

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 7TH DAY OF AUGUST 2015/16TH SRAVANA, 1937

R.S.A.No. 241 of 2010 (D)

AGAINST THE JUDGMENT IN AS 54/2002 of SUB COURT,
CHERTHALA.

AGAINST THE JUDGMENT IN OS 748/1999 of
ADDITIONAL MUNSIF COURT,CHERTHALA.

APPELLANT(S)/RESPONDENT/DEFENDANT:

P.P.SEETHAMA, S/O.LATE RAMESA PANICKER,
CHIRAYIL FROM PUTHANVEETIL, EZHUPUNNA VILLAGE,
ALAPPUZHA DISTRICT.

BY ADVS.SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

RESPONDENT(S)/PETITIONER/PLAINTIFF:

C.K.VISWANATHAN, S/O.KRISHNAN,
CHEMMANATTUTHARA, EZHUPUNNA VILLAGE,
ALAPPUZHA DISTRICT.

R1 BY ADV. SRI.T.K.RADHAKRISHNAN
R1 BY ADV. SMT.K.L.SREEDEVI

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY
HEARD ON 07-08-2015, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. No. 241 of 2010

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Dated this the 7th day of August, 2015.

JUDGMENT

The defendant in O.S. No. 748 of 1999 before the Munsiff's Court, Cherthala, who was able to save her property in the sense that she was asked to return the advance amount by the trial court, at the appellate stage suffered a decree for specific performance.

2. According to the plaintiff, he runs a STD booth. Ext.A1 agreement was executed on 19.8.1998 by the defendant and her husband agreeing to sell one cent of land with a building thereon for a total consideration of Rs.38,000/-. Rs.10,000/- was paid as advance and the document was to be executed within a period of one year. Even inspite of demand, the document was not executed. Ext.A2 notice dated 12.7.1999 was sent calling upon the defendant to come to the Sub Registry office on a particular date to execute the

deed. The defendant did not accede to the demand made by the plaintiff. Hence the suit.

3. The defendant resisted the suit. She denied the agreement and contended that no such agreement has been executed by her. According to the defendant, her husband was sick, since he was in need of money, he approached the plaintiff and received Rs.10,000/- from the plaintiff. According to the defendant, at that time plaintiff obtained signed blank papers from her. She denied having any intention to sell the property nor has entered into any agreement for sale. On the basis of these contentions, she prayed for a dismissal of the suit.

4. Issues were raised by the trial court and parties went to trial. Plaintiff examined P.Ws.1 to 3 and had Exts.A1 to A8 marked. The defendant examined D.W.1. The trial court on appreciation of the evidence found that the defendant had infact executed Ext.A1 agreement and

that the building in the property was put up by the plaintiff as consented by the defendant. But the trial court therefore in the peculiar facts and circumstances of the case declined to grant specific relief and directed return of advance amount with 6% interest. That made the plaintiff to approach the appellate court with A.S. 54 of 2002 complaining about the non-granting of decree for specific performance of the agreement. The appellate court re-appreciated the evidence and found that there was no justification for declining to grant decree for specific performance and accordingly modified the decree of the trial court to one for specific performance.

5. That brings the defendant before this Court.

6. Notice was issued on the following questions of law:

(i) When the trial court exercises its discretion not to grant a decree of specific performance, is the lower

appellate court correct in overturning that decision and granting a relief of specific performance on grounds that are insufficient to overturn such a discretion exercised by the trial court?

(ii) When an agreement of sale is created at a time when the husband of the defendant is suffering from serious illness like cancer and disease of the heart, and subsequently before the filing of the suit, the husband died leaving the defendant a widow, should not the courts refuse to exercise its discretionary relief of specific performance in favour of the widow?

(iii) When serious difficulties would be caused to a widow defendant if a discretionary relief of specific performance is granted, could the courts grant such a relief to the disadvantage of the widow defendant?

(iv) Is the grant of the discretionary relief of specific by the lower appellate court correct, in the facts and circumstances of the case?

(v) In the facts and circumstances of the case, is the judgment and decree of the

lower appellate court correct or sustainable?

7. Shri. N. Subramaniam, learned counsel appearing for the appellant contended that it is necessary that the plaintiff should aver and prove that he was always ready and willing to perform his part of the agreement and any omission on his part is crucial. Adverting to the plaint, it was contended that even though there is a pleading in that regard, in the evidence of P.W.1 he has not stated that he has the necessary financial capacity to put through the agreement. That is fatal and that would show that the plaintiff was not ready and willing to perform his part of the contract. Further, it is contended that Exts.A6 and A6(a) fixed deposits produced stands in the name of the children of the plaintiff and there is nothing to show that they were willing to give the amount to the plaintiff.

8. Relying on the decisions reported in **Susheela v. T.M. Muhammedkunhi** (2012(1) KHC 508),

Muhammed v. Chandrika (2010 (3) KHC 233), **Saradamani Kandappan v. S. Rajalakshmi** (AIR 2011 SC 3234), **H.P.Pyarejan v. Dasappa** (AIR 2006 SC 1144) and **Muhammed v. Chandrika** (2010(3) K.L.T. 306) learned counsel contended that lack of evidence regarding the availability of funds should be treated as fatal and the decree passed by the trial court needs to be restored.

9. Learned counsel appearing for the respondent on the other hand contended that this is a novel contention taken at the second appellate stage and all throughout the contention was that she has not executed the agreement. It is a total denial. She also denied having permitted the plaintiff to put up structure in the property. There is nothing in the written statement to show that at any point of time she entertained a doubt that the plaintiff was not ready and willing to perform his part of the agreement nor that he has the necessary financial capacity. The issue

regarding financial ability was never agitated before the courts below and the same is urged for the first time in the second appeal. It is pointed out by the learned counsel that all the contentions are found against and it was also found that the plaintiff was occupying a structure put up in the property and therefore considering equity, justice, good conscience and law on the point, the lower appellate court was perfectly justified in granting decree for specific performance.

10. After having heard learned counsel on both sides and having perused the records, this Court is of the opinion that there is considerable force in the submission made by the learned counsel for the respondent. In the plaint, it is clearly averred that the plaintiff was always ready and willing to perform the contract and there was never a doubt regarding his financial capacity. True, in his deposition as P.W.1, it is only stated "Ext.A1 പ്രകാരം പ്രവർത്തിക്കാൻ ഞാൻ തയ്യാറാണ്". The grievance of the

counsel for the appellant is that he has not gone further and stated that he has the necessary financial ability to purchase the property.

11. Here one has to notice that he has produced two FD receipts, Exts.A6 and A6(a), which show that he has got Rs.28,000/- in his hand. It is no doubt true that they stood in the name of the children. As is well settled, vendee only needs to show that he has the capacity to raise finance. There is no reason to doubt his capacity in the case.

12. Except for the above infirmity pointed out by the learned counsel for the appellant, there is nothing to show that the plaintiff was not ready and willing to perform his part of the contract at any point of time.

13. It is significant to notice that the plaintiff has averred in the plaint that after the sale agreement was executed he was permitted to occupy and put up structure to run an STD booth.

This specific averment was taken objection to by the defendant contending that no such permission was ever granted. Both the courts below found that the claim of the defendant to be untrue and found that as a matter of fact the plaintiff was allowed to put up the structure and occupy the same.

14. In the above situation, learned counsel also contended that escalation in price is not a criterion in favour of the defendant. Learned counsel relied on the decisions reported in **Narinderjit Singh v North Star Estate Promoters Ltd.** ((2012) 5 SCC 712) and **Vidyanadam v. Vairavan** (1997(1) K.L.T. SN 45). The latest view on the subject is that escalation of price by itself is not a ground to deny specific performance and passage of time is also not a reason for declining to grant relief to the plaintiff if it is found in law and in equity that he is entitled to relief. The trial court for obvious reasons without justifying its stand had given the relief of return

of advance amount.

14. The lower appellate court quite rightly taking note of the fact that after having permitted the plaintiff to occupy the premises and put up structure therein, it is quite unjust to deny specific performance to the plaintiff.

15. It is a case where the lower appellate court has rightly exercised the appellate jurisdiction in granting decree for specific performance and it cannot be found fault with.

The result is that this Second Appeal is without any merits whatsoever and it is only to be dismissed. I do so. However, there will be no order as to costs.

sb.

P. BHAVADASAN,
JUDGE