

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

RP.No. 725 of 2014 () IN RSA.824/2003

AGAINST THE JUDGMENT IN RSA NO. 824/2003 of HIGH COURT OF KERALA DATED
27.11.2013

PETITIONER(S)/APPELLANTS:

1. ANTONY, S/O.KOKLATHIKAL JOSEPH, AGED 62
KUPPATHODU AMSOM/DESOM
SULTHAN BATHERY-673 592.
2. THRESSIA, D/O.ABRAHAM, AGED 58
KUPPATHODU AMSOM/DESOM
SULTHAN BATHERY-673 592.

BY ADVS.SRI.K.G.BALASUBRAMANIAN
ALEX M SCARIA

RESPONDENT(S)/RESPONDENT:

K.M.JOSEPH, S/O.KADUKKAMTHODIYIL MATHAI, AGED ABOUT 80,
CHERUR AMSOM/DESOM & P.O: TIRUR- 676 304

BY ADV. SRI.K.S.BHARATHAN
BY SRI.P.R. VENKITESH

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON 02-07-2015, THE
COURT ON THE SAME DAY PASSED THE FOLLOWING:

A.HARIPRASAD, J.

R.P.No.725 of 2014

in

R.S.A. No.824 of 2003

Dated this the 2nd day of July, 2015

ORDER

Review petitioners are the appellants in the second appeal, viz., R.S.A.No.824 of 2003.

2. Heard the learned counsel for the review petitioners and the respondent.

3. The suit was one for recovery of possession filed by the review petitioners on the strength of their title. Item No.1 in the plaint schedule belonged to the first petitioner and item No.2, to the second petitioner. It is the case pleaded by them that the respondent trespassed into the property and hence the suit for recovery of possession was filed.

4. Respondent denied the case of trespass and contended that he came into possession of the property by virtue of an agreement to assign. It is the case pleaded that on 24.12.1984, as per an oral agreement, a sum of ₹35,900/- was paid by the respondent to the first petitioner as advance consideration. The balance consideration of ₹1,550/- was agreed to be paid on the date of execution of the sale deed. Pursuant to the agreement, the respondent was put in possession of the said

property. He is residing in the house situated therein. On 22.08.1986, the first petitioner agreed to execute a document and thus the agreement was prepared. That original agreement was lost from the possession of a mediator. A draft agreement was given to the respondent. Again another mediation took place. Thereafter, a new agreement was executed. The respondent claimed protection under Section 53A of the Transfer of Property Act, 1882 (in short, "Act").

5. Trial court considered the evidence adduced before it and decreed the suit in part directing the respondent to surrender possession of item No.2 in the plaint schedule in favour of the second review petitioner. That part of the decree has become final insofar as the respondent is concerned. Dissatisfied with the decree, the review petitioners took up the matter in appeal before the first appellate court. Court below considered the evidence afresh and confirmed the finding of the trial Judge and the appeal was dismissed. Hence the second appeal was preferred before this Court. In the second appeal, a learned Judge of this Court as per judgment dated 27.11.2013 considered the rival contentions and dealt with the issues elaborately. In fact the issue that was brought before this Court in the second appeal pertained only in respect of item No.1 in the plaint schedule. Therefore, this Court found that the respondent (defendant) is

entitled to keep his possession over that item under Section 53A of the Act. This finding is under challenge in this review petition.

6. Learned counsel for the review petitioners contended that this Court failed to consider the fact that the suit stands decreed in part and thereby the contention of part performance cannot be upheld. It is the contention of the learned counsel that the claim raised by the respondent in the suit is in respect of two items of properties and his contention is that he is entitled to keep possession of both the items by virtue of Section 53A of the Act. Even the trial court negated his contention in respect of one item of property. Learned counsel for the review petitioners, therefore, contended that the basis of the claim of the respondent is eroded as the plea for part performance cannot be split up. In answer to this argument, learned counsel for the respondent contended that the two items in the plaint schedule were handed over to the respondent by the review petitioners who are husband and wife. In respect to one item, no written agreement could be produced. That prompted the trial court to negative the contentions of the respondent. It cannot be taken as a ground for rejecting the plea of part performance in respect of one item covered by Exts.B3 and B4. On a reading of Section 53A of the Act, it is clear that the transferee in part performance of the contract if has taken possession of the property or

any part thereof, can take a defence provided by the said provision. Therefore, this contention of the review petitioner cannot be accepted.

7. Learned counsel for the review petitioners contended that Ext.B3 agreement is said to have been executed on 10.12.1986. Records show that the suit was instituted on 02.12.1986. According to the learned counsel, Ext.B3 agreement from its terms itself would indicate that there was a compromise of the disputes. Therefore, it should have been treated as an agreement falling under Order XXIII Rule 3 of the Code of Civil Procedure (in short, "CPC"). I cannot accept that argument at present for the reason that none of the parties had raised such a plea at any stage of the proceedings. Further, it does not have any foundation in the pleadings.

8. Learned counsel for the review petitioners relying on Section 16(c) of the Specific Relief Act, 1963 and Section 53A of the Act contended that the respondent should have averred in the written statement and proved at the time of evidence that he was ready and willing to perform his part of the contract. Then only he could have claimed the benefit of Section 53A of the Act. It is to be remembered that Section 16 of the Specific Relief Act falls within Chapter II relating to specific performance of contract. The caption to Section 16 of the said Act shows that it deals with personal bars to a relief of specific performance. Therefore, the rigid rule of pleading

readiness and willingness arises only in a suit for specific performance of a contract. On a reading of Section 53A of the Act, it can be seen that there must be specific contentions in the written statement that the transferee (here the respondent) has performed his part or is willing to perform his part of the contract. Learned counsel for the respondent took me through the relevant portions in the written statement indicating the existence of such averments. Therefore, I am unable to accept the contention of the review petitioners that on the said score, the judgment in the second appeal has to be reviewed.

9. The learned Single Judge has considered all the contentions of the rival parties in detail. I find no error apparent on the face of the judgment warranting a review.

In the result, the review petition is dismissed.

A. HARIPRASAD, JUDGE.

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