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

RSA.No. 676 of 2008 ( )

AGAINST THE JUDGMENT IN AS 67/2006 of DISTRICT COURT, KASARAGOD
DATED 12-12-2007

AGAINST THE JUDGMENT IN OS 3/2004 of SUB COURT, HOSDRUG DATED 28-03-2006

APPELLANT IN R.S.A./APPELLANT IN A.S./DEFENDANT IN SUIT:

PUTHEPURAYIL NASEEMA, D/O.P.P.KUNHAMU
AND ALIYUMMA, HOUSE HOLD, P.P.HOUSE
AJANNUR VILLAGE, HOSDRUG TALUK

BY ADVS.SRI.K.JAYAKUMAR (SR.)
SRI.P.B.KRISHNAN
SRI.R.SURAJ KUMAR
SMT.GEETHA P.MENON
SMT.V.DEEPA

RESPONDENT IN R.S.A./RESPONDENT IN A.S./PLAINTIFF IN SUIT:

C.ABDUL RAHIMAN, S/O.ASSINAR,
AGRICULTURIST, RESIDING AT ITTAMMAL AJANNUR VILLAGE
HOSDRUG TALUK, PO.MANIKOTH.

BY ADV. SRI.A.BALAGOPALAN
BY ADV. SRI.A.RAJAGOPALAN
BY ADV. SRI.M.N.MANMADAN
BY ADV. SRI.R.D.SHENOY (SR.)
BY ADV. SRI. VINOD BHAT

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

ds

P.BHAVADASAN, J.

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R.S.A. No. 676 of 2008

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Dated this the 07th day of August, 2015

JUDGMENT

The defendant in O.S.No. 3 of 2004, who suffered a decree for specific performance which was confirmed in appeal, is the appellant.

2. The facts absolutely necessary for the disposal of this appeal are as follows:

It is not in dispute that the defendant before the trial court entered into an agreement for sale evidenced by Ext.A1 dated 01.07.2003 whereby, she agreed to sell 4 cents of land with a building for a sum of ₹ 2 lakhs. ₹ 1,25,000/- was received as advance on the date of agreement itself. The plaintiff, who claimed that he was always ready and willing to perform his part of the contract, sent Ext.A2 notice calling upon the defendant to present in the Registrar's Office. The term of the agreement was six months and it expired on 01.01.2004. In spite of the notice issued to the defendant, she did not care to appear before the Registrar's office or to execute the document and that necessitated the suit.

3. The defendant resisted the suit by pointing out that even though she had executed Ext.A1 agreement, that was only as a security for a loan taken from the plaintiff. She pointed out that her husband had undergone a surgery on 13.06.2003 and she had incurred debts in that regard. So also, it was contended that complications developed after surgery and she had to gather more money for treatment. This compelled her to approach the plaintiff for a loan and she executed Ext.A1 agreement intending it only to be a security and not as an agreement for sale. She bonafide believed that her husband, who had been employed abroad, would recover soon and would be able to join duty and repay the debt. Unfortunately for her, that did not happen and she was unable to pay the amount within the time stipulated in the agreement. It was also pointed out that the property

would fetch at least a sum of ₹ 7 lakhs at the relevant time and the fact that the document contained only ₹ 2 lakhs as the sale price, would clearly show that it was not intended to be an agreement for sale. She would contend that as soon as she received Ext.A2 notice, she approached the plaintiff and sought for time to repay the debt which was agreed to by him, but still she did not repay the same. She expressed her readiness and willingness to return ₹1.25 lakhs which she borrowed with 12% interest per annum. On the basis of these contentions, she prayed for a dismissal of the suit.

4. On the above pleadings, issues were raised. The evidence consists of the testimony of PW1 and documents marked as Exts.A1 to A4 from the side of the plaintiff. The defendant examined herself as DW1 and had Exts.B1 and B2 marked.

5. Both the courts below came to the conclusion that Ext.A1 agreement was in fact executed by the defendant and the story put forward by her that it was only as a

security for a loan taken by her cannot be believed. The trial court decreed the suit.

6. In appeal, one of the contentions taken by the defendant was that the trial court had not considered the discretion that is to be exercised under Section 20 of the Specific Relief Act (hereinafter referred to as “the Act”) and that vitiated the judgment and decree of the trial court. The lower appellate court considered that aspect and felt that merely because the defendant contended that the property at the relevant time would have fetched a sum of ₹ 7 lakhs, is not by itself a ground not to exercise a discretion in favour of the plaintiff and dismissed the appeal confirming the judgment and decree of the trial court. That brings the defendant before this Court.

7. Notice was issued on the following substantial questions of law:

> “Whether the courts below were justified in the light of the contentions raised by the appellant and the evidence produced in support

> thereof in decreeing specific performance of Ext. A1 agreement on mere proof of its execution ignoring Sections 14 and 20 of Specific Relief Act?”

8. It may be mentioned here that at the time of admission, the appellant was directed to deposit a sum of ₹2,02,500/- before the sub Court, Hosdurg. That was done and the receipt was produced before this Court.

9. Sri. Jayakumar K., the learned senior counsel appearing for the appellant mainly stressed on the applicability of Section 20 of the Act to the facts of the case. There was no serious dispute regarding the execution of Ext.A1 agreement though the learned senior counsel pointed out that two facts which stand out are; 1) that the title deed i.e., the gift deed by which the defendant obtained the property, was in the possession of the plaintiff and he had produced the same before court and 2) that it is very unusual cases that an agreement for sale to be registered though there is no prohibition against that. These two

circumstances would have considerable impact on the claim made by the defendant that transaction was only a loan transaction and the agreement executed was not with an intention to sell the property. The learned senior counsel went on to point out that the lower appellate court has only considered one of the limbs of the discretionary aspect and that is not the sole criterion to decide whether discretion should be exercised in favour of the plaintiff. Section 20 of the Act is very clear on this aspect and it contains several clauses which impresses upon the Court the necessity to consider various aspects which would of advantage or disadvantage to either of the parties and make an evaluation on various factors before arriving at a conclusion. The learned senior counsel went on to point out that it is an obligation casts on the court and the court has to exercise that discretion based on sound judicial principles. According to the learned senior counsel, escalation of price or that the property would have fetched a higher price at the relevant time, may not by itself is a ground to deny specific performance. Several other factors, which have been pointed out by the learned senior counsel, do have a bearing on the issue and those aspects have not been considered. The learned senior counsel went on to contend that this Court had occasion to hold that even when the defendant remains *ex parte* or the written statement contains false averments, that does not absolve the court from discharging its duty conferred under Section 20 of the Act. When viewed from that angle, it is clear that neither of the courts below have considered this aspect in proper perspective and if that be so, that vitiates the judgment and decree and they are only to be set aside.

10. Sri. Vinod Bhatt, the learned counsel appearing for the respondent on the other hand contended that there is no serious dispute regarding the execution of Ext.A1 agreement and the receipt of ₹ 1.25 lakhs as advance amount. The learned counsel went on to point out that the operation was

on 13.06.2003 and the agreement was on 01.07.2003. The specific averment in the written statement is that she had to borrow amount for the operation and since complication developed after the operation, she had to further borrow amounts. This aspect, i.e. the developments of further complication, is not evidenced by any records and there is only the *ipse dixit* of the defendant. Drawing attention to the written statement, it was pointed out by the learned counsel that there was an attempt on the part of the defendant to disown title to the property by mentioning that a gift deed in her favour had not been accepted. Further, it is contended relying on the evidence of DW1 that she claims to have borrowed money from one Khasim, but surprisingly enough, she has no details about him at all. Further, it is contended by the learned counsel that there is no whisper in the written statement regarding any hardship that could be caused to the defendant by the grant of decree for specific performance and in the absence of any such pleadings in that regard, the court was not obliged to go into that question in detail. For the above purpose, the learned counsel relied on the decision reported in **Narinderjit Singh** v. **North Star Estate Promoters Limited** [2012 5 SCC 712] and **Prakash Chandra** v. **Narayan** [2012 5 SCC 403]. The learned counsel, relying on the principles laid down in the above decisions, contended that the lower appellate court has considered the question and it is not as if both the courts are silent about the issue. The lower appellate court was convinced that it will be inappropriate not to grant a decree for specific performance and thus, had confirmed the decree of the trial court. In short, the contention is that no grounds are made out to interfere with the judgment and decree of the court below and the appeal is only to be dismissed.

11. There is not much dispute regarding the execution of Ext.A1 agreement. Though the defendant would style it as a security document, the plaintiff would say it is a pucca

agreement for sale. Both the courts below have found that the document has been executed by the defendant and that the claim made by her that the document was executed as a security for the loan taken from the plaintiff, cannot be countenanced. Both the courts below were inclined to accept the submission made before this Court by the learned counsel for the respondents that even though the defendant claimed that she had borrowed amount from Khasim and also that there was subsequent developments after operation, they are not evidenced by any material. Therefore, the courts below came to the conclusion that an agreement for sale was in fact executed by the defendant. Being essentially a question of fact and its finding being based on appreciation of evidence in the case and since this Court finds no ground to interfere with those conclusions, the finding that Ext.A1 was in fact executed by the defendant is confirmed. What now remains to be considered is the applicability of Section 20 of the Act and also an evaluation as to whether the lower appellate court has applied its mind properly to the issue in that regard.

12. It will be only appropriate to refer to Section 20 of the Act, which reads as follows:

> "20. **Discretion as to decreeing specific performance.--** (1) 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.
>
> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance:--
>
> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas

its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that ths contract is not enforceable at the instance of the party."

13. The provision, on the very face of it, is uninhibited by any prohibitions and it stipulates the manner, circumstances and conditions under which discretion to be exercised. It casts an obligation on the court to consider whether merely because an agreement for sale is proved, whether it is obligatory for the court to order specific performance. The provision is specific in that regard that

merely because an agreement for sale is proved, the court is not bound to grant a decree for specific performance and the grant of relief still is discretionary. However, the provision is also clear to the effect that such a discretion is to be exercised on sound judicial principles and not at the whims and fancies of the court. Section 20(2) of the Act stipulates some of the circumstances where the court will be justified in exercising discretion against granting of decree for specific performance. They are only illustrative and not exhaustive. Explanation 1 is also clear to the effect that mere inadequacy of consideration or that the agreement is onerous to the defendant may not by themselves be a ground to deny specific performance to the plaintiff.

14. Subsequent conduct is also a relevant fact in this regard. Section 20(4) makes it clear that merely because an agreement is voidable, it is not a ground to deny specific performance.

15. The above provision leaves one in no doubt that the provision intends the court to evaluate the materials before it before coming to a conclusion whether a decree for specific performance should be granted or not. The provision is clear to the effect that merely because, it is proved that the vendor has executed a document, which is an agreement for sale, and that the vendee was again willing to perform his part of the contract and also that it was the defendant who had committed breach of the contract, does not automatically result in the decree of specific performance being granted.

16. There is a catena of decisions in this respect. Of course, the decisions relied on by the learned counsel for the respondents namely **Narinderjit Singh** v. **North Star Estate Promoters Limited** [2012 5 SCC 712] and **Prakash Chandra** v. **Narayan** [2012 5 SCC 403] do mention about the necessity for a pleading in that regard. In **Prakash Chandra**'s case (supra), it so happened that the lower

appellate court reversed the finding of the trial court on the basis of Clause (b) of sub-section 2 of Section 20 of the Act without framing an issue in that regard and that was confirmed by the High Court in appeal. The Apex Court has considered it to be objectionable and pointed out that in the absence of any defence of hardship and also evidence in that regard, decree of the lower appellate court was not justified. It was observed as follows:

> "15.The question as to whether the grant of relief for specific performance will cause hardship to the defendant within the meaning of Clause (b) of sub-section (2) of Section 20 of the Specific Relief Act, 1963, being a question of fact, the first appellate court without framing such an issue ought not to have reversed the finding of the trial court while concurring with it on all other issues with regard to the appellant's entitlement to relief for specific performance of contract.
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> The High Court in the second appeal failed to notice that the respondent had not taken any defence of hardship and no such issue was framed and in absence of any such

> evidence on record, the first appellate court held that he would be landless should the decree for specific performance be granted."

17. In the decision reported in **Narinderjit Singh**'s case (supra) it was held as follows:

> "21.In the present case, the appellant had neither pleaded hardship nor produced any evidence to show that it will be inequitable to order specific performance of the agreement. Rather, the important plea taken by the appellant was that the agreement was fictitious and fabricated and his father had neither executed the same nor received the earnest money and, as mentioned above, all the Courts have found this plea to be wholly untenable."

18. Going strictly by the above decisions, it would mean that it is necessary for the defendant to own the written statement, the factual hardship etc.. However, there are decisions which go on to hold that even in the absence of any plea in that regard, since it is an obligation casts on the court, the court is bound to consider the issue

irrespective of fact, pleadings or evidence in that regard. This Court has gone to the extent of holding that even if the defendant remains *ex parte* that does not absolve the court from considering the question of discretion exercisable under Section 20 of the Act. This Court has also held that even if all the contentions taken are totally false, that does not mean that the court is absolved from considering the issue as to whether the discretionary relief should be granted or not.

19. Two circumstances which stand out in this case are (1) that the plaintiff had produced the title deed of the defendant i.e. the gift deed and 2) that the sale agreement is a registered document.

20. Normally, when an agreement for sale is entered into, it is inconceivable that the document of title would have been handed over to the proposed vendee.

21. In fact, this Court had an occasion to consider such an issue in the decision reported in **Sarada** v. **Divakara**

Kurup [2012 (4) KLT SN 152], wherein, it was held as follows:

> "Exts.A2 and A3 are the original of document Nos. 2308 and 2536 of 1998. Ext.A4 is the original receipt for payment of revenue. According to the respondent, Exts.A2 to A4 were given to him at the time of execution of Ext.A1. If in fact the intention of parties was to execute a sale deed pursuant to Ext.A1, agreement within seven months as specified therein and on payment of the balance sale consideration, one is at a loss to find why the original documents (Exts.A2 to A4) were entrusted to the respondent even at the time of execution of Ext.A1. Normally, the original documents need be given to the respondent-purchaser only at the time the sale deed is executed pursuant to Ext.A1. In such situation, handing over of the original documents (Exts.A2 to A4) to the respondent at the time of execution of Ext.A1 is a circumstance which indicate that, that the transaction was not one for purchase of the suit property but a money transaction."

22. This Court held that the fact that the original of the title deed was handed over to the proposed vendee, it is

a clear indication of the fact that transaction was intended more to be a loan than an agreement to sell.

23. In the decision reported in **Omana Mathai** v. **Joseph Easo** [2014 (1) KLT 689], the relevance, significance and importance of Section 20 of the Act was considered in detail. It is interesting to note that in the said case, no written statement was filed by the defendant. The trial court has decreed the suit for specific performance which was confirmed by the lower appellate court . When it reached this Court, a Division Bench of this Court held that the mere fact that the written statement is not filed is not a ground not to exercise discretion under Section 20 of the Act. It was observed as follows:

> "The reasoning process in the aforequoted impugned judgment is reflected in the second paragraph thereof. The fact that the defendant remained *ex parte* is recorded. The judgment proceeds to the record that the plaintiff has filed an affidavit to prove the case. The marking of documents is recorded. Ext.A1

is noted as the agreement for sale. All that the learned trial Judge has thereafter noted is that the plaintiff affirmed that sale consideration was given. This reflects that the reasoning process discloses the consideration of the fact that the plaintiff affirmed that sale consideration was given. The judgment then proceeds to say that the learned Judge is satisfied that plaintiff is entitled for the decree prayed for. That sentence in the impugned judgment is only the recording of the satisfaction in that regard, however without stating any reasons whatsoever. This assumes importance because S.20(1) of the Act enjoins 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. Therefore, the exercise of discretion is a judicial act in terms of that section and that judicial act has to be expressed by stating the reasons which would be discernible from the judgment by a court of appeal if a party were to carry an appeal against the judgment. Without the reasons being expressed by the court of first instance, a court of appeal would be totally handicapped in deciding any appeal against such a judgment and decree. The impugned one is not a consent decree, but an *ex parte* decree. The eligibility of a litigant to have his appeal considered by a court of appeal is a statutory entitlement in terms of S.96 of the Code of Civil Procedure. That eligibility is legislatively remembered and reminded while enacting sub-section (1) of S.20 of the Act. Therefore, when a judgment which is delivered in a suit for specif performance of a contract for sale does not express the reasons, at least, its basic requirements, to exercise the discretion in a particular manner, the decree will not have legs to stand. We may also recall here that whatever is enumerated in sub-section (2) of S.20 of the Act and different circumstances mentioned in S.20 are only illustrative and not exhaustive. The circumstances of each case would be matter for consideration and the conduct of parties and respective interests under the contract would be relevant."

24. In the decision reported in [2015 (1) KLT SN 106 (C.No. 126)], it was held as follows:

> "A specific performance may be refused where there is inadequacy of consideration coupled with some other factors which are not amounting to fraud or mistake or some undue advantage taken by the appellants of their knowledge about low bargaining position or ill health of the defendant's husband or her family, even though such circumstances do not justify the non performance of the contract. Trial court considered the contention advanced by the appellant and dismissed the suit without granting any reliefs."

25. It is therefore clear that it is the duty or obligation casts on the court to consider whether even after the plaintiff has proved that there is a valid agreement for sale and that he was always ready and willing to perform his part of the contract, still the court has to consider whether a specific performance decree can be granted even in the absence of such a contention by the defendant. Nowhere in Section 20 of the Act, there is any indication to the effect that there should be pleading to that effect by the defendant or the vendor as the case may be should specifically urge

ground to seek relief of specific performance.

26. One cannot omit to note that Section 20 of the Act clearly stipulates that the decree for specific performance is a discretionary relief. Once it is stated to be a discretionary remedy, then there must be sufficient reason as to why either the specific performance is granted or is not granted. When such an obligation is cast on the court, it becomes necessary for the court to evaluate the entire materials before it and come to an independent conclusion on sound judicial principles as to what should be the relief that should be granted to the parties. In the context in which Section 20 of the Act is placed and considering the wording of the provision, it becomes difficult to accept the plea of the respondent in this case unless there are pleadings and evidence in that regard, the matter need not be considered. It does not appear to be so.

27. Further, in the case on hand, there is a definite plea that the document is executed as a security for a loan

which the defendant was compelled to avail of in the facts and circumstances mentioned by her. As already noticed, the two circumstances, namely, the handing over of the document of title and so also the registering of document, to a considerable extent, fortify the above contentions raised by the defendant.

28. The lower appellate court was mainly guided by the fact that merely because the defendant had said that the property, at the relevant time may fetch ₹ 7 lakhs by itself may not be a ground to decline specific relief to the plaintiff. But that is only one of the criterion. Several other factors which ought to have been taken note of by the lower appellate court while exercising the discretion in confirming the decree of the trial court.

29. It is true that in the case on hand, there is no plea in the written statement regarding the hardship that may be caused to the defendant. But there is pleading to the effect that the document executed was only as a security and not

as an agreement with an intention to sell the property. That is fortified by the two circumstances already made mention of.

30. Further, this Court, while admitting the second appeal, tested the bonafides of the appellant and directed to deposit the decree amount before the court below and she has done so.

31. For the above reasons, this Court is unable to confirm the decree for specific performance granted to the plaintiff by the courts below. This Court is of the view that the discretion has to be properly exercised. Therefore, the decree of the courts below are set aside and the decree is passed in the following terms:

The plaintiff will be entitled to realize a sum of ₹1,25,000/- with 12% interest from the date of suit till decree and thereafter at 6% per annum till realization. The plaintiff will be allowed to withdraw the amount deposited before the court below and adjust the same towards the amount due as per the decree. There will be no order as to costs.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge