

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

RSA.No. 50 of 2015

**JUDGMENT DATED 30.9.2013 IN AS 201/2011 OF I ADDL. DISTRICT COURT,
THALASSERY
JUDGMENT DATED 29.7.2011 IN OS 59/2009 OF SUB COURT, PAYYANNUR
.....**

APPELLANT(S)/APPELLANT/PLAINTIFF:

**PUTHIYA PURAYIL RAMAKRISHNAN, AGED 55 YEARS,
S/O.ACHUTHAN, R/O ANDOOR AMSOM AND DESAM,
TALIPARAMBU TALUK, KANNUR DISTRICT.**

BY ADV. SRI.C.S.SUNIL

RESPONDENT(S)/RESPONDENT/DEFENDANT:

**PULLANI PRABHAKARAN, AGED 58 YEARS,
S/O.KANNAN NAIR, TALIPARAMBA AMSOM, TRICHAMBARAM DESAM,
TALIPARAMBA TALUK, KANNUR DISTRICT, PIN - 670 141.**

**BY ADVS. SMT.O.V.BINDU
SMT.T.J.MARIA GORETTI**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
12-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

C.R.

P.B.SURESH KUMAR, J.

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R.S.A.No.50 of 2015.

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Dated this the 12th day of October, 2015.

J U D G M E N T

The defendant in a suit for realisation of money is the appellant in this Second Appeal.

2. The suit property belonged to the defendant. On 7.2.2005, the defendant agreed to sell the suit property to the plaintiff for a consideration of Rs.1,25,000/- and received a sum of Rs.1,00,000/- by way of advance sale consideration. Ext.A1 is the agreement for sale executed between the parties on 7.2.2005. According to the plaintiff, the defendant has not conveyed the property as per the terms of Ext.A1 agreement and hence the suit for realisation of the advance sale consideration charged on the suit property. Among others, the defendant contended that the

suit is barred by limitation. The trial court found that since the defendant has no case that the plaintiff has improperly declined to accept delivery of the property as per the terms of the agreement for sale, the plaintiff is entitled to recover the advance sale consideration charged on the suit property, as provided for under Section 55(6)(b) of the Transfer of Property Act. The trial court also found that since the plaintiff is seeking to enforce payment of money charged on the suit property, the suit is governed by Article 62 of the schedule to the Limitation Act and the suit instituted within twelve years from the date of agreement is within time. Consequent on the said findings, the trial court passed a decree as prayed for by the plaintiff. The defendant challenged the decision of the trial court in appeal. The appellate court, on a reappraisal of the materials on record, confirmed the decision of the trial court. The defendant who is aggrieved by the concurrent decisions against him has thus come up in this Second Appeal.

3. Heard the learned counsel for the appellant

as also the learned counsel for the respondent.

4. The learned counsel for the appellant contended that under Section 17(1)(b) of the Registration Act, instruments which purport or operate to create any interest of the value of rupees one hundred and upwards to or in immovable property is compulsorily registrable and therefore, Ext.A1 agreement for sale being an unregistered document, the plaintiff cannot claim a charge over the suit property and if the plaintiff cannot claim a charge over the suit property, the suit would fall under Article 54 of the schedule to the Limitation Act and since the suit is filed beyond three years from the date fixed for specific performance, it is barred by limitation. In other words, the contention raised by the learned counsel for the appellant is that since Ext.A1 is an unregistered document, the charge claimed over the suit property for realisation of the advance sale consideration on the strength of the said agreement is unsustainable. The learned counsel also relied on the decision of the Privy Council in **Dayal Singh v. Indar Singh**

(AIR 1926 PC 94) in support of the said contention.

5. The short question that falls for consideration is, therefore, whether the buyer in an unregistered agreement for sale of an immovable property is entitled to enforce the payment of advance sale consideration charged on the property. If the said question is decided against the appellant, the question of limitation raised by the appellant does not arise.

6. Section 100 of the Transfer of Property Act reads thus:

“100. Charges -- Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the later person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of charge.”

It is evident from the aforesaid provision that where immovable property of one person is by act of parties or operation of law made security for payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Going by the provision contained in Section 100 of the Transfer of Property Act, a charge is created over an item of immovable property either by act of parties or by operation of law. Section 55(6)(b) of the Transfer of Property Act reads thus:

“55. (6) The buyer is entitled-

x x x x x

- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.”

It is evident from the aforesaid provision that if the buyer in an agreement for sale does not improperly decline to accept delivery of the property, a charge is created over the property by operation of Section 55(6)(b) of the Transfer of Property Act for the amount of the advance sale consideration. A close reading of Section 55(6)(b) of the Transfer of Property Act would indicate that the creation of charge as per the said provision is dependent on the issue as to whether the buyer has improperly declined to accept delivery of the property. It is thus evident that if the buyer does not improperly decline to accept delivery of the property as per the terms of the agreement, a charge will be created in favour of the buyer in respect of the property by operation of the provision contained in Section 55(6)(b). The charge claimed by the buyer over a property which is the subject matter of an agreement for sale is therefore, a charge created in his favour by operation of law and not by virtue of the provisions of the agreement. As such, the question whether the agreement for sale is registered is

irrelevant. True, Section 17(1)(b) of the Registration Act provides that all non-testamentary instruments which purport or operate to create any interest of the value of one hundred rupees and upwards, to or in immovable property are compulsorily registrable. It is trite that an agreement for sale does not by itself create any interest in or charge on any property and that it only creates an obligation annexed to the ownership of the property. Therefore, the said provision does not apply to an agreement for sale. Further, Explanation to Section 17(2) of the Registration Act clarifies that a document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money. The decision in **Dayal Singh v. Indar Singh** (supra) relied on by the learned counsel for the appellant, is a decision rendered prior to the introduction of the Explanation to Section 17(2) of the Registration Act by

virtue of Act 2 of 1927. It is seen that the issue has not been addressed by the Privy Council in the said case in the context of Section 100 of the Transfer of Property Act. However, in **Nagarbashi Banik v. Meghnath Maishan** (AIR 1931 Calcutta 171), the Calcutta High Court held that the decision of the Privy Council in **Dayal Singh v. Indar Singh** (supra) is not good law after the introduction of the Explanation to Section 17(2) of the Registration Act by virtue of Act 2 of 1927. It is also observed by the Calcutta High Court in the said decision that the effect of the said amendment has been to supersede the decision in **Dayal Singh v. Indar Singh** (supra).

The Second Appeal, in the circumstances, is devoid of merits and the same is, accordingly, dismissed *in limine*.

Sd/-

**P.B.SURESH KUMAR,
(JUDGE)**

kvs

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PA TO JUDGE.