic, J.

1. This appeal is directed against the judgment and decree passed by the Additional Sub Court, Thrissur in O.S.No.146/09.
- 2.The suit was filed by respondents 1 to 3, impleading the appellants and the 4th respondent, who is the son of the first respondent and the brother of respondents 2 and 3 as defendants. The main prayer in the suit was for re-conveyance of plaint 'C' schedule property, having an extent of 1 Acre of land in Nattika village. By the judgment under appeal, the suit was decreed with consequential reliefs and it is aggrieved by this judgment, the appeal has been filed.
- 3.The main issue that is raised in this appeal is that under section 15 of the Specific Relief Act, 1963, specific performance of a contract can be obtained only by a party to the contract. According to the

appellants, there was no privity of contract between themselves and respondents 1 to 3, entitling the respondents for a decree for re-conveyance of the property. Therefore, it is stated that the judgment and decree of the trial court is illegal and unsustainable.

4.The main contention raised before us being as above, we shall take note of the relevant facts which are required to be noted.

5.'C' schedule property was owned by respondents 1 to 4, the mother and children. Ext.B23 is a registered power of attorney executed by respondents 1 to 3 in favour of the 4th respondent, authorising him to deal with and even dispose of 1 Acre 26 Cents of land specified therein, which was owned by respondents 1 to 3 and the 4th respondent. Ext.B45 is a sale deed executed on 3.12.2004, by which, PW8, Sri.Haroon, purchased the 'C' schedule property from plaintiffs and the 4th respondent. It was the 4th respondent who had executed the sale deed on his behalf and on behalf of respondents 1 to 3, in his capacity as the

power of attorney holder. Subsequently, by Ext.B44 sale deed dated 9.10.2007, one Santhosh purchased the property from PW8, Haroon. It is state that Santhosh is now no more.

6.According to the first appellant, Santhosh owed him a liability of ₹1.13 crores, for the recovery of which, he had filed O.S.694/07 before the Sub Court, Thrissur. By Ext.B30 order dated 11.7.2007, the properties mentioned therein were attached in the suit and the attachment was effected on 19.7.2007. Subsequently, the first appellant and late Santhosh compromised the suit as per Ext.B32 dated 3.10.2007 and on that basis, Ext.B31 judgment was rendered by the Sub Court on 6.10.2007.

7.According to the first appellant, it was in pursuance of Exts.B31 and B32, that Exts.B42 and B43 sale deeds were executed by late Santhosh in his favour on 10.10.2007 and 4.10.2007 conveying 30 cents and 70 cents of properties respectively. Thereafter, Ext.B41 document was executed by the first appellant on 10.10.2007 settling 30 cents of land covered by

Ext.B42 in favour of the second appellant. Appellants contend that since then, they were in possession and enjoyment of the property without any hindrance. In support of this claim, they referred to Exts.B21 and B22 basic tax receipts evidencing that the property was mutated in the name of the appellants, Exts.B19 and B20 possession certificates issued in their name and Ext.B3 electricity bill which shows that the power connection in the property has been changed into the name of the first appellant.

8.It is their case that while so, respondents 1 to 3 filed O.S.470/08 before the Sub Court, Thrissur seeking an order of injunction against the appellants alleging that the appellants were attempting to disturb their peaceful possession. Though an interim order of injunction was initially granted, the said order was later vacated. Subsequently, the suit was withdrawn as is evident from Ext.B24 judgment. It was thereafter that respondents 1 to 3 filed O.S.146/09 and the main prayer therein was for re-conveyance of the plaint 'C' schedule property.

9. In the suit, the allegations that were raised by respondents 1 to 3 are mainly that the 4th respondent had committed breach of trust and that exploiting the power of attorney executed ostensible sale deeds as security for the loans availed by him and that there was no conveyance or transfer of possession of properties as the documents were intended only as security for the loans advanced to him. These averments are contained in paragraphs 6, 7, 10, 11 and 12 which are extracted below for reference:

"6. The 1st plaintiff is 74 years old. Her son Sunil, the 3rd defendant was operating a bus service and also running other vehicles on hire. He had a financial crisis. He therefore requested his mother and sisters (the plaintiffs) to execute a Power of Attorney in his favour with respect to a portion of plaintiff A schedule properties for raising a loan from the Kattoor Service Co-operative bank to salvage his business from the crisis. It was in order to avoid his aged mother and married sisters going to the bank several times for executing the necessary documents and to the Register office that the Power of Attorney was executed. The plaintiffs reposed faith in him and they were in affectionate terms. Hence they had no hesitation in executing the Power of Attorney and helping him by raising a loan. There was no

permission granted to him to do any other dealings except raising a loan from the Co-operative Bank. But now it is learned that he committed breach of trust and created several documents to others encumbering the properties. The plaintiff and her daughters had no occasion to know about these documents created by him as he fraudulently and willfully concealed these documents and transactions from their knowledge. As possession and enjoyment of the plaint schedule properties had never been disturbed at any point of time, the plaintiff had no reason or opportunity to suspect about the conduct, integrity or honesty of the 3rd defendant. After the fraudulent and mischievous acts and breach of trust and cheating, he went abroad. For the last more than two years he is abroad.

7. It is seen from the documents produced by defendants 1 & 2 in O.S.470/2008 and on subsequent enquiries, that Sunil executed several mortgages not only to the Kattoor Service Co-operative Bank but several other documents to others. By committing breach of trust and by exploiting the Power of Attorney, Sunil executed two ostensible sale deeds with respect to 50 cents to Rajeev and another 50 cents to Joshi as per Document Nos.1511/2000 and 1512/2000 respectively. There was no transfer of possession of the properties, as they were intended only as a security for the loan advanced to Sunil. The plaintiffs continued to be in possession and

enjoyment of the entire 1 acre 38 cents. Subsequently it is seen that Sunil discharged the debt due to Rajeev and Joshi and they reconveyed the properties to Sunil, without any demur. Documents of reconveyance were registered as N.741 of 2001 and 1405 of 2002.

10. It is in the meanwhile that Sunil went abroad. He had only paid documentation charges and a portion of interest to Santhoshkumar. Santhoshkumar became urgently in need of money due to his business failure. Sunil was abroad. He therefore availed a loan of Rs.10,50,000/- from the 1st defendant, who was a known money lender. As insisted by him, Santhoshkumar executed two security bonds in the form of sale deeds, Document No.2410/2007 with respect to 70 cents for Rs.7,50,000/- and another Document No.2456/2007 for Rs.3,00,000/- with respect to 30 cents. The 1st defendant then executed a settlement deed in favour of his wife, the 2nd defendant with respect to 70 cents as Document No.2504/2007.

11. The documents successively executed by Sunil, Haroon and Santhoshkumar were really executed on trust (വിശ്വാസതീർപ്പ്) on the specific agreement and understanding that there will be a reconveyance executed on payment of principal with interest and documentation charges. No title is really transferred and the parties only

understood and intended the documents as only a security for the loan.

12. In spite of the documents in favour of Haroon, then in the name of Santhoshkumar and subsequently in the name of the defendants, possession and enjoyment of the entire property of 1 acre 38 cents continued with the plaintiff uninterruptedly. The plaintiffs are plucking the nuts from the coconut trees and holding the property as a single compact unit without any intervening boundaries in any manner at all without separating C schedule from A schedule."

10. On this basis, the main reliefs sought for in the plaint were to direct the appellants by a decree of specific performance to execute and register deed of re-conveyance in respect to plaint C schedule properties in favour of respondents 1 to 4 at their expense, within a stipulated period and in case of refusal, to execute such a conveyance by the Hon'ble Court. They also sought for a decree allowing them and the 4th respondent to deposit in court ₹12,12,750/- for payment to the appellants. An order of injunction restraining the appellants from alienating or trespassing into the plaint schedule

property or executing any document with respect to the plaint C schedule property were also sought for. It is also seen that in the plaint, court fee under section 42 of the Kerala Court Fees and Suits Valuation Act, 1959, providing for court fee payable for suits for specific performance was remitted.

11. Appellants filed their written statement denying the allegations and according to them, the sale in their favour was an absolute sale and was not a security as claimed in the plaint. They also contended that since the execution of the sale deed, they were in possession and enjoyment of the property. The third defendant, against whom allegations of fraud and execution of ostensible sale deed as security for loan received by him were raised, filed a written statement admitting the plaint averments.

12. The evidence consists of the oral evidence of Pws.1 to 10 and Dws.1 to 4. Exts.A1 to A8 and B1 to B50(a) were also marked. CW1 was examined as court witness and Exts.C1 and C1(a) Commission report and sketch

were also marked. On conclusion of the trial, the suit was decreed, directing deposit of ₹12,12,750/- with 12% interest thereon from the date of execution of Exts.B15 and B16 which are the originals of Exts.B42 and B43, till the date of deposit. It was also decreed that the appellants had executed re-conveyance transferring plaint 'C' schedule properties in the name of plaintiffs 1 to 3 and the third defendant. Injunction sought for was also granted. It is this judgment and decree which is under challenge.

13.We heard learned senior counsel for the appellants and the learned counsel appearing for respondents 1 to 3. There was no representation on behalf of the 4th respondent.

14.As we have already stated, the main contention to be considered in this appeal is that, in the absence of privity of contract between the appellants and respondents 1 to 3, a decree of specific performance could not have been granted. Section 15 of the Specific Relief Act, 1963 provides the persons for or

against whom contracts may be specifically enforced. This section, in so far as it is relevant, reads thus:

"S. 15. Who may obtain specific performance -

Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by-

(a) any party thereto;

(b) the representative in interest or the principal, of any party thereto:"

15. Reading of section 15 of the Act shows that specific performance of a contract may be obtained by a party to the contract or the representative in interest or the principal of any party thereto. However, section 20 providing that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Sub section (4) of section 20 provides that the court shall not refuse to any party

specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. Therefore, while under section 15, the right to such specific performance is conferred only on a party to the contract or his representative in interest or the principal of such a party, section 20(4) provides that the court shall not refuse specific performance to any party to a contract merely on the ground that the contract is not enforceable at the instance of the other party. Though Section 15 (a) and (b) would therefore show that decree of specific performance can be sought only by the parties mentioned therein, referring to section 20(4), the argument raised is that the fact that a third party cannot enforce a contract shall not be a reason to refuse to that party the relief of specific performance of the contract. Therefore, the argument raised by the respondents 1 to 3 plaintiffs is that the contention of the appellants has no force.

16. However, a close reading of section 20(4) of the Act would show that it only indicates that the relief of

specific performance cannot be refused simply on the ground of want of mutuality and that if all other conditions for the grant of specific performance are satisfied and there is no ground to deny the relief under the provisions of the Act, want of mutuality will not affect the discretion of the court to grant specific performance. This, therefore, shows that section 20(4) will not come to the rescue of respondents 1 to 3 to maintain the prayer for a decree for specific performance dehors the provisions contained in section 15, which entitles only a party to the contract, his representative in interest or his principal for such a decree.

17. Admitted facts on record, to which we have made reference, show that, initially, on the strength of Ext.B23 power of attorney, the 4th respondent had conveyed the property to PW8 Sri.Haroon by Ext.B45 dated 3.12.2004. In 2006, Haroon executed Ext.B44, conveying, again absolutely, the property to late Sri.Santhosh. By Ext.B42 and B43 dated 10.10.2007 and 4.10.2007 respectively, Sri.Santhosh conveyed 30 cents and 70 cents of the property covered by Ext.B44

in favour of the first appellant. Thereafter, the first appellant settled the 30 cents of land covered by Ext.B42 in favour of the second appellant by Ext.B41. According to the appellants, Exts.B42 and B43 were executed by late Santhosh in pursuance of Ext.B31 judgment in O.S.694/07 of the Sub Court, Thrissur, which was filed by the first appellant for recovery of money against Santhosh and in which, the first appellant and Santhosh had entered into Ext.B32 compromise.

18. These facts would therefore show that in so far as Ext.B41, executed by the 1st appellant settling the property purchased by him by Ext.B41 in favour of the second appellant is concerned, privity of contract is only between the first appellant and the second appellant. In so far as the first appellant is concerned, he acquired the property by Exts.B42 and B43 from late Sri.Santhosh and therefore, the privity of contract is only between himself and Santhosh. All these conveyances, though are stated to be ostensible sale deeds executed as security for advances received, are sale deeds absolutely

conveying the property to the vendee described therein without any reservation whatsoever. Therefore, respondents 1 to 3 or for that matter, the 4th respondent, did not have any privity of contract with the appellants. On this ground itself, the suit with the prayer for decree for specific performance was not maintainable and the trial court should have dismissed the suit for that reason itself.

19. Since we have concluded that the suit was not maintainable, rest of the issues raised before us are merely academic.

For the aforesaid reasons, the judgment and decree in O.S.No.146/09 of the Additional Sub Court, Thrissur are set aside and the appeal is allowed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

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PS to Judge