

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

RFA.No. 418 of 2014 (B)

AGAINST THE ORDER/JUDGMENT IN OS 329/2009 of SUB COURT, ATTINGAL
DATED 12-02-2014

APPELLANT(S)/PLAINTIFF:

SUDHEESH
S/O.DIVAKARAN, NALINI MANDIRAM, SARKARA VILLAGE
CHIRAYINKIL

BY ADVS. SRI.R.S.KALKURA
SMT.R.BINDU
SRI.M.S.KALESH
SMT.A.V.PRIYA
SRI.HARISH GOPINATH
SRI.JOHNSON JOSE PANJIKKARAN
SRI.SANIL KUNJACHAN

RESPONDENT(S)/DEFENDANT:

S.S. VIJI, AGED 30 YEARS
D/O.SARASWATHY, S.S BHAVAN, AZHOOR
CHIRAYINKIL NOW RESIDING AT VAYALIL VEEDU
ANANTHALAVATTOM P.O, CHIRAYINKIL 695 304

R1 BY ADV. SRI.M.BALAGOVINDAN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
29-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

R.F.A.No.418 of 2014

Dated this the 29th day of September, 2015

JUDGMENT

Antony Dominic, J.

1. The plaintiff in O.S.329/09 on the file of the Sub Court, Attingal is the appellant. Appellant filed the suit seeking specific performance of Ext.A2 agreement dated 24.12.2008 and for permanent prohibitory injunction. The suit was dismissed by the judgment and decree which is impugned herein.
2. We heard the counsel for the appellant and the learned counsel appearing for the respondent defendant.
3. Briefly, the facts of the case are that out of the 40.250 cents of property acquired by the respondent as per Ext.A1 settlement deed, 14.250 cents were agreed to be sold to the plaintiff as per Ext.A2 agreement dated 24.12.2008. According to the plaintiff, the price agreed was ₹12,07,500/-, out of which, ₹25,000/- was paid as advance on 24.12.2008

itself. It is stated that the period of the agreement was 5 months, which was extended by one more month. The plaintiff states that though he was ready and willing to perform his part of the agreement throughout the period, the defendant committed breach of the agreement and therefore, a notice was issued demanding performance of the agreement. This was returned unclaimed and thereupon, Ext.A3 notice was again issued. Ext.A3 was served on the defendant but she did not reply to the same. It was in such circumstances that the plaintiff filed a suit seeking a decree for specific performance and permanent prohibitory injunction.

4. In sum and substance, the contention of the defendant was that she had borrowed an amount of ₹25,000/- from the plaintiff in two instalments. It is stated that when the plaintiff demanded repayment, she could not repay the same and thereupon, under force and coercion, her signatures were obtained on a document which was already kept ready by the plaintiff. According to the defendant, she had not entered into any agreement agreeing to sell any part of the

property, much less 14.250 cents included in the plaint schedule and she also denied of having got the time for performance extended as claimed by the plaintiff.

5. Before the trial court, the plaintiff and the scribe who prepared Ext.A2 were examined as Pws.1 and 2. Exts.A1 to A3 were also marked. On behalf of the defendant, apart from herself, two other witnesses were examined as Dws.1 to 3. In the judgment under appeal, the court below found that since the signatures of Ext.A2 agreement are admitted by the defendant, burden was heavily upon her to prove that Ext.A2 was executed only as a security agreement and the defendant had failed to discharge the said burden. On that basis, the court found that Ext.A2 was executed agreeing to sell the plaint schedule property. Thereafter, referring to section 20 of the Specific Relief Act, the court took the view that the only circumstance in which the court may properly exercise its discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of

a contract capable of specific performance. According to the court, the plaintiff was having no case that in consequence of execution of Ext.A2, he had done any substantial acts or suffered losses. On that basis, the court declined to exercise discretion in favour of the plaintiff and dismissed the suit.

6. Having heard the submissions made on behalf of both sides, we are inclined to think that the conclusions in the judgment on the vital issues as to whether Ext.A2 was executed agreeing to sell the plaint schedule property and whether the plaintiff did not make out a case for exercise of discretion as provided under section 20 of the Specific Relief Act are unsustainable. In so far as the finding on Ext.A2 is concerned, as we have already stated, the only basis on which the court has held Ext.A2 as an agreement to sell the plaint schedule property is that the defendant had failed to discharge the burden to prove that Ext.A2 was executed only as a security. In so far as this finding is concerned, learned counsel for the respondent/defendant has referred us to the evidence adduced by the defendant and her

witnesses and it is contended that this conclusion has been arrived at without reference to the vital parts of the evidence. Similar is the case with reference to the findings of the court below that the only circumstance in which discretion to decree in specific performance can be exercised is where the plaintiff has done specific acts or suffered losses in consequence of a contract capable of specific performance. Here again, as rightly pointed out by the learned counsel for appellant, this conclusion has been arrived at without even making a detailed reference to the contents of section 20 of the Specific Relief Act. Therefore, for both these reasons, we are unable to sustain the judgment under appeal. In such circumstances, we set aside the judgment and decree under appeal and remit the matter back to the Sub Court for re-consideration.

7. At this stage, counsel for the respondent sought for an opportunity to adduce fresh evidence. In so far as this request is concerned, we clarify that in case the parties feel that further evidence is necessary for substantiating their respective case, it would be

open to them to make a request before the trial court, in which event, the trial court shall deal with the request in accordance with law. The judgment and decree are set aside and the suit is remitted to the Sub Court, Attingal for fresh disposal in accordance with law.

Registry will return the records. Parties shall appear before the Sub Court, Attingal on 4.11.2015.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

The judgment dated 29/09/2015 in R.F.A.418/2014 is corrected by incorporating a direction for refund of the entire court fee paid on the appeal to the appellant in terms of Section 67(1) of the Court Fees & Suits Valuation Act, as per order dated 30/10/2015 in I.A.2225/2015 in R.F.A.418/2014.

Sd/-
Registrar(Judicial)

k kb.

/True copy/

PS to Judge